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evebrief

Editorial

The Courts have been busy in the early part of the New Year and we therefore report a high volume of decisions in this edition.

The outcome of many cases often appears to be determined by the relevance of one word or phrase. Item 10 is no exception and summarises the Court's conclusions on a council tax banding appeal. It followed the intensified use of a motorway, causing a material reduction in value of the subject properties. In this instance it would not have accorded with the purpose of the legislation to construe the word "physical" narrowly. There need not be a physical change in the state of a locality and if a change clearly affected the value of the property, it was held a tax reduction should be possible.

Arguably, the most important Government publication in this edition at item 07 concerns the Planning and Reform Bill, one of the pillars of the current planning legislative programme. Crucially, it provides the enabling powers to establish the Community Infrastructure Levy (item 08), which seems to reincarnate former initiatives such as the planning charge and planning gain supplement, albeit with the distinction of revenue being collected locally. If implemented, it is said that the CIL will provide funding for infrastructure to support housing and economic growth. There will need to be a high degree of accountability to ensure revenue is allocated appropriately.

Jeremy Dharmasena

GeraldEve

Landlord & Tenant

01

High Court

Negotiations for lease — demising alternative parking spaces in new lease

***** PICTURE WAREHOUSE LTD V CORNHILL INVESTMENTS LTD
(2008) PLSCS 17 — Decision given 23.01.08

Facts: PW was the tenant of business premises under a 25-year lease from January 1980. In 1997 CI acquired the headlease of the building, much of which was used as a multi-storey car park. In 1999 the parties entered into negotiations for a new lease under which PW would move to a better position on the ground floor, give up two of its three parking spaces on the first floor and instead use two designated spaces at the front of the building. The rent was reduced by £500. Problems arose over the use of the parking spaces at the front of the building and in a letter dated 20.10.2000 CI informed PW that parking would be allowed for a maximum of 30 minutes. PW moved premises but the new lease finally agreed in 2003 made no reference to the allocated parking spaces at the front of the building and other tenants started to occupy them. PW applied for a new business tenancy under Part II of the Landlord and Tenant Act 1954 on the same terms as the previous lease ie including parking rights.

Point of dispute: Whether PW's appeal should be allowed against the ruling of the county court judge that no parking rights could be included in the new lease as CI had only given it a bare license to park in front of the building. CW argued that a term relating to parking should be included in the new lease by virtue of s32(3) of the 1954 Act which provided that rights enjoyed by a tenant in connection with its holding should be included in a tenancy granted under s29 of the Act.

Held: PW's appeal was dismissed. The judge had been correct to hold that the 2003 lease had correctly made no provision for outside parking and that such right as it enjoyed to outside parking was to be found in the 20.10.2000 letter. CW's rights relating to parking were therefore outside the 2003 lease and thus outside s32(3). Part II of the 1954 Act could not be used to enlarge the tenant's holding — the rights conferred by s35 to determine the terms of a tenancy in default of agreement between the landlord and tenant did not go that far. CW had failed to establish any case for having a term in the lease giving it an irrevocable right to park two cars outside the building.

02

Leeds County Court

Effectiveness of repairing covenant — liability of landlord in nuisance

***** JACKSON V JH WATSON PROPERTY INVESTMENT LTD
(2008) PLSCS 4 — Decision given 08.01.08

Facts: J was the tenant of a basement flat under a 125-year lease granted in 1996. Under the terms of the lease the landlord (WPI) covenanted, inter alia, "at all times during the term well and substantially to repair… and maintain… the exterior of the estate… and the entrance ways paths and staircases main walls party walls roof foundations and all structural parts thereof… with all necessary reparations and amendments whatsoever". As a result of a defect in the concrete light wells adjoining J's flat, water seeped into it. J accepted that there had not been a breach of WPI's covenant to repair as such, but contended that the wording of the covenant went beyond a mere covenant to repair and that there was a continuing nuisance.

Point of dispute: Whether J could succeed in a claim for damages from WPI for the inconvenience he suffered and/or the diminution in his flat's value. WPI denied that the ingress of water amounted to a nuisance in this case since the defect in the concrete had been present prior to the grant of J's lease. Accordingly, the principle of caveat lessee (beware lessee) applied which meant that the original landlord would not have been liable to J. In those circumstances no liability for a continuing nuisance was created when the lease was assigned to WPI in 1997.

Held: J's claim was dismissed. In the absence of an effective covenant to repair in the lease J could not rely upon the law of nuisance to impose an obligation to rectify faulty construction work by the original landlord. On its proper construction it was not possible to find that the wording of the covenant went beyond a mere covenant to repair. The premises were in the same physical condition as when they were constructed so no want of repair had been proved for which WPI could be liable under the repairing covenant.

Planning

03

Court of Appeal

Permission to appeal by third party not involved in initial proceedings

***** GEORGE WIMPEY UK LTD V TEWKESBURY BOROUGH COUNCIL
(2008) PLSCS 18 — Decision given 24.01.08

Facts: Since 2002 GW had owned a site shown on the local plan as allocated for residential development. The first respondent owned a neighbouring site that had not been so allocated and issued proceedings under s287 of the Town and Country Planning Act 1990, as a party aggrieved by the allocation in the local plan, seeking to quash the decision of TBC to adopt the local plan. The proceedings were served on and opposed by TBC, but GW was not served and did not apply to be joined as a party. The judge at first instance allowed the first respondent's application, holding that the decision to allocate the site for residential development was irrational because TBC had failed to have regard to the policy guidance contained in PPG 3 and the draft guidance in PPS 3. He ordered that the parts of the plan appertaining to the site should be quashed. TBC did not appeal against that decision.

Point of dispute: Whether GW could succeed in its application to appeal against the judge's decision. The first respondent argued that permission to appeal should be refused because GW had not been a party to and had taken no part in the proceedings before the judge.

Held: GW was granted permission to appeal. CPR 52.1(3)(d) defines "appellant" as "a person who brings or seeks to bring an appeal". Interpreted in the light of paragraph (e), which defines "respondent", paragraph (d) did not require an appellant to have been a party to the proceedings in the court below. In this case the appeal had a real prospect of success. An application by GW to join in the proceedings in lower court would probably not have succeeded as its interest in defending the local plan was not sufficient to justify adding it as a party. However, now the circumstances had been changed by TBC's decision not to appeal.

04

High Court

Appeal against refusal of permission for development in Great West Road area of London — failure to refer to Mayor of London's report in favour of development — assessment of risk to highway safety from advertisements

***** LONDON AND BATH ESTATES GROUP LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) All ER (D) 179 (Jan) — Decision given 25.01.08

Facts: LBE sought planning permission to construct an office building with LED advertising panels in the Great West Road area of London, near to the M40 on a stretch of road with a 40 mph speed limit and no hard shoulder. On appeal against refusal of permission the inspector appointed by the Sec of State identified two main issues: the effect of the development and advertisements on the character, appearance and amenity of the area and, secondly, the effect of the advertisements on highway safety. Dismissing the appeal the inspector concluded that the development would harm the amenity of the surrounding area and that the advertisements would present a risk to public safety as they could distract drivers on a busy stretch of road which had been classified as a motorway.

Point of dispute: Whether LBE's appeal should be allowed against the inspector's decision. LBE argued that the inspector should have referred to the report of the Mayor of London which favoured development, and that he had also erred in failing to refer to a specific policy concerning the Great West Road area which "encouraged" development to secure economic regeneration. LBE also contended that the inspector had erred in treating the stretch of the M40 in question as a motorway and should have taken into account its particular characteristics before coming to a conclusion on the advertising issue.

Held: LBE's appeal was dismissed. It would have been appropriate for the inspector to refer to the Mayor's report but the fact that it was not mentioned did not mean that it had not been taken into account. Reading the decision as a whole the inspector had applied the underlying principles of the policy even though it was not expressly mentioned. On the effect of the advertisements on the highway, the inspector had been technically correct to deal with those on the basis that the road was a motorway as it had been classified as such by the Highways Authority. In reaching his conclusions he had been correct to consider the characteristics of the road and driver behaviour.

05

Administrative Court

Challenge to refusal of permission for residential development in semi-rural location

***** ROLAND BARDSLEY HOMES LTD V FIRST SEC OF STATE
(2008) PLSCS — Decision given 16.01.08

Facts: In 2003 planning permission was granted for residential development on a site in Oldham, consisting of 18 apartments in two blocks and one house. In 2005 RBH sought permission to build 21 apartments and a new access road on the same site. This was refused by the local planning authority because it considered the design and scale of RBH's proposed development would be out of keeping with the character and appearance of the surrounding area. RBH's appeal to the Sec of State against the refusal of permission was dismissed, the inspector finding that notwithstanding the 2003 permission the development would be unsuitable. He considered that RBH's proposed buildings would be taller and more prominent than those approved in 2003, which would have been contained by the existing surrounding woodland and replacement planting as they would not have exceeded the predominant height of the trees. It was also found that the modern design and materials of the proposed buildings would be inappropriate in a semi-rural location.

Point of dispute: Whether RBH's appeal should be allowed against the inspector's refusal of permission. RBH argued that the inspector had: (i) misunderstood the tree survey information; (ii) acted unfairly by basing his conclusion upon the issue of "containment" which neither party had raised; and (iii) thereby erred in his assessment of the fall-back position under the 2003 permission.

Held: RBH's appeal was dismissed. The inspector had visited the site and was entitled to exercise his expert judgment in assessing the "predominant" height of the trees. He had had to exercise his planning judgment in assessing their prevailing height and the reference to the predominant height was just part of a broader assessment of RBH's proposals and their effect upon the landscape. The term "containment" did not raise a new issue, but was just a label for the relationship between the development proposals and the setting, both in general terms and with regard to the trees on the site — those matters had been raised at the inquiry. With regard to the fall-back position the inspector had correctly determined RBH's application on its merits while having regard to the fact that the earlier permission could be implemented. Having compared the two schemes he had found that RBH's scheme would breach development policies while the approved scheme would not.

06

Administrative Court

Allocation of land for housing in local plan

***** UK COAL MINING LTD V NORTH WARWICKSHIRE BOROUGH COUNCIL
(2008) PLSCS 10 — Decision given 17.01.08

Facts: UKCM owned a former colliery site at Polesworth and Dordon that it wanted to develop for housing but it was not allocated in the draft local plan produced by NWBC. At a public inquiry when objections to the draft plan were considered the inspector recommended that land for up to 425 dwellings in the Polesworth/Dordon area should be allocated for 2007-11 and indicated that UKCM's site was the most suitable for this development. NWBC then modified the plan: (i) housing allocations would be considered for 2001-11: (ii) the overall housing requirement for the plan period should be reduced; and (iii) the true shortfall in housing provision was only 271 units. Accordingly, a modification to the plan to include UKCM's site for housing development was unnecessary. UKCM made further objections arguing that the development plan required under the Planning and Compulsory Purchase Act 2004 would emerge later than previously assumed so that a gap in housing provision would arise in the meantime, but these objections were rejected and the plan was adopted.

Point of dispute: Whether the relevant parts of the plan should be quashed under s287 of the Town and Country Planning Act 1990. UKCM argued that NWBC had failed to take into account a material consideration, namely the timing issue raised in its objections and that the reasons given for its decision were inadequate.

Held: UKCM's claim was dismissed.

(i) That there was no significant shortfall in housing provision was a matter of planning judgment which NWBC was entitled to make. It had not failed to take into account a material consideration since, in the absence of a housing shortfall that needed to be addressed, the timing of the production of the development plans was irrelevant. Once it had concluded that the housing shortfall should be calculated from 2001-11 instead of 2006-11 it was entitled to reach different conclusions to the inspector's.
(ii) NWBC's reasons for adopting the plan had been inadequate as it had not properly explained why it had come to the conclusion that any housing shortfall was not significant. However, this failure had not substantially prejudiced UKCM. Even if NWBC had adopted the inspector's recommended policies they would have been incorporated on the basis of lesser housing need and there was no guarantee that the plan would have favoured development on the UKCM's site.

07

Planning Portal Special Feature

Planning Bill — in a nutshell

The Government is publishing three crucial bills that are central to its planning and environmental legislative programme. These are the Planning and Reform Bill, a Bill on climate change (which has already been published) and one on energy, (due later this month). The most important feature of the Planning and Reform Bill is the fact that it sets out a new single regime for handling key infrastructure projects including power stations, reservoirs, airports, railways, wind farms and waste projects, and it establishes a new Infrastructure Planning Commission. The Bill also provides the enabling powers to establish the Community Infrastructure Levy (see item 08 below) which will give local authorities the ability to "charge" developers to help fund new infrastructure provision.
http://www.planningportal.gov.uk/england/professionals/en/1115315410774.html
http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/reformplanningsystem/planningbill/

08

CLG Paper

The Community Infrastructure Levy

In its recent Planning Bill the Government has introduced provisions for the new Community Infrastructure Levy (CIL), the aim of which is to increase investment from the private sector in infrastructure for new and growing communities. CIL forms part of a wider package of funding for infrastructure to support housing and economic growth. The purpose of CIL is to ensure that a development contributes fairly to the mitigation of the impact that it makes on the local community ie by ensuring that the development is delivered, and in a more sustainable way, while the increases in land values that are generally seen as a result of development mean that contributions can be required without removing incentives to develop. CIL will be a standard charge decided by designated charging authorities and levied by them on new development. For example, it could be levied as a certain amount per dwelling or per square metre of development. This document explains the background to CIL and contains detail on the relevant provisions in the Planning Bill. It also explains how it is currently envisaged that CIL will operate, in particular:

- how the CIL will be set;
- how the CIL will be spent;
- the future of planning obligations;
- how, when and by whom CIL will be paid; and
- the approach to exemptions and thresholds

The document also explains how the Government will be continuing to develop the detail of the CIL in consultation with stakeholders and what local planning authorities will be expected to do during the period running up to and beyond the implementation of CIL.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/674479

09

CLG Impact Assessment

Impact Assessment of the Planning Policy Statement: Planning and Climate Change

This Impact Assessment has been prepared to assess the Planning Policy Statement: *Planning and Climate Change* which we reported at item 04 of the last edition of Evebrief (Volume 30(01) i04). The climate change PPS sets out how planning, in providing for new homes, jobs and infrastructure, should help shape places with lower carbon emissions and resilient to the climate change which is now seen as inevitable. The PPS has three main aims:

- to ensure that developments brought forward reduce their carbon impact through appropriate choices of location, layout, and by using renewable and low-carbon energy;
- to ensure that the planning process provides effective and positive support to proposals for renewable and low-carbon energy supplies; and
- to shape sustainable communities which are resilient to the impacts of climate change, including more extreme weather events such as hotter and drier summers, periods of intense rainfall, flooding and rising sea levels

This impact assessment aims to inform stakeholders about the likely impacts of the PPS and has been prepared in the light of comments received during public consultation on the draft PPS and the Partial Regulatory Impact Assessment.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/10

Rating

10

Administrative Court

Whether house should be revalued for council tax after falling in value due to material increase in nearby motorway traffic

****** CHILTON-MERRYWEATHER V HUNT
(2007) PLSCS 265 — Decision given 18.12.07

Facts: H and others, who lived near a motorway, applied to have their homes placed in a lower council tax band as the increased noise and fumes from the intensified use of the motorway had led to a material reduction in the value of their houses caused in whole or in part by a change in the physical state of the dwellings' locality within s24(4)(a)(ii) and 24(10) of the Local Government Finance Act 1992.

Point of dispute: Whether the appeal of C-M, the listing officer, should be allowed against the ruling of the local valuation tribunal that the change in the use of the motorway could be a "change in the physical state of the dwelling's locality" for the purposes of s24(10) of the Local Government Finance Act 1992, and could thus form the basis of an alteration in the valuation band.
C-M argued that the word "physical" should be given a narrow meaning involving some kind of physical change, such as the construction of a new road, not merely an increase in traffic levels.

Held: C-M's appeal was dismissed. An increase in noise and fumes owing to the intensified use of a nearby road was capable of being a "change in the physical state of the dwelling's locality" under s24(10) and could provide the basis for a change in council tax bands. The purpose of list alteration provisions was to produce a fair valuation for council tax, and if a change occurred which clearly affected the value of a property it should be possible to obtain a tax reduction.

11

High Court

Basis of valuation of drive-through restaurant on rent review

***** MCDONALDS REAL ESTATE LLP V ARUNDEL CORPORATION
(2008) All ER (D) 48 (Jan) — Decision given 16.01.08

Facts: In 1986 M was granted a 50-year lease of a warehouse which it redeveloped into a drive-through restaurant. The first rent review was on 29.09.90 and every five years thereafter.

Point of dispute: How the premises should be valued on rent review — on the basis of the actual building on the site, or as a hypothetical modern warehouse development.

Held: Notwithstanding that there was no warehouse on the site, the value of the property had to be calculated on the basis that it was a standard warehouse unit. The fact that, upon the grant of planning permission and consent by the landlord, it could be used for retail trade was also to be taken into account when calculating the rent.

Leasehold Reform

12

House of Lords

Leasehold enfranchisement — meaning of "house" — whether property "designed or adapted for living in"

****** BOSS HOLDINGS LTD V GROSVENOR WEST END PROPERTIES
(2008) UKHL 5 — Decision given 30.01.08

Facts: K was the tenant of a property built in 1730 and consisting of a basement, ground floor and four upper floors. For over 200 years it was used as a single private residence, but latterly the three lower floors were used for dressmaking although the upper floors were still in residential use. Photographs taken in 2003 showed that the rooms on the upper three floors had been stripped back to their basic structure — plaster had been hacked off walls and some ceilings and floorboards removed. However, the three lower floors did not appear to have been stripped out and doors, wiring, carpets and light fittings remained on the ground floor. K served a notice on G seeking to acquire the freehold of the property and then assigned the lease to BH.

Point of dispute: Whether BH was entitled to acquire the freehold. G's argument that because it was not physically fit for immediate residential occupation the building was not "designed or adapted for living in" was upheld in the county court and the Court of Appeal.

Held: BH's appeal was allowed. The words "designed or adapted for living in" in s2(1) of the Leasehold Reform Act 1967 required consideration of the property as it was originally built and the purpose for which it was originally designed. It was then necessary to consider whether the property had been adapted for another purpose and if so what. What had to be decided was whether the purpose for which the property had been designed or adapted was "for living in". The test adopted by the lower courts, namely whether a property was fit for immediate residential occupation, could lead to arguments and uncertainty and, in any event, s1(1) of the 1967 Act as originally enacted required in every enfranchisement the tenant to have occupied the house as his only or main residence. In this case the property was designed for living when it was built and, apart from the last ten years, all, or at least half of it (the three upper floors), had been used and laid out for residential purposes. The six floors of the building had not been substantially altered from the original construction as a house in single occupation, even though the property had become dilapidated and that the three residential floors had been stripped out to a basic structural shell. However, the three upper floors remained "designed" to be lived in and structurally the three lower floors appeared to be structurally laid out substantially as they were when the property was in single residential occupation. The ground floor was still fitted out in such a way as to give it a residential appearance.

13
High Court
Right to acquire new lease — assignment of notice — Section 43(3) Leasehold Reform, Housing and Urban Development Act 1993

***** TYPETEAM LTD V ACTON
(2007) All ER (D) 375 (Nov) — Decision given 23.11.07

Facts: T owned the freehold of a block of flats, one of which was owned by R. On 26.08.05 R purported to exercise his right to acquire a new lease by serving a notice on T under s42 of the Leasehold Reform, Housing and Urban Development Act 1993. On the same day R entered into a contract to sell his flat to A and agreed to assign the benefit of the s42 notice to him. The sale was completed on 01.09.05 and an assignment entered into. On 21.09.05 the transfer of the leasehold interest was registered.

Point of dispute: Whether the s42 notice was deemed to have been withdrawn pursuant to s43(3) of the 1993 Act. T's argument was that the assignment of the rights under the s42 notice had been ineffective as it had purported to transfer them immediately rather than when the transfer of the legal interest in the property was registered.

Held: T's appeal was dismissed against the lower court judge's ruling that it was permissible to read s43(3) as referring to an assignment taking effect both at law or in equity. The judge had not erred in concluding that "assignment" within s43(3) was capable of including an equitable assignment of the s42 notice.

14
Lands Tribunal
Price payable for freehold of block of flats — deferment rate

****** HILDRON FINANCE LTD V GREENHILL HAMPSTEAD LTD
(2008) PLSCS 14 — Decision given 10.01.08

Facts: GH was the nominee purchaser on behalf of the tenants of a block of flats in Hampstead, London NW3 on a collective enfranchisement claim under s13 of the Leasehold Reform, Housing and Urban Development Act 1993. The Leasehold Valuation Tribunal (LVT) took as the valuation date the date of the landlord's counternotice (January 2005) at which time the tenants' existing underleases had just over 63 years left to run. It applied a deferment rate of 7% and fixed the purchase price at £2.089m, which included a figure of £50,000 for the porter's flat.

Point of dispute: Whether the landlord's (HF) appeal should be allowed against the LVT's valuation. HF contended for a higher price of £2.983m in January 2006, or £2.935m in January 2005, arguing that there was no reason to depart from the deferment rate of 5% laid down in respect of flats by the Lands Tribunal in *Earl Cadogan v Sportelli (2007)*. However, GH's expert took the view that a rate of 8% was appropriate due to the special circumstances of this case: the rate that would be charged on bank loans for speculative property investment and the rates applicable to commercial property investment in the Hampstead area; the very different management and risk profile of this property compared with those in *Sportelli*; the property's location and its degree of obsolescence; and possible difficulties in obtaining possession when the existing leases expired.

Held: HF's appeal was allowed.

(i) In *Sportelli* the Lands Tribunal had identified a general deferment rate which LVTs were to treat as being generally applicable although subject to variation in particular cases where that was justified by the evidence. The evidence in this case did not justify a departure from the deferment rate applied in *Sportelli.* A purchaser of this property would not consider that deficiencies in the building were sufficiently significant to justify an increase in the deferment rate. Sportelli had left open the possibility of an additional allowance where there was a prospect of exceptional management difficulties but a purchaser of this particular block of flats would not, at the valuation date, have anticipated such difficulties.
(ii) The LVT was correct to have taken the valuation date as being the date of HF's counternotice in this case.
(iii) The appropriate figure to be attributed to the porter's flat was £200,000 as its potential sale value. Taking everything into account the price payable for the freehold was £2.835m.

Housing

15

CLG Statistical Release

House Price Index, October 2007

In October 2007 the mix-adjusted average house price in the UK was £220,195, up from £220,111 in September 2007 (not seasonally adjusted). UK annual house price inflation in October 2007 was 11.3%, up from 10.8% in September 2007, while annual house price inflation in London was 17.7%, up from 16.5% in September. For the three months to October 2007 UK annual house price inflation was 11.1% and 17.1% in London.
http://www.communities.gov.uk/documents/housing/pdf/583837

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CLG Survey Report

English House Condition Survey 2006 Headline Report

This summary report presents key findings from the 2006 English House Condition Survey and reports on the progress that has been made since 1996 and 2001 towards improving living conditions in England. The areas which are covered by the Survey are:

- decent homes (including the new Housing Health and Safety Rating System);
- disparities in living conditions;
- energy efficiency;
- quality of the local environment; and
- deprivation

http://www.communities.gov.uk/documents/housing/pdf/headlinereport2006

Compulsory Purchase

17

Administrative Court

Whether compulsory purchase order unnecessary and unfair — whether correct test applied for proportionality of decision

***** BELFIELDS LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) PLSCS 5 — Decision given 21.12.08

Facts: A local authority made a compulsory purchase order (CPO) under s226(1) of the Town and Country Planning Act 1990 in relation to 10.2 hectares of land consisting mainly of disused industrial land and terraced housing. The CPO was confirmed by the Sec of State, but B, which owned land affected by it, applied for an order to quash the CPO. Policy statements 17 and 18 of Circular 6/2004 stated that an acquiring authority should be sure that the purposes for which it was making the CPO justified interfering with the human rights of those whose land was affected.

Point of dispute: Whether B's application should be allowed. It contended that the Sec of State had failed to apply the correct test in determining whether there was a compelling case in the public interest that could justify the acquisition. It submitted that the court was required to consider objectively the proportionality of the decision — to be proportionate the CPO had to be the "least intrusive" means of achieving the public benefit sought or reasonably necessary to achieve that benefit.

Held: B's application was dismissed. In a case such as this proportionality was not to be determined by requiring the CPO to be the "least intrusive" means of achieving the public benefit, as this test had been rejected in a number of High Court and Court of Appeal cases. The policy requirement that a CPO would not be confirmed in the absence of a compelling case in the public interest fairly reflected the necessary balance required under the Human Rights Act 1998. Both the decision letter and the inspector's report made it clear that they were weighing the degree of uncertainty that the development would not take place in the absence of the CPO against the contribution that the site would make to the regeneration of the area. This approach was proportionate and the Sec of State was justified in concluding that there was a compelling need for the CPO.

18

Administrative Court

Whether failure to consult on location of city academy fatal to compulsory purchase order

***** WALKER V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) All ER (D) 156 (Jan) — Decision given 24.01.08

Facts: A local authority had issued a compulsory purchase order (CPO) under s226(1)(a) of the Town and Country Planning Act 1990 in respect land, including land owned by W, which formed part of a larger site for which outline planning permission had been granted for a city academy. There was public concern about possible inadequate public consultation on the choice of the site and the fact that its construction would necessitate the demolition of homes. An inspector appointed by the Sec of State held a public inquiry into the CPO. Objectors argued that the initial inadequate consultation was fatal to the CPO, referring to ODPM Circular 06/2004 which recited in paragraph 11 that "the recreation of sustainable communities through better balanced housing markets is one regeneration objective for which the s226(1)(a) power might be appropriate" but also referred to the need for consultation in relation to the framework for local development and local plans. Objectors also maintained that some of the funding for acquiring and clearing the site had been provided under a "housing market restructuring implementation agreement" and could not be used for the academy project as it included no housing element. The inspector agreed that the consultation had not been extensive but considered that there was no specific need to consult on the CPO itself. The Sec of State accepted the inspector's recommendation that the CPO be confirmed.

Point of dispute: Whether W's applications would be allowed: firstly, questioning the validity of the CPO under s23 of the Acquisition of Land Act 1981 and, secondly, for judicial review of the inspector's decision.

Held: Both W's applications were dismissed.

(i) The Sec of State had to be satisfied that there was a compelling case in the public interest for the CPO to be made. The CPO procedure itself did not require consultation. The inspector had to consider other matters, such as the fact that outline planning permission had been obtained after conducting a proper procedure and the fact that all of the arguments concerning the adequacy of the underlying scheme had been properly canvassed and considered at the inquiry.
(ii) On a proper construction of the wording of the implementation agreement it was consistent with the provisions for targets for housing demolition and with the wording of paragraph 11 of the 2004 Circular.

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Statutory Instrument

SI 2007/3617 The Compulsory Purchase (Inquiries Procedure) Rules 2007

These Regulations, which came into force on 29.01.08, replace the Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990 and the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994, prescribe the procedure to be followed in connection with public local inquiries relating to the authorisation of compulsory purchase orders.
http://www.opsi.gov.uk/si/si2007/pdf/uksi_20073617_en.pdf

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CLG Circular
Circular 01/2008: The Compulsory Purchase (Inquiries Procedure) Rules 2007

This Circular provides guidance on these new rules. The main reason for the Rules is to take account of changes introduced by Part 8 of the Planning and Compulsory Purchase Act 2004 and the subsequent Compulsory Purchase of Land (Written Representations Procedure) (Ministers) Regulations 2004 (SI 2004/2594). The changes to the Rules also reflect the commitment given by the former Office of the Deputy Prime Minister in 2002 to combine into a single set of unified Rules the previously separate arrangements which applied to ministerial and non-ministerial CPOs. Changes have also been made that reflect the current practices adopted in procedure rules employed in other types of inquiries.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/15

Real Property

21
Court of Appeal
Adverse possession — Claimants relying on without prejudice offer of defendant to buy property as demonstrating acknowledgement of claimants' title

***** OFULUE V BOSSERT
(2008) All ER (D) 236 (Jan)

Facts: O, who was the registered owner of a property, went to live abroad in 1976. In 1981 B (Mr B and Ms B) moved into the property which was then in a poor state of repair. They carried out various repairs and paid the rates, but no rent. In 1987 O instructed solicitors to commence proceedings for possession. In 1990 B counterclaimed on the basis that they had carried out extensive work to the property and had been offered a 14-year lease. B offered to purchase the property in August 1991 but that offer was rejected. B increased their offer in January 1992 in a without prejudice letter but that offer was also rejected. In August 1996 Mr B died and O's proceedings for possession were automatically stayed in August 2000. In November O served notice to quit on Ms B. Further applications were followed by another notice to quit in August 2003 and in September O issued proceedings seeking possession of the property.

Point of dispute: Whether O's appeal should be allowed against the lower court judge's ruling that Mrs B had acquired the property by adverse possession and that O's title had been extinguished. This required consideration of two questions: (i) whether the claim by Mr and Ms B, in their defence to possession proceedings, that they were tenants of the property prevented them from having the necessary intention for adverse possession; and (ii) whether Mr and Ms B had acknowledged O's title for the purposes of s29 of the Limitation Act 1980.

Held: O's appeal was dismissed. It was settled law that it was necessary only to show that the person who claimed to have acquired property by adverse possession had been in possession without the consent of the paper owner and intended to possess. A person who wrongly believed that he was a tenant could occupy property in such a way that he had possession. He did not have to show that he had an intention to exclude the paper owner. B's 1990 defence and counterclaim was an acknowledgement of O's title, but not that he was entitled to possession and the pleading did not stop time running in Ms B's favour for the purpose of the 1980 Act. The 1992 letter, in which Mr and Ms B made an offer to buy the property, was inadmissible in evidence as it was a without prejudice communication.

22

High Court

Easement for access over neighbouring property's rear yard — whether right extended to claimant's proposed redevelopment plans

****** RISEGOLD LTD V ESCALA LTD
(2008) PLSCS 13 — Decision given 17.01.08

Facts: R (the claimant) and E (the defendant) owned adjacent industrial units to the rear of which was a yard belonging to E. R's land had the benefit of an easement which was granted by a 1993 conveyance to enter upon "such part of the yard… as is necessary for the purpose of carrying out maintenance repair rebuilding or renewal to the Property". The right was subject to "the minimum disturbance and inconvenience being caused to the owners and occupiers of the Adjoining Property". R obtained planning permission to demolish the existing single-storey building on its property and to construct a five or six-storey block containing commercial units and flats, but to carry out this work R would need access to the yard and to erect temporary fencing and scaffolding on it. The arm of a tower crane which would be erected on R's land would also overhang the yard. E objected to the proposals and disputed that they came within the terms of the right granted by the 1993 conveyance.

Point of dispute: Whether R should be granted a declaration that it was entitled to enter upon the yard for the purpose of its proposed works. E argued that these were not "rebuilding or renewal" within the terms of the 1993 grant as that meant rebuilding the existing structure but not a complete redevelopment. R contended that the grant should be construed more widely and that "renewal" of the land could encompass the construction of anything for which planning permission was granted.

Held: R's claim was dismissed. Its entitlement to enter the yard depended not on the terms of the planning permission but upon the construction of the express grant in the 1993 conveyance. The terms of the grant implied that it had to be construed strictly and the right did not extend to the construction of something completely different on the dominant owner's land. Implicit in the term "rebuild" was that there should be a substantial replacement of the existing property with something that was broadly equivalent to what had been there before. Whether a proposed redevelopment fell within the scope of the right was a matter of fact, but R's plans were neither a rebuild nor a renewal of its property and, accordingly, it did not have the rights that it sought over the yard to carry out the redevelopment.

23

CLG Consultation Paper

Local Authority Property Search Services: Charges for Property Search Services
Deadline for Responses: 18.04.08

This paper contains the Government's proposals on charging by local authorities for property search services. These proposals, which implement the Office of Fair Trading's (OFT) recommendations on charging contained in its 2005 market study, support the implementation of Home Information Packs to ensure better quality and timeliness of information, and improved value for money for consumers. The aim of the proposals, in conjunction with CLG's guidance on access arrangements is also to facilitate a level playing field between local authorities and personal search companies in the delivery of property searches.
http://www.communities.gov.uk/documents/housing/pdf/propertysearchesconsultation

24

CLG Good Practice Guidance

Personal searches of the local land charges register and other records held by local authorities

This guidance sets out good practice for local authorities and personal searchers on the conduct of personal searches of the Local Land Charges Register and of other records held by local authorities for inclusion in a property search. The guidance is intended to:

- address the OFT's recommendation that local authorities make available all the unrefined information they hold that is needed to compile a Local Enquiries Search and that this is done on terms that do not advantage an authority's own search activities over personal searchers;
- promote good practice and working relations between local authority staff and personal searchers;
- confirm that all information should be made available to personal searchers wanting to complete a Local Enquiries Search;
- assist local authorities in providing access for personal searchers to both the Local Land Charges Register and other records, while allowing staff to manage and maintain those records;
- provide an overview of legislation which applies to property searches and the duties of local authorities in facilitating these searches; and
- ensure that local authorities do not act anti-competitively

http://www.communities.gov.uk/documents/housing/pdf/personalsearchguide

Contract

25

High Court

Liability to pay estate agent's commission where vendor makes fraudulent pre-contract misrepresentations rendering the contract unenforceable

****** JOHN D WOOD (RESIDENTIAL AND AGRICULTURAL) LTD V CRAZE
(2007) 50EG 108 — Decision given 30.11.07

Facts: C instructed JDW, an estate agent, to sell his flat. JDW arranged a viewing with a potential purchaser who agreed to buy it for £1.5m. Contracts were subsequently exchanged, but before completion the purchaser became aware of a history of noise problems with the flat although C had omitted to mention anything about this in any of the pre-contract documentation. The purchaser rescinded the contract on the ground of C's misrepresentation and completion did not take place.

Point of dispute: Whether C was liable to pay JDW's commission. JDW argued that its commission was payable as there had been an unconditional exchange of contracts. In the alternative, it was entitled to damages for breach of an implied term in the agency agreement between itself and C.

Held: C's appeal was allowed against the master's decision not to strike out JDW's claim.

(i) The master should have decided the matters of law and construction that had been put before him.
(ii) An exchange of "unconditional contracts" meant an exchange of contracts that would be enforceable by law. C's misrepresentation rendered the sale contract void and therefore unenforceable by him. Therefore the event that would have triggered the entitlement to commission had not occurred and no commission was payable.
(iii) However, in order to give business efficacy to the agency contract a term should be implied into it that C would not make fraudulent representations that would render any contract of sale unenforceable and thus prevent a sale. By making pre-contractual fraudulent misrepresentations C had breached that term and JDW was entitled to damages. These would be assessed by reference to what would have happened had C not made the representations. The court would have to assess whether JDW had suffered any loss as a result of the breach.

Tort

26

High Court

Professional negligence

***** LINGFIELD PROPERTIES (DARLINGTON) LTD V PADGETT LAVENDER ASSOCIATES
(2007) PLSCS 263 — Decision given 17.12.07

Facts: LP retained PLA, a firm of planning consultants in connection with an application for planning permission for a retail and business park on the site of a disused factory in Darlington. Outline permission was granted in 1991, subject to various conditions, including that the development should be commenced within five years and that a scheme of landscaping should be submitted for approval before works commenced. LP commenced the works before the deadline, but did not submit a landscaping scheme. The local authority obtained a court declaration that the planning permission had lapsed since the conditions precedent to the development had not been fulfilled and accordingly the works carried out by LP had been unlawful.

Point of dispute: Whether LP could succeed in an action against PLA for negligence and breach of duty. LP's argument was that PLA had been engaged to obtain the outline permission and thereafter to ensure that the attached conditions were satisfied. The partner in charge of the case should have submitted a scheme of landscaping within the due time or informed LP of the need to do so. PLA submitted that it had not been specifically instructed to ensure that all necessary consents and approvals were in place by December 1996.

Held: LP's claim was dismissed. On the evidence LP had not instructed PLA to submit a landscaping scheme in October 1996 and PLA was not under any duty to do so. PLA was not a firm of landscape architects and would have had to instruct one, involving time and cost and this would have been expected to be the subject of further instructions from LP.

Construction

27

CLG Guide

Improving the energy efficiency of our buildings — A guide to energy performance certificates for the construction, sale and let of non-dwellings

This guide provides an introduction to the Regulations relating to energy performance certificates for non-dwellings on construction, sale or let in England and Wales. Energy performance certificates (EPCs) promote the improvement of the energy performance of buildings and form part of the final implementation in England and Wales of EC Directive 2002/91/EC on the Energy Performance of Buildings.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/guidancenondwellings

28

CLG Statistical Report

Land Use Change in England: Residential Development to 2006 — Update — January 2008

- It is provisionally estimated that in 2006, 75% of new dwellings were built on previously-developed land, including conversions. This compares with 77% in 2005.
- It is provisionally estimated that in 2006, new dwellings were built at an average density of 41 dwellings per hectare, compared with 40 dwellings per hectare in 2005 and 25 per hectare between 1996 and 2002.

http://www.communities.gov.uk/documents/planningandbuilding/pdf/679228

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www.hmso.gov.uk
www.egi.co.uk
focus.focusnet.co.uk
www.newlawonline.com

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

SCOTLAND

Planning

01

Consultation Paper
Development Management
Deadline for Responses: 02.04.08

This paper concerns new secondary legislation on procedures relating to the processing of planning applications, now known as "development management". Attached to the paper are draft Town and Country Planning (Development Management Procedure) (Scotland) Regulations which set out the new procedures. The proposed changes to development management are specifically concerned with:

- making the processes around planning applications fit for purpose and responsive to different types of development proposal;
- improving efficiency in determining planning applications; and
- improving public involvement in the consideration of proposals requiring planning permission

http://www.scotland.gov.uk/Resource/Doc/208398/0055270.pdf

02

Consultation on Changes to Planning Application Procedures: Impacts on Communities — Summary Sheet
Deadline for Comments: 02.04.08

This paper summarises the proposed changes to development management, as contained in the Consultation reported at item 01 above. It is aimed at members of communities who will be affected by the changes and sets out the main proposals on how people will be able to obtain information on local planning issues and get involved in planning in their areas focusing on "development management" — the consideration of applications for planning permission.
http://www.scotland.gov.uk/Resource/Doc/208314/0055243.pdf

03

Scottish Government Publication

National Planning Framework 2 SEA Environmental Report: Non Technical Summary

As part of the preparation of the National Planning Framework (see Evebrief Regional Supplement Volume 30(1) i04), the Scottish Government is carrying out a Strategic Environmental Assessment (SEA). SEA is a method for considering the likely environmental effects of certain plans, programmes or strategies produced by public sector organisations and aims to:

- integrate environmental factors into policy and decision making;
- improve policies, and enhance environmental protection;
- increase public participation in decision making; and
- facilitate openness and transparency of decision making

The key purpose of this Environmental Report is to give consultees the environmental information that they need to enable them to respond to the NPF consultation which closes on 15.04.08.
http://www.scotland.gov.uk/Resource/Doc/208295/0055240.pdf

04

Scottish Government Publication

National Planning Framework 2 SEA Annex to the Environmental Report: Assessment of Strategic Alternatives

This supplementary paper has been prepared as part of the SEA of Scotland's Second National Planning Framework (NPF). It sets out the range of strategic alternatives that were considered as part of the early development of the NPF and identifies their respective environmental effects. These findings were used to inform the development of a "preferred option" for the NPF, which now forms the Discussion Draft NPF.
http://www.scotland.gov.uk/Resource/Doc/208924/0055360.pdf

05

Scottish Government Statistics

Planning Performance Statistics 2004-07

These statistics are taken from returns made by local authorities to the Scottish Government's Planning Directorate. The following are the key trends:

- there has been a slight increase in the number of applications being dealt with within the statutory target of 80% of all applications within two months — to 61%;
- the total number of householder applications being dealt with in three months has remained fairly static at around 90%;
- there has been a 1% increase in the number of major planning applications being dealt with by Councils within the four month period — to 46.5%;
- the number of minerals cases dealt with by planning authorities doubled last year;
- the approval rate for all applications remains steady at around 91%;
- the number of cases dealt with by delegated officers continues to increase and is now 85.3%;
- there is a continuing rise in the number of s75 agreements being concluded;
- there has been a substantial rise in the number of applications for telecommunications equipment being dealt with within three months, from 53.9% in 2005/06 to 70.6% in 2006/07;
- 84% of cases notified to Scottish Ministers were determined within 28 days against the 80% target; and
- 60% of local plans are over five years old compared to 70% in July 2005. However, 17% of local plans are still more than 15 years old

http://www.scotland.gov.uk/Resource/Doc/210804/0055721.pdf

Housing

06

Scottish Government Social Research Paper

The Effectiveness of Housing Land Audits in Monitoring Housing Land Supply in Scotland

This research report provides an assessment of current practice in respect of preparing and publishing Housing Land Audits in Scotland and makes a number of recommendations to help improve the consistency and accuracy of the auditing process.
http://www.scotland.gov.uk/Resource/Doc/209380/0055425.pdf

Transport

07

Scottish Government Social Research Paper

Implementation of aspects of SPP17 Planning for Transport

This report outlines the findings of research into the implementation of aspects of SPP17 Planning for Transport and its associated documents. The main purpose of SPP17 is to promote the integration of land use and transport.
http://www.scotland.gov.uk/Resource/Doc/210723/0055712.pdf

General

08

Scottish Government Statistical Survey

Scottish Vacant and Derelict Land Survey 2007

This bulletin presents a summary of results from the 2007 Scottish Vacant and Derelict Land Survey. The following are the main conclusions:

- There were 10,240 hectares of derelict and urban vacant land recorded in the 2007 survey, of which 2,660 hectares (26%) were urban vacant and 7,850 hectares were derelict (74%).
- Since 2002 there has been a decrease of 448 hectares in the total amount of derelict and urban vacant land being recorded in the survey, from 10,687 to 10,240. This land has been brought back into productive use or naturalised.
- Since 2002 an average of 616 hectares of derelict and urban vacant land was brought back into use each year.

http://www.scotland.gov.uk/Resource/Doc/210308/0055593.pdf

WALES

Rating

09

Statutory Instrument

WSI 2008/7 (W.3) The Non-Domestic Rating (Demand Notices) (Wales) (Amendment) Regulations 2008

These Regulations, which came into force on 02.02.08, change the information which is to be supplied when rate demand notices are sent by billing authorities in order to reflect the change made to the Local Government Finance Act 1988 by the Rating (Empty Properties) Act 2007. This provides that unless the Welsh Ministers order otherwise the normal liability for an unoccupied hereditament would be the same as for an occupied hereditament.
http://www.opsi.gov.uk/legislation/wales/wsi2008/pdf/wsi_20080007_mi.pdf

NORTHERN IRELAND

Planning

10

Consultation Paper

Public Consultation Draft — Addendum to PPS 7: Residential Extensions and Alterations
Deadline for Responses: 11.05.08

Comments are invited on this Draft Addendum to Planning Policy Statement, PPS 7, "Quality Residential Environments" on Residential Extensions and Alterations. It sets out the NI Planning Department's policy for the extension and/or alteration of residential property. Its key objectives are to ensure that an extension or alteration to a residential property does not harm residential amenity, is sympathetic with the original property, respects the existing character and appearance of neighbouring properties and the surrounding area, and contributes towards a quality environment.
http://www.planningni.gov.uk/AreaPlans_Policy/PPS/pps7_Addendum/pps7_addendum_draft.pdf

11

Statutory Rule

SI 2008/17 The Planning (Environmental Impact Assessment) (Amendment) Regulations (Northern Ireland) 2008

These regulations, which come into force on 12.02.08, amend the 1999 Regulations by giving effect to Article 3 of the European Directive 2003/35/EC insofar as it affects public participation in the decision making process for applications and appeals relating to development for which environmental impact assessment is required.
http://www.opsi.gov.uk/sr/sr2008/pdf/nisr_20080017_en.pdf