

# EVEBRIEF

## Legal & Parliamentary

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### HOUSING STRATEGY FOR ENGLAND RELEASED



Ben Aldridge  
Editor

At item 16 we report on 'Laying the Foundations: A Housing Strategy for England', launched last month by the government. The aims of the strategy include tackling the housing shortage, boosting the economy, creating jobs and giving people the opportunity to get onto the housing ladder. It identifies the ways in which the housing market isn't working, and puts forward a package of reforms which are intended to address these. Amongst these are the £400m 'Get Britain Building' investment fund, which should help unlock progress on stalled sites with planning permission that are otherwise ready to go, and is likely to be welcomed by small to medium development firms. Further details of the fund are expected to be published later in the month. The strategy also includes details of a mortgage indemnity scheme for

newly built homes. A number of lenders and builders have already announced they will take part in the scheme, under which the Government will underwrite part of the risk. Whilst this may help to address the lack of mortgage availability, some have raised concerns about the potential impact of the scheme on new-build home prices.

Elsewhere at item 07 we report on the Mayor's consultation for early minor alterations to the London Plan, which deals with changes to Government policy and other developments which happened too late to be taken into account when the current plan was adopted in July.

A handwritten signature in black ink, appearing to read 'B. Aldridge', with a long horizontal line underneath it.



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## LOCALISM

### 01 Localism Bill

The Localism Bill received Royal Assent on 15.11.11.

## LANDLORD & TENANT

### 02 Court of Appeal

#### Costs of proceedings before Leasehold Valuation Tribunal (LVT)

\* FREEHOLDERS OF 69 MARINA, ST LEONARDS-ON-SEA V ORAM (2011) PLSCS 263 – Decision given 08.11.11

**Facts:** The appellants were the lessees of two flats in a substantial Victorian building which had been converted into six flats, the freehold of which was owned by the remaining tenants, the respondents. Under Clause 1(b) of their leases the appellants agreed to pay, by way of service charge, towards the costs of repairing the common parts. Under Clause 3(12) they also covenanted to pay all expenses including solicitors' costs and surveyors' fees incurred by the respondents incidental to the preparation and service of a notice under s146 of the Law of Property Act 1925, or incurred in, or in contemplation of, proceedings under s146 and 147 of the Act; and to pay all expenses incurred by the respondents incidental to the service of all notices and schedules relating to wants of repair of the premises. The respondents, having carried out repairs to the property, commenced proceedings against the appellants to recover the service charges.

**Point of dispute:** Whether the appellants' appeal would be allowed against the finding of the district judge in the court below that they were responsible for paying the respondents' costs in the LVT under Clause 3(12) of the lease.

**Held:** The appeal was dismissed. The enforcement of the appellants' liability to pay service charges under Clause 1(b) required the determination of the LVT and a s146 notice. The covenant in Clause 3(12) was separate to that in Clause 1(b). The ruling of the LVT and a s146 notice were cumulative conditions precedent to enforcement of the appellants' liability for the respondents' costs of repair as a service charge leading to the conclusion that the respondents' LVT costs fell within the terms of Clause 3(12).

### 03 Newcastle upon Tyne County Court

#### Calculation of service charges

\* HOTSPUR LAND INVESTMENTS 2000 LTD V SMITH (2011) PLSCS 261 – Decision given 07.10.11

**Facts:** S held a 125-year lease of a design studio in a mixed use development owned by HLI in Newcastle. Under the terms of his lease S was liable to pay, as a service charge, a proportion of the total costs of servicing the properties. Under para 1.4.1 this was "the proportion... which the gross internal floor area of the Premises bears to the aggregate gross internal floor area [of] all Lettable Areas including the Premises", unless the landlord considered that proportion to be inappropriate, in which case para 1.4.2 entitled it to adopt "such other method... as may be fair and reasonable in the circumstances". S considered that HLI had calculated his proportion incorrectly by: (i) including in the floor area calculation for S's demise a roof garden and a courtyard that formed part of the demised premises; and (ii) excluding from the aggregate lettable area of the development balconies and some mezzanine floors constructed by lessees. HLI brought proceedings against S in respect of unpaid service charges.

**Point of dispute:** How, in principle, the service charge proportion payable by S should be determined.

#### Held:

- i. On the evidence HLI had regarded para 1.4.1 as giving rise to an unfair result and had adopted an alternative method determination under para 1.4.2 and the question was whether its calculation was fair and reasonable. There were good reasons to support the inclusion of the garden as it was surrounded by the structure of the landlord's building, was a significant part of S's premises and added value to the demise.
- ii. The amenity value to S of the courtyard was much less. It was not fair and reasonable for HLI to take the courtyard into account in a para 1.4.1 calculation on a full square footage basis, although it would be fair if it was included on a discounted basis.
- iii. The roof garden, apartment gardens and apartment balconies all had common characteristics of being let to individual tenants and of being designed for recreational purposes. It was inconsistent and therefore not fair and reasonable to exclude the balconies from the calculation while including the other two areas.
- iv. It would not be appropriate to interfere with the defendant's treatment of the mezzanine floors since there were valid arguments either way for including them in the service charge calculation: on the one hand it was a tenant's improvement for which the tenant should not have to pay rent; on the other, if the addition of a floor area enables the tenant to increase the number of staff employed, or the level of its activity this impinges on the development as a whole justifying an increase in the service charge payable.

## PLANNING

04 High Court

### Damages for trespass by advertising hoarding

\* STADIUM CAPITAL (NO 2) LTD V ST MARYLEBONE PROPERTY CO PLC  
(2011) PLSCS 262 – Decision given 08.10.11

**Facts:** On the flank wall of a building owned by the defendant was displayed, with planning consent, an advertising hoarding which faced a development site owned by the claimant. In 2004 the claimant's predecessor in title had served the defendant with a notice requiring it to remove the hoarding on the basis that it constituted a trespass of its airspace. The hoarding was removed in 2008, the year in which the claimant purchased the site. The claimant brought a claim for damages for trespass from January 2005 (when the 2004 notice expired) until the date when the hoarding was removed. At first instance damages of £313,972 were awarded representing all the licence fees that had been earned by the defendant from the hoarding during that period, but the defendant's appeal against that decision was allowed.

**Point of dispute:** The amount of damages that should be awarded. The claimant contended that damages should be assessed by reference to a hypothetical licence fee for the use of its land, taking into account that it would be entitled to erect its own hoarding entirely on its own land which would obscure the defendant's hoarding. Hypothetical negotiation would result in it taking most of the profits from the defendant's hoarding with the defendant retaining only £42,000, being 13.4% of the gross licence fee.

**Held:** The defendant's argument that the site owner would not achieve better than a 50/50 split in negotiations was accepted and damages in the sum of £156,986 were awarded to the claimant. In a case such as this an award of damages should be based on a hypothetical negotiation between a willing buyer and a willing seller at the time when the trespass began. The claimant was entitled to damages representing the licence fee that would have been payable as a result of a hypothetical negotiation to grant a licence to the defendant to enable the hoarding to overhang the claimant's airspace. Wayleaves granted in similar circumstances resulted in a 50/50 split and given that both parties would have had strong pressures to reach a reasonable compromise they would have negotiated a licence fee payable to the site owner amounting to 50% of the expected revenue from the advertising licence.

05 Administrative Court

### Nationally significant infrastructure project – proposal to build temporary accommodation for construction workers on claimants' land

\* R (ON THE APPLICATION OF INNOVIA CELLOPHANE LTD) V INFRASTRUCTURE PLANNING COMMISSION  
(2011) PLSCS 258 – Decision given 04.11.11

**Facts:** The interested party, X, proposed to build a new nuclear power station at Hinkley Point in Somerset and in connection with this development it needed to acquire the claimant's nearby land on which to build temporary residential accommodation and catering facilities for its construction force. Between 2009 and 2011 X negotiated with the claimant over the purchase of its land and access to it in order to carry out preliminary surveys, which were needed for the application for development consent for the accommodation as "associated development" under s115(1) of the Planning Act 2008. However, no agreement could be reached on access and X applied to IPC under s53 for authorisation to enter the land to carry out surveys. IPC issued this in April 2011.

**Point of dispute:** Whether to allow the claimant's application for judicial review of IPC's decision to grant the authorisation. It argued that: (i) the proposed accommodation was not "associated development" since it amounted to the construction of dwellings (excluded by s115(2)(b)); and (ii) the authorisation had not been made as a last resort since the claimant was still willing to negotiate reasonable access – it was therefore a disproportionate interference with their right to property under Article 1 of the First Protocol of the ECHR.

Held:

- i. The proposed temporary accommodation for the workers was not "dwellings" within s115(2)(b) of the 2008 Act. The accommodation which X proposed to build was similar to a hostel, as it was not self-contained and single rooms would be supported by catering and other facilities elsewhere on the site. The aim of the 2008 Act was to create an efficient, streamlined planning system for nationally significant infrastructure projects. Section 115(1) permitted applications for development consent to cover not just the project itself, but also associated development including accommodation for the large number of workers needed for its construction.
- ii. IPC's decision to issue a s53 authorisation was not flawed. Notwithstanding the parties' negotiations over a long period of time, their failure to reach a suitable agreement over access meant that IPC was entitled to conclude that this authorisation was required as a last resort. There had been no unlawful interference with Convention rights as there was no intention at this stage to take over permanently any rights over the land, and the application was only for authorisation to carry out surveys.



## 06 Statutory Instrument

**SI2011/2741 The Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2011**

These regulations, which come into force on 21.12.11, amend the 2009 Regulations, which implemented, in relation to nationally significant infrastructure projects, EC Directive 85/337/EC on the assessment of the effects of certain public and private projects on the environment. A new regulation is inserted which requires the Sec of State to review the operation and effect of the 2009 Regulations and to publish a report within five years after that regulation comes into force and every five years thereafter. It will then be for the Sec of State to decide whether the 2009 Regulations should remain as they are, or be revoked or amended. Amendments have been made to Schedule 1 and Schedule 2 to the 2009 Regulations in order to implement the amendments that have been made by Council Directive 2009/31/EC.

<http://www.legislation.gov.uk/uksi/2011/2741/contents/made>

## 07 Greater London Authority Consultation

**Early Minor Alterations to the London Plan**

Deadline for Comments: 20.12.11

These are the Mayor's proposals for some early minor alterations to the London Plan which was published on 22.07.11. These alterations will:

- add a new paragraph to the Overview and Introduction chapter of the Plan giving advice about the status of the Plan following publication of the National Planning Policy Framework;
- change London Plan policies 3.8 – 3.13 dealing with affordable housing. An alteration to the definition of "affordable housing" in policy 3.10 is proposed so as to include the Government's new affordable rent product. Changes to policy 3.11 are proposed with a new approach to setting affordable housing targets in Local Development Frameworks; and
- change parts of chapter 6 to reflect updated cycle parking standards following a TfL review.

The proposals have been published for formal consultation with the London Assembly and the GLA functional bodies.

<http://www.london.gov.uk/publication/early-minor-alterations-london-plan>

## 08 Greater London Authority Consultation

**Draft Housing Supplementary Planning Guidance**

Deadline for Comments: 24.02.12

This draft Housing Supplementary Planning Guidance (SPG) was published for public consultation on 01.12.11. It provides detail on how to carry forward the Mayor's view that "providing good homes for Londoners is not just about numbers. The quality and design of homes, and the facilities provided for those living in them, are vital to ensuring good liveable neighbourhoods". It is informed by the Government's draft National Planning Policy Framework and, once adopted, the new Housing SPG will replace the 2005 SPG and the 2010 Interim Housing SPG.

<http://london.gov.uk/consultation/draft-housing-supplementary-planning-guidance>

## 09 English Heritage Publication

**Understanding Place: character and context in local planning**

This document offers ideas for local authorities, councils and communities on the practical uses of historic characterisation within local and neighbourhood planning. 22 case studies have been used to demonstrate how the results of historic characterisation have been used in a wide variety of ways to inform plan-making and development management.

[http://www.helm.org.uk/upload/pdf/CSP\\_vg\\_final.pdf?1321245921](http://www.helm.org.uk/upload/pdf/CSP_vg_final.pdf?1321245921)

## RATING

10 Fife Valuation Appeal Committee

### Material change in circumstances appeals – fall in rental levels

\* VARIOUS V FIFE ASSESSOR

Date of Decision: 25.11.11

**Properties:** Various retail units within The Mercat Shopping Centre, Kirkcaldy.

**Issues:** The use of fall in rental levels between 1 April 2008 (Tone Date) and effective date of 2010 Revaluation (1 April 2010). The Assessor argued that this did not constitute a Material Change of Circumstances for the 2010 Revaluation.

**Decision:** The Committee have dismissed the Assessor's arguments and found in favour of the Appellants. The Committee found:

- i. The application of the literal interpretation of s3(4) of The Local Government (Scotland) Act 1975 results in injustice, unfairness and the outcome contrary to the aim of the Act to share the rates burden fairly.
- ii. The drafting of s3(4) of the 1975 Act contains real mischief that should be made good.
- iii. The application of s3(4) of the Act was contrary to common sense and convenience and does not assist in the aim to achieve a correct valuation roll.
- iv. That the treatment of the Material Change of Circumstances rules should be the same for existing properties as for those new properties entering the Valuation Roll.
- v. The drafting of the 1975 Act made no provision for a downturn in value between Tone Date and the effective date which cannot be ignored
- vi. The appeals had arisen due to exceptionally unusual global economic circumstances and highlighted the shortcomings in the legislation.

*Editor's note: This decision will be appealed by the Assessor to be determined at Lands Valuation Appeal Court (Supreme Court) in 2012.*

11 CLG Business Rates Information Letter

### Business Rates Information Letter (06/2011): Localism Act 2011

This letter covers the Localism Act 2011, the Bill having received Royal Assent on 15.11.11. It contains four business rates measures in Clauses 68-71:

- ballot for imposition and certain variations of a business rate supplement;
- non-domestic rates: discretionary relief – it is intended to bring the changes into force in time for the 2012/13 financial year;
- small Business Rate Relief – the changes will be brought into force in time for the 2012/13 financial year; and
- cancellation of liability to backdated non-domestic rates – Clause 71, which will come into effect two months after Royal Assent.

These measures still need to be brought into force.

<http://www.communities.gov.uk/publications/localgovernment/bril62011>

12 CLG Business Rates Information Letter

### Business Rates Information Letter (07/2011): New Business Rate Measures

This letter provides information on the Chancellor's 2011 Autumn Statement and Business Rates Measures on:

- a further six month extension of the increase in Small Business Rate Relief; and
- a deferral scheme for 60% of the RPI increase (5.6%) in 2012-13 bills. This will be administered on a similar basis as the 2009/10 deferral scheme. Businesses will be able to defer 60% of the increase in their 2012/13 liability and repay that deferred amount in 2013/14 and 2014/15.

<http://www.communities.gov.uk/publications/localgovernment/bril72011>



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## HOUSING

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13 Greater London Authority Consultation

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### Draft SPG Affordable Housing Note

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Deadline for Comments: 03.02.12

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This consultation is a draft supplementary planning guidance note on affordable housing. It is concerned with how the Government's new affordable rent housing product can be used to implement the policies in the London Plan and deals both with setting affordable housing targets in Local Development Frameworks, and with negotiation of affordable housing on private residential and mixed use development sites.

<http://www.london.gov.uk/publication/draft-spg-affordable-housing-note>

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14 CLG Statistics

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### Housebuilding – September quarter 2011, England

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These statistics relate to the period July to September 2011. Key points are as follows:

- there were 23,410 house building starts (seasonally adjusted). This is 1% fewer than in the June quarter, 62% higher than the March quarter 2009 trough, but 51% lower than the December quarter 2005 peak;
- the number of housing completions has also fallen, down from 27,330 in the June quarter 2011 to 26,190 in the September quarter 2011. This compares with a 5% fall between the March 2011 and the June 2011 quarters; and
- there were 96,070 housing starts in the 12 months to September 2011, down by 7% compared with the 12 months to September 2010. In the 12 months to September 2011 there were 106,000 housing completions, down by 2% compared with the 12 months to September 2010.

<http://www.communities.gov.uk/publications/corporate/statistics/housebuildingq32011>

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15 CLG Statistics

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### House Price Index September 2011

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The latest UK house price index statistics, based on mortgage completions during September 2011, were released on 15.11.11. The key points from the release are as follows:

- in September UK house prices decreased by 1.4% over the year and decreased by 0.7% over the month (seasonally adjusted);
- the average mix-adjusted UK house price was £207,326 (not seasonally adjusted);
- average house prices increased by 0.6% over the quarter to September, compared to a quarterly decrease of 0.8% over the quarter to June (seasonally adjusted);
- average prices decreased during the year in all UK countries: in England by 1.1%; in Wales by 3.4%; in Scotland by 3.3%; and in Northern Ireland by 11.6%;
- prices paid by first time buyers were 0.7% lower on average than a year earlier and prices paid by former owner occupiers also fell by 1.7%;and
- prices for new properties were 8.8% higher on average than a year earlier whilst prices for pre-owned dwellings decreased by 2.1%.

<http://www.communities.gov.uk/publications/corporate/statistics/hpi092011>

## 16 CLG Publication

**Laying the Foundations: A Housing Strategy for England**

This new strategy designed to help the housing market and promote new building was launched on 21.11.11. The Housing Strategy sets out a package of reforms whose aim is to:

- stimulate the housing market;
- lay the foundations for a more responsive, effective and stable housing market in the future;
- support choice and quality for tenants; and
- improve environmental standards and design quality.

The following are some of the proposed initiatives included in the strategy:

- a scheme led by the Home Builders Federation and Council of Mortgage Lenders to provide up to 95% loan-to-value mortgages for new build properties;
- a consultation on a proposal to reconsider s106 planning obligations which were agreed before April 2010 where the development has stalled;
- launch of a new £400m "Get Britain Building" investment fund to support building firms which need development finance to enable them to restart work on stalled sites;
- "Build Now, Pay Later" deals and freeing up public sector land with capacity to deliver up to 100,000 homes as a way of supporting builders who are finding it difficult to obtain finance;
- encouraging individuals to build their own homes by providing £30m short-term project finance on a repayable basis;
- providing more support to local areas who wish to construct large scale new developments in order to meet the needs of growing communities; and
- giving communities new powers to deliver development through Community Right to Build.

<http://www.communities.gov.uk/publications/housing/housingstrategy2011>

## 17 Greater London Authority Report

**London Housing Market Report – Quarter 3, 2011**

This report summarises key trends in London's housing market, including prices, affordability, repossessions and new housing construction. The data used is the latest available in mid-November and where possible comparisons have been made between trends in London and the rest of the country. The key points are as follows:

- economic growth in London and the UK as a whole remains weak. Unemployment in London has reached 10%;
- new mortgage lending and consumer confidence have stabilised at low levels;
- average house prices in London rose by 3% over the last year, but they fell in all other regions;
- the number of home sales remains at less than half pre-recession levels;
- average private sector rents in London are higher than in all other regions and have risen at a faster rate over the last year; and
- new housing starts fell in Q3 2011, but registrations to build new homes and orders for new housing construction are both higher than last year's levels.

<http://www.london.gov.uk/publication/london-housing-market-report-quarter-3-2011>

## 18 CLG Statistics

**Housing Stock, England – Dwelling Stock estimates, England, 2011**

These statistics, which were released on 30.11.11, report on the dwelling stock in England as at 31.3.11. The key points are as follows:

- There were an estimated 22.8 million dwellings in England, 0.53% more than the previous year;
- The South East has the greatest number of dwellings with 3.7 million. There are 3.3 million homes in London and 3.1 million in the North West. The North East has the smallest number with 1.2 million homes; and
- In March 2011 there were 18.8 million private dwellings (owner occupied and privately rented) and 4 million social rented dwellings. Between March 2010 and March 2011 the social rented stock increased by 16,000 dwellings and the private stock by 105,000 dwellings.

<http://www.communities.gov.uk/publications/corporate/statistics/housingstock2011>



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**REAL PROPERTY**

19 Court of Appeal

**Boundary dispute – adverse possession**

\* ZARB V PARRY  
(2011) PLSCS 269 – Decision given 15.11.11

**Facts:** The appellant and respondent owned neighbouring properties. In 1992 the appellant's predecessor had transferred a portion of his garden to the respondent's predecessor after which time a strip of land, measuring 890 sq ft, physically formed part of the respondent's garden but the paper title to it was owned by the appellant. In the county court it was held that the respondent had acquired title to the strip by adverse possession.

**Point of dispute:** Whether the appellant's appeal against the county court ruling would be allowed. The appellant argued that: (i) since the respondent's possession of the strip had been with the consent of the appellant's predecessor it could not be said to be adverse; (ii) any adverse possession by the respondent had been interrupted by the appellant's attempt to fence it off in July 2007 so as to start time running again for claiming adverse possession; and (iii) the respondent had failed to satisfy the requirement in para 5(4)(c) of Schedule 6 to the Land Registration Act 2002 that throughout the previous period of ten years he reasonably believed that he owned the strip.

**Held:** The appeal was dismissed.

- i. On the facts of this case the judge was entitled to conclude that the appellant's predecessor had not consented to the respondent's use of the strip.
- ii. An adverse possessor had to demonstrate that he had exclusive control of the land in question. The paper title owner had the advantage in law and to effect repossession of property it was sufficient to show that he had resumed possession for a short period of time. In this case it was clear that the appellant had intended to recover possession but did not succeed in doing so in any meaningful sense, since, following a confrontation with the respondent, he had abandoned the attempt. Therefore the respondent's adverse possession had not been interrupted.
- iii. The judge's implicit finding that the respondent reasonably believed that he owned the strip for the purposes of para 5(4)(c) of Schedule 6 to the 2002 Act was not against the weight of evidence.

20 Court of Appeal

**Prescription – right of way**

\*\* LONDON TARA HOTEL LTD V KENSINGTON CLOSE HOTEL LTD  
(2011) PLSCS 272 – Decision given 22.11.11

**Facts:** The London Tara Hotel ("the appellant") and the Kensington Close Hotel ("the respondent") owned adjacent hotels. A private service road, belonging to the appellant, had been used by the respondent and its predecessors for access to its building for many years. In 1973, the then owner of the site of the appellant's hotel had granted a licence to use the road to the then owner of the respondent's hotel. This licence expired in 1980, when the ownership of the respondent's hotel changed hands, but the road continued to be used for deliveries and by coaches taking visitors to the respondent's hotel. In 2007 the appellant asserted that the respondent had no rights over the access road and that its use of it constituted a trespass which should cease immediately. It applied for an injunction restraining the respondent from using the road, together with damages, but this application was refused by the High Court which ruled that the respondent had used the roadway for 20 years or more without force, openly and without the permission of the owner and so had established a right of way by prescription over the roadway. (See Evebrief Volume 32(16) item 10).

**Point of dispute:** Whether the appellant's appeal against the High Court decision should be allowed. The appellant argued that: (i) the judge had been wrong in concluding that the use of the road had been "as of right" since the appellant had no reason to believe that the ownership of the respondent's hotel had changed; (ii) the correct inference was that a fresh licence had been granted in 1980, which only expired in 1996 on the next change of ownership; and (iii) even if a right of way by prescription had been obtained, it did not extend to coaches or construction vehicles.

**Held:** The appeal was dismissed.

- i. A prescriptive right would be established if the use satisfied the tests of not being by force, by stealth, or by licence. The licence had ended in 1980 and since another one had not been granted after that the use of the road could not be said to be with permission and thus a prescriptive right of way had arisen.
- ii. Whether a licence was to be implied was a question of fact. A distinction had to be made between an implied licence and mere inaction by the landowner with knowledge of the use relied on. The judge had correctly directed himself that acquiescence or toleration was not sufficient to imply a licence and then found nothing more than that on the facts.
- iii. The judge was entitled to conclude that a prescriptive right of way for coaches and construction vehicles had been established.

## 21 Court of Appeal

**Metal stairway between two properties accessing first floors – right of way – constructive trust – easement**

\*\* CHAUDHARY V YAVUZ  
(2011) PLSCS 275 – Decision given 22.11.11

**Facts:** The appellant (Y) and the respondent (C) owned neighbouring properties with commercial uses on the ground floors and residential above. Y's property (No 35) included an alleyway between the properties on which C had constructed a metal stairway which provided the only access to the upper floors of both properties. When Y's predecessor in title sold the property to Y the contract incorporated the Standard Conditions of Sale 4th ed, which meant that it was sold "subject to the encumbrances on the property". Condition 3.1.2(b) stated that these included "those encumbrances discoverable by inspection of the property before the contract". It was common ground that the stairway was such a discoverable encumbrance, but C had not registered his right of way over it under s34 of the Land Registration Act 2002. After completion of his purchase of No 35, Y disconnected the stairway from No 37 making it impossible for C to use the stairway to access the upper floor of his property.

**Point of dispute:** Whether Y's appeal would be allowed against the finding of the judge in the court below that C had a right of way over the stairway. The judge had concluded that since the metal structure was obvious upon inspection, and given the terms of the contract, it would be unconscionable for Y to prevent C from using it. Y's argument was that the judge had erred in law in finding that C had a right of way which was an overriding interest, and, secondly, that his right would, in any event, have been binding by constructive trust.

**Held:** Y's appeal was allowed.

- i. There had been no occupation of any part of the metal structure which could give C rights in the status of an overriding interest.
- ii. There was nothing in the contract to allow the court to conclude that Y, the purchaser, had undertaken a new obligation, not otherwise existing, to give effect to the relevant encumbrance. Accordingly, no constructive trust had been imposed. In the absence of any express reference in the contract to the right asserted by C and an express provision requiring the purchaser to take the property subject to any such right, it was not sufficient that the metal structure was apparent on inspection of the land and that it provided the access to the upper floors of both properties. Unless there were third party rights over the metal structure that were binding on him it was open to Y to remove all or any part of it.

## 22 Court of Appeal

**Option to purchase under void oral contract – whether failure of consideration entitled respondents to restitution**

\* SHARMA V SIMPOSH LTD  
(2011) PLSCS 276 – Decision given 23.11.11

**Facts:** The appellant property development company acquired a property with a view to converting it into eight flats for sale. The respondent paid money to the appellant under an oral agreement giving it an option to purchase the whole of Phase 1 for £1.1m, and under which the appellant agreed to complete the building works within an agreed timescale and not to market the property elsewhere. Since the agreement was not in writing it was void under s2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, but the appellant kept its side of the bargain. The respondent, on the other hand, decided not to proceed because of the general economic situation and reclaimed the money it had paid under the agreement.

**Point of dispute:** Whether the appellant's appeal would be allowed against the ruling of the county court judge that the respondent (the claimant in the county court action) was entitled to the return of the money it had paid under a void contract. The issue was whether there had been a failure of consideration which entitled it to restitution.

**Held:** The appeal was allowed. The law of restitution is concerned with money paid or benefits conferred in respect of legally ineffective transactions. The judge found on the facts that the respondent did get the benefit that it had paid for; the appellant had kept to its agreement to take the property off the market pending completion and to its offer to sell it to the respondent at an agreed price. Even though the agreement was void for failure to comply with the provisions of s2 of the 1989 Act, it did not follow that property in the deposit could not pass to the appellant – that depended on the intention with which the payment was made. In this case property in the deposit was intended to pass and the respondent would have to establish a recognised ground of restitution. The only suggested ground, failure of consideration, had no merit since the respondents had obtained the benefit for which the payment was made. There was no injustice in the appellant retaining the deposit.



**ENVIRONMENT**

23 Statutory Instrument

**SI 2011/2855 The Incidental Flooding and Coastal Erosion (England) Order 2011**

Sections 38 and 39 of the Flood and Water Management Act 2010 empower the Environment Agency and local authorities to carry out works in the interests of nature conservation, the preservation of cultural heritage or people's enjoyment of the environment or of cultural heritage. This order, which came into force on 01.12.11, applies the relevant provisions of the Water Resources Act 1991 relating to compulsory purchase, powers of entry, and compensation to the exercise of the powers under these sections. The application of those provisions for the purposes of s38 are also modified so that:

- The Environment Agency may not exercise powers of compulsory purchase except for the purpose of enabling the UK to comply with its obligations under certain named EU Directives; and
- The Environment Agency and local authorities must give seven days' notice before exercising the powers of entry in relation to agricultural land (except in an emergency).

<http://www.legislation.gov.uk/uksi/2011/2855/contents/made>

24 Statutory Instrument

**SI 2011/2856 The Flood and Water Management Act 2010 (Commencement No 5 and Transitional Provisions) Order 2011**

This order, which was made on 28.11.11, brings into force the provisions of the Flood and Water Management Act 2010. The main provisions, allowing the Environment Agency and local authorities to carry out incidental flood or coastal erosion risk management work that may cause flooding, came into force on 01.12.11.

<http://www.legislation.gov.uk/uksi/2011/2856/contents/made>

**ENERGY**

25 Department for Energy and Climate Change Consultation

**Comprehensive Review Phase 1: Consultation on Feed-in Tariffs for Solar PV**

Deadline for Comments: 23.12.11

This consultation invites comments on the Government's proposals for the tariff levels available for renewable electricity generation from solar PV installations of 250kW or below under the Feed-in Tariffs scheme (FITs). FITs was introduced on 01.04.10 under powers in the Energy Act 2008 with the aim of encouraging deployment of more small scale low carbon electricity generation, particularly by organisations, businesses, communities and individuals who have not traditionally engaged in the electricity market. It allows many people to invest in small scale low carbon electricity in return for a guaranteed payment for the electricity they generate and export. Deployment of PV has accelerated rapidly in recent months, but falling installation costs and a number of other factors, including rising electricity prices, have meant that the returns available to new generators are higher than envisaged and thus unsustainable. The tariffs proposed in this consultation reflect these developments. It is also proposed to prioritise energy efficiency by linking PV tariffs to specified minimum energy efficiency requirements from 01.04.12. New multi-installation tariff rates for aggregated solar PV schemes are also proposed which would apply to new installations with an eligibility date after 01.04.12.

[http://www.decc.gov.uk/en/content/cms/consultations/fits\\_comp\\_rev1/fits\\_comp\\_rev1.aspx](http://www.decc.gov.uk/en/content/cms/consultations/fits_comp_rev1/fits_comp_rev1.aspx)

26 Department for Energy and Climate Change Consultation

**The Green Deal and Energy Company Obligation Consultation**

Deadline for Comments: 18.01.12

This consultation invites views on the details of the Green Deal and ECO policies that are to be implemented in secondary legislation and under the energy licensing framework. The Energy Act 2011 made provision for the development of a Green Deal and a new Energy Company Obligation (ECO) to replace the existing Carbon Emissions Reduction Target and the Community Energy Saving Programme, both of which will expire next year. Green Deal is a market led framework that will allow individuals and businesses to make energy efficiency improvements to their buildings at no upfront cost, with the costs being repaid by instalments. Delivery of the Green Deal is underpinned by ECO which will place one or more obligations on energy companies requiring them to generate a specific amount of credit by facilitating the installation of energy efficiency measures in homes in GB before a set deadline.

[http://www.decc.gov.uk/en/content/cms/consultations/green\\_deal/green\\_deal.aspx](http://www.decc.gov.uk/en/content/cms/consultations/green_deal/green_deal.aspx)

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27 CLG Statistics

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**Code for Sustainable Homes and Energy Performance of Buildings: Cumulative and Quarterly Data up to end of September 2011**

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These statistics show the number of dwellings that have been certified to the standards set out in the Code Technical Guide.

- Since April 2007 80% of certificates issued at the design stage and 88% at the post construction stage have been awarded a three star rating.
- The average energy efficiency rating of new homes was 79.7 in England and 78.5 in Wales for the quarter July-September 2011. This is a decrease of 0.6 points for England and 1.9 points for Wales on the same quarter in 2010.

<http://www.communities.gov.uk/publications/corporate/statistics/codesustainablesapq32011>

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28 CLG Publication

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**Information Update for Domestic Energy Assessors**

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This document advises on the major changes that are being made to the content and format of the Energy Performance Certificate (EPC) for domestic buildings. These will be introduced in April 2012 and include the following:

- more graphics and white space;
- a single energy efficiency graph on the front page;
- significantly reduced amount of text;
- clear signposting to the Green Deal;
- indication of which recommendations could be funded through the Green Deal;
- greater focus on potential financial savings; and
- recommended improvements situated nearer the front of the document.

Additional training requirements for Domestic Energy Assessors are to be introduced shortly.

<http://www.communities.gov.uk/publications/planningandbuilding/updatedomesticenergy>

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**TRANSPORT**

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29 London Assembly Government Publication

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**A New Airport for London – Part 2**

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This report sets out the economic and business case for building a new hub airport to serve London and the South East. It is the second of a series of reports being published by the Mayor which argue the case for providing increased aviation capacity, and is particularly concerned with the economic arguments in favour of a new airport, both for London and the rest of the country. The Mayor argues that a new airport should become the cornerstone of the Government's plans for economic growth and warns that without one the UK will lose its place near to the top of the global economy.

<http://www.london.gov.uk/publication/new-airport-london-part-2>



**GERALDEVE**

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## London (West End)

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

## London (City)

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

## Birmingham

Alan Hampton Tel. 0121 616 4832  
ahampton@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](mailto: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.

### Evebrief editorial team

Tony Chase  
Steve Hile  
Peter Dines  
Hilary Wescombe  
Gemma Goakes  
Ben Aldridge  
Annette Lanaghan  
Ian Heritage

### 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

Simon Prichard Tel. 020 7489 8900  
sprichard@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

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For more information on our research services please contact:

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

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