Legal & Parliamentary

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evebrief

Editorial

Of interest to those concerned with the valuation of residential properties, at item 20 we report on a decision of the Upper Tribunal (Lands Chamber) in Zuckerman and Others v Trustees of the Calthorpe Estates. This was an appeal brought by eleven leaseholders of flats in a block in Edgbaston against an LVT decision which adopted a 5% deferment rate to value the freehold reversion in line with the Lands Tribunal's decision in Sportelli.

Although Sportelli concerned properties in prime central London, the Lands Tribunal expressed the view in their decision that the deferment rate elsewhere would be the same unless there was compelling evidence to the contrary. The Court of Appeal dismissed the appeal on the question of deferment rate, endorsing the Tribunal's approach and confirming that generic rate should be the starting point. However it suggested that as the Tribunal had heard evidence only in relation to prime central London there must be a distinction between properties there and elsewhere, opening the door to arguments on deferment rate outside prime Central London.

Nevertheless, the deferment rate of 5% for flats has been generally applied across the country since, with the Tribunal overturning decisions where LVTs have departed from it. This case is of note as the first dealing with flats outside London where the Tribunal has shown itself willing to depart from that generic rate, albeit for specific reasons relating to the circumstances of that case.

Elsewhere, at item 10 we report on a government consultation on proposed changes to permitted development rights for small scale renewable energy and low carbon technologies for both householders and businesses, as well as for electric vehicle infrastructure. Securing renewable energy through small scale microgeneration and electric vehicles are both key national priorities and these proposals, if introduced, should remove one of the major costs related to installation of onsite renewables.

On behalf of the Evebrief Editorial Team, I would like to take the opportunity to wish all our readers a very merry Christmas and a happy New Year.

Ben Aldridge

GeraldEve

Landlord & Tenant

01

Court of Appeal

Section 30(1)g Landlord & Tenant Act 1954 — whether landlords had intention to occupy premises for their own business

***** PATEL V KELES
(2009) PLSCS 313 — Decision given 12.11.09

Facts: The appellant landlords held a long leasehold interest in business premises. The respondent tenants ran a shop selling newspapers and confectionery from the ground floor and basement which they occupied under a five-year sublease. The appellants opposed the respondents' application to renew their tenancy on the ground that they wanted to occupy the premises for their own newsagents' business. It was common ground that under s30(1)(g) of the Landlord & Tenant Act 1954 the appellants needed to show that: (i) they would be able to give practical effect to their intention to occupy the premises for the purposes of their business; and (ii) they had a subjective intention to so use them.

Point of dispute: Whether the appellants' appeal would be allowed against the ruling of the judge in the court below that the appellants had not satisfied the requirements of s30(1)g. Although the first requirement was satisfied, the judge took the view that the appellants' promise to give an undertaking that they would use the premises as a newsagent for two years created doubt as to their intention, since they ought to have a substantial and genuine intention to run the business for the foreseeable future, not just for two years.

Held: The appeal was dismissed. The fact that the court found that a sale was merely likely rather than intended was enough to entitle it to conclude that the landlord did not have the requisite intention to occupy the premises. The landlord had to prove that it had a genuine intention to occupy the premises for the purposes of his business, and that was a question of fact to be decided on consideration of the circumstances of each case. The intended occupation had to be real and more than short term and on the facts of this case the trial judge had been entitled to come to the conclusion he had.

02

Court of Appeal

Calculation of damages for breach of repairing covenant — s18 Landlord and Tenant Act 1927

****** VAN DAL FOOTWEAR LTD V RYMAN LTD
(2009) PLSCS 338 — Decision given 03.12.09

Facts: The appellant was the landlord of a listed building occupied by the respondent tenant under a tenancy at will following the expiration of a full repairing lease. Although the respondent offered to take up a new lease, this offer was declined by the appellant and the respondent vacated the building leaving it in a state of disrepair. Under s18 of the Landlord and Tenant Act 1927 damages for breach of a repairing covenant could not exceed the amount by which the value of the reversion in the premises was diminished owing to the breach of the covenant. The parties agreed that the value of the reversion in the premises was £950,000 in their current state and £1,069,838 if the repairs were carried out, the difference between these figures being £119,838.

Point of dispute: Whether the appellant's appeal should be allowed against the ruling of the court below that the award of damages should reduced to £49,538 based upon the difference between £1,069,838 and a higher figure of £1,020,300 for the premises in their current state. This higher figure for the reversion was reached on the basis that if the appellant had marketed the freehold reversion for six months prior to the expiry of the lease a purchaser would have paid more having discovered that the respondent was prepared to pay a rent of £64,200 pa for a new tenancy.

Held: The appeal was allowed. The judge's assessent had been based on hypothetical facts that caused him to misidentify the subject matter of the valuation, and which was not permitted under s18 of the 1927 Act. The appellant had not actually received an increased offer and there had been no prospect of a contract for a new lease being agreed with the outgoing tenant at the valuation date.

03

High Court

Terms of occupation of caravan park

***** BRIGHTLINGSEA HAVEN LTD V MORRIS
(2009) PLSCS 329 — Decision given 27.11.09

Facts: The first claimant held a lease of a caravan park which contained a covenant that the caravans were only to be occupied between March and October, at weekends and for ten days over Christmas and New Year. The site license to the second claimant replicated the terms of the lease and planning permission for the site was conditional upon the caravans only being occupied during those periods. Each of the defendants had bought a mobile home or lodge from the second claimant. The defendants claimed that they had purchased the lodges on the basis of promises that they would be granted leases permitting them to occupy them during the day during the closed period. However, the second claimant applied for an injunction preventing them from doing so. The defendants sought declarations that they had rights in equity to be granted leases on the promised terms. It was held that the defendants had been promised they could occupy the lodges during the day in the closed period. The first claimant, as long leaseholder, was the constructive trustee of the beneficial interests in respect of each defendant's plot and it was held that the defendants were entitled to appropriate relief against the first claimant.

Point of dispute: What was the appropriate relief to be granted? The court had to decide on the relief that would satisfy the equity and relevant factors included: (i) the nature of the expectation created by the defendant's conduct; (ii) the detriment suffered by a claimant in reliance on the defendant's representations; (iii) the degree to which a defendant's conduct had been unconscionable; and (iv) the need for some proportionality between a claimant's expectation and his detriment.

Held: The award for not being able to use the lodges in the day had to be considered in the context that they could not be used at night. The appropriate measure of compensation was the "cost of accommodation measure" which would amount to the additional cost of securing accommodation for the daytime as well as overnight in the closed period. This would be the difference between the cost of bed and breakfast (minus breakfast) and the cost of renting, plus compensation for disturbance and discomfort at not being able to use the lodges during the day. A declaration would be made that the defendants were entitled to a lease giving effect to the promises made to them, save that it would prohibit daytime occupation during the closed period.

04

CLG Publication

Meanwhile use lease and guidance notes (for direct lettings by a landlord to a temporary occupier)
Meanwhile use sublease and guidance notes (for lettings by an intermediary, eg a local authority or voluntary body)
Intermediary Meanwhile use lease and guidance notes (for lettings by a landlord to an intermediary, eg a local authority or voluntary body)

These model leases have been prepared as part of the Communities and Local Government's Meanwhile Project (www.meanwhile.org.uk) to encourage the temporary occupation of empty town centre retail premises by non-commercial occupiers, who can contribute to town centre vitality but who would otherwise be unable to afford normal commercial rents. It is envisaged that temporary occupiers might include voluntary or charitable groups, information centres, artists, musicians etc. The purpose of these model documents is to provide industry standard legal instruments to minimise administrative and legal costs for both landlords and tenants and enable temporary occupation to be taken up as soon as possible.
http://www.communities.gov.uk/documents/citiesandregions/pdf/1384616.pdf
http://www.communities.gov.uk/documents/citiesandregions/pdf/1384626.pdf
http://www.communities.gov.uk/documents/citiesandregions/pdf/1384613.pdf

Planning

05

Court of Appeal

Advertisement consent — change in type of display

**** R (ON THE APPLICATION OF CLEAR CHANNEL UK LTD) V HAMMERSMITH AND FULHAM LONDON BOROUGH COUNCIL (2009) PLSCS 293 — Decision given 27.10.09

Facts: CC operated an advertisement display site in Fulham. Originally, it had been used for displaying a static poster hoarding, but over the years there had been a number of changes in the types of advertisements displayed on the site — an illuminated display of rotating panels, then an illuminated scrolling display, followed in 2002 by a static illuminated display (the golden square). In 2008 that was replaced by a taller digital display with internal illumination that was programmed to display a different advertisement every seven seconds. HFLBC served a notice under s11 of the London Local Authorities Act 1995 requiring CC to remove the new structure. CC claimed that it had the benefit of deemed consent, having used the site for advertising without express consent for ten years. Its application for judicial review of HFLBC's decision to issue the notice was unsuccessful, the High Court holding that: (i) the replacement of the golden square by a digital hoarding was a material alteration in the manner of use; (ii) it was an advertisement that comprised a sequential display within Class 13(4) of Schedule 3 to the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 and did not comply with the conditions therein; and (iii) under the 2007 Regulations CC had no right to revert to a former use that had previously enjoyed deemed consent. (See Evebrief Volume 31(04) item 04)

Point of dispute: Whether CC's appeal would be allowed against the High Court ruling. The issues for determination were whether: (i) the judge's approach to the issue of material alteration had been correct and there was sufficient evidence to support his finding; (ii) the digital hoarding was an advertisement that comprised sequential displays; (iii) a 'right to revert' existed under the 2007 Regulations; and (iv) the respondents' decision to serve a notice was unlawful.

Held: The appeal was dismissed. (i) Whether a material alteration had arisen was to be judged by reference to considerations of amenity and public safety and these were matters of fact for the judge. There was sufficient evidence to support his conclusions. (ii) Class 13(4)(a) applied where the image changed and the expression "sequential displays" was to refer to any display where one image followed another. The judge had been correct to hold that the case fell within Class 13(4)(a). (iii) The judge was correct to find that the deemed consent could not be recovered by reverting to a former use. The 2007 Regulations did not provide for the "right to revert" to a previous use that had enjoyed deemed consent under Class 13. (iv) HFLBC had not acted unlawfully in exercising their discretion to serve a notice under s11 of the 1995 Act.

06

Administrative Court

Claimant acquiring former monastery for redevelopment — Sec of State refusing to list building to prevent its demolition — council designating monastery as conservation area — whether designation made for an improper purpose

* METRO CONSTRUCTION LIMITED V BARNET LONDON BOROUGH COUNCIL
(2009) PLSCS 327 — Decision given 25.11.09

Facts: MC bought a former Carmelite monastery with the intention of redeveloping it for residential use. Although the building was included in a local list, this listing would not protect it from demolition, which was not "development" for planning purposes. On advice from English Heritage the Sec of State declined BLBC's request to list the building and BLBC designated it as a conservation area, under s69(1) of the Town and Country Planning Act 1990.

Point of dispute: Whether the designation should be quashed. MC submitted that the quality of the area was the primary consideration when designating a conservation area, not the quality of individual buildings. It argued that BLBC had erred in designating a conservation area for the sole purpose of preventing the demolition of the monastery without considering whether the area as a whole was of special architectural or historical interest.

Held: MC's claim was allowed. Although the lack of protection against demolition might seem undesirable it would be improper and unlawful to use the power to designate a conservation area to protect a building that the law had excluded from protection against demolition, as it had not been specifically listed and locally listed buildings did not enjoy protection against demolition. A designation of an area as a conservation area could not be justified where its true purpose was to prevent demolition rather than to enhance or preserve an area. BLBC's decision to designate was due to a perceived need to protect the monastery from demolition rather than because the site was suitable to be regarded as a conservation area. The designation had been made for an improper purpose and would be quashed.

07

Administrative Court

Permission for residential development granted contrary to development policy — whether unmet need for affordable housing a material consideration justifying departure from development plan

***** R (ON THE APPLICATION OF SKRZYPCZAK) V TORRIDGE DISTRICT COUNCIL
(2009) PLSCS 336 — Decision given 03.12.09

Facts: In November 2006 TDC granted planning permission for a development of 15 residential properties on land in open countryside. Seven of the dwellings were for open market sale, the remaining eight were affordable housing units. Although contrary to development plan policy TDC took the view that the provision of eight affordable homes, which would help address the substantial unmet need for affordable housing in the area, was a material consideration of sufficient weight the justify the grant of permission. They took into account housing needs as identified in a detailed 2006 survey and considered a financial appraisal document submitted by the interested party, which indicated that owing to the costs of the development it would not be possible to deliver 100% affordable homes on the site. This document was treated as confidential and not disclosed to the objectors.

Point of dispute: Whether the applicants should be granted judicial review of the decision to grant permission for the development. They considered that: (i) affordable housing was already addressed in the local plan and should not have been considered independently as a material consideration; and (ii) the failure to disclose the financial appraisal amounted to procedural unfairness.

Held: The claim was dismissed. (i) Section 38(6) of the Planning and Compulsory Purchase Act 2004 introduced a presumption that priority should be given to the development plan unless material considerations outweighed it. TDC had had regard to this presumption by showing how the application departed from the development plan and in demonstrating the need for affordable homes as a potentially material consideration. Although affordable housing need had been addressed in the development plan, the 2006 survey had shown that the need had increased since the plan had been adopted and TDC were entitled to regard this fact as a material consideration. (ii) Although the statutory regime provided for the public's involvement in consideration of a planning application there had been no contravention of that regime in this case. TDC had drawn a reasonable balance between the competing interests.

08

CLG Circular

Circular 08/09: Arrangements for Handling Heritage Applications — Notification to the Sec of State (England) 2009

Under the present arrangements local planning authorities are required to notify the Sec of State, English Heritage and the National Amenity Societies of applications for listed building consent which they are minded to grant affecting Grade I and Grade II* buildings as well as Grade II (unstarred) buildings where demolition of the principal building, the principal wall of the principal building or a substantial part of the interior is affected in accordance with the arrangements set out in Circular 01/01. With effect from 01.12.09 the Sec of State will only need to be notified in cases where the local planning authority is minded to grant consent and has received written objections from English Heritage or one of the six National Amenity Societies covered by the Direction annexed to the Circular.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/circularheritage.pdf

09

CLG Research report

Small-scale renewables and Low-carbon technology Non-domestic permitted development review: Summary

This document is a summary of a report produced by Entec UK which made recommendations to CLG and the Welsh Assembly Government for amending the General Permitted Development Order (GPDO) to allow small-scale renewable and low carbon technologies to have permitted development rights in non domestic land uses where they can be implemented with minimal impacts on neighbouring properties and the environment. The document sets out those recommendations and summarises the reasons for making those recommendations.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/smallscalesummary.pdf

10

CLG Consultation

Permitted development rights for small scale renewable and low carbon energy technologies, and electric vehicle charging infrastructure: Consultation
Deadline for Comments: 09.02.10

This paper seeks views on proposals for changes to the planning system to permitted development rights for:

- domestic wind turbines and air source heat pumps;
- non-domestic wind turbines, air source heat pumps, ground source heat pumps, water source heat pumps, solar panels, flues for biomass systems and combined heat and power systems, structures to house anaerobic digestion systems and biomass boilers, structures to house hydro-turbines; and
- electric vehicle charging infrastructure.

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

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CLG Report

Review of permitted development for charging points for electric cars

This review follows the Government's announcement of its intention to kick-start an electric vehicle motoring revolution. It considers possible barriers in the planning system and how they can be removed to facilitate the installation of a national network of electric vehicle charging points. It recommends some minor regulatory changes and considers some of the spatial planning implications of the emerging network. It also examines experience of current technologies in this country and overseas involving electric vehicles generally, and charging points in particular, and reviews the experiences of local authorities, charging point providers and existing electric vehicle users. The conclusion that it reaches is that except in a very few areas the planning system has not so far proved to be a serious barrier to uptake.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/electriccarsreview.pdf

12

CLG Statistical Release

Development Control Statistics: England 2008-09

This release, issued on 29.10.09, presents statistics on Development Control in England in 2008-09.

- District level planning authorities in England received 507,000 applications, a decrease of 22% compared to the previous year.
- 489,000 decisions were made, 18% lower than the previous year.
- 387,000 applications were permitted — some 83% of decisions. This rate has remained broadly level since 2005/06.
- 71% of major applications were decided within 13 weeks, a rate that has stayed the same since 2006/07.
- In 2008/09 county level planning authorities received 1,667 county matters planning applications, 8% lower than in the previous year.
- At county level 1,507 decisions were made, of which 92% were permissions. This rate has remained more or less level since 2001/02.

http://www.communities.gov.uk/documents/statistics/pdf/1368876.pdf

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Anticipated flood prevention legislation

It was announced in the Queen's Speech on 18.11.09 that legislation is to be introduced to protect communities from flooding and to improve the management of water supplies. The Government has since confirmed that a Flood and Water Management Bill will be introduced in the next Parliamentary session. This will include measures to give local authorities legal responsibility for surface water flooding and other measures which would mean that developers will need to consider installing Sustainable Drainage Systems (SUDs) for new developments to help prevent surface water run-off overloading the sewer system.

14

CLG Guidance

Greater flexibility for planning permissions: Guidance

This document is intended to provide practical guidance for local authorities, developers and others on the measures that are being taken forward following the consultation on 'Greater Flexibility For Planning Permissions' (see Evebrief Volume 31(09) item 07).
It covers the extension of time limits for implementing existent planning permissions, non-material amendments to existing planning permissions and minor material amendments as well as setting out the key features of the procedures and a practical guide to their use and explains how they differ from existing procedures.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1388639.pdf

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CLG Letter

Letter to Chief Planning Officers: Environmental Impact Assessment (EIA) — Implications of recent judgments

This letter was sent to Chief Planning Officers in England on 18.11.09. It provides interim guidance for planning authorities regarding environmental impact assessment (EIA) following two recent court decisions. The first is the High Court case of 'Baker v Bath and North East Somerset Council, Hinton Organics (Wessex) Limited' which concerns the procedure for screening planning applications for changes or extensions to existing or approved development. The second is the ruling of the European Court of Justice in the 'Mellor' case concerning whether under Article 4 of the EIA Directive, authorities are required to make available to the public the reasons for issuing a screening opinion where EIA is not required for development.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/letterenvironmentaljudgment.pdf

Rating

16

Statutory Instrument

SI 2009/3095 The Non-Domestic Rating Contributions (England) (Amendment) Regulations 2009

Under Part II of Schedule 8 to the Local Government Finance Act 1988 billing authorities are required to pay amounts (called non-domestic rating contributions) to an account held by the Sec of State ('the non-domestic rating pool'). The national non-domestic rating pool is subsequently distributed to authorities under the rules contained in Part III of Schedule 8 to the 1988 Act. Provisional payments are made into the national non-domestic rating pool during the financial year and final calculations and adjustments of those contributions are made after the year ends. With effect from 31.12.09 these Regulations amend the rules in the 1992 Regulations for the calculation of non-domestic rating contributions and the assumptions to be made in calculating the provisional amount of the non-domestic rating contributions for the financial years beginning on or after 01.04.10.
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093095_en.pdf

17

CLG Response to Consultation

The Government's response to consultees' comments on the proposed transitional arrangements for the non-domestic rating revaluation 2010

The Government published the consultation document 'The transitional arrangements for the non-domestic rating revaluation 2010 in England' in July 2009, to seek views on its proposals for a transitional relief scheme to limit and phase in large changes in the rates liability of business properties as a result of the 2010 business rates revaluation. This document explains how the comments received during the consultation informed the decision on which transitional scheme would be implemented.
http://www.communities.gov.uk/documents/localgovernment/pdf/1384472.pdf

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CLG Rates Information Letter

Business rates information letter (14/2009): 2010 Revaluation and the Provisional Multipliers

This business rates information letter concerns the 2010 Revaluation Transitional Relief Scheme and the Provisional Multipliers. It sets out details of the Transitional Relief Scheme which is to be adopted following consultation undertaken earlier this year, as well as details of the provisional non-domestic multiplier and small business non-domestic multiplier.
http://www.communities.gov.uk/documents/localgovernment/pdf/1384557.pdf

Leasehold Reform

19

Central London County Court

Enfranchisement of house where rooms furnished and let on a short-term basis as holiday accommodation

****** HOSEBAY LTD V DAY
2009 PLSC 318 — Decision given 05.11.09

Facts: H, a company wholly owned by M, held long leases of three Victorian terraced houses in South Kensington. D owned the freeholds. H let self-catering rooms in the properties as short term accommodation for visitors to London. H paid non-domestic rates in respect of the properties and each operated under an established use, registered by the local planning authority for the provision of short term accommodation of between 1 and 90 days. In 2006 or 2007 M set up another company which took underleases of the three properties together with a transfer of the assets and undertakings of the letting business. In April 2007 H served notices under s8 of the Leasehold Reform Act 1967 to acquire the freehold of each property.

Point of dispute: Whether H was entitled to acquire the freeholds. D argued that it was not because (i) the properties were not a 'house' within the definition of the Act; although originally designed for living in within the meaning of the Act they had lost the quality of being houses as they had been adapted for another use; and (ii) the leases were business tenancies protected by the Landlord and Tenant Act 1954 which excluded them from the operation of the 1967 Act, unless the tenant was resident at the property which H, as a limited company, could not be. D asserted that the business operations continued to be H's.

Held: H's claim was allowed.

(i) Section 2(1) of the 1967 Act imposed a dual test for determining whether a building was a house. The building had to be 'designed or adapted for living in' and it had to be a house 'reasonably so-called'.
(ii) The words 'living in' meant occupation with some degree of permanence. The removal of the residence requirement by the Commonhold and Leasehold Reform Act 2002 did not affect the nature of the property that would qualify for the exercise of rights under the 1967 Act and the property had to be a residence or a home. The buildings were being used as a hotel, but the bed-sits could be 'lived in'. The buildings were, either by original design or adaptation, 'designed or adapted for living in' within the meaning of the Act.
(iii) There would have to be exceptional circumstances for a court to find, where a property was found to be 'adapted for living in' that it was not a house reasonably so-called. There were no such circumstances in this case; each building was a 'house' capable of being the subject of an enfranchisement claim under the 1967 Act.
(iv) The 1967 Act was not intended to benefit business operations or pure investors. Had it not been for the transactions between H and its sister company H would have been in occupation of the premises for the purposes of a business carried on by it, such that Part II of the 1954 Act would have applied. The occupation by the sister company in this case was not to be treated as H's since there was a formally constituted relationship of landlord and tenant between the two companies. The fact that these arrangements were set up in order to enable H to acquire the freeholds did not prevent them from being effective. The sister company occupied the premises and operated the business under its own name under the tenancy agreements granted to it, which meant that at the time of service of its s8 notices H was entitled to acquire the freeholds.

20

Upper Tribunal (Lands Chamber)

Determination of deferment rate — adjusting 'Sportelli' rate for different growth and obsolescence between West Midlands and Central London and management of flats — deferment rate increased from 5% to 6% for flats

****** ZUCKERMAN V TRUSTEES OF THE CALTHORPE ESTATES
LRA/97/2008 — Date of decision: 18.11.09

Facts: Z appealed against an LVT decision concluding for the 5% deferment rate for flats in accordance with the 'Sportelli' Lands Tribunal decision on 15.09.07. This combined appeal concerned 11 flats in Kelton Court, a block on the Calthorope Estate in Edgbaston, Birmingham. The flats were held on nominal ground rents with unexpired terms of 64 years in all but one case, where there were 63.75 years unexpired. The claimants were now direct tenants of C.

Issues: Whether the 'Sportelli' deferment rate of 5% for flats (in Prime Central London) being made generally throughout the country, was the correct rate to apply to the subject properties in this locality having regard to: (i) obsolescence; (ii) growth; and (iii) management issues. The 5% rate comprised the risk free rate of -2.25%, real growth rate of +2.0%, risk premium +4.5% and flats management +0.25%.

Held: Appeal allowed. In the subject case, considering the evidence adduced by the valuation experts, the generic 5% for flats was to be increased to 6% because:

(i) Having regard to the differences in capital values compared with building costs and greater risk of deterioration in the subject flats over and above the difference in vacant possession values a purchaser would require a 0.25% increase in the risk premium from 4.5% to 4.75%.
(ii) Despite limitations of the statistical information available, the difference between long term PCL and West Midlands growth rates had been considerable. An investor would expect slower long term growth and he would reduce his bid by increasing the risk premium by a further 0.5% from 4.75% to 5.25%.
(iii) The effects of The Service Charges (Consultation Requirements) (England) Regulations wef 31.10.03 were more widely known at the subject valuation date in September 2007, adding to even greater management problems, requiring an addition of 0.5% for the management problems associated with flats. Had the headleases still been in existence, there would have been no departure from the Sportelli uplift of 0.25%.

Real Property

21

Supreme Court

Whether permissible to grant possession order against trespassers in respect of land not occupied by them

****** SEC OF STATE FOR ENVIRONMENT AND RURAL AFFAIRS V MEIER
(2009) PLSCS 335 — Decision given 01.12.09

Facts: Travellers had established an unauthorised camp in Hethfelton Wood, near Wool, Dorset, one of numerous woods managed by the Forestry Commission on behalf of the Sec of State for Environment and Rural Affairs. The Sec of State brought proceedings for possession against the travellers, not only in respect of Hethfelton Wood but also for several other woods managed by the Commission in Dorset in an area of 25 miles by 10 miles. This was to prevent the travellers moving to another wood if possession of Hethfelton were ordered. It also applied for injunctions against the same parties restraining them from re-entering Hethfelton or entering the other woods. At first instance the recorder granted an order for possession in respect of Hethfelton but he would not make the wider order for possession sought on the ground that the Commission had not considered the 2004 government guidance on managing unauthorised camping.

Point of dispute: Whether the travellers' appeal would be allowed against the Court of Appeal's ruling which overturned the recorder's decision and granted the relief sought by the Sec of State. The Court of Appeal had relied on its own 2004 decision in the case of 'Sec of State for the Environment, Food and Rural Affairs v Drury'. The main issue was whether the court had power to grant a possession order in respect of land not occupied by the appellants. The appropriateness of injunctive relief was also considered.

Held: The appeal was allowed in part. (i) 'Drury' had been wrongly decided. There was no justification for the conclusion that a wider precautionary order for possession could be made in respect of entirely separate pieces of land, only one of which was occupied by trespassers, just because they happened to be in the same ownership. (ii) A decision on whether to grant an injunction restraining a person from trespassing would turn on the facts of the particular case. The 2004 guidance did not preclude the granting of an injunction to restrain travellers from trespassing on other land and in this case there were no grounds for setting aside the injunction which had been granted.

22

Court of Appeal
Restrictive covenants

***** DENNIS V DAVIES
(2009) PLSCS 288 — Decision given 22.10.09

Facts: The respondents owned five houses on an estate of houses built by a development company, H. The houses all enjoyed river views and most had waterside frontages. The houses were sold under a series of materially identical transfers between H, the management company and the original purchasers while the communal areas and mooring facilities were transferred to the management company. Each transfer contained a series of positive and restrictive covenants. Paragraph 1 of the schedule containing the restrictive covenants provided that the management company's permission had to be obtained before anything could be erected on the plot or any part of any building. Paragraph 2 included a covenant not to carry on from the plot any trade, business or manufacturing concern that might be or become a nuisance or annoyance to the owners or occupiers for the time being of the estate (the nuisance and annoyance covenant). The appellant, who was the respondents' neighbour, obtained planning permission to erect a three-storey side extension to his house and commenced work.

Point of dispute: Whether the appellant's appeal should be allowed against the decision of the judge in the court below that his proposed building works would breach the restrictive covenants. Issues arose as to: (i) whether the covenant in para 2 included such activities as extending an existing house; and (ii) whether management company approval precluded an assertion that the works would constitute an actionable annoyance.

Held: The appeal was dismissed. (i) The wording of the covenant in para 2 was sufficiently wide to be capable of extending to activities of all natures, including building an extension which, when finished, would be an actionable annoyance. The implied obligations of the management company in considering a para 1 approval application did not have the consequence of restricting the apparently unambiguous scope of para 2 so as not to include potentially annoying buildings. (ii) There was no reason why the giving of a para 1 approval should be regarded as impliedly preventing a plot owner from asserting and proving that the proposed building would constitute an actionable annoyance in breach of para 2.

23

High Court
Right of Way — Prescription

***** PROPERTY POINT LTD V KIRRI
(2009) PLSCS 319 — Decision given 20.11.09

Facts: Since 1982 K had owned a house in North London. PP purchased some adjacent land in 2006, including part of an alleyway running alongside K's house which she used to access her garage and to receive deliveries and some land ("the yellow land") to the rear which K used to reverse into the garage. In 2001 another adjacent owner had erected a hoarding over part of the alleyway which meant that K had to use a more circuitous route to reach the yellow land, part of which was over land belonging to a third party. Following the removal of the hoarding in 2006 K registered an entry against PP's title to record a prescriptive right of way over its land. The adjudicator refused PP's application for that entry to be removed, finding that K had established a right of way.

Point of dispute: Whether PP's appeal against the adjudicator's decision would be allowed. The appeal was restricted to the question of whether K had established the necessary 20-years continuous user, in view of the fact that the means of access had changed in 2001. PP argued that: (i) the right K claimed was not an easement known to law; (ii) owing to the different route and the different manner of usage of the yellow land after 2001, the periods of use before and after could not be combined to make the necessary 20 years; and (iii) an easement could not be established where the claimed right of way had required access over a third party's land since 2001 over which K had no right.

Held: PP's appeal was dismissed. (i) The right claimed by K was a right to enter for the purpose of turning vehicles to enable her to reverse into her garage. The purpose and nature of the easement she claimed was clearly defined and understood and there was no reason why a right of way could not be established for this purpose. It was quite appropriate for a right of way to turn vehicles to be granted in a location such as this, a built up North London suburb. (ii) The yellow land had been used for the entirety of the period. It was the user of the yellow land that was relevant, not the route by which it was entered. (iii) The fact that K had accessed the yellow land across a third party's property from 2001 did not prevent a right of way from arising. There was no authority under which the absence of an enforceable legal right to use the intervening land was a barrier to the establishment of a right of way.

Housing

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CLG Statistical Release

House Price Index — September 2009

The latest UK house price index statistics produced by Communities and Local Government were released on 10.11.09.

- UK house prices were 4.1% lower than in September 2008, but 1.2% higher than in August 2009.
- The mix-adjusted average house price in the UK stood at £199,303 in September 2009 (not seasonally adjusted).
- UK house prices rose by 3.1% in the quarter ending September 2009. This compares with a smaller rise of 0.3% for the quarter ending June 2009 (seasonally adjusted).
- Annual average house prices fell in England by 4%, in Wales by 6.7% and in Northern Ireland by 18.3%.
- Annual average house prices paid by first time buyers in September 2009 were 1.3% lower than a year ago. By comparison average house prices paid by former owner occupiers were 5.2% lower.
- Annual average house prices paid for new properties in September 2009 were 6.6% lower than a year ago, while average prices paid for pre-owned dwellings were 3.9% lower.

http://www.communities.gov.uk/documents/statistics/pdf/1377193.pdf

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CLG Statistical Release

House Building: September Quarter 2009, England

These statistics relate to the period July to September 2009.

- There were an estimated 25,820 housing starts in England in the September quarter 2009, up 18% on the previous quarter and 16% higher than in the same quarter last year. This is the third successive quarterly rise in seasonally adjusted housing starts.
- Private enterprise housing starts (seasonally adjusted) were 21% higher than in the June quarter 2009 and 20% higher than in the September quarter 2008.
- Annual housing starts figures for England totalled 83,080 in the 12 months to September 2009, down 35% compared with the 12 months to September 2008 and 55% below their 2005-06 peak.
- Housing completions in England were estimated to be 29,050 in the September quarter 2009, 4% lower than the previous quarter. Compared to the same quarter in 2008, they were down by 12%.
- Private enterprise housing completions (seasonally adjusted) were 8% lower in the September quarter 2009 than the June quarter 2009, and 18% lower than in the September quarter 2008.
- Annual housing completions in England totalled 122,800 in the 12 months to September 2009, down by 21% compared with the 12 months to September 2008.

http://www.communities.gov.uk/documents/statistics/pdf/1386815.pdf

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CLG Statistical Release

Five Year Land Supply for Housing in England as at April 2009

This release, which is the first in an annual series summarising Local Planning Authorities' reported assessments of the 'Five Year Land Supply for housing', reports on the land supply for the five years from April 2009. The statistics include details of:

- the number and proportion of authorities which reported identifying at least a sufficient supply of sites for their housing requirements for five years from April 2009; and
- each local planning authority's reported proportion of the 'five-year housing requirements' that can be accommodated on available, suitable and achievable sites.

As at April 2009:

- 86% of all local planning authorities reported that they have identified sufficient sites to supply all their housing requirements for the next five years;
- the North East, North West, West Midlands and London had the highest proportions of local planning authorities (91%) with at least a sufficient supply of land for their housing requirements for the next five years; and
- the East Midlands and South West had the lowest proportion of local planning authorities (78% each) reporting at least a sufficient supply of land for their housing requirements over the next five years.

http://www.communities.gov.uk/documents/statistics/pdf/1386844.pdf

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Homes and Communities Agency (HCA) Bulletin

Monthly Housing Market Bulletin — 19 November 2009

This document provides HCA staff with the latest information on housing market trends, the economy and the housebuilding industry.

- The housing market continued to see house price rises in October and both Nationwide and Halifax recorded house price increases.
- Mortgage lending has risen by 43% over the past year but is still only at half its pre-credit crisis levels.
- The number of transactions completed has started to increase and the Land Registry recorded a 9% increase in the number of properties sold in England and Wales over the past year.
- Despite the economy being in recession, according to the Halifax the house price to earnings ratio remained above its long-run average 4.0 at 4.54 in October.
- According to CLG, housing starts in England in Q3 2009 were 18% up on the previous quarter.
- Housebuilders have been raising money through rights issues to reduce debts and most companies are now increasing their family housing delivery relative to apartments.
- The UK continues to be in recession with GDP having fallen by 5.2% over the past year and unemployment stands at 7.8%.

http://www.homesandcommunities.co.uk/public/documents/MonthlyHousingBulletinNovFinal.pdf

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CLG Consultation Paper

Guidance for local authorities on incentivising landowners to bring forward additional land for rural affordable housing on rural exception sites
Deadline for Responses: 18.02.09

This consultation paper seeks views on proposals to incentivise landowners to bring forward land for affordable housing in rural areas through a referrals system which would enable landowners to nominate family members or employees meeting the relevant criteria for affordable housing on their land, and/or by allowing landowners to retain a legal interest in the land.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/incentivisingconsultation.pdf

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CLG Publication

Government response to the Matthew Taylor Review: Implementation plan

This document sets out how the Government is taking forward and implementing the recommendations of the 'Taylor Review of Rural Economy and Affordable Housing'.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/taylorimplementationplan.pdf

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CLG Statistical Publication

Housing and Planning Statistics 2009

This is the first edition of this new CLG publication, an annual compendium of statistics covering all aspects of housing and a selection of planning information in England. Where consistent data are available, the tables also cover the whole of the UK. Statistics are published on the following:

- dwelling stock
- house building
- repossession activity
- household estimates and projections
- housing market: house prices and mortgages
- rents, lettings and tenancies: costs, tenancy types and housing benefits
- statutory homelessness
- household characteristics: tenure trend, length of residence, economic status, household type, occupation density and income
- housing finance and household expenditure
- social housing sales to sitting tenants
- affordable housing supply
- housing conditions
- land use change statistics
- statistics on planning applications

http://www.communities.gov.uk/documents/statistics/pdf/1400509.pdf

Construction

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CLG Consultation

Zero Carbon for New Non-domestic Buildings: Consultation on Policy Options
Deadline for Responses: 26.02.10

This consultation sets out the evidence base, policy options and proposals for further work towards the Government's aim that all new non-domestic buildings should be zero carbon from 2019, with the public sector leading the way from 2018.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1391110.pdf

Environment

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Statutory Instrument

SI2009/3042 The Flood Risk Regulations 2009

These Regulations, which came into force on 10.12.09, transpose Directive 2007/60/EC of the European Parliament and of the Council on the assessment and management of flood risks for England and Wales. The Environment Agency (EA) and local authorities must prepare preliminary assessment reports about past floods in each river basin district and the possible harmful consequences of future floods. EA is also under a duty to prepare a preliminary assessment map of each river basin district and the authorities must then identify areas which are at significant risk of flooding. Assessments of, and decisions on, areas at significant risk must be reviewed every six years. EA and local authorities must prepare a flood risk map and flood hazard map, as well as a flood risk management plan, for each area which has been identified as being at significant risk of flooding. Those plans must set objectives for managing the flood risk and propose measures for achieving those objectives.
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093042_en.pdf

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Defra Consultation

Consultation on the English National Parks and the Broads: Draft Circular — revised version combining Circular 12/96 and Circular 125/77 — Vision for National Parks: Government Priorities
Deadline for Responses: 05.02.10

Much of Circular 12/96 on National Parks is now out of date and a replacement is needed. The new Circular will be policy guidance for all those whose decisions or actions might affect the National Parks and the Broads. It will update the existing circular by introducing a new vision for the National Parks and the Broads over the next forty years; setting out priorities for the National Park Authorities and the Broads Authority; and updating the statutory duties and functions of those Authorities. It will place particular emphasis on:

- dealing with climate change
- continuing to conserve and enhance the landscape and natural heritage
- securing maximum value for money from available funding
- fostering biodiversity

http://www.defra.gov.uk/corporate/consult/nationalpark/index.htm
http://www.defra.gov.uk/corporate/consult/nationalpark/consultation-document.PDF

General

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CABE Publication

Design Review — Principles and practice

This publication, based on information from a 2008 survey of local and regional design review panels, explains how design review can support good design through the planning process and how to set up and run a design review panel. It is intended to be an authoritative presentation of good practice for those managing panels, as well as participants and those using their recommendations in decision making.
http://www.cabe.org.uk/publications/design-review-principles-and-practice

35
CABE Publication
The green information gap: mapping the nation's green spaces

This position paper argues that there is a major gap in national information about England's urban green spaces, which makes it difficult to coordinate provision, respond to changing social needs or plan for a changing climate. It argues that a single, shared, information resource would help piece together the different elements of England's green infrastructure — parks, gardens, allotments, trees, green roofs, cemeteries, woodlands, commons, grasslands, moors and wetlands.
http://www.cabe.org.uk/publications/the-green-information-gap

36
CABE Publication
Grey to Green — How we shift funding and skills to green our cities

This paper argues that there is a need for more management of, and investment in, green infrastructure — a network of living green spaces. It argues that a strategic approach to developing and managing green infrastructure can impact not only upon the performance of a place, physically and economically, but also upon the health of its inhabitants and those who work there. It identifies an urgent need to increase the number of people with appropriate skills to deliver this infrastructure.
http://www.cabe.org.uk/publications/grey-to-green

37
CABE Publication
Future health — Sustainable places for health and well-being

This paper brings together CABE's knowledge about sustainable, health-promoting design with the latest thinking about individual health and well-being. It aims to demonstrate how good planning can have a long term positive effect on public health, how healthcare trusts can reduce carbon footprints and costs by co-locating services and how designers can influence people's well-being with sustainable design.
http://www.cabe.org.uk/publications/future-health

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HM Government Publication
World class places: Action Plan

'World Class Places' published on 12.05.09, sets out the Government's strategy for improving the quality of the built environment, recognising the economic, social and environmental benefits that this can bring. This action plan builds on that document and sets out clear next steps on how the Government intends to work with its partners in the industry to deliver the ambitions set out in the strategy.
http://www.culture.gov.uk/images/publications/worldclassplaces-actionplan.pdf

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THE SUNDAY TIMES 100 BEST COMPANIES TO WORK FOR 2009

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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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evebrief

SCOTLAND

Environment

01

Statutory Instrument

SSI 2009/393 The Flood Risk Management (Scotland) Act 2009 (Commencement No 1 and Transitional Savings Provisions) Order 2009

The Flood Risk Management (Scotland) Act 2009 received Royal Assent on 16.06.09. Part 2 (ss3 to 6 and ss55, 71, 94, 95 and 97) came into force on that day. This Order brings all of the provisions of the Act into force on 26.11.09, except s42 (amendment to planning regulations) and Parts 4 (local authority powers to manage flood risk), 6 (powers of entry and compensation) insofar as it relates to Part 4, and 7 (reservoirs).

http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090393_en.pdf

GeraldEve

NORTHERN IRELAND

Planning

02

Planning Service Consultation Paper
Permitted Development Rights for Microgeneration Development
Deadline for Comments: 22.01.10

This paper follows a policy review of 'Permitted Development Rights for Small Scale Renewable Energy Development'. It seeks comments on proposals for the provision of permitted development rights for small scale renewable energy development associated with non-domestic land uses. It proposes exclusions and conditions to address the impact of extending permitted development rights on neighbours, the wider community and the environment. It also contains a section dealing with proposals for domestic microgeneration permitted development rights that follows on from a previous consultation exercise undertaken in 2007.
http://www.planningni.gov.uk/index/news/news_consultation/microgenpd_consultation_paper.pdf

03

Planning Service Consultation Paper
Householder Permitted Development Rights
Deadline for Responses: 22.01.10

This consultation paper follows a report to Planning Service by WYG Planning which sought to identify the impacts arising from householder development; considered the scope for extending householder permitted development rights; and proposed simplifications and improvements to the processing of householder developments. This document seeks the views of the public and other interested parties on proposed revisions to Parts 1 and 2 (excluding Part G) of the Planning (General Development) Order (Northern Ireland) 1993 (the GDO).
http://www.planningni.gov.uk/index/news/news_consultation/householderpd_consultation_paper.pdf

04

Planning Service Consultation Paper
Draft Addendum to Planning Policy Statement 7 — Safeguarding the Character of Established Residential Areas
Deadline for Comments: 05.03.10

This draft Addendum to PPS 7 provides new planning policy provisions on the protection of local character, environmental quality and residential amenity in established residential areas, villages, and smaller settlements. It also sets out policy on the conversion of existing buildings to flats or apartments, as well as on the promotion of wider use of permeable paving in new residential developments to help reduce the risk of flooding from surface water run-off.
http://www.planningni.gov.uk/index/policy/policy_publications/planning_statements/final_version__for_printing__of_draft_addendum_to_~_statement_7__safeguarding_the_character_of_established_residential_areas.pdf