Legal & Parliamentary

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evebrief

Editorial

The last few weeks have been busy for the courts, and we would like to draw your attention to some of the more interesting decisions in this edition.
At item 01 we report on another case which serves to illustrate the importance of serving notices correctly when attempting to exercise break clauses in commercial leases. The decision of the Court of Appeal in *Orchard (Developments) Holdings plc v Reuters Ltd* highlights the differences between formal and informal notices and the need for the latter to be acknowledged in time to make them effective. The High Court decision in *Clarence House Ltd v National Westminster Bank plc* (item 04) demonstrates that an attempt by a tenant to "virtually assign" its rights and liabilities under a lease without a landlord's consent is likely to fall foul of the alienation provisions in a commercial lease.

In *Salvage Wharf Ltd v G&S Brough* (item 17) the Court of Appeal held that a property owner had not lost its rights to light enjoyed under the Prescription Act 1832 by virtue of an adjoining developer owner serving a light obstruction notice against it under the Rights of Light Act 1959, notwithstanding that the parties had entered into an agreement in which the affected owner acknowledged that the developer's proposed new buildings could adversely affect its subsisting rights to light, air support, etc.

On the subject of court decisions generally, readers may be interested to consider the costs of litigation.
The long-running disputes arising from the construction of the new Wembley Stadium eventually reached the Court of Appeal, and have been resolved, but the judge commented that the trial bundle totalled 550 lever arch files, the cost of photocopying alone approached £1m and the pleadings ran to thousands of pages with each side fielding teams of experts, solicitors, leading counsel and two to three junior counsel.
The parties' costs totalled approximately £22m, far exceeding the sums that were seriously in dispute between the parties, with the result that the only people who benefitted from their failure to seize favourable opportunities to settle before going to trial were the lawyers involved.

Annette Lanaghan

GeraldEve

Landlord & Tenant

01

Court of Appeal

Break clause in commercial lease — validity of break clause notice served by fax

**** ORCHARD (DEVELOPMENTS) HOLDINGS PLC V REUTERS LTD
[2009] All ER (D) 85 (Jan); [2009] PLSCS 13

Facts: ODH was the landlord of commercial premises which were let to a company for a period of 15 years from 31.01.01. In 2004 the lease was assigned to R. The lease contained a break clause under which R could terminate the lease at the end of the fifth or tenth year of the term by giving six months notice. The break clause made it clear that the notice could either be a formal one, which would have to be delivered by hand, sent by registered post or by recorded delivery, or an informal one which could be given or served in another way but had to be acknowledged by the receiving party or its agent. R sent notices of its intention to exercise the break clause by letter and by fax on 29 and 30 July 2005. The letters were delivered to the wrong address. R vacated the premises by the break date, but ODH did not acknowledge receipt of the faxes until December 2006.

Point of dispute: Whether the break clause notice had been effective. The question was whether an acknowledgement given after the whole of the six-month notice period had passed, and after the break date itself, could retrospectively validate the informal notice given by fax. At first instance the judge found in favour of R and ODH appealed against that decision.

Held: ODH's appeal was allowed. An informal notice, if it was acknowledged in time, was a valid break clause notice but otherwise it was ineffective and it was settled law that there is no obligation to acknowledge an informal notice. An informal notice that was ineffective at the critical moment six months before the lease anniversary could not subsequently be made effective within the six-month notice period. Once the break point had passed it was too late for an acknowledgement; a lease could not be retrospectively ended by an acknowledgement given prior to or during litigation as that would remove all certainty. To comply with the break clause the tenant either had to serve a formal notice in time, or an informal notice which was acknowledged before the beginning of the six-month notice period.

02

High Court

Provision by landlord of Christmas decorations in shopping centre — whether "Promotion" as defined in lease

* BOOTS UK LTD V TRAFFORD CENTRE LTD
(2009) All ER (D) 221 (Jan) — Decision given 08.12.08

Facts: TC was the landlord of a shopping centre. Under the lease between TC and B (a tenant), the landlord was to bear "50% of the cost of Promotion in any service charge period". Promotion was defined as "…advertising and other forms of promotion of the Centre intended to bring additional custom to the Centre, which shall be reasonable and proper…" At Christmas TC put up decorations and provided a variety of entertainments, a large television screen and a Santa's grotto.

Point of dispute: Whether the items provided at the Centre by TC at Christmas constituted "Promotion", as that expression was used in the lease, and thus should be paid for as to 50% by TC.

Held: They did not constitute a "Promotion". In deciding whether the disputed matters came within the phrase "Promotion" it had to be asked whether they came within an ordinary understanding of that phrase. Applying the test that a person would know whether a thing was a form of promotion if they saw it, it was clear that the four disputed items could be categorised as facilities, amenities or attractions, but they were not forms of promotion.

03

High Court

Assignment of underlease — landlord refusing consent — whether claimant had tenancy for a term of years — whether claimant could shelter behind tenancy of a third party

***** ROUF V TRAGUS
(2009) All ER (D) 29 (Jan) — Decision given 13.01.09

Facts: The defendant landlord owned premises in south west London. In 1998, by a 25-year underlease, the premises were demised to M and H but the underlease was never registered. In 1999 M and H sought to transfer the underlease to the claimant who began to run a business from the premises. In 2006, M and H sought the landlord's consent to the assignment which was not forthcoming; negotiations between the defendant and the claimant continued and the claimant paid rent until July 2007 but the underlease was not assigned to him, and by September arrears of rent in the sum of £85,000 had accrued. The claimant obtained an injunction restraining the defendant from interfering with his possession and enjoyment of the premises. In December 2008 he was adjudged bankrupt.

Point of dispute: Whether the claimant's application for the continuance of the injunction should be allowed. He argued that he had a right to remain in the premises, either because he was a tenant with a lease for a specified term, or there was a third party with a lease behind which he could shelter.

Held: The application was dismissed. The underlease had never been assigned to the claimant, and the parties did not have a binding contract within the meaning of s2 of The Law of Property (Miscellaneous Provisions) Act 1989 — at most the claimant might be able to argue that he had a periodic tenancy which would, in any event, contain a forfeiture clause. There was no lease behind which the claimant could shelter: due to non-registration the underlease could not take effect as a legal estate and the absence of specific performance, by way of payment of rent, meant that it could not take effect in equity either. Against the background of arrears and the claimant's bankruptcy it was not appropriate to grant an injunction to protect, at most, a claim to a periodic tenancy which was subject to forfeiture.

04

High Court

Virtual assignment of lease of commercial premises — landlord's consent not obtained — whether breach of covenant against alienation

****** CLARENCE HOUSE LTD V NATIONAL WESTMINSTER BANK PLC
(2009) PLSCS 25 — Decision given 23.01.09

Facts: CH was the landlord and NWB the tenant under a lease of office premises for a term of 25 years from 1985. The lease prohibited the tenant from assigning, underletting, sharing or parting with possession of the demised premises or executing any declaration of trust in respect of the property or the lease without CH's consent. NWB had underlet the premises to the occupier for a term which expired three days before its own lease. In 2005 NWB entered into a virtual assignment whereby it transferred to a third party all the economic benefits and burdens of the lease, but it did not assign the leasehold interest or change the occupancy. NWB granted the virtual assignee a power of attorney to act on its behalf in respect of the property. CH was not informed of these arrangements and nor was its consent sought.

Point of dispute: Whether CH could succeed in its claim: (i) that NWB had acted in breach of the lease by entering into the virtual assignment; and (ii) for damages.

Held: The claim was allowed.

(i) The virtual assignment did not amount to an underletting or an assignment within the terms of the detailed alienation covenant in the lease, nor was it a declaration of trust with regard to the property or the lease. The relationship between NWB and the assignee was a contractual one and any claim for breach would give rise to a claim for damages at common law, rather than for equitable compensation.
(ii) However, the virtual assignment had put NWB in breach of the restriction against sharing or parting with possession of the property — possession included receipt of rents and profits and the right to receive these. NWB had therefore breached the alienation covenant in the lease and an inquiry into damages would be ordered.

05

Lands Tribunal

Long lease of flat granted to respondent under right-to-buy provisions of the Housing Act 1985 — whether service charge clause in lease permitted landlords to maintain a reserve fund for estimated costs of future repairs

***** LEICESTER CITY COUNCIL V MASTER
(2009) PLSCS 6 — Decision given 12.12.08

Facts: M held a long lease of a property dated April 2005 which was granted to him by LCC under the right-to-buy provisions of the Housing Act 1985. Clause 3(2) of the lease provided for the payment of service charges as a "fair proportion… of the reasonable costs or estimated costs… of any services incurred by the Lessor" as required under the lease "so far as such costs are chargeable to the Lessee by the Lessor under the provisions of Part III of Schedule 6 of the Act".

Point of dispute: Whether M was liable to pay instalments towards a reserve fund for future repairs. LCC contended that clause 3(2) had to be construed against the background of the s125 notice served on M in connection with his right-to-buy claim containing details of the level of service charge that would be levied during the first five years. The notice, which included an estimate of the cost of anticipated repairs within that period and a projected estimate of anticipated repairs after that, stated that "The landlord will designate such funds as a reserve fund and apply the same accordingly." LCC appealed against the leasehold valuation tribunal's ruling that Clause 3(2) did not entitle LCC to set up a reserve fund for repairs and it only covered costs or estimated costs for services that had actually been performed. It also ruled that the background to the right-to-buy claim could not justify any wider interpretation than this since it was inadmissible as a declaration of subjective intent.

Held: LCC's appeal was allowed in part. On a proper construction of Clause 3(2) LCC were entitled to demand from M a fair proportion of the reasonable estimated costs of future repairs which they incurred in observing and performing their repairing obligations under the lease. They could build up a reserve fund against the reasonable estimated cost of future repairs which would be needed in due course, but estimates for these had to be properly prepared. The s125 notice should be treated not as a subjective declaration of intent by LCC, but as a statutorily required document that was intended to have, and by force of statute did have, a continuing legal effect after the lease to M was executed.

Planning

06

Court of Appeal

Gypsies living on unauthorised sites in breach of planning control — council seeking to remove caravans from land by direct action — whether council had considered needs of individual families

***** R (ON THE APPLICATION OF MCCARTHY) V BASILDON DISTRICT COUNCIL
(2009) PLSCS 21 — Decision given 22.01.09

Facts: The respondents were 40 families of Irish travellers and gypsies who occupied unauthorised green belt sites. BDC refused planning permission for their sites and enforcement notices were upheld on appeal. Subsequently, using their powers under s178 of the Town and Country Planning Act 1990, BDC sought to remove the caravans from the land and to force the respondents to comply with the notices by removing the hardstanding and restoring the land to its natural state. When the respondents applied for judicial review the Equality and Human Rights Commission intervened, arguing that BDC had failed in its duty to have regard to race equality under s71(1) of the Race Relations Act 1976.

Point of dispute: Whether BDC's appeal should be allowed against the ruling of the judge in the court below granting the respondents' applications. The judge concluded that although BDC had had due regard to its race equality duty, the approach to need had been too restrictive. More consideration should have been given to the possibility of finding alternative sites, and the circumstances of each individual in question needed to be taken into account.

Held: BDC's appeals were allowed. On the evidence, the judge had erred in holding that consideration had not been given to the needs of individual families and BDC's decision to take action under s178 of the 1990 Act had been lawful and properly taken. The court would be slow to grant protection to those who, in constant defiance of the law, established homes on environmentally protected sites. BDC had followed correct procedures and in taking the decision to invoke s178 the respondents' persistent breaches of planning control and of criminal law were relevant factors. It was clear that BDC was aware of its duties under the Housing Act 1996 and considered as a whole the documents demonstrated that sufficient consideration had been given to the individual cases of each respondent.

07

Court of Appeal

Application for judicial review of grant of conditional planning permission for a distribution depot by organisation concerned with conservation of invertebrates

**** R (ON THE APPLICATION OF BUGLIFE — THE INVERTEBRATE CONSERVATION TRUST) V THURROCK THAMES GATEWAY DEVELOPMENT CORPORATION
(2009) PLSCS 27 — Decision given 28.01.09

Facts: B objected to a proposed development of a distribution depot on the site of a former power station on the ground that the site was of national importance as a habitat for rare and endangered invertebrates. Initially, Natural England had opposed the application, but withdrew its objection following the recommendation by planning officers that it should be approved subject to completion of a s106 obligation and the imposition of planning conditions. In the event permission for the development was granted subject to 30 conditions, one of which required the developer to submit a phasing plan for the development to ensure that compensatory habitats would be provided for the invertebrates.

Point of dispute: Whether B's appeal should be allowed against the decision of the court below to dismiss its application for judicial review of TTGDC's decision to grant permission for the development. The judge in the High Court ruled that TTGDC's conclusions that any long term harm would not be significant and that any short term harm would be alleviated by the proposed mitigating measures were fair, and that it was therefore unnecessary to follow the steps required by PPS 9 on biodiversity and geological conservation.

Held: B's appeal was dismissed. The application site had obvious advantages as a distribution site, and the limited effects on the conservation of biodiversity, opportunities for mitigation and benefits for the environment meant that TTGDC's approach had been appropriate and lawful. They were entitled to take a long term view based on the information they had been given, including planning officers' reports and detailed representations from Natural England. The detailed planning conditions attached to the permission and the s106 agreement were an adequate safeguard.

08

High Court

Planning permission to convert a barn in a special landscape area to ancillary residential use — local authority issuing enforcement and stop notices — appeal against decision of inspector appointed by Sec of State authorising defendants to continue works

* AMBER VALLEY BOROUGH COUNCIL V NORTHCOTT
(2009) EWHC 80 (Admin) — Decision given 23.01.09

Facts: N owned a farm in a special landscape area. In 2006 AVBC granted N planning permission to convert a barn into ancillary residential accommodation for a sick relative. This permission ("the 2006 permission") had no conditions or limitations attached to it. After the building works had commenced, and when the barn was partially dismantled, AVBC issued enforcement and stop notices stating that the proposed rebuilding of the roof and some of the walls of the barn went beyond what had been permitted and that the barn was being demolished and rebuilt, rather than just altered and extended. The inspector appointed by the Sec of State allowed N's appeal against the notices and granted permission for the development that had already been carried out, on the grounds that a substantial part of the original walls remained and the rebuilt sections were in accordance with the approved drawings.

Point of dispute: Whether AVBC's application to quash the inspector's decision should be allowed. AVBC argued that the inspector had failed to identify the magnitude of the departure from what had been approved by the 2006 decision, by stating that it involved the rebuilding of a barn when in effect it was the construction of a new dwelling house, and that he had reached his decision without proper consideration of the relevant planning policies and guidance in the local plan.

Held: The application was dismissed and the inspector's decision upheld. The relevant starting point was as he had identified it, the 2006 permission, not the position as it had stood on the ground when the notices were served. There had been nothing wrong with the inspector's approach, and although the 2006 permission might not have been clear as to exactly what works were permitted in respect of the barn, there was ample evidence to support a finding that the 2006 permission envisaged some element of demolition and rebuilding. The inspector's reasoning had been adequate and the argument advanced by AVBC that he had not properly considered relevant planning policies and guidance in the local plan was not founded. In essence, the present challenge was an attempt to re-run the merits of the appeal to the Sec of State.

09

Administrative Court

Challenge to identification of sites for eco-towns

***** R (ON THE APPLICATION OF THE BARD CAMPAIGN) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (2009) All ER (D) 249 (Jan) — Decision given 27.01.09

Facts: A housing green paper issued on 23.07.07 defined eco-towns as "green developments" that met the highest standards of sustainability, to include low and zero carbon technologies and quality public transport systems. Where practical, brownfield sites and surplus public sector land would be used. The process of shortlisting sites designated for the building of Eco-towns was begun and a draft sustainability assessment, a draft planning policy statement and a consultation document entitled "Eco-towns — living a greener future" were published.

Point of dispute: Whether to allow the claimants' application for judicial review of the government's proposal to include in the shortlist two depots, formerly belonging to the Ministry of Defence. The claimants argued that (i) there had been no consultation on the principle of constructing Eco-towns, or, if there had, the reasons given for particular proposals had not been sufficient to enable the consultees to consider and give intelligent answers; (ii) there had been no public consultation on the key criteria for selecting Eco-towns, their number or their size; (iii) there had been insufficient information on the process leading to shortlisting of 15 proposed locations for Eco-towns; and (iv) there had not been enough time to consider the documents.

Held: The application was refused. A reasonable reader of the housing green paper would be in no doubt that it was a consultation document. It contained an extended discussion of the Eco-towns proposal and sufficient reasons for the Government's proposals. The "Eco-towns — living a greener future" document did not comprise the consultation process prior to final determination of which locations should be on the shortlist, but sought views on certain matters that might assist the Sec of State for the purposes of formulating material for that consultation, when it eventually took place. There was no basis upon which to infer that the Sec of State had failed to consider the consultation responses to the green paper. The published documents gave adequate information and time for the limited consultation envisaged at that particular stage of the proceedings.

10

Administrative Court

Screening opinion

***** R (ON THE APPLICATION OF FRIENDS OF BASILDON GOLF COURSE) V BASILDON DISTRICT COUNCIL (2009) PLSCS 22 — Decision given 23.01.09

Facts: BDC, who owned the freehold of a golf course, accepted a tender from the interested party to run the course under a lease. The interested party applied for planning permission to develop the course, including constructing a clubhouse and driving range with associated landscaping and engineering work, some of which would involve remodelling areas of the course by depositing inert waste material. BDC provided a screening opinion, but concluded that an environmental impact assessment (EIA) would not be required since the proposed development was not an EIA development within either Schedule 1 or 2 to the 1999 Regulations since it was not an "installation for the disposal of waste" that would significantly affect the environment. The waste would be brought in to create artificial mounds, thus it was not a "waste operation" and the amount of material used would be less than 50,000 tonnes per year.

Point of dispute: Whether the applicants could succeed in their application to quash the grant of planning permission. With regard to the screening opinion they contended that BDC: (i) had lacked sufficient information to judge whether or not an EIA was required, and had erred in assessing the amount of waste material that would be required; (ii) should have reconsidered their screening opinion following the consultation response from Natural England; and (iii) should have consulted the county council.

Held: The claim was dismissed. (i) BDC had been provided with sufficient information on which to base their conclusion regarding the need for an EIA. The bringing of waste onto the golf course was not an operation that was likely to require an EIA. BDC was entitled to reach that conclusion and it was not vitiated by the fact that they had under-estimated the amount of material that would be required. (ii) BDC had not been under a duty to reconsider their screening opinion in the light of the consultation response from Natural England. (iii) BDC had been entitled to come to the conclusion that the application was for the improvement of the golf course rather than an application within the Town and Country Planning (Prescription of County Matters) (England) Regulations 2003, which would require determination by the county council. Having decided that it was the relevant local planning authority, there was no statutory requirement for BDC to consult the county council before granting permission.

11

Administrative Court

Extension to building in green belt — interpretation of paras 3.4 and 3.6 of Planning Policy Guidance 2: Green Belts (PPG 2)

***** DACORUM BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) All ER (D) 262 (Jan) — Decision given 29.01.09

Facts: In 1998 H purchased two buildings in the green belt and obtained retrospective planning permission to replace them with larger ones. At a later date H added a conservatory to one of the dwellings and in 2006 applied for planning permission in respect of that structure. Permission was refused by DBC on the ground that the structure infringed paras 3.4 and 3.6 of PPG 2 as the new structures had to be judged by comparing their size to that of the building they replaced. H's appeal against the enforcement notice issued by DBC was allowed by the Sec of State's inspector, who interpreted paras 3.4 and 3.6 to mean that the appropriateness of the new structures had to be judged by comparing them with the size of the existing building rather than the original one.

Point of dispute: Whether the inspector's decision should be quashed.

Held: DBC's application to quash the inspector's decision was allowed. When considering the correct interpretation of paras 3.4 and 3.6 of PPG 2 in cases where a building within the green belt had been demolished and replaced with a new structure, the words "original building" in para 3.6 referred to the building which had been demolished. The appropriateness of any subsequent proposed additions to the new structure fell to be assessed by comparison with the size of the original building, not with that of the structure which had replaced that building.

12

CLG Planning Policy Statement

Planning Policy Statement 11: Regional Planning Strategies (2004), technical amendments

Regional Spatial Strategies (RSS) were introduced in 2004 and the process for preparing RSS is set out in Planning Policy Statement 11: Regional Spatial Strategies (PPS11). Drawing upon experience to date, this document makes some small changes to the existing text in PPS11 with the aim of increasing the administrative effectiveness of the guidance.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/pps11amendments.pdf

13

CLG Consultation

Planning Act 2008: Consultation on list of statutory consultees for National Policy Statements
Deadline for Responses: 20.04.09

This consultation relates to the list of statutory consultees which the Sec of State must consult before designating a document as a National Policy Statement under the Planning Act 2008.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/consultationstatutoryconsult.pdf

14

CLG Statistical Release

Land Use Change Statistics (England) 2007 — Provisional estimates (January 2009)

In 2007 it is provisionally estimated:

- 77% of dwellings (including conversions) were built on previously developed land, compared with 76% in 2006.
- New dwellings were built at an average density of 44 dwellings per hectare, compared with 41 dwellings per hectare in 2006.
- 2% of dwellings were built within the Green Belt (unchanged since 2004) and 4% of land changing to residential use (from any use) was within the Green Belt, compared to 5% in 2006.
- 10% of dwellings were built within areas of high flood risk and 6% of land changing to residential use was within areas of high flood risk, compared to 10% and 7% respectively in 2006.

http://www.communities.gov.uk/documents/statistics/pdf/1133537.pdf

Rating

15

CLG Consultation Paper

Business rate supplements: a consultation on draft guidance to local authorities
Deadline for Responses: 17.04.09

The government set out its proposals for business rate supplements in a White Paper published in October 2007 and these proposals are now being taken forward through the Business Rates Supplements Bill. Clause 26 of the Bill makes provision for guidance to be issued to levying authorities relating to:

- the kinds of projects which may or may not be regarded as appropriate ones for levying a business rates supplement (BRS);
- the carrying out by a levying authority of an economic assessment;
- the types of expenditure which may be regarded as appropriate use of money raised through BRS, within a given project;
- the "additionality" requirement;
- the contents of an initial or final prospectus or a document required to be published, in particular the level of detail required; and
- the holding of a ballot on the imposition of a BRS or on a proposal to vary a BRS

This document sets out the draft guidance to be issued under Clause 26(3).
http://www.hm-treasury.gov.uk/d/business_rates_supplements230109.pdf

Real Property

16

Court of Appeal

Boundary dispute — whether agreement on boundary was a contract for the sale or disposition of an interest in land for the purposes of s2 of the Law of Property (Miscellaneous Provisions) Act 1989

***** MELHUISH V FISHBURN
(2008) All ER (D) 23 (Jan) — Decision made 19.11.08

Facts: The claimant, a property developer, sold a property to the defendant in 2001. On the Land Registry plan the boundary was shown as a straight line, but it was not marked out on the ground. The defendant claimed that at the end of 2001 he and the claimant agreed that the boundary would be curved in order to give the claimant access to some other land that he owned; in return the defendant would be given an extra piece of land, increasing the size of his garden by 1.8%, to compensate him for the loss of land that this would involve. This agreement was reflected in plans prepared by a garden contractor, who laid out the garden in accordance with those plans in April 2002. The contractor gave evidence that he had agreed the layout with the claimant before carrying out the work. In June 2002 the parties jointly paid a surveyor to prepare a plan showing the current boundary.

Point of dispute: Whether the claimant's appeal should be allowed against the ruling of the judge in the court below accepting the evidence of the defendant about the position of the boundary, and rejecting the claimant's contention that the defendant had stolen some of his land. The judge rejected the claimant's contention that the agreement should have complied with s2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Held: The claimant's appeal was dismissed. The finding that the judge came to had been open to him on the evidence. There was nothing unfair in the judge not accepting the claimant's denials of the defendant's case in cross-examination, and there were good reasons for him accepting the evidence of the garden contractor. The agreement was merely to demarcate a boundary and was not a contract for the sale or disposition of an interest in land for the purposes of s2 of the 1989 Act as the amount of land involved in the transfer was trivial.

17
Court of Appeal
Right to light

****** SALVAGE WHARF LTD V G&S BROUGH
(2009) PLSCS 31 — Decision given 29.01.09

Facts: SW, a developer, intended to develop land in the vicinity of B's property. The parties entered into an agreement ("the 1999 agreement") under which B acknowledged that the development could adversely affect its subsisting rights to light, air, support and other easements and rights belonging to or enjoyed by the property, but it agreed not to take any action to enforce those rights. The development was constructed, but omitting a building that was to have been constructed behind B's property. Subsequently a large complex, The Cube, was proposed which would require B's property to be compulsorily purchased. In June 2006 SW applied for registration of a light obstruction notice against B's property pursuant to s2 of the Rights of Light Act 1959. The notice stated that registration of the notice "was intended to be equivalent to the obstruction of access of light to the said building across our land which would be caused by the erection of an opaque structure of unlimited height [the notional wall]". The notice was registered. B's property was to be compulsorily purchased, but whether it enjoyed rights to light would substantially affect the amount of compensation payable. In order to protect its position with regard to rights to light B applied for declarations that: (i) it was entitled to an easement to receive light through the windows of the property; and (ii) the light obstruction notice should be cancelled.

Point of dispute: Whether SW's appeal should be allowed against the decision of the High Court to grant B the declaratory relief that it sought. The High Court had ruled that, by virtue of s3 of the Prescription Act 1832: (i) B's property enjoyed an easement of light through its windows; (ii) that right had not been abandoned by the 1999 agreement; (iii) the project as described in the 1999 agreement did not include The Cube; and (iv) any interference with B's right to light by the development of The Cube would go beyond what was permitted by the 1999 agreement.

Held: SW's appeal was dismissed.

(i) The judge had been correct to allow B's claim and to direct cancellation of the light obstruction notice.
(ii) B had not abandoned its rights to light by entering into the 1999 agreement. The proviso to s3 of the Prescription Act 1832 did not apply, since its light was not "enjoyed by some consent or agreement expressly made or given for that purpose". The 1999 agreement enabled SW to carry forward its project without the risk of infringement proceedings while confirming B's enjoyment of its subsisting rights.

Under the 1999 agreement B had consented to a development that would cause some reduction in the amount of light entering its premises, but it did not consent to a completely different development (the notional wall) that would block out all light. It was also relevant that the 1999 agreement envisaged a development which would be completed within three years, whereas the light obstruction notice was registered seven years later.

Tort

18

Court of Appeal

Noise nuisance from racetrack — whether nature and character of neighbourhood had changed following planning permissions — whether injunctive relief appropriate

****** WATSON V CROFT PROMO-SPORT LTD
(2009) PLSCS 23 — Decision given 26.01.09

Facts: CPS was the leaseholder of land which it used as racing circuit. W and others, who lived near to the racetrack, brought an action in respect of noise nuisance. The track was used on around 190-200 days a year and the noise levels emanating from it substantially exceeded what was considered to be reasonable. W sought an injunction to restrict the use of the circuit and damages for the diminution in enjoyment of their homes. CPS accepted that the racing produced high levels of noise, but argued that W had no claim since the noise from the racetrack was to be expected in a locality whose nature and character was established by planning permissions granted in 1963 and 1998. In addition, by virtue of an obligation entered into by CPS under s106 of the Town and Country Planning Act 1990, CPS had agreed to a number of restrictions to benefit persons who would otherwise be adversely affected by the use of the racetrack.

Point of dispute: Whether both parties' appeals against the findings of the High Court judge should be allowed. Although concluding that CPS's activities amounted to an actionable nuisance, the judge declined to grant an injunction and awarded W £149,000 damages as compensation for the diminution in the value of their properties. CPS argued that the judge had been wrong in law not to conclude that the nature and character of the locality had changed — the fact that planning permission had been granted for a noisy activity affected the private rights of citizens to complain of a common law nuisance.

Held: CPS's appeal was dismissed and W's appeal allowed.

(i) Given the judge's findings on the diminution of the value of W's properties consequential on the finding of nuisance and the scale of damages that he had awarded, this was clearly a case of substantial injury to W's enjoyment of their homes. Accordingly, the grant of an appropriate injunction restricting CPS's core activities would not be oppressive.

(ii) It could not be said that the grant of planning permission of itself affected the private right of individuals to complain of a common law nuisance as it was well established that the grant of a planning permission as such did not affect the private law rights of third parties. Whether there had been a change in the nature and character of the locality was a matter of fact and degree and on the evidence it could not be said that the judge's conclusion had been so wrong or perverse as to justify interference with his decision.

Taxation

19

CLG Research Paper

Application of Discretionary Council Tax Powers for Empty Homes — Executive Summary

This summary report sets out the key findings of a study into the impact that the discretionary application of the 50% Council Tax discount on empty homes is having on bringing such properties back into use. The key findings include the following:

- In 2007 there were 307,000 properties empty for longer than six months (long term empty (LTE)) in England, compared with 315,000 in 2004.
- In general, local authorities who have removed the discretionary council tax discount on LTE properties have a lower proportion of empty property stock than those who have not. These authorities were more likely to be in the south of the country and in areas experiencing higher market pressure for housing.
- In general, local authority officers who were interviewed were sceptical that removing or reducing discounts alone could motivate owners to bring properties back into use, as in most areas the costs of leaving a property empty, in terms of foregone rent etc. far outweigh the burden of any additional tax.
- Not all decisions to remove council tax discounts were directly related to LTE stock levels or wider policy aspirations. Some authorities removed the discounts to raise additional revenue in the short term, or because they had removed discounts on second homes and wanted to achieve a consistent approach to council tax policy.

http://www.communities.gov.uk/documents/localgovernment/pdf/1127899.pdf

Housing

20

Statutory Instrument

SI 2009/34 The Home Information Pack (Amendment) Regulations 2009

These Regulations come into force on 06.04.09 and amend the 2007 Regulations by adding the property information questionnaire to the list of required documents that must be in the home information pack before or at the first point of marketing.
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090034_en.pdf

21

CLG Survey Report

English House Condition Survey 2006 — Revised Headline Report

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

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

http://www.communities.gov.uk/documents/housing/pdf/ehcsheadline2006.pdf

22

CLG Survey Report

English House Condition Survey 2007 — Headline Report

This summary report presents key findings from the 2007 English House Condition Survey and progress being made towards improving living conditions in England. The following are the key policy areas addressed:

- housing conditions, including housing stock decency, housing stock and the Housing Health and Safety Rating System (HHSRS), vulnerable households in the private housing sector and non-decent homes, children living in non-decent homes, and deprived districts and non-decent homes;
- energy efficiency of the housing stock; and
- quality of the local environment

Since 2006 the Fitness Standard has been replaced by HHSRS as the statutory criterion of decency. It is estimated that there were 7.7 million non-decent homes in 2007, a little under 35% of the housing stock. Overall, 1.1 million homes in the social sector were non-decent and social housing was less likely to be non-decent than privately owned homes (29% and 36% respectively). There has been no statistically significant change in the number or proportion of the housing stock that was non-decent between 2006 and 2007, although in the private sector the proportion of homes that were non-decent fell from 47% to 45%. The key reason for this improvement is likely to be the number of new and existing properties entering the sector during this period. The most frequent reason for homes not achieving the decent homes standard was the presence of one or more Category 1 hazards under the HHSRS, but it was found that privately owned homes were almost twice as likely to have these hazards compared to social housing.

http://www.communities.gov.uk/documents/statistics/pdf/1133548.pdf

(Housing Surveys Bulletin — Issue No 4 January 2009 — http://www.communities.gov.uk/documents/statistics/pdf/1133593.pdf)

23

CLG Statistical Summary

Survey of English Housing Preliminary Report 2007/08

This report presents the preliminary findings from the final year of the Survey of English Housing, a household survey that has been conducted continuously for the Department for Communities and Local Government (CLG) from 1993-94 to 2007-08. In April 2008 this survey was merged with the English House Condition Survey to form the new English Housing Survey. The 2007-08 Survey of English Housing, which was carried out for CLG by the National Centre for Social Research, provides important housing data on owner occupation and on the social and private rented sectors. This preliminary report presents the key findings under headings which include:

- housing Tenure
- younger households and private renting
- owner Occupation by household type
- household size
- housing tenure by ethnicity
- mortgage type
- mortgage difficulties
- overcrowding
- household moves
- buying aspirations
- satisfaction with local area

http://www.communities.gov.uk/documents/statistics/pdf/1133551.pdf

23

CLG Statistical Release

House Price Index — November 2008

- UK house prices were 8.6% lower than in November 2007;
- the mix-adjusted average house price stood at £199,732 in November 2008 (not seasonally adjusted);
- UK house prices fell by 4.4% in the quarter ending November 2008, compared with a 3.6% fall in the previous quarter, ending August 2008;
- annual house prices fell in England by 8.7%, in Wales by 10.1%, in Scotland by 3.9% and in Northern Ireland by 16.2%; and
- annual average house prices paid by first time buyers in November 2008 were 11.8% lower than a year ago – by comparison, prices paid by former owner occupiers were 7.4% lower

http://www.communities.gov.uk/documents/statistics/pdf/1116925.pdf

24

Report to the Department of Communities and Local Government

Government Review of Regulation and Redress in the UK Housing Market: Final Report

At the time when the Consumers, Estate Agents and Redress Act 2007 was being debated the Government committed itself to a wider review of regulation across the property sector, as currently agents operating in different sectors of the housing market eg letting agents, caravan parks, HIP providers and private search companies, are subject to different legislation. This research assesses the scale and scope of regulation and identifies any gaps and imbalances across the different market sectors which may be working to the detriment of consumers. The scope for simplification, strengthening existing redress provisions and improving consumer awareness is considered.
http://www.berr.gov.uk/files/file49743.pdf

Environment

25

Defra, Welsh Assembly Government, and Scottish Government Consultation

Consultation on Local Authority Pollution Prevention and Control: The scope of the proposed six-year review of Process Guidance Notes for Part B Installations
Deadline for Comments: 06.02.09

Defra, the Scottish Government and the Welsh Assembly Government issue guidance on the air pollution control standards which reflect Best Available Techniques (BAT) for those installations regulated by local authorities under the Environmental Permitting Regulations (EPR). The control regime is generally referred to either as Local Authority Pollution Prevention and Control, or as the regulation of "Part B" installations. Process guidance notes, which set out the Government's view on what constitutes BAT to minimise air emissions from Part B installations, are reviewed periodically to ensure that they remain relevant and up-to-date. This consultation seeks views on how the next review should be conducted and what it should cover. It is proposed to undertake the review of all 82 process guidance notes between 2009 and 2011.
http://www.defra.gov.uk/corporate/consult/sixyear-review/consultation.pdf

General

26

All Party Urban Development Group

Building local jobs — ensuring local communities gain employment from regeneration

This paper argues that regeneration of city centres has not led to better employment opportunities for local residents and that this represents a wasted opportunity. The report asks how regeneration can be better used to deliver job opportunities for local residents, taking into account the current recession in the economy and how its findings can be used when the situation turns around. The evidence suggests that there are five factors that could help link regeneration to job opportunities for local residents:

- using s106 planning agreements to secure commitment to local employment objectives;
- building partnerships between local authorities, employment agencies, further education and employers at the pre-development stage;
- forecasting possible employment opportunities during planning, construction and post-development phases;
- using targeted employment strategies to link training to employer demand; and
- ensuring that regeneration leaves a positive employment legacy by creating long term opportunities, jobs with career prospects, and ongoing support for employees

http://0301.netclime.net/1_5/1bb/3e5/3ba/APUDG-BuildingLocalJobs%20FINAL.pdf

27

Independent Report to CLG

The Credit Crunch and Regeneration: Impact and Implications

This report considers the following issues:

- what is the credit crunch?
- what has been its impact on commercial property?
- what has been its impact on housing markets?
- what has been its impact on partners and projects?
- what has been the impact on regeneration agencies?
- what has been the impact upon places?
- what might happen next?
- what are the policy implications?

http://www.communities.gov.uk/documents/citiesandregions/pdf/1135143.pdf

28

Good Practice Guide

Archaeology & Development

It is estimated that £150m is spent by developers on archaeology each year. Although archaeological remains are treated as a material consideration in the planning process, archaeology is often underestimated as a business risk — often it is not considered early enough in a project leading to unforeseen consequences, while on the other hand opportunities to add value to a project by integrating aspects of the historic environment into the final design, generating community benefits and positive publicity may be underestimated. The aim of this guidance is to provide clients, designers and investors in the development sector with a unified source of independent and practical advice and information regarding archaeology, drawing on the plentiful existing, but often confusing, guidance.

http://www.ciria.co.uk/acatalog/c672.pdf

29
CABE Essay
Good Design: the fundamentals

This essay, written by the Chief Executive of CABE, Richard Simmons, explores the questions "Why does design matter and what is the best way to achieve it?" It considers why architecture and urban design are important cultural assets and why good design can only be reached if it has users in mind. The essay sets out the thinking behind "*Shape the Future, CABE's strategy for 2008/09-2010/11*".
http://www.cabe.org.uk/AssetLibrary/12750.pdf

Shape the future: corporate strategy 2008/09-2010/11
http://www.cabe.org.uk/AssetLibrary/12747.pdf

30
CABE Briefing
Public Space Lessons — Improving green space skills

This report considers the problems faced by the green space sector due to an acute shortage of skills in the workforce. It is considered that there are too few professionals such as landscape architects and green space managers working in the sector, and that the situation is worsening because of inadequate training and career development opportunities. As a result the quality of green spaces is suffering with the workforce looking after them being under-valued and poorly paid. This briefing explains why better skills are so important to this sector and gives useful tips on what green space organisations can do to improve them.
http://www.cabe.org.uk/AssetLibrary/12753.pdf

Gerald Eve's UK office network

Gerald Eve LLP is an independent firm of chartered surveyors and property consultants, employing more than 330 staff across the UK.

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Evebrief has been established for more than 30 years. It is a summary of the latest statutory and legal cases affecting the property industry and is widely regarded in the industry as the most comprehensive document of its type.

Useful web links

www.ukonline.gov.uk
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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Gerald Eve Research

One of our key roles at Gerald Eve Research is to communicate with our clients and others; to inform them, for example, on our latest thinking on topical issues such as legal matters and the implications for broader property market trends.

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Legal & Parliamentary

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evebrief

SCOTLAND

Planning

01

One Scotland Consultation Paper
Designing Streets
Deadline for Comments: 23.03.09

The aim of this paper is to demonstrate the benefits that flow from good street design and assigning a higher priority to cyclists and pedestrians. It sets out an approach to the design, particularly of residential streets and streets where traffic is light, that recognises their role in creating more workable places for members of the community. "*Designing Streets"* is a companion document to "*Designing Places"* applying the principles of good design contained in that policy to both new and existing streets. "*Designing Places"* highlights six key qualities of successful places and "*Designing Streets"* explains how these qualities are applied to street design, as follows:

- distinctive — responding to local context to create places that are distinctive
- safe and peasant — creating safe and attractive places using imaginative layouts to minimise vehicle speeds naturally
- easy to get to and move around — enabling ease of movement by all modes of travel, particularly walking and cycling, connecting well with existing streets and allowing for links for future areas of development
- welcoming — encouraging integration between neighbours to create a sense of community
- adaptable — planning networks that allow for future adaptation
- resource efficient — using materials and designs that are durable and cost-effective to construct and maintain

http://www.scotland.gov.uk/Resource/Doc/258568/0076694.pdf

Rating

02

Statutory Instrument

SSI 2009/3 The Non-Domestic Rate (Scotland) Order 2009

This order comes into force on 01.04.09 and prescribes a rate of 48.1 pence in the pound as the non-domestic rate to be levied throughout Scotland in respect of the financial year 2009-10.
http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090003_en.pdf

Housing

03

Responding to the Changed Economic Climate: More action on Housing

In August last year, the Scottish Government announced a series of new housing actions in response to the changing economic climate. This document details the progress that has been made on these, as well as the further housing measures that the Scottish Government is taking as part of its economic recovery programme.
http://www.scotland.gov.uk/Resource/Doc/1125/0076470.pdf

Environment

04

Scottish Government Study

Study into health and environment

The Scottish Government has announced that it is to fund a major new research project on the links between the environment and public health. It will examine evidence on interaction between people and their environments and will assist in informing future policy on both public health and the environment. Historically, the focus has been on creating environments that are free from hazards, but the Government now recognises that there is an additional need to create physical environments which positively nurture better health and well-being.
http://www.scotland.gov.uk/News/Releases/2009/01/23103830

General

05

Scottish Government Statistical Bulletin

Scottish Vacant and Derelict Land Survey 2008

The following are the main points to emerge from this survey:

- There were 10,832 hectares of derelict and urban vacant land recorded in the 2008 survey, of which 2,630 hectares (24%) were urban vacant and 8,203 hectares were derelict (76%).
- Since 2002 there has been an increase of 145 hectares in the total amount of derelict and urban vacant land recorded in the survey. This is attributable to land that has been brought back into productive use or removed due to naturalisation being balanced by a small number of large sites falling out of use.
- Since 2002 an average of 608 hectares of derelict and urban vacant land was brought back into use each year. The 2008 survey recorded 564 hectares of derelict and urban vacant land being reused since 2007.
- North Lanarkshire has the highest recorded amount of derelict and urban vacant land, and Glasgow City the second highest.

http://www.scotland.gov.uk/Resource/Doc/259018/0076787.pdf

06

Housing, Regeneration and Planning Research Paper

Literature review: policies adopted to support a healthy retail sector and retail led regeneration and the impact of retail on the regeneration of town centres and local high streets

The Scottish Government commissioned the Institute of Retail Studies at the University of Stirling to provide a literature review on the policies adopted to support a healthy retail sector and retail led regeneration and the impact of retail on the regeneration of town centres and local high streets.
http://www.scotland.gov.uk/Resource/Doc/256976/0076300.pdf

WALES

Environment

07

Welsh Assembly Government Consultation

Welsh Assembly Government Policy Statement on Water
Deadline for Comments: 25.02.09

The Welsh Assembly Government has developed a Policy Statement on Water, and seeks views on the changes that it proposes to make to water policy in Wales. It is hoped that the timing of this consultation will help water services in Wales respond to the economic, social and environmental changes that affect water.

The statement has been developed to fit in with the Welsh Assembly Government's wider policies including:

- The consultation on a new Sustainable Development Scheme for Wales, "*One Wales: One Planet*";
- The Environment Strategy for Wales and its action plan; and
- The Climate Change Strategy for Wales

The Welsh Government's core principles for water are:

- to ensure access to safe drinking water;
- to maintain water and sewerage services at an affordable price; and
- to ensure compliance with the statutory obligations that drive water quality

http://wales.gov.uk/docs/desh/consultation/090114waterpositionen.doc?lang=en

08

Welsh Assembly Government Consultation

Revised Guidance on the Power to Promote or Improve Economic, Social and Environmental Well-Being
Deadline for Comments: 20.03.09

Section 2(1) of the Local Government Act 2000 provides local authorities with a discretionary power to do anything which they consider is likely to achieve the promotion or improvement of the economic, social and/or environmental well-being of their areas. The power was brought into effect in Wales on 09.04.01, but before exercising it a local authority must have regard to any guidance issued by the Assembly, and it is intended that this draft will be that guidance. The Welsh Assembly Government first consulted on guidance in June 2001, and again in late 2005. This latest draft guidance takes account of earlier consultation responses and makes reference to authorities' power to trade in ordinary functions, a power conferred by Order in 2006, and not covered by previous versions of the guidance.
http://wales.gov.uk/docs/dsjlg/consultation/090123wellbeinglettere.pdf?lang=en

NORTHERN IRELAND

Planning

09

Statutory Rule

SR 2009/17 The Planning (Control of Advertisements) (Amendment) Regulations (Northern Ireland) 2009

These Regulations, which come into force on 19.02.09, amend the 1992 Regulations. The changes relate, inter alia, to the definition of "amenity", the addition of certain limitations to granting deemed consent for the display of an advertisement, provisions relating to the giving of directions for express consent in certain circumstances, provisions to allow discontinuance orders to be made in order to remedy what appears to be a substantial injury to the amenity of the locality or a danger to public safety, and the introduction of deemed consent in relation to advertisements on sites which have been used for displaying advertisements for the preceding ten years without express consent.

http://www.opsi.gov.uk/sr/sr2009/pdf/nisr_20090017_en.pdf