EVEBRIEF

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COMMUNITY INFRASTRUCTURE LEVY: DETAIL EMERGES

Ben Aldridge
Editor

Since the publication of the last edition of Evebrief, The Localism Bill has cleared the House of Commons. It contains various modifications to the Community Infrastructure Levy (CIL) to make it more flexible and give the Government power to require that the money raised goes directly to the neighbourhoods where development takes place.

Against this backdrop, CLG has released two information documents on CIL. The first is 'Community Infrastructure Levy: An Overview', reported on at item 09, which is a revision of an earlier document and reflects the amendments introduced by the Community Infrastructure Levy (Amendment) Regulations 2011. Potentially of more interest is the information document on CIL Relief, reported on at item 08, which provides details of the principal reliefs available, namely: charitable, social housing and exceptional circumstance relief.

Notably, some of these reliefs will only apply where authorities have pre-approved policies in place. Where they do apply, the provisions for relief are not entirely straightforward, with potential to cause delays to commencement of development in certain circumstances, and pitfalls to be avoided. Developers hoping to take advantage of these reliefs will wish to ensure they read the full document.

Elsewhere, at item 05, we report on the second edition of the RICS Code of Practice for Service Charges in Commercial Property, which sets out best practice for commercial service charges. This has the status of a RICS Guidance Note and will be of interest to owners, occupiers and property managers.

GERALDEVE

LANDLORD & TENANT

01 Court of Appeal

Air-conditioning units on roof of building – damages for trespass – whether respondent management company unreasonably withholding consent for units in light of headlease covenant and freeholder's opposition

* EATON MANSIONS (WESTMINSTER) LTD V
SINGER COMPANIA DE INVERSION SA
(2011) PLSCS 132 – Decision given 18.05.11

Facts: The appellant, SCI, held underleases in two flats in a building which was managed by the respondent (EMW) who also held a headlease granted to it by the freeholder in 1978. The headlease contained a covenant against alterations. In 1980 SCI installed several air-conditioning units on the roof of the building with EMW's consent, but later it added more without consent. In 2006 SCI sought consent to carry out refurbishment works to its flats and to replace the air-conditioning units. EMW approached the freeholder who did not consent to the latter proposal, expressing concerns about potential annoyance to neighbours from noise, vibration and heat. However, SCI proceeded to install the new units. The freeholder expressed continuing concern over their size and visibility and the situation with other flat owners who might also want to install air-conditioning units.

Point of dispute: Whether SCI's appeal would be allowed against the ruling in the court below that it was liable to EMW for damages in trespass. The judge had rejected SCI's contention that EMW had unreasonably withheld its consent to the installation of the units and found that EMW's approach was reasonable in the light of the freeholder's concerns and the risk that by giving consent it would be in breach of its headlease covenants.

Held: SCI's appeal was dismissed. SCI's underlease did not permit it to place anything on the roof, whether with or without consent. The 1980 consent did not assist SCI with regard to any other equipment. SCI therefore had to rely on a collateral right based on the principles of proprietary estoppel. EMW was not obliged to show that the proposed works would give rise to a breach of the headlease covenant in order to justify its refusal of consent, and, in the circumstances, it had been entitled to take a cautious line with regard to the freeholder's attitude. The freeholder's reasons for opposing the units included concern over their size and visibility and these were directly relevant to the headlease covenant. SCI had no realistic prospect of demonstrating that EMW had unreasonably refused consent for the retention of the apparatus or of defending EMW's claim for damages in trespass.

02 Court of Appeal

Breach of landlord's repairing obligations

*GRAND V GILL
2011 PLSCS – Decision given 19.05.11

Facts: The appellant rented a top-floor flat from the respondent long leaseholder. The appellant was originally granted a 12-month assured shorthold tenancy in 2004 and when this expired she continued to occupy the flat under an assured periodic tenancy. The appellant brought proceedings against the respondent for breach of his repairing obligations due to the presence of damp and mould throughout the flat. Malfunctioning of the boiler meant that the flat had no proper heating until it was repaired in 2007 and a broken window was left unrepaired for a year. At first instance the judge held that the primary cause of the damp was the design and structure of the flat, particularly its poor ventilation which was aggravated by water coming in from the roof and guttering, which were not the respondent's responsibility. He held, following the authority of 'Quick v Taff-Ely Borough Council [1985] 2EGLR 50', that a landlord's repairing obligation under s11 of the Landlord and Tenant Act 1985 arose only where there was structural damage and that there was no actionable disrepair if severe condensation was caused by the inherent design of the property. Damage to the internal plaster work caused by damp was decorative and not structural, and he held that the respondent's liability for damp was limited to 10%, reflecting the extent to which the malfunctioning of the boiler and the broken window had contributed to the problem. The total sum of damages awarded was £5,600, of which £5,000 related to the boiler problem and the remaining £600 to the damage caused by the damp.

Point of dispute: Whether the appellant's appeal against the judge's award would be allowed. The main issue was whether the plasterwork could be regarded as part of the structure of the flat so that the damage to it could be regarded as structural damage for which the respondent was liable.

Held: The appeal was allowed. The plaster finish to an internal wall or ceiling formed part of the "structure" of a dwelling house for the purposes of the covenant implied by s11(1) of the 1985 Act, rather than being merely decorative. Plasterwork was generally a constructional finish to which decorations could be applied. The wall and ceiling plasterwork in the flat should properly be regarded as part of the structure of the flat for which the respondent was responsible by virtue of the tenancy agreement and under s11(1). The respondent had breached his repairing obligations and the judge had erred in discounting the full liability figure by as much as 90%. The judge should have awarded (i) full compensation for the plasterwork damage; and (ii) discounted compensation for the remainder of the damage to which the lack of heating had contributed. However, the full liability figure that the judge had awarded for the damp was unrealistic and the figure of £1,275 should be substituted, resulting in overall damages of £6,275.

03 High Court

Tenancy deposit scheme

* POTTS V DENSLEY
(2011) PLSCS 122 – Decision given 06.5.11

Facts: The respondent, D, let a residential property to the appellant, P, on a series of one-year assured shorthold tenancies from May 2007. For the first two years D paid the appellant's deposits into an authorised tenancy deposit scheme but in 2009 the parties agreed that P would withdraw the deposit from the scheme and pay it directly to D. P delayed paying the deposit and in June 2009 D served a notice terminating the tenancy in exercise of a break clause. P paid the full deposit three days later which D offered to refund straightaway, but P insisted on it being paid to an authorised deposit holder. P applied to the county court for an order that D pay her three times the amount of the deposit (s214 of the Housing Act 2004) as a sanction for failing to comply with the requirements of an authorised scheme (s213), within 14 days of receipt. A few days later D paid the deposit into a scheme.

Point of dispute: Whether P's appeal would be allowed against the finding of the county court judge that, although there had been a technical failure to comply with the initial requirement to secure the deposit, it would be unjust to apply the s214 sanction in the circumstances of this case. P sought to distinguish the Court of Appeal ruling in the case of 'Vision Enterprises Ltd (t/a Universal Estates) v Tiensia (2010)' that a sanction could not be imposed where the landlord had complied with the deposit scheme requirements by the date of the hearing. P argued that this decision did not apply where the tenancy had ended before the deposit was paid into an authorised scheme.

Held: P's appeal was dismissed.

i. Section 214(4) of the 2004 Act was mandatory. Once a finding had been made that a deposit had not been secured in accordance with the Act there was no discretion to refuse to make an order for payment of three times the deposit sum. Having found a breach of s213(4) the county court judge had been wrong not to make an order and in purporting to exercise a discretion which was not provided for in the Act.

ii. However, the judge should have found that the relevant provisions had, in fact, been complied with. A landlord could comply with the s213 requirements at any point up to the hearing of the application under s214(4). There were no grounds for making the distinction suggested by P between compliance before and after the tenancy had terminated. Having secured the deposit before the hearing, albeit after the tenancy had terminated, D had a complete defence to P's claim.

04 CLG Notice

Change to Ground Rent Notice

This document notifies leaseholders and landlords of a change made on 26.04.11 to the Notes for Leaseholders contained within the 'Landlord and Tenant (Notice of Rent) (England) Regulations 2004 (SI 2004/3096)'.The notes now make it clear that forfeiture action cannot be taken for non-payment of rent, service charges or administration charges (or a combination of these) unless the unpaid amount is more than £350 or consists of (or includes) an amount which has been outstanding for more than three years.

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

05 RICS Code of Practice

Service charges in commercial property – Code of Practice (UK)

This Code of Practice, which has the status of a guidance note, is the RICS's second edition of this Code. It builds on the first with communication, transparency and timeliness continuing to be central elements. Increased engagement with the legal profession is seen to be a key aspiration, and whilst it cannot override leases it is expected that as leases are renewed or new ones granted they will be drafted to reflect what is seen as best practice, as espoused by the Code. The City of London Law Society and Practical Law Company have drawn up service charge lease provisions which have been specifically designed to comply with the principles and provisions of this Code and web links to these are provided in the guidance.

http://www.rics.org/site/download_feed.aspx?fileID=9649&fileExtension=PDF

PLANNING

06 Court of Appeal

Lawful Use Certificate

*AVON ESTATES LTD V WELSH MINISTERS
(2011) PLSCS 129 – Decision given 16.05.11

Facts: The appellants, AE, owned land on the Welsh coast over which planning permissions had been granted between 1965 and 1973 for the erection of holiday bungalows. Each permission was for a limited period and provided that it would expire on a given date (two in 1985 and two in 1995), at which time the site was to be restored to its former use. Each permission contained a seasonal occupancy condition. The bungalows continued to be used within the seasonal occupancy periods for a long time after the permissions expired, but no enforcement action was taken and the bungalows became immune from enforcement action (s171B, Town and Country Planning Act 1990). In 2008 the respondents (WM) granted certificates of lawfulness of the existing or proposed use of the bungalows as dwelling houses, but stipulated that their use continued to be subject to the seasonal occupancy conditions.

Point of dispute: Whether AE's appeal would be allowed against the High Court judge's determination that the seasonal occupancy conditions attached to the original permissions had not ceased to be enforceable. The judge held that a "permission granted for a limited period", within s72(2) of the Town and Country Planning Act 1990 did not cease to exist after the expiry of that period – what had expired was the time within which the use should have ceased and the restoration should have occurred.

Held: The appeal was allowed. It was a long-standing approach in planning law that a condition in a planning permission could not be enforced if the landowner did not have to rely on the permission to authorise its development. It was difficult to conceive of a condition in a temporary permission under s72 that could sensibly relate to the development once it had ceased to be authorised by that permission. Although the seasonal use condition in the permissions had no express time limit, it was intended to be co-terminous with the authorised development. The document had to be read as a whole in such a way as to avoid internal inconsistency, and it would be illogical to give the seasonal occupancy condition a life beyond the specified date.

07 High Court

Effect of registration of land with benefit of planning permission for residential development as a village green under the Commons Act 2006

** BDW TRADING LIMITED (T/A BARRATT HOMES)
V THE MERTON GREEN ACTION GROUP
[2011] EWHC B7 (QB) Case No. 0CF90671
Decision given 15.02.11

Facts: In March 2007 Monmouthshire County Council appropriated some land at Caerwent, Monmouthshire for planning purposes. In October that year the claimant, BDW, purchased the land from the council, approval of reserved matters was granted and construction of the new residential development commenced in March 2010. The defendants, MGAG, who wished to preserve the land in its existing use, applied for it to be registered as a village green in July 2009. The inspector's report recommending registration as a village green was issued on 07.01.11.

Point of dispute: Whether, notwithstanding any registration of the land as a village green under the Commons Act 2006, s241 of the Town and Country Planning Act 1990 (TCPA 1990) permits development in accordance with the planning permission which has been granted. BDW contended that it did, whereas MGAG argued that development would interfere with the recreational rights of inhabitants whose rights predominated after registration.

Held: BDW's claim was allowed: s241 of the 1990 Act should prevail.

i. The 2006 Act was a statute relating to village green land and nothing in it disapplied s241 TCPA 1990.

ii. The Courts presume that Parliament does not intend an implied repeal of an earlier statute, and the presumption against implied repeal is stronger where modern precision drafting is used. That presumption is also stronger the more weighty the enactment said to have been repealed. TCPA 1990 is a more "weighty" statute than Commons Act 2006.

iii. The enactment of the 2006 Act had not changed the position under the Commons Registration Act 1965. Where there had been a registration of a village green under the 1965 Act, the provisions of s241 TCPA 1990 had full effect. There had not been a re-evaluation of the balance between the public interest in development of land appropriated by a principal authority for given planning purposes so long as planning permission has been granted and the public interest in individuals being able to use for recreational purposes land which has been the subject of registration as a village green.

iv. The language of s241 is general "notwithstanding anything in any enactment".

v. It is for Parliament to strike a balance between the respective public, and private, interests which may be involved in a case such as this.

vi. The provisions of s241 TCPA 1990 prevailed and the Commons Act 2006 had not expressly or impliedly abrogated the effect of those provisions.

08 CLG Publication

Community Infrastructure Levy Relief: Information document

The Community Infrastructure Levy Regulations contain provisions for mandatory and discretionary relief from the Levy. This document, which is not a formal guidance, contains information about the practical application of the Regulations with explanations to charging and collecting authorities about giving relief for charities, social housing and in exceptional circumstances.

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

09 CLG Publication

Community Infrastructure Levy: An Overview

The Community Infrastructure Levy is a planning charge which came into force on 06.04.10 through the Community Infrastructure Levy Regulations 2010. This document, which replaces the previous 'Community Infrastructure Levy: An Overview' published on 18.11.10, sets out the purpose of the Community Infrastructure Levy and how it is intended to operate. The key features of the new charge, its rationale, purpose and how it will work in practice, are explained .

http://www.communities.gov.uk/publications/planningandbuilding/communityinfrastructurelevymay11

10 CLG Letter to Chief Planning Officers

Letter to Chief Planning Officers: Design and Planning

This letter informs planning officers of how changes that are taking place in the organisation of the planning system will affect design in planning. Local communities will have more say in how their local neighbourhoods are developed and how they look but it has been decided that CABE, which until now has been a source of good design expertise and support, can no longer be supported in its current form due to budget cuts. It has been announced that the Design Council is to take over CABE's activities on design for homes and neighbourhoods. In particular it will:

- provide support for and encourage design review of new housing, neighbourhoods and mixed development schemes, particularly at local level;
- provide support for and encourage and enable others to provide design advice at local level and to communities who wish to engage in this area; and
- provide support for and encourage design review for nationally important schemes.

More information on the Design Council can be obtained from its website:

www.designcouncil.org.uk

http://www.communities.gov.uk/documents/planningandbuilding/pdf/1906853.pdf

HOUSING

11 CLG Statistical Release

House Price Index – March 2011

These statistics were published on 17.05.11.

Key points from the release are as follows:

- in March, UK house prices increased by 0.9% over the year and by 1.2% over the month (seasonally adjusted);
- the average mix-adjusted UK house price stood at £205,565 (not seasonally adjusted);
- average house prices were 0.5% lower over the quarter to March, compared to a quarterly decrease of 0.4% over the quarter to December (seasonally adjusted);
- average house prices increased by 1.3% in England during the year, but fell by 0.7% in Scotland, by 2.5% in Wales and by 13.9% in Northern Ireland;
- prices paid by first time buyers were 0.3% lower on average than a year earlier while owner occupiers paid 1.4% more; and
- prices for new properties have increased by 10.7% compared to a year earlier, whilst prices for pre-owned dwellings increased by 0.2%.

http://www.communities.gov.uk/publications/corporate/statistics/hpi032011

12 HCA Monthly Housing Market Bulletin

Monthly Housing Market Bulletin – 30 April 2011

The Housing Market Bulletin provides HCA staff with the latest information on the housing market, the economy and the housebuilding industry.

For March/April the following points are of interest:

- house prices remained broadly stable, with Halifax reporting price rises of 0.1% in March;
- hometrack recorded an increase in both buyers and sellers – this is in line with normal seasonal trends;
- transaction and mortgage lending levels remain at less than half their pre-credit crisis levels and there are few signs of this changing in the short term;
- 40% of transactions are now in cash due to the difficulties of obtaining mortgage finance;
- the economy grew by 0.5% in Q1 2011 and employment rose by 143,000 in the three months to February;
- inflation is running at double Government's target levels; and
- the UK Bank Rate remained at 0.5% in April although the European Central Bank raised its rates to 1.25%.

http://www.homesandcommunities.co.uk/sites/default/files/our-work/housing-bulletin-april2011.pdf

13 CLG Statistical Release

House Building: March Quarter 2011, England

These statistics, which were published on 19.05.11 relate to the period January to March 2011.

Key points from this release are as follows:

- There were 29,140 housing starts, 26% more than during the December quarter 2010 and 88% more than during the trough of the March quarter 2009. However, the figure is still 41% lower than the March 2007 peak.
- Private enterprise starts (seasonally adjusted) were 24% higher than in the December quarter 2010. Starts by housing associations were 37% higher.
- Housing completions increased by 25% from 23,500 in the December quarter 2010 to 29,380 in the March quarter 2011. Between the September 2010 and December 2010 there was a 12% fall.
- Private enterprise housing completions were 23% higher in the March 2011 quarter than in the December 2010 quarter (seasonally adjusted), while housing association completions increased by 29% over the same period.
- There were 106,590 housing starts in the 12 months to March 2011 up by 22% compared with the 12 months to March 2010. In the 12 months to March 2011 there were 105,930 housing completions in England, down by 7% compared with the 12 months to March 2010.

http://www.communities.gov.uk/publications/corporate/statistics/housebuildingq12011

REAL PROPERTY

14 Court of Appeal

Rescission

** BDW TRADING (T/A BARRATT NORTH LONDON)
V J M ROWE (INVESTMENTS) LTD
(2011) PLSCS 127 – Decision given 12.05.11

Facts: In February 2008 contracts were exchanged for the sale by the appellant (JMR) of commercial premises in Watford to the respondent (BDW) for £1.8m. Under Clause 6.2 of the sale agreement BDW could delay completion until certain conditions were satisfied, one of which related to the termination of an existing lease of part of the premises and the payment of compensation to the outgoing tenant. Either party was entitled to rescind the contract if by July 2008 Clause 6.2 had not been complied with, "save where the party purporting to serve such notice is in default of its obligations under this Clause 6.2". Although the conditions had not been fulfilled by July 2008, the parties continued to work towards completion of the sale. However, in November 2008 BDW served notice to rescind the contract on the grounds that JMR had failed to comply with Clause 6.2(vi) and it brought proceedings for the return of its deposit. JMR's argument that BDW had lost its right to rescind since in July 2008 it had chosen to continue with the contract rather than relying on the breach of Clause 6.2(vi) was rejected in the High Court.

Point of dispute: Whether JMR's appeal would be allowed against the judge's finding that non-fulfilment of Clause 6.2 had given rise to an option to determine the contract, which BDW had been entitled to exercise since it had not breached any requirement of Clause 6.2 nor had it waived its right to determine. JMR argued that BDW should not be permitted to rely on its own wrong as the non-fulfilment of Clause 6.2 had in part been caused by BDW's breach of other contractual provisions.

Held: The appeal was dismissed.

i. The principle that a party could not rely on its own wrong did not prevent the operation of rescission. The application of that principle could be modified or excluded under the terms of the contract, and in this case there was such a contractual intention: Clause 6.2 was expressly subject to the proviso that notice of rescission could not be served when the party in question had defaulted on its own obligations under that clause and thus it was not possible to infer any wider disability on rescission in the event of a breach of the other contractual provisions. Had the parties intended any wider qualification this would have been expressly set out in the contract, which was a commercial agreement that had been negotiated and agreed with the benefit of legal advice.

ii. Not all rights to terminate a contract involved a repudiatory breach by the other party, nor did they all have the effect of making the party with the right to rescind make an immediate election. Whether a party with a contractual right to rescind had waived that right by electing to affirm the contract would depend on the terms of the particular contract and the circumstances in which the right had arisen. The right to rescind in Clause 6.2 was an option for the parties to terminate their contractual relationship on the non-fulfilment of certain conditions by a specified date. BDW was entitled to wait until after July 2008 before it served its notice and in the meantime it was obliged to continue to fulfill the Clause 6.2 conditions. Nothing that BDW had done before it served its notice in November 2008 had amounted to a waiver of its rights.

15 Court of Appeal

Expert witness

* STANLEY V RAWLINSON
(2011) PLSCS 118 – Decision given 12.04.11

Facts: The appellants and respondents owned neighbouring properties separated by an old, poorly maintained and leaning red brick wall. The wall collapsed in high winds in October 2001. In September 2007 the appellants commenced proceedings in negligence against the respondents, alleging that the wall had collapsed because the respondents had placed a large quantity of earth against it when they had excavated a swimming pool on their property. Although it was common ground that high winds were the immediate cause of collapse the appellants argued that the wall had been made more vulnerable by the groundworks on the respondents' land. At first instance the judge held that the respondents were not liable in negligence for the costs of replacing the collapsed wall. In reaching this conclusion he dismissed a question raised by the appellants' expert as to why the wall had not collapsed during earlier gusts of wind the speed of which had been measured at a local weather station. He had also commented that the expert appeared to go beyond the usual role of an expert witness.

Point of dispute: Whether to allow the appellants' appeal. They contended that the judge: (i) had acted unfairly towards the expert witness; (ii) had failed to recognise one of the expert witness's theories as to why the wall had collapsed – "the rainwater theory"; and (iii) had erred in placing only limited value on evidence regarding wind speeds recorded at the local weather station.

Held: The appeal was dismissed.

i. The judge had been unduly critical of the expert witness. There was nothing incorrect in an expert advising his client on the evidence required to meet the opposing case.

ii. However, the rainwater theory was never likely to be accepted. The judge's main reason for concluding that the respondents' works were unlikely to have affected the wall's ability to withstand high winds was not due to the view he had formed of the expert's evidence, but because of the insubstantial nature of the respondents' works insofar as they related to contact with the wall and soil disturbance.

iii. The weather station was too far away from the site for the readings from it to represent the wind speed hitting a wall in a cluster of urban buildings.

CONTRACT

16 Court of Appeal

Validity of document execution

* REDCARD LTD V WILLIAMS
(2011) PLSCS 117 – Decision given 20.04.11

Facts: The appellants (W) agreed to purchase the freehold interest in a building divided into five flats from the respondent company (R), together with the leaseholders' interests. The leaseholders were directors and shareholders in R. In the contract R was defined as the "seller" and two of R's authorised signatories signed it. The signatories were also defined as "sellers" in respect of the sale of their leasehold interests in two of the flats. The document did not bear R's common seal or separate signatures stated to be "for and on behalf of" R and W refused to complete, claiming that the agreement was invalid because it did not contain these words, as required by s2 of the Law of Property (Miscellaneous Provisions) Act 1989 and s44(4) of the Companies Act 2006. At first instance it was held that the agreement had not been executed by R and was therefore not binding.

Point of dispute: Whether W's appeal would be allowed against the ruling of the court, allowing R's appeal against the first instance decision that a reasonable reader would have appreciated that the signatories had signed both on their own behalf and on behalf of R.

Held: W's appeal was dismissed. For a document to have the same effect as if executed under the common seal of a company, s44(4) required not only that it be signed on the company's behalf by two authorised signatories, but also that it be "expressed in whatever words to be executed by the company". The exact wording "by or on behalf of" the company was not necessary. R had been defined as the "seller" and the signatures of two authorised signatories appeared under the words "SIGNED… SELLER". Notwithstanding that the wording "by or on behalf of" did not appear, it would be absurd to say that the contract for the sale of the freehold by R had not been executed by that company. If the company was defined as the "seller" the signatures at the end of the agreement under the words "SIGNED… SELLER" meant that the document was expressed to be executed by the company. There was no reason why the legal position should be any different where freehold and leasehold transactions were combined in one document, the authorised signatories being parties to the contract and the defined term "the seller" including both the individual leaseholders and the company.

TORT

17 Technology & Construction Court

Negligence – limitation of action

* RENWICK V SIMON SMITH & MICHAEL BROOKE ARCHITECTS AND OTHERS
(2011) PLSCS 119 – Decision given 05.05.11

Facts: The claimant, R, engaged the defendant architect to design a large basement room beneath their rear garden and the second defendant structural engineer to provide design, construction and advisory services in respect of waterproofing it. The room was completed in November 2001 but shortly afterwards large quantities of water started entering it as the waterproofing had not been carried out effectively. R engaged a waterproofing expert, who advised the use of an internal render as a solution to the problem and completed the work in September 2004. Damp spots which appeared on the ceiling of the room between 2002 and 2008 were repaired by the same company. By the summer of 2008 water had started to accumulate under the floor and the room flooded. In July 2010 R commenced proceedings in contract and tort against all three defendants claiming damages in excess of £900,000. The pleadings did not positively suggest that the second defendant had recommended remedial work or involving the waterproofing expert, but R contended that investigations which the second defendant had carried out since 2008 had enabled water to percolate through the reinforced concrete and/or the internal render.

Point of dispute: Whether the second defendant's claim for summary judgment would be allowed. He argued that R's claims were statute-barred under s14A of the Limitation Act 1980 since he had known about the incidents that had occurred in 2002 and this was the date when the three-year limitation period permitted under s14A started to run.

Held: The claim was dismissed. The starting date for the three-year period under s14A was the earliest date on which a claimant has the necessary knowledge to bring a claim in damages in respect of which the claim is concerned. Such knowledge does not mean certainty, but knowledge of sufficient essential facts to initiate a claim. It was clear that by 2002 R had had sufficient knowledge to justify embarking on preliminaries for issuing a claim. However, R had also pleaded allegedly culpable advice by the second defendant that the problems could be remedied by applying an internal render as an alternative to replacing the defective concrete. Negligent advice relating to the remedial solution which was eventually adopted would lead to a different cause of action, still in negligence, but the damage from that breach of duty would only have arisen at the point when the remedial solution failed. This might be when more than insignificant water penetration first occurred, or when R had the requisite knowledge for bringing an action in respect of that later type of damage. Therefore, it was not appropriate to grant summary judgment.

CONSTRUCTION

18 High Court

Breach of duty – Occupier's liability – apportionment of liability

* FURMEDGE V CHESTER-LE-STREET DISTRICT COUNCIL (2011) PLSCS 131 – Decision given 16.05.11

Facts: In July 2006 a work of art, known as the Dreamspace V, which was an interactive art exhibition consisting of an inflatable PVC structure, broke free of its anchorage in a gust of wind while it was installed at a park in Chester-le-Street. Two people were killed and one injured, resulting in claims for compensation by F. The local council, CLSDC, had invited A, who had designed the artwork, to display it in the park for which the council was responsible. BI, a project manager and organiser of arts events, had been involved in constructing and erecting the structure when it was exhibited in Liverpool and its employees had moved the work to Chester-le-Street, re-erected it there and acted as stewards in and around the structure while it was open to the public there. A was uninsured and had no means to pay any civil liability claim so the two effective parties to the action were CLSDC and BI. It was accepted that A had provided an inadequate risk assessment of the artwork's installation.

Point of dispute: Whether liability should be apportioned between CLSDC and BI. CLSDC accepted that it was liable for failing to recognise the inadequacy of the risk assessment or to take steps to ensure the adequacy of the anchorage, but argued that BI should share liability. BI denied that it had been an "occupier" of the structure such that it owed a duty of care to visitors under the Occupiers' Liability Act 1957, or that there had been any breach of that duty by its employees giving rise to vicarious liability.

Held: Apportionment was granted.

i. For the purposes of the 1957 Act the same premises could have more than one occupier. Occupation would normally require a degree of physical control over the premises, even if it was not entire or exclusive. BI had become an occupier of the structure because: (a) its employees had played a central role in constructing the installation albeit under another party's direction; (b) they had erected the structure in Liverpool, dismantled it, moved and re-erected it in Chester-le-Street; and (c) they had acted as stewards both inside and outside the structure. Therefore, through its employees, BI had become an occupier within the law. BI should have carried out its own risk assessment and it should have addressed the safety issue, having become aware of the structure's instability in windy conditions while it was in Liverpool.

ii. Both of the parties were significantly at fault for failing to recognise the adequacy of the risk assessment and for failing to ensure that the anchorage of the structure was secure for all reasonably foreseeable conditions. Because BI knew about the potential instability of the structure before it moved to Chester-le-Street and had not alerted CLSDC to this, its liability was higher than CLSDC's in the ratio of 55%/45%.

19 English Heritage Guidance

Energy Efficiency and Historic Buildings: Application of Part L of the Building Regulations to historic and traditionally constructed buildings

For historic buildings and buildings of traditional construction an appropriate balance needs to be achieved between building conservation and measures that improve energy efficiency if lasting damage is to be avoided to a building's character and significance and its fabric. This new guidance has been produced to coincide with the revisions to Part L of the Buildings Regulations which came into force on 01.10.10 and provides technical advice to help prevent conflicts between the energy efficiency requirements in Part L of the Building Regulations and the conservation of historic and traditionally constructed buildings.

http://www.helm.org.uk/upload/pdf/EH-partL-web.pdf?1305358565

20 CLG Statistical Release

Code for Sustainable Homes and Energy Performance of Buildings: Cumulative and Quarterly Data for England, Wales and Northern Ireland up to March 2011

This release gives data on the following:

- numbers of post construction and design stage certificates that have been issued for homes in the private and public sectors;
- numbers of dwellings at the design and post-construction stage that have received a three or six star rating between April 2007 and March 2011; and
- average energy efficiency SAP (the Government's Standard Assessment Procedure for assessing the energy performance of dwellings) of new homes.

http://www.communities.gov.uk/documents/statistics/pdf/19058332.pdf

21 CLG Publication

Zero carbon homes: Impact assessment

This impact assessment sets out the evidence and argument for implementing a new definition of zero carbon homes. Developers will be required to deal with all emissions from new build homes falling under the scope of building regulations from 2016. A specified portion of this will have to be dealt with on-site through energy efficiency measures and remaining emissions will have to be dealt with through off-site measures.

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

ENERGY

22 Committee on Climate Change Review

Renewable Energy Review

This review, which was commissioned by the Government in the May 2010 Coalition Agreement, sets the Committee's advice on the potential for renewable energy development in the UK whether existing targets should be reviewed. It contains new analysis of technical feasibility and economic viability of renewable and other low-carbon energy technologies and scenarios for renewable energy deployment. The Review concludes that there is scope for more use of renewable energy to 2020 (up to 45%, compared to 3% today) while higher levels subsequently would be technically feasible.

http://www.theccc.org.uk/reports/renewable-energy-review

GENERAL

23 Ministry of Justice Guidance

The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing – s9

The Bribery Act 2010 received Royal Assent on 08.04.10. The Act creates a new offence under s7 which can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf and s9 of the Act requires the Sec of State to publish guidance about the procedures which commercial organisations can put in place to prevent persons associated with them from bribing. That guidance is contained in this document. In the event of a particular case of bribery occurring, it is a full defence for an organisation that it had adequate procedures in place. The guidance is formulated around six guiding principles, each followed by commentary and examples. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of any particular prosecution is a matter that can only be resolved by the courts, taking into account the particular facts and circumstances of the case, and the onus will be on the organisation seeking to rely on the defence to prove that it had adequate procedures in place to prevent bribery.

http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf

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London (West End)
Hugh Bullock Tel. 020 7333 6302
hbullock@geraldeve.com

London (City)
Simon Prichard Tel. 020 7489 8900
sprichard@geraldeve.com

Birmingham
Alan Hampton Tel. 0121 616 4832
ahampton@geraldeve.com

Cardiff
Joseph Funtek Tel. 029 2038 8044
jfuntek@geraldeve.com

Glasgow
Ken Thurtell Tel. 0141 221 6397
kthurtell@geraldeve.com

Leeds
Mike Roberts Tel. 0113 244 0708
mroberts@geraldeve.com

Manchester
Mike Roocroft Tel. 0161 830 7070
mroocroft@geraldeve.com

Milton Keynes
Simon Dye Tel. 01908 685950
sdye@geraldeve.com

West Malling
Lisa Laws Tel. 01732 229423
llaws@geraldeve.com

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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.

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

Abbreviations
The following abbreviations are used in evebrief:

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

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

*** Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.

** Noteworthy case which does not significantly alter the law or which relates to a relatively obscure point.

* Interesting but non-essential reading.

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

Agency
Simon Prichard Tel. 020 7489 8900
sprichard@geraldeve.com

Compensation & Compulsory Purchase
Tony Chase Tel. 020 7333 6282
tchase@geraldeve.com

Building Consultancy
Michael Robinson Tel. 0161 830 7091
mrobinson@geraldeve.com

Environment & Contamination
Keith Norman Tel. 020 7333 6346
knorman@geraldeve.com

Landlord & Tenant
Graham Foster Tel. 020 7653 6832
gfoster@geraldeve.com

Leasehold Reform
Julian Clark Tel. 020 7333 6361
jclark@geraldeve.com

Minerals & Waste Management
Philip King Tel. 0113 244 0708
pking@geraldeve.com

Planning & Development
Hugh Bullock Tel. 020 7333 6302
hbullock@geraldeve.com

Rating
Jerry Schurder Tel. 020 7333 6324
jschurder@geraldeve.com

Real Property
Annette Lanaghan Tel. 020 7333 6419
alanaghan@geraldeve.com

Valuation
Mark Fox Tel. 020 7333 6273
mfox@geraldeve.com

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For more information on our research services please contact:
Robert Fourt
Partner
Tel. 020 7333 6202
rfourt@geraldeve.com

www.geraldeve.com

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EVEBRIEF

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NORTHERN IRELAND

PLANNING

01 Act of Parliament

Planning Act (Northern Ireland) 2011

This Act received Royal Assent on 04.05.11. It brings forward a number of reforms to the planning system.

http://www.legislation.gov.uk/nia/2011/25/contents/enacted

02 Act of Parliament

High Hedges Act (Northern Ireland) 2011

This Act, which provides for the control of high hedges, received Royal Assent on 03.05.11.

http://www.legislation.gov.uk/nia/2011/21/contents/enacted

03 Department of the Environment Consultation

Draft Supplementary Planning Guidance: Building on Tradition – a Sustainable Design Guide for the Northern Ireland Countryside

Deadline for Comments: 08.07.11

This guide is intended to assist all those involved with sustainable development in the Northern Ireland countryside to understand the requirements of PPS 21 which was published in June 2010. It seeks to address current trends in relation to poor standards of design by promoting quality and sustainable building design.

http://www.planningni.gov.uk/index/policy/supplementary_guidance/guides/draft_design_guidance_to_accompany_pps_21__-_building_on_tradition.htm

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