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Editorial

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EDITOR'S LETTER

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I am delighted to introduce to you Property Law UK a monthly legal publication which I have subscribed to for many years. Gary Webber and his co-editors have provided a superb resource for residential conveyancers, commercial property lawyers, and property litigators.

In the past I would welcome an email from Gary with each monthly publication along with an extensive library of articles and previous cases which was easily accessible.

I am honoured that Gary has been willing to allow me to take on this new role and I am delighted that a number of guest editors have been willing to continue their work, and there are a number of new guest editors that will be working to bring to you details of cases and changes to practice and procedure.

As well as producing resources for busy professionals we will be able to highlight training opportunities from guest editors and from my own company IQ Legal Training Limited. To that end, any subscribers will be invited to attend two free 60 minute training webinars each year in which I will examine key issues relevant to residential conveyancers and commercial property lawyers.

A subscription will also enable access to a forum to discuss and explore topics.

Having spent over 18 years delivering training courses and webinars on a myriad of different topics and subjects, I am looking forward to a new venture hopefully delivering content to the same high standards Gary and his colleagues provided over the years.

Best wishes and compliments of the season,

Ian Quayle, Managing Editor

A REVIEW OF 2021

To provide a flavour of the sorts of things that Property Law UK will explore, here is a brief summary of some important cases and developments in property law.

CO-OWNERSHIP

EDITED BY IAN QUAYLE, TRAINING CONSULTANT, CHIEF EXECUTIVE OF IQ LEGAL TRAINING LIMITED

Dealing with co-owners

Case Notes

This article will explore two recent cases which highlight some of the commonly encountered problems. The first of which is **Ralph v Ralph [2021] EWCA Civ 1106,** and **Rowland v. Blades [2021] EWHC 2928 (Ch).**

Ralph v Ralph

In this case David and Dean Ralph (father and son) contracted to purchase a property. David (the father) could not obtain a mortgage but Dean could and so joined in the purchase and became party to the mortgage.

The Land Registry TR1 form Box 11 (the relevant box at the time of the purchase) were to hold the property on trust for themselves as tenants in common in equal shares (holding the beneficial interest in equal shares).

The Court of Appeal considered whether the TR1 in question, not being executed by David and Dean as transferees as well as by the transferor, complied with s53(1)(b) Law of Property Act 1925, and whether the decision in Taylor v Taylor [2017] EWHC 1080 (Ch) that the TR1 was unimpeachable was correct, The latter point was not but the point was not argued by the parties in the case and so the Court assumed that the TR1 amounted to a validly executed declaration of trust.

At trial, Dean brought a claim for a

declaration that he was a 50% beneficial owner of the property and an order for sale under TOLTATA.

The trial judge decided that there had been no agreement reached at all on the beneficial ownership, that there was a mistake in completing the TR1 as the wrong box had been ticked which could be rectified by deletion and that as a consequence was held beneficially for David (the father).

Decision

The decision was reached because there was no agreement as to the beneficial ownership between David and Dean and between them as individuals and the solicitor who acted for them both. The position was not helped by the fact the TR1 was executed by the sellers

There was evidence that David intended the property to be for the benefit of his family but the position was not clear, and Dean had other younger siblings.

The case was subject to two appeals:

1. Morris J found in favour of David whilst accepting that there could be rectification of the transfer to delete the X in the ticked box on the basis that there was no common intention of sole ownership by David but relying on Stack v Dowden and Jones v Kernott David was the sole beneficial owner. Emphasis was placed on the fact that Dean had neither contributed directly to the purchase price nor made any instalment payments.
2. On the second appeal

For rectification to be ordered there had to be some outward expression of accord between the parties having common intention that was not reflected in the contract see **Joscelyne v Nissen [1970] 2QB 86**.

In this case there was no accord as to how the beneficial interest in the property would be divided and therefore there was no express or implied agreement that the ticked box would not be ticked. It followed that the parties had not actually agreed anything nor that they had the same intention.

The decision of the Court of Appeal permitted Dean to have a 50% share in the beneficial interest. His only consideration for that was being technically liable for the payments to the mortgagee.

For common intention to enable rectification of a document there needs to be evidence of a genuine actual common intention that each parry appreciates the other has which is not reflected in the document.

The lessons for conveyancers are:

Practice Points

- Make sure the right boxes are ticked when dealing with Box 10 of TR1 (now Box 11)
- Ensure there is evidence of common intention just in case the documentation is unclear. Consider using Land Registry Form JO
- Make sure buyer clients understand the contents of the TR1
- Make sure buyer co-owners sign the transfer as evidence of their intention with regard to the beneficial interest.

Another interesting case for conveyancers was also heard this year: **Rowland v. Blades [2021] EWHC 2928 (Ch).**

In this case the parties had commenced a relationship in 2006 and already owned their own homes. In early 2009, the parties purchased Tadmarton House with the intention to spend their free time together (Per Dr Rowland), and at weekends and holidays, share with family and friends, and to live in when they retired.

HHJ Jarmon QC held that for the purpose of this judgment, there was no material difference between the descriptions for purchase given by each party. The property was purchased for just over £1.5 million. The purchase monies and associated costs were supplied by Dr Rowland but the property was registered in the names of both parties.

Later in 2009, Ms B discovered that Dr R had formed a relationship with another person. She told Dr R she did not want him to take his new partner to Tadmarton House. Dr R agreed not to do so. Ms B spent most weekends at the property during the period.

In October 2015, Dr R's new relationship broke down and thereafter there was nothing to stop him spending time at the property. However, he chose not to do so after this time.

The court at first instance had ordered that the property should be sold and the net sale proceeds be divided equally between the parties.

> **"There was an argument that Dr R was entitled to rent for the periods of time he was excluded from the property."**

This was not challenged on appeal. The court had also found that Ms B had excluded Dr R from the property, but only for three days per week over weekends in a period from 01 November 2009 to 31 October 2015. This was similarly not challenged on appeal.

There was an argument that Dr R was entitled to rent for the periods of time he was excluded from the property described as a magnificent weekend retreat.

Practice Points

The lessons to be learned here are:

- Ensure that you have evidence of the parties contributions and their wishes with regard to the beneficial interest
- Warn clients who are relinquishing their entitlement to the beneficial interest
- Ensure a deed of trust deals with the determination of the trust
- Keep detailed records of instructions received and advice given

The cases are interesting in that they highlight some critical issues for conveyancers to be aware of:

- Use co-ownership questionnaires to establish evidence of contributions and intentions with regard to beneficial interests.
- Ensure clients are aware of the choices available with regard to beneficial interest
- Complete the TR1 carefully highlight how Box 10 has been completed and why, and ensure client's sign the transfer
- Do not shirk away from the "what if?" question where one client is being extremely generous (or foolish!) in gifting part of the beneficial interest to their co-owner
- Assume nothing and ensure you give clients advice and choice
- Advise about the need for clients to review their position with regard to co-ownership if circumstances change. For example they need to be aware that a joint tenancy can be unilaterally severed
- Record the advice that you give

BOUNDARY ISSUES

EDITED BY IAN QUAYLE, TRAINING CONSULTANT, CHIEF EXECUTIVE OF IQ LEGAL TRAINING LIMITED

In the case of Gibson v New [2021] EWHC 1811 (QB), a boundary agreement between landowners is not binding on subsequent owners.

Case Notes

This is a potentially worrying case as the Court held that a Settlement Agreement, which incorporated an expert determination provision, amounted to a boundary agreement and the trial judge Murray J went on to say that that Settlement Agreement (and therefore the boundary agreement) does not bind successors in title and has no proprietary effect binding third parties...

The finding that a boundary agreement is personal to the contracting parties would mean that any boundary dispute which was resolved by way of a boundary agreement (either found to exist by the Court, or formed as a compromise) could be re-opened once one party to that boundary agreement sells their property.

In this case, two neighbours fell out over a boundary, then mediated, and came to a settlement agreement. The settlement agreement was that the mediator would select a land surveyor who would determine the boundary position. Both Owners would be bound by this determination;

Neighbour two was dissatisfied with the surveyor's determination and

His justification for this was the Inconsistent Boundary Point in Neilson v Poole. Here the trial judge Murray J decided that this type of boundary agreement had no proprietary character until adverse possession has moved the legal boundary.

Older cases such as Neilson v Poole and Joyce v Rigolli confirm boundary agreements may be treated as proprietary. The statements made obiter in Haycocks v Neville confirmed previous cases.

The decision in Gibson v New runs contrary to what was thought to be settled law.

The uncertainty generated by Gibson v New might lead to parties and their legal advisors to make determined boundary applications to the Land Registry.

Where a determined boundary application is opposed the Land Registry will refer the matter to the First Tier Tribunal and either the applicant or the party opposing the application might be liable for the costs of the other.

Practice Points

- In residential transactions check whether boundary sensitivity is an issue
- If boundary sensitivity is an issue ensure client's have realistic expectations and appreciate the problems in locating a legal boundary.
- A determined boundary application to the Land Registry is a means of identifying and recording a legal boundary but requires the consent of neighbouring landowners and a Land Registry compliant plan needs to be submitted with the application.

ADVERSE POSSESSION

EDITED BY IAN QUAYLE, TRAINING CONSULTANT, CHIEF EXECUTIVE OF IQ LEGAL TRAINING LIMITED

LAND DISPUTES – Dowse v City of Bradford Metropolitan District Council [2020] UKUT 0202 (LC)

Adverse possession can cause problems for residential conveyancers and commercial property lawyers.

Case Notes

This case related to an area of open land behind Roy Dowse's property measuring about two acres. Dowse claimed to have been in possession of the land for well over 10 years by using it for grazing livestock, storing materials and keeping a caravan. Before the Upper Tribunal (Lands Chamber), counsel for the applicant accepted that "adjacent to" in condition 3 means "having a boundary with", not merely being in close proximity to, but argued that the third condition was not limited to boundary disputes.

The trial judge decided in reading conditions (a), (b) and (c) of para.5 of Schedule 6 of the Land Registration Act 2002 together, it is clear that the exception is to the effect that the applicant was justified in believing that the true position of the boundary was where he believed it to be.

The exception is necessarily to do with the position of the boundary, and not simply giving effect to a reasonable belief of the applicant as to ownership, otherwise conditions (a) and (b) would be otiose.

It would be bizarre that parliament should intend to allow the

proprietor to be dispossessed after only 10 years, without warning, if part of the disputed land adjoined the applicant's land but not if it did not, and not in a case where the boundary had been fixed, even if the claim to adverse possession had nothing to do with the general boundary between the applicant's land and the disputed land.

"The claim to adverse possession of the greater part of disputed land that does not adjoin the boundary can have nothing to do with the position of the boundary between the two parcels."

The case reveals the third exception is a much narrower exception than has previously been thought. In most cases a claim will only succeed if the disputed land is on the applicant's side of the dividing fence and the legal ownership of the area is questionable by virtue of the general boundaries rule. The Dowse case clarifies the scope of the exception and will undoubtedly result in a reduction of to purloin a neighbour's land.

Practice Points

- Ensure a buyer client inspects the target property to ascertain that the title plan , agents particulars of sale, survey or valuation are consistent with each other and what is seen during inspection
- Where a boundary dispute relates to or involves a claim for adverse possession caution should be exercised where it is likely that the potential adverse possessor will rely on the neighbour encroachment ground. Can the adverse possessor contend that he/she had a reasonable belief that the land belonged to him/her
- Remind landowners to keep their addresses for service at the Land Registry up to date so that they are aware of an adverse possession claim and advise them of the importance to react swiftly if an adverse possession claim is made.

FIXTURES AND FITTINGS

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A NEW CASE DEALING WITH SOME OLD LAW

The case of The Royal Parks Ltd and others v Bluebird Boats Ltd [2021] EWHC 2278 (TCC).

Case Notes

The issue of what is a chattel and what is a fitting is an interesting academic issue which can also amount to a practical problem in residential conveyancing.

The court provided a useful restatement of the obvious:

- An item will be treated as being part of the land if the following conditions are met:
    a. the degree of annexation is such that the structure is permanently fixed to the land and can only be removed by a process of demolition
    b. the purpose of such annexation must be that it should form part of the land
- An item will be treated as a chattel if it sits on the land but is otherwise unattached, unless there is objective evidence that it was intended to form part of the land

And remember:

- Where the item is annexed to the land but potentially removable,

it will be treated as being part of the land if the purpose for which it was annexed was the permanent and substantial improvement of the land; but it will be treated as a chattel if the purpose for which it was annexed was temporary or for the more complete enjoyment and use of it as a chattel.

- The test as to the degree and purpose of such annexation is an objective one; it is not determined by the subjective intention of the parties or any contractual arrangements between them

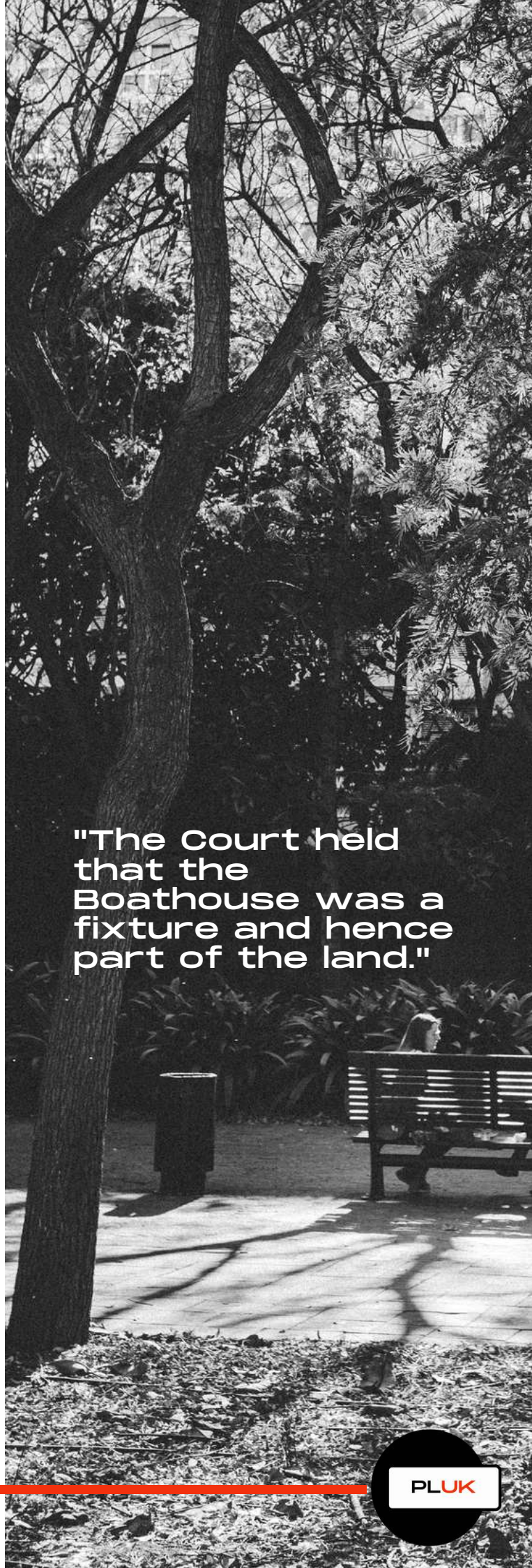
The Court held that the Boathouse was a fixture and hence part of the land.

The decision was based on expert evidence was to the effect that the superstructure could be disassembled and removed by works of medium complexity taking about four weeks and the slab could only be removed by destroying it.

It was agreed by the parties' experts that 90% of the main structural steel frame could be removed and re-used in another location but the threaded rods and bolts fixing the steel columns to the concrete floor slab would not be capable of removal and would have to be cut off at the base. 90% of the windows and external doors could be removed and used elsewhere.

In addition the following facts were important:

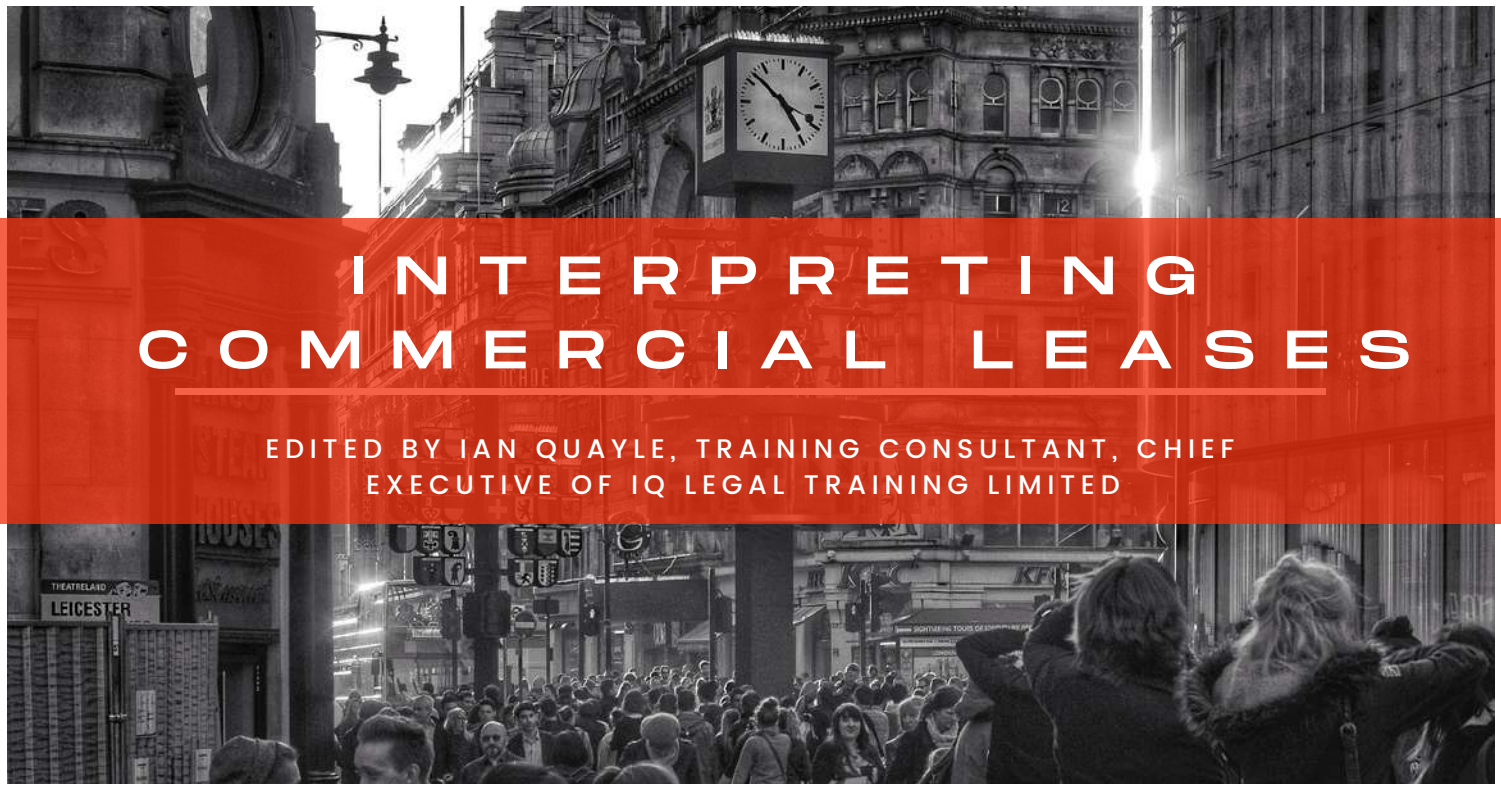
- The main steelwork and timber



roof structure could be capable of relocation.
- The membrane roof covering would be destroyed.
- Internal timber framework could be reused but not the associated plasterboard walls and ceilings.
- The sanitary ware and kitchen cabinets could be reused.
- Between 75 and 90% of the timber cladding could be re-used.

The trial judge provided four reasons for concluding that the Boathouse was a fixture, not a chattel:

- The Boathouse consisted of both the slab and the superstructure on her analysis, the Boathouse was permanently fixed to the land
- Even if the superstructure could be treated separately from the slab (as the Court of Appeal had done when considering a shed on a concrete base in Webb v Frank Bevis), its removal and re-use would amount to the salvage of parts, not the reinstatement of the whole.
- The purpose for which the Boathouse was constructed was the permanent and substantial improvement of land by the Serpentine. This was supported by the fact that the erection of the Boathouse was the price for the grant of the concession.
- Any subjective intention that Bluebird had to erect a building that could easily be dismantled and removed was not determinative (and the Judge did not accept that the evidence established that there had been such an intention).



INTERPRETING COMMERCIAL LEASES

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Monsolar IQ Limited v Woden Park Ltd [2021] EWCA Civ 961

Case Notes

There has been some recent case law concerning how leases should be interpreted. You will recall the case of Arnold v Britton [2015] UKSC 36 which involved the interpretation of a service charge provision in some leases of holiday chalet plots in a caravan park in South Wales. The relevant provision was as follows:

"To pay to the lessors without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first three years of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent three year period or part thereof."

The effect of this clause literally applied was that the initial service charge of £90 per annum would be increased on a compound basis by 10% every 3 years. The actual effect of this was that, by 2015, the service charge was £2,500 and by the term date in the leases, in 2072, the sum payable annually would be £550,000. None of these sums of course bore any relation to the

sums actually expended by the landlord in the upkeep of the caravan park.

The Supreme Court accepted that use of the literal meaning of the clause produced "unattractive, indeed alarming" results, "unattractive consequences" and a "highly unsatisfactory outcome". The tenants submitted that the service charge clause required the lessee to pay a fair proportion of the lessor's costs of providing the services, subject to a maximum, which is £90 in the first year of the term, and increases every year by 10% on a compound basis. In other words, they argued that, in effect, the words "up to" should be read into the clause set out in para 7 above, between the words "the provision of services hereafter set out" and "the yearly sum of £90".

The Supreme Court did not accept the tenant's arguments as were contrary to Lord Neuberger considered to be the "the natural meaning" of the words used and involved inserting words which weren't there.

Lord Neuberger provided some useful guidance:

- Firstly he confirmed the importance of paying close attention to the words actually used by the parties to the contract
- Commercial common sense should not be invoked to undervalue the importance of the language of the provision which is to be construed. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract
- The court should not embark on an exercise of looking for or constructing ambiguity or drafting infelicities in order to allow it to apply commercial common sense and depart from the natural meaning of the words used.
- Commercial common sense could not be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language
- A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight

The recent case of Monsolar IQ Ltd v Woden Park Ltd [2021] EWCA Civ 961; [2021] EGLR 35, concerned a clear mistake in a rent review formula, which was not itself linguistically or mathematically nonsensical, but would have had an absurd and irrational effect on the future rent during the term.

The lease in Monsolar related to a wind farm. Such leases normally included rent review provisions that increased the rent annually by reference to the retail price index.

Rather than increasing the passing rent by the amount of any inflation since the last increase, or increasing the starting rent by the total amount of inflation since the start of the lease, the clause in this lease applied the total amount of inflation since the start of the lease at each annual review. The

consequence of this would lead to absurd rents at the end of the term as it would potentially mean that the rent could still increase in any year, even if inflation turned negative in later years of the term, and would mean that the rents towards the end of the term would be different for the same overall amount of inflation, depending on whether more of that inflation had occurred early or late in the term.

The Court of Appeal explained harking back to the case of Chartbrook v Persimmon [2009] 1 AC 1101 that in interpreting wording ,it is not sufficient that the possible results of applying the literal wording of a provision should "lack commercial common sense", or that it would be imprudent for anyone to agree to such a provision. Only if the provision produced results that were "irrational, arbitrary, nonsensical or absurd" could its literal meaning be departed from.

In Monsolar the court asserted that there might be a "fine dividing line" between a case where the outcome appears "commercially unattractive and even unreasonable" and one which appears "nonsensical or absurd". Applying this to the rent review provision given the effects of the formula on the future rent in Monsolar, the Court of Appeal held that it was "about as plain a case of such a mistake as one could find".

A further requirement from Chartbrook is that it must also be "clear" what the parties actually intended. If it is clear that a mistake has been made, but not what the parties actually intended, then the literal wording must still be applied.

"Only if the provision produced results that were "irrational, arbitrary, nonsensical or absurd" could its literal meaning be departed from"

In Monsolar there were two possible ways to correct the clause. It could be corrected so that it applied only one year's inflation to the rent fixed at the last review, or so that it applied the total amount of inflation from the start of the lease up to the review date to the original starting rent. However, the Court of Appeal accepted that, because the clause was not an upwards-only review clause, these two corrections would in fact produce identical rents.

It was clear what the parties intended, even though that intention could be expressed in two different ways.

Monsolar makes it clear what the actual intention of the parties was, then, as Lord Hoffmann observed in Chartbrook, there is no "limit to the amount of red ink" which the court can use to correct their mistake in expressing their intention.

Practice Points

- When drafting commercial leases take care to ensure if a clause is complex there is evidence of what the parties intended. For example if drafting a complicated formula or calculation provide a worked example
- Ensure when drafting or advising on commercial property documents that client's see the document (the lease) and that they are provided with an explanation of the terms.
- Try to keep drafting as simple as possible

TURNOVER LEASES

EDITED BY IAN QUAYLE, TRAINING CONSULTANT, CHIEF EXECUTIVE OF IQ LEGAL TRAINING LIMITED

A scamper through some key issues

Case Notes

Given the difficult economic circumstances incentives for tenants are being offered and there has been a resurgence in interest in turnover leases.

The use of turnover rents is said to be a model which encourages greater risk sharing and a stronger partnership between landlord and retailer. There are problems with turnover leases:

- Reliance on data sharing and trust between landlords and tenants.
- The availability of CVAs for tenants to escape liability where a traditional lease means the tenants trading position becomes untenable apply to turnover leases as well enabling tenants to escape onerous provisions
- Recently the temporary legislative changes which have resulted in limitations in the landlords' rights to enforce

Turnover leases are not uncommon for example in mining leases and more recently, they have been applied to other commercial lettings, notably to lettings of shops, hotels and restaurants and they have become increasingly

popular.

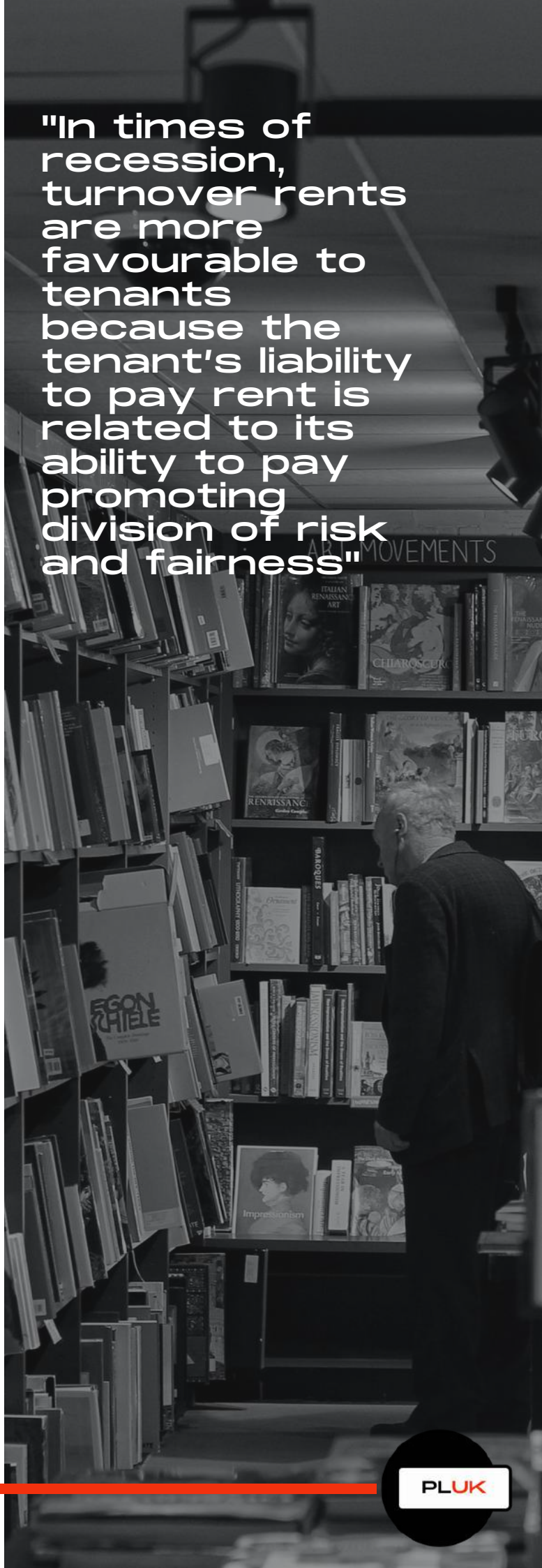
In times of recession, turnover rents are more favourable to tenants because the tenant's liability to pay rent is related to its ability to pay promoting division of risk and fairness.

Apart from the potential for the incorporation of turnover rent clauses in new leases, it continues to be surprising that it remains undecided whether the court has any jurisdiction to set a turnover rent on a lease renewal under the Landlord and Tenant Act 1954 Part II. It is simply stated in "Woodfall on Landlord and Tenant" (looseleaf), para. 22.149.6, that: "In appropriate circumstances, the court may fix the rent by reference to a percentage of the tenant's turnover or commission.

The courts have fixed rents in this manner in the case of lifestock markets, but it may be that the court would have such power in relation to retail units where there are no comparables … or where the current tenancy provides for rent to be assessed on that basis. There is a problem as to how the problem of disregarding the tenant's goodwill can be overcome in these circumstances."

In Reynolds and Clark "Renewal of Business Tenancies" (5th ed.), the authors set out a valuable analysis of sections 34 and 35 of the LTA 1954, and discuss the arguments for and against the court having jurisdiction to set a turnover rent, including such case law as exists.

If a turnover lease is being contemplated consider:



1. The definition of profit and the interrelationship with taxes

Theoretically in Debenhams Retail Plc v Sun Alliance & London Insurance Co Ltd [2005] 3 E.G.L.R. 34, the tenant held department store premises under a lease granted in 1971 for a term of 99 years from 1965. The lease reserved a basic rent together with an additional rent calculated by reference to the store's turnover, defined as "the gross amount of the total sales". The Court of Appeal held the words "gross amount of total sales" meant everything that was taken at the till, including VAT, without deduction.

2. The possibility of changing profit rates

If the price of a commodity rises at a faster rate than the cost of living, pressure is likely to develop on dealers in that commodity to reduce their margin of profit or rate of commission: Naylor v Uttoxeter UDC (1974) 231 E.G. 619, per Brightman J. Accordingly, the tenant may find that the proportion of rent to profit increases.

Similar problems arise where profit margins are reduced.

3. The definition of turnover

If acting for tenants the definition of turnover needs to be carefully considered upon which the rent is to be calculated. It should as far as possible be related to the actual profit made by the tenant.

From the landlord's point of view too close a relationship between rent and profit means that their income will depend to a large extent on the efficiency with which the tenant carries on business rather than on the value of the demised property.

4. A basic rent should be reserved

This provides a base figure for the landlord set in the past at between 70 per cent and 90 per cent of the open market rental. An alternative is to use a guaranteed minimum which is reviewed at periodic intervals.

5. Minimum and maximum turnover figure

A tenant's adviser should ensure that there is a minimum turnover figure, which is not to be taken into account in assessing the rent, and possibly a maximum figure above which turnover is ignored.

6. Sales

Where the tenant is likely to have sales or special offers, their advisers should attempt to ensure that it is the amount they receive rather than the full retail price which is to be included in the calculation of turnover.

7. Credit

Where the tenant's business includes a substantial number of transactions in which they give credit to their customers the draftsman will have to consider whether the amount of the transaction should be brought into account at the time of the transaction or at the time of payment, whether interest payments are to be included in the calculation of turnover and whether the tenant is to have an allowance for bad debts.

8. Vouchers, gift cards, the internet and click and collect

The landlord's adviser should consider the impact of sales of store vouchers and gift cards. They should consider the way in which the retailer accounts for profits resulting from shoppers' and tenant's use of the internet. Orders placed remotely on the internet but collected from the store should also be attributed to the store where the collection is made.

9. Rent Review

If the lease is to include rent review provisions, it has been common to see clauses where the parties have provided for the base rent to be reviewed to the open market rental level disregarding the turnover provisions. Equally, in the hospitality and leisure sectors, and for unique properties, a profits method of valuation is commonplace (and requires careful thought).

10. Alienation

The parties should also consider whether the provisions as to payment of a turnover rent are to continue if the lease is assigned or a sub-letting takes place, or are to be made personal to the original tenant.
If the provisions are to terminate, the full market rent should become payable.

Licence fees or sub-rents is taken into account in the calculation of the tenant's turnover.

11. Keep Open Covenants

Consider impact of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 enforcing the lockdown which has forced thousands of businesses to close. Subject to the need for parties to consider the incorporation of pandemic specific drafting, a landlord's adviser will generally wish to couple a turnover rent clause with a tenant's covenant to keep open to attempt to ensure that the demised property is kept open and trading. Clearly, if the demised property ceases to be used for trading, the landlord's income will drop or possibly cease.

In addition to the impact of government regulation, the tenant should ensure that the clause excludes circumstances where the store is, for example, closed for repairs, refitting or as a result of damage caused by insured risks. The landlord may wish to include a term for the rent to revert to the open market rental level if the closure is in excess of a certain period.

12. Accounting Machinery

If a Base Rent is payable, then the lease will provide that the Base Rent is to be paid in conventional instalments in advance. Because the turnover for each year can only be established following the end of the relevant year, most landlords will also normally wish to provide for a provisional sum to be paid in

advance on account of the turnover rent on the same dates as the basic rent is payable.

The lease should provide for the landlord to have sufficient power of inspection of the tenant's books to satisfy himself that any information supplied by the tenant is correct. There should probably be a provision for independent determination (by an accountant rather than a surveyor) in case of dispute. Reliance on the tenant's audited accounts for the purpose of calculating turnover may be unwise for the landlord, not because those accounts may be inaccurate but because they may not be settled until well after the end of the rental period in question.

13. Confidentiality

The tenant's adviser will wish to ensure that confidentiality provisions are included to ensure that the landlord does not disclose the tenant's private business information, and that it uses that information solely to calculate the turnover rent.

14. Dispute Resolution

Linked to the need for confidentiality, a private arbitration mechanism will be the best way forward in the event of dispute.

Practice Points

- If acting for a landlord where a tenant is seeking assistance and guidance consider whether in consideration for providing assistance to the tenant some form of benefit can be gained for the tenant. The lease can be regeared to assist the landlord's management.
- When acting for tenants in connection with turnover leases ensure that the tenant appreciates rent is not calculated on the basis of profit. If trading conditions lead to a reduction in profit sharing turnover could eradicate profit altogether

ELECTRIC VEHICLE CHARGING POINTS

EDITED BY IAN QUAYLE, TRAINING CONSULTANT, CHIEF EXECUTIVE OF IQ LEGAL TRAINING LIMITED

Issues for Property Lawyers

Case Notes

The UK government announced a ban on the sale of new petrol and diesel cars from 2040 and by 2050, their aim is that almost every vehicle on UK roads should be zero emissions.

As we have seen electric vehicles are becoming increasingly popular in the UK and worldwide and with it are the concerns due to the lack of charging infrastructure in place nationwide. As a result public and private charging facilities need to be greatly expanded to ensure the UK EV market can grow in line with expectations.

There are two charging point models currently:

1. Stand-alone installations where the land is leased or owned directly by the charging point owner
2. Models where charging points are installed by the charging point owner under a license arrangement on land owned or leased by third parties (e.g. in supermarket car parks or service stations).

There are a number of issues for commercial property lawyers:

- When acting for developers it is

important to understand that the client may want to seek to combine charging points with other technologies to maximise potential revenue streams and to mitigate the cost of grid reinforcement – for example, by co-locating with solar panels or battery storage facilities.

- It may be necessary for developers to pay for reinforcement works to achieve connections with higher capacity – this can be prohibitive, especially where the location is only suitable for a small number of charging points.

- No matter whether a licence, option for lease, agreement for lease or lease itself will need to be drafted to allow for such additional developments (whether intended at the time of construction of the charging points, or further down the line). In addition planning issues need to be considered.

- As technology develops existing charging installations may need retrofitting and documentation will need to allow it.

- Wayleaves and easements for the construction and installation of electricity cabling and substations might be required. Fortunately EV charging points are likely to be near to existing grid connections where there are car parks, service stations or business premises.

- Where reinforcement or additional connections are needed to supply charging points and support their capacities, in addition to the reinforcements and connection costs themselves, a developer should consider early the likely cost of obtaining relevant easements, wayleaves and access rights. Landowners and their agents are much more alive now to the potential value of such rights, and should be contacted early in order to obtain the appropriate rights.

- The Alternative Fuels Infrastructure Regulations 2017 which came into force on 9 October 2017. These regulations put in place standards for sockets and vehicle connectors, impose requirements for intelligent metering and require operators to make EV charging points accessible to the public on an open and non-discriminatory basis. There are civil penalties in place if these requirements are not met.

- The requirements which could be put in place under the Automated and Electric Vehicles Act 2018 (AEVA 2018) will also need to be observed. These will deal with issues around access, functionality and the information which will need to be provided to the consumer by those offering public charging points. Part 2 of the of the AEVA 2018 gives the Government powers to create multiple regulations to deal with the installation and operation of EV charging points as the UK EV market expands and the number of charging points increase. The powers include the ability to introduce regulations to ensure that all EVs can charge at any charging point and introduce requirements on how operators

provide access to charging points.

- Consumer legislation requires consideration. A fee for the use of a charging point has to be fair, easily and clearly comparable, transparent and non-discriminatory. This will necessitate business models for charging points factoring in consumer pricing. Further, operators of charging points will need to comply with the various consumer laws applying to various aspects of their business, including relating to any online or app-based sales, customer services provisions and so on.

- The electricity supply licence regime applies to the supply of all electricity in the UK, including the sale of electricity through a charging point. Failing to comply with the supply licence provisions is a criminal offence. In practice, there are exemptions which may be applicable to avoid the need to a supply licence where EV charging ·points are located. The available exemptions will depend on the nature of the infrastructure set up, however the rules are complex and any business models, supply arrangements (and the documents recording this) should be carefully considered to ensure that an exemption applies and a licence is not required.

- When dealing with leaseholds depending on the terms of the lease, landlord consent may be required for alterations. If the charge point will sit outside, additional rights for access and

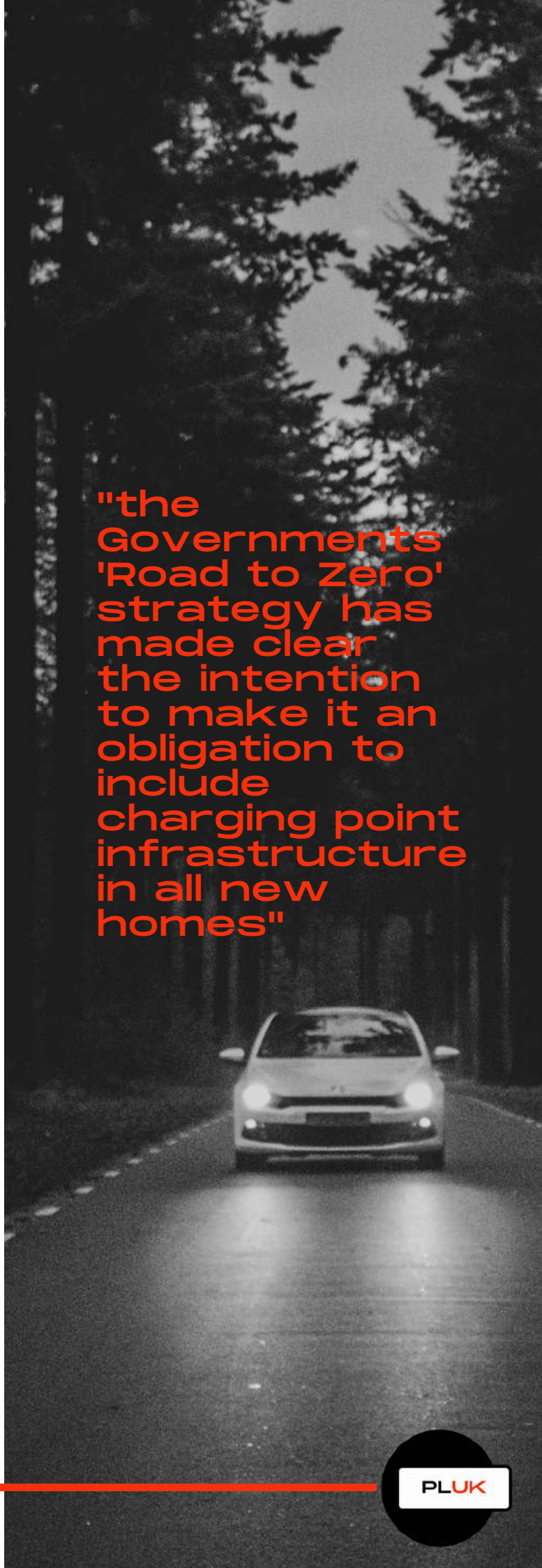
maintenance may be required together with an obligation to repair.
Other issues relevant to leaseholds including the need for clear allocation of responsibilities, and consideration should be given to provisions relating to possible reinstatement at the end of the term, applicability of rent review, service charge, security of tenure and insurance.

What about planning considerations for EV charging points?

The Town and Country Planning Order 2011 (SI 2011 2056) introduced permitted development rights for EV charging points in public and private car parks but planning permission may be required for charging points installed elsewhere.

Several local authorities have introduced an obligation on developers to include EV charging points on new developments and the Governments 'Road to Zero' strategy has made clear the intention to make it an obligation to include charging point infrastructure in all new homes.

Planning permission is not required for the installation of wall-mounted electric vehicle charging points in areas lawfully used for off street parking – provided the electrical outlet must not exceed 0.2 cubic metres in size, and it can't face onto, or be within, two metres of a highway. The point also can't be within a site designated as a scheduled monument or within a listed building.



The rules for installing an upstand with a mounted electrical charging are similar. Planning permission is not required if the upstand outlet does not exceed 1.6 metres in height from the level of the surface used for the parking of vehicles. Installation cannot result in more than one upstand being provided for a single parking space.

The Government's planning proposals

Residential Buildings:

- The government proposes every new residential building with an associated car parking space to have a chargepoint. The Government proposes this requirement applies to buildings undergoing a material change of use to create a dwelling. The government proposes requiring every residential building undergoing major renovation with more than 10 car parking spaces to have cable routes for electric vehicle chargepoints in every car parking space.

New Non-Residential Buildings:

- The government proposes every new non-residential building and every non- residential building undergoing a major renovation with more than 10 car parking spaces to have one chargepoint and cable routes for an electric vehicle chargepoint for one in five spaces.

Existing Non-Residential Buildings:

- The government proposes a requirement of at least one chargepoint in existing non-residential buildings with more than 20 car parking spaces, applicable from 2025.

Schedule 2, Part 2, Class D of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) states that planning permission is not required for the installation of a wall mounted electrical outlet for recharging of electric vehicles as long as the area is lawfully used for off-street parking.

For installation to be classed as permitted development, the electrical outlet (and its casing) must not:

- Exceed 0.2 cubic metres
- Face onto and be within two metres of a highway
- Be within a site designated as a scheduled monument
- Be within the curtilage of a listed building.

Installing an upstand with a mounted electrical charging outlet Schedule 2, Part 2, Class E of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) states that planning permission is not required for the installation of an upstand with an electrical outlet mounted on it for recharging electric vehicles, as long as the area is lawfully used for off-street parking.

For installation to be classed as permitted development, the electrical upstand and the outlet must not:

- Exceed 2.3 metres in height from the level of the surface used for the parking of vehicles. This limit is 1.6 metres where in the curtilage of a dwelling house or block of flats
- Be within two metres of a

highway.

- Be within a site designated as a scheduled monument
- Be within the curtilage of a listed building
- Result in more than one upstand being provided for each parking space

Turning to the issue of Building Regulations the Government proposes the creation of a new part to the English Building Regulations requiring electric vehicle charging infrastructure in new buildings and buildings undergoing material change of use and major renovation.

For residential buildings, the Road to Zero strategy set out that the government wants every new home to have a chargepoint, where appropriate. This includes newly built homes and homes created through a material change of use of an existing building. The Government proposes a requirement of a chargepoint in every new home with an associated parking space and proposed specifying that the chargepoints must have a minimum power rating output of 7kW, be fitted with a universal socket that can charge all types of electric vehicle currently on the market and meet relevant safety and accessibility requirements.

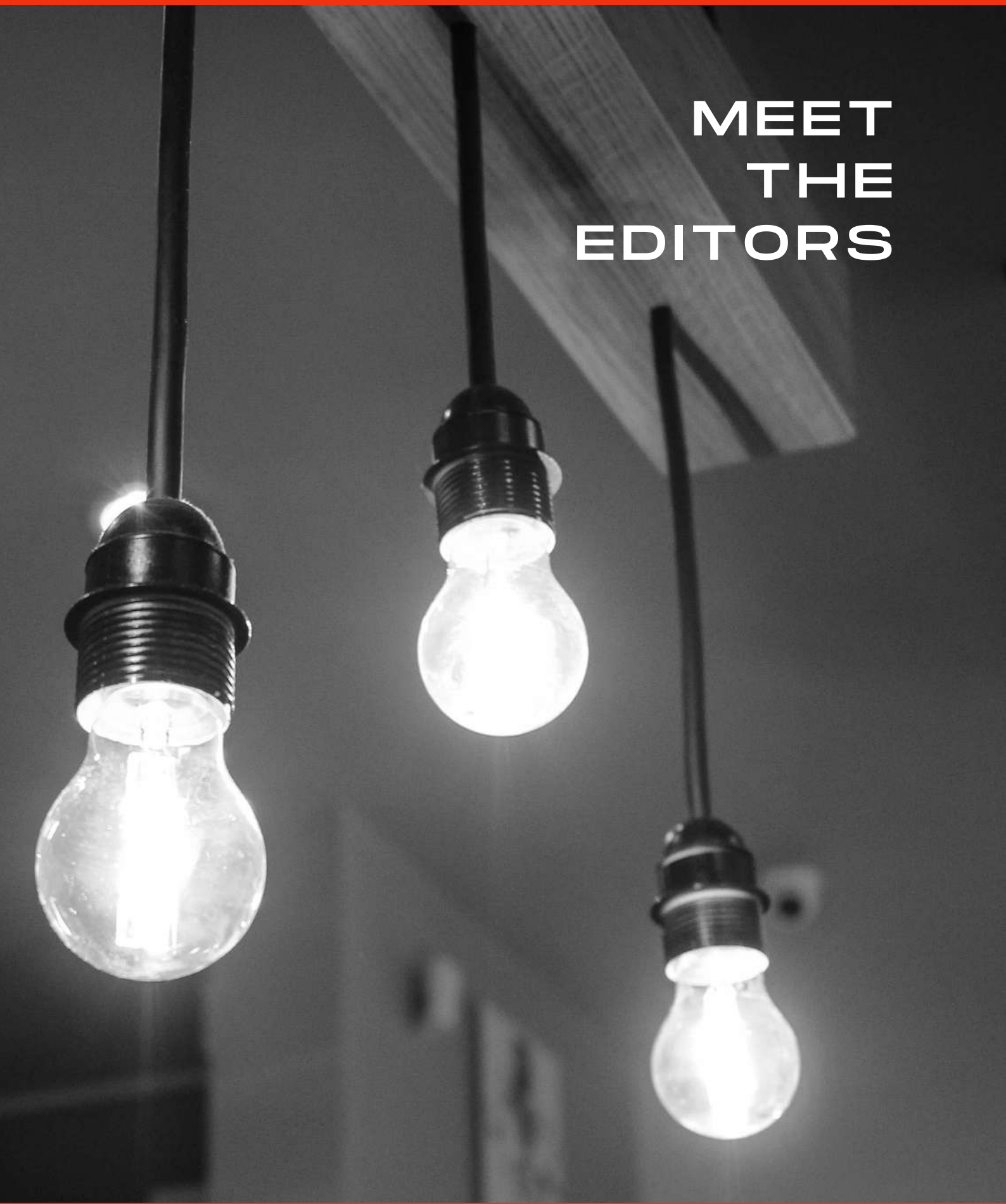
For new non-residential buildings the proposal is a requirement for new non-residential buildings and non-residential buildings undergoing major renovation with more than 10 parking spaces to have at least one chargepoint and cabling routes for one in five spaces.

The government does not think it is necessary to go further than this at this stage. The demand for chargepoints and the type of chargepoints needed at non-residential buildings is mixed, and will depend on how the building is used and the wider provision of chargepoints in the local area. The government does not therefore consider it appropriate to set a more prescriptive standard for all non-residential buildings through Building Regulations. We are, through this consultation, seeking views on this position.

The Government proposes to require one chargepoint in existing non-residential buildings with more than 20 car parking spaces. This will help create certainty for drivers that their destination will have at least one chargepoint, while not overburdening building owners or leading to an over-supply of chargepoints.

Practice Points

- Ensure consideration is given to electric vehicle charging point issues.
- Deal with basics such as ensuring the appropriate easements are granted
- Take care to ensure there is flexibility with regard to supply such as enabling the upgrading, improving, repair and maintenance of cabling



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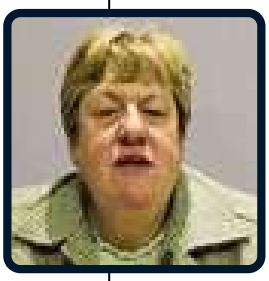

Specialism: Property Transactions

Peta has over 25 years' experience of practising property law. She was a Real Estate Partner at Dentons for 17 years and is now a full-time freelance lecturer, trainer and writer, providing training on behalf of organisations as well as in-house training for law firms and local law societies.

Peta is a member of the Consultation Board of Practical Law Company and the Editorial Board of Landlord and Tenant Review. She is the co-author of two books on the Landlord and Tenant Act 1987 and writes five sections of Isurv (the information resource of the RICS). She regularly publishes articles in the Estates Gazette and Landlord and Tenant Review. She is a Site Editor for the Property Law website.

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James has a particular interest in the intersection of property law with other fields, such as insolvency. He is a contributor to the forthcoming 'Company Voluntary Arrangements' edited Tom Smith QC and Elaine Nolan (OUP, 2022).

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- Land Law including title, conveyancing, boundaries, adverse possession, easements, restrictive covenants, co-ownership etc
- Landlord and Tenant including all aspects of business, residential and agricultural possession claims, dilapidations, lease renewals, rent reviews
- Related professional negligence claims

Nigel is the author of Atkin's Court Forms, Vol 28(1) Mortgages (2020) (Lexis Nexis) and Mortgage Possession Actions (Sweet & Maxwell) and maintains his own specialist Mortgage Law website www.legalmortgage.co.uk.

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Piers has a number of direct access clients, mainly property developers and is happy to accept direct instructions in most cases.

He is on the editorial board of Landlord and Tenant Review and PropertyLawUk and writes a periodic update on leasehold enfranchisement.

He is the co-author of "Megarry's Manual of the Law of Real Property" (Sweet & Maxwell, 9th edition), "Enfranchisement Law and Practice" (Wildy and Sons Ltd) and Service Charges Management (Sweet & Maxwell, 3rd edition).

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Sarah qualified as a solicitor in 1990, and throughout her career, she has been focused on trying to improve the house moving experience for all involved.

Sarah established her own practice, dealing exclusively with residential conveyancing in April 2000 and has seen many changes in conveyancing, along with changes to the market. Sarah believes that solicitors have a crucial role in making sure that the public receive good advice at a stressful time.

For ten years, Sarah has been a member of the Law Society Conveyancing and Land Law Committee, heading the Residential Property sub group. She has been involved in the redrafting of the Protocol Forms, and led the group which drafted the new edition of the Protocol. She is the joint author of the CQS Tool Kit, a regular contributor to the Law Society's Property in Practice magazine and has been quoted in articles in The Times, The Financial Times, and other media. Sarah sits on the Government Home Buying and Selling Group which is reviewing the way in which house buying is carried out.

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Zahrah has been conducting conveyancing transactions since 2003 and qualified as a solicitor in 2011. She is experienced in the usual freehold and leasehold sales and purchases, re-mortgages and transfers of equity though leaseholds are her strong point.

However, her passion is for shared ownership leases. Having previously worked for solicitors that did the Housing Association sales, her experience and knowledge has been put to good use acting for purchasers and sellers of shared ownership leases.

Zahrah also assists clients with small developments with plot sales or splitting a freehold building into flats with new leases.

Zahrah has also spoken about shared ownership in 2020 for legal knowledge provider Lexis Nexis and also as guest speaker for the National Housing Federation's Affordable Home Ownership (virtual) Conference in 2020.

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Tom is a barrister with nearly 40 years of experience in town & country planning, highway law and public law. He was formerly a solicitor and has had considerable experience in local government and private practice. Tom was the Chief Solicitor to North Hertfordshire District Council and has held senior positions in local government.

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She works with law firms, law societies and training providers to provide expert, practical and bespoke training on:

- A wide variety of commercial property law topics
- Long leasehold residential property law, including pre-emption rights
- Avoiding and resolving property related disputes

Sarah has also co-authored two leading textbooks on residential tenants' pre-emption rights under the Landlord and Tenant Act 1987.

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Tracy is a property lawyer who has spent over two decades in the legal profession, most recently as managing partner of a Merseyside multi-disciplinary practice and was recently appointed as Lead Assessor for the Law Society's Conveyancing Quality Scheme (CQS).

Tracy possesses a diverse mix of skills and is highly experienced in operational management and business strategy. She provides valuable practice management support to law firms, particularly in the areas of risk and compliance. Tracy is an experienced trainer working with national training organisations and local law society's and her area of expertise is in the areas of law firm compliance and quality management standards.

Tracy is passionate about the benefits Lexcel can bring to a practice and it is this passion which saw her appointed to the Law Society Lexcel Panel in 2013. She is a Law Society accredited Lexcel Consultant and a Lexcel Assessor for both the England & Wales standard, and the International standard.

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Ian Quayle qualified as a solicitor and worked in private practice for 12 years specialising in property law matters including residential development work, commercial acquisitions and disposals.

Ian has delivered over 1500 property related training courses for city and regional firms, local law societies and local authorities. His training style and delivery is relaxed, but he is able to explain the law and practical issues relating to the training topic in a way that ensures delegates learn, or reinforce learning, and derive meaningful benefit from the training provided.

Ian has provided training to businesses in-house, public courses, and spoken at conferences. He is prolific in his delivery of webinars on conveyancing related issues, and he has delivered live and pre-recorded webinars nationally and internationally for leading legal training providers and continues to do so.

Unusually, Ian is able to deliver training in both commercial and residential property fields generating courses on a myriad of topics some of which are of general application and others more specialist and focused. Ian has taught a number of training courses aimed at support staff.

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David Keighley was admitted as a solicitor in 1982. Until his retirement from full time practice in September 2016 David was a partner in and Head of Residential property at a Legal 500 firm. Having done so part time whilst in practice, he now uses his extensive experience and understanding of practical conveyancing to cut through the academic niceties and make things relevant for the busy practitioner.

He, in conjunction with a range of commercial providers & local Law Societies, regularly presents at property law conferences, seminars, webinars, audio seminars, training courses and related events.

David is a contributing author for the Law Society Conveyancing Handbook, provides modules for the Law Society's Conveyancing Quality Scheme (CQS) online training course and provides monthly online seminars in conjunction with Legal Futures. He has also acted as a tutor for CILEX Law School and has written for publications including the Law Society's Property in Practice Magazine and the Solicitors Journal

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