

London Real Estate Practice **Quarterly Update for Overseas Investors | Autumn 2020**



Welcome to Greenberg Traurig's Quarterly Update for Overseas Investors, prepared by the firm's London Real Estate Practice. This newsletter reviews a range of legal and practice developments that may directly affect overseas investors in the UK real estate sector.

Company Voluntary Arrangements

Company voluntary arrangements (CVAs) have surged over the last 18 months, particularly within the retail and leisure industries. A CVA is a type of insolvency process which allows a UK company, in financial difficulties, to reach a legally binding agreement with its creditors for the restructure and repayment of its debts. The key features of a CVA include:

- It is a statutory, but out-of-court, insolvency process (governed by Part I of the Insolvency Act 1986).
- The aim is to avoid ultimate insolvency by restructuring a company's debts in co-operation with the company's creditors, while allowing the company to continue to trade.
- The proposal can be put forward by the company's directors to the company's creditors, assuming the company is not already in administration or liquidation, in which case the administrator or liquidator may put forward a proposal.
- The proposal must be sufficiently clear, and creditors can subsequently abstain, approve, reject, or propose modifications to the proposal.
- 75% (by value) of the company's unsecured creditors need to vote to support the proposal for it to be implemented and become binding, from the date of approval, on all unsecured creditors (e.g., suppliers; landlords), including those who dissented. To be clear that is 75% of those who submit votes. The proposal will not be properly approved, however, if more than half of the total value of the non-connected creditors vote against it.

- The CVA is overseen by an insolvency practitioner whose job is to ensure that a fair balance is struck for everyone involved. The company's directors retain control of the business throughout the process.
- The rights of secured creditors (e.g., banks or other debt providers) and preferential creditors are not affected. Any debt owed to secured creditors must be paid in full or directly negotiated with that creditor.
- Creditors have 28 days following approval of a CVA proposal to challenge it on the grounds of either unfair prejudice (e.g., unsecured creditors have been treated in different ways which is unfairly prejudicial) or material irregularity (correct process not followed).

CVA proposals can have a direct impact on commercial landlords due to frequent requests for a compromise in relation to rental arrears, rent concessions, and the termination of leases across an occupier's portfolio. The British Property Federation (BPF) has reiterated that, done well, CVAs can be a good way to turn around a failing business, but they should not be used as a mechanism to allow businesses to cut property costs without a credible turnaround plan. The BPF strongly encourages businesses to engage with the BPF in developing CVA proposals such that the BPF can suggest improvements that could increase property owner support.

The BPF have produced some useful [briefings and documents regarding CVAs](#).

COVID-19

- The protection afforded to commercial occupiers pursuant to the Coronavirus Act 2020 has been extended again. The temporary legislation provides that commercial owners cannot forfeit leases for non-payment of rent. This protection, for 'relevant business tenants', is now in place until 31 December (extended from 30 September), following which an owner's right to forfeit will become operable again. Note: this is not a suspension of an occupier's obligation to pay rent.
- Restrictions on the use of Commercial Rent Arrears Recovery (CRAR) have also been extended until 31 December. CRAR is a statutory procedure whereby commercial owners can take control of an occupier's goods to recover rent arrears.
- There are still no statutory restrictions on commercial owners seeking to recover rent arrears from occupiers pursuant to the terms of an existing rent deposit or guarantee.
- Earlier this year, the deadline to notify HMRC about an option to tax was extended from 30 days to 90 days from the date the decision to opt was made. On 2 November, and in light of the ongoing pandemic, HMRC updated its [guidance](#), and this extended 90-day time limit now applies to decisions to opt made between 15 February 2020 and 31 March 2021.

Insurance

On 15 September, the High Court of England and Wales handed down judgment in the Financial Conduct Authority's (FCA) COVID-19 business interruption insurance test case.

Eight insurer defendants agreed to be part of the test case and 21 sample wordings were considered, to seek clarity on and determine issues of principle around policy cover and causation. The test case was not intended to encompass all possible disputes, but to resolve some key contractual uncertainties.

The FCA (on behalf of policyholders) argued that the disease and/or prevention of access wording in the sample policies provided cover and that cover was triggered by COVID-19 (and the UK Government's

consequential actions) resulting in policyholders suffering losses. Although the High Court found in favour of the FCA on most of the key issues, each policy must now be considered against the judgement (and the circumstances of the policyholder's business) to establish what it means for that policy. The judgement does not determine how much is payable under individual policies but simply provides the basis for doing so subject to any appeal.

Subsequently, the parties to the dispute were given permission to ask the Supreme Court to reconsider the case in a 'leapfrog' appeal (missing out an appeal to the Court of Appeal). At the time of this writing, that Supreme Court appeal has now ended but we do not yet know whether the judgement will be received before Christmas.

[Access further information and the latest updates on this case.](#)

Green Financing & Retrofitting

The green loan market aims to facilitate environmentally sustainable economic activity. Green loans are loan instruments made available exclusively to finance new and/or existing eligible green projects relating to, for example, renewable energy; pollution prevention & control; green buildings.

The Loan Market Association (LMA) has recently published some additional guidance on the applicability of their Green Loan Principles (GLP) to green loan funding for the retrofit of existing buildings. By way of background, the GLP are a high-level framework of voluntary market standards and [guidelines](#) developed by representatives from leading financial institutions, to promote the development and integrity of the green loan product. They are based around four core components: (i) use of proceeds (the fundamental determinant of green loan); (ii) process for project evaluation and selection; (iii) management of proceeds and (iv) reporting. To promote consistency across the financial markets, the GLP build on the Green Bond Principles (GBP) – the internationally recognised voluntary [guidelines](#) of the International Capital Market Association promoting transparency, disclosure and reporting in the green bond market.

The recent [guidance](#) from the LMA deals specifically with the application of the GLP in a real estate retrofit lending context. Acknowledging that retrofit projects have the potential to substantially contribute to climate change mitigation, the guidance points out that retrofitting an existing building can be more environmentally sustainable than demolishing and re-building a building to the highest energy efficiency standards. Although there is no single standard for determining whether retrofit activities qualify for green loan funding, a project should make verifiable improvements in the energy efficiency, carbon emissions and/or climate resiliency of the asset or portfolio of assets being funded. There are certain industry standards and certifications which may also help in determining the 'greenness' of particular retrofit activities, e.g., BREEAM Refurbishment and FitOut ratings.

The EU Regulation on the Establishment of a Framework to Facilitate Sustainable Investment (the EU Taxonomy) which came into force in July 2020, sets certain performance thresholds (Technical Screening Criteria) for economic activities which make a substantial contribution to one of the following six EU environmental objectives: (i) climate change mitigation; (ii) climate change adaptation; (iii) sustainable use and protection of water and marine resources; (iv) transition to a circular economy; (v) pollution prevention and control; and (vi) protection and restoration of biodiversity and ecosystems. For retrofit activities in a real estate finance context to be considered EU-Taxonomy aligned, they would also need to meet the Technical Screening Criteria as well as the criteria specified within the GLP.

One of the main issues for real estate industry participants that are "keen to go green" is the lack of consistency in data points to benchmark an asset or continue to monitor its progress; the industry

continues to evolve in its thinking on what actions will best protect or benefit the environment. Property owners must also be mindful of the importance of partnering with their occupiers in terms of ongoing monitoring to achieve the best results.

Lease Code

The Royal Institution of Chartered Surveyors (RICS) Code for leasing business premises (2020 Code) became effective 1 September and aims to improve the quality and fairness of negotiations on commercial lease terms. The [2020 Code](#) applies to lettings (including renewals) of premises in England and Wales to tenants who will carry on trade, professional or other business activities in them for a term of more than six months.

The 2020 Code replaces the previous 2007 Lease Code. Whereas adherence to the 2007 Lease Code was voluntary and a matter of best practice, parts of the 2020 Code are now mandatory for RICS members and RICS-regulated firms. Such mandatory obligations include conducting constructive and collaborative negotiations, advising any unrepresented parties of the existence of the 2020 Code, and recommending to unrepresented parties that they obtain professional advice. Perhaps most significantly, however, the 2020 Code prescribes written heads of terms containing, as a minimum, the requirements set out at Part 2 of the 2020 Code. The 2020 Code also includes template heads of terms and a checklist for negotiations at Appendix A.

While the 2020 Code does not have legal status, failure by RICS members to comply with its mandatory requirements may have adverse consequences including disciplinary proceedings and reputational damage.

Planning

There have been some significant changes to the planning law system in England over the last few months (most notably changes to the use classes system and new permitted development rights, intended to bring forward more residential development). In addition, the UK Government launched a number of consultations in August including a White Paper ('Planning for the Future') that proposes a radical overhaul of the planning system, with a very different approach to Local Plans and a move away from the Community Infrastructure Levy, affordable housing viability debates and section 106 agreements.

GT recently hosted a [webinar](#), along with Town Legal, to provide our clients with an update on these recent changes and what the implications might be for real estate transactions.

Transport

What is HS2?

HS2 is the UK's new high-speed line, the aim of which is to provide rail capacity across the UK as part of the country's low carbon transport future.

The line will link London, the Midlands, the North and Scotland, including eight of Britain's 10 largest cities. Construction is split into three phases – Phase One linking London and the West Midlands; Phase 2a linking the West Midlands and the North via Crewe; and Phase 2b completing the railway to Manchester and Leeds. The aim is that Phase One will open between 2029 and 2033.

[See where the route will go.](#)

What is Crossrail?

Crossrail is a railway project, specific to London and the south-east, that aims to provide a high-frequency east-to-west service through central London in support of the capital's considerable growth. The new line will be branded the Elizabeth line and will comprise 40 stations linking each of the London Docklands, the City, the West End, Heathrow, Berkshire and Essex.

Delivery of the new line is in its final stages and the aim is for the transport scheme to become operational in the early part of 2022.

[Read more about Crossrail.](#)

** This GT Newsletter is limited to non-U.S. matters and law.*

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