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Volume 31(07) 01 June 2009

evebrief

Editorial



Jeremy Dharmasena

The last two or three weeks have been relatively quiet in the courts and there have been few reports, consultations or circulars published. It is perhaps though worth checking the statistical releases to track latest developments on house prices. The facts suggest there is a glimmer of hope and a green shoot (maybe even two — see items 07 and 08), with prices dropping 3.8% for the quarter to March 2009 compared with 4.8% in the quarter to February 2009. At that rate of "recovery" we would see house prices stabilising by July; a somewhat optimistic scenario I know. Nevertheless, in central London at least, there are murmurs of increased activity amongst agents and it seems overseas investors are creating competition. There appears to be increased activity in the house building sector too, with housing starts in the March 2009 quarter up 13% on the previous quarter.

Possibly of general interest at item 10, albeit dealing with a rather fine legal point, is a case relating to adverse possession. It involves a river mooring where the defendant's boat had been moored for the past 26 years. The court decided that, in principle, it was possible to acquire title to part of the river bed through occupation of a vessel where it did not rest on the bed at all times. The flowing and ebbing of the tide did not mean the "squatter" had relinquished physical possession of the land upon which the boat rested even though it did so only at low tide.

Jeremy Dharmasena

Landlord and Tenant

01

Court of Appeal

Rent Act 1977 protected tenancy — whether order for possession reasonably made

* WHITEHOUSE V LEE

(2009) PLSCS 157 — Decision given 14.05.09

Facts: The elderly appellant, W, and her husband had lived in the same flat since 1963 and were protected tenants under the Rent Act 1977. The landlord, L, wished to sell the flat, garages beneath and adjoining house with vacant possession to fund their pension and had purchased another flat a mile away and offered it to W and their husband, who did not like it or want to move away from their present home and locality. L brought proceedings seeking vacant possession on the grounds that suitable alternative accommodation was available. The judge considered it reasonable to make a possession order, having balanced the social and emotional consequences of the appellants having to move against the reasonableness of L's wishes to realise their assets and provide for their pensions in later life. W appealed against the order.

Point of dispute: Whether the judge erred in his approach to reasonableness.

Held: The appeal was allowed. The judge had approached the question of reasonableness on a mistaken basis. The question was not whether it was reasonable for the landlord to seek possession, but whether it was reasonable for the court to make an order. In particular this required the judge to consider the effect upon the landlord and the tenants if an order were made and if it were not. L had advanced no case of hardship if they could not sell with vacant possession, and could still sell the properties subject to the tenancy or choose not to sell and defer the pecuniary gain. However, the threatened move would remove W and her husband from a community in which they played an important role and enjoyed friendship and support. In all the circumstances it was not reasonable to make a possession order.

Planning

02

Administrative Court

Appeal against enforcement notice — material change of use in breach of planning control introduced co-mingled waste to site. Conditions imposed re vehicle movements — whether inspector erred in law in placing conditions on activities which did not constitute or give rise to a change of use

* CHAS STORER LTD V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(2009) PLSCS 160 — Decision given 15.05.09

Facts: The appellant company operated a waste processing site. In 2006 the Council issued an enforcement notice alleging a breach of planning control following a material change of use arising from a change in and intensification of the type of material brought into the site. On appeal the inspector imposed conditions on the use of the whole operation regarding, in particular, vehicle movements.

Point of dispute: The appellant contended that the conditions should only apply to those uses which constituted a change of use rather than the site as a whole.

Held: The appeal was allowed. The inspector was not entitled to impose conditions on uses which did not constitute a material change of use.

03

Administrative Court

Planning appeal inspector grants permission for a replacement bungalow in the Green Belt — whether inspector applied correct test and the proposed development was larger than the existing building

* HOBSON V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2009) PLSCS 161 — Decision given 08.05.09

Facts: A planning application was made for the development of a detached two-storey house in the Green Belt in place of an existing bungalow. Planning permission was refused and appealed. At appeal the inspector concluded permission should be allowed as the proposal would not be materially larger than the existing building.

Point of dispute: Whether the inspector had erred in law when applying PPG2 Green Belt policy by relying on a judgment based on the visual appearance of the proposed development rather than its physical size.

Held: The application was dismissed. The inspector had applied the correct tests and her decision letter was entirely proper, adequate and intelligible.

04

Consultation new Planning Policy Statement

Consultation paper on a new Planning Policy Statement 4: Planning for Prosperous Economies

This is a comprehensive new draft planning policy statement which brings together in one document all of the Government's key planning policies relating to the economy. The aim is to create a streamlined, coherent set of planning policies designed to meet the economic challenges faced today and over the longer term. This consultation seeks views on the structure and format of the new proposed streamlined approach to policy and additionally responses are sought in respect of various proposed policy changes, such as those relating to the rural economy (in response to the Taylor review of rural housing and economic development).
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/consultationeconomicpps.pdf>

05

CLG Guidance

Tree Preservation Orders: A Guide to the Law and Good Practice — Addendum May 2009

This addendum to the original guidance published in March 2000 replaces the previous addendum issued in September 2008 to take account of recent Regulations and legislation. The changes include a fast-track appeal process and a right to claim costs where local planning authorities refuse consent to carry out work to protected trees or impose conditions.
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/tposguideaddendum.pdf>

Human Rights

06

Administrative Court

Refusal of local authority to permit open-air funeral pyre

** GHAI v NEWCASTLE CITY COUNCIL
(2009) PLSCS 151 — Decision given 08.05.09

Facts: G was an orthodox Hindu who wished to have his body cremated on an open-air funeral pyre after his death on the grounds that in India this was essential for the transmigration of a person's soul. He challenged NCC's refusal to provide land for this purpose and also sought judicial review of its decision not to permit the funeral rights of Hindus in its area to be observed within its crematoria.

Point of Dispute: Whether, inter alia: (i) the Cremation Act 1902 prohibited funeral pyres and G's request could therefore not be considered unless the law were changed, as contended by NCC; (ii) an interference with the manifestation of G's religious beliefs could be justified under Article 9 of the European Convention on Human Rights (ECHR); (iii) NCC had breached Article 8 of ECHR by preventing him from exercising his choice of a funeral right, which did not respect his private and family life; and (iv) he had been discriminated against by the prohibition of open-air funeral pyres in breach of Article 14 of ECHR.

Held: That (i) the 1902 Act made it clear that open-air cremation was prohibited; (ii) G's rights under Article 9 had not been violated — although the Act and the related 2008 Regulations interfered with his religious beliefs the legislation was consistent with the cultural expectations of UK residents and secured the avoidance of likely offence and distress; (iii) the requirement that cremation takes place in a building did not amount to an interference with the right to respect for privacy and family life — open-air cremation lay outside the private sphere of a person's existence as protected by Article 8; and (iv) land that would meet G's requirements, such as being 2km from housing, with water and reasonably secluded, was not available within the city and the argument as to religious discrimination could therefore not succeed. The claim was dismissed.

Housing

07

CLG Statistical Release

House Price Index — March 2009

- House prices fell 13.6% in the 12 months ending March 2008.
- The mix-adjusted average house price in the UK was £187,193 (not seasonally-adjusted).
- UK house prices fell by 3.8% in the quarter ending March 2009, compared with 4.8% in the quarter ending February 2009.

<http://www.communities.gov.uk/documents/statistics/pdf/1228768.pdf>

08

CLG Statistical Release

House Building: March Quarter 2009, England

- There were an estimated 18,340 (seasonally adjusted) starts during the quarter, up 13% on the previous quarter but 44% lower than the March quarter in 2008.
- Private enterprise starts were 51% lower than in the March quarter in 2008, but starts by Registered Social Landlords rose by 5%.
- Completions were 4% lower than the previous quarter and 23% lower than the March quarter in 2008.

<http://www.communities.gov.uk/documents/statistics/pdf/1236690.pdf>

This release contains a range of comparative statistics and projections relating to housing stock and related matters. Key points include:

- a projected increase in the number of households from 21.5m in 2006 to 27.8m in 2031;
- an increase in the total housing stock from 17.7m in 1979 to (provisionally) 22.2m in 2007; and
- 613,000 vacant private sector dwellings in April 2008, or 3.3% of the total stock — an increase from 587,000 in 2007

<http://www.communities.gov.uk/documents/statistics/pdf/1225311.pdf>

Real Property

10

High Court

Moored vessel — acquisition of title to river bed by adverse possession

* PORT OF LONDON AUTHORITY V ASHMORE
(2009) PLSCS 150 — Decision given 08.05.09

Facts: The defendant, A, owned a sailing barge, which had been moored on the Thames near Battersea Bridge since 1983, without obtaining possession from the PLA. The PLA applied to register title to the river bed and A objected insofar as it concerned the area of the bed on which the boat came to rest at low tide, claiming he had acquired title by adverse possession, the limitation period being 12 years. The PLA sought possession of that part of the river bed or foreshore occupied by the boat together with an injunction to restrain further trespass and declaratory relief.

Point of dispute: As a preliminary issue, whether the owner of a vessel moored on a tidal river or other tidal water could acquire title, by adverse possession, to the sea or river bed or foreshore for the footprint of the vessel where the title had not been registered and the vessel rested on the land or foreshore at low tide only.

Held: The preliminary issue was determined in A's favour. In principle it was possible to acquire title to the part of the bed of a tidal river or to the foreshore through the occupation of a vessel that did not rest on the bed or foreshore at all times. What constitutes sufficient possession depends upon the nature of the land and the manner in which it is commonly used and enjoyed. In this case, short of building on it, a squatter could not be physically present on the foreshore every minute of the day and this was not a bar to such a claim. As to whether the defendant had demonstrated sufficient intention to possess the river bed, though the claimant argued that what the defendant was doing could have been equally compatible with the exercise of some other right less than possession, in this case the mooring of the vessel was not attributable to anything other than an intention to possess this part of the river bed. Accordingly the defendant had established not only the necessary fact of possession but also sufficient intention to possess the relevant part of the river bed throughout the material time.

Contract

11

High Court

Tender for construction project through procurement process — attempt to submit additional information after submission of tender but before the deadline

** JR LEADBITTER & CO LTD v DEVON COUNTY COUNCIL
(2009) PLSCS 148 — Decision given 01.05.09

Facts: DCC undertook a procurement process, under Public Contracts Regulations 2006 (SI 2006/5) implementing Directive 2004/18/EC, for a four-year framework agreement for construction projects. The invitation required tenders to be submitted electronically to a secure portal by a deadline and each tender had to include at least four case studies. JRL submitted a tender before the deadline but omitted the case studies, and on realising this and attempting to add them to the tender it found that the portal had not been designed to accept further information. The tender was rejected on the ground that it had not been submitted in complete form before the deadline, and JRL sought an injunction requiring its tender to be considered and alternatively damages for the loss of the chance to be selected as a contractor.

Point of dispute: Whether, as alleged by JRL, DCC was in breach of (i) Reg 4 of the 2006 Regulations; (ii) community obligations requiring tenderers to be treated equally; and (iii) the obligation under Reg 30 to select contractors only on the basis of the most economically advantageous tenders.

Held: The tender was substantially incomplete and there was nothing to suggest that DCC would not have rejected it when the omission was discovered. JRL had not been treated in a discriminatory way — the tender documents made it clear that no further information could be added once the tender had been submitted, and none of the tenderers would have been permitted to add to their tenders after submission. A departure from these terms could itself constitute unequal treatment and a lack of transparency. In exceptional circumstances late submission of portions of a tender could be accepted, particularly where this resulted from an error on the part of the procuring authority, but there was no requirement to do so and in this case the decision to reject the tender was well within the margin of discretion given to contracting authorities.

Leasehold Reform

12

Lands Tribunal

Collective enfranchisement — whether price enhanced by value potentially released on redevelopment of the building from flats to a single house

** THE EARL CADOGAN V 2 HERBERT CRESCENT FREEHOLD LIMITED

LRA/91/2007 — Decision given 15.05.09 before His Honour Judge Huskinson and A J Trott FRICS

Facts: Cadogan appealed against the Leasehold Valuation Tribunal's determination of an enfranchisement price of £2,164,946 for the freehold of 2 Herbert Crescent, London SW1 in accordance with the Leasehold Reform, Housing and Urban Development Act 1993. The property was arranged as two flats and two maisonettes at the valuation date, with a headlease expiring on 25 September 2009. The underlease of Flat 1 had been extended under the 1993 Act so as to expire on 25 September 2099. C was the freeholder and 2HCF the nominee purchaser. The headlease was owned by a Mrs Marks (M), who occupies the basement caretaker's flat. It was agreed before the LVT that M would have security of tenure at the expiry of the headlease and C could not reopen this issue before the LT.

Points of dispute: (i) The value of the freehold with vacant possession (available for continued use as flats or for reconversion to a single family house); (ii) the process of effecting s61 of the 1993 Act to obtain vacant possession of Flat 1 including identifying the competent landlord for service of the appropriate notice; (iii) what risk attached to securing planning permission for the reconversion; (iv) what risk attached to M's security of tenure in terms of compensating her to secure vacant possession; and so (v) whether there was sufficient uplift in value to justify a hypothetical purchaser's overbid for reconversion.

Held: (i) The freehold vacant possession value should be £4.085m, based on the LT's own findings; (ii) it was not for the LT to decide the disputed points of law in effecting the s61 notice but to consider the extent to which the potential difficulties would manifest themselves in the mind of the hypothetical purchaser of the freehold. The purchaser would be advised of the incentive to avoid litigation and delay in exercising s61 by coming to an early agreement to obtain vacant possession with a generous payment; (iii) it was unlikely there would be any difficulty in securing planning permission; (iv) vacant possession of M's flat could be achieved by serving notice under Schedule 10 of the Local Government and Housing Act 1989 to provide alternative accommodation, albeit an expensive route with associated delays. Alternatively, a deal could be reached with M to surrender the headlease and avoid the s61 difficulties; (v) there was substantial additional value for reconversion to a single house (£765,000).

An allowance of two thirds of £765,000 (or £510,000) would be an appropriate sum to cover all the risks, leaving £255,000 as additional value representing the overbid for the freehold purchase. The LVT had determined too low a figure. Allowing the appeal, the LT determined a price of £2,383,639.

Editor's note: Gerald Eve partner, Julian Clark, gave expert evidence on behalf of Cadogan.

<http://www.landtribunal.gov.uk/judgmentfiles/j598/LRA-91-2007.pdf>

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County Court

Leasehold Reform, Housing and Urban Development Act 1993 — leaseback of flat in building subject to collective enfranchisement

* PANAGOPOULOS V EARL CADOGAN
(2009) PLSCS 159 — Decision given 05.05.09

Facts: C owned the freehold of a building divided into five flats on the ground and upper floors with a basement flat below. In 2006 three out of the five qualifying tenants served notice on C under s13 LRHUDA 1993 to acquire the freehold of the building. A s21 counter-notice was served in which no leaseback of any part of the building was sought. Subsequently C notified P of his intention to grant a lease to a nominee of the caretaker's flat, and in 2008 granted a 999-year lease at a peppercorn rent of the caretaker's flat and adjacent light well. P objected to the application to register the lease on the grounds that the counter-notice had not requested a leaseback, and proceedings were issued to determine the effect of s19 of the 1993 Act on the lease.

Point of dispute: (i) Whether the lease was void as severance of the freehold interest under s19(1)(i) LRHUDA 1993; (ii) whether the lease was void as a disposal of acquirable common parts under s19(1)(ii) and s2(1)(b) LRHUDA 1993.

Held: Judgment was given for P. The court held that the lease was void, and even if it had not been void then the lessees would have been entitled to acquire it. The lease was within s153 LPA 1925, and could be converted into a freehold by nothing more than the lessee's own declaration, and it therefore involved a severance of the freehold and so was void under s19. Both the caretaker's flat itself and the light well demised under the lease were within the meaning of "common parts" under the Act given the covenants in some leases regarding the provision of a resident caretaker. The lease was therefore also void as it was of common parts, which it was reasonably necessary that the lessees should acquire.

14

CLG Consultation

The right to enfranchise (RTE) provisions — May 2009

Deadline for responses: 03.05.09

This consultation paper sets out the Government's proposal for the non-implementation of the RTE provisions in the 2002 Commonhold and Leasehold Reform Act. Sections 121-124 of the Act when implemented would have required existing leaseholders wishing to collectively enfranchise to do so through a TRE company. It invites views of consultees on the repeal of the RTE provisions having regard to the practical difficulties identified with the operation of those provisions.
<http://www.communities.gov.uk/documents/housing/pdf/1227824.pdf>

General

15

CLG Report

Transforming Places Changing Lives: Taking Forward the Regeneration Framework

This document sets out how the Government is taking forward the delivery of the framework. It includes a summary of the commitments that central Government and its key delivery agencies — The Homes and Communities Agency; and The Regional Development Agencies — have made to deliver the regeneration framework. The role of central and local Government in regeneration and in engaging with the communities is also recognised.

<http://www.communities.gov.uk/documents/citiesandregions/pdf/1227732.pdf>

16

CLG Report

Transforming Places: Changing Lives: Taking Forward the Regeneration Framework — Equality Impact Assessment — May 2009

The aim of this assessment is to provide a clearer link between neighbourhood renewal and wider regeneration and economic interventions, helping co-ordination with regional strategies, focusing on areas with a potential for sustainable economic growth and private sector investment over the long term. The assessment aims to clarify what regeneration should deliver, providing a clear framework for regeneration activity.

<http://www.communities.gov.uk/documents/citiesandregions/pdf/1227742.pdf>

17

English Heritage and CABI Consultation Draft

Large Digital Screens in Public Places

This guidance has been prepared to help local authorities consider planning applications for large digital screens in public places. Some of these will be part of the Live Sites programme for the London 2012 Olympic Games and the Paralympic Games. It will also extend to advice relating to other organisations, broadcasters and commercial companies to install large digital screens in towns and cities for a variety of purposes. The guidance is designed to assist all parties involved in the decision making process when considering the potential effects on the wider historic environment as well as from a local context.

<http://www.cabe.org.uk/files/large-digital-screens-in-public-spaces.pdf>

18

CLG Consultation

Business Rate Supplements: Draft Proposals on Ballot and Administration Arrangements — May 2009 Deadline for Responses — 19.08.09

This consultation paper sets out the Government's proposals for balloting those liable for proposed business rates supplements where the funding of additional projects to promote the economic development of their local areas exceeds one third of the total cost of the project. The BRS Bill follows extensive debate following the Lyons Inquiry and the review of sub national economic development and regeneration.

<http://www.communities.gov.uk/documents/localgovernment/pdf/1232131.pdf>

19

Law Commission Consultation Paper

Statute Law Repeals: Abortive Railway Projects — Proposed Repeals

Deadline for responses: 04.09.09

Views are sought on the proposed repeal of 216 local Acts relating to abortive railway projects and now considered obsolete because the projects they authorised collapsed. In the few cases where the line was actually constructed and open for use the line was abandoned a few years later. Most of the Acts proposed for repeal have been obsolete for more than a century.

http://www.lawcom.gov.uk/docs/abortive_railway_projects.pdf

20

British Council for Offices research publication

Biomass and Offices

This report highlights the role of biomass as a fuel and discusses the technology behind its use, environmental impacts, the UK government's biomass strategy, economic viability and its transportation. It also provides a step-by-step guide for assessing the suitability of biomass heating.

<http://www.bco.org.uk/download.cfm?aid=1304>

(Please note that you need to be a member of BCO to access this link)

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focus.focusnet.co.uk
[www.newLawonline.com](http://www.newlawonline.com)

Abbreviations

The following abbreviations are used in evebrief:

BLD	Lexis Nexis Butterworths (internal abbreviation)
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
P&CR	Property, Planning and Compensation Reports
PLSCS	Property Law Service Case Summaries

The star system

Cases are marked with one, two or three stars as follows:

- *** Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.
- ** Noteworthy case which does not significantly alter the law or which relates to a relatively obscure point.
- * Interesting but non-essential reading.

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evebrief

SCOTLAND

Planning

01

Consultation and draft Bill

The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill

Deadline for responses: 14.08.09

Views are sought on this draft Bill, which will introduce new provisions and remove barriers to the use of existing powers that will enhance the ability of regulatory and planning authorities to manage the historic environment in a sustainable way.

<http://www.historic-scotland.gov.uk/amlb-bill.pdf>

02

Draft Statutory Instrument

The Town and Country Planning (Charges for Publication of Notices) (Scotland) Regulations 2009

These regulations, due to come into effect on 03 August 2009, will make provision for the recovery by planning authorities of the cost of publishing a notice in a newspaper under Reg 20(1) Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008. Reg 20(1) requires the planning authority to advertise planning applications in certain circumstances.

http://www.opsi.gov.uk/legislation/scotland/ssi2009/draft/pdf/sdsi_9780111005262_en.pdf

WALES

Planning

03

Statutory Instrument

WSI 2009/851 The Town and Country Planning (Fees for Applications and Deemed Applications) (Amendment) (Wales) Regulations 2009

These regulations, which came into force on 06.04.09, further amend the 1989 Regulations to increase certain Welsh planning fees by 4.2%.

http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20090851_mi.pdf

04

Statutory Instrument

WSI 2009/995 The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009

These regulations, which came into force on 06.05.09, implement Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage. They apply to damage to protected species, natural habitats, sites of special scientific interest, water and land.

http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20090995_mi.pdf

05

Statutory Instrument

WSI 2009/1024 The Town and Country Planning (General Development Procedure) (Amendment) (Wales) Order 2009

This Order, which comes into force on 01.06.09, substitutes a new Article 4D into the town and Country Planning (General Development Procedure) Order 1995 to make provision for design and access statements which are required to accompany specified applications for planning permission.

http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20091024_mi.pdf

06

Statutory Instrument

WSI 2009/1026 The Planning (Listed Buildings and Conservation Areas) (Amendment) (Wales) Regulations 2009

Regulation 3 of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 ("the 1990 Regulations") makes provision for applications made to local planning authorities for listed building consent or conservation area consent. Wef 01.06.09 Reg 2 of these regulations substitutes a new Reg 3B into the 1990 Regulations making provision for design and access statements which are required to accompany applications for listed building consent.

http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20091026_mi.pdf

07

Ministerial Interim Planning Policy Statement 01/2009

Planning for Sustainable Buildings — May 2009

This Ministerial Interim Planning Policy Statement provides a new s2.12 of Planning Policy Wales. It expresses that development proposals should mitigate the causes of climate change and include features that provide effective adaptation to and resilience against the current and predicted future effects of climate change.

<http://wales.gov.uk/docs/desh/publications/090507mippssustainablebuildingsen.pdf>