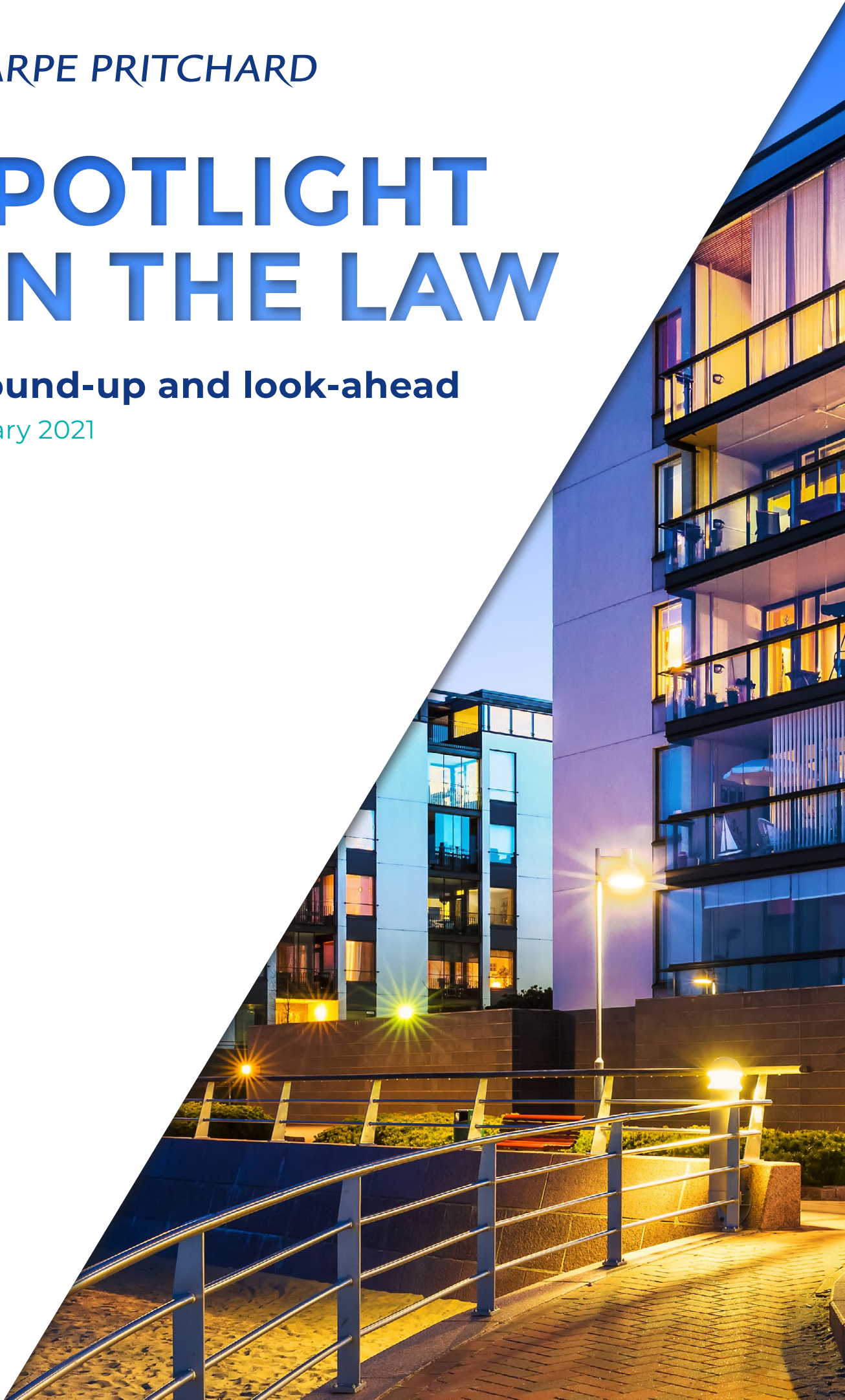


SHARPE PRITCHARD

SPOTLIGHT ON THE LAW

A round-up and look-ahead

January 2021



During an extraordinary year, here are the views from each of the specialist teams across Sharpe Pritchard on the cases and developments over 2020 that had a significant impact on their respective practice areas, along with a look-ahead to what we may expect to see in 2021.



REAL ESTATE

Shifting sands – how the UK’s property landscape will emerge after 2020.

2020 was an eventful year; COVID-19 not only impacted our health but also the way we live, work and shop. Changes encountered in 2020 may hold the ‘key to the door’ in 2021.

Home/Office?

The role of the workplace has shifted dramatically and working from home looks set to become the “old normal” with many unlikely to rush back to the office.

The desire to have flexible workspaces closer to where people live is changing the face of regeneration away from urban centres, with new neighbourhoods needing to incorporate not just housing, a school and a local shop, but also flexible community spaces and opportunities for small businesses.

In both urban and non-urban regeneration there will be more emphasis on providing quality green spaces near to where people live to make walking and cycling easier and safer.

Increased delivery of district heating schemes and sustainable travel will not only help to meet carbon reduction targets but also reduce household bills.

High (Street) Hopes

Prolonged lockdowns combined with reluctance to travel long distances to shop has impacted tenants on the high street and had knock-on effects for landlords and investors.

Perhaps inspired by the Government’s new voluntary Code of Practice, landlords and tenants have negotiated temporary changes to their leases to limit the damage dealt by the pandemic.

One change is a move towards more flexible rental systems e.g. having all, or part of, the rent being linked to turnover. If used correctly this can encourage landlords and tenants to work in partnership and ensure both are invested in the success of the tenants’ businesses.

Landlords who invest in creating a

desirable destination can help attract higher footfall for tenants, leading to increased turnover and therefore rental payments; it will be interesting to see whether the trend away from fixed or upward-only rent reviews will continue into 2021.

There is hope that the end of the pandemic is now in sight but, with Brexit now having arrived, uncertainties continue and the start of 2021 is shaping up to be as eventful as the end of 2020.



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PROJECTS AND OUTSOURCING

Guidance on e-signatures.

Our Projects and Outsourcing team has, like many others in 2020, been adapting to the move to virtual platforms and a paperless approach.

In the context of COVID-19, the Law Society has adapted its guidance on executing commercial contracts using electronic signatures.

The legal framework for electronic signatures is primarily based on Regulation (EU) No 910/2014 (the “eIDAS Regulation”), which will be transposed into English law following Brexit, the Electronic Communications Act 2000, and the case of *Mercury Tax Group (and another) v HMRC [2008] EWHC 2721 (“Mercury”)*.

Mercury established the importance of ensuring that the contract and signature form part of the same document. Some local authorities have fully embraced the move to electronic signing and sealing, e.g. by using digital signature software.

However, for those authorities that do not have this capability, our solution involves the following steps in accordance with Law Society

guidance following the Mercury case:

- The finalised contract is emailed to the parties;
- The signatories print the execution page and sign in wet ink or affix their seal;
- The parties email a scan or a photo of the execution page back to us along with a copy of the finalised contract.

This method avoids the need to print the whole contract and addresses the issue that arose in Mercury by ensuring the requisite intention to create legal relations.

As an additional precaution, the signatory’s confirmation can be sought that their signature was applied with their knowledge and agreement.

In deciding which approach to take to electronic signatures, local authorities should also consider what is permitted under their constitution and whether it requires amendment.

Our teams will be keeping an eye on further developments in this area.

While it is currently prohibited by Land Registry, it remains to be seen whether new guidance will be introduced to allow witnesses to sign a contract by virtual means.



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CONSTRUCTION AND COMMERCIAL

How contract omissions have been dealt with by the courts.

The Construction and Commercial team have been looking into the case of *Van Oord Limited -v- Dragados UK Limited [2020] CSOH 87*. This Scottish case considered whether it was a breach of contract to omit work from a contractor and pass the works onto another contractor. The court ruled that the transfer of works from the Sub-contractor to third parties was a breach of contract, but they were still valid instructions under the Sub-contract.

The judgment aligns with that of the English courts in *Abbey Developments v PP Brickwork [2003] EWHC 1987*. Both judgments show that not only do you need to provide for the express contractual right to make an omission or reduction in works/services, you also have to expressly reserve the right to instruct a third party to carry out those omitted works/services or to do them yourself. A failure to do so will likely land you in repudiatory breach territory!

The judgment also offers guidance on what should be paid to the

original contractor for the omitted work. The assessment of costs in such circumstances is not necessarily as straightforward as it may first seem, as many contracts simply provide for valuation based on additions as opposed to omissions. In this case the instructions to omit the works were compensation events under the NEC contract which should be assessed in accordance with the compensation event mechanism.

Careful consideration therefore needs to be given to the drafting in respect of the right to omit or reduce works/services. Our full case review can be found on our [website](#).

As if 2020 had not been eventful enough, on 8 December the **Construction Playbook** was published. The Playbook provides guidance on the procurement of works by the public sector, with the aim of ensuring that public sector works are delivered in a modern, environmentally-

friendly and efficient way. Watch out for more from us on this during 2021.



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INFRASTRUCTURE

2020 sees raft of new developments, with more expected this year.

The end of 2020 saw a raft of developments in infrastructure policy, setting the scene for the year ahead. The **Spending Review 2020**, **National Infrastructure Strategy** and the Government's final **Green Book Review 2020** were all published in November 2020, with a clear emphasis on infrastructure as a long-term priority.

Even while the country faces another national lockdown, there is a focus on infrastructure investment and infrastructure's role in the post-COVID-19 economic recovery. The Government has indicated its desire to speed up delivery of infrastructure projects, as evidenced by the creation of its new infrastructure delivery taskforce **Project Speed**.

At the same time, the Government has announced long-term goals for the environment and for society. The **National Infrastructure Strategy** aims to deliver the "Ten Point Plan for a Green Industrial Revolution", for delivering net zero emissions by 2050.

The Green Book Review highlights that the Government intends to continue its 'levelling up' agenda across the country. The priority of

delivering wider social value is also demonstrated through the requirement that from 1 January 2021 central Government contracting authorities must evaluate **social value** in major procurements.

The **Energy White Paper**, published in December 2020, also emphasises the Government's focus on using infrastructure delivery to achieve its net zero and 'levelling up' targets.

The Infrastructure team is particularly interested to see how the Government will support investment in new technologies, including charging infrastructure, offshore wind turbines, carbon capture systems, and hydrogen technology, and we're keeping an eye on progress in terms of the establishment of the proposed new **UK Infrastructure Bank**.

Finally, in December 2020, the Government focused its attention on the procurement aspects of **Project Speed**, including publication of the new **Construction Playbook** and the Green Paper on **Transforming Public Procurement** that proposes radical changes to the UK's procurement rules.

In the context of a post-Brexit UK, it will be interesting to see how the Government increases opportunities to promote innovation through public procurement, including the way that infrastructure is delivered.



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PLANNING AND PARLIAMENTARY

Significant changes as UCO brings added tensions.

The Planning team saw a lot of attention given to the Government's much-hyped planning white paper but more immediate effects in the changes to the Use Classes Order (UCO) will bring interesting tensions into the planning system.

While attention was focused on the *Planning for the Future* White Paper, the ramifications of which are uncertain given the strength of opposition from some quarters, we have seen immediate effects from the significant changes to the UCO and the planning permission requirements for changes of use.

Most notable was the replacement of Classes A, B and D with a new broad Class E that captures retail, offices and food and drink. Changes between these uses will no longer constitute "development" so will not require planning permission.

Introducing considerable flexibility in the UCO, it is viewed by the Government as encouraging a high street revival. But on the other hand, it may cause difficulties in controlling development.

This new flexibility will not be available, however, until 31 July 2021, when permitted development rights are also expected to undergo further changes.

We have already seen clients (both developers and planning authorities) struggle with the complicated transitional provisions for existing planning applications.

For applications submitted before 1 September 2020, many still under consideration, the previous use classes will apply.

The understandable focus on the UCO's new flexibility perhaps

overlooks its more restrictive elements.

More uses now fall under the *sui generis* category, such as cinemas and pubs. Whilst the different types of premises within Class E can change use from one to another without planning permission (for example, retail to food and drink), *sui generis* premises cannot. This tension within the UCO will be interesting to see playing out.



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ICT, DATA AND CORPORATE

Data Protection after Brexit.

The Brexit transition period came to an end on 31 December 2020. In advance of that, many organisations would have been making Brexit preparations across many areas, but the data protection position remained unclear until the final deal was announced.

Does the GDPR still apply?

GDPR has been incorporated into UK law by virtue of the Data Protection, Privacy and Electronic Communication (Amendments etc) (EU Exit) Regulation 2019, with a few tweaks to make it function as the UK GDPR.

We also still have all our other domestic data protection legislation such as the Data Protection Act 2018.

What about transfers of personal data from the UK to the EU?

The Government has clarified that there are no changes as a result of Brexit to the way personal data transfers from

the UK to the EU, EEA and Gibraltar.

Similarly, personal data can continue to be sent to other countries that the EU has granted data protection adequacy decisions to. The ICO website has a list of those countries for reference.

Can personal data still transfer from the EU to the UK?

Under the EU's version of the GDPR, personal data cannot be transferred to a country outside the EEA unless that country has an "adequacy decision" or other mechanisms are used such as EU standard contractual clauses.

The UK has applied for an adequacy decision but a decision on that was not made in time for the Brexit deal.

However, the Brexit deal has agreed a bridging mechanism that sets out that for a period of four months – which

can be extended by a further two months – personal data can continue to flow from the EU to the UK without need for any extra mechanisms whilst the EU makes a decision.

The ICT, Data and Corporate team will be keeping a close eye on developments in this and other Brexit-related areas that may need to be reflected in our clients' contracts and processes.



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DISPUTE RESOLUTION & LITIGATION

A busy year for housing litigation.

Despite the Government's temporary freeze on possession proceedings in response to the Coronavirus pandemic during 2020 and the extended restriction on the enforcement of eviction orders thereafter, Sharpe Pritchard continued to have a busy year advising on all aspects of housing litigation.

One of our most high profile cases involved acting for the Royal Borough of Kingston in the case of [*RB Kingston v Derek Moss \[2020\] EWCA Civ 1381*](#).

This case resolved a long-disputed issue, confirming that a large number of councils nationwide had, since the advent of the water resale legislation in the early 21st Century, been overcharging their social housing tenants when undertaking the widespread practice of collecting water rates from tenants on behalf of water companies.

We predict further headaches to come as local authorities grapple with the fallout from this decision

and undertake the process of deciding if, when, and how they will refund such charges.

Indeed, we have already provided advice on this subject to a few dozen local authorities since the judgment was handed down at the end of October 2020.

We have also worked on a number of other important housing law cases this year, including two leading HMO/property licensing cases:

- [*Hussain v Waltham Forest \[2020\] EWCA Civ 1539*](#) which confirmed the ability of local authorities to rely upon the conduct underlying spent convictions when considering whether to grant or revoke a housing licence under the Housing Act 2004.
- The judicial review case of [*Mohamed and Lahrie v Waltham Forest \[2020\] EWHC 1083 \(Admin\)*](#) which confirmed that the offence of failing to licence a property as an HMO under s.72 of the Housing

Act 2004 is both a strict liability offence and a continuing offence. This means that for the purpose of calculating the time limit for prosecuting this offence, the clock continues to re-start each day the property remains unlicensed.

We have a team of expert litigators available to provide advice on all aspects of housing litigation, as well as on a wide range of other local authority litigation matters, including all aspects of Judicial Review, and appellate work right up to the Supreme Court.



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