EVEBRIEF

Legal & Parliamentary

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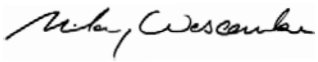
GAGA TAKES CENTRE STAGE

Hilary Wescombe
Editor

In an issue dominated by cases I would draw attention to Loader v Sec of State at item 10. The resolution of this case has held up a number of others currently under review and affected for Environment Impact Assessment reasons. Importantly the decision rejects the argument that the interpretation of "significant effects" for the purposes of deciding if an EIA is required (screening assessment) should be widely interpreted. The decision also confirms a practical approach to screening given in the EC document "Guidance on EIA screening" including a checklist of some 17 questions to be considered.

Item 02 K/S Victoria Street v House of Fraser relates to the operation of AGAs and associated anti-avoidance legislation affecting tenancies granted on or after 1 January 1996. The court held that the original guarantor cannot validly guarantee the liability of an assignee whether under the terms of lease or freely offered. As a result, landlords should review existing arrangements as obligations on a guarantor relating to an assignee will be unenforceable. This outcome can be circumvented by requiring the guarantor of a tenant to guarantee that tenants' obligations through the vehicle of an AGA, thereby giving landlords further protection referred to as a GAGA. The Court did not decide on whether an original guarantor could then be made a co-guarantor of a subsequent tenant's obligations under an AGA but its comments indicate that this is likely to be acceptable.



GERALDEVE

LOCAL GOVERNMENT

01 CLG Statement

Capital and Assets Pathfinder Programme 2010-11: Position statement

The purpose of this document is to highlight how local areas could manage their assets (buildings and land owned (or used) by public sector organisations) better, and to outline ways in which the Government can assist them to do this. Its aim is to stimulate local authority led action in the current economic climate where reducing the deficit is the Government's priority. The value of public owned assets in England is approximately £385bn, and it is estimated that the backlog of maintenance across the public sector is £40bn and that running costs are approximately £25bn per annum.

http://www.communities.gov.uk/publications/localgovernment/capassetsstatement201011

LANDLORD & TENANT

02 Court of Appeal

Assignment of lease

** K/S VICTORIA STREET V HOUSE OF FRASER (STORES MANAGEMENT) LTD
(2011) PLSCS 198 – Decision given 27.07.11

Facts: In January 2006 the first defendant (T1) sold a department store to the claimant and immediately took a leaseback of the premises for a term of 35 years at an initial rent of £2.25m. The obligations of T1 were guaranteed by its parent company, the third defendant (G1). However, from the claimant's point of view T1 was not a satisfactory tenant and clause 3.5 of the January 2006 agreement required T1 within three months to assign the lease to the second defendant, T2, and G1 to guarantee T2's obligations. T1 did not assign the lease and the claimant brought proceedings to enforce clause 3.5.

Points of dispute:

i. Whether the claimant's appeal would be allowed against the decision of the court below that although the claimant could require an assignment of the lease to T2, it could not require G1 to act as T2's guarantor since that would frustrate the operation of s24(2) of the Landlord and Tenant (Covenants) Act 1995, which was designed to ensure that the liabilities of a tenant's guarantor terminated when the lease was assigned. The judge held that those parts of the agreement requiring the guarantee were void under the anti-avoidance provisions of s25.

ii. Whether the defendants' appeal would be allowed against the ruling in the court below that T2 was not entitled to effect an immediate reassignment to T1.

Held: Both appeals were dismissed.

i. The requirement for G1 to act as T2's guarantor was void under s25(1)(a) of the 1995 Act. It would frustrate the operation of s24(2) if a landlord could impose an obligation on the tenant's guarantor to guarantee the liability of an assignee if the lease were assigned. Any such contractual arrangement contained in a later document was also caught since s25 applied to agreements "whether or not" they were made in or prior to a tenancy.

ii. The better view was that s25(1) invalidated any agreement that involved a guarantor of a tenant from guaranteeing that tenant's assignee, regardless of whether the agreement was entered into at the landlord's insistence or was freely offered by both assignor and guarantor. This rule was qualified in cases where there was an authorised guarantee agreement (AGA) under s16 where the landlord required the tenant to enter into an AGA guaranteeing the performance of the lease covenants by the assignee. Section 24(2) released the tenant's guarantor only "to the same extent as the tenant", so where the tenant reassumed liability under an AGA, the guarantor could be required to give a guarantee in respect of that liability. If a guarantor of a tenant was released from its guarantee on an assignment of the tenancy nothing would prevent it from becoming a guarantor again on a further assignment.

iii. T2 could not, on taking an assignment of the lease, immediately reassign it to T1.

03 High Court

Section 30(1)(g) Landlord and Tenant Act 1954

* HUMBER OIL TERMINALS TRUSTEE LTD V ASSOCIATED BRITISH PORTS
(2011) PLSCS 205 – Decision given 29.07.11

Facts: Land on which an oil terminal was situated was leased by the claimant (HO) from the defendant (ABP). The leases expired in December 2009 and following the breakdown of negotiations to extend the leases HO commenced proceedings for the grant of new tenancies. These were resisted by ABP who argued, relying on s30(1)(g) of the Landlord and Tenant Act 1954, that it intended to occupy the premises in order to provide port facilities and services for the import and export of oil.

Point of dispute: Whether ABP intended to occupy the holdings for the purposes, at least in part, of a business within s30(1)(g) and, if so, when and in what circumstances.

Held: The preliminary issue was determined in favour of ABP. The word 'intention' when construing s30(1)(g) had to be given its ordinary meaning; the intention had to be settled and unlikely to change. The test was of intention and reasonable practicability, not of the probability of achieving the start or likely success once established. It was not for the court to examine the financial viability of the landlord's plans, nor to consider whether or not there were detailed building plans or planning and licensing consents. In this case, ABP intended to reoccupy the premises at the termination of the leases, whenever that might occur, for the purpose of providing port services to third-party oil companies or traders.

04 Court of Appeal

Assured tenancies under Housing Act 1988 – whether houseboats were dwelling houses within meaning of Act

* TRISTMIRE LTD V MEW
92011) PLSCS 208 – Decision given 28.07.11

Facts: The appellants lived in houseboats in Bembridge Harbour, Isle of Wight. The houseboats were made from converted World War 2 landing craft, and although originally designed to float, they had been raised to rest on timber supports above the level of the highest tide. In the 1990s each houseboat had been purchased from its previous owner under a sale and purchase agreement for the sale of a chattel. Mains services were connected but sewage discharged directly into the harbour. Each of the appellants occupied the houseboats as their sole residence and paid council tax, harbour dues and mooring fees. The respondent, T, acquired a long lease of the entire harbour and served notices to quit on the appellants who argued that they were assured tenants under the Housing Act 1988.

Point of dispute: Whether the appellants' appeal would be allowed against the ruling of the court below that they only held licences, and even if they were tenancies they were not of dwellinghouses since the houseboats remained chattels, not annexed to the land.

Held: The appeal was dismissed. If the appellants did have tenancies they were of the plots that accommodated the wooden supports on which the houseboats rested. Such a tenancy could not be of a 'dwellinghouse' unless the houseboats had become part of the land. This had not happened and the houseboats remained chattels that the tenants could remove at the end of the lease. Annexation to become part of the land was a matter of intention and degree: placing the houseboats on wooden supports did not give them a sufficient degree of permanence to make them part of the plots on which the supports stood. The supports belonged to T who provided a facility that the houseboat owners could use for a fee. The houseboats were structures that could be moved without being dismantled or destroyed in the process. The arrangements by which the harbour owner provided facilities for stationing the houseboats at a rent had not been converted into leases of dwellinghouses. The appellants were not, therefore, assured tenants.

05 CLG Consultation Paper

A new mandatory power of possession for anti-social behaviour

Deadline for comments: 27.10.11

This consultation seeks views on a new mandatory power of possession which would enable landlords to take swifter action to evict anti-social tenants. The government is intending to introduce this legislation alongside the legislative changes that are required following the Home Office's recent consultation on reforming tools and powers to tackle anti-social behaviour.

http://www.communities.gov.uk/publications/housing/antisocialbehaviourconsult

PLANNING

06 Court of Appeal

Section 106 agreement – whether permission for food-store element had been impermissibly 'bought' by cross-subsidy for cricket club

*R (ON THE APPLICATION OF DERWENT HOLDINGS LTD) V TRAFFORD BOROUGH COUNCIL
(2011) PLSCS 190 – Decision given 20.07.11

Facts: TBC, the first respondent, granted a supermarket chain and the local cricket club's joint application for permission to construct a superstore and to redevelop the Old Trafford Cricket Club to international level, with the store and the cricket ground being linked by a pedestrian walkway. It was agreed that TBC would sell the land for £21m to the supermarket chain, which would then pass it on to the cricket club for the redevelopment of the cricket ground. The two elements of the proposal were to be linked by means of an agreement under s106 of the Town and Country Planning Act 1990, so as to ensure that the food store would not open for trading until the cricket club had awarded contracts for the works needed to satisfy the requirements of the English Cricket Board.

Point of dispute: Whether the appellant's application for judicial review of the planning permission would be allowed. The appellant, DH, had been refused permission for its own store on a nearby retail park. It contended that TBC's planning committee might have been confused as to the relevant planning principles and that there was a risk that permission for the superstore element of the development had been impermissibly 'bought' by the cross-subsidy for the cricket club.

Held: DH's application was dismissed. It should be presumed that the planning committee had been guided by the planning officer's advice to consider the two parts of the proposal separately, his report contained sufficient reasons to conclude that both were acceptable in planning terms and additionally there were significant regeneration benefits. In planning terms it was not objectionable for a local planning authority and a developer to enter into an agreement that would secure objectives desirable for the area. Because the cricket club and the proposed superstore were in close physical proximity to each other and linked, it was reasonable to include them both in a single application; it would also have been permissible to take account of the benefits of the one as offsetting the possible planning objections to the other.

07 Court of Appeal

Lawful use certificate

* GREYFORT PROPERTIES V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2011) PLSCS 199 – Decision given 28.07.11

Facts: The appellant, GP, owned a steeply sloping site in Torquay which had planning permission, granted in 1974, for a development of 19 flats in accordance with approved plans. The permission contained a condition that the development be commenced within five years and that "before any work is commenced on the site", the ground-floor levels of the building had to be agreed with the local planning authority (lpa). Preparatory works were carried out in 1978 after which time no further progress was made until 2005 when GP applied to the lpa for a lawful use certificate arguing that the 1974 permission had been kept alive by the 1978 preparatory works. The inspector upheld the lpa's decision to refuse the certificate on the grounds that the preliminary works carried out in 1978 were not sufficient to implement the permission. Given the topography and sensitive nature of the site he considered that the condition regarding approval of ground levels was a condition precedent going to the heart of the permission.

Point of dispute: Whether GP's appeal should be allowed against the ruling of the judge in the court below who upheld the inspector's decision. The judge held that: (i) the inspector had been entitled to find that the ground levels condition went to the heart of the decision; and (ii) the condition had the same effect as an express prohibition on any development being carried out before that matter received approval.

Held: GP's appeal was dismissed. As a matter of general principle operations would lawfully implement a planning permission only if they were permitted by that permission read together with its condition. Operations carried out in contravention of a condition could not be described as commencing the permitted development. The condition clearly prohibited the commencement of any work on the site before the ground floor levels were agreed. The wording of the condition, stating that a particular matter had to be approved before development commenced was equivalent to a prohibition on commencement of the development until the condition was fulfilled. The inspector had been entitled to conclude that approval of the ground floor levels was fundamental to the development permitted and that the condition went to the heart of the permission. That condition had been breached and this prevented the 1978 works from being a lawful implementation of the permission.

08 Court of Appeal

Reasons for granting planning permission – whether local planning authority obliged to state reasons why proposal assessed to be in compliance with PPS 4

* R (ON THE APPLICATION OF TELFORD TRUSTEE NO 1 LTD) V TELFORD AND WREKIN COUNCIL
(2011 PLSCS Decision given 27.07.11

Facts: The interested party, which ran a food store in Telford town centre on a lease from the claimants, contracted to purchase another site from the defendant council, conditional on it being given permission to open another food store. The claimants, who also wanted to open a new store on land adjacent to the existing one, objected to the interested party's application. In its summary of reasons for deciding to grant permission to the claimant (given under Article 22(1) of the Town and Country Planning (General Development Procedure) Order 1995), the council stated that the application for the proposed retail store had been assessed in accordance with PPS 4.

Point of dispute: Whether the claimants' application for judicial review of the decision to grant permission would be allowed. The claimants contended that: (i) the council's summary of reasons was inadequate as it should have explained why the proposal had been assessed to be in accordance with the policies of PPS 4, rather than simply stating that to be the case; and (ii) the council had failed to take into account a material consideration – its own right to compensation under s237 of the Town and Country Planning Act 1990 for breach of their private law rights relating to restrictive covenants affecting the council's site.

Held: The claim was dismissed.

i. The requirement to give a summary of reasons for the grant of planning permission is different to the requirement to give full reasons when refusing permission. It is not necessary to give a summary of reasons for rejecting an objector's representations, nor a summary of reasons for reasons.

ii. Private law rights would not normally be material to a planning decision. The payment of compensation under s237 would only have been a material consideration if the level of compensation was so substantial that it might prevent or delay the development of the council's site, and in this case the defendants had been advised that the compensation issue was not one of any consequence.

09 Administrative Court

Application for judicial review of decision to grant permission for flood defences

*R (ON THE APPLICATION OF U & PARTNERS (EAST ANGLIA) LTD) V BROADS AUTHORITY
(2011) PLSCS 193 – Decision given 13.07.11

Facts: The Environment Agency (EA), which was responsible for flood defences, decided to implement a broadland alleviation strategy which would involve the construction of new defence walls on the Norfolk Broads. The proposal would involve taking part of the claimant's land and when EA constructed the new wall the claimant was left being responsible for maintaining the existing defence to its land as the EA was no longer responsible for it. The claimant applied for permission to apply for judicial review of the defendant's decision to grant permission for the new alleviation work, arguing that the 1999 Environmental Impact Regulations had not been complied with and, secondly, that the planning committee had been wrongly advised that the risk of flooding on the claimant's land was not a planning consideration. The 1999 Regulations bring into domestic law the EC Council Directive on the assessment of projects impact on the environment.

Point of dispute: Whether the claimant should be granted permission to apply for judicial review of the defendant's decision to grant permission for EA's new alleviation scheme. The EA argued that it should not as it had been unduly prejudiced as a result of the claimant's undue delay in bringing its claim having spent £130,000 on the new defence wall.

Held: The application was granted. Both the direct and indirect effects of the development should have been taken into account and the defendants had been wrong to disregard the effect on the claimant's land since the scheme involved abandoning existing defences and thus adding to the risk of flooding. A planning authority should consider both adverse and beneficial effects of a development and then exercise their judgment in deciding whether to grant permission for it. In this case the court was satisfied that the claim had not been brought promptly, but the permission to apply for judicial review should not be refused where, as in this case, the grant of planning permission was clearly ultra vires and the EC Council Directive had been breached.

10 Administrative Court

Environmental Impact Assessment

** R (ON THE APPLICATION OF LOADER) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2011) PLSCS 204 – Decision given 28.07.11

Facts: A developer sought planning permission to redevelop a former bowls club to form 41 sheltered apartments for the elderly with car parking. Permission was refused by the lpa but granted on appeal to the defendant Sec of State. Subsequently, however, the inspector's decision letter was quashed by consent because the defendant had failed to consider whether the proposal was a Schedule 2 application within the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 which required an EIA to be undertaken. The defendant later made a negative screening direction determining that the proposed development did not require an EIA.

Point of dispute: Whether the claimant's application for judicial review of the screening direction would be allowed. The claimant argued that: (i) the defendant had misdirected himself as to the meaning of "significant effects on the environment" in Article 2 of the Council Directive 85/337/EEC (the EIA Directive) ; and (ii) the defendant's reasons for the screening direction were defective in respect of the possible effect of the removal of some asbestos.

Held: The application was dismissed.

i. The question of "significant effects on the environment" was a matter of judgment for the decision maker and was reviewable on the grounds of Wednesbury unreasonableness. The approach favoured by the claimant would transfer the focus from whether a project was likely to have significant effects on the environment to whether its effect on the environment should be considered. A range of matters might be relevant to the latter decision and influence it, even though they could not have significant effects on the environment. This approach would substitute a new lower test for that set out in the EIA Directive and the 1999 Regulations. It was not intended that an EIA should be required in respect of any development that might affect the environment. There should not be a single defined test of "significant effects on the environment" to be applied in all cases and expert decision makers had to make their decisions on a case-by-case basis.

ii. The reasons for a screening decision did not need to be elaborate but they had to demonstrate that the issues had been understood and considered and had to contain sufficient information to enable interested parties to understand the basis of the decision that an EIA was not required. In this case the reasons given had been brief but sufficient in the context of preceding correspondence, which had also addressed the asbestos issue where it had been concluded that relevant environmental standards would be adhered to with no significant effect. This was a modest development and the reasons given were sufficient to explain why the decision maker had concluded that the removal of asbestos would not have significant effects on the environment.

11 Statutory Instrument

SI 2011/1824 The Town and Country Planning (Environmental Impact Assessment) Regulations 2011

These regulations, which come into force on 24.08.11, consolidate with amendments the provisions of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and subsequent amending instruments. The 1999 Regulations consolidated and updated earlier instruments which implemented the Council Directive on the assessment of the effects of certain public and private projects on the environment. These Regulations apply to England only and to Scotland, Wales and Northern Ireland for provisions in relation to projects serving national defence purposes. The main changes to the 1999 Regulations include the following:

- a limitation to the requirement for subsequent applications to be subject to the screening process to those cases where the development in question is likely to have significant effects on the environment which were not identified at the time that the initial planning permission was granted;
- a requirement for the reasons for negative screening decisions to be provided in writing and placed on Part 1 of the Register, to be available for public inspection; and
- an amendment to clarify that any person may ask the Sec of State to exercise the power of direction.

http://www.legislation.gov.uk/uksi/2011/1824/contents/made

12 Defra Consultation

The registration of new town or village greens

Deadline for Comments: 17.10.11

This consultation seeks views on proposals to reform the system for registering new town or village greens under s15 of the Commons Act 2006. The volume of applications to register new greens (in 2009 there were 185), the character of application sites, the controversy that such applications often attract, the cost of the determination process and the impact of a successful registration on the landowner are all giving rise to increasing concern.
This consultation aims to present the Government's case for reforming the current registration system in order to achieve an improved regulatory balance between protecting high quality green space valued by local communities and enabling the right development to take place at the right time. It also seeks to reduce the burden on both local authorities and affected landowners.
It is not intended to review sites that are already registered.

http://www.defra.gov.uk/consult/2011/07/25/town-village-greens/

13 Federation of Small Businesses (FSB) Report

Small business and infrastructure: Planning

This report, which forms part of a series considering the infrastructure needs of small businesses, discusses the barriers faced by small businesses in relation to the planning system and makes suggestions as to how the system could be reformed in order to create the right conditions to support growth. It argues that there needs to be a fast track for small business planning applications in order to encourage much needed economic growth and that the bureaucracy surrounding the planning system is acting as a barrier to such growth.

http://www.fsb.org.uk/documentstore/filedetails.asp?id=474

14 CLG Statement

The Planning Guarantee and information requirements

This statement was released in a letter to Chief Planning Officers. In 'The Plan for Growth', issued alongside the Budget, the Government announced an ambitious programme of measures to simplify and streamline the system for determining planning applications – in the financial year 2010-11 3,200 planning applications took longer than 52 weeks to determine. Under the Planning Guarantee, which will be consulted on this autumn, no planning application should take longer than one year to reach a decision. At the same time the Government will also be consulting on the introduction of measures to reduce the amount of information required to accompany planning applications. Ahead of these consultations, this statement explains how the planning guarantee could operate and gives an initial indication of the issues that will need to be addressed in introducing it.

http://www.communities.gov.uk/planningandbuilding/planningsystem/planningpolicy/planningguarantee/

http://www.communities.gov.uk/publications/planningandbuilding/letterplanningguarantee

RATING

15 Business Centre Association (BCA) and British Property Federation (BPF) Campaign

Empty Property Rates Tax

The BCA has launched a campaign against the Empty Property Rates Tax which it perceives is inhibiting economic growth and putting jobs at risk. Having raised the threshold for empty property rates to £18,000 in 2010 it lowered this to £2,600 in April this year. The campaign is supported by the British Property Federation (BPF) and they are calling for signatures to a petition which would enable a debate to be tabled in the House of Commons. The link to this petition is:

https://submissions.epetitions.direct.gov.uk/petitions/318/signature/new

COMPULSORY PURCHASE

16 Court of Appeal

Section 19(3) Land Compensation Act 1973 barring compensation to appellants for diminution in value to their homes caused by noise from new road– whether section incompatible with Article 1 of First Protocol to and Article 6 of European Convention on Human Rights

** THOMAS V BRIDGEND COUNTY COUNCIL
(2011) PLSCS 196 – Decision given 26.07.11

Facts: The appellants lived near to a recently constructed relief road which was to be adopted by the respondent council once its inspector issued a letter of acceptance. This was due to happen after the developer had made good any defects to the inspector's satisfaction during a 12-month maintenance period running from the date when the road was substantially completed. The road was first opened for public use in July 2002, but the developer took three years to complete the necessary works and it was not adopted until 2006. The appellants claimed compensation from the council under the Land Compensation Act 1973 for alleged diminution in the value of their homes attributable to noise and other nuisance from the road. However, s19(3) barred such claims where the road had not been adopted within three years of being open to public traffic.

Point of dispute: Whether s19(3) represented an unlawful interference with the appellants' right to peaceful enjoyment of their properties under Article 1 of the First Protocol to the European Convention on Human Rights and breached their right under Article 6 to a fair and public hearing to determine their civil rights. They submitted that statutory provisions designed to protect the peaceful enjoyment of people's homes failed to do so because they could be defeated by unilateral action, or inaction, by those responsible for paying compensation.

Held: The appellants' appeal against the Land Chamber's preliminary ruling that s19(3) was not incompatible with their rights under the European Convention was allowed. Article 6 was concerned with procedural rights and did not assist the appellants. Assuming that the appellants could show depreciation in value sufficient in principle to give rise to a claim for compensation, that was an interference with the peaceful enjoyment of their property sufficient to engage Article 1. Once an interference with Article 1 rights was accepted the presence or absence of compensation was not a separate issue but an important element in deciding whether, in authorising the interference in the general interest, the balance struck by the state was fair. In the case of s19(3) circumstances such as the present case led to the bizarre situation where a diligent road-builder who finished the project on time was penalised by the liability to pay compensation, whereas an inefficient one could evade liability. The affected householders suffered the inconvenience and disturbance of a protracted maintenance period and the loss of any right to compensation for the effects of the road's use. A breach of Article 1 had been established and s19(3) should be read so as to entitle the appellants to compensation. Logic and common sense suggested that parliament would not have left open the loophole that had arisen in a case such as this had it been alerted to the problem.

HOUSING

17 Homes and Communities Agency (HCA) Monthly Housing Market Bulletin

Monthly Housing Market Bulletin – 22.07.11

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

- house prices have changed very little over the last month. Nationwide predicts that this pattern is likely to continue for the remainder of the year;
- London is the only region to have seen rises in house prices;
- HMRX reported that the level of transactions remains historically low, at about half pre-credit crisis levels and 14% lower than at the same time last year;
- the economy returned to growth in Q1 with growth of 0.5% being recorded; and
- in Q1 construction output fell by 3.4%.

http://www.homesandcommunities.co.uk/sites/default/files/our-work/housing-bulletin-july2011.pdf

REAL PROPERTY

18 Court of Appeal

Proprietary estoppel

* HAQ V ISLAND HOMES HOUSING ASSOCIATION
(2011) PLSCS – Decision given 20.07.11

Facts: H, the respondent, rented a property from the local authority, originally for 15 years from 1983, from which he ran a convenience store. When the contractual term expired in 1998 the tenancy continued under Part II of the Landlord & Tenant Act 1954, but before this H had obtained planning permission to extend the premises and applied for a new lease. At the end of 2001, an agreement was reached in principle between H and the local authority under which H was to carry out the extension works himself and the authority would grant him a new 60-year lease of the extended premises at an initial rent of £5,570, reviewable every five years but only to 15% of the open market rental. Although the documentation was not finalised, H was permitted to enter the property to carry out the works and in 2003 he began trading from the extended shop. Two years later the local authority transferred the property to the appellant housing association (IHHA) which was not prepared to grant H a lease on the previously agreed terms. It proposed to grant H a new tenancy of the extended premises for 15 years at an annual rent of £36,000.

Point of dispute: Whether, on the grounds of proprietary estoppel, H was entitled to a new tenancy of the premises on the terms agreed with the local authority.

Held: IHHA's appeal was allowed against the ruling of the judge in the court below that the local authority had waived the "subject to contract" status of the 2001 agreement and represented unequivocally that it would grant H a lease following completion of the works. Although H had been allowed into the building to carry out the works this did not mean that the need for the documents to be executed had been dispensed with. The negotiations had continued on a "subject to contract" basis and one party alone could not convert them from that status to a binding agreement. While the agreement between the parties was still subject to contract, they acted at their own risk. The local authority had done nothing which amounted to a representation that the formal documents would not have to be finalised or executed. The basic requirements for proprietary estoppel had not been made out and it was not unconscionable for IHHA to rely on its strict legal rights.

19 Court of Appeal

Restrictive covenant

* REES V PETERS
(2011) PLSCS 191 – Decision given 21.07.11

Facts: Various 1957 conveyances of land by F to X contained a restrictive covenant, the benefit of which was assigned to the appellants (R) by X in three transfers of property between 1980 and 1987. The covenant was expressly to be made with the "Purchasers and their successors in title" and was "for the benefit of the property hereby conveyed, or the part thereof for the time being remaining unsold and every part thereof" and it prohibited the use of a meadow for anything other than as grassland or grazing, or the erection of any building on it without the written consent of the purchasers. In 1990 P, the respondent, purchased the meadow from F's personal representatives. The transfer stated that the property was sold subject to the covenants contained in the 1957 conveyance but when P's title was registered there was no mention of the 1957 covenant in the Charges register.

Point of dispute: Whether the appellants' appeal should be allowed against the ruling of the court below which dismissed their claim for a declaration that the restrictive covenant in the 1957 conveyance was valid and binding on P and an order to rectify the Charges register accordingly. The judge ruled that the 1957 covenant applied only until the land conveyed by the 1957 conveyance was sold and it therefore ceased to apply once the appellants acquired it, by reason of that acquisition.

Held: The appeal was allowed. The relevant clause was "the purchasers and their successors in title" which would include successors in title to the entire property, and it was not cut down by the later words in the covenant: "for the benefit of the property hereby conveyed, or the part thereof for the time being remaining unsold and every part thereof". The wording of the covenant was sufficient to enable it to be annexed to the land. Successors in title to the entire property, such as the appellants, were entitled to the benefit of the covenant – if a part of the property was later sold the covenant was not annexed to the part sold but it remained annexed to the part retained. The Charges register of the respondent's property should be rectified to refer to the covenant.

TORT

20 Court of Appeal

Nuisance – unpleasant odours escaping through party wall

* HIROSE ELECTRICAL UK LTD V PEAK INGREDIENTS LTD (2011) PLSCS 213 – Decision given 11.08.11

Facts: The appellant, HE, rented a unit on an industrial estate from which it manufactured parts for mobile telephones. The neighbouring premises were occupied by the respondent, PI, which manufactured food additives and coatings. From the beginning of PI's occupation HE had complained about the strong spicy smells emanating from PI's premises which caused a nuisance to HE's premises and were injurious to the health of its employees. It was accepted that the smells had been escaping from PI's property through cracks in a party wall.

Point of dispute: Whether HE's appeal would be allowed against the ruling of the judge in the court below that the smells did not amount to a nuisance in law, taking into account the nature of the neighbourhood, the evidence as to frequency, intensity and effect and the fact that the occupier of a unit on a light industrial estate had to expect the possibility of unpleasant smells. HE contended that the decision had been wrong because (i) PI's use of its unit was not reasonable given the porous state of the party wall between the two units; and (ii) the judge had misinterpreted and misapplied the law laid down in Southwark London Borough Council v Mills and wrongly drawn an analogy from that case which concerned noisy neighbours.

Held: HE's appeal was dismissed. The judge had correctly interpreted the Southwark judgment. In determining whether a nuisance had arisen the court had to apply an objective standard set according to the circumstances and locality of the neighbouring properties. PI's food additive manufacturing was permitted on planning grounds and there had been no objection or intervention by the relevant statutory authorities on health and safety or environmental grounds. The judge had been entitled to conclude that the reasonable user by an occupier of industrial premises on an industrial estate did not become a nuisance because of inadequacies in the party wall between its premises and those of its neighbour.

CONSTRUCTION

21 National Self Build Association (NaSBA) Report

An Action Plan to promote the growth of self build housing

In January 2009 NaSBA launched a report on how an increase in the amount of self building could help the housing and construction sectors. The purpose of this Action Plan, produced in conjunction with the Government, is to promote self build in the UK. NaSBA considers that there is the capacity and the demand to significantly increase the number of self built homes in the UK and that self build could become a major source of housing provision, as it is in many other countries. The aim is to create the conditions to enable more community-led group developments to be built, and to make it easier to undertake refurbishment projects.

http://www.nasba.org.uk/Content/Reports.aspx

GENERAL

22 Ministry of Justice Consultation

Options for dealing with squatting

Deadline for Responses: 05.10.11

The aim of this consultation is to gather more information about the nature and extent of squatting in England and Wales and to invite views on whether, and how, existing criminal and civil mechanisms should be strengthened to deal with the problem. The consultation is presented in four sections:

1. the extent of the problem;
2. the existing law;
3. possible options for dealing with squatters; and
4. the potential impact of these options on enforcement authorities and other organisations.

http://www.justice.gov.uk/consultations/dealing-with-squatters.htm

23 London Assembly Environment Committee Report

For a Rainy Day – the Mayor's role in managing London's flood risk in case of severe rainfall

This report argues that London is at risk of serious flood damage in the event of extreme rainfall and that the Mayor has an important role to play in tackling this. The risks to London presented by tidal flooding have been considerably reduced by the construction of the Thames Barrier, but this does not deal with the problems that could arise in London if it received a comparable amount of rain as that which caused the 2007 floods in other parts of England. This report concentrates on the threat of rapid river and surface water flooding arising from a period of severe rainfall. The report recommends that the Mayor should:

- ensure surface water flood risk information is publicly available;
- extend funding for sustainable drainage schemes;
- retain and show a plan to achieve the target of restoring 15km of rivers in his Climate Adaptation Strategy;
- encourage water companies to work directly with householders to rectify misconnected drains; and
- secure funding for work to reduce flood risk in London.

http://www.london.gov.uk/publication/rainy-day

24 RICS Chart Book

RICS UK Economy & Property Market Chart Book – August 2011

This book presents an overview of the state of the British economy with up-to-date information and data on the following areas:

- financial markets;
- economic trends;
- construction;
- housing market; and
- commercial property.

http://www.rics.org/site/download_feed.aspx?fileID=10091&fileExtension=PDF

25 CLG Statistical Publication

Land Use Change Statistics (England) 2010 – provisional estimates

The latest national statistics on land use change were released on 29.07.11. This release provides details of the latest estimates for 2010 on changes to developed uses, covering information on the following:

- changes to residential use;
- density of new dwellings;
- changes within the Green Belt;
- changes within areas of high flood risk; and
- changes to all developed uses.

In 2010 it is provisionally estimated that:

- 76% of dwellings (including conversions) were built on previously-developed land, down from 80% in 2009;
- new dwellings were built at an average density of 43 dwellings per hectare, up from 41 dwellings per hectare in 2009;
- 2% of dwellings were built within the Green Belt (unchanged since 2004) and 5% of land changing to residential use was within the Green Belt, 2% lower than 2009; and
- 9% of dwellings were built within high flood risk areas, 2% lower than in 2009, and 5% of land changing to residential use was within areas of high flood risk – down from 6% in 2009.

http://www.communities.gov.uk/publications/corporate/statistics/lucs2010provisional

26 CLG Consultation

The use of restrictive covenants in the pub industry and their impact on local communities

Deadline for Comments: 25.10.11

The aim of this consultation is to establish an evidence base regarding the use of restrictive covenants which prevent pubs from continuing in that use after they are sold and the impact this has on local communities. The purpose of the consultation is to build up an accurate picture of the use of restrictive covenants in the pub industry to enable the Government to assess whether any action needs to be taken.

http://www.communities.gov.uk/publications/communities/pubrestrictivecovenants

27 British Property Federation (BPF) Guide

Getting Connected Utilities Connections: A Guide for Developers

Organising utility connections is often cited as the single most common cause of delay in construction projects. Improved technology and greater efficiency has meant that construction times have become shorter, but the connections industry has failed to keep pace.
The degree of complexity involved in getting connections will depend upon the size and nature of the development with larger schemes often involving multiple connections, extensive reinforcement of the network, including designing, planning and constructing the physical infrastructure such as pipelines, cables and switchgear, and the preparation of complex legal agreements. In recent years the regulatory bodies – the Office of Gas and Electricity Markets (OFGEM) and the Water Services Regulatory Authority (OFWAT) – have tried to improve the situation by promoting greater competition within the sector and setting tougher connection performance standards. However, industry surveys continue to show a high level of dissatisfaction with many utility companies and regulators receive significant numbers of complaints from customers and independent connection providers about the delays in getting connections and the poor quality of service delivered by distribution companies.

Improving the current situation will require further changes to the competition regime, the adoption of more efficient working practices by utility companies and tougher penalties for poor performance. However, it is felt that developers and contractors could do more to help themselves. This guide is intended to:

- explain the current system for obtaining new connections to gas, electricity and water services – it does not deal with telecommunications connections;
- describe the role of the major organisations involved in the process; and
- set out the problems that are most commonly experienced and ways that developers could seek to mitigate them.

http://www.bpf.org.uk/en/files/bpf_documents/construction/Getting_Connected_utilities_guide_for_developers.pdf

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THE SUNDAY TIMES 100 BEST COMPANIES TO WORK FOR 2011

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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.

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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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