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Legendary Legal Update

Speakers

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The speakers cannot accept responsibility for any errors or inaccuracies, loss or damage unless we have given you, personally, specific advice relating to a matter about which you have given us full background details.

You must also bear in mind that the contents of this webinar are based on English Law, and because it contains archival material, that material is bound to go out of date (so please bear in mind the date this webinar was recorded.) Please also remember that the law may be different in Wales.

NOT COVERING THE BUILDING SAFETY ACT 2022

Coming up...

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- Case Law Update - *the top ten … plus 1*

1. *Fearn & Others v Board of Trustees of the Tate Modern Gallery* [2023] UKSC 4 (nuisance & overlooking)
2. *Aviva Investors Ground rent GP Ltd and another v Williams and others* [2023] UKSC 6 (service charge reapportionment)
3. *Tower Hamlets v Khan* [2022] EWCA Civ 831 (cost recovery)
4. *Dorrington Residential Ltd v 56 Clifton Gardens Ltd* [2022] UKUT 266 (LC) (breach, access to flat)
5. *Assethold Limited v Adam* [2022] UKUT 282 (LC) (reasonableness & waking watch)
6. *Lambeth v Kelly* [2022] UKUT 290 (LC) (dispensation from s.20 consultation requirements)
7. *Assethold v Eveline Road RTM Co Ltd* [2023] UKUT 26 (LC)
8. *Charles Hunt (Holdings) Ltd v 77-82 Bridle Close Freehold Ltd* [2023] UKUT 32 (LC) (collective enfranchisement & development value)
9. *Reekie v Oakwood Court Residents Association Ltd* [2023] UKUT 25 (LC) (exercise of discretionary power to apportion service charges)
10. *Power & Kyson v Shah* [2023] EWCA Civ 239 (Party Wall Act)
11. *AHGR Ltd v Kane-Laberack and another* [2023] EWCA Civ 428 (define live/work)

- Heat Network (Metering and Billing) Regulations 2014 (as amended in 2015 and 2020)

Fearn & Others v Board of Trustees of the Tate Modern Gallery [2023] UKSC 4

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- In legal terms, one of the most important property cases of the last decade.

- Established that overlooking is capable of amounting to a "private nuisance", and there is theoretically no limit on what might amount to a "private nuisance".

Fearn & Others v Board of Trustees of the Tate Modern Gallery [2023] UKSC 4

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- What is the common law of private nuisance?
- Wrongful interference by one land owner, with another land owner's use and enjoyment of their land, or rights over land. Diminution in value and/or amenity of land rather than personal discomfort.
- No limit to what can constitute a nuisance. Categories of nuisance are not closed.
- Nuisance can consist of:
    i. Encroachment onto neighbour's land;
    ii. Direct physical interference (e.g. flood or leak, or fumes, noise or dust);
    ii. Interference with utility or amenity value of land e.g. obstructing access, light or air, preventing connection to public sewer, or even (in one NZ case) dazzling rays of sun
- Not necessary for the claimant's land to have suffered damage – *Williams v Network Rail*
- For applications in noise nuisance see *Southwark v Mills* and *Fouladi v Darout*

Fearn & Others v Board of Trustees of the Tate Modern Gallery [2023] UKSC 4

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- Not all interferences are actionable. At a general level, concerned with maintaining a balance between the conflicting rights of landowners. Unifying principle is one of reasonableness between neighbours. Balancing one land owner's right to do what they want with their own land against another land owner's right not to be interfered with.

- Interference must be substantial (not minor).

- Ordinary use of land:
  - Is C's use of land ordinary or unusual? Occupier cannot complain if use complained of is not ordinary use (e.g. storage of particularly delicate & sensitive type of paper, as in *Robinson v Kilvert*)
  - Is D's use of land ordinary, or unusual? Even if D's activity substantially interferes with C's land, will not be actionable if activity is ordinary use of D's land (as in *Southwark v Mills*).

- Coming to a nuisance is no defence

Fearn & Others v Board of Trustees of the Tate Modern Gallery [2023] UKSC 4

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- 5.5m visitors to the Tate every year, with c.500k – c.600k visiting the viewing platform, 300 at any one time.

- Walls of Neo Bankside Development constructed mainly of glass.

- Visitors can see straight into the living room of Cs' flats, which are about 34m away. A significant number of visitors display an interest in the interiors of the claimants' flats. Some look, some photograph, some peer, some wave. Occasionally binoculars are used. Photographs showing interiors of flats have been posted on social media.

Fearn & Others v Board of Trustees of the Tate Modern Gallery [2023] UKSC 4

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- Trial Judge: overlooking capable of amounting to a nuisance, but not in this case, as Cs' chose to live in a building with glass walls and could have installed net curtains.

- Court of Appeal: overlooking not capable of amounting to a nuisance.

- HELD: Cs claim succeeded. No limit to what might constitute a nuisance. Beyond doubt that viewing and photography which take place from Tate's building cause substantial interference with the ordinary use and enjoyment of C's property, while viewing platform is a very particular and exceptional use of land and not at all ordinary.

Aviva Investors Ground rent GP Ltd and another v Williams and others [2023] UKSC 6

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- Another very important SC decision
- Concerns leases which provide L / Man Co with discretion to determine or alter service charge proportions
- Leases in this case provided for service charges consisting of a fixed percentage of L's costs "or such part as the landlord may otherwise reasonably determine"
- Previous case law …
  - "fair and reasonable proportion" (to be determined by landlord / surveyor) void and unenforceable, due to s.27A(6), LTA 1985: *Windermere Marina Village v Wild*, *Gater v Wellington Real Estate*, *Sheffield v Oliver*
  - same principle applied to contractual powers to reapportion: *Fairman v Cinnamon (Plantation Wharf) Ltd* and earlier *Williams v Aviva* decisions (at the UT and CoA)

Aviva Investors Ground rent GP Ltd and another v Williams and others [2023] UKSC 6

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- SC overturned all of that case law, bringing us back to the pre-Windermere / 2014 position ...
- Previous cases "put the anti-avoidance cart before the jurisdictional horse".
- Section 27A(6) not intended to deprive L of contractual power to determine or reapportion service charges. Rather, designed to stop parties to a lease from preventing FTT from challenging L's decision. Simply preserves FTT's existing jurisdiction to determine whether a service charge is contractually or statutorily legitimate.
- If previous cases were correct, consequences would be absurd (no service charge proportions without FTT decision) and would result in huge administrative burden to FTT.
- So now … apply the wording of the lease!

Aviva Investors Ground rent GP Ltd and another v Williams and others [2023] UKSC 6

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- Rent repayment orders are an important sanction against rogue landlords who commit offences in relation to the private rented sector (e.g. non licensing of houses in HMOs)
- Q: does the FTT have the power to make an RRO not only against the landlord, but also any superior landlord?
- A: No!

Tower Hamlets v Khan [2022] EWCA Civ 831

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- Another case about "69 Marina" cost recovery clauses!
- Lessor entitled to recovery any costs that were "incidental to the preparation and service" of a s.146 notice.
- Q: Did that include the cost of proceedings related to arrears recovery?
- A: No!

Tower Hamlets v Khan [2022] EWCA Civ 831

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So …

- "In contemplation of proceedings" under s.146 & s.147
  - includes costs of proceedings (*Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258)
  - as long as forfeiture contemplated (*No. 1 West India Quay (Residential) Ltd v East Tower Apartments* [2018] EWCA Civ 250)
  - and as long as right to forfeit available & not waived (*Barret v Robinson* [2014] UKUT 322 (LC))

- "For the purpose of" preparing & serving a s.146 notice
  - as above (*Kensquare v Boakye* [2021] EWCA Civ 1725)

- "Incidental to" the preparation & service of a s.146 notice
  - only cost of preparing & serving notice recoverable (*Tower Hamlets v Khan* [2022] EWCA Civ 831)

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Dorrington Residential Ltd v 56 Clifton Gardens Ltd [2022] UKUT 266 (LC)

- Appeal from FTT decision that leaseholders in breach for failing to provide access

- Lease provided as follows:

"to permit the Landlord or its agents or workmen at all reasonable times (Requisite Notice having been given) to enter into and upon the Demised Premises for any other purpose connected with the interest of the Landlord in the Building or the Demised Premises or its disposal charge or demise and in particular to examine the state and condition thereof and to ascertain that there has been and is no breach of or non-compliance by the Tenant with the covenants on the Tenant's part herein contained …"

- Requisite Notice defined:

"notice in writing to the Tenant 24 hours before any entry is made on the Demised Premises or any part thereof PROVIDED THAT in the case of emergency no notice shall be required."

- Flat occupied by sub-tenants. History of issues including rodent infestation.

- Notice given in April 2021 requesting access in May 2021.

Dorrington Residential Ltd v 56 Clifton Gardens Ltd [2022] UKUT 266 (LC)

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- Dorrington's arguments:
  - "Requisite Notice" had not been given. Reason given for inspection not a valid one;
  - Notice had not given reasonable period of time;
  - Failure to open door on single occasion not a breach.

- UT rejected all of them. Notice was validly requested and leaseholder was in breach.

Assethold Limited v Adam [2022] UKUT 282 (LC)

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- On whether waking watch costs "reasonably incurred", within meaning of s.19 of the LTA 1985.

- Several reports about the external walls and risk of spread of fire, with different conclusions. Brief chronology:
  - Oct 2019, 4site found minor defects.
  - Feb 2020, Hydrock indicated building was satisfactory subject to changing timber decking on balconies, which was done
  - August 2020, Hydrock undertook an intrusive survey
  - Jan 2021, Hydrock undertook a further external wall survey and in Feb / March 2021 report said that risk was "intolerable" and substantial remedial work would be required
  - March 2021, Assethold hired WW, £28k monthly
  - Shortly afterwards, leaseholders obtained a report from Safety Consulting Partnership which reported that the fire risk at the property was low

Assethold Limited v Adam [2022] UKUT 282 (LC)

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- Leaseholders argued (and FTT agreed) that WW costs not reasonably incurred because Hydrock report incorrect

- Appeal allowed

  - Landlord acted rationally in the face of a conclusion that risk was "intolerable" from a reputable company. Second Hydrock report was based on a different inspection, so not an obvious contradiction. Not reasonable to expect landlord to know or assess whether Hydrock had applied matrix correctly.

  - FTT's decision based on hindsight provided by parties' expert witnesses. FTT had to look at was not what it knew as a result of the proceedings, but at whether the expenditure was reasonable in the circumstances and on the basis of the information available when the cost was incurred

Lambeth v Kelly [2022] UKUT 290 (LC)

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- Lambeth undertook works to fix a roof leak, costing £7,882.41
- On 29th July 2021, FTT found that Lambeth had not complied with the consultation requirements and capped contribution of applicant leaseholder at £250.
- At the FTT, Lambeth argued that it had served valid s.20 notices and, in the alternative, applied for dispensation.
- FTT did not accept that s.20 notices had been served and held that if Lambeth wanted dispensation it would have to apply in the usual way, with the correct form, paying the correct fee and listing all leaseholders as Rs

Lambeth v Kelly [2022] UKUT 290 (LC)

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- Lambeth applied to the FTT for dispensation. FTT refused on the grounds that:
    i. Application made too late. Should have been made at the time of the s.27A app
    ii. Leaseholder had been prejudiced by failure to consult in the form of being unable to budget for the works and being unable to make a case that there had been a prejudice

- Appeal allowed:
    i. There was nothing in 1985 Act to support the view that an application for dispensation cannot be made after a s.27A determination. Not appropriate to strike out application for abuse of process. Background facts may be similar, but they are two separate applications.
    ii. Leaseholder could not demonstrate that she had suffered any "relevant prejudice". Nothing to do with reasonableness of cost or standard.

Assethold v Eveline Road RTM Co Ltd [2023] UKUT 26 (LC)

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RTM case involving 4 flats, at one end of a terrace.

Q: Can premises qualify as a "self-contained part of a building" for the purpose of a claim to acquire the right to manage, if those premises could be divided into smaller self-contained parts?

L sought to rely on *Triplerose v Ninety Broomfield Road RTM Co Ltd*, and the fact that (unlike the 1993 Act) it is not possible for a sub-group to form a breakaway RTM Co.

RTM Co sought to rely on *41-60 Albert Place Mansions (Freehold) Ltd v Craftrule Ltd* ("Craftrule").

HELD: claim succeeded. If premises qualifies under s.72 (by satisfying the tests for "self-contained building" or "self-contained part of a building", that is the end of it. Nothing in the 2002 Act to suggest that it should not qualify if it is capable of being divided into smaller qualifying premises.

Charles Hunt (Holdings) Ltd v 77-82 Bridle Close Freehold Ltd [2023] UKUT 32 (LC)

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- Collective enfranchisement case, on price to be paid for freehold.

- Qs:
  - To what extent should price be uplifted due to value of hope of entering into deeds of variation with leaseholders to permit subletting?
  - To what extent should price be uplifted due to hope value of development of roof space opportunity

- Has attracted some attention in and outside of enfranchisement circles, because these are common issues in enfranchisement cases and the landlord was only allowed a small uplift.

Charles Hunt (Holdings) Ltd v 77-82 Bridle Close Freehold Ltd [2023] UKUT 32 (LC)

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- UT did not accept L's argument that there was value in the ability to grant deeds of variation to permit subletting. No compelling evidence that value of flats would increase with right to sublet or that leaseholders would pay significant sums for deed of variation and legal risk following *Duval.*

- As to development value
  - Possible to construct 1 or 2 small flats in roof space
  - Any hope value for development would only exist to the extent that a hypothetical purchaser would anticipate being able to add value by gaining & implementing PP
  - After deducting build costs of £315k and applying a 45% reducing for planning risk, among other things, profit modest.
  - Hope value of roof space development opportunity no more than £10k.

Reekie v Oakwood Court Residents Association Ltd [2023] UKUT 45 (LC)

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- Lessee (Mr Reekie) makes no use of the lift which serves the upper floors of Oakwood Court. Is he nevertheless obliged to contribute towards the cost of refurbishing the lift?

- In general, where a lessee covenants to pay a fixed percentage of L's costs, the benefit he derived from a particular cost is irrelevant: see, e.g. *Billson v Tristem*, *Camden v Levitt*, *Solarbeta v Akindele* …

- However, in this case, lease provided as follows:

  "1. In respect of any parts of the main structure of the Building (for example the lift flat roofs or balconies) and the driveway leading to the garages at the rear which are the responsibility of the Company under Part One of this Schedule but of which only a tenant or certain tenants have the use the Company may charge such tenant or those tenants either the whole or such part as the Company thinks fit of the cost of maintenance of those parts to reflect such use

  2. Any doubt difficulty or dispute as to the apportionment of the total service cost under this Schedule shall be resolved and settled by the Company whose decision shall be final and binding on all the tenants"

Reekie v Oakwood Court Residents Association Ltd [2023] UKUT 45 (LC)

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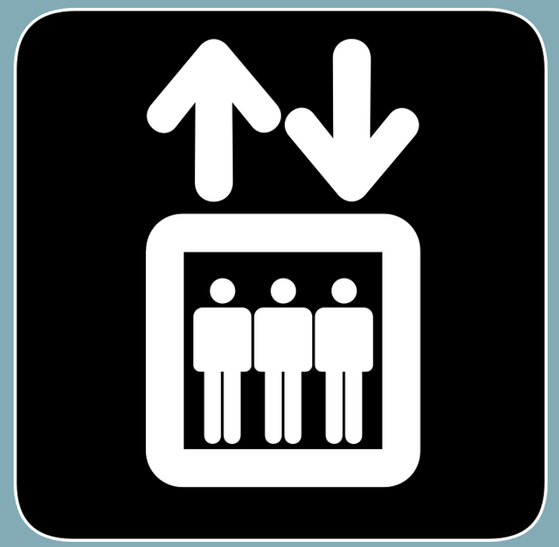
- Lessee had a right to use the lift and therefore "had use of it". To monitor and charge leaseholders in accordance with actual usage would require constant surveillance and would be administratively difficult.

- Man Co "may" (not "must") charge a different proportion.

- Man Co succeeded. Appeal dismissed.



Power & Kyson v Shah [2023] EWCA Civ 239

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- No Notice No Act? – The Party Wall Act 1996
- This case concerned an application by Party Wall Surveyors against the owner of a property who was doing work to a Party Wall.
- The D argued the work fell outside the scope of the Act.
- D's neighbour appointed their own surveyor (Power) who unilaterally appointed a surveyor for D (Shah).
- The surveyors drew up a party wall award.
- The court held that a surveyor cannot be unilaterally appointed and the Award was invalid.

AHGR Ltd v Kane-Laberack and another [2023] EWCA Civ 428

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- 999 year lease granted in 2002 – mixed development:
  - 13 business units
  - 14 residential flats
  - 1 live/work unit
- The lease prohibited the use of the unit *"otherwise than as a live/work unit in accordance with the terms and conditions…in the planning permission".*
- *HELD*
  - *in this particular set of circumstances the grant of planning permission for the live/work unit meant "live and/or work" meaning it could be used as a residential unit.*
  - "Live/work" in the lease was, as a matter of language, ambiguous and could mean live and work, live or work, or live and/or work.
  - The planning permission plan showed the whole unit shaded as "live/work". It did not impose a sub-division into separate "live" or "work" areas. The leaseholder had discretion regarding where to live and where to work, which suggested a permissive approach to the phrase "live/work". The leaseholder might choose only to live at the unit, only to work at the unit, or to do both in parts of their choosing.
  - Given the leaseholder could be served with planning enforcement notices and ultimately be the subject of criminal proceedings, if it was intended that lawful use of the unit required both living and working, that would be spelled out using clear and unambiguous language.

Heat Network (Metering and Billing) Regulations 2014 (as amended in 2015 and 2020)

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VIABLE ✓

- Meters MUST be installed
- **Criteria:**
  - not in the exempt class or the open class
  - connected to communal heating after 1 September 2022
  - newly constructed or originally constructed for connection to communal heating
  - connected to a district heat network on or after 27 November 2020
  - where the building is newly constructed or originally constructed for connection to a district heat network
  - Buildings to which Regulation 7(2) of the Heat Network (Metering and Billing) Regulations 2014 applied before 27th November 2020, i.e.
    - where a connection was made in a newly constructed building supplied by a district heat network (between 18 December 2014 – 27 November 2020),
    - where a building supplied by a district heat network had undergone major renovations relating to technical services (between 18 December 2014 – 27 November 2020).

OPEN ?

- Any Building which first fell within the open class before 1 September 2022, **meters must be installed before 1 September 2022 unless:**
  - Heat supplier determined it would not be cost effective or technically feasible to instal meters - determination **before** 27 November 2021, where the building first fell within the open class before that date.
  - Heat supplier determined that it would not be cost effective or technically feasible to instal meters - determination **before** 1 September 2022, where the building first fell within the open class before that date but **after** 27 November 2021
  - In respect of any building which first fell or falls within the open class after 1 September 2022, the heat supplier is or was under an obligation to instal meters where it determines or determined that it would be technically feasible and cost effective.
- **Criteria**
  - not in the exempt class
  - connected to communal heating on or after 27 November 2020 but before 1 September 2022
  - newly constructed or originally constructed for connection to communal heating and where
    - there is more than one entry point for the pipes of the communal heating into any private dwelling or non-domestic premises, or
    - the building or any part of it is supported housing, alms-house accommodation or purpose built student accommodation.
    - Any other existing building (as at 27 November 2020) which does not fall into the exempt class or viable class

EXEMPT X

- Meters DO NOT need to be installed
- Transfer Exemption
  - not consisting mainly of private dwellings
  - connected to communal heating on or after 27 November 2020
  - newly constructed or originally constructed for connection to communal heating or existing building as at 27 November 2020
  - where:
    - heat distributed by means other than hot water
    - cooling is supplied and distributed by means other than water
- Building Use Exemption
  - Not in the viable class and not supported housing, alms-house accommodation or purpose-built student accommodation.
- Lease Exemption
  - Building as at 27 November 2020 that is not in the viable class and more than 10% of the dwellings and non-domestic premises are subject to a leasehold interest where:
    - Began before 27 November 2020 and
    - Contains a provision which would prevent billing based on actual consumption unless the lease was varied, renewed or comes to an end.

Contact us!

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Thank You!