Legal & Parliamentary

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evebrief

Editorial

In the nick of time items 14 and 15 bring in the Regulations making the much discussed changes to the empty rates regime in England and Wales, but not Scotland, from 1 April 2008. Those with vacant factories and warehouses will pay full rates once their property has been continuously empty for six months. Other vacant, non-domestic property will be subject to full rates after only three months.

Our team of rating surveyors has been considering the options available to businesses seeking to avoid the new tax. Rating law is complex but the possible options include:

- intermittent occupation: occupation for a minimum of six weeks will qualify the property for another period of relief;
- charitable occupation: charities are entitled to 80% mandatory rates relief on properties they occupy;
- incomplete built or refurbishment: incomplete properties cannot be assessed until they are considered complete for rateable occupation; and
- properties not capable of beneficial occupation: this includes damaged or uninhabitable buildings

These examples are a short summary. More options may be applicable in individual circumstances. Billing authorities are now issuing their demands for 2008/09 and ratepayers with empty properties should consider whether they can take any action to mitigate liability.

Item 17 sets out an important Leasehold Reform case in which Gerald Eve associate, Keith Gibbs, gave evidence on behalf of the respondent. When considering a "standing house" approach the Tribunal adopted a site proportion value of 55% of "entirety value" whereas historically, the proportion had been 50% in the subject locality of central London.

Hilary Wescombe

GeraldEve

Budget

01

Delivered 12.03.08

The following are of note to the property industry:

(i) **Real Estate Investment Trusts** — The Government announced that there will be a consultation during 2008 on the simplification and clarifation of the tax treatment of dividends from REITs directly into share incentive plans.
(ii) **Stamp duty land tax —** The SDLT exemption will be extended to new flats which meet the zero-carbon criteria, applying retrospectively from 01.10.07. The SDLT lease duty rule will be abolished for all residential transactions and the threshold is being increased for non-residential transactions from £600 to £1,000. For most property transactions below £40,000 it will not be necessary to complete an SDLT 60.
(iii) A new **property authorised investment fund** (PAIF) regime will commence on 06.04.08.
(iv) The Government is to explore the case for additional targeted and cost-effective VAT measures that will help to bring empty homes back into use.
(v) **Capital Gains Tax**: The Government is pursuing the abolition of taper relief and the introduction of an 18% capital gains tax rate. There will be an entrepreneurs' relief for small business owners.
(vi) The Government's ambition to make all new non-domestic buildings **zero carbon** by 2019 was confirmed.

Landlord & Tenant

02

High Court

Tenant applying for new tenancy of commercial premises — whether manner in which the site was being used justified landlord's opposition to new tenancy

****** FOWLES V HEATHROW AIRPORT LTD
[2008] All ER (D) 226 (Feb) — Decision given 15.02.08

Facts: F was the tenant of a site on which he carried out various commercial activities. M became the landlord in 1989 and served a notice under s25 of the Landlord and Tenant Act 1954 terminating the tenancy and stating that it would oppose the grant of a new one. In May 1988 the local authority had served an enforcement notice on F alleging that there had been a material change in the use of the land to a haulage contractor's yard and requiring the discontinuance of that use within 12 months. F failed to comply and was convicted in 1990 for continuing to use the site in that way. A further prosecution was followed in 1994 by the grant of a seven-year permission for use of part of the site for recycling waste concrete and restoration of part to grassland. In 1995 the freehold was transferred to HA. F's applications for permanent planning permission were unsuccessful and in December 2006 the local authority served a breach of condition notice requiring F to cease concrete crushing within six months, but not requiring restoration of the land. F applied for an order to quash that notice and at the same time he applied for a new tenancy.

Point of dispute: Whether HA was entitled to oppose the grant of a new tenancy to F on the grounds that, in the light of the breach of condition and enforcement notices, F's use of the site constituted the commission of criminal offences such that he should not be granted a new tenancy. F argued that the local authority had not been entitled to serve the breach of condition notice, as the condition was a composite one, and it was not possible to sever cessation of use from restoration of the land.

Held: F's application for a new tenancy was dismissed. HA had made out its grounds of opposition as most of F's activities on the site had been illegal and would remain so. The local planning authority had been entitled to serve a breach of condition notice in respect of anything upon which planning permission was conditional: the condition did not have to be contained in a separate paragraph. Therefore, the notice had been valid and F's failure to comply with it meant that he had been committing a criminal offence by continuing his concrete crushing operations on the site. The effect of the enforcement notice was that F could not legally carry on his haulage business at the site either.

03

High Court

Part I of Landlord & Tenant Act 1987 — block of flats — disposal by landlord of parts of property — whether disposals attracted qualifying tenants' right of first refusal — whether items disposed of formed part of a building

***** DARTMOUTH COURT BLACKHEATH LTD V BERISWORTH LTD
(2007) PLSCS 49 — Decision given 27.02.08

Facts: The qualifying tenants in a block of flats, operating through DCB, claimed that two disposals that the landlord had made to B in 2003 attracted their right of first refusal under Part I of the Landlord & Tenant Act 1987 obliging B to make an onward disposal to DCB. The property in question included the main building, a garage block, drives, paths and gardens. The garage block contained 20 garages, some of which were let to tenants of the flats on separate leases, an electricity sub-station serving the property, a caretaker's office and a mobile phone plant room housing equipment belonging to a mobile phone service provider. The first disposal was of three garages, the plant room, the caretaker's office and the substation. The second was a lease of the airspace above the roof, the light well, basement rooms and a small area of land adjoining the rear wall of the main building, over the basement rooms.

Point of dispute: Whether DCB could exercise Part I rights in respect of these two disposals. This required consideration as to whether: (i) the "premises" referred to in Part I, and to which the requirements of s1(2) were to be applied, meant only the area proposed to be disposed of by the landlord or a more objectively ascertainable unit; and (ii) the property under consideration could be said to "consist of the whole or part of a building" within s1(2)(a).

Held: DCB's claim was allowed in part. (i) The "premises" affected by a disposal, within the meaning of sections 1(1) and 4(1) of the 1987 Act, were not merely the property of which the landlord was disposing but had to be ascertained in an objective manner. In this case the premises comprised the entire block of flats. If the relevant "premises" were defined as "the area being disposed of" a landlord would be able to dispose of common parts separately from any flat without the qualifying tenants being able to acquire them. This would defeat the purpose of Part I, which was to bring the premises of which their flats formed part under tenants' control. (ii) The 2003 transfer did not attract Part I rights since the items disposed of were not appurtenant to the main building: the tenants did not enjoy use of the garages as part of their tenancies; the mobile phone plant room housed equipment belonging to a third party; the landlord was not obliged to provide a caretaker's office and the tenants had no interest in the electricity sub-station. However, the disposal under the 2003 lease attracted Part I rights as the lightwell and basement formed part of the main building; the area of land over the basement was as much a part of the building as a roof while the airspace fell within the common parts of the building.

04

High Court

Assignment of lease — Landlord & Tenant Act 1988

***** THE ROYAL BANK OF SCOTLAND PLC V VICTORIA STREET (NO 3) LTD
(2008) All ER D) 31 (Mar) — Decision given 04.03.08

Facts: A 42 year lease of commercial premises from 25.12.69 contained a covenant by the tenant not to assign the lease without the landlord's written consent, not to be unreasonably withheld in respect of a respectable and reasonable potential assignee. It also provided that the property was to be used for the business of banking or as offices with ancillary car parking. The reversion passed to VS and on 03.10.07 RBS, the tenant, wrote to VS asking it to treat the letter as a formal application for permission to assign the lease to OIB Ltd, a company incorporated in August 2007 providing professional property services. The letter included a request to consider the application urgently. VS replied two months later refusing consent on the basis that OIB was not a respectable and reasonable potential assignee as it was a newly incorporated company.

Point of dispute: Whether VS had unreasonably withheld consent to the proposed assignment. The following issues fell to be determined: (i) whether the letter of 03.10.07 had been an application for consent to assign the lease; (ii) if so, whether time began to run from that date; (iii) whether the Landlord and Tenant Act 1988 placed a duty upon a landlord to facilitate the overcoming of its reservations in respect of a potential assignee; and (iv) whether VS had any real prospect of successfully persuading the court that its refusal of consent had been upon reasonable grounds.

Held: RBS's applications for a declaration that VS had unreasonably withheld consent to the proposed assignment and damages for breach of statutory duty were dismissed. The Landlord and Tenant Act 1988 imposed no statutory duty on a landlord to facilitate a successful application for consent to assign. There was no bar on multiple applications and an unsuccessful tenant could re-apply. The 03.10.07 letter could be treated as a proper application, there is no prescribed form for such an application. RBS had failed to show that VS had no real prospect of successfully persuading a court that its refusal of consent had been on reasonable grounds.

Planning

05

Court of Appeal

Gypsy site on green belt — inspector upholding refusal of planning permission — whether inspector had due regard to need to promote racial equality

***** R (ON THE APPLICATION OF BAKER) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) PLSCS 51 — Decision given 28.02.08

Facts: A group of Irish travellers were refused planning permission to retain a number of caravans and mobile homes on plots within the green belt. Each of the plots had originally had two-year permissions that were personal to the then occupiers, who had since moved on. The travellers' appeal against the refusal of permission was dismissed by the inspector who, having conducted a balancing exercise weighing the harm to the green belt should the travellers be allowed to remain against the considerations in favour of their case, came down against them.

Point of dispute: Whether the gypsies' appeal should be allowed against the inspector's ruling. In particular, they advanced a new ground that had not been put to the lower court judge, that the inspector had acted in breach of s71(1)(b) of the Race Relations Act 1976 by failing to have due regard to the requirement to "promote equality of opportunity… between persons of different racial groups". (The Equality and Human Rights Commission were given permission to intervene in the Court of Appeal since the s71(1) issues were being considered for the first time in a planning context.)

Held: The appeal was dismissed. The s71 duty had not been breached. The inspector had been aware of the plight of gypsies generally, and their disadvantages compared with the settled community and it was immaterial whether she had known of the existence of the specific statutory provision. In order to discharge the s71 duty the inspector had to take into account the need to promote equality of opportunity for the gypsies to access housing which would enable them to benefit from education, healthcare and other social needs. However, she also had to have regard to PPG 2 which contained a powerful statement that residential use of such sites constituted inappropriate development of the green belt. The question to be answered in each case was whether the decision maker had in substance had due regard to the relevant statutory requirement. It would be good practice for an inspector to refer to s71(1) and any relevant material in cases where that provision was likely to arise.

06

High Court

Interpretation of agreements under Section 106 Town and Country Planning Act 1990

***** SOUTHAMPTON CITY COUNCIL V HALLYWARD LTD
(2008) All ER (D) 356 (Feb) — Decision given 25.02.08

Facts: In 2004-05 H and SCC entered into three s106 agreements in connection with property development in Southampton. Under the first contract SCC agreed to pay a sum to a company called C Ltd to be applied only for the purposes of affordable housing and failure to apply the sums by a certain time would result in the amount being recoverable by SCC. The terms of the second agreement required C to develop a site with a certain amount of affordable housing, while the third concerned an increase in the amount of flats to be built and therefore also the amount which should be designated for affordable housing.

Point of dispute: (i) Whether the obligation to repay SCC sums already advanced by the council, rather than simply to "pay" the authority, meant that the agreement did not fall within s106(1)(d); and (ii) whether the first agreement complied with s106(9)(c) notwithstanding that it did not state exactly the nature of C's interest in the land.

Held:

(i) An obligation to repay sums advanced by a local authority for a purpose which had not been fulfilled fell within the definition of "requiring a sum or sums to be paid to the authority" in s106(1)(d). The wording of the section was sufficient to include repayment.
(ii) Section 106(9) required that an agreement should state what a person's interest in land actually was and failure to do this would render the agreement as not falling within the section. On the widest possible interpretation s106(9) had not been met by the first agreement in this case as it failed to state the nature of C's interest in the land; accordingly, SCC was not entitled to the benefits otherwise conferred by s106.

07

High Court

Whether inspector erred in granting planning permission for a development in accordance with an out of date structure plan

***** MAIDSTONE BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) All ER (D) 194 (Mar) — Decision given 13.03.08

Facts: The Sec of State appointed an inspector to hear an appeal against refusal of permission to change the use of land for the stationing of mobile homes. Following an inquiry the inspector allowed the appeal, but there was a lengthy delay between the end of the inquiry and the issue of the decision letter during which time the Kent 7 Medway Structure Plan 2006 was adopted. However, the inspector determined the appeal on the basis of the former 2000 structure plan.

Point of dispute: Whether the inspector had erred in law in failing to determine the appeal in accordance with the 2006 plan, rendering his decision unlawful.

Held: MBC's application was allowed. The inspector had not approached the matter in the way contemplated by the 2006 plan. It was an important concept in planning law that where there is strong opposition to an application for planning permission the processes follow statutory rules and regulations and decisions of the courts.

08

Statutory Instrument

SI 2008/550 The Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2008

Wef 06.04.08 this Order amends the 1995 Order which specifies the procedures to be followed in connection with planning applications, appeals to the Sec of State and related matters, so far as these are not laid down in the Town and Country Planning Act 1990. These amendments relate to the form and content of application forms for planning permission, general provisions relating to applications including the bodies to which applications should be made, and time periods within which local planning authorities must determine applications.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080550_en.pdf

09

Statutory Instrument

SI2008/580 The Town and Country Planning (Mayor of London) Order 2008

Section 2A of the Town and Country Planning Act 1990 gives the Mayor of London power to direct that applications for planning permission for developments of potential strategic importance ("PSI applications") must be determined by him rather than the local planning authority. This Order, which comes into force on 06.04.08, defines "PSI application" and sets out categories of development in Parts 1 to 4 of the Schedule. The Order also sets out the circumstances in which the Mayor's powers to give directions may be exercised and deals with procedural matters connected with the exercise of those powers.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080580_en.pdf

10

Statutory Instrument

SI 2008/595 The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Amendment) (England) Regulations 2008

These Regulations, which come into force on 06.04.08, amend the 1997 Regulations which prescribe the classes of appeal which are to be determined by persons appointed by the Sec of State in accordance with the provisions of Schedule 6 to the Town and Country Planning Act 1990, Schedule 3 to the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Schedule to the Planning (Hazardous Substances) Act 1990 instead of being determined by the Sec of State. The following classes of appeals are now also to be determined by an appointed person instead of by the Sec of State:

- appeals concerning tree preservation orders and tree replacement notices;
- appeals concerning the determination of conditions attached to mineral permissions; and
- appeals concerning hazardous substances consent

http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080595_en.pdf

11

Statutory Instrument

SI 2008/675 The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2008

Wef 06.04.08 this Order amends the 1995 Order which confers permitted development rights in respect of certain development. Article 2(3) inserts new Part 40 of Schedule 2 into the 1995 Order and provides permitted development rights for the installation of specified types of microgeneration equipment including solar PV and solar thermal equipment on or within the curtilage of dwelling houses.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080675_en.pdf

12

Draft Statutory Instrument

The Town and Country Planning (Fees for Applications and Deemed Applications) (Amendment) (England) Regulations 2008

These Regulations, which will come into force on 06.04.08, amend the 1989 Regulations and revoke the 2005 Amendment Regulations, will increase fees payable for most planning applications by approximately 25%. In respect of applications relating to the alteration of existing dwelling houses or developments within the curtilage of a house the increase is only 11%.
http://www.opsi.gov.uk/si/si2008/draft/pdf/ukdsi_9780110809892_en.pdf

13

CLG Publication — Government Response

Securing the Future Supply of Brownfield Land: Government Response to English Partnerships' Recommendations

In 2003 English Partnerships was asked to work with Government departments and stakeholders to develop a comprehensive National Brownfield Strategy for England with the aim of overcoming the problems which were preventing brownfield sites from being brought back into use. Government policies are now encouraging the reuse of more brownfield sites and currently about three quarters of new development takes place on brownfield land compared with less than 60% ten years ago. *The Brownfield Guide — A Practitioners Guide to Land Reuse in England* was published in 2006 followed by a set of policy proposals in the form of a set of overriding principles and a number of policy recommendations. This document contains the Government's response to those recommendations.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/Ssecuringfuturebrownfield.pdf

Rating

14

Statutory Instrument

SI 2008/386 The Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008

Section 45 of the Local Government Finance Act 1988 provides that owners of empty non-domestic properties are liable to pay non-domestic rates if certain conditions apply, one of these being that the property must fall within a class prescribed by regulations made by the Sec of State. These Regulations, which come into force on 01.04.08, prescribe that class as consisting of all buildings or parts of buildings with certain exceptions. Those exceptions include properties which have been continuously empty for three months or less and some new exceptions are introduced by Regulation 4: industrial properties which have been continuously empty for six months or less (previously there was a permanent exception for those properties) and non-domestic properties owned by companies in administration.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080386_en.pdf

15

Statutory Instrument

SI 2008/428 The Local Government (Non-Domestic Rating) (Consequential Amendments) (England) Order 2008

This Order, which came into force on 24.03.08, amends the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989, the Non-Domestic Rating (Chargeable Amounts) (England) Regulations 2004 and the Non-Domestic Rating (Collection and Enforcement) (Miscellaneous Provisions) Regulations 1990 to reflect the reforms made to liability for rates in respect of empty non-domestic properties by the Rating (Empty Properties) Act 2007. These reforms primarily increased the liability of owners of empty non-domestic properties from 50% of the basic rate for occupied properties to 100% and put in place a zero-rate for charities and community amateur sports clubs which own empty non-domestic properties. The 2007 Act also gave the Sec of State the power to reduce, by order, the liability of owners of empty non-domestic properties to a minimum of 50% of the basic occupied rate. The 2007 Act will apply in respect of financial years beginning on or after 01.04.08 and the amendments in this Order relating to that Act have the same application.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080428_en.pdf

16

Statutory Instrument

SI 2008/429 The Central Rating List (England) (Amendment) Regulations 2008

These Regulations come into force on 01.04.08 and amend the 2005 Regulations by omitting regulation 8(3) so that British Telecommunications plc (BT) will continue to be treated as being in occupation of all unbundled local loops indefinitely.
An unbundled local loop exists where the copper wire connection between the local telephone exchange and the customer's premises is disconnected from BT's network and connected to an alternative service provider's network.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080429_en.pdf

Leasehold Reform

17

Lands Tribunal

Determination of price payable on either standing house or cleared site approach for determining disputed site value for purposes of calculating enfranchisement price

*** EVANGELOS TSIAPKINIS V EARL CADOGAN
LRA/59/2006 — Decision given 25.01.08

Facts: This was an appeal by the tenant of a two storey Victorian terrace mews house in Pavilion Road, London SW1, against a decision by the Leasehold Valuation Tribunal. The LVT determined the enfranchisement price payable for the freehold calculated in accordance with s9(1) of the Leasehold Reform Act 1967 at £437,000, based on its assessment of £1,000,000 as being the site value at the valuation date calculated on the "cleared site" approach.

Point of dispute: (i) The assessment of site value at £1,000,000; and (ii) whether the "cleared site" approach to derive the site value should be used at all and, if so, how it should be assessed. Both parties examined the "standing house" approach to derive the site value by reference to a percentage of the "entirety value" (assuming the site was fully developed and the resulting property in good condition).

Held: i) The site value was assessed at £1,000,000. ii) The Lands Tribunal accepted the LVT's approach of comparing the prices paid for comparable sales of existing mews houses based on developable floor area, since evidence was put forward which enabled a direct assessment of site value. However, they acknowledged the problems associated with the methodology where none of the comparables could be used without adjustment. They therefore believed it necessary to consider the "standing house" approach. Their assessment of site value on the "cleared site approach" was £1,023,000 and on the "standing house" approach, £946,000 derived from a site proportion of 55%. Nevertheless, since the "cleared site" approach required least adjustment the Tribunal specifically agreed with the LVT's assessment of site value at £1,000,000. The appeal was dismissed.

Real Property

18

Court of Appeal

Adverse possession — mortgagor remaining in exclusive possession of mortgaged property for more than 12 years after the limitation period began to run was in "adverse possession" of it for purposes of Limitation Act 1980

** ASHE (AS TRUSTEE IN BANKRUPTCY FOR BABAI) V NATIONAL WESTMINSTER BANK PLC
(2008) All ER (D) 128 (Feb) — Decision given 08.02.08

Facts: In 1989 B granted NWB a second charge over his home to secure his liabilities with the bank. NWB made formal demands for payments in 1992 but took no proceedings or other steps to enforce its right to possession or to obtain payment. Following negotiations some instalment payments were made. B was declared bankrupt in March 1993 and in September 2006 A, B's trustee in bankruptcy, commenced proceedings seeking a declaration that NWB's legal charge had been extinguished by virtue of sections 15 and 17 of the Limitation Act 1980.

Point of dispute: Whether NWB's appeal should be allowed against the ruling of the lower court judge granting A the declaration he sought. NWB argued that the position under the 1980 Act was that time did not begin to run against a mortgagee unless and until the mortgagor's right to possession had terminated and/or the mortgagor was in possession without the mortgagee's consent — such as when the mortgagee sent a formal demand to the mortgagor requiring him to vacate or commenced possession proceedings.

Held: NWB's appeal was dismissed. B's possession of the property was referable to his own registered legal title to the property. It was not derived from the bank's title to the property. According to the ruling in *J A Pye (Oxford) Ltd v Graham* B's possession was "adverse possession" within para 8 of Schedule 1 of the Limitation Act 1980 and accordingly NWB's claim was statute barred.

19

Court of Appeal

Interpretation of restrictive covenant

***** CITY INN (JERSEY) LTD V TEN TRINITY SQUARE LTD
(2008) PLSCS 57 — Decision given 06.03.08

Facts: A 1962 transfer between the Port of London Authority (PLA) and a third party company contained the following covenant: "the Transferee for itself and its successors in title covenants with the Transferor and its successors in title… to the intent that the burden of the covenant may run with the land and bind the land hereby transferred and every part thereof to observe and perform the covenants and stipulations set forth in the Third Schedule hereto". The Third Schedule contained a stipulation that the transferee was not allowed to erect or make any external alteration to the buildings on the land without obtaining written approval to the detailed plans and elevations from the "Estate Officer for the time being of the Transferor". Likewise, change of use of the land from offices and a car park would also require the transferor's written consent. The covenants were expressed to run with the land and, in one place only, to affect successors in title. A building was constructed on the land and later acquired by CIJ. TTS acquired the neighbouring property which had formerly been the head office of PLA. CIJ obtained planning permission to demolish the building and to replace it with a hotel and PLA gave consent to all the necessary works.

Point of dispute: Whether TTS's appeal should be allowed against the High Court ruling that the transfer had defined "Transferor" as the PLA only. As the draftsman had made express reference to successors in title elsewhere in the document it could not be implied under s78 of the Law of Property Act that "the Transferor" included successors. (See Evebrief Volume 29(10) i02).

Held: TTS's appeal was dismissed. In some cases a court might conclude that notwithstanding his chosen definition the draftsman must have meant something else by using the term that he did and would so construe the document in question, but such a conclusion would only be reached where, if the term were given its defined meaning, the end result would be absurd. In the present case the term "Transferor" in the agreement meant only the PLA. The parties to the contract had not contemplated or allowed for a situation where the PLA would leave a successor in title.

20

Court of Appeal

Solicitor's professional negligence — whether claim statute-barred

***** WATKINS V JONES MAIDMENT WILSON (A FIRM)
(2008) PLSCS 55 — Decision given 04.03.08

Facts: W bought some land from a builder (F) who agreed to build them a house on the site. W instructed JMW, a firm of solicitors, to act for them and a number of documents were drawn up, including a building agreement, clause 21(ii) of which provided that if F failed to complete the works by 31.08.98 W could terminate the agreement and pay for any work completed by that date. Subsequently W claimed damages for the negligent advice that they had received from JMW, since that advice had led them to complete the building agreement which in turn led to their losing certain rights under clause 21(ii) when they waived the completion date and becoming embroiled in an expensive dispute with F.

Point of dispute: Whether W's claim was statute-barred. Conventionally, any cause of action based upon the advice given by JMW to W had accrued before 26.08.98 and was therefore statute-barred by the time that W's proceedings were issued. W relied upon: (i) the authority in *Law Society v Sephton & Co (2006) UKHL 22*, that their loss was contingent only and thus the limitation did not begin to run until the contingency matured, which was after 26.08.98; and, in the alternative: (ii) *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) (1998) 1 EGLR 99 & (1998) 05 EG 150* that there was no loss on entry into the agreement with F since the net position was beneficial at that time to W and the limitation period could not begin to run until the net position became disadvantageous to them.

Held: W's appeal against the judge's ruling that their claims were statute-barred was dismissed. There was an actual tangible loss at the time that the contract was entered into which was W's chance of negotiating a more favourable agreement. Accordingly, any claims based on the contract dated 03.03.98 were statute-barred. JMW's alleged negligent advice led to entry into the transaction and at that point the cause of action was complete. Even if JMW should have advised W renegotiate the agreement, it was the same event which constituted the breach of duty, and a claim for damages for loss of this chance of renegotiation was an alternative or additional head of loss. When W entered into the building agreement with F they acquired certain rights which they alleged were less valuable than they had been led to believe. However, those rights had a value and accordingly W had suffered measurable loss when they acted on the allegedly negligent advice to enter into a later transaction and their claim was statute barred. *Sephton* was distinguished.

Contract

21

High Court
Overage

***** WALKER V KENLEY
(2008) PLSCS 52 — Decision given 29.02.08

Facts: K agreed to sell a hotel in Padstow to O Ltd. The property benefited from planning permission to build five holiday cottages to the rear but O wished to develop the land for residential purposes. The agreement was therefore conditional upon O obtaining planning permission for "not less than 16 three-bedroom units of permanent residential accommodation throughout the year" by January 2004 or such later date as K might approve, such approval not to be unreasonably withheld or delayed. Various schemes submitted by O for permission to demolish the hotel and build flats were refused and the longstop date passed while appeals were pending. Following proceedings on the issue of whether the agreement was still in existence the parties entered into a consent order giving O further time to obtain planning permission. In the event that O obtained planning permission for a development of "residential flats", K would receive an overage payment for each flat sold. Later the planning condition was waived and the property was transferred to O who eventually obtained permission to develop 17 apartments subject to the condition that they were used "for holiday accommodation only". O's interest was transferred to W.

Point of dispute: Whether W should be granted a declaration that no average payment was due to K since the flats were not "residential flats" within the meaning of the parties' agreement.

Held: W's claim was allowed. The term "residential flats" did not include holiday apartments, but flats that the occupier would regard as his or her residence. The parties had intended to limit the overage provision to flats that were available for full time residential occupation and that interpretation was supported by the background to the agreement. The commercial context suggested that the parties wanted to provide for an overage payment in the event of permission being obtained for a different kind of development to that for which permission already existed.

Housing

22

CLG Statistical Release
House Price Index — January 2008

- The mix-adjusted average house price in the UK in January 2008 stood at £221,758, up from £218,007 in December 2007 (not seasonally adjusted).
- Annual house price inflation in January 2008 was 8%, down from 8.4% in December 2007. Annual house price inflation in London was 13.8% in January, up from 12.2% in December.
- For the quarter ending January 2008 UK house prices increased by 0.7%. This compares with a price increase of 0.9% for the three months ending October 2007.

http://www.communities.gov.uk/documents/housing/pdf/717145

23

CABE Publication

Building for Life — Evaluating housing proposals step by step

Building for LIfe, the national standard for well-designed homes and neighbourhoods, was developed by CABE and the Home Builders Federation and is backed by the Housing Corporation, English Partnerships and Design for Homes. It is made up of 20 criteria that embody these partners' vision of how housing developments should be: functional, attractive and sustainable. This guide explains in detail how to help assess and compare the quality of proposed developments using the Building for LIfe criteria. It gives examples of the materials a design team should prepare to help an assessor understand the design thinking behind a development. Section 1 of the guide explains each of the 20 Building for Life criteria and points to key types of evidence which would help evaluate a proposed design, while s2 describes and gives examples of different types of evidence and lists the Building for Life criteria for which they would provide useful information.
http://www.cabe.org.uk/AssetLibrary/11349.pdf

Construction

24

Statutory Instrument

SI 2008/647 The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2008

Wef 06.04.08 these Regulations amend the 2007 Regulations in relation to various requirements related to energy performance certificates and recommendation reports. They implement Articles 7 (energy performance certificate) and 10 (independent experts) of EC Directive 2002/91/EC and of the Council of 16.12.02 on the Energy Performance of Buildings.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080647_en.pdf

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Statutory Instrument

SI 2009/671 The Building (Amendment) Regulations 2008

Wef 06.04.08 these Regulations amend the 2000 Regulations by inserting a new regulation 22A which designates provisions of building regulations to which s35A of the Building Act 1984 applies. Section 35A provides for an extended time limit for bringing prosecutions for contravention of designated provisions of two years from the date of a contravention. The only provisions which may be designated under s35A are those in building regulations made for the purpose of conserving fuel and power or reducing greenhouse gas emissions.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080671_en.pdf

Environment

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Defra Consultation

Consultation on the draft regulations and guidance implementing Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage
Deadline for Comments: 27.05.08

These Regulations will impose obligations on operators of activities which cause or threaten to cause environmental damage. Environmental damage is defined in the Regulations and generally only includes more serious damage to certain species and habitats, water and land. The Regulations will supplement existing environmental protection legislation such as the Environmental Protection Act 1990, the Water Resources Act 1991, the Wildlife and Countryside Act 1981 and the Control of Major Accident Hazards Regulations 1999 and will include offences and penalties for failure to comply with obligations in them. Enforcement will be by different authorities depending on the nature of the activity and the damage caused, including the Environment Agency, Natural England, the Countryside Council for Wales and local authorities.
http://www.defra.gov.uk/corporate/consult/env-liability-regs/consultation-eld.pdf

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Defra Consultation

Consultation on proposals for joint waste authorities in England
Deadline for Responses: 09.06.08

The Local Government and Public Involvement in Health Act 2007 contains powers to allow for the establishment of joint waste authorities in England and provides that the Sec of State can make Regulations and guidance to provide the framework for proposals for these. The purpose of this consultation is to seek views on draft Regulations and draft guidance on proposals for joint waste authorities with the aim of improving efficiency and reducing the burdens on individual local councils.
http://www.defra.gov.uk/corporate/consult/jwa/consultation.pdf

General

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CLG Review

A review of the alternative approaches to regional casino-led regeneration

In response to the House of Lords rejecting the Sec of State's decision to accept the Casino Advisory Panel's (CAP) recommendation that Manchester should be granted the licence for a regional casino, the Government has examined whether deprived areas can be equally well served by other forms of regeneration. Although it is perceived that regional casinos could achieve regeneration through the creation of jobs in deprived areas and investment in projects on brownfield sites there are concerns about the possible economic and social costs associated with casino-led regeneration, and the potentially significant costs that would arise as a result of an increase in compulsive gambling. This Review considers the evidence on whether regional casinos are, in fact, the best way to regenerate specific deprived areas, drawing on the evidence within the various bid documents submitted to CAP for the licensing of a regional casino and published literature on casinos and the benefits of regeneration generally. The review considers the following issues:

- what is the regeneration need which casinos are thought to meet and what is the nature of the market failures involved?
- what are the economic benefits of casino-led regeneration?
- what are the economic and social costs of casino-led regeneration?
- what alternatives are there to casino-led regeneration that could be considered?

http://www.communities.gov.uk/documents/citiesandregions/pdf/703867

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CLG Statistical Release

Floorspace and rateable value of commercial and industrial properties: 1st April 2007, England & Wales

This release announces the publication of statistics on commercial and industrial bulk class properties in England and Wales, and is based on information provided by the Valuation Office Agency. This publication contains a brief summary of the statistics.
http://www.communities.gov.uk/documents/corporate/pdf/705678

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Commission for Architecture and the Built Environment (CABE) Briefing

Civilised streets

There has recently been a fundamental shift in the way that streets are thought about and designed. For the past 60 years most streets have been designed with the needs of the motorist and motorised traffic put first while the needs of other people who need to use streets — pedestrians, shoppers, cyclists, people with babies and children etc — have been given much less consideration. Now the social and economic value of the pre-20th century role of streets as places of community interaction as well as being conduits for traffic is being rediscovered, but this is generating debate about safety and acceptable risk. This paper aims to clarify the debate, explores the advantages, disadvantages and wider implications of new and different approaches to designing streets and sets out CABE's views on these matters.
http://www.cabe.org.uk/AssetLibrary/11279.pdf

31

Commission for Architecture and the Built Environment (CABE) Briefing

Assessing design quality in LIFT primary care buildings

The LIFT (local improvement finance trust) programme is the largest sustained investment in improving and developing frontline primary and community care facilities in the history of the National Health Service. The Department of Health and Community Health Partnerships collaborated with CABE to survey the design quality of primary care buildings procured under the LIFT initiative. This study assesses the design quality of 20 out of 82 primary care buildings completed at the time of the survey and built under the first three waves of the programme between 2002 and 2006. The findings are intended to inform and support policy developments aimed at achieving high quality patient and staff environments.
Summary: http://www.cabe.org.uk/AssetLibrary/11283.pdf
Full report: http://www.cabe.org.uk/AssetLibrary/11284.pdf

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Useful web links
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www.odpm.gov.uk
www.dft.gov.uk
www.inlandrevenue.gov.uk
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

Rating

01

Statutory Instrument

SSI 2008/85 The Non-Domestic Rates (Levying) (Scotland) Regulations 2008

These Regulations, which come into force on 01.04.08, make provision for the amount payable in certain circumstances as non-domestic rates in respect of non-domestic subjects in Scotland. They apply only to the financial year 2008-09 — the non-domestic rate for subjects not covered by these Regulations has been fixed by SSi 1008/32. Regulation 3 provides for the general reduction in rates for non-domestic subjects with a rateable value of £15,000 or less, on a sliding scale of between 20% and 80%. Regulation 4 provides a formula for the additional amount payable as rates for lands and heritages with a rateable value exceeding £29,000.
http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080085_en.pdf

02

Statutory Instrument

SSI 2008/84 The Non-Domestic Rating (Telecommunications and Canals) (Scotland) Amendment Order 2008

This Order, which comes into force on 31.03.08, amends article 2B of the 1995 Order so that the unbundled local loop which British Telecommunications plc lets or licenses to any person is treated as occupied by that company from 31.03.08. It makes permanent the temporary provisions introduced by article 2(4) of the 2006 Order.
http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080084_en.pdf

03

Statutory Instrument

SSI 2008/83 The Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2008

Wef 01.04.08 these Regulations amend the 1994 Regulations to exclude lands and heritages owned by a company or limited liability partnership in administration, or a limited liability partnership which is being wound up, from the lands and heritages prescribed under the Local Government (Scotland) Act 1966. The effect of this is that no rates are payable in respect of unoccupied lands and heritages owned by such a company or limited liability partnership, or in the case of such lands and heritages being partly occupied, where the rateable value has been apportioned between the occupied and unoccupied parts, in respect of the unoccupied part. This amendment brings the rating of unoccupied lands and heritages owned by a company or limited liability partnership in administration or a limited liability partnership being wound up into line with that of property owned by a company which is subject to a winding-up order or in the process of winding up voluntarily.
http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080083_en.pdf

Planning

04

Planning Advice Note

PAN 84: Reducing Carbon Emissions in New Development

The planning system has an important role to play in enabling the move towards low and zero carbon development through the use of energy efficient, micro-generating and decentralised renewable energy systems. This PAN contains information and guidance on implementing the target contained in SPP 6 "Renewable Energy" which states: "all future applications proposing development with a total cumulative floorspace of 500 square metres or more should incorporate on-site zero and low carbon equipment contributing at least an extra 15% reduction in CO_2 emission beyond the 2007 building regulations carbon dioxide emissions standard." The aim of using planning policy to deliver low and zero-carbon equipment in new buildings is that it will provide a flexible approach to choosing the most appropriate equipment for individual proposals as well as helping to stimulate development in the technology market. This document provides information for planners, architects, developers, building standards verifiers and the general public on the context, technical information and planning processes of small scale energy production.
http://www.scotland.gov.uk/Resource/Doc/214728/0057273.pdf

05

Scottish Government Consultation Paper

Permitted Development Rights for Domestic Microgeneration Equipment
Deadline for Responses: 12.05.08

Scottish Ministers are committed to promoting greater uptake of microgeneration, recognising its potential to provide a sustainable source of low carbon energy and in reducing carbon dioxide emissions from buildings. In order to encourage the installation of more microgeneration equipment in domestic buildings this paper invites views on the extent to which planning control can be reduced for domestic buildings by making microgeneration equipment "permitted development", thus removing the need to apply for planning permission. The following are the main types of micro renewable equipment:

- solar water heating;
- solar electricity (photo voltaics);
- small wind turbines;
- biomass boilers;
- heat pumps (ground, water and air source);
- combined heat and power systems; and
- hydro-electric generators

At the moment the installation of most microgeneration equipment such as solar panels, heat pumps or wind turbines almost always requires householders to apply for planning permission which can be a disincentive to their use. Further consideration is being given to the subject of microgeneration equipment for non-domestic buildings and this will be the subject of a separate consultation.
http://www.scotland.gov.uk/Resource/Doc/213981/0056876.pdf

Housing

06

Statutory Instrument

SSI 2008/76 The Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008

These Regulations, which will come into force on 01.10.08, are made under the Housing (Scotland) Act 2006 and prescribe the documents which a seller or a selling agent must possess and provide in response to a request from potential buyers. These documents are a survey report, which should contain information on energy efficiency, and a property questionnaire. A copy of the prescribed documents must be supplied within nine days of the request and the information must relate to a date no earlier than 12 weeks before the house is put on the market. The marketing of certain kinds of exceptional properties, listed in regulations 7-14, does not give rise to these duties to possess and provide the prescribed documents.
http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080076_en.pdf

WALES

Planning

07

Ministerial Interim Planning Policy Statement

01/2008 Planning for good design

This Ministerial Interim Planning Policy Statement provides a revised s2.9 (Promoting sustainability through good design) of Planning Policy Wales and the existing s2.9 is cancelled.
http://new.wales.gov.uk/desh/policy/planning/MIPPS/planningforgooddesign/plggooddesigne.pdf?lang=en

Energy

08

Consultation

Renewable Energy Route Map for Wales

Consultation on the way forward to a leaner, greener and cleaner Wales.

In the One Wales document, the Welsh Assembly Government sets out its commitment to tackling climate change, including beginning work on diversified renewable energy generation. The Renewable Energy Route Map for Wales is the first strategic step to fulfilling that commitment. The map sets out specific actions on how a renewable electricity self-sufficiency objective could be met, how biomass resources could be used for significant renewable heat production, and how to support challenging energy efficiency and small-scale micro-generation ambitions. The route map is split into three main sections:

- renewable Energy Technologies;
- energy efficiency/micro-generation/distributed generation; and
- planning consents, electricity grid infrastructure and research and development capability

http://new.wales.gov.uk/consultation/desh/2008/2003479/routemape.pdf?lang=en