Legal & Parliamentary

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evebrief

Editorial

The 2010 rating revaluation assessments come into effect on 1 April. Most ratepayers will by now have received their bills for the 2010/11 rate year, with all the complexity involved with new values, Uniform Business Rates, reliefs and supplements.

Appeals against the 2010 assessments can be made from 1 April on which date the right to challenge the 2005 values ceases in most cases. Ratepayers will need to ensure that proposals have been served by the end of this month if properties or their locality have been affected by a material change of circumstances.

Looking further into the past, there are still some residual opportunities to alter the 2000 revaluation assessments, but we understand that Regulations will be made soon to bring these to an end.

Turning to Landlord and Tenant matters at item 02 we report on a High Court case that sets out the extent to which a tenant's guarantor can be bound by an authorised guarantee agreement (AGA). AGAs have been commonplace since the Landlord and Tenant Covenants Act 1995 came into force and in entering into such an agreement the assigning tenant guarantees the obligations of the new tenant. Landlords have often also required that guarantors enter into an AGA. Under this ruling an agreement preventing the release of the guarantor from its obligations would frustrate express provisions of the 1995 Act.

The landlord in this case has obtained leave to appeal and it is unlikely that standard forms of lease will be changed in the meantime. However if the ruling is not overturned then no doubt landlords will require a proposed guarantor to take a lease in its own name or look for alternative measures such as some form of independent guarantee at the time of assignment.

Hilary Wescombe

GeraldEve

Landlord & Tenant

01

High Court
Tenancy deposit scheme

***** DRAYCOTT V HANNELLS LETTINGS LTD
(2010) PLSCS 46 — Decision given 12.02.10

Facts: D entered into an assured shorthold tenancy of a property in Derby. HL was the landlord's letting agent to whom D was to pay a deposit in order to secure his obligations under the agreement. HL would hold the deposit as stakeholder and the Housing Act 2004 required that it be paid into an authorised tenancy deposit scheme. Sections 214 and 215 enabled tenants to initiate proceedings should the landlord fail to comply with the requirements of the Act and under s213 the Deposit Protection Service (DPS) was authorised to administer a tenancy deposit scheme. D paid their deposit in March 2008, but it was not registered with the DPS until 19 May.

Point of dispute: Whether D could succeed in his claim that he should be paid a sum equal to three times the value of the deposit by HL (the statutory penalty), owing to the latter's failure to comply with the requirements of the protection scheme as the deposit had been registered late. HL argued that the claim could only be brought against the landlord and that no penalty could be imposed since the deposit had been registered before the claim was issued.

Held: HL's appeal against the county court judge's decision to allow D's claim was allowed. (i) It was not an initial requirement of the deposit protection scheme that the payment should be made within 14 days. (ii) D was entitled to bring his claim against HL rather than the landlord. Section 212(9) provided that a landlord in respect of a shorthold tenancy included a reference to parties acting on its behalf in connection with that tenancy. The penalty would be imposed on the party who was responsible for failing to comply with s213, which in this case was HL, not the landlord. (ii) However, HL had protected the deposit before D's claim was issued which meant that D was not entitled to an order under s214(3) or (4).

02

High Court
Assignment of lease — validity of guarantee agreement — s25 Landlord and Tenant (Covenants) Act 1995

****** GOOD HARVEST PARTNERSHIP LLP V CENTAUR SERVICES
(2010) PLSCS 55 — Decision given 23.02.10

Facts: By an underlease dated October 2001 X demised business premises to Y for a term of ten years. CS, the defendant, was a party to the underlease as guarantor for Y. In 2004 the underlease was assigned to Z. X agreed to grant the licence to assign on the basis that CS and Y would enter into a guarantee agreement. In 2005 the claimant, GHP, acquired the freehold and brought proceedings to recover from CS rent that was due in December 2008 and March 2009 pursuant to the guarantee agreement.

Point of dispute: Whether GHP's application for summary judgment against CS in respect of the unpaid rent would be allowed. CS argued that the 2004 guarantee agreement was void and unenforcable against it by virtue of s25 of the Landlord and Tenant (Covenants) Act 1995.

Held: GHP's application was dismissed. The purpose of the 1995 Act was to limit the extent to which an original tenant could be liable to a landlord once it had assigned its lease and it provided for tenants and others to be released from their obligations once a lease was assigned. GHP's claim was barred by s25-s24 provides that any obligations undertaken by a person as guarantor for a tenant should come to an end when the lease is assigned. If a guarantor is required to enter into a further guarantee when the lease is assigned that would frustrate the operation of the Act under s25(1)(a) as it would impose on the guarantor obligations equivalent to those from which s24 was designed to secure his release. Section 16 addressed the circumstances in which a tenant could give a guarantee for an assignee (authorised guarantee agreements, or AGAs) but there was no equivalent provision for guarantors; if parliament had intended a tenant's guarantor to be able to guarantee the obligations of an assignee it would have stated so explicitly in the Act. In this case CS was required to enter into a further guarantee when the underlease was assigned to Z as a precondition of the necessary licence to assign. This guarantee agreement was invalidated by s25 insofar as it purported to impose liability on CS.

Planning

03

Court of Appeal

Appeal against refusal of planning permission for employment development on site identified to be protected for employment use in local plan policy

***** JOHNSON BROTHERS V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(20100 PLSCS 59 — Decision given 22.02.10

Facts: JB applied for planning permission to construct new storage and distribution units, with associated parking, on a former airfield in the countryside. Part of the site was already being used as an industrial estate. Local plan policy ECON 1 stated that the site was to be protected and safeguarded for employment use, while policy ECON 2 allowed for the expansion of existing rural employment sites, provided that they met criteria relating to need and the absence of significant harm to the area. The lpa refused permission on the grounds that JB's proposed development was unsuitable. The inspector appointed by the Sec of State dismissed JB's appeal against the refusal of permission, finding that the site was in an isolated rural location with limited services and facilities and no convenient public transport. He rejected JB's contention that the protected status of the site in the local plan meant that it was allocated for employment use making it impossible for the lpa to contend that it was unsuitable for such use. The inspector found that although the development would not conflict with ECON 1, that policy did not favour JB's proposal and neither did it meet the criteria for expansion of employment sites in ECON 2.

Point of dispute: Whether JB's appeal would be allowed against the decision of the judge in the court below to dismiss its appeal against the inspector's decision. The judge found that the inspector had not misconstrued the planning policies and had been entitled to conclude that the identification of the site as one that was protected for employment purposes did not mean that it was suitable for JB's proposed development.

Held: JB's appeal was dismissed. Policy ECON 1 was a protective one and did not amount to the allocation of the site for employment use. The inspector's approach to the policy had been correct in view of the location of the site. To construe the policy as allocating the protected land for employment use would lead to an oversupply of new employment land.

04

Administrative Court

Planning permission for change of use of Green Belt land — gypsy site — Sec of State's decision unimpeachable

***** BARNSLEY METROPOLITAN BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2010] All ER (D) 184 (Feb) Hearing date 15.02.10

Facts: A family of gypsies occupied a site within the Green Belt which had suffered from flooding in 2007, causing damage to some of their accommodation, infrastructure and facilities. They wished to move to an alternative site and sought planning permission for change of use at another Green Belt location. BMBC took the view that there were not very special circumstances to rebut the presumption of inappropriate development in the Green Belt and refused permission. That decision was reversed by the inspector appointed by the Sec of State to hear the gypsies' appeal. The inspector found (i) the original site was visually intrusive, so it would be beneficial for it to be vacated; (ii) there was a clear and unmet need for gypsy sites in the area which was not being met by local planning policy; and (iii) the family were living in a state of constant fear for their lives due to the flood risk.

Point of dispute: Whether BMBC's appeal against the inspector's decision under s288 of the Town and Country Planning Act 1990 should be allowed. BMBC argued that the inspector had failed to take into account the possibility of a grant of temporary permission, which was a material consideration, and, secondly, that there were a number of features relating to the existing site which he should have taken into account, but had not as they had not been brought up by the gypsy family during the course of the proceedings, which meant that BMBC had been denied "a fair crack of the whip".

Held: BMBC's appeal was dismissed. The inspector's decision letter was careful, well-reasoned and balanced. He had not erred in his approach, nor in the manner and reasoning of his conclusions. He had anticipated and recognised the points the council might have been expected to raise and it had not suffered any unfairness.

05

High Court

Enforcement notice — s179 Town and Country Planning Act 1990 — distinction between requiring something to be removed from land and requiring the cessation of an activity taking place on the land

***** WILLIAMS V HEREFORDSHIRE COUNCIL
(2010)All ER (D) 169 (Feb) — Hearing date 16.02.10

Facts: W and his wife lived in a mobile home on land which belonged to W's wife. HC issued an enforcement notice alleging a breach of planning control by W and his wife and requiring removal of the mobile home and restoration of the land to its original condition. Eventually, notwithstanding some compliance with the notice W and his wife were prosecuted. The wife was convicted of an offence under s179(1) of the Town and Country Planning Act 1990 for "failing to take any step required by the notice to be taken" or in carrying on "any activity required by the notice to cease. W was convicted of an offence under s179(4) which provided "A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on".

Point of dispute: Whether W's appeal against his conviction would be allowed. The judge had found that W had breached his obligation to cease to reside on the land. Although it was accepted that the notice did not expressly state that W should stop living on the land, the judge held that that obligation could be implied into it. W argued that when properly analysed the notice under s179(4) did not require the cessation of any activity. H contended that the judge had confused his position with that of his wife: he only had to "do" something, not to "desist" from doing something.

Held: W's appeal was allowed. The duty to remove something from land was quite distinct from the obligation to cease to live on that land. This was an important distinction which ran through the enforcement provisions of the 1990 Act, and the authorities confirmed that there was a difference between doing and desisting. The notice under s179(4) did not require an activity to cease, and W's conviction was quashed.

06

Statutory Instrument

SI 2010/305 The Infrastructure Planning (Decisions) Regulations 2010

This Order came into force on 01.03.10 and set out matters to which the Sec of State, the Infrastructure Planning Commission's council or panel of commissioners must have regard when deciding applications for development consent relating to: (i) listed buildings, conservation areas and ancient monuments (reg 3); (ii) deemed licences under Part 2 of the Food and Environment Protection Act 1985 (reg 4); (iii) deemed consents under s34 of the Coast Protection Act 1985 (reg 5); and (iv) hazardous substances (reg 6). When making a decision the council or panel must also have regard to the UN Environment Programme Convention on Biological Diversity of 1992.
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100305_en.pdf

07

Statutory Instrument

SI 2010/321 The Planning and Compulsory Purchase Act 2004 (Commencement No 12, Revocation and Amendment) Order 2010

This Order brought into force on 22.02.10 para 3 of Schedule 6 to the Planning and Compulsory Purchase Act 2004 so far as it was not already in force. The provision substitutes s69 of the Town and Country Planning Act 1990 which relates to registers, kept by local planning authorities, containing information with respect to applications for planning permission, local development orders and simplified planning zone schemes. Without this substitution the original s69 did not include provision for registration in respect of local development orders, but in other respects the substituted section is similar to the original.
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100321_en.pdf

08

Statutory Instrument

SI 2010/472 The Town and Country Planning (Fees for Applications and Deemed Applications) (Amendment) (England) Regulations 2010

These Regulations came into force on 26.02.10. The 1989 Regulators provided for the payment of fees for certain applications for planning permissions and other consents. Regulation 2 provides for fees to be charged for applications to the local planning authority for determination of an application for a new planning permission to replace an existing permission for development that has not yet commenced and for determination of applications for a non-material change to an existing planning permission. Under these regulations the maximum fee is decreased from £250,000 to £1,690 in respect of para 9(b) which sets out scales of fees for the carrying out of any operation not coming within the other categories set out in Part 2 (scale of fees in respect of applications made or deemed to be made on or after 6.4.08), Schedule 1 to the 1989 Regulations.
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100472_en.pdf

09

Statutory Instrument

SI 2010/498 The Town and Country Planning (Blight Provisions) (England) Order 2010

The blight notice provisions in ss149 to 171 of the Town and Country Planning Act 1990 enable persons holding certain interests in categories of land specified in Schedule 13 to that Act (including land affected by certain planning and highway proposals), to require the appropriate authority to acquire their interest in the land. One of the interests in land which qualifies for protection is that of an owner-occupier of a hereditament where the annual value does not exceed an amount prescribed by the Sec of State. This Order, which comes into force on 01.04.10 and revokes the 2005 Order, increases the annual value limit from £29,200 to £34,800 to take account of the 2010 rating revaluation.
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100498_en.pdf

10

Statutory Instrument

SI 2010/601 The Town and Country Planning (Regional Strategy) (England) Regulations 2010

Part 5 of the Local Democracy, Economic Development and Construction Act 2009 establishes a new regional strategy for each region in England, outside Greater London, setting out policies in relation to sustainable economic growth and in relation to development and land use in the region. The regional strategy is kept under review and revised from time to time by the responsible regional authorities (RRA) which comprise the Leaders' Board for the region and the Regional Development Agency. These Regulations, which come into force on 01.04.10, set out requirements in relation to revision of the regional strategy by the RRA.
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100601_en.pdf

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CLG Planning Policy Statement

Planning Policy Statement 25 Supplement: Development and Coastal Change

This Planning Policy Statement (PPS) Supplement replaces the policy on managing the impacts of coastal erosion on development set out in Planning Policy Guidance 20, 'Coastal Planning' which is cancelled, with the exception of paras 2.9, 2.10, and 3.9. It sets out a planning framework for the continuing economic and social viability of coastal communities with the aim of striking the right balance between economic prosperity and reducing the consequences of coastal change on communities.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1498576.pdf

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CLG Practice Guide

Planning Policy Statement 25 Supplement: Development and Coastal Change — Practice Guide

This Practice Guide complements 'Planning Policy Statement 25 Supplement: Development and Coastal Change' (see item 11 above) by offering practical guidance to planners and other stakeholders on how to implement its policies. The guide draws on existing good practice and is illustrated with case studies.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1499049.pdf

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CLG Consultation Paper

Consultation paper on a new Planning Policy Statement: Planning for a Natural and Healthy Environment
Deadline for Responses: 01.06.10

This consultation seeks views on a new Planning Policy Statement on planning for the natural environment, green infrastructure, open space, sport, recreation and play. In its final form this PPS will replace the following:

- PPS 9: Biodiversity and Geological Conservation;
- PPG 17: Planning for Open Space, Sport and Recreation;
- PPS 7: Sustainable Development in Rural Areas — insofar as it relates to landscape protection, soil and agricultural land quality and forestry; and
- PPG 20: Coastal Planning insofar as it relates to coastal access, heritage coast and the undeveloped coast.

It takes account of the commitment in the 2007 White Paper, Planning for a Sustainable Future, to streamline existing PPGs and PPSs and separate out policy from guidance.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1498981.pdf

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Consultation Paper

Consultation on a Planning Policy Statement: Planning for a Low Carbon Future in a Changing Climate
Deadline for Responses: 01.06.10

This consultation seeks views on a new draft planning policy which combines and updates existing planning policy statements on climate change (PPS 1 supplement) and renewable energy (PPS 22) into one document. The new PPS, which will be a supplement to Planning Policy Statement 1: Delivering Sustainable Development (PPS1), sets out a planning framework for securing progress against the UK's targets for cutting greenhouse emissions and using more renewable and low carbon energy, and the need to plan for climate change.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1499780.pdf

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CLG Research Report

Take up and application of the policies in the planning policy statement on planning and climate change: Final report

This research was undertaken to examine the implementation of the Climate Change Planning Policy Statement (PPS), particularly through the take up of its policies in regional spatial strategies and local development plan documents, and how they have been applied through development control. Barriers to effective implementation of the policies are also identified. It was found that the take-up of Climate Change PPS in plans and policies was very variable, partly reflecting the initial slow progress nationally in preparing development plan documents. In the case of Core Strategies that had already been adopted by April 2009, many had been based on earlier planning policy requirements. Other factors are also at play, including:

- the lack of relevant skills and knowledge in planning departments; and
- the varying degree of priority placed on climate change issues by planning authorities.

A number of courses of action are suggested in the report.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1498000.pdf

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CLG Publication

Government response to the Matthew Taylor Review: Updated implementation plan

This publication sets out, in tabular form, short summaries of the Government's responses to the various recommendations contained in the Matthew Taylor Review and progress that is being made in the implementation of new legislation following on from this.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1475599.pdf

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Department for Business Innovation & Skills Policy Statement

Policy Statement on Regional Strategies

This Policy Statement sets out the Government's policy framework for the preparation of Regional Strategies under Part 5 of the Local Democracy, Economic Development and Construction Act 2009.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1479804.pdf

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Conservative Party Policy Green Paper

Open Source Planning

This paper contains the Conservative Party's proposals for fundamental reform of the planning system. A Conservative government would make the planning system "symmetrical by allowing appeals against local planning decisions from local residents" and the new "open source" planning system would "promote new homes and jobs to the benefit of the economy, local democracy and the environment". Under the initiatives in the paper the Conservatives propose to:

- use collaborative democracy to allow local communities to create 'bottom-up' local plans within a new national planning framework;
- introduce a faster approvals process for planning applications where a "significant majority" of the immediate residential neighbours raise no objection;
- abolish the powers of the Planning Inspectorate to rewrite communities' local plans;
- abolish regional spatial strategies and top-down housing targets;
- reward councils and communities through incentives in order to encourage more building of new homes and businesses;
- maintain national Green Belt protection and other special protections for wildlife and the countryside;
- abolish the Infrastructure Planning Commission and allow Parliament to vote on and ratify national planning policy;
- amend the Use Classes Order so that people can use land and buildings for any purpose allowed in the local plan;
- establish a presumption in favour of sustainable development, provided it conforms to national standards, conforms with the local plan, and pays a development tariff ; and
- issue a reduced number of simplified guidance notes, setting out minimum environmental, architectural, design, economic and social standards for sustainable development.

http://www.conservatives.com/News/News_stories/2010/02/~/media/Files/Green%20Papers/planning-green-paper.ashx

Rating

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Statutory Instrument

SI 2010/408 The Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2010

Under s45 of the Local Government Finance Act 1988 owners of unoccupied non-domestic properties are liable to pay non-domestic rates if certain conditions apply. One of those conditions is that the property must fall within a prescribed class, which under the 2008 Regulations consists of all buildings or parts of buildings together with their associated land, apart from those listed in Regulation 4. Wef 01.04.10 these Regulations amend Regulation 4(g) so as to include within the exemption properties with a rateable value of less than £2,600 for financial years beginning on or after 01.04.11. For the financial year commencing 01.04.10 only, that amount is increased to £18,000.
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100408_en.pdf

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Statutory Instrument

SI 2010/456 The Central Rating List (England) (Amendment) Regulations 2010

Under ss53, 64(3) and 65(4) of the Local Government Finance Act 1988 the 2005 Regulations prescribed the hereditaments which are to be listed on central non-domestic rating lists for England compiled on or after 01.04.05, and designate the persons who will be considered to be in occupation or, if unoccupied, ownership of those hereditaments for rating persons. The Schedule to the 2005 Regulations lists the persons designated as occupying centrally listed hereditaments. Wef 01.04.10 these Regulations amend the designated persons in Part 12 (long distance pipe-line hereditaments) to reflect changes in occupation of certain long distance pipe-line hereditaments.

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100456_en.pdf

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CLG Statistical Release

Number of hereditaments benefiting from Small Business Rate Relief and the number of empty hereditaments

Details of estimates of the number of hereditaments that benefit from Small Business Rate Relief (SBRR) and the number of empty hereditaments were announced on 25.02.10. The following are the key points from the latest release:

- At 31.12.08 there were an estimated 462,000 hereditaments benefiting from the SBRR scheme in England, representing an increase of 16.7% since December 2006.
- At 31.03.09 there were an estimated 237,000 empty non-domestic hereditaments in England, representing 14% of all hereditaments.

http://www.communities.gov.uk/documents/statistics/pdf/568793.pdf

Leasehold Reform

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Central London County Court

Enfranchisement of house — whether building a house reasonably so called — whether lawful use determinative regardless of actual user

***** LEXGORGE LTD V HOWARD DE WALDEN ESTATES LTD
(2010) PLSCS 54 — Decision given 15.02.10

Facts: L was the long leaseholder of a terraced property in central London. The building had been constructed in the eighteenth century as a single residence on three floors with a basement and no major structural alterations had been carried out. It still looked like a house, although the whole building had been used as offices for many years. A 1949 planning consent permitted the conversion of the second and third floors into a self-contained maisonette, and the user clause in L's lease reflected this, specifying office use of the lower floors, storage in the basement and residential use of the upper floors. These requirements were reiterated in a sublease and subsequent licence granted to a firm of solicitors. When L served its notice of claim the upper floors were furnished for residential use.

Point of dispute: Whether L's claim for the freehold of the building under the Leasehold Reform Act 1967 would be allowed. This turned on whether it was a house "reasonably so called" within the second limb of s2(1) of the 1967 Act. L argued that it was as it had been designed as such and the relevant planning consent and lease covenants required a substantial part of the property to be used for residential living, although in practice there had been long non-residential user. A central issue was the interpretation of the 'ratio' of the Court of Appeal decision in the case of 'Prospect Estates Ltd v Grosvenor Estate Ltd [2009] 1 EGLR 47', and whether that decision required the court to focus on the lawful and permitted use of the building or allowed consideration of the actual use.

Held: L's claim was allowed.

- Actual user was a relevant factor in determining whether a building was a house reasonably so called. That proposition formed part of the ratio in the Prospect Estates case, and generally planning or contractual restrictions on use would not apply and long actual use of the building, rather than its lawful use, would be determinative.
- If a court found that a building had been designed or adapted for living in when it was built, within the first limb of s2(1), it should then consider whether it was excluded from the definition of a house because it could not reasonably be so called, due to exceptional circumstances. These would include looking at the prescribed and dominant use, the lawfulness of the actual use and whether the living accommodation was ancillary to the office use.
- This building was a house reasonably so called because: (i) the building looked like a house; (ii) although it not been used for residential purposes for a long time, it was only a matter of changing the furniture for the upper floors to revert to residential use; (iii) under the relevant planning consent residential use was the only lawful use of the second and third floors; and (iv) under the lease covenants the residential accommodation was meant to be used as separate self-contained flats, not just as ancillary accommodation to the office use of the lower floors. The proportion of residential use required by the planning consent and the terms of the lease was substantial and it could not be said, therefore, that the office use was predominant. Office use of the second and third floors had been unlawful and this prevented it from being an exceptional circumstance that would lead to a conclusion that the building should be excluded from the definition of a house, or that it was no longer reasonable to call it such.

Tort

23

High Court

Negligence — damages for breach of contract — loss of chance

***** JOYCE V BOWMAN LAW LTD
(2010) PLSCS 60 — Decision given 18.02.10

Facts: BL, a conveyancing firm, acted for J on the purchase of a dilapidated cottage on a 0.12 ha plot. The property had been advertised with an option to purchase additional land at the bottom of the garden for £20,000, to be exercised within 12 months, if the vendor's application for permission to erect one dwelling on that land was unsuccessful. Exchange of contracts and completion took place simultaneously, but the contract contained a seller's not a buyer's option. BL admitted negligence for failing to appreciate the nature of the option in the contract and for erroneously advising J that he would be able to buy the additional land if the vendor had failed to obtain planning permission within 12 months of completion. The vendor refused to sell the land to J.

Point of dispute: The measure of damages that J could recover from BL for its negligence. J contended that he was entitled to damages for loss of the profit that he would have made had he been able to redevelop the property and the additional land together by building a detached house.

Held: J's claim was allowed in part.

- In principle, J could recover consequential losses based on the profit that he would have made had he been able to build a new house, subject to those damages falling within the second rule in 'Hadley v Baxendale (1854)': the damages for breach of contract had to be such as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract.
- Additional loss would be recoverable if there were special circumstances which the contract breaker knew about. In this case BL knew that J intended to purchase the property with a view to making a profit from developing it and that the additional land was important to his plans.
- To succeed in a claim for loss of chance the claimant had to prove that he had a real or substantial, rather than a speculative, chance, and that the loss he had suffered was not nominal.
- If J had been properly advised he would have had an 85% chance of being granted the buyer's option and a 40% chance of obtaining planning permission on the additional land. J had lost a potential profit of £375,000, less a profit of £245,000 that he might have made if he had undertaken a smaller project, leaving a balance of £130,000.
- The percentage prospects of a future event that depended on hypothetical actions of third parties were cumulative and had to be multiplied together. A less than entirely mathematical approach was appropriate where factors affecting future events overlapped. J could recover 29% of the balance for the loss of chance of making the additional profit had he acquired the additional land.
- J was entitled to damages of £37,700 (£130,000 x 29%) which would put him into the position he would have been in had he been granted the option.

Housing

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CLG Report

English Housing Survey: Headline Report 2008-09

In April 2008 the English House Condition Survey was integrated with the Survey of English Housing to form the English Housing Survey (EHS). This report contains the first headline findings from the new survey. The report is split into two sections:

- Section 1 focuses on the profile of households including trends in tenures, household type, and economic status of households. It also covers the buying aspirations of renters, overcrowding and under-occupation, recent movers and satisfaction with home and local area.
- Section 2 provides an overview of England's housing stock, including age, size and type of home and measures of living conditions. This includes energy efficiency of the housing stock, decent homes, the Housing Health and Safety Rating System and homes affected by damp and mould.

http://www.communities.gov.uk/documents/statistics/pdf/1479789.pdf

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EHS Bulletin

English Housing Survey (EHS) Bulletin: Issue 1

This bulletin summarises the main report findings on household trends and housing stock. (See item 24 above).
http://www.communities.gov.uk/documents/statistics/pdf/1481221.pdf

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RICS Research Report

Full report — Transaction costs, planning and housing supply

The planning system has become increasingly complex with a move away from a land use based approach, when decisions on planning applications were made "on their merits", as it now attempts to tackle such issues as climate change and social inclusion. This growth in complexity and objectives has impacted upon more mainstream planning proposals and the aim of this research is to consider the costs of supporting information requirements for schemes that still require planning permission in the mainstream system. It also considers whether the extensive supporting information now required to accompany planning applications is actually understood by local authority planners, its implications upon wider policy objectives, general attitudes towards supporting information and the cost implications of providing this information.
http://www.rics.org/site/download_feed.aspx?fileID=5997&fileExtension=PDF

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CLG Statistical Release

Housing Stock, England — Dwelling Stock estimates, England, 2009

- On 31.03.09 there were an estimated 22,564,000 dwellings in England, 0.74% more than the previous year.
- On 31.03,08 there were an estimated 22,398,000 dwellings in England, which represented an increase of 0.93% on the previous year.

http://www.communities.gov.uk/documents/statistics/pdf/1484641.pdf

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CLG Statistical Release

Net supply of housing: 2008-09, England

This Statistical Release presents figures on net additional dwellings in England and the regions up to 2008-09. Annual net additional dwellings, also known as net housing supply, measures the absolute change in dwelling stock between 1 April and 31 March the following year. The absolute change in dwelling stock is the number of new house building completions plus any gains or losses through conversions, demolitions and changes of use.

- Annual housing supply in England reached 166,570 net additional dwellings in 2008-09, a 20% decrease on the number of net additional homes supplied in the previous year, and the lowest annual level of net housing supply since 2003-04.
- Eight out of the nine English regions experienced a decrease in the number of net additional dwellings supplied in 2008-09. The largest annual decrease was seen in the North East (43%) followed by the North West (37%).
- The only region which saw an annual increase in net housing supply was London (3%).

http://www.communities.gov.uk/documents/statistics/pdf/1484364.pdf

Construction

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CLG Circular

Circular 01/2010: The Building Act 1984,The Building (Local Authority Charges) Regulations 2010: New Provision for Local Authority Building Control Charges

This Circular draws attention to the Building (Local Authority Charges) Regulations 2010 (SI 2010/404) and associated documents. (See item 30 below). It explains the purpose of the provisions in the 2010 Regulations and indicates how they differ from the previous 1998 Regulations. It also draws attention to the transitional provisions and other guidance issued on the regulations.
http://www.communities.gov.uk/publications/planningandbuilding/circular012010

30

Statutory Instrument

SI 2010/404 The Building (Local Authority Charges) Regulations 2010

These Regulations, which come into force on 01.04.10, authorise a local authority to fix and recover charges for the performance of their building control functions relating to building regulations according to a charging scheme governed by principles laid down by the Regulations. They make each local authority responsible for setting their own building control charges, within the accounting and administrative requirements laid down in the Regulations. These Regulations largely re-enact the 1998 Regulations, which are revoked with savings.
http://www.communities.gov.uk/publications/planningandbuilding/divletterbuildingcontrolcharges
http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100404_en.pdf

31

CLG Research Study

The Code for Sustainable Homes: Case Studies Volume 2 — March 2010

The Code for Sustainable Homes measures the sustainability of a home against nine design categories, rating the "whole home" as a complete package. It uses a rating system to demonstrate the overall sustainability performance of a home, the rating being between one and six stars depending upon the extent to which the Code standards are achieved. This research comprises a set of case studies into some of the developments being built to the Code standards, covering a range of social and private housing which used a variety of different build systems or materials, and achieving a range of Code standards. The research aims to help develop and improve the operation of the Code. The case studies also include key learning points to help developers who are building to Code standards.
http://www.communities.gov.uk/documents/planningandbuilding/pdf/1490945.pdf

32

Making better use of Energy Performance Certificates and data: Consultation
Deadline for Comments: 25.05.10

The aim of this consultation is to make better use of Energy Performance Certificates (EPCs) and data. It invites comments on a number of measures to help improve the effectiveness of EPCs, including the following:

- making better use of energy performance data by extending and managing access to EPC data held on the England and Wales domestic and non-domestic EPC registers;
- enabling local authorities to use EPC data to support development of wider purposes such as support of local Carbon Frameworks as set out in the Household Energy Management Strategy (HEM) 2010;
- EPCs for houses in multiple occupation (HMOs) when rooms in such buildings are rented out;
- EPCs for short term holiday lets;
- property adverts to show the EPC rating;
- extending the use of Display Energy Certificates to commercial buildings; and
- clarifying when EPCs are required for sale or renting out of domestic and non-domestic properties.

http://www.communities.gov.uk/publications/planningandbuilding/epceffectivenessconsult

General

33

Supreme Court
Registration of town green — Commons Act 2006

***** R (ON THE APPLICATION OF LEWIS) V REDCAR AND CLEVELAND BOROUGH COUNCIL
(2010) PLSCS 65 — Decision given 03.03.10

Facts: In 2007 L applied to RCBC to register part of a golf course as a town green under s15 of the Commons Act 2006, on the ground that local inhabitants had enjoyed 20 years use of the land as of right for sports and pastimes. The land was owned by RCBC who let it to a golf club. RCBC refused the application on the recommendation of an inspector who found that the local inhabitants had not used the land as of right, as they had overwhelmingly deferred to the golf club using the land, and did not give the appearance of asserting a right eg recreational users refrained from walking over playing parts of the course while play was in progress.

Point of dispute: Whether L's appeal should be allowed against the decision of the Court of Appeal, which upheld the ruling in the court below, to dismiss L's application for judicial review of the inspector's decision on the ground that the local inhabitants' deference to the golfers prevented a finding that their user was as of right.

Held: L's appeal was allowed and RCBC were ordered to register the disputed land as a town green.

- Use of the land by local inhabitants for sports and pastimes would be use "as of right" if the land had been enjoyed openly and in the way that a person with a right to do so would have used it. The important thing was the quality of the user, and it must not have been by stealth, force or with the licence of the owner.
- Deference by local inhabitants to the landowner's use of the land was not inconsistent with their user being as of right. This was because it would be accepted that where two or more rights coexisted over the same land, there might be occasions when they could not be exercised simultaneously. Registration did not enlarge the rights of local inhabitants so as to prevent the landowner from using the land for its own purposes. Rights could coexist after registration subject to give and take on both sides and this would be so where the recreational use had coexisted with the owner's use during the 20-year period relied on to establish the right.
- The inspector had misdirected himself. The local inhabitants' use of the land was peaceful, open and not based on any licence from either the golf club or RCBC. Common sense dictated that they interfere with the golfers as little as possible, but that was not inconsistent with use of the land as of right for lawful sports and pastimes.

34

Court of Appeal

Provision of land for open air cremation — whether structure designed for open air cremations a "building" within s2 of Cremation Act 1902

***** R (ON THE APPLICATION OF GHAI) V NEWCASTLE CITY COUNCIL
(2010) PLSCS 45 — Decision given 10.02.10

Facts: G, an orthodox Hindu, wanted to be cremated on an open-air pyre after his death in accordance with his religious beliefs. His application to NCC requesting them to dedicate some out of town land for that purpose was refused on the grounds that open air cremation was prohibited under the Cremation Act 1902 and the Cremation (England and Wales) Regulations 2008. Section 2 of the Act defined "crematorium" as a building fitted with appliances for the purpose of burning human remains. G challenged NCC's decision by judicial review, in which proceedings a number of parties intervened on health, moral and public interest grounds. G contended that NCC's interpretation of the legislation so that open air cremation was precluded would contravene his rights under Articles 8,9 and 14 of the European Convention on Human Rights (ECHR).

Point of dispute: Whether G's appeal against the decision of the High Court would be allowed. The judge found that the 1902 Act and the 2008 Regulations prohibited open air cremation and that the legislation met the requirements of the ECHR. G accepted that his religion did not require an open air pyre, and that a cremation within a structure was acceptable so long as the body was burned on a traditional fire, rather than using electricity, and the sun could shine on the body while it was being cremated.

Held: G's appeal was allowed. The combined effect of the 1902 Act and the 2008 Regulations was that cremation could take place only within a structure that: (i) was a building; (ii) was fitted with appliances for the purpose of burning human remains; (iii) had been constructed in a suitable location that was not too close to a dwelling or a highway; and (iv) the opening of which had been notified to the Sec of State. None of these requirements were an obstacle to G's wishes as to the way in which he wanted his cremation to be conducted. The type of structure that would be needed, which had a substantial aperture to enable sunshine to fall on the body, would still be a "building" within the 1902 Act. As used in ordinary language, the word "building" described a wider range of structures than an enclosure of brick or stonework covered by a roof. Nothing in the Act required cremations to be invisible to the public. The structures in India within which cremations take place have a solid roof supported on columns without walls. They are substantial, solid and relatively permanent and such a structure would be a "building" within s2 of the 1902 Act.

35

UK Green Building Council and the Zero Carbon Hub — Joint Report

Sustainable Community Infrastructure

Deployment of integrated, cost effective, low carbon infrastructure (such as community scale heating, water harvesting and telecommunications) is increasingly recognised as having an important role to play in meeting the challenges of delivering a sustainable built environment. However, it is perceived that there is a gap between the requirements of national policy, what planners and local political leaders are seeking to establish and what industry is capable of delivering. This Report argues that there is a need for greater collaboration between policy makers, planners and developers and local infrastructure providers. This Task Group seeks to achieve a common understanding between all these stakeholders regarding the steps that need to be taken to unlock socially-equitable, cost-efficient and carbon-effective ways of delivering sustainable community-scale infrastructure solutions.
http://www.ukgbc.org/site/resources/show-resource-details?id=641

36
CLG Publication
Warm Homes, Greener Homes: A Strategy for Household Energy Management

This document sets out the Government's Strategy for helping people make their homes more comfortable in cold weather, reduce energy use and save costs, and make greater use of small scale renewable and low carbon sources of energy. As well as helping individuals this Strategy will have wider benefits:

- Reducing carbon emissions associated with energy use in dwellings. The Low Carbon Transition Plan, published in 2009, set out the aim of cutting emissions from fossil fuels in homes by 29% by 2020.
- Reducing demand for fossil fuels, which will improve energy security for the UK which increasingly relies on imported supplies.
- Job creation, in the manufacture and installation of home insulation, and in the manufacture, installation and servicing of renewable and low carbon sources of energy.

http://www.decc.gov.uk/en/content/cms/what_we_do/consumers/saving_energy/hem/hem.aspx
(you can download the pdf from this page)

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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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Legal & Parliamentary

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evebrief

SCOTLAND

Planning

01

Statutory Instrument

SI 2010/61The Town and Country Planning (Prescribed Date) (Scotland) Amendment Regulations 2010

These Regulations, which come into force on 31.03.10, amend the date prescribed in the 2007 Regulations for the purposes of s26AA(2) of the Town and Country Planning (Scotland) Act 1997 from 01.04.10 to 31.03.13. This means that in the absence of a prior grant or refusal or planning permission under s31A of the 1997 Act, 31.03.13 is the earliest date on which planning permission would be required for the operation of a marine fish farm which uses equipment placed or assembled before 01.04.07.
http://www.opsi.gov.uk/legislation/scotland/ssi2010/pdf/ssi_20100061_en.pdf

02

Scottish Government Circular

Planning Circular 2 2010 — The Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2010

This Circular explains the provisions of the Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2009 which came into force on 08.03.10 (SI 2010/27) (see item 01 of Evebrief Supplement Volume 32(03)). The aim of the amendments to the 1992 GDPO (Scotland) is to enable more microgeneration equipment to be installed on or within the curtilage of existing domestic buildings without the need to apply for planning permission.
http://www.scotland.gov.uk/Resource/Doc/304908/0095674.pdf

03

Scottish Government Consultation Paper

Consultation Paper on a Proposed Housing Bill: The Private Rented Sector, Licensing of Mobile Home Sites and the Twenty Year Rules

Deadline for Responses: 19.04.10

The Scottish Government is committed to a thriving private rented sector and to encouraging it to play a key role in meeting Scotland's housing needs by providing good quality accommodation and improving choices for homeless people. The first four parts of this consultation relate specifically to the private rented sector, the proposals arising from recommendations made by the Scottish Private Rented Sector Strategy Group which was set up in October 2009 following a review of the private rented sector which was carried out earlier in 2009. The next part of the consultation is concerned with the licensing of mobile home sites, with the aim of strengthening the system to raise and maintain standards on sites. Finally, the paper seeks views on proposals to change the two 20-year rules that currently limit the length of residential leases and on the redemption of standard securities over a property in return for the payment of the outstanding amount of the loan plus any charges to encourage long term lending.
http://www.scotland.gov.uk/Resource/Doc/304701/0095618.pdf

WALES

Rating

04

Statutory Instrument

SI 2010/271 The Non-Domestic Rating (Demand Notices) (Wales) (Amendment) Regulations 2010

These Regulations, which came into force on 03.03.10, amend the 1993 Regulations by revising the information that is to be supplied in rate demand notices following the revaluation on 01.04.10 and concerning the small business rate relief scheme pursuant to the Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2010 (see item 06 below)
http://www.opsi.gov.uk/legislation/wales/wsi2010/pdf/wsi_20100271_mi.pdf

05

Statutory Instrument

SI 2010/272 The Non-Domestic Rating (Unoccupied Property) (Wales) (Amendment) Regulations 2010

Under s45 of the Local Government Finance Act 1988 owners of unoccupied non-domestic properties are liable to pay non-domestic rates if certain conditions apply. One of those conditions is that the property must fall within a prescribed class, which under the 2008 Regulations consists of all unoccupied hereditaments to which none of the conditions in Regulation 4 applies. Regulation 4 excludes from liability for non-domestic rates under s45 of the 1988 Act all hereditaments shown in a non-domestic rating list with a RV of less than a specified amount, currently £15,000. Wef 03.03.10 these regulations increase that figure to £18,000 for the purpose of a hereditament shown in the list for the financial year beginning on 01.04.10 only.
http://www.opsi.gov.uk/legislation/wales/wsi2010/pdf/wsi_20100272_mi.pdf

06

Statutory Instrument

SI 2010/273 The Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2010

Wef 01.04.10 this Order amends the 2008 Order by amending the general 25% and 50% rate relief and the retail 25% rate relief so that the threshold for relief is not reduced following the non-domestic rating revaluation in 2009. The amendments ensure that businesses whose valuations have increased in line with the national average and are currently within the relief thresholds remain within the thresholds.
http://www.opsi.gov.uk/legislation/wales/wsi2010/pdf/wsi_20100273_mi.pdf

NORTHERN IRELAND

Rating

07

Statutory Rule of Northern Ireland

SRNI 2010/37 Non-Domestic Rating (Unoccupied Hereditaments) (Amendment) Regulations (Northern Ireland) 2010

Under Article 25A of the Rates (Northern Ireland) Order 1977 rates are payable on unoccupied properties that fall within a class prescribed by Regulations. One of those classes is all non-domestic buildings or parts of buildings, subject to certain exceptions. These Regulations, which come into force on 01.04.10, add an exception to the 2007 Regulations to provide that rates will not be payable on an unoccupied property where the person entitled to possession is a company in administration.
http://www.opsi.gov.uk/sr/sr2010/pdf/nisr_20100037_en.pdf

08

Statutory Rule of Northern Ireland

SRNI 2010 38 The Rates (Payment of Interest) (Amendment) Regulations (Northern Ireland) 2010

The 2007 Regulations provide, subject to exceptions, for the payment of interest where the Department of Finance and Personnel repays an amount paid on account of a rate or credits such an amount against a subsequent liability to rates. Wef 01.04.10 these Regulations amend the 2007 Regulations as follows:

- by providing for interest to be payable on the repayment of any overpayment under an agreement for the deferred payment of rates; and
- by providing that no interest shall be payable where repayments or credits are made under Article 30D of the Rates (Northern Ireland) Order 1977 (energy efficiency).

http://www.opsi.gov.uk/sr/sr2010/pdf/nisr_20100038_en.pdf