

EVEBRIEF

Legal & Parliamentary

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IT IS AS IT IS



Peter Dines
Editor

I find myself relying on the phrase “it is as it is”, as we seem to have a number of cases which confirm the obvious, “Save Our Parklands” (item 04), “Westminster” (item 03), “Fitzwilliam” (item 22), “Church Commissioners” (item 16), “Telford and Wrekin Council” (item 06) and “TW logistics” (item 02). Still I am sure the results provide comfort in some degree for those on the winning side and not too much of a shock for the loser.

At item 10 we report on the forthcoming changes to “Permitted Development” rights in town planning to encourage growth and relax unnecessary planning burdens on developers and land owners. I am suggesting that these rights will be confirmed shortly after Royal Assent is granted to the Growth and Infrastructure Bill in June, as the bill contains the provision for “prior approval” arrangements under which the permitted development rights will operate.

As reported, the provisions are likely to include the change of use from office use to residential in areas not explicitly excluded as being of particular importance to the national economy. For example, it may be that London’s “Central Activities Zone”, “Tech City”, The “Isle of Dogs” and parts of nationally significant, strategic, regional centres are excluded from the relaxation. The three year provision is very likely to have an important effect on housing delivery.

We will also have new provisions relating to uses within town centres and the change of use of agricultural buildings to business use (not residential) and of course the use of buildings for free schools. There may, in addition, be increases in the limits to permitted extensions to residential and business premises.

It will be very interesting to consider the result of this three year “experiment” in freeing up planning constraints on the use of land with the goal of promoting growth in new housing and business.

An Evebrief gold star, to the first person who can identify the most famous person to celebrate the use of the phrase “it is as it is”? Answers please by email to pdines@geraldev.com.



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LANDLORD & TENANT

01 High Court

Guarantor's liabilities – whether guarantor's liability continued beyond dissolution of tenant

*RVB INVESTMENTS LTD V BIBBY [2013] PLSCS – Decision given 25.01.13

Facts: B, the defendant, guaranteed the liabilities of the tenant to the claimant landlord, RVB, under leases of units 2 and 4 on an industrial estate. The lease of unit 2 was a five year term from December 2007 and that of unit 4 was for five years from November 2005. B's obligations as guarantor were stated to apply until the expiry of the tenancy under the lease "or (if earlier) the date on which the lessee ceases to be bound by the covenants in this lease". In the event that the lease were disclaimed or forfeited during the guarantee period, RVB was entitled to require B to accept a new lease of the premises for a term equivalent to the residue of the original lease at the same rent as had applied immediately before the disclaimer. The tenant went into liquidation and in March 2008 B disclaimed the lease of unit 4 pursuant to s178 of the Insolvency Act 1986. In March 2009 the tenant was dissolved. In May 2011 the Treasury Solicitor filed a notice of disclaimer in respect of the lease of unit 2 pursuant to s1013 of the Companies Act 2006. In August 2011 RVB's request that B take a new lease of unit 2 pursuant to its obligations as guarantor, for the residue of the term but at a higher rent than before, was refused. RVB brought a claim for specific performance and also claimed outstanding rent and service charge in respect of both units.

Point of dispute: Whether RVB's claim would be allowed. B contended that he was not liable under the guarantee because:

- i. on the proper construction of the lease his obligations as surety came to an end when the tenant was dissolved in March 2009;
- ii. the vesting of unit 2 in the Crown amounted to an assignment by operation of law within the meaning of the Landlord and Tenant (Covenants) Act 1995, such that B, as the guarantor of the "former tenant" was not thereafter liable in the absence of a notice served on it by RVB under s17(3); and
- iii. B had accepted surrender of the leases by its conduct as it had entered the premises to carry out inspections and begun to market them.

Held: RVB's claim was allowed.

- i. Under s178(4) of the 1986 Act the disclaimer of a lease by the liquidator of an insolvent tenant did not affect the liabilities of guarantors, whose rights and liabilities remained as though the lease had continued. It made no difference that the guarantee period could end on "the date on which the Lessee ceases to be bound by the covenants in this lease" since that provision was to deal with the situation that applied under s5 of the Landlord and Tenant (Covenants) Act 1995 where, if the tenant assigned the premises, he was released from the covenants of the tenancy. The same applied to the disclaimer of the lease of unit 2 by the Treasury Solicitor following the vesting of that lease in the Crown in bona vacantia.
- ii. RVB did not need to serve a notice under s17(3) of the 1995 Act. The obligation under that section did not arise where the tenant was dissolved following a liquidation.
- iii. RVB had not accepted a surrender of the lease which would bar it from enforcing B's obligations as guarantor. There had been no unequivocal act of taking possession by RVB which would prevent it from denying that the tenancies were at an end. RVB was entitled to look for a new tenant and still maintain its right for rent against the old tenant and surety until a new one was found.
- iv. Damages in lieu of specific performance would not be an adequate remedy.
- v. The rent payable under the new lease should be the same as that payable immediately before the date of the disclaimer.

PLANNING

02 Court of Appeal

Planning policy – future of port – whether Conservation Area Management Plan (CAMP) was consistent with local plan

*R (ON THE APPLICATION OF TW LOGISTICS LTD) V TENDRING DISTRICT COUNCIL [2013] PLSCS 23 – Decision given 24.01.13

Facts: A small village in Essex called Mistley on the banks of the River Stour, contained a working port and formed part of a conservation area. The respondent Ipa, TDC, adopted a CAMP which the appellant company, TWL, the port operator, claimed was unlawful and appealed against on the grounds that certain sections of it were inconsistent with the relevant parts of the local plan. Its argument was that, properly construed, the local plan provided that the quayside area was for port related uses while local plan policy meant that a change of use of an existing building could not be allowed unless and until all port related uses had been excluded.

Point of dispute: Whether TWL's appeal would be allowed against the High Court's ruling dismissing its claim. TWL argued that the CAMP's approach to the industrial port buildings was that they should be removed or replaced, when the local plan recognised that the quayside should remain as an operational port including warehouse buildings. In support of its argument TWL referred to the evolution of the local plan.

Held: The appeal was dismissed. The provenance of the CAMP or of the local plan was irrelevant and public documents such as these should be interpreted objectively. In a case where different parts of the local plan pointed in different directions, it was for the planning authority to decide which policy was to be given greater weight in relation to a particular decision. The local plan was neutral on the question of port reorganisation and specifically envisaged that the warehouse could be redeveloped provided that policy LMM1, aimed at protecting the existing port operations, was complied with. The judge had correctly interpreted LMM1 and had then gone on to reject the argument that the CAMP was inconsistent with that policy. Nothing in TWL's arguments had persuaded the court that the judge's analysis had been wrong.

03 Administrative Court

Lawful use certificate for pavement seating outside a restaurant – whether such use continuous for more than ten years where the pavement furniture removed at night and during certain times of year

*WESTMINSTER CITY COUNCIL V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2013] PLSCS 17 – Decision given 17.01.13

Facts: At first instance WCC refused the second defendant's application for a lawful use certificate in respect of the siting of tables and chairs outside a restaurant in central London, which the second defendant claimed was restaurant use falling within Class A3 of the Use Classes Order 1987. The inspector appointed by the Sec of State allowed the second defendant's appeal against that decision, finding that the use had continued for more than ten years so as to become immune from enforcement action and consequently lawful within the meaning of s191(2) of the Town and Country Planning Act 1990.

Point of dispute: Whether WCC's application to quash the certificate would be allowed. WCC contended that the inspector had been wrong in finding that the use had been continuous throughout the ten year period since the furniture was removed and put away when the restaurant was closed and there were periods when it was not used, even when the restaurant was open. It submitted that the certificate permitted unlimited amounts of furniture on the pavement at all times of day and night, and throughout the year, that it failed to define the times during the year when, and the hours between which, the restaurant was closed and nor did it specify the intensity of use.

Held: WCC's claim was dismissed.

- i. Overnight storage of outdoor restaurant furniture was a necessary feature of this type of use. The evidence indicated that the pavement furniture had been provided on the pavement continuously for customers' use for at least ten years and that overnight interruptions were a normal and accepted part of that provision, just as periods when the furniture was not used during periods of cold weather were, or when the restaurant was closed for holidays or during periods of enforced closure for lack of demand. The inspector was entitled to conclude that the second defendant had established, on the balance of probabilities, that there had been no significant interruptions in the restaurant's use of the pavement and had given sufficient reasons for his conclusions.
- ii. The certificate did not certify a greater or more extensive use than that which had acquired immunity. Although the certificate did not specifically refer to Class A3, it described the use as being "in connection with the existing restaurant" and thus it confirmed the use of the pavement to restaurant use within Class A3. Any number of tables and chairs were permitted to be placed within the demarcated areas so long as they did not exceed the number that could safely be accommodated for normal on-site eating.

04 Administrative Court

Planning permission granted for housing development contrary to current development plan policy but supported by draft local development framework in early stages of consultation – whether grant of permission premature

*R (ON THE APPLICATION OF SAVE OUR PARKLAND APPEAL LTD) V EAST DEVON DISTRICT COUNCIL [2013] PLSCS 18 – Decision given 18.01.13

Facts: The claimant, SOPAL, a company set up by local residents to promote the preservation of local parkland and meadows in the Axminster area as an open space and recreational facility, opposed plans by a developer to build a housing estate on an area of grassland outside the town. Although the development was contrary to the policies in the then current local plan, EDDC granted permission to the developer to build 400 homes on the site, 40% of which were to be affordable housing, but retaining the existing sports centre. The proposed development did accord with the preferred policy approach in the emerging draft local development framework (LDF), at that time in the early stages of public consultation.



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Point of dispute: Whether SOPAL's application for judicial review of the decision to grant planning permission would be allowed. SOPAL argued that EDDC had failed to comply with its obligation, under s38(6) of the Town and Country Planning Act 2004 to determine the application in accordance with the development plan unless material considerations indicated otherwise. It further submitted that the grant of permission was premature and that EDDC had breached a legitimate expectation that their strategic decision as to the scale and location of new housing in Axminster would be made through the LDF process, by considering responses to the consultation, and not through a planning application that pre-empted the LDF consultation.

Held: The claim was dismissed.

- i. The effect of granting planning permission on emerging development plan documents could be a material consideration. The report submitted by the planning officer to EDDC's planning committee had been full, detailed and clear regarding the weight to be given the LDF. EDDC had had regard to the development plan and to all material considerations and had been entitled to exercise their judgment in favour of granting planning permission.
- ii. In this case there was no justification for refusing planning permission on the grounds of prematurity. Such a refusal would have been inconsistent with national planning policy and would have been in breach of central government guidance.
- iii. There were no grounds for asserting a breach of legitimate expectation – for legitimate expectation to arise there had to be a representation by a public body on which the claimant could reasonably rely, or the public body had to have adopted a regular practice which the claimant could reasonably expect to continue. EDDC had given no specific undertaking to any individual or group.

05 Administrative Court

Planning appeal for residential development – whether findings and conclusions of first inspector a material consideration to which second inspector required to have regard

*ARUN DISTRICT COUNCIL V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2013] PLSCS 27 – Decision given 25.01.13

Facts: In 2010 ADC, the claimant, refused to grant planning permission for a residential development on a vacant site in Ferring, Sussex, located within a “strategic gap” outside the built up area of the town. That decision was upheld by the inspector who considered the effect of the development on the strategic gap prescribed in development plan policy under the relevant regional spatial strategy (RSS). The inspector's decision was later quashed in the High Court under a consent order and the matter reheard by a different inspector. By the time she gave her decision, the Localism Act 2011, providing for the abolition of RSSs, had received royal assent.

Point of dispute: Whether the decision of the second inspector, which overturned that of the first, meaning that permission for the development was granted, should be quashed. ADC argued that the second inspector had:

- i. failed to take into account, as a material consideration, the findings and conclusions of the first inspector in relation to the strategic gap, which remained valid notwithstanding the quashing of his decision; and
- ii. failed to give adequate reasons for giving only limited weight to the 2011 Act.

Held: The claim was dismissed.

- i. The findings and conclusions of the first inspector were not material considerations which the second inspector was required to take into account in reaching her decision. The second inspector's role was to redetermine the matter, not to review the decision of the first inspector. The principle that like applications should be determined alike did not apply where the previous inspector's decision no longer stood but had been quashed in its entirety.
- ii. The second inspector's reasons for her decision in relation to the Localism Act 2011 were sufficient as its wording adequately indicated the prevailing uncertainty as to whether the particular RSS would be revoked. As she could not know with any certainty whether the RSS would be revoked under the 2011 Act, either in whole or in part, she was entitled to give little weight to that consideration.

06 Administrative Court

Conditional planning permission for garden centre – condition requiring list of products proposed to be sold to be submitted – whether planning inspector properly granting lawful use certificate in respect of use for any Class A1 retail purpose

*TELFORD AND WREKIN COUNCIL V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2013] PLSCS 30 – Decision given 29.01.13

Facts: In 2002 the claimant Ipa, TWC, granted planning permission to the interested party for a garden centre near Newport in Shropshire. It was a condition of the permission that before the centre opened for trading, details of the proposed types of products to be sold should be submitted to, and agreed in writing by, TWC. The list was submitted but TWC never formally approved it. Subsequently, when the interested party applied to TWC for a lawful use certificate to certify that it would be lawful to use the site for any retail purpose within Class A1 of the Town and Country Planning Use Classes Order 1987, TWC refused to grant this, submitting that the condition in the planning permission restricted the products that could be sold to those in the interested party's list.

Point of dispute: Whether TWC's application to quash the decision of the inspector would be allowed. The inspector had upheld the interested party's appeal against TWC's refusal to grant the lawful use certificate. The inspector found that the condition did not restrict the products that could be sold as it only required a list of products that the interested party intended to sell and did not restrict the products permitted to be sold from the site to those in the list.

Held: TWC's claim was dismissed. The general rule was that a planning permission was a self-contained document, unless another document was incorporated by reference or it was necessary to refer to one in order to avoid an ambiguity. In construing a permission, the question was not what the parties intended, but what a reasonable reader would understand the lpa to have permitted. The condition in this case was unambiguous, expressly requiring a list of proposed types of products to be sold to be submitted in advance, but not containing any prohibition on selling goods other than those in the submitted list. TWC were aware of the wording they would have needed to use in order to restrict the use of the premises to a garden centre.

07 Administrative Court

Planning permission for travelling showpeople's site – enforcement notices alleging use of site by gypsies and travellers in breach of permission

*WINCHESTER CITY COUNCIL V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2013] PLSCS 39 – Decision given 01.02.13

Facts: In 2003 the claimant local authority, WCC, granted planning permission for change of use of a site near Micheldever in Hampshire to use as a travelling show people's site. The permission contained various conditions relating to the positioning and size of caravans, hardstanding and storage areas, the number of people that could occupy the site and one requiring the site to be restored to its former condition in the event that it ceased to be used by travelling show people. In 2011 WCC issued enforcement notices alleging a material change of use as the site was being used by gypsies and travellers who were not travelling show people. On appeal the inspector overturned the enforcement notices on the basis that in the absence of any condition expressly restricting the use of the site to travelling show people the permission should be interpreted as permitting use as a general residential caravan site.

Point of dispute: Whether WCC's appeal against the inspector's decision would be allowed.

Held: The appeal was allowed. The use permitted by the 2003 permission was a sui generis use as a travelling show people's site; nowhere was it described as residential caravan site and the attached conditions would not be appropriate for such a site. In planning terms there is a significant distinction between a site for travelling show people and one for general residential use, even by travellers and gypsies, as the former needs secure permanent bases for the storage of equipment and for residential use, particularly in winter. New guidance issued in 2007 and 2012 recognised the distinction between travelling show people and gypsies and travellers who do not share the same culture and traditions. The 2003 permission was a grant of permission to use the land as a travelling show people's site, which was a distinct and narrower use than permission to use land as a residential caravan site.

08 Statutory Instrument

SI 2013/117 The Regional Strategy for Yorkshire and Humber (Partial Revocation) Order 2013

This Order, which came into force on 22.02.13, partially revoked the regional strategy for Yorkshire and Humber (comprising the Yorkshire and Humber plan Regional Spatial Strategy to 2026 ("the RSS") and the Regional Economic Strategy for Yorkshire & Humber 2006–2015. Policies in the RSS which relate to the Green Belt around the City of York are retained.

<http://www.legislation.gov.uk/uksi/2013/117/contents/made>

09 Statutory Instrument

SI 2013/147 The Town and Country Planning (Modification and Discharge of Planning Obligations) (Amendment) (England) Regulations 2013

These Regulations amend the 1992 Regulations in relation to England (but not Wales). A new Regulation 2A is inserted into the Regulations which prescribes a period of one month, beginning from the date on which Regulation 2A comes into force (28.02.13) after which applications to modify or discharge planning applications entered into on or before 06.04.10 can be made.

<http://www.legislation.gov.uk/uksi/2013/147/contents/made>



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 10 DCLG Letter to Chief Planning Officers

Permitted development rights for change of use from commercial to residential

New permitted development rights for change of use from B1(a) office to C3 residential purposes will come into force this spring. These rights are part of a package of measures being introduced by the Government to support economic growth. Initially, the rights will be limited for a period of three years towards the end of which time it will be decided whether they should be extended indefinitely. They will be accompanied by a tightly drawn prior approval process which will cover significant transport and highway impacts, and development in areas of high flood risk, land contamination and safety hazard zones. However, local authorities will also have the opportunity to seek an exemption for specific parts of their locality but any exemptions will only be granted in exceptional circumstances where the local authority can clearly demonstrate that the introduction of the new permitted development rights in a particular area will lead to:

- the loss of a nationally significant area of economic activity; or
- substantial adverse economic consequences at the local authority level which are not offset by the positive benefits the new rights would bring.

A proposed change from commercial to residential use that does not benefit from the new permitted development rights (e.g. where it cannot satisfy the prior approval requirements) will continue to require a planning application.

<https://www.gov.uk/government/news/planning-measures-will-make-best-use-of-underused-buildings-for-providing-new-homes>

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/68937/Letter_about_permitted_development_rights_for_change_of_use_from_commercial_to_residential__24_January_2013_.pdf

 11 Government News

Planning changes to help open free schools

After the Growth and Infrastructure Bill is passed in June changes to the planning rules will allow free schools to open in almost any building for a year without the need for planning permission. The new permitted development rights will also give free schools extra time to obtain permanent planning permission to stay in the buildings after the first year. The aim of this is to ensure that the best use is made of existing buildings and to give greater certainty to parents and pupils.

<https://www.gov.uk/government/news/planning-changes-to-help-open-free-schools-gates-faster>

 12 CLG Statistical Release

Planning applications in England: July to September 2012

In the period July to September 2012 authorities undertaking district level planning in England:

- Received 113,100 applications for planning permission, a decrease of 7% compared with the corresponding quarter in 2011;
- Decided 110,500 planning applications, 5% fewer than in the same quarter in 2011;
- Granted 89,900 permissions, 5% lower than in the same quarter in 2011; and
- Decided 3% fewer residential decisions compared to the September quarter 2011.

In the year ending September 2012 district level planning authorities:

- Received 466,900 applications, a decrease of 25 on the year ending September 2011 figure;
- Decided 429,900 planning applications, a decrease of 1% on the year ending September 2011;
- Granted 350,400 permissions, slightly fewer than in the year ending September 2011;
- Decided 57% of major applications in 13 weeks, 69% of minors and 815 of others within 8 weeks; and
- 15 fewer residential decisions were made compared to the previous year.

<https://www.gov.uk/government/publications/planning-applications-in-england-july-to-september-2012>

RATING

13 Upper Tribunal (Lands Chamber)

Self-catering holiday units – receipts and expenditure approach – whether actual receipts represented fair maintainable trade

*DENNETT V VICTORIA JOANNE CRISP MRICS (VO) UTLC
Case Number: RA/8/2012 – [2013] UKUT 035 (LC) –
Before N J Rose FRICS – Decision given 24.01.13

Property: Talehay, Pelynt, Looe, Cornwall, a complex of five self-catering units. They were entered in the 2010 rating list at RV £9,900 while the ratepayers contended that the correct assessment was RV £7,550.

Issues: Whether the actual receipts for the units represented their fair maintainable trade to be adopted on a receipts and expenditure valuation for rating purposes.

Held: The ratepayer's appeal was allowed. The evidence of turnover from a range of comparable sites supported the ratepayer's contention that the cottages were overtrading with their revenues boosted by exceptional expenditure in marketing and the employment of an on-site manager. The actual receipts were found not to be representative of those expected from a reasonably competent operator.

14 CLG Publications

Business Rates Retention and the 2013–14 Local Government Finance Settlement: A plain English guide and A practitioner's guide

The government is committed to giving local councils more power and greater influence over how the money that they collect in rates and council tax is spent. It is estimated that about 70% of local authority income will in the future be raised locally compared to about half under existing arrangements, and that councils will be able to keep up to 50% of all business rates growth. It is hoped that this will give them the incentive to encourage local growth through enterprise and job creation. Councils are also to be given greater flexibility to pool their business rates in order to encourage growth across their areas and will be able to borrow money against future business rate growth in order to fund local infrastructure projects. These guides explain the new arrangements in detail.

<https://www.gov.uk/government/publications/business-rates-retention-and-the-local-government-finance-settlement-a-plain-english-guide>

<https://www.gov.uk/government/publications/business-rates-retention-and-the-local-government-finance-settlement-a-practitioners-guide>

LEASEHOLD REFORM

15 Upper Tribunal: Lands Chamber

Enfranchisement of house – proper method of valuation – use of comparable transactions – valuation of leasehold by application of relativity percentage

*VOYAZIDES V EYRE [2013] PLSCS 46 – Decision given 22.01.13

Facts: V, the appellant, exercised her right under the Leasehold Reform Act 1967, to acquire the freehold of a house in St John's Wood, London, of which she was the long lessee, 19.16 years of the lease remaining unexpired at the relevant valuation date. The LVT determined the price payable for the freehold at £7.43m, based on a freehold value of £15m and a leasehold value of £6.3m with an agreement deferment rate of 4.75% and capitalisation rate of 5%. The freehold value had been arrived at by reference to comparables, being two sales of another property in the same road. With regard to leasehold value the LVT had regard to graphs of relativity, which indicated a relativity of 42% of freehold value for an unexpired term of 19.16 years, rejecting V's contention that the sale of another neighbouring property was the best starting point for valuing the leasehold.

Point of dispute: Whether to allow V's appeal against the LVT's determination on both the freehold and leasehold values. During the course of the appeal V's expert changed his view on the correct approach to the comparable on which the LVT had relied for the freehold value, submitting that the property had been sold not as a house but as a development site since it had been marketed with planning permission for redevelopment, albeit that the purchaser had not implemented that particular permission.

Held: The appeal was dismissed.

- i. V's property should be valued as a house, not as a development site. The sale of the comparable property provided the best market evidence of the freehold value of V's property, whether it was viewed as a redevelopment site or as an existing house suitable for refurbishment and improvement.
- ii. V's argument that an adjustment should be made for planning blight due to proposals to redevelop a school on a neighbouring site and, secondly, problems caused by the proximity of the Israeli ambassador's private residence was rejected. The redevelopment of the school had been known for some time and its effect would already be reflected in the comparables. Difficulties associated with the Israeli ambassador's house would not have affected value in the prevailing rising market at the valuation date, while the presence of visible police and security were a compensating factor as they would help deter burglaries.
- iii. All the proposed valuation methods had drawbacks. The LVT had been entitled to have recourse primarily to graphs of relativity in circumstances where there was little market evidence and many adjustments were required. In the light of all the evidence the LVT had been entitled to take the relativity of the leasehold interest in the property at 42% and its leasehold value of £6.3m should be upheld.



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16 Central London County Court

Notices served on freeholders claiming right to acquire freehold of building and new long leases of four basement flats that were created unlawfully – whether creation and subletting of flats in breach of covenant and planning control precluded sublessees from being “qualifying tenants” for purposes of enfranchisement under Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”)

*CHURCH COMMISSIONERS FOR ENGLAND V HAMIDI [2013] PLSCS 45 – Decision given 04.02.13

Facts: The claimants, CCE, owned the freehold of a property which as originally built comprised 23 flats on the ground and five upper floors with seven garages in the basement and rear yard. The mortgagee in possession of the headlease had subdivided the basement to create several new flats, in breach of a covenant in the headlease. Between 2010 and 2012 CCE received several notices claiming to exercise rights of leasehold enfranchisement under the 1993 Act. One of these related to the acquisition of the freehold by collective enfranchisement, purported to be served on behalf of “qualifying tenants” of 14 flats, so as to exceed the statutory threshold of not less than one half of the total number of flats, while three further notices claimed new long leases of three of the basement flats. CCE alleged that the mortgagee of the headlease, the former headlessee, and various tenants had conspired by unlawful means to deprive CCE of the freehold by claiming to have sufficient qualifying tenancies and that they had done this by including some tenants who did not qualify since their flats in the basement had been unlawfully created in breach of covenant. It was also alleged that several of the 14 tenancies were owned by the mortgagee which meant that they were not “qualifying tenants”.

Point of dispute: Whether CCE’s claims would be allowed. An issue arose as to whether the creation of new basement flats in breach of covenant and of planning control precluded the tenants of those flats from qualifying for enfranchisement under the 1993 Act.

Held: The issue was determined in CCE’s favour. The mortgagee had exercised his powers improperly. The subleases should not be treated as binding on CCE for the purpose of satisfying the statutory criteria for enfranchisement.

- i. Each of the three units in respect of which the notices had been served was a “flat” within the meaning of the 1993 Act, but there was no long lease of any of them for the purpose of the legislation since the extent of the demise under the subleases did not correspond to the flats as built.
- ii. The demise of the fourth basement unit did include a flat let on a long lease, but there was no qualifying tenant of it for the purposes of the 1993 Act in circumstances where the basement flats had been created in breach of covenant in the headlease. In this case the creations of the four basement flats and their subleases had been unlawful.

- iii. The four new basement flats had been created in breach of planning legislation and building regulations and the breaches were so substantial that the flats would never fall within the 1993 Act.
- iv. The maxim that a person could not benefit from his own wrong applied in this case to preclude the mortgagee or his successors in title from participation in the service of enfranchisement notices.

HOUSING

17 Homes and Communities Agency (HCA) Housing Market Bulletin

Housing Market Bulletin, January 2013

This Bulletin, which draws its information from a wide variety of sources, provides the latest information on the housing market, the economy and the housebuilding industry.

- House prices are falling gradually across most of the UK, relative to inflation, although prices in London continue to increase.
- UK growth slipped back into negative territory in the fourth quarter; inflation levels are steady; unemployment levels continue to fall.
- According to HMRC there were 79,000 residential property transactions in the UK during December 2012, which is 7% less than in December 2011. However the total number of transactions in 2012 was 5.1% higher than during the previous year.
- Data from Hometrack indicates that the number of new buyers registering with agents fell by 9.9% in December 2012, the volume of properties listed fell by 6.8% and sales agreed by 13%.

<http://www.homesandcommunities.co.uk/ourwork/market-context>

18 CLG publication

Housing guarantee scheme rules: private rented sector

This document outlines the scheme rules for the private rented sector debt guarantee. The purpose of the housing guarantees is to support the building of new homes for the private rented sector by enabling housing providers to raise debt with a government guarantee thus reducing their borrowing costs and enabling them to provide more homes.

<https://www.gov.uk/government/publications/housing-guarantee-scheme-rules-private-rented-sector>

19 CLG publication

Housing guarantee scheme rules: affordable housing

This document outlines the scheme rules for the affordable housing debt guarantee which is to support the building of new affordable homes. The guarantee will only support projects that will deliver additional new-build affordable homes on schemes not included in existing affordable housing programmes.

<https://www.gov.uk/government/publications/housing-guarantee-scheme-rules-affordable-housing>

20 English housing survey bulletin: issue 8

English housing survey 2011 to 2012: headline report

This is the report of initial findings from the English housing survey for 2011 to 2012. It contains details of trends in tenure, household type, economic status, buying expectations of renters, overcrowding and under occupation, recent movers and difficulties with obtaining mortgage finance. The report also provides an overview of the housing stock in England and the latest findings on its condition and energy performance – including energy efficiency, insulation and heating characteristics, and the presence of damp and mould.

<https://www.gov.uk/government/publications/english-housing-survey-bulletin-issue-8>

<https://www.gov.uk/government/publications/english-housing-survey-2011-to-2012-headline-report>

21 DCLG Publications

English housing survey 2010: homes report English housing survey 2010: homes statistics

This annual report on England's housing stock in 2010 contains detailed information on the following areas:

- Stock profile;
- Amenities, services and the local environment;
- Disrepair and dampness;
- Decent homes;
- Dwelling safety issues;
- Energy performance; and
- Potential for improving energy performance.

Accompanying this report are the statistics – homes webtables 2010 and a guide to using these tables.

<https://www.gov.uk/government/publications/english-housing-survey-homes-report-2010>

<https://www.gov.uk/government/publications/english-housing-survey-homes-statistics-2010>

REAL PROPERTY

22 High Court

Land Registration – fraudulent transfer – whether claimant retaining beneficial interest – whether claimant entitled to alteration of the register to reinstate him as registered proprietor pursuant to Schedule 4 of the Land Registration Act 2002

*FITZWILLIAM V RICHALL HOLDINGS SERVICES LTD [2013] PLSCS 28 – Decision given 28.01.13

Facts: For many years the claimant, F, was the registered proprietor of a house in North London. While he was living abroad another party sold the property to RHS using a forged power of attorney, purportedly granted to him by F, and RHS was registered as proprietor. F became aware of the transaction and claimed that he had never authorised the sale. He applied to the court for an order that the register be altered in his favour for the purpose of correcting a mistake, pursuant to para 2(1)(a) of Schedule 4 of the Land Registration Act 2003, so as to reinstate him as the registered proprietor.



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Point of dispute: Whether F's application would be allowed. F contended that, notwithstanding the vesting of the legal title in RHS pursuant to s58 of the 2002 Act, he remained the beneficial owner since he had been deprived of his legal ownership by fraud. He relied on the 2002 case of *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* which pre-dated the 2002 Act and concerned the equivalent provisions of s69 of the Land Registration Act 1925. It was held that s69 of the 1925 Act only vested the bare legal estate in the new registered proprietor and, where the transfer was fraudulent, it would not amount to a "disposition" within s20 so as also to transfer all "rights, privileges, and appurtenances belonging or appurtenant thereto".

Held: F's claim was allowed. The court was bound by authority to construe s69 of the 1925 Act as dealing only with the legal estate in the relevant land, not its beneficial ownership, and to hold that a fraudulent transfer which, in the absence of the 1925 Act, would be of no effect, could not constitute a "disposition" within the meaning of s20. The court was bound to construe the equivalent provisions in the Land Registration Act 2002 similarly which meant that F remained the beneficial owner of the property notwithstanding RHS's registration as its proprietor.

TORT

23 High Court

Limitation – Solicitors' negligence – Claimant landlord instructing defendant firm of solicitors to advise in connection with claims for statutory lease extensions of two flats – claim held to be time-barred

*ST ANSELM DEVELOPMENT CO LTD V SLAUGHTER & MAY (2013) PLSCS 35 – Decision given 01.02.13

Facts: The claimant, SAD, owned the headlease of a block of flats in London which were let on underleases each of which contained indemnity provisions allowing SAD to recover from the lessees, as part of the service charge, a proportion of the ground rent payable under its headlease. In 1997 the lessee of two of the flats applied for a lease extension in respect of one of them and SAD instructed the defendant firm of solicitors (SM) to act for it in connection with this claim. It was also instructed in connection with the claim for a lease extension for the second flat a few months later. The new lease of the first flat was granted in September 1999 and that of the second one in December that year. SM had advised SAD that the provisions of the new leases did not compromise it in respect of its position regarding the service charge, but in fact they contained no indemnity provisions which meant that SAD lost the right to recover a proportion of the ground rent (which rose substantially in 2006).

Point of dispute: Whether SAD could succeed in its claim for negligence against SM. SAD contended that if it had been given the correct advice either an indemnity provision would have been included in the leases or it would have received compensation under the Leasehold Reform, Housing and Urban Development Act 1993.

Held: SAD's appeal against the ruling of a master summarily dismissing its claim was allowed in part. The master had found that the claim had been brought outside the six-year limitation period, as he took the view that SAD's claim in respect of both flats stemmed from wrong advice given by SM in March 1999 in relation to the first flat. In the present case it was found that the correspondence and other facts showed that SM had been separately instructed in respect of each lease. Therefore SM should have exercised due skill and care to safeguard the interests of its client in each case and that duty continued for the second flat independently of the first – there were separate causes of action for each flat. Although the claim against SM in respect of the first flat was time-barred SAD had a real prospect of showing that its claim as regards the second flat was brought within the primary limitation period and that claim should not have been dismissed summarily.

ENERGY

24 British Council of Offices Report

Capacity of Central London's Energy Infrastructure

This report addresses concerns expressed by real estate professionals on the capacity of London's energy infrastructure to support new office developments. These concerns related to a lack of capacity which was increasing the complexity, expense and risk to new developments. The report addresses the following questions:

- The level of risk to developments;
- The role of planning policy;
- Governance of the energy industry;
- Recovery of costs; and
- Renewables.

It includes two case studies:

- The Zig Zag Building; and
- 20 Fenchurch Street.

<http://www.bco.org.uk/research/researchreports/detail.cfm?rid=198&cid=0>

(N.B. This report can only be accessed by BCO members.)

25 Government Publication

Green Deal: deciding on the best energy saving home improvements for you

The Green Deal is a new government-backed programme that lets people pay for home improvements, such as insulation, through savings on their energy bills.

The purpose of this short leaflet, published by the Department of Energy and Climate change, is to help customers understand the energy efficiency measures available under the Green Deal and how to maximise the benefits from them.

<https://www.gov.uk/government/publications/green-deal-deciding-on-the-best-energy-saving-home-improvements-for-you>

26 Government Publication

How savings figures are calculated under the Green Deal's Golden Rule

This guidance contains explanations of how the Golden Rule savings figures are calculated. A property's potential energy savings, and thus Energy Performance Certificates, are calculated using RdSAP (the "Reduced data-input Standard Assessment Procedure").

<https://www.gov.uk/government/publications/how-savings-figures-are-calculated-under-the-green-deals-golden-rule>

27 Government Publication

Green Deal finance: Illustrative examples

This document contains examples of how Green Deal finance could work in practice.

<https://www.gov.uk/government/publications/how-green-deal-finance-could-work-in-practice>

28 Government Publication

The Carbon Plan: Delivering our Low Carbon Future

In June 2011 the Coalition Government legalised a commitment to halve 1990 levels of greenhouse gas emission by the mid 2020s. This Carbon Plan sets out how the Government intends to meet this goal in a way that will protect consumer bills and help to attract new investment in low carbon infrastructure, industries and jobs.

<https://www.gov.uk/government/publications/the-carbon-plan-reducing-greenhouse-gas-emissions--2>

29 Government Publication

Information for the Supply Chain on Green Deal Measures

The Green Deal and the Energy Company Obligation (ECO) will work in combination to drive the installation of energy efficiency improvements, referred to in legislation as "qualifying energy improvements", but commonly referred to as "measures". This publication sets out how Green Deal measures are described within the assessment tools and when the tools will recommend the measures in question. This publication covers the position for the Green Deal only. Detailed guidance on Energy Company Obligation measures will be produced by Ofgem.

<https://www.gov.uk/government/publications/information-for-the-supply-chain-on-green-deal-measures>

30 Government Publication

Green Deal Code of Practice

This is the Code of Practice for Green Deal Providers, Green Deal Assessors, Green Deal Installers and Certification Bodies. It was issued by the Secretary of State for Energy and Climate Change under Regulation 10 of the Green Deal Framework (Disclosure, Acknowledgment, Redress, etc.) Regulations 2012.

<https://www.gov.uk/government/publications/green-deal-code-of-practice--2>



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31 Government Publication

The Green Deal: A new way for owners and tenants to pay for home improvements

This scheme allows for homeowners and tenants to pay for some or all of the improvements they make over time through their electricity bill.

<https://www.gov.uk/government/publications/green-deal-a-new-way-to-pay-for-energy-saving-home-improvements>

32 Government Publication

Specification for Certification Bodies certifying the Green Deal Advice Service

This specification has been developed by DECC in conjunction with relevant expert bodies and interested parties to provide additional requirements against which the Green Deal Accreditation Body will accredit Certification Bodies to certify organisations who intend to provide the Green Deal Advice Service.

<https://www.gov.uk/government/publications/specification-for-certification-bodies-certifying-the-green-deal-advice-service>

33 Government Publication

Specification for organisations providing the Green Deal Advice Service

This specification has been developed by DECC in conjunction with relevant expert bodies and interested parties to provide requirements against which organisations intending to provide the Green Deal Advice Service will be certified by the Certification Bodies.

<https://www.gov.uk/government/publications/specification-for-organisations-providing-the-green-deal-advice-service>

LONDON

34 London Assembly Government Consultation

**Draft Town Centres Supplementary Planning Guidance
Deadline for Comments: 31.05.13**

This SPG provides guidance on the implementation of London Plan Policy 2.15 Town Centres and its associated Annex and other policies in the Plan which specifically refer to town centre development and management. It also provides guidance on Policy 2.16 Strategic Outer London Development Centres and their potential to be developed as business locations with distinct strengths of greater than sub-regional importance. The draft SPG includes guidance on the following matters:

- Promoting the vitality and viability of London's town centres, including neighbourhood and local centres;
- Supporting a mix of uses in town centres – retail, leisure, culture, tourism, business, social infrastructure and housing;
- Accommodating the growth in demand for new town centre floorspace within centres or in well-integrated edge-of-centre sites;
- Bringing back into use vacant or under-used properties;
- Promoting inclusive access by public transport, shop-mobility, walking and cycling;
- Promoting healthy and sustainable neighbourhoods;
- Developing a sense of place in town centres; and
- Implementing the Strategic Outer London Development Centre concept to enhance the distinct economic strengths of these locations, while complementing growth in other centres.

<http://www.london.gov.uk/publication/town-centres-supplementary-planning-guidance>

35 London Publication

London Heat Map

The Mayor of London is committed to delivering 25% of London's energy supply by decentralised energy (DE) by 2025 and in order to deliver this target a DE programme has been developed to facilitate and accelerate the uptake of district heating. The initial programme, which ran from 2008-10, was called the Decentralised Energy Master Planning (DEMaP) programme which identified opportunities for district heating networks through heat mapping and energy masterplanning. The DEMaP programme identified the stages of development required to progress a project from heat mapped opportunity, through feasibility, and finally procurement to market. A new set of guidelines has recently been published by the Mayor to support the delivery of decentralised energy schemes in London. The "District Heating Manual for London" provides practical guidance for developers, network designers and planners with the aim of creating a consistent framework for delivering efficient interconnecting district heating networks.

<http://www.londonheatmap.org.uk/Content/home.aspx>

GENERAL

36 HELM (Historic Environment Local Management) Publication

Heritage Works: The Use of Historic Buildings in Regeneration

This document, which has been written by a partnership of English Heritage, the British Property Federation, RICS and Deloitte, is a detailed guide on using heritage assets in regeneration projects. Containing information on how to prepare for these projects and how to identify and overcome common pitfalls, the guide also includes features such as a chart for navigating listed building consent and lists of issues to consider when carrying out surveys. It also includes information on such issues as breaking cycles of decline, concept development, economic benefits, using characterisation, VAT, fund-raising, the public realm and management plans.

<http://www.helm.org.uk/guidance-library/heritage-works/>

37 Defra Publication

Statistical Digest of Rural England 2013 – January 2013

This Digest is a collection of statistics on a range of social and economic subject areas. The statistics are split by rural and urban areas, allowing for comparisons between the different rural and urban area classifications. The Digest includes high level statistics which present an overall picture for England.

The January 2013 publication includes updates on:

- Economic indicators (productivity, GVA, employment and economic activity, investment, skills, enterprise and business demography); and
- Indicators for living in rural areas (poverty and fuel poverty).

<http://www.defra.gov.uk/publications/2013/01/31/pb13821-stats-digest-rural-england/>

38 Joint publication by CABE at the Design Council, Design for Homes and the Home Builders Federation

Building for Life 12

Endorsed by the Government, Building for Life 12 is the industry standard for well-designed homes and neighbourhoods. It is based on the new NPPF and the Government's commitment to build more, better homes and to involve local communities in planning.

<http://www.designcouncil.org.uk/our-work/CABE/Localism-and-planning/Building-for-Life/>



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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.

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EVEBRIEF

Legal & Parliamentary

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SCOTLAND

LANDLORD & TENANT

01 Statutory Instrument

SSI 2013/19 The Private Rented Housing (Scotland) Act 2011 (Commencement No.5 and Transitional Provision) Order 2013

This Order brings s33 of the 2011 Act into force on 01.05.13. Section 33 inserts two new sections, 30A and 30B into the Housing (Scotland) Act 1988 making it a requirement of landlords under assured tenancies to provide their tenants with certain prescribed documents. Failure to do so without reasonable excuse is a criminal offence.

<http://www.legislation.gov.uk/ssi/2013/19/contents/made>

02 Statutory Instrument

SSI 2013/20 The Tenant Information Packs (Assured Tenancies) (Scotland) Order 2013

This Order, which comes into force on 01.05.13, provides for landlords under assured tenancies to provide their tenants with certain prescribed documents. These include a Tenant Information Pack which contains information about the tenancy agreement, the property, the landlord, tenancy rights and tenancy responsibilities. The way in which these documents are to be provided is also prescribed.

<http://www.legislation.gov.uk/ssi/2013/20/contents/made>



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RATING

03 Statutory Instrument

SSI 2013/37 The Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2013

W.e.f. 01.04.13 these Regulations amend the 1994 Regulations as regards premises that attract a reduced non-domestic rate liability.

- Where previously certain unoccupied premises attracted a liability to pay 50% of the non-domestic rates that would be payable were they occupied, that liability is now increased to 90%.
- The Regulations also provide for a new class of property that is deemed to be unoccupied, the relief for which is 50%.
- Provision is made for a 90% rate to apply where there is a reduced liability as a result of premises being partly unoccupied for a short period of time.
- A new relief is introduced for property that has been unoccupied for at least a year before becoming occupied. Such a property is deemed to be unoccupied, notwithstanding any actual occupation for a period of up to one year.
- A new exemption is introduced for unoccupied new build property.

<http://www.legislation.gov.uk/ssi/2013/37/contents/made>

TAXATION

04 Statutory Instrument

SSI 2013/45 The Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013

W.e.f. 01.04.13 these Regulations make provision for council tax variations for dwellings which have no resident.

- Reg 2 provides for two categories of dwelling with no resident – a property which is not occupied as a sole or main residence is classed as an “unoccupied dwelling”, unless it is a “second home”. To be classed as a second home a dwelling must be furnished and the taxpayer will have to be able to establish that it is lived in for at least 25 days in any year.
- Where there is no resident of the dwelling Reg 3 provides the default position of a 50% discount from the amount of council tax payable.
- Reg 4 gives local authorities the power to modify the application of these Regulations in respect of unoccupied dwellings and second homes. Local authorities are also given power to modify the application of these Regulations in relation to different cases or classes of cases, and to provide differently for different parts of a local authority's area.

- Regs 5 and 6 limit the power to vary, including that local authorities cannot modify the application of these Regulations outside specified bandwidths. Reg 6 sets out the bandwidths. For most dwellings, including second homes, the amount of discount cannot be increased beyond the 50% provided by reg 3 and a discount of less than 10% must be awarded. However, where a dwelling has been an unoccupied dwelling for more than a year an increase in liability of up to 100% can be provided for, subject to certain exceptions.

<http://www.legislation.gov.uk/ssi/2013/45/contents/made>

CONSTRUCTION

05 Responses to Scottish Government Consultations

Review of the Building (Scotland) Regulations 2004: Technical Handbooks – S0 (General)

Review of the Building (Scotland) Regulations 2004: Technical Handbooks – S4 (Safety)

Review of the Building (Scotland) Regulations 2004: Technical Handbooks – S7 (Sustainability)

Review of the Building (Scotland) Regulations 2004: Technical Handbooks – S2 (Fire)

These consultations contained proposals for changes to building regulations for introduction in the autumn.

<http://www.scotland.gov.uk/Publications/2013/01/1141>

<http://www.scotland.gov.uk/Publications/2013/01/1695>

<http://www.scotland.gov.uk/Publications/2013/01/8741>

<http://www.scotland.gov.uk/Publications/2013/01/8305>

NORTHERN IRELAND

RATING

06 Statutory Instrument

NISR 2013/15 The Rates (Temporary Rebate) (Amendment) Order (Northern Ireland) 2013

This Order, which comes into force on 01.04.13, provides for the rebate to be granted during the two year period ending on 31.03.15 in respect of properties which become occupied during the year ending on 31.03.13 after having been unoccupied for a continuous period of at least 12 months. The amount of the rebate is one half of the rate chargeable in respect of the net annual value of the property and is granted for a period of twelve months.

<http://www.legislation.gov.uk/nisr/2013/15/contents/made>

07 Statutory Instrument

NISR 2013/16 The Rates (Regional Rates) Order (Northern Ireland) 2013

This Order was made on 31.01.13 and will come into force on the day after the day on which it is affirmed by resolution of the Assembly. The Order fixes the amount of 33.02 pence in the pound as the amount of the regional rate to be levied on the rateable net annual values of hereditaments (non-domestic regional rate) and 0.3882 pence in the pound as the amount of the regional rate to be levied on the rateable capital values of hereditaments (domestic regional rate) for the year ending 31.03.14. The increase in both these rates is 2.7%.

<http://www.legislation.gov.uk/nisr/2013/16/contents/made>