

EVEBRIEF

Legal & Parliamentary

Volume 32(10) 19 July 2010

01 Landlord & Tenant
03 Planning
08 Rating
14 Leasehold Reform

16 Real Property
18 Tort
19 Contract
24 General

PUBLIC SPENDING CUTS, PLANNING APPLICATIONS ON THE INCREASE, RUCTIONS IN RATING



Gemma Goakes
Senior Surveyor

The emergency budget measures are starting to take effect with the axe poised over the public sector. We report on some of those who have been among the first to be cut. Details on post election initiatives and the implications thereof are becoming clearer through implementation and more information papers together with consultations continuing to flurry through.

In this edition we report on encouraging news that planning applications are on the increase. Item 07 draws attention to the report which follows the publicised rise in interest of mediation in planning disputes.

Local authority revenues are not assisted if they fail to collect business rates in accordance with the regulations. At item 08 we report on North Somerset District Council's unsuccessful attempt to recover late rates from Honda Europe in respect of its premises at Royal Portbury Docks occupied for the import and export of vehicles. The regulations require

notice for payment of business rates to be served on 1 April in the relevant year or as soon as practicable thereafter. In this case, rate demands were issued in November 2007 for the period from November 2002 to February 2005. The Court held that the failure to issue demands in accordance with the regulations did not result in automatic invalidity. Rather, the court had to consider the length of delay and the impact of that delay upon the ratepayer. In this case, Honda had genuine reason to believe that it would not have a rates liability and this fact, taken together with the lengthy delay, resulted in substantial prejudice to Honda such that the Council's claim failed.

We also report a somewhat controversial Valuation Tribunal decision (item 09) – which may yet be appealed – regarding a proposal to delete an office from the Rating List during major refurbishment works. The Tribunal determined that the premises remained a rateable hereditament and the works were in the nature of repair.

A handwritten signature in cursive script that reads "Gemma Goakes".

LANDLORD & TENANT

01 High Court

Notice – agreement between landlord and equipment leasing company

* GERSON (LEASING) LTD V GREATSUNNY LTD
(2010) PLSCS 168 – Decision given 17.06.10

Facts: G, the landlord, let premises to a tenant for use as a children's play area and restaurant. Various items of equipment in the demised premises were leased by GL to the tenant and the equipment lease provided that all the items remained GL's property at all times. G and GL also agreed that the equipment would remain GL's property, whether or not it was incorporated into or attached to the premises and in the event that G terminated its lease to the tenant it would "give notice of the termination" to GL who would then have 28 days in which to remove the equipment ('the landlord's waiver'). The tenant defaulted on its rental payments under both the premises and equipment leases. In May 2007 GL terminated the equipment lease and demanded the return of the equipment. G then forfeited the lease by physical re-entry and informed GL of this fact by telephone in June 2007 but GL did not remove its equipment. Two years later G relet the premises, including the equipment.

Point of dispute: Whether GL could succeed in its claim for damages against G. GL argued that G had given inadequate notice of the termination of the premises lease and should not have relet the premises without reserving a right of re-entry to enable GL to remove its equipment.

Held: The claim was dismissed. Notwithstanding the terms of the landlord's waiver most of the equipment had become part of the premises once installed and did not in law remain GL's property. This meant that GL's interest in the equipment was governed by its contractual rights under the equipment lease and the terms of the landlord's waiver. The landlord's oral notice was sufficient and there was nothing in the circumstances of the case to indicate that written notice was required, nor was there any necessity for it to refer to the 28-day period for removing the equipment. There was no general presumption that notices should be in writing and it could not reasonably be inferred from the wording of the landlord's waiver that written notice was required.

02 Rotherham County Court

Break clause – vacant possession

* IBREND ESTATES BV V NYK LOGISTICS (UK) LTD
(2010) PLSCS 186 – Decision given 22.06.10

Facts: IE was the landlord and NYK the tenant of a warehouse under a lease which contained a break clause permitting the tenant to terminate the lease on 03.04.09 by six months' prior notice and provided that it had paid the rent up to date and gave up vacant possession of the premises. The lease could also be broken on any subsequent quarter day with six months' prior notice. NYK gave notice of its intention to break on 03.04.09. The issue of terminal dilapidations was not resolved until 01.04.09 when NYK suggested that it could carry out the necessary repairs and works of redecoration during the week after 03.04.09 during which time it would continue its security cover of the premises. The repairs were carried out by 09.04.09.

Point of dispute: Whether NYK had effectively broken the lease in April 2009. IE argued that it had not since it had not given vacant possession by the break date. There had been workmen at the premises and some of NYK's possessions as well as security staff after 03.04.09. NYK argued that it had given vacant possession or, if it had not, IE had waived the breach.

Held: IE's claim for a declaration that NYK had not effectively broken the lease in April 2009 was allowed. A tenant seeking to exercise a break clause has to comply strictly with any conditions attaching to the exercise of that option but the issue of vacant possession had to be judged by reference to tests established by case law. The first question to be answered was whether at the relevant date the party who was required to give vacant possession was using the property for its own purposes; the second was whether there was a substantial impediment to the landlord using the property. The maintenance of security at the premises and the continued presence of some of NYK's goods did not preclude vacant possession. However the continued presence of workmen at the premises to carry out the required repairs meant that NYK had not given vacant possession to IE on 03.04.09. Its use of the premises was more than de minimis. NYK was not obliged to carry out the repairs before vacating and the evidence did not establish that IE had agreed to NYK's continued presence or had waived the failure to give vacant possession.

PLANNING

03 CLG Statistics

Planning Applications: January to March 2010 (England)

In the March quarter of 2010:

- 118,400 planning applications were received, 6% more than during the same quarter in 2009
- 95,700 applications were decided, an increase of 3% over the same quarter in 2009
- 12,000 applications for residential development were decided, down by 3% on the 2009 March quarter
- 1,400 major residential applications were decided, an 8% increase on the March 2009 quarter
- 70% of major applications were decided within 13 weeks

In 2009-10 local planning authorities received 466,400 district level planning applications compared to 689,000 applications in 2004-05.

<http://www.communities.gov.uk/publications/corporate/statistics/planningapplicationsq12010>

04 CLG News

Abolishing regional local authority leaders' boards

The funding and powers of the regional local authority leaders' boards, which took over most of the functions and staff of the old regional assemblies, are to be removed. These boards will become redundant as the current regime of regional strategies is abolished and local authorities are handed back control over delivery of services in their areas. In addition it has been announced that spending on two projects has been suspended until they are reviewed:

- The Sevenstone retail quarter regeneration project, involving the Homes and Communities Agency (HCA) and Yorkshire Forward
- HCA funding of up to £10m towards the Kent Thameside Strategic Transport Programme

<http://www.communities.gov.uk/news/newsroom/1617981>

05 College of Estate Management (CEM) Report

The Future of RDAs

The new coalition government intends to abolish England's Regional Development Agencies (RDAs) and consultations are underway to review the options and agree schemes which will transfer their role, powers and budgets to other bodies, including local authorities. Following a recent survey of approximately 2,000 current and former students, this paper presents their views on the future of regional governance in England. It discusses the establishment and responsibilities of RDAs, charts the political debate into the future of these agencies in the run-up to and since the May 2010 General Election and summarises the results of the CEM Research questionnaire. A strong preference for an assessment of RDAs on a region-by-region basis is identified.

<http://www.cem.ac.uk/ourresearch/reportsandpublications/researchpapers.aspx>

06 CLG letter from the Chief Planning to Local Planning Authorities in England

Letter to Chief Planning Officers: Revocation of Regional Strategies

This letter, published on 06.07.10, contains some 'question and answer' style advice on immediate issues that might arise from the announcement that Regional Strategies are to be revoked. It provides clarification on how local planning authorities can continue to bring forward their Local Development Frameworks and make planning decisions in the transitional period before the 'Localism Bill' is passed which will introduce new ways for local authorities to address strategic planning and infrastructure issues based on co-operation.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1631904.pdf>

07 Report commissioned by the National Planning Forum and the Planning Inspectorate

Mediation in Planning

The publication of this report follows the growing interest in the potential value of using mediation in the planning system since the subject was first raised in 1996. The Killian-Pretty report (2008) recommended the use of alternative dispute resolution at all stages of the planning process. Planners, elected members, developers, businesses and local communities need to find ways to work more effectively together and the non-confrontational, collaborative approach that mediation offers provides a way to achieve this. There is a history of support for using mediation as an alternative dispute resolution procedure within the planning system and this report sets out the action that needs to be taken by a number of people/bodies to enable and support the use of mediation in the planning system as part of its normal business.

<http://www.natplanforum.org.uk/Final%20Report%20-%20Mediation%20in%20Planning%20-%20PDF.pdf>

RATING

08 High Court

Validity of late notices for payment of rates

* NORTH SOMERSET DISTRICT COUNCIL V HONDA MOTOR EUROPE LTD
(2010) PLSCS 182 – Decision given 02.07.10

Facts: NSDC brought proceedings against HME and two other companies in respect of unpaid non-domestic rates for premises at the Royal Portbury Docks which they used for the import and export of vehicles. The notices were issued on 06.11.07 in respect of the period November 2002 to February 2005.

Point of dispute: Whether NSDC's claims for the unpaid rates were valid. HME argued that they were not since the notices had not been served in accordance with the provisions of Reg 5 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 which require that a notice should be served on or as soon as practicable after 1 April in the relevant year, being the chargeable financial year to which the notice related. HME contended that it had no reason to believe that it would have any rates liability and had suffered substantial prejudice as a result of the delay and it would be unconscionable or conspicuously unfair to allow NSDC to enforce liability for the disputed rates. NSDC's argument was that their inspections system had broken down which meant that they had been unaware that the sites in question were in rateable occupation or had failed to ascertain the identity of the occupiers.

Held: NSDC's claims were dismissed. A failure to serve a Reg 5 notice as soon as practicable did not result in its automatic invalidity – the court would have regard to the length of the delay and its effect on the ratepayer on the context of the public interest in collecting outstanding rates. If non-compliance with Reg 5 gave rise to automatic invalidity this would increase the burden on other taxpayers and ratepayers even if the individual ratepayer was not prejudiced and might in fact benefit from the late notice. Parliament could not have intended that ratepayers should not have to pay their taxes as a consequence of a purely minor administrative error, but in this case the court was satisfied that the notices were served so late as to cause HME prejudice and that NSDC's claims should fail.

09 Valuation Tribunal for England

Whether empty properties “incapable of beneficial occupation” during major refurbishment works qualified for deletion from rating list

* Appeal No 503014527688/058N05 – Decision given 27.05.10

Properties: Exchequer Court, 33 St Mary Axe, London EC3A 8EX and 50 Mark Lane, London EC3R 7QH, which the occupiers argued should be deleted from the rating list during the course of major refurbishment works as they could not be occupied as offices and thus were “incapable of beneficial occupation”. The VO took the view that the works were works of repair and as they were economic the rating assessments should not be deleted from the list for the period of the works.

Issue: Whether the entries for these properties should be deleted from the rating list during the course of the works.

Decision: The ratepayers’ appeals were dismissed. The properties should not be deleted from the rating list during the course of the works. The properties had been entered in the list as hereditaments, which meant that they had occupational value. The properties had not ceased to be hereditaments whilst the works were being carried out and the nature of the works had not resulted in different hereditaments being created. Beneficial occupation was not a relevant consideration and it had not been uneconomic to undertake the works, in accordance with the definition of rateable value. A property should only be deleted when it was no longer fulfilling the definition of a hereditament.

10 Statutory Instrument

SI 2010/1655 The Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Order 2010

This Order, which comes into force on 23.07.10, provides for the level of Small Business Rate Relief to be increased between 01.10.10 and 30.09.11 and temporarily amends the 2004 Order.

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101655_en.pdf

11 Statutory Instrument

SI 2010/1656 The Non-Domestic Rating (Collection and Enforcement) (Local Lists) (England) (Amendment) (No 2) Regulations 2010

These regulations, which also come into force on 23.07.10, provide for the 1989 Regulations to be amended and for minor associated amendments to the Non-Domestic Rating Contributions (England) Regulations 1992 and the Council Tax and Non-Domestic Rating (Demand Notices) (England) Regulations 2003, following changes to the level of Small Business Rate Relief between 01.10.10 and 30.09.11 for certain ratepayers who meet the relevant conditions. The 1989 Regulations are amended so as to allow for the increased level of relief to be apportioned to the correct parts of the financial years.

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101656_en.pdf

12 CLG Business Rates Information Letter

Business rates information letter (8/2010): Budget announcement – changes to the small business rate relief scheme and legislation to cancel certain backdated business rates

This letter covers:

- The small business rate relief (SBRR) scheme. From 01.10.10 eligible ratepayers will receive 100% relief on properties up to RV £6,000 and there will be tapered relief for properties between RV £6,001 and RV £12,000. These levels of relief will be available for one year, until 30.09.10.
- Legislation to cancel certain backdated business rates liabilities. The Government intends to introduce legislation to cancel certain backdated business rates liabilities for those properties that meet the ‘schedule of payments’ criteria and incurred a backdated rates liability following a split from another rateable property, such as some based in ports. The criteria for entering into an agreement under the ‘schedule of payments’ remains the same as before (see Regulation SI 2009/204)

<http://www.communities.gov.uk/publications/localgovernment/bri182010>

<http://www.communities.gov.uk/documents/localgovernment/pdf/1627919.pdf>

13 Consultation

Discretionary Business Rate Discounts

Deadline for Comments: 16.07.10

Under s47 of the Local Government Finance Act 1988 local authorities have powers to grant discretionary business rates reliefs to charities, certain not-for-profit or philanthropic bodies, community amateur sports clubs and to some properties in rural settlements. This consultation seeks views on the Government's proposal to replace the s47 powers with a new power allowing a local authority to grant relief to any ratepayer, subject to the ratepayer meeting any eligibility criteria that the authority chooses to impose. The provisions contained in s49 concerning hardship would not change. The kinds of situations where it is envisaged that discretionary relief may be granted include the following:

- to top-up mandatory relief
- to individual ratepayers
- to all ratepayers in a particular ward, eg to assist the regeneration of a rundown area
- to a class of ratepayer across the authority's area
- as part of a programme to attract investment to an area
- to specific sectors eg high street retail units

The funding of reliefs is currently dealt with through secondary legislation (the Non-Domestic Rating Contributions (England) Regulations 1992 (SI 1992/3082)). The effect of the relevant provisions is that:

- 25% of the cost of any discretionary relief granted to a charity or community amateur sports club is centrally funded and 75% is funded by the authority; and
- 75% of the cost of any discretionary relief granted to a not-for-profit organisation, as a top-up to mandatory rural rate relief or to other rural businesses (which are not eligible for mandatory relief) is centrally funded and 25% is funded by the authority.

It is not intended that these funding arrangements will change and the same proportion of relief would be paid by central government as at present.

LEASEHOLD REFORM

14 Court of Appeal

Enfranchisement of houses – whether properties were houses for purpose of s2(1) of the Leasehold Reform Act 1967

** HOSEBAY LTD V DAY; LEXGORGE LTD V HOWARD DE WALDEN ESTATES LTD (2010) PLSCS 181 – Decision given 01.07.10

Facts: The first appeal concerned three terraced properties in London SW7 which were constructed and initially occupied as large houses. The properties were let on long leases which stipulated that they were only to be used as residential flats with a resident caretaker and that the external appearance should remain as that of a private dwelling house. The respondent acquired all three leases in 1996 and used the buildings to provide self-contained short term accommodation for tourists to London.

The second appeal related to a property in Marylebone, London W1 which was built as a house and occupied as a single private residence for many years. It was subject to a 109-year lease granted in 1952. The respondent acquired the property in 1978 and 25 years later served notice on the landlord to acquire the freehold. By this time the whole property was being used as offices and under the terms of the lease around half of the internal area of the property could not be used other than for office purposes.

Point of dispute: Whether the appellants' appeals would be allowed against the county court's rulings that each of the properties was a house within s2(1) of the Leasehold Reform Act 1967.

Held: The appeals were dismissed.

- i To determine whether premises had been adapted for living in one had to look at the most recent works of adaptation and assess objectively whether they resulted in the property being adapted for living in. What was important was how a property was adapted, not why, and the use to which it was being put at the date of the notice was irrelevant. In the first appeal all three properties had in the most recent conversion been adapted for living in with self-contained units of accommodation.
- ii Each of the properties in the first appeal had been designed and constructed for use as a residence by a single family, had the appearance of a town house and had been converted internally so that almost every room could be used as a self-contained unit. Each of the three properties could reasonably be called a house.
- iii Even though the property in the second appeal was used wholly for office purposes this did not mean that it was not a "house... reasonably so called". The property had originally been designed and built and initially used as a residence and under the lease the two upper floors were restricted to residential use – the landlord had objected to their use as offices. Just because the upper two floors had been used as offices for many years did not change the property so much that it could no longer be called a house.
- iv The right to enfranchisement under the 1967 Act applied to empty and substantially commercial buildings even if nobody had recently lived there or intended to live there, provided that they satisfied s2(1).
- v In each of these appeals the respondent had the right to acquire the freehold.

15 Leasehold Valuation Tribunal

Scheme of management – s19 Leasehold Reform Act 1967

*DONATH V TRUSTEES OF 2ND DUKE OF WESTMINSTER WILL TRUST
(2010) PLSCS 180 – Decision given 17.06.10

Facts: D was a resident on the Grosvenor Belgravia Estate which was subject to a scheme of management under s19 of the Leasehold Reform Act 1967. This scheme had been adopted with the High Court's approval in 1973 at which time only 17 properties on the estate had been enfranchised – since then that figure had risen to 100. H was concerned that the trustees had failed to deal with residents' breaches of the scheme, such as failures to keep properties in repair and converting them to office use. He applied to the LVT under s19 to vary the scheme of management so as to require the trustees to enforce the scheme more actively by placing an express obligation on them to use their best endeavours to maintain established standards in the area and to use all available powers to ensure that breaches were remedied.

Point of dispute: Whether H's application should be allowed. The trustees opposed the application arguing that: (i) an application to vary a scheme could only be made by the landlord; (ii) the tribunal had no power to impose amendments with which the landlord did not agree; and (iii) s19 was intended to preserve the powers held by a common landlord and did not permit a property owner who had enfranchised to impose positive covenants on the landlord.

Held: The application was refused. The LVT had no power under s19 of the 1967 Act to impose duties on a landlord by varying a scheme of management. The obligations anticipated by the section were placed on enfranchising owners and future owners, not on the common landlord. Section 29 was intended to preserve the landlord's position as it had been before the 1967 Act permitted tenants to enfranchise, not to impose on the landlord any additional obligations regarding the preservation of the amenity of the estate. The variation sought by H could only be achieved with the trustees' consent.

REAL PROPERTY

16 Court of Appeal

Undue influence

* ANNULMENT FUNDING CO LTD V COWEY
(2010) PLSCS 173 – Decision given 23.06.10

Facts: The respondents, C, were an unmarried couple who had been in an established relationship for many years. They jointly owned a house valued at £800,000 which was charged to a bank. A bankruptcy order was made against the first respondent. The amount of his beneficial interest in the house was sufficient to pay his creditors and in order to annul the bankruptcy he obtained a short term bridging loan from AF. C was unable to find a mortgage company to repay the loan and AF commenced proceedings seeking possession of the house and repayment of the loan in full.

Point of dispute: Whether AF's appeal should be allowed against the county court's finding that the charge should be set aside as against the second respondent, as a result of presumed undue influence on the part of the first respondent. AF argued that: (i) it was not open to the judge to find that there was actual undue influence when the second respondent had relied on presumed undue influence; (ii) there was insufficient evidence to make a finding of actual undue influence; and (iii) the judge had been wrong not to sever the loan from the security.

Held: The appeal was dismissed.

- i The presumption of undue influence was a rebuttable evidential presumption which arose where the nature of the relationship between the two parties was such as to justify, in the absence of other evidence, an inference that the transaction was procured by the undue influence of one party over another. Where there had been a full trial, as in this case, the judge had to look at all the evidence to decide whether or not the allegation of undue influence had been proved. The judge had concluded that actual undue influence was established and AF could not complain about this finding.
- ii It was irrelevant whether this was a case of undue influence or misrepresentation. In either the principles that applied to put a lender on inquiry were clearly established. This was a case of unwitting misrepresentation and the second respondent was entitled to set aside the transaction as against the first respondent and she could also set it aside as against AF because the judge had found that it had had the necessary constructive notice and there was no appeal against that finding.
- iii The judge having found that the loan and the charge had been affected by the relevant undue influence there was no question of severing a part of the transaction that was not affected by undue influence or misrepresentation.

17 High Court

Standard conditions of sale (4th ed) – whether defendant entitled to refuse to transfer property to sub-purchaser and rescind contract

* PITTACK V NAVIEDE
(2010) PLSCS 172 – Decision given 24.06.10

Facts: In July 2007 P entered into a contract governed by the Standard Conditions of Sale (4th ed) to purchase N's leasehold residential property for £2.7m. Clause 1.5 provides that the buyer is not entitled to 'transfer the benefit of the contract'. The original completion date was July 2008, later brought forward by N to June 2008. Without informing N, P found a sub-purchaser and proposed to complete the two contracts with a single transfer from N to the sub-purchaser. When N became aware of the situation in early June 2008 he insisted that he would only transfer the property to P, whereupon the sub-purchaser withdrew from the sub-sale. P refused to complete and N served a notice to complete with which P did not comply. N purported to rescind the contract and forfeited the deposit.

Point of dispute: Whether P could succeed in his claim to recover the deposit. His argument was that N had wrongly refused to transfer the property to the sub-purchaser and that N had failed to provide the necessary licence to assign from the landlord. N contended that he was entitled to refuse to transfer the property to the sub-purchaser since to do so would be a breach of Standard Condition 1.5.

Held: P's claim was allowed. There was a distinction between an assignment of the benefit of a contract and a requirement to effect a transfer to a third party. In the absence of any express provision to the contrary a purchaser was entitled to require the vendor to transfer the property to a third party. The standard conditions of sale (4th ed) did not alter this position, and these could be distinguished from the position under the standard commercial property conditions of sale which contained an additional sub-clause specifically disallowing sub-sales. Parties using the non-commercial conditions in a residential sale and purchase would have to make an explicit exclusion for sub-sales to be prohibited. Under Standard Condition 8.3.3 P was also entitled to rescind the contract for N's failure to obtain from the landlord a licence to assign to P three working days before the contractual completion date.

TORT

18 Court of Appeal

Liability for damages in nuisance and negligence

* LAMBERT V BARRATT HOMES LTD
(2010) PLSCS 163 – Decision given 16.06.10

Facts: The local council, the second appellant, sold the lower part of a redundant school playing field to BH, a developer. The field sloped down towards its south east corner and surface water naturally drained past the gardens of houses built in that corner of the field. Following construction of houses on the lower part of the field these gardens suffered flooding. L and others, who owned the houses, brought proceedings in nuisance and negligence against BH, which in turn claimed against the local council pursuant to an agreement under which the council purportedly undertook to indemnify BH against such claims.

Point of dispute: Whether the local council could succeed in its appeal against the finding of the court below that they were liable in damages for breach of duty to take reasonable steps to abate the flood water nuisance to L's land. BH did not challenge the High Court judgment.

Held: The appeal was allowed. The judge's conclusions, that the council was in breach of its measured duty of care for failing to (i) abate the nuisance; and (ii) actively co-operate in solving the problem eg by constructing drainage ditches and a catch pit were wrong as the scope of its measured duty had been overstated. The council should not be held liable for damage that was more extensive than that which was foreseeable. It was not necessarily the duty of a party in the council's position to carry out extensive and expensive remedial works to prevent damage that should have been foreseen: the scope of the duty might be limited to warning neighbours of possible risks. The council were under a duty to co-operate in a solution that involved the construction of suitable drainage on its retained land, but that did not mean it should fund the whole cost of such works. The court would not go further and formally dismiss the claim against BH. Further proceedings were required to establish the scope of both appellants' measured duty of care and whether this had been breached.

CONTRACT

19 High Court

Specific performance

* FRASERS ISLINGTON LTD V HANOVER TRUSTEE CO LTD
(2010) PLSCS 175 – Decision given 25.06.10

Facts: FI, the claimant, was the tenant under two building leases of land in Islington. The freeholder was the defendant HT. FI and HT agreed that FI would develop the site for commercial and residential purposes and once the development was completed it could acquire the freehold for £1 with a simultaneous leaseback to HT of the commercial parts at a peppercorn rent. Plans delineating the exact extent of the commercial leaseback were annexed to the building leases. These were later amended to show two electricity transformers, one each for the commercial and residential parts, in two small substation chambers. The left hand chamber was to serve the commercial parts and be included in the commercial leaseback. In the end the residential transformer was installed in the left hand chamber. In April 2008 a certificate of practical completion was issued and FI exercised the option to purchase the freehold. It proposed to grant the commercial leaseback substituting the right-hand for the left-hand chamber.

Point of dispute: Whether FI could succeed in its claim for specific performance. HT argued that FI was not offering full performance of its own obligations since it refused to include the left hand electricity chamber in the leaseback. A master had granted summary judgment to FI holding that HT had no real prospect of success on any of their grounds of defence.

Held: HT's appeal against the master's ruling was dismissed. The equitable and discretionary power to grant specific performance should not be confined within rigid categories. Where a claim for specific performance would not provide everything that was contracted for the question was whether the defendant would, nevertheless, receive substantially what it had bargained for. A party who sought specific performance but who was unwilling to perform all its obligations had to justify that unwillingness and there were various categories of potentially good reasons. The left hand chamber comprised only a minute fraction of the floor area of the commercial part of the development and failure to include it in the commercial lease would not deprive HT of the substance of the bargain. HT would not suffer any disadvantage compared to the £80,000 that FI would have to spend to move the residential transformer across to the right hand chamber. HT's grounds for resisting specific performance offered no reasonable prospect of success at trial and FI's reasons for being unwilling to perform all its obligations were good ones.

20 High Court

Joint venture agreement for redevelopment of Chelsea Barracks – planning application withdrawn following intervention by the Prince of Wales – whether defendant in breach of contract – repudiatory breach – available remedies

* CPC GROUP LTD V QATARI DIAR REAL ESTATE CO (2010) PLSCS 174 – Decision given 25.06.10

Facts: CPC and QDRE entered into a joint venture agreement to acquire and develop the Chelsea Barracks site in central London. In April 2007 a company, PBGL, in which CPC held a 20% interest acquired the site from the Ministry of Defence for £959m and a year later it applied for planning permission from Westminster City Council for a mixed use development using a design by Rogers Stirk Harbour & Partners. In November 2008 QDRE purchased CPC's interest in PBGL for nearly £38m, plus deferred consideration of £81m payment of which was linked to progress in obtaining planning permission. Under Clause 7 of the agreement QDRE agreed to use reasonable but commercially prudent endeavours to bring about the situation when the deferred consideration would be payable. The parties undertook to act towards each other in the utmost good faith. Para 5(f) of schedule 4 stated that the planning application was not to be withdrawn unless (i) the Mayor of London had indicated that he intended to exercise his power to direct the City Council to refuse the application; and (ii) the parties' appointed planning consultant recommended that a revised planning application would have a better chance of success than an appeal against a refusal of permission for the first application. Para 5(aa) provided that QDRE could at any time elect to pay CPC £69.5m whereupon all the other obligations would fall away. Following intervention by the Prince of Wales, who disliked the proposed design, the planning consultant informed QDRE in June 2009 that the officers of the Greater London Authority had informed him that the Mayor of London was unhappy with the scheme and would be likely to refuse permission. On the same day QDRE withdrew the planning application.

Point of dispute: Whether CPC could succeed in the proceedings that it brought against QDRE. CPC argued: (i) the para 5(f) conditions for withdrawal of the application had not been met; (ii) QDRE had breached clauses 5(f) and 7; and (iii) those breaches were repudiatory in nature. QDRE argued that CPC had breached the utmost good faith obligation by its actions in early 2009 and it accepted that breach as repudiatory.

Held: The claim was allowed in part and declarations granted accordingly.

- i On all the evidence the Mayor of London had not indicated by June 2009 that he intended to exercise his power to direct that the planning application should be refused. The indication given to the planning consultant was that the mayor wanted the scheme to be changed; the conditions for withdrawing the planning application were not fulfilled and its withdrawal had breached para 5(f) .
- ii Although CPC had attempted to produce a situation in which it could be paid the deferred consideration or a payment under para 5(aa), its conduct had not breached its obligation of utmost good faith. CPC had been in repudiatory breach of contract.
- iii QDRE's conduct had repudiated the contract since it had evinced an intention no longer to be bound by the agreement. However, CPC had not accepted the repudiation which meant that the agreement remained in full force.
- iv In the events that had occurred QDRE was not obliged to make the payment under para 5(aa). It had not elected to make that payment. In principle CPC was entitled to damages for QDRE's breach of para 5(f) – the amount would have to be determined by considering how much CPC would need to be paid to put it into the same position that it would have been in had the planning application not been withdrawn and this would have to be the subject of an assessment hearing.

21 CABA Report

Decent homes need decent spaces

It is known that the quality of open spaces near to people's homes has a profound impact on health and well-being. CABA research has shown that people living in deprived areas are less likely to have access to good quality open space. This report considers how social landlords could provide more opportunities for people of all ages to enjoy the open space on their doorsteps for relaxing, sport, play, gardening and socialising.

<http://www.cabe.org.uk/files/decent-homes-need-decent-spaces.pdf>

22 CABA Report

Community green – using local spaces to tackle inequality and improve health

This report, the largest of its kind that has been carried out in England, considers the relationship between urban green space, inequality, ethnicity, health and well-being by examining the impact of the quality of local green spaces on the health and well-being of people in six deprived and ethnically diverse areas. It concludes that providing good quality local green space is an effective way to tackle inequality.

<http://www.cabe.org.uk/publications/community-green>

<http://www.cabe.org.uk/files/community-green.pdf>

23 Homes and Communities Agency – Monthly Housing Bulletin

Monthly Housing Market Bulletin – 30 June 2010

This bulletin provides HCA staff with the latest information on housing market trends the economy and the housebuilding industry.

- House price changes are levelling out and Halifax predicts that house prices will be flat for 2010.
- The 22 June emergency budget announced tax rises and extensive spending cuts. It is perceived that these measures are likely to reduce consumer expenditure and in turn lower both house price growth and economic growth.
- Mortgage lending is gradually improving, but is still only at half its pre credit crisis levels.
- Bank of England base rate is still 0.5% and many believe that rates will not rise until early next year because of the weakness of the economy.
- The economy remains fragile though weak growth has returned.
- Unemployment is currently relatively high, at 7.9%.
- Transaction volumes in June were lower than in the previous month, but increased by 13% in the year to May, according to HMRC.
- Housebuilders are cautious, but are selectively acquiring land as their finances pick up.

http://www.homesandcommunities.co.uk/public/documents/Monthly_Housing_Bulletin_June_2010.pdf

GENERAL

24 RICS Research Paper

Land markets and the modern economy

All human beings are ultimately dependent on land for their survival – the question is who should own the land and how should access to it be controlled for the benefit of all. Some would argue that governments should determine who is allowed to own land; others maintain that the best way to achieve the optimum form of land use is through the operation of free market forces under the umbrella of a state-controlled regulatory framework. This paper examines the reasons why buying and selling rights in land are important and suggests ways in which the efficiency and effectiveness of land markets can be improved.

http://www.rics.org/site/download_feed.aspx?fileID=5530&fileExtension=PDF

GERALD EVE'S UK OFFICE NETWORK

Gerald Eve LLP is an independent firm of chartered surveyors and property consultants, employing more than 330 staff across the UK.

We provide a comprehensive range of services to our private and public sector clients — including more than 40 per cent of the FTSE100 — covering agency, corporate property management, professional and transaction-based advice.

Our philosophy is to serve clients by identifying opportunities and solving problems relating to property through the provision of high quality, thoroughly researched cost effective advice.

London (West End)

Hugh Bullock Tel. 020 7333 6302
hbullock@geraldev.com

London (City)

Simon Prichard Tel. 020 7489 8900
sprichard@geraldev.com

Birmingham

Chris Kershaw Tel. 0121 616 4800
ckershaw@geraldev.com

Cardiff

Joseph Funtek Tel. 029 2038 8044
jfuntek@geraldev.com

Glasgow

Ken Thurtell Tel. 0141 221 6397
kthurtell@geraldev.com

Leeds

Mike Roberts Tel. 0113 244 0708
mroberts@geraldev.com

Manchester

Mike Roocroft Tel. 0161 830 7070
mroocroft@geraldev.com

Milton Keynes

Simon Dye Tel. 01908 685950
sdye@geraldev.com

West Malling

Lisa Laws Tel. 01732 229423
llaws@geraldev.com



To add your name to the evebrief distribution list, please contact us at evebrief@geraldev.com

Evebrief has been established for more than 30 years. It is a summary of the latest statutory and legal cases affecting the property industry and is widely regarded in the industry as the most comprehensive document of its type.

Useful web links

www.ukonline.gov.uk
www.odpm.gov.uk
www.dft.gov.uk
www.inlandrevenue.gov.uk
www.hms.gov.uk
www.egi.co.uk
focus.focusnet.co.uk
[www.newLawonline.com](http://www.newlawonline.com)

Abbreviations

The following abbreviations are used in evebrief:

BLD	Lexis Nexis Butterworths (internal abbreviation)
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
P&CR	Property, Planning and Compensation Reports
PLSCS	Property Law Service Case Summaries

The star system

Cases are marked with one, two or three stars as follows:

- *** Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.
- ** Noteworthy case which does not significantly alter the law or which relates to a relatively obscure point.
- * Interesting but non-essential reading.

Contact details

If you require full details of any of the cases presented in this publication, or would like to discuss them in further detail, please contact our specialists:

Agency

Chris Kershaw Tel. 0121 616 4800
ckershaw@geraldev.com

Compensation & Compulsory Purchase

Tony Chase Tel. 020 7333 6282
tchase@geraldev.com

Building Consultancy

Michael Robinson Tel. 0161 830 7091
mrobinson@geraldev.com

Environment & Contamination

Keith Norman Tel. 020 7333 6346
knorman@geraldev.com

Landlord & Tenant

Graham Foster Tel. 020 7653 6832
gfoster@geraldev.com

Leasehold Reform

Julian Clark Tel. 020 7333 6361
jclark@geraldev.com

Minerals & Waste Management

Philip King Tel. 0113 244 0708
pking@geraldev.com

Planning & Development

Hugh Bullock Tel. 020 7333 6302
hbullock@geraldev.com

Rating

Jerry Schurder Tel. 020 7333 6324
jschurder@geraldev.com

Real Property

Annette Lanaghan Tel. 020 7333 6419
alanaghan@geraldev.com

Valuation

Mark Fox Tel. 020 7333 6273
mfox@geraldev.com

Gerald Eve Research

One of our key roles at Gerald Eve Research is to communicate with our clients and others; to inform them, for example, on our latest thinking on topical issues such as legal matters and the implications for broader property market trends.

For more information on our research services please contact:

Robert Fourt
Partner
Tel. 020 7333 6202
rfourt@geraldev.com

Disclaimer & Copyright

Evebrief is a short summary and is not intended to be definitive advice. No responsibility can be accepted for loss or damage caused by any reliance on it.

© All rights reserved

The reproduction of the whole or part of this publication is strictly prohibited without permission from Gerald Eve LLP.

EVEBRIEF

Legal & Parliamentary

Volume 32(10) 19 July 2010

- 01 Scotland – Planning
- 02 Scotland – Housing
- 03 Wales – Planning

SCOTLAND

PLANNING

01 Scottish Government Consultation

Resourcing a High Quality Planning System: A Consultation Paper

This consultation examines how planning can be resourced more effectively and its quality improved in the context of public sector constraints and slower rates of development. It explores alternative delivery options and proposes fee structures that are more proportionate in the longer term. This paper is part of a wider package of measures currently being implemented to support modernising the planning system.

<http://www.scotland.gov.uk/Resource/Doc/317790/0101200.pdf>

HOUSING

02 Scottish Government Consultation

Wider Planning for an Ageing Population – Housing and Communities: Consultation on the Workstream Report and its Suggested Actions

This consultation concerns the report produced by the Wider Planning for an Ageing Population stakeholder working group, which took forward the work of the Wider Planning for an Ageing Population workstream, whose aims were:

- to understand the key needs and wants of older people, with respect to the housing and environmental circumstances that would optimise their independence and quality of life; and
- to propose short, medium and long term actions at national and local level.

The stakeholder working group considered radical and innovative ideas which could inform strategy for older people's housing over the next twenty years, while recognising the likelihood of a more difficult financial climate in years to come.

<http://www.scotland.gov.uk/Resource/Doc/316308/0100676.pdf>

WALES

PLANNING

03 Welsh Assembly Government Study

Study to Examine the Planning Application Process in Wales

This study was carried out by GVA Grimley Ltd for the Welsh Ministers and looked at the operation of the planning application process in Wales. The research, which was conducted between September 2009 and April 2010, was based on:

- a questionnaire sent to all 25 Local Planning Authorities in Wales;
- a series of Focus Groups involving representatives of the public and private sectors; and
- the use of case studies and 'practice pointers' to examine how particular issues were being handled or how problems were being overcome.

The findings of the research demonstrated that the planning application process is under stress, most criticism being directed to the organisation and operation of the process. It was found that there is a lack of consistency across Wales in the procedures for the validation, registration and processing of planning applications. A series of recommendations for reform are made, including calling for new Policy Statements on the promotion of sustainable economic development and on development management. Other suggestions include the following:

- applications should be made electronically and a standard approach introduced to the validation of planning applications;
- the requirements for certain types of information should be relaxed to make applications less cumbersome;
- guidance should be introduced on the content and use of planning conditions;
- measures be introduced for the sharing of best practice on the operation of planning committees;
- the introduction of mandatory training for councillors; and
- Permitted Development rights be extended and the Use Classes Order amended.

http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-agendas/research_report_eng_june_2010.pdf?langoption=3%26ttl=Study%20to%20Examine%20the%20Planning%20Application%20Process%20in%20Wales%20