EVEBRIEF

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LOCALISM: A STRAIGHT TALKING OVERVIEW

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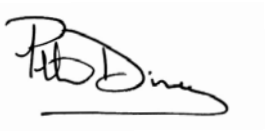
Editor

'A Plain English Guide to the Localism Bill' is reported as the first item in this issue. This provides an overview of the Government's emerging policy and amongst other things confirms the key planning strategies which are being followed in order to make the planning system clearer, more democratic and more effective. The themes of the Bill boil down to the abolition of regional strategies and the Infrastructure Planning Commission; the rise of neighbourhood development plans and the community right to build, driven by local groups; a requirement to consult on large applications; and the reform of the Community Infrastructure Levy, Local Plan making and enforcement rules. The Bill is currently at Committee Stage.

At item 14 we report on a recent Upper Tribunal decision which usefully restates the Rating Law in relation to new properties. The key conclusion is that there is no scope for including in the list a building which is nearly, even very nearly, ready for occupation unless the completion notice procedure has been followed. In this case, the offices required only modest additions to be ready for occupation, ie small power (a ring main and power points), tea points and some full height partitioning.

An item in the Scottish section is of interest. It reports a Scottish Government briefing note which argues strongly for a major reform of the Crown Estate, which, if it goes forward, could see the devolution of control over the management and revenues of the Crown Estate in Scotland to the Scottish Parliament.



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LOCALISM BILL

01 CLG Guide

A Plain English Guide to the Localism Bill – Update

This guide replaces the version which was published in January this year and gives an overview of the main measures of the Localism Bill under four headings:

- New freedoms and flexibilities for local government
- New rights and powers for communities and individuals
- Reform to make the planning system more democratic and effective
- Reforms to ensure that housing decisions are made locally

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

LOCAL GOVERNMENT

02 Centre for Cities paper

Big shot or long shot? How elected mayors can help drive economic growth in England's cities

Under the Localism Bill it is proposed to hold referenda in 11 cities in England on the question of whether they should have mayors. This paper argues that a yes vote could have large potential implications for local economic development policies in these cities as local economic policy making has the potential to work better with a mayoral model of governance.

http://www.centreforcities.org/bigshot

LANDLORD & TENANT

03 Court of Appeal

Vacant possession – exercise of break clause

* IBREND ESTATES BV V NYK LOGISTICS (UK) LTD (2011) PLSCS 156 – Decision given 16.06.11

Facts: The appellant tenant occupied warehouse premises under a lease from the respondent landlord which contained a tenant's break clause permitting the appellant to terminate the lease on 03.04.09 by giving six-months prior notice to the respondent, provided that the rent was up-to-date and the appellant delivered up vacant possession. In September 2008 the appellant gave notice to break the lease in April 2009. Issues relating to the schedule of dilapidations were not resolved until 01.04.09 and the parties agreed that the appellant could carry out some outstanding repair works after the break date but that the keys would be returned on the break date. There were further communications regarding the keys and the necessary repairs were completed by 09.04.09.

Point of dispute: Whether the appellant's appeal would be allowed against the finding of the court below that it had not effectively broken the lease in April 2009 since it had failed to give vacant possession on the break date. The judge found that the respondent had not done anything to waive that failure and it rejected the appellant's contention that a telephone conversation regarding the return of the keys was consistent with the respondent accepting that the lease was at an end.

Held: The appeal was dismissed.

i. At the moment when vacant possession was required to be given, the property had to be empty of people and the purchaser had to be able to assume and enjoy immediate and exclusive possession, occupation and control. The appellant had not given vacant possession on 03.04.09. It was not a condition of the exercise of the break option that the repairs were done, and although the appellant had offered to return the keys, it had not done so. The appellant should have removed everyone from the warehouse on 03.04.09, including its security guard, returned the keys and then gone back in later to complete the repairs as the respondent's licensee.

ii. The respondent had not waived the appellant's failure to give vacant possession on the break date and had made no election between inconsistent rights.

04 Court of Appeal

Tenant's deposit

* HASHEMI V GLADEHURST PROPERTIES LTD
(2011) PLSCS163 – Decision given 19.05.11

Facts: The appellant landlord let a flat to the respondent on an assured tenancy from September 2007. The tenant paid an initial deposit of £6,240 when he signed the tenancy agreement which provided that at the end of the tenancy the appellant could deduct from it any sums necessary to make good any breach of the tenants' repairing obligations under the lease. The appellant did not deal with the deposit in accordance with an authorised scheme under s213 of the Housing Act 2004, but retained it in its own bank account. When the tenant vacated the flat in October 2008 the appellant retained £1,123.99 from the deposit for breaches of the tenant's repairing and cleaning obligations under the tenancy agreement. The respondent brought a claim against the appellant for three times the amount of the deposit as the sanction under s214(4) for its failure to comply with the initial requirements of an authorised deposit scheme. The district judge struck out the claim on the ground that s214 had ceased to apply once the tenancy came to an end.

Point of dispute: Whether to allow the appellant's appeal against the decision of the court below, which had allowed the respondent's appeal against the district judge's decision and ordered the appellant to pay to the respondent the deposit of £6,240 plus three times that sum as the sanctions under s214(3) and (4).

Held: The appeal was allowed. The power of a court to make an order under s214(3) and (4) came to an end with the tenancy and it was for the tenant to make use of the prescribed remedy under s214 – the initial requirement of the authorised scheme was to be dealt with at the beginning of a lease term, not later than its expiry.

05 High Court

Validity of service charge demand under section 20B of the Landlord and Tenant Act 1985

* BRENT LONDON BOROUGH COUNCIL V SHULEM B ASSOCIATION LTD
(2011) PLSCS 168 – Decision given 29.06.11

Facts: The respondents, BLBC, were the freehold owners of five blocks of flats each of which contained between 2 and 32 flats. The appellant, SA, was the lessee of 15 of the flats under 90-year leases from August 1956 which contained a covenant by SA to pay and contribute a proportion of the costs of repairing the exterior of the flats. On 12.03.04 BLBC wrote a standard form letter to all of the lessees setting out estimated costs for repair works to the blocks. BLBC entered into a contract with a building contractor. The work was valued as it progressed with certificates of valuation being prepared to identify the sums payable on account by BLBC to the contractor. On 23.02.06 BLBC wrote to SA seeking payment of its share of the estimated costs within 28 days. SA failed to pay and on 15.12.06 BLBC wrote again enclosing an invoice for the major works. Section 20B(1) of the 1985 Act provided that if any of the costs of any service charge were incurred more than 18 months before a demand for payment, the tenant was not liable to pay that proportion of the service charge. Under s20B(2) that provision does not apply if, within a period of 18 months beginning with the date when the costs were incurred the tenant was notified in writing that they had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by payment of a service charge.

Point of dispute: Whether BLBC could recover the sums due to it under the terms of the lease. In the county court SA's application to strike out the claim was refused, the judge taking the view that the letter of 23.02.06 was a relevant notification for the purposes of s20B(2). SA argued that the only relevant demand was the one dated 15.12.06 and that it did not comply with s20B(1).

Held: SA's appeal against the county court decision was allowed. On the true construction of the relevant clause in the lease, because the letter of 23.02.06 did not ask for a proportion of BLBC's expenses but asked for a contribution based on estimated figures, it did not conform to the requirements of a demand for the purposes of the lease. The 23.02.06 letter was not a valid demand for service charge and did not satisfy the requirement of s20B(2) that the notification contained a statement "that these costs had been incurred" when it did not purport to state what the actual costs were and that these might be greater than the estimated costs.

PLANNING

06 Administrative Court

Change of use – abandonment

* BRAMALL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2011) PLSCS 158 – Decision given 17.06.11

Facts: An old cottage which had been used as a dwellinghouse between 1918 and 1955 fell into disrepair and became unfit for human habitation. Permission to restore the property was refused in the 1950s and in 1956 the owner obtained permission to change its use to a poultry house. That use ceased in 1961 after which time the property remained unused. In the 1990s the claimant, B, acquired the property but his application to the lpa for a lawful development certificate for the property as a dwelling was refused on the basis that residential use had been abandoned for such a long time that the structure no longer had a lawful use as a dwelling. An inspector appointed by the Sec of State held a public inquiry at which B's appeal against that refusal was dismissed.

Point of dispute: Whether B's application under s288 of the Town and Country Planning Act 1990 to quash that decision and remit the case for redetermination should be allowed. The appeal turned on the question of whether B or his predecessor had abandoned their right to resume the use of the property as a dwellinghouse at the time he made his application for a certificate of lawfulness.

Held: The application was dismissed. The test for abandonment was the objective view of a reasonable man having knowledge of all the relevant circumstances. The following four factors had to be considered:

i. whether the property had been used for any other purposes;

ii. the physical condition of the building;

iii. the length of time that it had been used for residential purposes; and

iv. the intentions of the owners of the building.

The relevant circumstances that had to be assumed to be within the knowledge of the reasonable man when applying the test of abandonment included the reasons given for the owner not resuming use after cessation. In this case the inspector had taken all relevant factors into account and there was no justification for the court to award the relief sought by B.

07 Administrative Court

Application to quash planning permission for large urban extension

HERTFORDSHIRE COUNTY COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2011) PLSCS 165 – Decision given 20.06.11

Facts: In 2009 the Sec of State granted planning permission to WSC, a consortium of landowners and house building companies, for the first phase of a 5,000 dwelling scheme. HCC, the claimant, was the education authority for the area. WSC gave a unilateral undertaking pursuant to s106 of the 1990 Act. HCC contended that the decision to grant permission for the development was outside the powers of the Town and Country Planning Act 1990 because the Sec of State had not taken account of the latest development plan in terms of affordable housing and renewable energy requirements, or because he had failed to give adequate reasons for his conclusions on these matters. Under the terms of its undertaking WSC was required to provide for certain necessary infrastructure, but it had been permitted to pay money instead and HCC argued that the provisions allowed for in the unilateral undertaking regarding temporary schools were inadequate.

Point of dispute: Whether to allow HCC's application to quash the Sec of State's decision to grant permission for the development.

Held: The application was granted.

i. In principle there was no legal objection to a developer opting to pay cash to a local authority for a particular item of infrastructure rather than carrying out the works itself. Option provisions in a unilateral undertaking did not raise any different issues in principle.

ii. The combination of positive and negative covenants, and the provisions for the transfer of land in this case, were part of the restrictions on development and use of land within s106.

iii. There was nothing objectionable under s106 in a local authority being offered land on which necessary infrastructure would be built and agreeing the terms of the transfer.

iv. The Sec of State was entitled to conclude that an offer, if accepted, was reasonable and effective to achieve the necessary infrastructure and there was no legally objectionable compulsion.

v. However, on the evidence in this case, the Sec of State had ignored the renewable energy policy and the unilateral undertaking did not secure the provision of temporary school provision that he required and which he thought had been secured. The Sec of State had misinterpreted the effect of the convoluted undertaking, ignoring relevant considerations and relying on irrelevant ones. Accordingly his decision to grant permission would be quashed.

08 CLG Statement

Presumption in favour of sustainable development

The Government has published its proposed wording for the new presumption in favour of sustainable development. Lpas should plan positively for new development, and approve all individual proposals wherever possible. The presumption states that lpas should:

- prepare local plans on the basis that objectively assessed development needs should be met, and with sufficient flexibility to respond to rapid shifts in demand or other economic changes;
- approve development proposals that accord with statutory plans without delay; and
- grant permission where the plan is absent, silent, indeterminate or where relevant policies are out of date.

All of these policies should apply unless the adverse impacts of allowing development would significantly and demonstrably outweigh the benefits, when assessed against the policy objectives in the National Planning Policy Framework taken as a whole.

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

09 English Heritage Guidance

Seeing History in the View

This document presents a method for understanding and assessing heritage significance within views. The method can be applied to any view that is significant in terms of its heritage value and has been designed to provide a consistent and positive approach to managing change. Such views may be selected by a developer or a planning authority as part of the Environmental Impact Assessment of a specific development proposal.

http://www.english-heritage.org.uk/publications/seeing-history-view/

10 CLG Statistics

Planning Applications: March Quarter 2011 (England)

In the period between January and March 2011 local planning authorities undertaking district level planning:

- received 119,400 applications, an increase of around 1% compared with the March 2010 quarter;
- decided 96,800 applications, an increase of 1% compared to the March 2010 quarter;
- granted 78,500 applications, an increase of 2% on the March 2010 quarter; and
- decided 12,000 residential applications, unchanged from the March 2010 quarter.

In the 12 months to March 2011 district level local authorities:

- received 483,500 applications, 4% more than in the previous 12 months;
- decided 439,900 applications, 5% more than in the 12 months to March 2010;
- granted 355,600 permissions, up 6% on the previous year; and
- decided 51,800 residential applications, an increase of 5% on the 12 months to March 2010.

http://www.communities.gov.uk/publications/corporate/statistics/planningapplicationsq12011

11 CLG Issues Paper

How change of use is handled in the planning system – tell us what you think: Issues paper

Comments by 01.09.11

As part of its Plan for Growth, the Government announced that there would be a review of how change of use is handled in the planning system. The main aim of this review is to look at the scope for further liberalisation and how barriers to change of use could be removed in order to help facilitate growth. This paper is the first stage of that review with the intention of promoting discussion and inviting interested parties to submit evidence of any issues with the operation of the current system and areas for possible change.

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

12 Report prepared for the Department of Energy and Climate Change

Analysis of How Noise Impacts are Considered in the Determination of Wind Farm Planning Applications

Planning Applications

This review investigated the way in which noise impacts for wind farms are determined in England, including the methods used in practice to implement the ETSU-R-97 guidance, in order to provide suggestions as to areas where it is considered that more detailed guidance is required. The first part of the review consists of a review of noise assessments which have accompanied planning applications since 2004 when PPS 22 Renewable Energy was issued and which included advice on the assessment of noise from wind farms. The review has highlighted the potential problems faced by local planning authorities dealing with noise assessments for wind farm sites, both in terms of the way the documents are structured and in the variations in the way some factors are taken into account in the assessments. It concludes that best practice guidance is required to confirm and, where necessary, clarify and add to the way ETSU-R-97 should be implemented in practice. This guidance could usefully include advice on the structure of planning conditions and noise limits designed to regulate noise from operational wind turbine sites. There is also an increasing requirement to clarify the approach to be taken with respect to cumulative impact.

http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/wind/2033-how-noise-impacts-are-considered.pdf

LEASEHOLD REFORM

13 CLG Consultation

Updating Leasehold Value Limits – Consultation paper

Deadline for Comments: 12.09.11

This paper sets out proposals for increasing the value limits that determine eligibility to rights for long leaseholders to remain in their properties at the end of their lease terms (Schedule 10 Local Government and Housing Act 1989) and for lease extensions or purchases of freeholds of leasehold houses under the Leasehold Reform Act 1967. These value limits are set by reference to the upper rental threshold for assured tenancies. This was increased on 01.10.10 to take account of inflation in market rents and the proposed corresponding increases to the leasehold value limits will restore consistency with the upper rental threshold for assured tenancies.

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

RATING

14 Upper Tribunal

Newly erected office buildings entered in rating list by VO – units lacking small power points and partitioning – whether hereditaments to be entered in list

** PORTER (VO) V TRUSTEES OF GLADMAN SIPPS
RA-63-2008 – Before the President and NJ Rose FRICS – Decision given 20.05.11

Property: 19 speculatively built office premises, units 1-12 and 14-20 Miller Court, Severn Drive, Tewkesbury, Glos which, before any completion notice had been served in respect of any of the units, were entered in the Rating List by the VO wef 01.05.06. The Valuation Tribunal held that none of them satisfied the requirements necessary for inclusion in the list and directed deletion of the entries. This was because it found that they were incapable of beneficial occupation, which meant that they were not hereditaments at the material day, notwithstanding that completion notices had not been served by the Billing Authority. The works required to complete the units to put them into a usable state included the following:

i. installation of much of the required lighting;

ii. installation of office partitioning;

iii. installation of telephones; and

iv. final coat of paint.

The tribunal considered that the amount of work necessary to make the appeal property capable of beneficial occupation was more than 'de minimis' as contended by the VO – the largest of the three types of units would take approximately six weeks to fit out.

Issue: Whether to allow the VO's appeal against the decision of the Valuation Tribunal.

Decision: The appeal was dismissed. On the evidence any potential occupier of the units would have required small power (a ring main and power points), tea points and at least some full height partitioning to be installed before occupying them as offices. The installation of partitioning would involve further consequential fitting out which items, when provided, would be part of the hereditament. The units were not ready for occupation on the material day and the VT was right to conclude that the units did not satisfy the requirements for entry in the Rating List as hereditaments. In the course of his judgment the President made the following key statement:

"The authorities, in our judgment, establish the following. A building is only a hereditament if it is ready for occupation, and whether it is ready for occupation is to be assessed in the light of the purpose for which it is designed to be occupied. If the building lacks features which will have to be provided before it can be occupied for that purpose and when provided will form part of the occupied hereditament and form the basis of its valuation it does not constitute a hereditament and so does not fall to be shown in the Rating List. There is in consequence no scope for including in the list a building which is nearly, even very nearly, ready for occupation unless the completion notice procedure has been followed."

15 CLG Draft guidance note

Draft guidance note for local authorities on implementing the cancellation of certain backdated business rates liabilities

This note explains how certain backdated rates liabilities relating to the 2005 Rating List will be cancelled and to give examples of when the cancellation applies. It also includes the proposed draft of the secondary legislation which will implement the cancellation.

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

HOUSING

16 CLG Statistical Publication

House Price Index – April 2011

These statistics, released on 14.06.11, are based on mortgage completions during April 2011.

- in April, UK house prices decreased by 0.3% over the year and decreased by 1.1% over the month (seasonally adjusted);
- the average mix-adjusted UK house price was £204,439 (not seasonally adjusted);
- average house prices were 0.3% lower over the quarter to April;
- average prices remained unchanged during the year in England but decreased in Scotland by 1.2%, in Wales by 1.4% and in Northern Ireland by 15.2%;
- prices paid by first time buyers were 1.6% lower on average than at the same time in 2010. Prices for owner occupiers increased by 0.2%; and
- prices for new properties were 4.2% higher on average than a year earlier whilst prices for pre-owned dwellings decreased by 0.6%.

http://www.communities.gov.uk/publications/corporate/statistics/hpi042011

17 Homes and Communities Agency (HCA) Bulletin

Monthly Housing Market Bulletin – 26 May 2011

- most house price indices reported modest falls in house prices during April;
- hometrack recorded an increase in numbers of both buyers and sellers in April;
- HMRC reports that the level of transactions remains historically low, 8% lower than at the same time last year;
- the number of house purchase loans increased by 24% in March, but is still lower than at the same time last year;
- in Q1 2011, 0.5% growth in the economy was recorded, reversing the decline of 0.5% recorded in the previous quarter; and
- in Q1, there were 29,140 housing starts in England, 26% up on the previous quarter and 15% higher than a year earlier. The largest increase was recorded in London (73%)

http://www.homesandcommunities.co.uk/sites/default/files/our-work/housing-bulletin-may2011.pdf

18 Homes and Communities Agency (HCA) Bulletin

Monthly Housing Market Bulletin – 24 June 2011

- house prices saw little change between 26.05.11 and 24.06.11. The only area which saw any difference from the general falling trend was London;
- HMRC reported that the level of transactions remains historically low, 4% lower than this time last year;
- there was a fall in the number of mortgage approvals in April, which will mean fewer completions in the coming months;
- private rents continued to increase across the country, fuelled by strong demand and low supply; and
- the volume of new construction orders fell by 15% in Q1 2011.

http://www.homesandcommunities.co.uk/sites/default/files/our-work/junehousingbulletin2011final1.pdf

19 HCA Statistics

Homes and Communities Agency National Housing Statistics

- In the financial year ending 31.03.11, there were 57,605 housing starts and 64,242 housing completions in England delivered under the National Affordable Housing Programme, the Kickstart Housing Delivery Programme and the Local Authority New Build Programme and the Property and Regeneration Programme.
- 49,361 of the housing starts on site were for affordable homes. Over half of these (52%) were in London and the South East.
- In the year to 31.03.11, 55,856 of the housing completions were for affordable homes, again over half of these being in London, the South East and the South West.

http://www.homesandcommunities.co.uk/sites/default/files/official-statistics-release-140611.pdf

COMPULSORY PURCHASE

20 DCLG Guidance

Circular 06/04: Compulsory Purchase and the Crichel Down Rules

This circular was revised on 09.06.11 with an Appendix KA inserted between Appendices K and L in Part 1 of the Memorandum. This Appendix relates specifically to requests from voluntary and community organisations, and other third parties, who are campaigning to save local assets such as historic pubs, seaside piers or market halls which are under threat when their owners refuse to sell. Local authorities must now give serious consideration to all viable requests put to them by voluntary and community groups for the compulsory purchase of a threatened community asset and must respond formally to such requests giving reasons for their decisions.

http://www.planningportal.gov.uk/general/news/stories/2011/jun11/16jun11/160611_2

REAL PROPERTY

21 Court of Appeal

Mistake – construction of contract

* BASHIR V ALI (2011) PLSCS 159 – Decision given 20.06.11

Facts: B, the appellant, successfully bid at auction to purchase a freehold property from A, the respondent. In the auction particulars it was described as comprising a ground-floor shop, let at a rent of £7,000 per annum, and a self-contained first floor flat to be let for 125 years at completion at an annual rent of £100 (referring to an intended lease-back of the flat to A). The auction catalogue drew the attention of prospective purchasers to the general and special conditions of sale and stated that they were assumed to have inspected properties in which they were interested, although B had not done so. B's bid for the property was successful and he signed a memorandum of sale. He thought that he had bought a shop and a first floor flat, but in fact the property also included a ground floor studio flat. B sought an order requiring the whole property to be transferred to him, subject only to a leaseback of the first floor flat to A for 125 years at a rent of £100 pa, but A claimed that they were obliged only transfer a flying freehold, comprising the shop and first floor flat.

Point of dispute: Whether B's appeal would be allowed against the ruling of the judge in the court below. The judge rejected both parties' cases and held that:

i. the sale contract had to be construed in the light of both the sale price and the actual state of the property, of which they were assumed to be aware;

ii. an objective observer would realise that a mistake had occurred and that the gift of a studio flat with vacant possession could not have been intended; and

iii. the contract should be construed as requiring a leaseback of the studio flat on the same terms as the first floor flat (See Evebrief Volume 32(24) item 11).

Held: B's appeal was allowed. Properly construed the sale contract required a transfer of the entire property subject only to the existing shop lease and the leaseback of the first floor flat. Both the wording of the auction catalogue and the memorandum of sale made it impossible to interpret the contract as being for the sale of only part of the freehold of the property. The documentation described the property by reference to its address and title number and everything pointed to a sale of the entire registered title. If a sale of a flying freehold had been intended this would have been clearly highlighted in the auction catalogue due to the conveyancing and mortgage complications of such an estate. The conclusion of the judge in the court below was also incorrect as this would involve subjecting the sale to an incumbrance that had not been mentioned in the documentation. Where a contract resulted from a bid made at auction the terms were not negotiated – it was for the vendor to decide what he was offering to sell and on what terms, and for the bidder to decide how much to bid in the light of that. If the property was misdescribed and given a low reserve leading the bidder to believe that a mistake had been made, that did not mean that the contract had to be construed so as to rectify the mistake. The mistake could be corrected by construction only if, objectively, it was clear what property and terms the vendor had intended to offer and that the bidder had understood these and intended to bid on that basis. These requirements were not satisfied in this case.

TORT

22 Court of Appeal

Surveyor's negligence

** SCULLION V BANK OF SCOTLAND PLC (T/A COLLEYS)
(2011) PLSCS 157 – Decision given 17.06.11

Facts: In 2002 S, the respondent, bought a two-bedroom flat which he intended to let out. He found the property through a company which specialised in finding investment properties for its clients and the company introduced him to a mortgage broker through whom he applied for a buy-to-let mortgage. The broker instructed the appellant, C, a firm of property surveyors to produce a valuation report for the mortgage lender. The report valued the property at £353,000 with an achievable rent of £2,000. S purchased the property for £300,000 of which £290,766 was funded by the mortgage. It remained unlet for some months and then only achieved a rent of £1,050 per month with the tenant remaining for one year only. S sold the property in May 2006 for £270,000.

Point of dispute: Whether to allow C's appeal against the finding of the court below that C had owned a duty of care to S in respect of the valuation report and had negligently overstated both the capital and rental valuations. C argued that S had not relied on its valuation and that, even if he had, it had owed no duty of care to him.

Held: C's appeal was allowed. The report had been prepared for the mortgage lender. Although C had known that there was a high probability of S seeing the report and knew that he was paying for it, it had not been foreseeable that he would rely on it when deciding to proceed with the purchase rather than obtaining his own valuation advice. This was a different situation to a purchaser buying a home for his own use, when he could be expected to rely on a valuation report prepared for the mortgagee. As it was a buy-to-let purchase it was essentially a commercial transaction and people who invested in property were likely to be wealthier and more commercially astute than those who bought for their own occupation. Unlike owner-occupiers there was no evidence that most buy-to-let purchasers relied on valuations prepared for their mortgagees rather than obtaining their own valuations. A valuer acting for a prospective mortgagee of a buy-to-let property could expect a prudent purchaser to obtain his own advice on the amount of rent that the property was likely to command as well as other issues relating to rental matters. S had established neither foreseeability of damage, nor a sufficient degree of proximity between himself and C, nor that it would be fair, just and reasonable to impose on C a duty of care towards him.

23 Technology and Construction Court

Damages for subsidence allegedly caused by neighbouring tree roots

* BERENT V FAMILY MOSAIC HOUSING
(2011) PLSCS 155 – Decision given 25.05.11

Facts: B, the claimant owned the freehold of a Victorian house in a mature tree-lined street. The back garden backed onto a deep railway cutting, beyond which were two tunnels that had been constructed in 2003 for the Channel Tunnel railway. The next door property, which was owned by the first defendant housing association, had a mature tree in its front garden. The second defendant, lpa, owned two trees on the pavement outside B's property. B's property had shallow foundations and in 2003 it suffered leaks due to damage to drains. Repairs to the drains in 2005 meant that they were no longer having a deleterious effect on the underlying soil, but the internal and external walls continued to crack and by 2009 the building had suffered extensive damage. B brought proceedings against the defendants for damages in nuisance and negligence, arguing that they had wrongfully caused or permitted the roots of their trees to encroach onto her premises causing subsidence. B contended that the defendants had breached their common law duty of care to take steps to minimise or prevent such damage as might be caused by the close proximity of their trees to her property.

Point of dispute: Whether B's claim would be allowed. The issues which arose were:

i. the cause of the damage to her property in 2003;

ii. whether and, if so, the extent to which the defendants were liable for continuing damage after 2003; and

iii. whether B was entitled to damages.

Held: The claim was allowed in part.

i. To establish liability for tree damage it had to be established that the trees were an effective and substantial cause of the damage, but they did not have to be the sole cause. The damage to B's property was related to the 2003 tunneling works and no evidence had been produced regarding tree root induced subsidence. Although the contribution to the damaged soil structure from each of the defendants' trees was material, in 2003 it was unlikely to have been the predominant cause.

ii. Regarding the question of whether the defendants were liable for continuing damage that depended on whether they had acted reasonably. By April 2009 it was clear that their trees were causing the problem and it would have been reasonable to remove them in the autumn of 2010. The defendants' failure to do this until February 2011 meant that they were both in breach of duty.

iii. B was awarded damages in the sum of £5,000 for gross inconvenience and loss of amenity.

CONSTRUCTION

24 Statutory Instrument

SI 2011/1515 The Building (Amendment) Regulations 2011

These Regulations, which come into force on 15.07.11, amend the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 ('the 2007 Regulations') and the Building Regulations 2010 ('the 2010 Regulations'). A number of small errors are corrected, including amendment of the definition of 'renovation' in the 2010 Regulations to clarify that repairing a flat roof is not included in the requirement to upgrade insulation in Reg 23. A new paragraph is added to the list in Schedule 3 of work that is exempt from the requirement to give a building notice or to deposit full plans when carried out by persons specified in that Schedule and adds to those bodies in paragraphs 7, 11 and 12 which are able to register persons for the purposes of self-certification schemes.

http://www.legislation.gov.uk/uksi/2011/1515/contents/made

25 RICS Consultation

RICS draft guidance note – Party wall legislation and procedure (6th edition)

Deadline for Comments: 25.07.11

This consultation draft provides guidance for RICS members who accept instructions in circumstances where the Party Wall etc Act 1996 will apply and the procedures to be followed where it does. It also addresses the surveyor's role when acting for a client in the early stages in these procedures, as well as for surveyors who are formally appointed to administer the Act's dispute resolution mechanism.

https://consultations.rics.org/consult.ti/party_walls/consultationHome

26 CLG CIRCULAR

Circular 02/2011: The Building Act 1984, Building (Amendment) Regulations 2011

Circular letter: Building (Amendment) Regulations 2011

This Circular draws attention to these Regulations (see item above) and the letter informs building control bodies about the changes to the Building Regulations, which include a change to repairs of flat roofs and to Competent Persons Schemes.

http://www.communities.gov.uk/publications/planningandbuilding/circular022011

http://www.communities.gov.uk/publications/planningandbuilding/divletterbuidingregs2011

TRANSPORT

27 London Assembly Report

The future of road congestion in London

This report highlights the need for a new approach to managing the conflicting demands for London's roads. At present more than ten million journeys are made in private motor vehicles in London each day, there are nearly 7,000 buses running along approximately 700 routes and almost 90% of London's freight is carried by road. As the population increases and new jobs are created, the amount of traffic is predicted to grow significantly and this Report calls on the Mayor and Transport for London (TfL) to set out how they are going to manage congestion in the short and longer term, specifically:

- to update projections for future growth and how this will affect congestion;
- to set out detailed benchmarks for measuring congestion;
- to consider further expansion of car clubs;
- to consider changes to freight delivery practices;
- to assess the pilot lane rental scheme for road works; and
- to assess the pros and cons of constructing new river crossings.

http://www.london.gov.uk/publication/future-road-congestion-london

ENERGY

28 Department of Energy and Climate Change Publication

Microregeneration Strategy

This strategy, which was published on 22.06.11, focuses on the non-financial barriers to microgeneration which need to be tackled in order to maximize the effectiveness of the financial incentives that the Government has put in place. The actions set out in the Strategy will support the increased uptake of small scale localised energy production, projects which can involve individuals, local neighbourhoods and communities in becoming involved with generating local heat and power. These projects are important in helping to meet renewable and carbon targets as domestic space heating is the single largest contributor to the UK's carbon emissions from heat.

http://www.decc.gov.uk/en/content/cms/meeting_energy/microgen/strategy/strategy.aspx

GENERAL

29 London Wildlife Trust Report

London: Garden City?

This report highlights the problem of London's gardens being changed to hard surfaces for practical reasons. It is estimated that garden greenspace in the capital's gardens is being lost at a rate of the equivalent of an area two and half times the size of Hyde Park each year, driven by recent trends in garden design which tend to focus on the architecture of a garden but ignore the functional and environmental benefits of vegetation and soils.

http://www.wildlondon.org.uk/Portals/0/News/tabid/71/mid/414/newsid414/265/Default.aspx

30 RICS Research Report

The future of private finance initiative and public private partnership

Over the last decade the private sector has taken a more active role in financing, designing, developing and operating essential infrastructure. Instrumental in the expansion of partnership based procurement has been the international roll out of the Public Private Partnership (PPP) model which has formed an essential pillar of economic growth across the world. More than 40 countries have used it across a diverse range of infrastructural provision and service delivery arrangements. This report presents an evidence base to enable the RICS to inform and guide members and other stakeholder groups on the challenges and opportunities afforded by PPPs. The key findings from the report are presented under a series of thematic headings and reflect the views and experiences of a diverse range of key stakeholder groupings across five key PPP markets, namely Australia, Canada, India, the UK and the US.

http://www.rics.org/site/download_feed.aspx?fileID=9846&fileExtension=PDF

31 RICS Publication

RICS Policy – Public Private Partnerships: A New Landscape

The UK's PPP and PFI programme has delivered 698 new infrastructure projects totaling £53bn in capital value. Activity peaked in the mid-to-late 2000s with activity being particularly strong in the civil infrastructure (eg roads, rail and waste) and social infrastructure (education, health, prisons etc) sectors. The global recession and the 2010 change in government has significantly changed the PPP market in the UK with some major programmes, such as the Building Schools for the Future, being suspended, while in Scotland the devolved SNP government, which is ideologically opposed to the PFI model, has suspended a number of projects. This report considers the future of the PPP model in the UK and a number of key global markets in a new economic environment where there are tighter credit conditions and less government spending. Although not suitable for all projects the need to attract private sector finance for infrastructure development will support a significant role for PPPs over the next decade and the construction industry, financial institutions and governments will need to work together to create a PPP system fit for the new economic world.

http://www.rics.org/site/download_feed.aspx?fileID=9849&fileExtension=PDF

32 RICS Publication

RICS Policy – Public Private Partnerships: Summary

This document contains a summary and recommendations drawn from 'The Future of The Private Finance Initiative and Public Private Partnerships' reported at item 31 above.

http://www.rics.org/site/download_feed.aspx?fileID=9848&fileExtension=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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EVEBRIEF

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SCOTLAND

PLANNING

01 Scottish Government Publication

The Potential of Development Charges in The Scottish Planning System

This report contains the findings of a five-month research study from Autumn 2010 to Spring 2011 on the potential of development charges in the Scottish Planning System. The research considered the impact that the economic downturn has had on the ability of the property development market and the public sector to deliver upfront physical infrastructure to enable new developments to be delivered efficiently, particularly in Scottish urban areas.

http://www.scotland.gov.uk/Publications/2011/06/29082709/0

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GENERAL

02 Scottish Government Briefing Note

Scotland Bill – Crown Estate

This note argues that the Crown Estate in Scotland, which includes its sea bed and most of the foreshore, needs to be reformed. This is because the revenues from its management do not benefit Scotland directly, but go to HM Treasury. It explains how the Estate, which is potentially very valuable in terms of its capacity for electricity generation, could be better managed for Scotland's benefit and outlines proposals for change.

http://www.scotland.gov.uk/Resource/Doc/352275/0118354.pdf

03 Scottish Government Guidance

The Flood Risk Management (Scotland) Act 2009: Delivering Sustainable Flood Risk Management

The Scottish Government is committed to reducing the risk of future flooding events and to improving Scotland's ability to manage and recover from any events which do occur. The passing of the Flood Risk Management (Scotland) Act in 2009 was an important step towards better flood risk management and this guidance sets out statutory guidance to the Scottish Environment Protection Agency (SEPA), local authorities and Scottish Water on fulfilling their responsibilities under the Act to:

- manage flood risk in a sustainable manner; and
- consider the social, environmental and economic impact of exercising their flood risk management functions.

http://www.scotland.gov.uk/Publications/2011/06/15150211/0

WALES

HOUSING

04 Statutory Instrument

WSI 2011/1409 The Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011

This Order, which comes into force on 01.12.11, amends the level of annual rent above which a tenancy cannot be an assured tenancy under paragraph 2 of Schedule 1 to the Housing Act 1988, increasing the amount from £25,000 to £100,000.

http://www.legislation.gov.uk/wsi/2011/1409/contents/made