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evebrief

Editorial

The final edition of 2008 marked the completion of 30 years of the publication of Evebrief. This first edition in our 31st year comes as we face the uncertainties that 2009 holds, but we will be ensuring that Evebrief continues to be a consistent and reliable means by which readers can ensure that they are up-to-date with changes in the law relating to property and with the latest government initiatives and publications.

We report at item 06 the decision of the Court of Appeal in Lay v Ackerman. Lay and others are trustees of the Portman Estate, the freehold owners of a six-storey former town house in Great Cumberland Place, West London, converted into five flats plus ground floor medical consulting rooms. Messrs Ackerman were the long-leaseholders of the building and occupiers of one of the flats.

The dispute between the parties began as long ago as September 2000 when the Ackermans issued proceedings against the Estate claiming that they were entitled, under the 'enfranchisement' legislation, to purchase the freehold of the entire property. That claim was dismissed by the court in 2002 but in the meantime the Ackermans had served further notices asserting a right to acquire a new lease of their flat and, again, the freehold interest in the whole building.

The arguments, and the outcome of the case, are summarised in our report and the court was unequivocal in its interpretation of the legislation and its dismissal of the freehold claim. The case does though address issues of interest, and in particular it serves as yet another illustration of the problems caused by what are widely perceived as being deficiencies in the drafting of the 1967 and 1993 Acts, in terms of both the clear interpretation of the Acts themselves and the relationship between them.

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Planning

01

High Court

Appeal against grant of temporary permission for caravan site — Circulars 11/95 and 01/2006

***** BROMLEY LONDON BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2008] All ER (D) 240 (Dec) — Decision given 18.12.08

Facts: Having been refused permission to develop land as a caravan site for two gypsy families F's appeal against the refusal and the enforcement notice issued by BLBC was allowed by an inspector appointed by the Sec of State. The inspector granted temporary permission for two years, stating in his decision letter that he had taken into account circumstances in favour of F's use of the site, and the fact that although there were no other realistic alternative sites at that time, there was a reasonable prospect of an alternative site becoming available before the end of the two-year period. The letter contained references to paras 45 and 46 of Circular 01/2006 "*Planning for Gypsy and Traveller Caravan Sites"* which in turn refer to the advice on the use of temporary permissions contained in paras 108-113 of Circular 11/95.

Point of dispute: Whether the inspector's decision should be quashed. BLBC contended that he had failed to take into account a material consideration, namely the advice contained in para 109 of Circular 11/95 that if there were grounds for refusing permission which could not be met by conditions, those should also be grounds for refusing temporary permission.

Held: BLBC's appeal was dismissed. Reading Circulars 11/95 and 01/2006 together it was clear that a temporary condition could be appropriate in circumstances where a permanent permission would be refused because there was some harm that would be unacceptable on a permanent basis. This did not mean that an unacceptable harm on a permanent basis became acceptable if only temporary; there had to be another additional and distinct factor, which in this case was the expectation that there would be a change in planning circumstances and that an alternative site would become available at the end of two years.

02

Administrative Court

Application to quash part of local plan including claimant's land within green belt

***** HAGUE V WARWICK DISTRICT COUNCIL
(2008) PLSCS 351 — Decision given 15.12.08

Facts: H owned some land that was adjoined by housing and railways on two sides. Along its northern boundary was an established tree/hedge belt which had previously marked a local authority boundary. In 1982 an inquiry was held by a planning inspector which resulted in the exclusion of the land from the green belt. In subsequent plans this decision was not challenged, but in 2007 there was a redefinition of the green belt area and an inspector recommended that the new local plan adopted by WDC should include H's site within the green belt. He concluded that its exclusion had been an incongruous anomaly and that the hedgerow boundary had only been chosen for administrative convenience rather than sound planning principles.

Point of dispute: Whether H's application to quash the relevant part of the local plan relating to the inclusion of the site in the green belt should be allowed, on the grounds that it was unlawful and/or that he had been substantially prejudiced by the inspector's failure to give any or adequate reasons for the recommendation.

Held: H's application was allowed. A consistent approach should be applied to green belt areas and once land had been approved for designation as green belt land, its status should be altered only in exceptional circumstances. Some event should have occurred after an original designation which would justify a subsequent inclusion or exclusion. In this case there was no evidence to support the inspector's conclusion that the only reason H's land had been excluded from the green belt was because one of its boundaries was an old administrative boundary and it was administratively convenient to exclude it. There was no material evidence to support his conclusion that the exclusion of H's land from the green belt designation had been based on a mistake.

03

Administrative Court

Gypsies — appeal against refusal of temporary planning permission for stationing of caravan in Area of Outstanding Natural Beauty (AONB)

***** LANGTON V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) PLSCS 3 — decision given 07.01.09

Facts: L owned land in an AONB on which two caravans had been parked. L's application for temporary planning permission to station a residential mobile home on the land for three years was refused by the local planning authority, and L's appeal was dismissed by the inspector appointed by the Sec of State. The inspector accepted that the claimants were travellers whose proposals represented a sustainable form of gypsy/traveller development, but he dismissed their appeal on the grounds that residential use of the land would significantly detract from its secluded woodland location and AONB status, thus conflicting with environmental planning policy for the area.

Point of dispute: Whether L's application to quash the inspector's decision should be allowed. Their challenge related to: (i) the fact that the inspector had treated their rights under Article 8 of the European Convention on Human Rights as "any other material consideration"; and (ii) the manner in which he had treated the balance to be struck between the need for travellers' sites, which supported the grant of permission, and harm to the AONB.

Held: L's appeal against the inspector's decision to refuse permission was allowed. (i) With regard to Article 8 rights, the decision had to be looked at as a whole to determine whether these had been appropriately addressed; there was not a particular formula which had to be followed. In this case, looking at the inspector's decision letter, it was held that he had fully considered L's circumstances and was entitled to conclude that the appeal should be dismissed; such a conclusion was proportionate in order to safeguard the legitimate aim of conserving the natural beauty of the area. (ii) However, having recognised that a temporary development would not be as harmful as a permanent one, he should have considered whether there was a reasonable expectation that new sites would become available in the area which could meet the need for alternative sites when the temporary permission expired (paras 45-46 of Circular 1/2006).

04

CLG Statistical Release

Planning Applications: September Quarter 2008, (England)

- Compared with the same quarter in 2007 the number of planning applications received by district level planning authorities decreased by 19%.
- Over the same period there was a 15% decrease in the number of decided applications, and a 14% decrease in the number of decisions on applications for residential development.
- At county level the number of applications determined was only 1% lower than the same quarter in 2007. 92% of applications were granted compared with 93% the previous year.

http://www.communities.gov.uk/documents/statistics/pdf/1096656.pdf

Rating

05

Statutory Instrument

SI 2008/3264 The Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) (No 2) Regulations 2008

These Regulations, which come into force on 20.01.09, modify the 2003 Regulations concerning matters to be contained in council tax demand notices and the information to be supplied with such notices.
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20083264_en.pdf

Leasehold Reform

06

Court of Appeal

Notice to acquire new lease of one flat in building under s42 of the Leasehold Reform, Housing and Urban Development Act 1993 — subsequent claim to acquire freehold of entire building under s8 Leasehold Reform Act 1967 — whether continuation of lease by para 5(1) of Schedule 12 of the 1993 Act applied to entire lease or only to flat subject to s42 claim

****** LAY V ACKERMAN
(2008) PLSCS 352 — Decision given 16.12.08

Facts: The freehold of a building in West London was owned by the respondents and the appellants held a 50-year lease which expired in September 2001. There were five flats in the building, one of which the appellants lived in, as well as consulting rooms on the ground floor and storage in the basement. In September 2001, a few days before the lease expired, the appellants served notice to acquire a new lease of their flat under s42 of the Leasehold Reform, Housing and Urban Development Act 1993. In April 2002, while this claim remained outstanding, the appellants gave notice of a further claim to acquire the freehold of the whole building under s8 of the Leasehold Reform Act 1967.

Point of dispute: Whether the appellants' appeal should be allowed against the decision of the judge in the court below to dismiss the 1967 Act claim. The judge did not accept the contention that their lease had been extended by virtue of their claim under s42 of the 1993 Act and the provision in para 5(1) of Schedule 12 to that Act that "the lease of the flat shall not terminate" during the currency of a claim and for three months thereafter. The appellants argued that para 5(1) did not limit the continuation to part only of a lease which meant that the lease of the entire building continued once the s42 notice had been served, while the respondents contended that it only continued in respect of the one flat and it was only those premises that the appellants sought to enfranchise by the s42 notice.

Held: The appeal was dismissed. Para 5(1) of Schedule 12 of the 1993 Act continued the lease only of the flat in respect of which the s42 claim was made. It did not apply to other flats or parts of the building that were comprised in the existing lease and the purpose of the provision was to preserve the position pending determination of the claim.

Housing

07

Consultation Paper

Definition of Zero Carbon Homes and Non-Domestic Buildings
Deadline for Comments: 18.03.09

This consultation is concerned with the definition of zero carbon homes that will apply to new homes built from 2016 and also seeks views on the Government's aim that all new non-domestic buildings should be zero carbon from 2019. It was acknowledged in the Policy Statement *Building a Greener Future* (July 2007) that the high-level definition set out in that statement might not apply in all situations and the Government undertook to consult on further detail at a later stage — this consultation takes forward that commitment by seeking views on a proposed definition which it is intended will apply to all new homes.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1101177.pdf

08

Housing Surveys Bulletin — Issue Number 3

This Bulletin contains the 2006 English House Condition Survey (EHCS) Annual Report published on 25.11.08 and a summary of its results. It also provides key findings from *Housing in England 2006/07*, the annual report of the Survey of English Housing 2006/07 and an update on the progress of the new English Housing Survey. The EHCS Report focuses on findings related to key policy areas for decent homes: Housing Health and Safety Rating System (HHSRS), energy performance, poor quality neighbourhoods and disparities in living conditions. The Report contains findings on a range of energy performance indicators for the housing stock, including carbon dioxide emissions, improvement potential, and energy efficiency. Problems of damp, serious condensation and mould and amenities of the housing stock are also covered. Key findings are these:

- In 2006 there were 7.7 million "non-decent" homes in England (using the updated definition of the standard which includes HHSRS) of which 6.6 million were privately owned and the remainder were social housing.
- 4.7 million homes (22%) had one or more Category 1 hazard under HHSRS, one of the most common being excess cold.

http://www.communities.gov.uk/documents/housing/pdf/housingsurveysbulletin3.pdf

09

CLG Statistical Release

Affordable Housing Supply, England, 2007-08

- In 2007-08 53,730 additional affordable homes were supplied, an increase of 21% from the figure of 44,570 in 2006-07, and the highest number provided in one year since 1996-97.
- 29,370 of these were made available for social rent while the remainder of homes were provided through other intermediate housing schemes including shared ownership and shared equity, up 19% and 23% respectively on the previous year.
- New build homes accounted for 43,560 or 81% of all new affordable homes supplied in 2007-08, a similar proportion to the previous year.
- Just under half of the national supply of affordable homes were provided in London and the South East.
- The only region which saw a decrease in the number of affordable homes provided was the North East.

http://www.communities.gov.uk/documents/statistics/pdf/1102058.pdf

Compulsory Purchase

10

Administrative Court

Claimant challenging validity of CPO as unfair and biased — whether inspector appointed by Sec of State had made errors of law justifying quashing of CPO

***** MORTELL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2008) EWHC 3022 (Admin) — Decision given 12.12.08

Facts: M's house was to be compulsorily acquired under a compulsory purchase order (CPO). Following a 13-day inquiry the Sec of State accepted the inspector's recommendation to confirm the CPO. M was a person aggrieved by the CPO for the purposes of s23(1) of the Acquisition of Land Act 1981 and a statutory objector.

Point of dispute: Whether M's application to quash the CPO would be allowed on the ground that it did not fall within the power conferred by the 1981 Act. M alleged that the inspector had behaved unfairly as he had showed bias towards the acquiring authority and that his approach had contained errors of law. The Sec of State argued that the CPO was necessary in order to address low housing demand in the area and to create a balanced housing market with a choice of housing in neighbourhoods where people would want to live.

Held: M's application was dismissed as there was no substance to his complaints. The inspector had not failed to have regard to important considerations, neither he nor the Sec of State had committed an error of law and there was no evidence of unfairness or bias. The test which had to be applied by the Sec of State was whether (i) there was a compelling case in the public interest for the CPO to be made; and (ii) it could achieve one or more of the objectives set out in s226(1) of the Town and Country Planning Act 1990. Provided that (i) could be made out and it could be shown that compulsory purchase was reasonably necessary it did not have to be the least intrusive option.

11

Lands Tribunal

Derelict property — assessment of compensation — whether price achieved on sale by tender providing reliable basis for valuation for compensation purposes

***** MEGHNAGI V HACKNEY LONDON BOROUGH COUNCIL
(2008) PLSCS 34 — Decision given 20.12.07

Facts: M's freehold four-bedroomed property in Clapton, London E5 had been occupied by squatters since 1997 and had become derelict and uninhabitable. A CPO was made and confirmed and the property vested in HLBC in November 2000, the relevant valuation date. HLBC invited offers for the property on an informal tender basis with a closing date in July 2001. In the invitation to tender the property was described as having suffered extensive fire damage and as being in a derelict and dangerous condition. Bidders would have to provide a £80,000 bond to guarantee that renovation would take place. The highest bid received was £135,000.

Point of dispute: The amount of compensation payable to M. M's expert valued the property at £230,000 as at the valuation date relying upon prices achieved on sales of properties in the vicinity between November 2000 and March 2001. He argued that the results of the sale by informal tender could not be relied upon since the property had not been properly marketed. HLBC's valuation was £120,000 based partly upon the price achieved in April 2002 and partly upon the sales of other properties in the area.

Held: Compensation was assessed at £147,000. The comparables had not been inspected internally and no reliable estimate had been provided regarding the costs of bringing the property into a habitable condition. Therefore the most reliable starting point was the price achieved from the tender process. However, the description in the tender document would have encouraged bidders to overestimate the extent of the necessary building work and the requirement of an £80,000 bond would lead a prospective purchaser to assume that the works would cost that amount, whereas the real cost would be much less. Accordingly, the value of the highest bid underestimated the value of the property by 15%, and adjusting the resulting figure to take into account changes in house prices between November 2000 and July 2001 produced a value at the valuation date of £147,000.

Editor's note: This decision was made in 2007 but there was an open award of costs which was determined in 2008, when the decision took effect.

Real Property

12

Court of Appeal

Adverse possession — whether appellant estopped from claiming title to garage

***** ST PANCRAS & HUMANIST HOUSING ASSOCIATION LTD V LEONARD
(2008) PLSCS 355 — Decision given 17.12.08

Facts: The Housing Association owned a leasehold interest in two semi-detached properties, including gardens to the rear and a garage, and was the successor in title to a co-operative housing association set up by former residents, including L who moved in as a squatter in 1973. L claimed that he had acquired title to the garage by adverse possession since 1975 but had only become aware of his rights in this respect in 2006. In the court below the judge found that L had taken possession of the garage in 1975 and had established the necessary 12 years' possession since then. The fact that other residents used it to store property was immaterial since they had either done this with L's permission or as trespassers about whom he was unaware or tolerated.

Point of dispute: Whether L's appeal should be allowed against the ruling of the judge that he was estopped from asserting his claim to the title of the garage. This was because the way in which he had conducted himself at a meeting of the management committee of the co-operative had created the impression that the garage was communal property and he had allowed the committee members to proceed in the belief, when they were negotiating with the council for the lease, that the lease would give them control and possession of the garage. L contended that no proprietary estoppel had arisen since he had no knowledge of the law of adverse possession at that time and his behaviour as a member of the management committee had not been unconscionable.

Held: L's appeal was dismissed. Although L had not become aware of his potential right to ownership of the garage until 2006, the judge found that (i) he had had a clear intention to use and possess the garage; (ii) he had sought to further his own interest with regard to the garage as far as he could; and (iii) he had held the necessary intention to occupy the garage to the exclusion of others. He believed that he had a right to exclusive possession of the garage as against other residents and that that right would continue even after the co-operative acquired a lease. Notwithstanding that belief, he had encouraged the co-operative to negotiate with the council on the basis that the garage would become leasehold property and would be available communally.

Contract

13

High Court

Contract for sale of land — third party claiming interest — claimant failing to obtain release of interest before long stop date — defendant refusing to complete — whether claimant entitled to summary judgment

***** BEST BEAT LTD (IN LIQUIDATION) V MOURANT & CO TRUSTEES LTD
(2009) PLSCS 1 — Decision given 18.12.08

Facts: BB, whose only asset was some land and premises acquired for a redevelopment project, was wound up in August 2006. It entered into a contract to sell the property to M with completion fixed to take place on 20.12.07. The contract provided for vacant possession on completion and incorporated the standard commercial property conditions of sale (1st ed). Just before completion was due to take place a third party (B) claimed that he had been granted a lease of the property in 2004; M refused to complete as BB could not deliver vacant possession. The parties entered into a variation agreement in order to give BB the opportunity to clear B's claim. Under Clause 2.6.1 of the agreement BB had to obtain a declaration that B had no interest in the property or a release from him of any interest he might have on or before 02.11.08. Before he would release his interest B required £90,000 from cleared funds, and could not execute the deed of release until 03.11.08. M considered that it was released from any obligation to complete since BB could not comply with Clause 2.6 of the variation agreement.

Point of dispute: Whether BB's application for summary judgment should be granted. BB sought specific performance of the contract on the basis that all the conditions specified in the variation agreement had been satisfied and that the requirement for BB to obtain a release before 02.11.08 was not to be construed as requiring delivery of an unconditional release before completion.

Held: BB's application was dismissed as it could not be said that M did not have an arguable defence. Although the modern approach to construction was to pay less attention to the wording and grammar of a document, if admissible evidence was found supporting an alternative meaning which the parties could reasonably have intended, the starting point was to assume that there were not linguistic mistakes in an agreement where legal advisers were involved. In this case there was little evidence of the background beyond the difficulties posed by B to completion of the original contract and the aim of the variation agreement was to achieve a compromise between the purchaser's right to demand an early completion date and the seller's need to solve the problem posed by B. The meaning of Clause 2.6 was clear and required the release to be executed by 2.11.08. Even if the longstop date was read as being 03.11.08 the deed of release had not been released unconditionally until 04.11.08 as a result of the operation of the conditions of sale.

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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

Statutory Instrument

SSI 2008/426 The Town and Country Planning (Development Planning) (Scotland) Regulations 2008

These Regulations come into force on 28.02.09 and are concerned with the preparation and publication of strategic development plans and local development plans under Part 2 of the Town and Country (Scotland) Act 1997 as substituted by s2 of the Planning etc (Scotland) Act 1997.

http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080426_en.pdf

02

Statutory Instrument

SSI 2008/427 The Planning etc (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Order 2008

This Order, which also comes into force on 28.02.09, makes provisions in relation to the substitution of a new Part 2 to the Town and Country Planning (Scotland) Act 1997 by s2 of the Planning etc (Scotland) Act 2006.

http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080427_en.pdf

03

Statutory Instrument

SSI 2008/432 The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008

These Regulations make provision for the manner in which applications for planning permission, for approvals required by a condition imposed on a grant of planning permission in principle and for certificates of lawful use and development under the Town and Country Planning (Scotland) Act 1997 are to be made. They will apply to all applications made on or after 03.08.09 but will also apply to the limited extent provided for in Part 11 in respect of applications made before, but not yet determined by, that date. Part 2 of the Regulations, which relates to the requirements for pre-application consultation introduced into the Act by s11 of the Planning etc (Scotland) Act 2006, comes into force on 06.04.09

http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080432_en.pdf

04

Statutory Instrument

SSI 2008/433 The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008

These Regulations are concerned with the preparation and content of schemes of delegation under s43A(1) of the Town and Country Planning (Scotland) Act 1997 and the procedure for reviews held by virtue of s43A(8) of that Act. Parts 1 and 2 will come into force on 06.04.09 and the remainder of the Regulations will be effective from 03.08.09.

http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080433_en.pdf

05

Statutory Instrument

SSI 2008/434 The Town and Country Planning (Appeals) (Scotland) Regulations 2008

These Regulations, which will apply to appeals where the notice of appeal is given on or after 03.08.09, make provision in connection with appeals to the Scottish Ministers under s47, 130, 154, 169, and 180 of the Town and Country Planning (Scotland) Act 1997 and in relation to the procedure for dealing with applications called-in for determination by the Scottish Ministers, by virtue of a direction under s46 of that Act.

http://www.opsi.gov.uk/legislation/scotland/ssi2008/pdf/ssi_20080434_en.pdf

06

Consultation Paper

Revision of Circular 12/1996: Planning Agreements: Consultation Paper
Deadline for Comments: 27.03.09

It was announced by the First Minister in August last year that the planned review of Planning Obligations under the 2006 Act would be postponed in order to avoid additional burdens on the development industry during the current period of economic uncertainty. The Scottish Government has therefore decided to focus on how best to make the current system of planning agreements operate more effectively and to this end it proposes to revise Circular 12/1996. This consultation seeks views on the proposed revised Circular, which will contain Scottish Government policy for the use of agreements made under s75 of the Town and Country Planning (Scotland) Act 1997 (planning agreements), and provides guidance on the circumstances in which such agreements should be used and on how they can be most efficiently concluded.

http://www.scotland.gov.uk/Resource/Doc/256182/0076041.pdf

Housing

07

Scottish Government Statistical Publication

Affordable Housing Securing Planning Consent, 2005-08

This summary presents key statistics from the second survey of Scottish Planning Authorities on the amount of affordable housing provision granted planning consent during the 2005-08 financial years. The following are the main points to be noted:

- during 2005-08 it is estimated that 18,763 affordable housing units were granted planning consent;
- 76% of those units are to be publicly funded;
- in addition to the 18,763 affordable units granted planning consent, a further 573 planning applications (the majority for market-price housing) contained a developer commuted payment for affordable housing in return for planning consent; and
- the highest number of affordable units were granted planning permission in Glasgow, all to be publicly funded

http://www.scotland.gov.uk/Resource/Doc/255324/0075695.pdf

WALES

Rating

08

Statutory Instrument

WSI 2008/3075 The Non-Domestic Rating (Demand Notices) (Wales) (Amendment No 2) Regulations 2008

The 1993 Regulations provide for the contents of rate demand notices issued by billing authorities in Wales and for the information to be supplied with these notices. These Regulations, which will apply to rates payable after 31.03.09, amend the 1993 Regulations by providing for additional information to be supplied concerning the rating revaluation due to come into effect from 01.04.10 and concerning the small business rate relief scheme established by the Non-Domestic Rating (Small Business Relief) (Wales) Order 2008.
http://www.opsi.gov.uk/legislation/wales/wsi2008/pdf/wsi_20083075_mi.pdf