

REAL ESTATE UPDATE

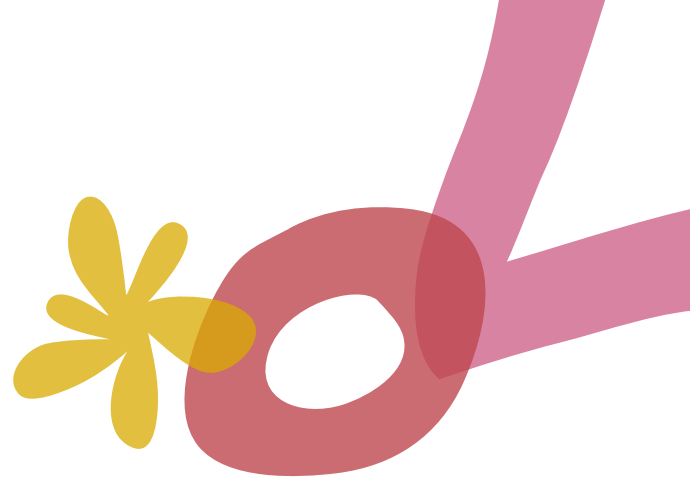
SPRING 2020

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Welcome



In this edition of our Real Estate update, we focus on climate change and its impacts, focusing in particular on how to manage the process of reducing your property's emissions.

We start with a roundup of the latest news on environmental measures, from **Beatrice Lewers** (page 3).

Climate change will inevitably impact our world and our lives, but there is much that can be done to mitigate its effects. Businesses and organisations can play a vital part in adopting the urgent changes that are needed. **David Hunter** urges us all to be change makers, not change takers (page 4).

Reducing workplace emissions is a vital part of the UK's goal to achieve net zero emissions. It is obviously a worthwhile aim, but achieving it will often involve navigating complex landlord-tenant-supplier relationships. **Will Scott** and **Karli Hiscock** look at how to manage the process of making positive changes (page 6).

With buildings and the construction sector a significant contributor to carbon emissions, now is the time to look at reducing your building's carbon footprint. **Rebecca Rider** provides a useful list of points to consider (page 8).

The rapid growth of impact finance in recent years has seen sustainability and socially responsible investing move to the top of the agenda. **Malcolm Headley** and **Christina Tennant** argue that real estate finance has to be at the heart of impact finance discussions (page 9).

And finally, **Megan Vick** provides our regular round up of significant recent case law (page 10).

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News in brief and recent deals

Beatrice Lewers rounds up the latest property news and gives a snapshot of some of our recent deals.



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Environmental Bill 2019-21

On 30 January 2020 the government introduced the Environment Bill 2019-2021. The Bill supersedes the Environment Bill 2019 which failed to progress before the December 2019 General Election. The Environment Bill 2019-2021 aims to legally oblige policy-makers to consider choosing policy options that cause the least environmental harm. On 19 March 2020, the Environment Bill was suspended as the sittings of the Public Bill Committee of the House of Commons are halted due to the coronavirus disease (COVID-19) outbreak, until further notice.

<https://services.parliament.uk/bills/2019-21/environment.html>

Coronavirus Act 2020

The Coronavirus Act 2020 received Royal Assent on 25 March 2020. The Act provides extra support for commercial and residential tenants who will be protected from forfeiture and eviction respectively if they are unable to pay rent because of the coronavirus. There is a three-month stay in relation to all possession proceedings based on non-payment of rent, however this is limited to the non-payment of rent only. The Act also reserves the power to extend this period to six months in relation to residential property.

<http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted>

<https://www.gov.uk/government/news/extra-protection-for-businesses-with-ban-on-evictions-for-commercial-tenants-who-miss-rent-payments>

Government scheme to reduce carbon emissions

On 18 February 2020 the government announced that households and businesses will benefit from £90 million to cut carbon emissions in industry and homes. Of this, £70 million will include funding for two of Europe's first ever large-scale low carbon hydrogen production plants, which could generate enough clean energy to heat more than

200,000 homes. The remaining £20 million will fund local energy projects across the UK, which could reduce household emissions by up to 80% and save consumers money on their energy bills.

<https://www.gov.uk/government/news/90-million-uk-drive-to-reduce-carbon-emissions>

RECENT DEALS

Acting on the grant of a 250-year lease of gallery space for the historic and prestigious Royal Watercolour Society (RWS). The grant of the lease on 13 February 2020 follows the successful planning and construction process undertaken by the developer/landlord. The large gallery space is located on Whitcomb Street just off Trafalgar Square and marks a 'coming home' for RWS as the building had been used by RWS over 150 years ago! We are delighted to have helped RWS reach this landmark moment.

Exchanged contracts for a 10 years lease of new offices headquarters for an environmental sector client in Eastcheap, London.

Provided real estate and charity advice in relation to a merger between two charities with similar objectives. There were eight properties involved on the real estate side, various permanent endowment funds and restricted funds to consider and advice on the intricacies of the right of first refusal under the Landlord and Tenant Act 1987.

Change makers

The Climate Emergency demands us to be change makers not change takers.

David Hunter urges us all to be change makers, not change takers.



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David works with community-owned and focused organisations providing renewable energy and enterprises active in the circular economy. He advises on procurement, state aid and contracting and commercial issues for charities and social enterprises delivering public services.



The article below was written before the COVID-19 pandemic. Whilst attention has inevitably, and appropriately, been diverted to addressing the pandemic, the points made in the article remain relevant for us all. It is important they are not forgotten and the response to the pandemic has demonstrated that anything is possible – and quickly – where there is sufficient incentive to balance the needs of human life, liberty and the economy.

‘Our greatest responsibility is to be good ancestors.’

These are the words of Jonas Salk, one of the twentieth century’s great scientists. Until recently, many might have taken this to mean leave your kids comfortably off and don’t embody Philip Larkin’s This Be the Verse. As the climate emergency and biodiversity crisis loom over us though, that responsibility takes on a more existential flavour.

The impact of climate change will affect everything we do. It contributes to biodiversity loss, will exacerbate water and food shortages, cause mass internal migrations and create millions of

international refugees; coastal cities will disappear and geopolitical tensions are likely to increase. This is not the worst-case scenario. This is what the science tells us is inevitable. The urgency is around limiting the consequences. Alongside this, the UN’s leading research body on nature has announced urgent action is necessary to reverse the loss of plants, insects and other creatures on which humanity depends for food, pollination, clean water and a stable climate, as the planet’s life-support systems are approaching a danger zone for humanity.

This is a critical turning point in human evolution. Even though we have left it too late to prevent climate change and the Sixth Extinction (effectively failing as the oft quoted ‘first generation to understand the impact of human activity and the last with the ability to do something about it’), there is still much we can do to limit their worst effects.

What these twin threats demonstrate is the interdependent nature of the world we live in. Not only do climate change and biodiversity loss exacerbate one another, they are each a product of a culture and

economy that treat nature as existing for human exploitation, rather than valuing it as a living world that we are part of and have a practical, as well as moral, duty to protect. This does not mean businesses and markets have to be demonised. It does mean that they have to return to being means not ends and take their place in contributing to a broader human (and more than human) flourishing.

So, fundamental change to our lives is inevitable and we have the choice of seeking to influence that change in ways that may benefit ourselves, our loved ones and society more widely; or cling to what we know, deal with what is in front of us and leave the future for others to cope with.

Change is challenging. Behavioural economics tells us the majority prefer not to risk losing something they have, for the sake of a potentially greater gain in the future. Many have worked for years to build their knowledge and expertise and do not like to be told that not just the goalposts, but the pitch, are moving. We are often too busy to pause to reflect, never mind to learn. It is especially hard when we are talking not so much about new skills as a new way of being.

What needs to change is attitudinal: what we bring of ourselves to our work, the attention we give to the implications of our actions, our colleagues' actions, our clients' actions (and inactions in each case) and our willingness to engage with those implications. We need to be enquiring and supportive. We are all in this together, none of us knowing what the solutions are, perhaps wondering if something is wrong with us for feeling that the world is, as Shakespeare had it, 'out of joint'.

I am fortunate to work for a B Corp, where our purpose and social impact are taken seriously. We have recognised that reducing our carbon emissions and responding urgently to the climate emergency is essential – or it may undermine any other impact we work towards. We are committed

not just to reducing our own footprint, but helping staff to reduce theirs and prepare for what is to come; to collaborating with others to amplify our impact and sharing our learning; and to using our professional skills to improve and protect the environment.

It means being open to developing a different relationship to our work, our clients and each other; something we are just beginning to explore. We are having conversations with clients about how they are thinking about the climate emergency and biodiversity crisis; what their expectations are from others (like their advisors) in their value circles; and changing expectations of them on the part of their stakeholders. We are looking at how contracts may be drafted so that the parties to them can work together to optimise the environmental impact performing the contract may have, rather than simply using bargaining power to offload risks wherever possible. We are exploring the questions that need to be asked before transactions are entered into to ensure inadvertent harm is not caused simply by continuing with established – but no longer fit for purpose – practices. And we are sharing what we learn widely with the aim of its widespread adoption, rather than treating it as valuable proprietary property ripe for exploitation.

Something else Jonas Salk said was: *'If all the insects were to disappear from the earth, within fifty years all life on earth would end. If all human beings disappeared from the earth, within fifty years all forms of life would flourish.'* While recent history suggests he could be right, wouldn't it be great to ensure our descendants never find out?

'This is a critical turning point in human evolution. Even though we have left it too late to prevent climate change and the Sixth Extinction... there is still much we can do to limit their worst effects.'

FIND OUT MORE

You can find out more about our B Corp journey and what it means for our commitment to lessening our environmental impact here: <https://bateswells.co.uk/the-uks-first-b-corp-law-firm>



Climate emergency and real estate

Reducing workplace emissions is a vital part of the UK's goal to achieve net zero emissions. It is obviously a worthwhile aim, but achieving it will often involve navigating complex landlord-tenant-supplier relationships.

Will Scott and Karli Hiscock look at how to manage the process of making positive changes.



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Karli has more than 13 years' experience in advising on all aspects of commercial property transactions. Her work is diverse and includes acquisitions and disposals for clients including charities and investors, as well as all aspects of landlord and tenant transactions.

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We are writing this article – in the cold winter months – sitting in our warm well-lit office, and we hope that you are likewise sitting comfortably in warm, light premises. This comfort is something we generally take for granted, but it is contributing to our country's climate change emergency.

The UK government has set a target to reach net zero emissions by 2050. Scotland has declared a climate emergency, with a target of net zero emissions by 2045. The UN warns that we could have only 10 years to make significant changes to avoid catastrophe. The declaration of a climate emergency and hearing such stark warnings can make us fearful, but how can we all take steps to help reduce or halt climate change?

The evidence shows that the bulk of carbon emissions derive from our demand for energy; given that, according to the UK Green Building Council, UK buildings account for 30% of our carbon emissions, we need to start thinking about how to reduce the emissions created by our workplaces.

Elsewhere in this update (*page 8*) our colleague Rebecca Rider provides helpful tips on how to reduce the carbon output of buildings, including in relation to lighting and careful consideration of the type of energy supply. In this article we are taking a broader look at the steps that organisations can take and the shift in the landlord and tenant relationship that may be required to make such changes.

'The inevitable question is where the responsibility for the cost of changes lies and the likelihood is that if a landlord agrees to make changes to reduce the carbon emissions of the premises, then the cost will be payable by the tenants through the service charge.'

1. A problem shared

The work of a facilities manager is never done and a wholesale review of the carbon emissions of your premises together with ways to make improvements is likely to be a big task. A first practical step could be to set up a working committee to manage the process. When discussions are then required with the landlord, suppliers and other occupiers, tasks can be delegated and managed and improvements monitored.

2. Policy implementation

You may be able to make changes to your energy supply, as well as to managing your waste and reducing your energy consumption. Planned preventative maintenance of your premises could save costs in the long run and can be a useful way of ensuring that furniture and materials remain sustainable.

3. Collaboration

Changes to your premises to reduce carbon emissions are likely to require discussions between landlords and tenants. For example, a change to a green energy supplier would likely need your landlord to agree to change the supply for the whole building. Would your fellow tenants consider paying a premium for cleaner energy?

If you are looking to make changes to your space to make the premises more energy efficient, you are likely to require consent from your landlord. Seeking your landlord's consent to works is not a new concept but requiring 'buy-in' and collaboration from your landlord does represent a shift. Collaborative decision making by occupiers sharing buildings also represents a new way of working for most tenants occupying commercial space.

4. Monitor and measure

If you are not already collecting the data on your waste management and energy consumption, and monitoring these aspects of your occupation, you are

missing a great opportunity. You cannot track your impact on the environment without monitoring and measuring your carbon footprint. There are online tools to help with this or you may find that seeking the advice of an environmental consultant is the best way for you to measure and reduce your carbon emissions.

None of this should feel like an insurmountable hurdle. If there is already an occupier's forum in your building, this can be a useful first step. A group of people asking for changes can be a powerful voice with landlords.

The inevitable question is where the responsibility for the cost of changes lies. The likelihood is that if a landlord agrees to make changes to reduce the carbon emissions of the premises, then the cost will be payable by the tenants through the service charge. However, this may result in longer-term savings on running costs for each occupier; and if significant improvements are made to the premises the landlord may be in a position to benefit from accreditations as to the energy efficiency of the building and the knock-on health benefits to its occupiers, such as from the WELL Building Standard®. The International WELL Building Institute and other organisations will accredit your premises and recommend actions that can be taken to improve your premises' score, the net result of which will help lessen your premises' adverse impact on the environment.

As the current landlord and tenant relationship is framed, there is often very little that can be done to compel either party to adhere to any environmental policies. Working together to tweak this relationship can ensure that parties can be held to account when it comes to premises having an adverse impact on the environment.

As with many aspects of life, when communities work together a great result is achieved, and this is also true

of occupation of commercial space. Most organisations occupy a part of a building and therefore live cheek by jowl with other organisations. What if the fellow tenants were to start talking to each other about their collective environmental objectives, and what if those objectives aligned? Collectively they would have a much louder voice and have a much greater chance of persuading a landlord to make the necessary alterations to ensure that the building as a whole has less of a negative effect on the environment.

We at Bates Wells have significantly reduced our carbon emissions – life in the office has not changed, but the raw materials that go into that daily life have. We would be more than happy to talk to you about what you can do to reduce your organisation's carbon footprint.

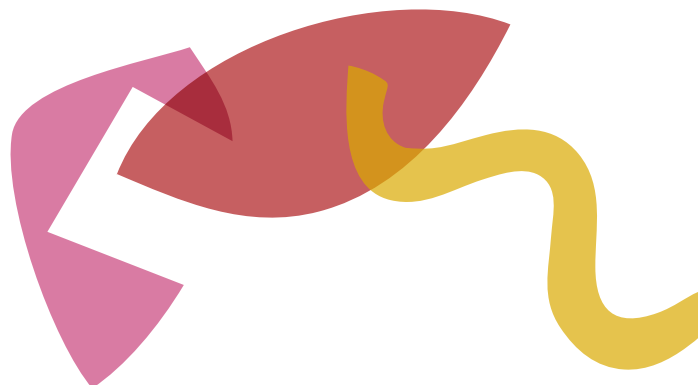
FIND OUT MORE

You can find out more about our commitment to reduce our carbon footprint on our website at <https://bateswells.co.uk/our-impact>

General information on climate change from BEIS 2019 <https://www.gov.uk/guidance/climate-change-explained>

2019 progress report to Parliament by the Committee on Climate Change <https://www.theccc.org.uk/publication/reducing-uk-emissions-2019-progress-report-to-parliament>

Please get in touch with us to discuss our experience and how we can help you to reduce your environmental impact.



How can you reduce the carbon output of your building?

With buildings and the construction sector a significant contributor to carbon emissions, now is the time to look at reducing your building's carbon footprint.

Rebecca Rider provides a useful list of points to consider.



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The world is 0.8°C warmer today than it was a century ago and since 1990 we have experienced the 10 warmest years in the UK's history. In May 2019, the UK became the first country to declare a climate emergency and the UK government has made a legally binding commitment to becoming carbon neutral by 2050. Never before has it been so crucial that all of society steps up in a collective effort to reduce its carbon output; drastic change is needed to achieve this.

All organisations must think carefully about how to reduce their carbon footprint. Buildings are a good place to start, as buildings are the third-largest carbon emitting sector in the UK, with building and construction responsible for 39% of all carbon emissions in the world.

Reducing a building's carbon footprint makes sense: not only will it make a positive impact on the environment but it could also reduce running costs, improve employee morale and increase the property's value.

Tenants are, of course, constricted to a large extent by the actions of their landlords (see previous pages), but arguably we are at a point in time when it is incumbent upon tenants to demand best practice of their landlords.

Below is a list of ways to reduce the carbon output of your building, which may provide a starting point when drawing up a list of 'tenant demands'. The obvious opportunity to do this is when you are negotiating a new lease or when the building is being refurbished, but there is no reason why you should not approach your landlord now.

- **Efficient heating, ventilation and air conditioning systems** – you may not be able to negotiate new state-of-the-art ventilation systems, but you can work with what is there already. Are the building's heating and cooling systems scheduled to run only during pre-determined 'peak' hours and then to turn off overnight and at the weekends?

- **Lighting** – have old-fashioned halogen bulbs been replaced with low energy LED lighting? You could manage the costs of this by upgrading in stages. Are the lights linked to motion sensors to ensure that they turn off when they are not needed? Are there solar control window films on the windows to control solar thermal gain so that it warms offices in the winter but does not overheat them in the summer?
- **Toilets** – how efficient are the toilets? Is there a reduced average flush volume?
- **Energy suppliers** – what energy suppliers does the building use? Could it choose renewable suppliers?
- **Is renewable energy generated on site?** – is there room for solar panels on the roof? Could rain water be collected on the roof and used for the toilet systems throughout the building? Is there space to plant trees or plants (particularly ones which encourage pollinators)?
- **Recycling** – what are the building's recycling practices? How much of the building's waste is actually recycled? Could this be improved?
- **Interior fit out** – does the building's interior fit out utilise recycled products? From paint to furniture, there are recycled and more sustainable options – does your building choose these? Is the building well insulated with environmentally-friendly materials?

While most of these energy saving measures only require small changes, collectively they could contribute to the change that is desperately needed, and by implementing just one or two you could start your organisation on a journey towards more significant carbon savings.

FIND OUT MORE

Information on the contribution of building and construction to climate change from <https://www.worldgbc.org/news-media/WorldGBC-embodied-carbon-report-published>

Impact finance for real estate

The rapid growth of impact finance in recent years has seen sustainability and socially responsible investing move to the top of the agenda.

Malcolm Headley and Christina Tennant argue that real estate finance has to be at the heart of impact finance discussions.



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Malcolm helps clients with their real estate requirements, whether they are acquiring, developing, leasing, managing, disposing or financing. With real estate transactions becoming more complex, he understands the commercial drivers, manages the process efficiently and delivers within often challenging timescales.



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In these times of climate emergency and social change, impact finance is becoming increasingly important to real estate investment. The remarkable increase in impact finance in the last few years signals the beginning of a fundamental change in the economy.

Known variously as 'green loans', 'socially responsible investing', 'ethical financing' and 'sustainable financing', impact finance aims to deliver a positive environmental and social contribution, as well as achieving an attractive financial return.

On 2 July 2019, the Department for Business, Energy and Industrial Strategy published the government's Green Finance Strategy, '*Transforming finance for a greener future*'. The strategy aims at:

- aligning private sector financial flows with clean, environmentally sustainable and resilient growth; and
- strengthening the competitiveness of the UK financial services sector.

The catchphrases are 'greening finance' and 'financing green'. This is important to distinguish from so-called 'green washing', which the FCA has described as 'marketing that portrays an organisation's products, activities or policies as producing positive environmental outcomes when this is not the case'.

'Buildings are central to every element of people's lives – their home, workplace, education and leisure. Real estate finance therefore has to be at the heart of any impact finance discussion.'

The Green Loan Principles were published by the Loan Market Association and others in March 2018 (and were extended in December 2019). In March 2019, they were followed by the Sustainability Linked Loan Principles.

Impact finance can take a variety of forms, whether predicated on a 'green

loan' – where the finance is used for 'Green Projects' (such as sustainably accredited buildings, affordable housing and community buildings) – or based on a sustainability linked loan, which incentivises improvements in the borrower's sustainability (judged against key sustainability performance indicators) with cheaper loan terms.

Bloomberg data identified worldwide green and sustainability linked loans to have exceeded \$99 billion in 2018 (for which sustainability linked loans accounted for \$43.2 billion). The figures in 2019 easily surpassed this, with borrowers raising \$62 billion of sustainability-linked loans globally in just the first nine months of 2019.

Buildings account for around one-third of global greenhouse gas emissions and devour 40% of the world's energy. Buildings consume energy and resources during every phase of their lifecycle – from construction and operation, to upkeep and redevelopment. Equally buildings are central to every element of people's lives – their home, workplace, education and leisure.

Real estate finance therefore has to be at the heart of any impact finance discussion. Real estate asset owners, investors and funders are beginning to acknowledge and recognise their fiduciary role to manage environmental and social concerns as a fundamental part of their business practice and management.

Lenders such as Schroders, BNPP, ING and Triodos are now heavily promoting sustainable real estate finance. The market for impact finance is likely to accelerate in the coming years.

FIND OUT MORE

We provide a regular update on the Impact Economy. Please sign up on our website via our newsletter registration page <https://bateswells.co.uk/newsletter>

Case law update

Megan Vick reports on the latest case law developments.



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Fearn and others v Board of Trustees of the Tate Gallery [2020] EWCA Civ 104

The Court of Appeal has denied claims in private nuisance by neighbours of the Tate Modern (the Tate), attempting to prevent the public from looking over to their flats from the Tate's viewing platform. The case confirms that landowners cannot use the law of private nuisance to defend their privacy rights.

The case involved residential flats on the South Bank of London, facing the Tate building. The Tate has a viewing platform on its exterior, and this platform faces the floor-to-ceiling windows of the flats. Viewers on the platform often look into the windows of the flats, and sometimes take photographs or use binoculars to look in.

Owners of several of the flats brought a claim to seek an injunction to stop the public from looking into their homes from the platform. Using the principles of private nuisance, they argued that the viewing platform unreasonably interfered with their enjoyment of their properties.

The owners also made an argument that their rights to a private and family life under Article 8 of the Human Rights Act 1998 had been infringed, but this claim was not successful because the Tate was held not to be a public body to which the act applies.

The judge at first instance rejected the owners' claims, and they appealed to the Court of Appeal, but this appeal was also unsuccessful.

The Court of Appeal decided that the law of private nuisance could not protect privacy rights. Their key reasons were: that privacy (particularly in relation to overlooking) is already dealt with by planning law; that if privacy laws were extended too far then developments in towns and cities would be restricted; and that it would be difficult to create an objective test to decide whether privacy had been unreasonably interfered with.

Landowners must therefore rely on planning regulations to address privacy issues, and this will usually mean looking to prevent such issues before buildings are developed or altered, rather than bringing claims later. In certain, limited circumstances the law on harassment and stalking may also provide a remedy.

Berkeley Square Investments Ltd v Berkeley Square Holdings Ltd [2019] UKUT 0384 (LC)

The Upper Tribunal has ordered the modification of a leasehold covenant, showing that applications for such modifications under section 84(12) of the Law of Property Act 1925 can be successful when properly argued. The case also provides useful clarification of the points the tribunal is likely to consider when deciding these applications.

The applicant, Berkeley Square Investments Ltd, is a long leaseholder of 45 Berkeley Square, a Grade I-listed building. The respondent, Berkeley Square Holdings Ltd, owns the freehold.

The user covenant in the lease permitted use as offices only, and the leaseholder sought to have this covenant modified in order to use the building as a private members' club.

In accordance with the criteria under section 84, the leaseholder argued that the use as offices was now 'obsolete', and alternatively that continued existence of the restriction would impede reasonable use of the building.

The Upper Tribunal did not accept the first argument, as although demand for offices in older, listed buildings may have decreased, such demand does still exist and so the use could not be said to be obsolete. However, the Upper Tribunal did accept the second argument. It held that use as a private members' club was reasonable (and indeed there are several such clubs in the immediate area) and that it would not diminish the value of the reversion. In addition, the applicant had

obtained planning permission for the change of use from Westminster City Council.

The freeholder made arguments against the modification based on the noise and disruption that may be caused by the use, and the possible impact on the freeholder's rental income for its own private members' club. The Upper Tribunal rejected these arguments, as they did not detract from the fact that the proposed use was reasonable.

Man Ching Yuen v Landy Chet Kin Wong, First-tier Tribunal (Property Chamber), 2020

The First Tier Tribunal (FTT) has considered the question of whether the signature to a deed can be witnessed remotely, and have not reached a definitive conclusion. The case therefore confirms that the safest course is still to have deeds witnessed in person (i.e. with physical presence) and not to rely on remote forms of communication.

The case involved a dispute over whether a transfer of property had been forged. Wong argued that when she signed the document in Hong Kong, her solicitor witnessed this from London over Skype. The solicitor then signed the document to attest to having so witnessed, several days later. Yuen argued that a signature could not be witnessed remotely in this way.

This meant that the court had to decide firstly whether the signing had been validly witnessed, and secondly whether the witness had validly attested (i.e. whether the solicitor had made a valid declaration that they had witnessed the signature), for the purposes of section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989.

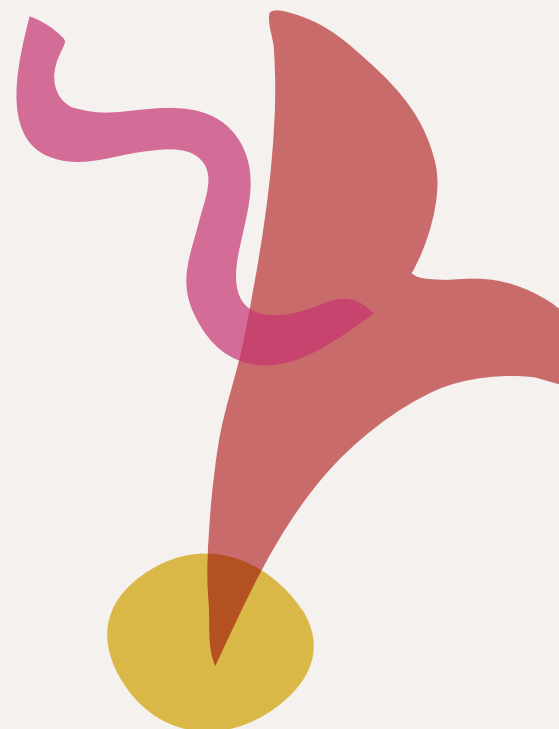
The FTT considered whether a signature could be witnessed over

Skype. They reviewed the legislation and case law to date, and decided that the law on this is currently inconclusive. For that reason, the FTT held that it was certainly possible for a court to decide that physical presence is needed for witnessing to be valid, and therefore that Yuen had a good prospect of success on this point.

Regarding the attestation by the solicitor, the FTT reviewed the law on this point and held that the attestation does not need to be contemporaneous to the witnessing. However, they did not give an indication as to how much of a time gap would be permissible, so the position on this matter is still not clear and it is therefore safest to ensure that a witness signs his/her attestation at the same time as he/she witnesses the party's signature.

In these times of remote working and communication, it is worth noting that the Law Commission carried out a review of the law on electronic execution of documents in 2019. In this review, the Law Commission noted that the law on witnessing is not sufficiently clear, and suggested that the government should consider legislative reform to allow for video witnessing. The government has recently responded to this report with a statement expressing agreement that clarity is needed, and announcing that an industry working group will be convened to consider the matter of video witnessing (and other matters related to electronic execution of documents).

<https://www.lawcom.gov.uk/project/electronic-execution-of-documents>





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The information in this update is necessarily of a general nature. Specific advice should be sought for specific situations.



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