EVEBRIEF

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SIMPLIFYING BUSINESS RATES RELIEF IS NOT THAT SIMPLE

Tony Chase
Partner

Both the Conservatives and the Liberal Democrats made pre-election promises in their manifesto to automate the small business rate relief (SBRR) scheme. At item 06 we report the Government's first attempt to fulfil its commitment – with a consultation paper setting out its suggested options.

At present, small businesses which believe they qualify for SBRR have to apply for it to their local council and confirm that they do not occupy any other property above the prescribed limit. The difficulty is that no council knows whether a ratepayer occupies property in any other local authority areas, and is not able to determine whether a business qualifies for relief without an application and declaration having been made. It is therefore not possible simply to automate the existing scheme – a major change would be required if the Government is to fulfil its promise.

Three options have been put forward. The problem with the first of these however, of granting SBRR to all properties below the rateable value limit, is that it will target small properties rather than small businesses, and it is estimated that it will increase the UBR paid by other ratepayers, who are funding the scheme by paying a business rates supplement, by 0.5p – adding about 1.2% to total rates liability. The second option is something of a 'halfway house'; it will have far less of an impact on other ratepayers, but still leaves those with rateable values below £12,000 having to apply as at present – which would not exactly constitute "automation". The final option seems to be something of a cry for help – asking for suggestions as to other data which might be used to identify qualifying properties and occupiers!

The Government is evidently beginning to appreciate the complexity of the rating system and that it is far more difficult to deliver change than it is to promise it.

LANDLORD & TENANT

01 Court of Appeal

Landlord & Tenant Act 1954 – tenancy at will or contractual periodic tenancy?

** CATALYST COMMUNITIES HOUSING LTD V KATANA
(2010) 26 EG 92 – Decision given 28.01.10

Facts: CCH was the freehold owner of business premises that it intended to redevelop for social housing. Anticipating that the planning process would be lengthy it let the premises on a three month tenancy to R which was not contracted out of the Landlord and Tenant act 1954. The tenancy contained an express provision (Clause 2.2) that if R held over at the end of the fixed term the tenancy would be terminable by either party giving not less than one week's notice regardless of how the rent payable in respect of the occupation was calculated or paid. A few months later R allowed K and others to occupy parts of the premises, purportedly granting them long leases. R continued to pay rent to CCH until he disappeared in 2006, by which time at least one of the occupiers had established a valuable business at the premises.

Point of dispute: Whether K's occupation enjoyed the protection of the Landlord and Tenant Act 1954. K argued that the tenancy at will which had been created at the end of the fixed term had been converted into a contractual periodic tenancy either: (i) by virtue of Clause 2.2; or (ii) by implication from the payment and acceptance of rent. K further argued that it was entitled to leases of the property under the principles of proprietary estoppel.

Held: K's appeal against the ruling of the judge in the court below was dismissed. CCH was entitled to possession on the grounds that K did not have a periodic tenancy. R had become a tenant at will, not enjoying the protection of the 1954 Act, and it was common ground that K could be in no better position than R. The provisions of Clause 2.2. were not inconsistent with the continuation of a tenancy at will. CCH had wanted to keep the position as fluid as possible so that the property could be redeveloped as soon as the planning permission came through and this supported the trial judge's conclusion that CCH had not intended to grant anything more than a tenancy at will. K's argument based on proprietary estoppel also failed. There was no evidence that CCH knew about the terms on which K had been allowed into the property, nor that K had spent money on its business in the belief that it would be able to enjoy the property for the full term it had purportedly been granted by R.

02 High Court

Break clause

* HEXSTONE HOLDINGS LTD V AHC WESTLINK LTD
(2010) PLSCS 179 – Decision given 11.06.10

Facts: HH held a lease of a warehouse for a term of ten years from August 2005. When the premises became surplus to its requirements it granted an underlease to AHC for the same term less two days and on similar terms as to the rent. The underlease identified the tenant by referring to AHC's name, contained a reference to its company registration number, and included a break clause enabling the tenant to determine the underlease in October 2009 by giving six months' written notice to the landlord. In August 2007 AHC became part of the ES group of companies. In 2008 HH received a letter, on ES headed notepaper, announcing that AHC was to change its name to ES and providing a new address to which future invoices were to be sent. In the event, AHC remained separate from ES and the namechange did not take effect. In April 2009 HH received another letter, also on ES notepaper, purporting to give notice to exercise the break clause. The letter was signed by ES's account manager "for and on behalf of the company". HH's enquiries revealed that the underlease had not been assigned to ES.

Point of dispute: Whether HH's application for a declaration that the underlease continued would be allowed. At the same time AHC counter-claimed for a declaration that the break clause had been validly exercised.

Held: HH's claim was allowed and AHC's counterclaim was dismissed.

i The notice to exercise the break clause had not been given by the tenant under the underlease: a tenant notice had to fulfil the formal requirements imposed by the underlease. The reasonable recipient test was only relevant to the separate issue of whether a notice that conformed to formal requirements was effective to convey the required information. A notice given on ES's headed paper, stated to be given for and on behalf of ES, had to be regarded as given by ES and there was no evidence that the tenant itself had decided to serve the notice. The notice was invalid because it had not been given by the tenant but by a third party.

ii An analysis of the facts demonstrated that the notice had been given by ES as principal, rather than as agent for AHC, and it was not alleged by AHC that anyone in that company had authorised ES's account manager to serve the notice.

iii Only a general agent could serve a valid break notice in its own name without disclosing the fact of the agency on the face of the notice. AHC could not demonstrate that it had created a general agency under which the agent had authority to undertake anything in relation to AHC's lease. There was no evidence of an express creation of a general agency and insufficient evidence from which to infer one.

PLANNING

03 Administrative Court

Wind turbines – environmental effects

** BARNES V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2010) PLSCS 193 – Decision given 09.07.10

Facts: The local planning authority refused permission for a development of six wind turbines on a site near Kendal, Cumbria. B, who belonged to a countryside protection group, objected to the proposal due to the visual effect of the turbines and noise levels. The matter went to a public inquiry before a planning inspector who granted conditional permission for the development, on the basis that the adverse effect was outweighed by the need for renewable energy. The conditions included a requirement that the local council's approval be obtained to the final designs and specifications of the turbines and a condition relating to noise levels.

Point of dispute: Whether to allow B's application to quash the planning permission. B argued that the inspector had failed to impose any condition regarding the maximum permitted size of the turbines or any requirement as to their energy output. This meant that the local council could approve turbines which were larger, or produced less electricity, than those assessed in the applicant's environmental statement on which the inspector's conclusions had been based. B also contended that the noise condition was unlawful as it did not define the methodology for assessing compliance and failed to define the parameters for measuring noise, such as time of day, weather conditions and type of equipment to be used.

Held: B's claim was dismissed.

i A planning permission for a development to which environmental impact assessment requirements applied would be unlawful if it permitted development that would have significant effects on the environment which differed from those assessed in the environmental statement. The decision had to be read as a whole, and in this case permission had been granted for six turbines whose dimensions were set out in the application. The absence of a condition regarding energy output was not erroneous as the inspector had not suggested that his conclusion on acceptability was dependent upon output.

ii The measurement of noise was difficult and needed to be carried out in accordance with determined parameters, the definition of which was desirable. In this case the noise conditions imposed by the inspector should be interpreted benevolently, giving effect to them if possible. They could be applied through the local authority, or an inspector on appeal, taking a reasonable view as to what parameters should be applied – often government guidance document ETSU-R-97 would be used. The noise condition was not invalid.

Per curiam: It was unfortunate that, after many years of wind farm development applications, there were no generic noise conditions contained in national planning guidance for local planning authorities and inspectors to impose. This resulted in inconsistent decisions and resources being wasted on parties coming to agreement as to exactly what noise conditions should contain.

04 Review

Penfold Review of non planning consents – Final Report July 2010

The principal aim of the Penfold Review of the planning system, of which this report is the second phase, has been to identify opportunities to deregulate in order to support business investment in development. This report considers whether the process for obtaining non-planning consents is delaying or discouraging business investment and whether investment would be supported by streamlining processes, removing duplication and improving working practices. Key problems which were identified include the following:

- the volume and complexity of non-planning consents and fragmented responsibility for them within government
- overlaps and duplication between planning and non-planning consents which lead to inefficiency and blurring of boundaries between whether and how a development should proceed
- delays which increase development costs and lead to an adverse economic impact
- developers find that their experiences of dealing with consenting bodies are inconsistent

This Review considers changes that could be made to increase certainty, speed up processes, reduce duplication and minimise costs. The most problematic consents are perceived to be heritage, highways and environment-related consents and the Review has sought to make recommendations which focus on improving the operation of consents in those specific areas.

http://www.berr.gov.uk/assets/biscore/better-regulation/docs/p/10-1027-penfold-review-final-report.pdf

05 Planning guidance

Planning applications for school developments

New planning guidance has been published in advance of Royal Assent being obtained to the Academies Bill. This guidance, in the form of a statement by the Communities Secretary, must be taken into account as a material consideration when determining all planning applications for school development. It states that local authorities should:

- attach very significant weight to the desirability of establishing new schools and enabling local people to do so;
- adopt a positive and constructive approach towards applications to create new schools and seek to mitigate the negative impacts of development through the use of planning conditions or obligations; and
- only refuse planning permission for a new school if the adverse planning impacts outweigh the desirability of establishing a school in that area. Where a local authority refuses planning permission on this basis the Government will ask the Planning Inspectorate to deal swiftly with any appeal that is lodged.

The Government will consult soon on proposed changes to the Use Classes Order which will reduce regulation and make it easier to convert buildings to schools.

RATING

06 CLG Consultation

Making Small Business Rate Relief Automatic (SBRR)

Deadline for Responses: 13.08.10

SBRR was brought into effect in April 2005 in order to counter the disproportionately high impact that business rates had on small businesses. The eligibility criteria for the relief are as follows:

- The sole or main property that the small business occupies must have a rateable value (RV) under the threshold for the relief (currently £18,000, or £25,500 in Greater London), and
- Each additional property must have a RV of no more than £2,600 and the total RV of all the properties it occupies must be below the overall threshold for the relief.

There is no existing source of data to enable local authorities to reliably identify whether a property with a RV below the threshold is occupied by a ratepayer with no additional properties or by a business with multiple premises. Ratepayers currently have to complete a simple form declaring that they meet the additional property criteria in order to receive the relief. It is estimated that around 80% of properties occupied by eligible small businesses were subject to claims for SBRR in 2008. The relief is paid for by a supplement on the rates paid by ratepayers who are not eligible for SBRR, currently 0.7 pence per pound of RV.

Views are invited on the following three options for automating the relief by changing the eligibility criteria to ones which can be verified by the local authority using existing sources of data:

1. Extend eligibility to all properties below the RV threshold regardless of whether they are occupied by businesses with multiple properties.
2. Extend eligibility as for Option 1, but for a buffer zone only of properties with RV between £12,000 and £18,000, or £25,500 in London, with the declaration form requirement retained for properties below RV £12,000.
3. Identify a practical alternative to the ‘sole premises’ criteria to target small businesses using existing data.

Views are also invited on whether there are other options for improving take up of SBRR which could be brought in more quickly.

07 CLG Business Rates Information Letter

Business rates information letter (9/2010): Temporary increase in small business rate relief

This note sets out for local authorities and other practitioners the policy intention behind the statutory instruments which temporarily increase the rate of small business rate relief. These SIs are:

- The Non-Domestic Rating (Small Business Rate Relief) (Amendment) (England) Order (SI 2010/1655); and
- The Non-Domestic (Collection and Enforcement) (Local Lists) (England) (Amendment) (No 2) Regulations (SI 2010/1656)

(See Evebrief, Volume 32(11) items 10 and 11)

http://www.communities.gov.uk/publications/localgovernment/bril92010

08 Valuation Tribunal for England Practice Statement

Listed Appeals where the parties have reached agreement

This statement, which came into effect on 02.08.10, addresses recent concerns about appeals being struck out by the Valuation Tribunal when the parties thought they had been agreed. Now, so long as agreement has been reached and the forms returned correctly to the VO, there should be no risk of striking out in the future.

http://www.valuationtribunal.gov.uk/Libraries/Publications/Practice_Statement_-_B5_Listed_appeals_where_the_parties_have_reached_agreement_final.sflb.ashx

09 Valuation Tribunal for England Practice Statement

Non-Domestic Rates (Rating List 2010): Disclosure and Exchange

This Practice Statement comes into effect on 01.01.11. It provides a strict timetable, failure to comply resulting in automatic striking out:

- notices of VT hearing to be issued no less than two weeks after target date;
- hearings to be at least six weeks after notice of hearing;
- VO to serve any Reg 17 notices six weeks before hearing;
- Appellant to serve statement of case and summary of evidence no less than four weeks before hearing; and
- VO to respond and serve statement of case no less than two weeks before hearing.

http://www.valuationtribunal.gov.uk/Libraries/Publications/Practice_statement_-_A7_Non-Domestic_Rates_Disclosure_and_Exchange_final.sflb.ashx

LEASEHOLD REFORM

10 Leasehold Valuation Tribunal

Collective Enfranchisement – Deferment rate

** ASHDOWN HOVE LTD V REMSTAR PROPERTIES LTD
(2010) PLSCS 208 – Decision given 28.06.10

Facts: AH was the nominee purchaser for the purposes of a claim by qualifying tenants of flats in a block in Hove, East Sussex to acquire the freehold of the building under the Leasehold Reform, Housing and Urban Development Act 1993 from the freeholder, RP.

Point of dispute: The deferment rate to be applied to the freehold vacant possession value. AH argued that it should be higher than the generic 5% rate for flats laid down in Earl Cadogan v Sportelli [2007] 1 EGLR 153, on the ground that the building in question was different from properties in the prime central London (PCL) area on which the Sportelli rate was based. It argued that the rate should be increased by:

i 0.25% to reflect obsolescence and deterioration since the property had a number of maintenance problems, including flooding to an underground car park, low energy efficiency and the need to replace single glazed windows;

ii 0.5% to reflect the difference in capital growth rates, on the basis that these were significantly lower outside PCL; and

iii 0.25% to reflect the special management problems of the building and the increased complexity of leasehold management following the changes made by Part 2 of the Commonhold and Leasehold Reform Act 2002.

Held: A deferment rate of 6% was applied.

i There was a significant difference in value between flats in Hove and those considered in Sportelli, while building costs were similar. It was likely to remain economically viable to repair PCL flats for longer than similar sized flats like this one in Hove. There was a greater risk of deterioration in this block than there was in PCL so a purchaser of the freehold reversion to the block would expect an additional 0.25% in the risk premium to reflect this.

ii The available evidence suggested that capital growth for flats in the Hove area would be at a lower rate than in PCL and an investor's bid would be adjusted accordingly. The risk premium should be increased by 0.5% to reflect this.

iii In considering risks associated with management difficulties it was not appropriate to differentiate between properties with an intermediate headlease between the freehold interest and individual flat leases where the freeholder was responsible for management. However, where there was a leaseholder-controlled management company, as in this case, there was a risk that this company could fold leaving the freeholder with the responsibility of maintaining the building and an investor would require an additional 0.5% to reflect this. (In the final decision, only 0.25% was added for the risks involved in managing the block in question, leading to a deferment rate of 6% as contended for by AH).

COMPULSORY PURCHASE

11 Administrative Court

Certificate of alternative development for compensation claim

*ROOFF LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2010) PLSCS 202 – Decision given 16.07.10

Facts: In 2005 a site owned by R in Stratford, East London was acquired under a compulsory purchase order (CPO) as part of the development site for the London 2012 Olympics. The site, which was located in an industrial and commercial area, adjoining a freight railway, fell within a zone of large-scale redevelopment of the Stratford area. For the purposes of its compensation claim R applied to the lpa for a certificate of appropriate alternative development under s17 of the Land Compensation Act 1961. It sought a certificate that in the absence of the CPO planning permission would have been granted for Class C3 residential use. That was rejected and the lpa issued a certificate confined to Class B1 and B2 business and light industrial uses. The inspector appointed by the Sec of State to consider R's appeal against that decision concluded that it was highly unlikely that permission for residential development on R's land would have been given due to its proximity to noisy railway line and a proposed major road realignment, as well as other surrounding 'bad neighbour' uses.

Point of dispute: Whether to allow R's appeal against the Sec of State's decision. R argued that the inspector had failed to recognise that the relevant statutory planning guidance required mixed-use residential development in the absence of reasons to the contrary and that the reasoning of his decision had been inadequate.

Held: R's claim was dismissed. An application under s17 of the 1961 Act was to be treated as though it were a planning application, based on the hypothesis that the development which gave rise to the CPO would not take place, and the applicant had to be able to identify the timescale when the development could be appropriate. Read as a whole the inspector's decision did not indicate that he had misunderstood either the contents of the relevant planning guidance or the nature of his duty in applying it to the site. The relevant policies did not require a residential development regardless of environmental considerations. The inspector had been entitled to conclude that factors such as the road and the railway militated against the possibility of permission being granted for any residential development on R's site, especially as there were plenty of suitable riverside and other sites nearby. The inspector's reasoning had been adequate, and even if that were not the case R had not suffered detrimentally to justify quashing the inspector's decision.

HOUSING

12 Court of Appeal

Affordable housing policy

* BARRATT DEVELOPMENTS PLC V WAKEFIELD METROPOLITAN DISTRICT COUNCIL
(2010) PLSCS 216 – Decision given 29.07.10

Facts: In April 2009 WMDC adopted a core strategy which set out its development policy until 2026. This included a provision that all developments above a certain size should incorporate 30% affordable housing. The policy was formulated at a time when market conditions were favourable, but, while it was being considered by an inspector appointed by the second defendant Sec of State, the market slumped and no new housing was being built. On the inspector's recommendation the adopted policy specified that all proposals for new housing should provide for 30% affordable housing unless otherwise agreed with WMDC. However, the actual level of affordable housing on a particular site could be negotiated when planning permission was sought, having regard to abnormal costs, economic viability and other requirements of the development. All but the smallest sites had to contribute to the affordable housing provision. BH, a developer, brought proceedings under s113 of the Planning and Compulsory Purchase Act 2004 to quash the affordable housing policy claiming that it did not reflect an assessment of the likely economic viability of land for housing within the area.

Point of dispute: Whether BH's appeal would be allowed against the decision of the court below which dismissed its application for judicial review. It argued:

i the 30% affordable housing target was not supported by economic evidence

ii the defect was not cured by providing for negotiation in respect of individual sites

iii the policy was in other respects unclear and unsupported

Held: BH's appeal was dismissed. In a case like this the appellant had to specify the precise grounds on which it alleged that the relevant decision was beyond the powers of the Act or was procedurally defective. It was not suggested that the policy failed to conform with RSS, nor that procedural requirements had not been complied with, so it had to be considered whether the policy was 'sound' and the inspector's recommendations adequately reasoned. 'Soundness' was a matter to be judged by the inspector and WMDC, it raised no issue of law unless it could be shown that the decision was irrational or relevant guidance had been ignored. Reasons would be adequate if they were intelligible and the reader could understand why the matter had been so decided and the conclusions that had been reached on the principal controversial issues. There was sufficient evidence for the inspector to conclude that a 30% target was realistic in favourable conditions, and as market conditions are subject to constant change it would not be appropriate for a policy to contain varying thresholds and/or lower affordable housing targets. Nor had BH advocated any alternative model although it had the resources and expertise to do this.

13 CLG Statistical Publication

House Price Index – May 2010

These figures, released on 13.07.10, include data based on mortgage completions during May 2010.

- UK house prices were 11% higher than in May 2009 and 0.7% higher than in April 2010 (seasonally adjusted)
- the mix-adjusted average house price in the UK stood at £209,505 in May 2010 (not seasonally adjusted)
- UK house prices rose by 1.7% in the quarter ending May 2010. The rise for the previous quarter to February 2010 was 2.9%
- annual average house price rose in England by 11.7%, in Scotland by 3.7% and in Wales by 10.9%. In Northern Ireland they fell by 1.1%
- annual average house prices paid by first time buyers in May 2010 were 11.6% higher than a year ago, while average house prices paid by former owner occupiers were 10.8% higher
- prices paid for new houses in May 2010 were 6.5% higher than last year. Average prices paid for pre-owned dwellings were 11.3% higher

http://www.communities.gov.uk/publications/corporate/statistics/hpi052010

TORT

14 Supreme Court

Trespass – oil extraction using pipelines beneath appellant's property – whether appellant entitled to damages for trespass – correct approach to assessing quantum of damages

** BOCARDO SA V STAR ENERGY ONSHORE LTD
(2010) PLSCS 213 – Decision given 28.07.10

Facts: SEO held a petroleum licence under the Petroleum (Production) Act 1934, which authorised it to search, bore for and extract petroleum and gas from an oilfield, part of which extended under B's estate. The depths of the drilled pipelines under B's land varied from 800ft to 2,900ft below the surface. B, who had not given permission for the pipelines and to whom no compensation had been paid under s8(2) of the Mines (Working Facilities and Support) Act 1966, only became aware of them in 2006. B's claim for damages for trespass was allowed at first instance, when substantial damages were awarded based on a percentage of the value of the extracted oil. In the Court of Appeal the decision on liability was upheld, but the damages award was reduced to £1,000.

Point of dispute:

i Whether B's appeal would be allowed on quantum of damages. This issue depended on whether the compensation principles relating to compulsory acquisition cases applied to cases under the 1966 Act, including the rule in 'Pointe Gourde' that an award for compensation for compulsory acquisition could not include an increase in the value of land that was entirely attributable to the underlying scheme.

ii Whether SEO's cross-appeal on liability would be allowed. This question depended on whether B's title to the land extended down to the underground strata through which the pipelines ran.

Held: The appeal and the cross-appeal were dismissed.

i The Crown, through which SEO held their licence, only asserted ownership of the petroleum, not the strata of land in which it was found. This meant that the underground layers through which the pipelines passed belonged to B as owner of the paper title to the land above. SEO had no defence to a claim for trespass, either at common law or under the 1934 Act, and were liable.

ii The correct measure of damages for SEO's trespass was such sum as the court would have assessed as proper compensation to B for the grant of such rights as were necessary to enable SEO to extract petroleum. The principles relevant to compulsory acquisition applied to the assessment of compensation under s8(2) of the 1966 Act because the grant of ancillary rights to a petroleum licence-holder involved the compulsory acquisition of rights over land. Parliament must have intended compensation to be assessed on similar principles to those that applied under other compulsory purchase legislation, save insofar as s3(2)(b) of the 1934 Act expressly provided for a 10% uplift in respect of ancillary rights required to extract petroleum.

iii On an application of ordinary compulsory purchase principles B was not entitled to assert and benefit from the ransom value of the ancillary rights without which SEO could not unlock the value of the oil.

15 High Court

Right to use a garden square in Kensington

* HERRMANN V KENSINGTON AND CHELSEA ROYAL LONDON BOROUGH COUNCIL
(2010) PLSCS 190 – Decision given 09.07.10

Facts: In 2008 H bought a house in a terrace just off a garden square in Kensington and Chelsea. The square consisted of a garden at the centre, surrounded by railings and accessed by a locked gate, with houses around the perimeter. H's house was on a terrace leading to the square from nearby roads and the houses in both the terrace and around the square had been developed in the mid-19th century in the same architectural style. The garden was controlled and managed under the provisions of the Kensington Improvement Act 1851 and KCRLBC managed the square under the provisions of that Act. A committee, comprising owners and lessees of houses constituting the square, was responsible for the care and management of the garden. The treasurer of the garden committee and KCRLBC refused to give H a key to the garden.

Point of dispute: Whether KCRLBC was liable to H in nuisance. H argued that its refusal to give him a key to the garden was an actionable interference with his right to enjoy access to the garden. He relied on various provisions of the 1851 Act, contending that the core concept of a square was of a defined entity containing dwelling-houses, which could consist of a crescent, a terrace, a square in the conventional sense or some combination of those elements, together with a garden associated with it, but not necessarily at the centre of it. H argued that the square and the terrace created to give access to it together formed the relevant 'square' and that his house was 'in' that square.

Held: H's claim was dismissed. The 1851 Act had to be construed in a way as to make it readily workable. The reference in s51 to houses 'in and encompassing' the square meant those houses that had a front or side that entirely or in part faced the open square, half square, circus, crescent or terrace, as those expressions were popularly understood, within which the garden in question was located or with which it was associated. Whatever its exact shape, the square had to be of a kind that, with its attendant garden, the average man in the street would have no difficulty in recognising. Once the square had been identified the houses in that square qualified for garden rights. The Act had been interpreted in this way for over 50 years without dissent. On that approach H's house did not lie 'in' the square in question, nor could it be said to 'encompass' it. Since neither the front nor the side of H's house faced the square he could not enjoy the right to use the garden.

CONTRACT

16 Court of Appeal

Rescission of contract for sale of land

* WEIR V AREA ESTATES LTD
(2010) PLSCS 203 – Decision given 20.07.10

Facts: In January 2008 W exchanged contracts with AEL to purchase a registered freehold property for £400,000 and paid a £40,000 deposit. It was clear from the schedule to the freehold title that the property had been subject to a nine-year lease granted in April 2004, but extra special condition 7 (ESC 7) of the special conditions of sale provided: "The lease… determined by operation of law on 31 August 2006. The buyer shall accept the position and shall not be entitled to require any further proof of the determination or raise any objection or requisition with regard thereto." In fact, the position was that the lessee had moved out of the property, purporting to surrender the lease, but that surrender was ineffective because at the time the lessee was subject to a bankruptcy petition which meant that any disposition of property was void without the consent of the court. The petition had been registered against the leasehold title in August 2006 and in November that year the bankruptcy order was registered against the leasehold title. When W sought to rescind the contract because of the encumbrance of the leasehold interest AEL secured a disclaimer of the lease from the trustee in bankruptcy.

Point of dispute: Whether AEL's appeal should be allowed against the order of the judge in the court below that the deposit should be repaid to W with interest and costs. AEL argued that: (i) ESC 7 prevented W from relying on the continued existence of the lease as a ground for rescission; and, even if it did not (ii) the lease should only be regarded as a technical conveyancing defect insufficient to justify rescission.

Held: The appeal was dismissed.

- The seller had to disclose defects of which he knew, and in this case AEL should have known that the purported surrender, unsupported by a court order, was ineffective. ESC 7 had drawn W's attention to the potential issue of the lease, but as it contained an unqualified assertion that the problem no longer existed this amounted to an implied representation that AEL had taken reasonable steps to confirm the accuracy of this statement.
- The existence of the lease was not a technical conveyancing defect insufficient to justify rescission. There would have to be a successful application to the court seeking ratification of the surrender or a successful request to the trustee in bankruptcy to disclaim. At the time the contract was entered into neither of these lay in AEL's control and could not be assumed as a foregone conclusion.

17 Court of Appeal

Rescission of contract for sale of off-plan property due to failure to obtain headlease within stipulated time

* MCGAHON V CREST NICHOLSON REGENERATION LTD
(2010) PLSCS 206 – Decision given 21.07.10

Facts: M contracted to purchase, off-plan, a flat from a developer, CNR, and paid a 10% deposit. The contract was conditional upon the grant of a headlease of the block to CNR and if this had not been granted by 01.06.08 either party would have the right to rescind the contract by serving a notice of rescission on the other at which point the contract would become null and void and M's deposit would be paid back. The headlease was granted on 04.09.08 and on 29.09.08 M purported to serve a notice on CNR rescinding the contract and requesting the return of their deposit. CNR argued that the contract had not been terminated as the headlease had been granted before the date of M's notice of rescission and that M was required to complete after service of a notice to complete.

Point of dispute: Whether to allow M's appeal against the ruling of the judge in the court below that he was not entitled to the return of his deposit plus interest since this would lead to an uncommercial result for both parties.

Held: M's appeal was dismissed. There was no provision in the contract making time of the essence for the grant of the headlease, which meant that the contract could become unconditional even if the headlease was granted after 01.06.08, notwithstanding that there was a right of rescission if it had not been granted by that date. This meant that the right to rescind existed up to the grant of the headlease and did not continue once it had been granted. M had not taken any steps to ascertain whether the headlease had been granted by 01.06.08 and did not take such steps until after it had actually been granted on 04.09.08. It was also affirmed that the result sought by M would be an uncommercial one.

18 Technology and Construction Court

Frustration of contract

* GOLD GROUP PROPERTIES LTD V BDW TRADING LTD
(FORMERLY BARRATT HOMES LTD)
(2010) PLSCS 189 – Decision given 01.07.10

Facts: GGP and BDW entered into an agreement under which BDW would build houses and flats on GGP's land. BDW would sell the newly built properties on long leases at minimum prices on behalf of GGP and would receive a share of the sales revenue. Under the contract BDW was to commence building works within 12 months of receiving vacant possession from GGP and complete the development within 30 months. As a result of the fall in the property market following the recession, little work was done. BDW proposed that the development be delayed or the payment terms reviewed.

GGP considered that BDW had breached its contractual obligations and insisted that the breach be remedied. BDW took the view that the contract was at an end and unenforceable, whereupon GGP purportedly accepted BDW's repudiatory breach and commenced proceedings for damages. GGP's application for summary judgment was rejected.

Points of dispute:

- Whether BDW had been in repudiatory breach of the development agreement.
- Whether GGP had breached the obligation of good faith by refusing to contemplate any change to the revenue-sharing arrangements.
- Whether GGP's refusal to review the minimum set prices had been a cause of the breach.
- At what point the agreement had been terminated.

Held: GGP's claim for damages was allowed.

- BDW's breaches were repudiatory.
- The obligation of good faith did not require GGP either to agree to an adjustment of the revenue-sharing mechanism or to negotiate such an adjustment as an obligation on its own or as part of any negotiation on minimum prices. Revising the revenue-sharing agreement would result in a significant reduction in profits and it could not be said that GGP was in breach of its good faith obligations by refusing to accept the proposals or negotiate on them.
- GGP had not breached the contract and, in so far as it had taken an incorrect view of its obligations regarding minimum price, that was not the cause of the agreement being terminated.
- The agreement came to an end in September 2009 when BDW exercised its right of termination and by GGP's acceptance of BDW's repudiatory breach. Exercising the right of termination was not an affirmation of the agreement.

GENERAL

19 High Court

Frustration of contract

* HILDRON FINANCE LTD V SUNLEY HOLDINGS LTD
(2010) PLSCS 185 – Decision given 06.07.10

Facts: In 1986 HF sold the freehold in a block of flats to SH. The flats were held on long leases, apart from one which was occupied by a resident porter. The parties entered into an agreement that if the flat was not needed for a resident porter at any time during the next 21 years, SH would sell a new long lease of it on the open market, with vacant possession, and would pay HF half of the proceeds of sale less certain expenses. In 2003, following the introduction of the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993, a majority of the tenants applied to acquire the freehold of the block. The tenants' notice was registered at the Land Registry under s97(1). This meant that SH could no longer sell a long lease of the porter's flat as it formed part of the common parts which the tenants were entitled to acquire under s2(1)(b). By 2007 a flat for a resident porter was no longer required and a value of £200,000 was attributed to it.

Point of dispute: Whether HF was entitled to a payment under the 1986 agreement, or to damages for its breach. HF contended that the court should seek to give effect to the underlying objectives of the overage agreement in the light of the changed circumstances and that the sale of the freehold of the block was equivalent to the sale of a long lease of the porter's flat.

Held: HF's appeal against the declaration of the county court that it was not entitled to any payment was dismissed. HF was asking the court to go too far in its reconstruction of the porter's flat agreement. In a general sense, the purpose of the agreement was to unlock and share the increased capital value of the flat if it was not needed for a porter, but the steps that were to be taken in that event had been drawn up on the assumption that the flat could be sold on the open market, with a new standard form long lease, and for a price that HF would be able to approve. A sale of the freehold interest in the flat as part of the disposal of the entire block had been outside the parties' contemplation in 1986 as had the fact that such a disposal had to be at a price ascertained according to the 1993 Act. It was not possible to construe the agreement in such a way that it applied to the events that had occurred. It would be unreasonable to construe the porter's flat agreement as imposing an absolute liability on SH when its performance had become impossible. The contract had been discharged by frustration with no fault on either side.

20 Commission for Rural Communities Report

State of the Countryside 2010

The Commission for Rural Communities is a government funded statutory body which aims to ensure that the Government's policies, programmes and decisions take into account the needs and circumstances of rural communities. This report contains factual information on social, economic and environmental issues in rural England, highlighting current challenges and trends for government and other organisations. It is divided into three chapters, covering the following topics:

- Living in the Countryside;
- The economy in rural England; and
- Land and environment.

http://ruralcommunities.gov.uk/sotc2010

Summary Report

http://ruralcommunities.gov.uk/files/sotc/sotc2010summary.pdf

21 English Heritage Guidance Note

The Disposal of Heritage Assets

This guidance note, which contains advice on the disposal of 'heritage assets' by central government bodies, replaces the 1999 guidance note on the disposal of historic buildings. The term heritage asset has been adopted in line with Planning Policy Statement 5: Planning for the Historic Environment and the guidance applies to a wide range of asset types including historic buildings, monuments, memorials, archaeological remains, designed landscapes, battlefields and wrecks. Public bodies have an important role in promoting regeneration and sustainable development through the disposal of their surplus land and property and this guidance note aims to ensure that proper account is taken of heritage values associated with any surplus land. It should be applied across central government, including the departments, executive agencies and non-departmental public bodies for which they are responsible. Although it is not mandatory beyond central government it contains the elements of best practice for the public sector as a whole, including local authorities, health trusts, public corporations and the police and it complements the guidance published by English Heritage for local authorities on managing their heritage assets. ('Managing local authority heritage assets' (2003)).

http://www.helm.org.uk/upload/pdf/Guidance_on_disposals_June_2010.pdf?1280220924

22 Defra Consultation

Marine Planning System for England

Deadline for Responses: 13.10.10

This consultation invites views on proposals for a new marine planning system in England. The new regime will be built upon the provisions of the Marine and Coastal Access Act 2009 with a strategic approach to management of the marine environment and a focus on sustainable development. The Marine Management Organisation will draw up the Marine Plans for England. The consultation is designed to consider the following specific themes regarding the marine planning system for the English Inshore and Offshore Regions:

- its general purpose and benefits;
- its scope, context, structure and implementation;
- roles and responsibilities within the marine planning system;
- the interaction between terrestrial and marine planning systems; and
- decision making in Marine Plan areas and the transitional arrangements necessary in decision making until the marine planning system has been fully implemented across the whole of England's marine area.

http://www.defra.gov.uk/corporate/consult/marine-planning/index.htm

23 Defra Consultation

Marine and Coastal Access Act 2009: Secondary Legislation for the Marine Licensing System

Deadline for Responses: 13.10.10

A new marine licensing system is to be introduced under Part 4 of the Marine and Coastal Access Act 2009 which sets out a framework for a new system to regulate marine activities in accordance with relevant marine policy documents. The aim is to achieve sustainable development while protecting the environment, human health and users of the sea. Certain aspects of the new system will be introduced through secondary legislation, specifically:

- The delegation of licensing functions to the Marine Management Organisation;
- Appeals against licensing decisions;
- Exemptions from the need to have a licence;
- Establishing and maintaining a licensing register; and
- Fees and charges.

The new marine licensing system is linked with the Marine Policy Statement and Marine Plans. (See item 22 above). Both of these are being consulted on in parallel.

http://www.defra.gov.uk/corporate/consult/marine-licensing-system/index.htm

24 london.gov.uk publication

Revised London View Management Framework SPG

The London View Management Framework contains the Mayor's policy framework for managing the impact of development on key panoramas, river prospects and views in the city. A draft revised London View Management Framework (LVMF) SPG was consulted on in May 2009 and a new revised LMVF SPG was published in July.

http://www.london.gov.uk/who-runs-london/mayor/publications/planning/revised-london-view-management-framework-spg

25 London Assembly Report

Cornered shops: London's small shops and the planning system

The All Parliamentary Small Shops Group has warned that small independent retailers may have completely disappeared from Britain by 2015. Building on the work of that Group, this report considers the following questions:

- the benefits of small, local and independent retailers to London;
- whether there is evidence to show that they may be under threat and what those threats may be;
- what policies have been proposed to support small, local and independent retailers and the progress that has been made in implementing such policies;
- what the Mayor can do through the planning system to support such retailers; and
- this report considers ways in which the London Plan could provide more support to small shops. It is recommended that the Mayor should lobby the Government to give London's boroughs greater control and flexibility to support small shops through the planning system. Central to these proposals would be a revision of the Use Classes Order by dividing the existing A1 Class into 'essential services' shop uses, such as grocers, bakers, butchers and newsagents, and other more service based uses eg internet cafes and betting shops, so that planning permission would be required for a change of use between these categories.

http://www.london.gov.uk/sites/default/files/Final%20draft%20small%20shops_0.pdf

26 Government Statistics

Land Use Change Statistics (England) 2009 – provisional estimates (July 2010)

The latest statistics on land use change, issued on 30.06.10, contain estimates for 2009 of changes on previously developed land and the average density of new dwellings. It is provisionally estimated that in 2009:

- 80% of dwellings (including conversions) were built on previously-developed land. This figure is the same as for 2008;
- 2% of dwellings were built within the Green Belt (unchanged since 2004) and 7% of land changing to residential use (from any use) was within the Green Belt (unchanged from 2008); and
- 11% of dwellings were built within areas of high flood risk (an increase from 9% in 2008) and 6% of land changing to residential use was within such areas (unchanged since 2007)

http://www.communities.gov.uk/publications/corporate/statistics/lucs2009provisionaljuly

27 CABE Report

Helping local people choose good design: design review network annual report 2009/10

The aim of design review is to improve the quality of architecture, landscape architecture and urban design, including the design of streets and public space. CABE's design review panel was set up in 1999 to provide expert independent advice on strategic and significant schemes across England. To date, it has conducted around 3,000 reviews. As well as CABE, there are now eight other design review panels and together they have formed an 'affiliated network' to ensure that schemes that are appropriate for design review are seen either by the CABE national panel or by one of the affiliated panels. There are also a number of local and sub-regional review panels, whose work is not covered by this report. This report details the activities and achievements of CABE's main design review panel and the eight affiliated panels, but it excludes the work of the special panels operating during 2009/10 covering schools, London 2012 and Crossrail. Examination of the use of design review shows that:

- in 2009/10 204 local authorities benefited from the design review network, almost two thirds of the authorities in England;
- projects with a total construction value of £40.6bn benefited from design review, roughly half the value of the £78bn worth of large projects of over £10m that went through planning last year;
- approximately 176,800 homes were reviewed; and
- the design review network service cost £1.9m in 2009/10, which represents 0.005% of the value of all the development that it reviewed.

http://www.cabe.org.uk/files/helping-local-people-choose-good-design.pdf

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London (West End)
Hugh Bullock Tel. 020 7333 6302
hbullock@geraldeve.com

London (City)
Simon Prichard Tel. 020 7489 8900
sprichard@geraldeve.com

Birmingham
Chris Kershaw Tel. 0121 616 4800
ckershaw@geraldeve.com

Cardiff
Joseph Funtek Tel. 029 2038 8044
jfuntek@geraldeve.com

Glasgow
Ken Thurtell Tel. 0141 221 6397
kthurtell@geraldeve.com

Leeds
Mike Roberts Tel. 0113 244 0708
mroberts@geraldeve.com

Manchester
Mike Roocroft Tel. 0161 830 7070
mroocroft@geraldeve.com

Milton Keynes
Simon Dye Tel. 01908 685950
sdye@geraldeve.com

West Malling
Lisa Laws Tel. 01732 229423
llaws@geraldeve.com

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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.

Contact details
If you require full details of any of the cases presented in this publication, or would like to discuss them in further detail, please contact our specialists:

Agency
Chris Kershaw Tel. 0121 616 4800
ckershaw@geraldeve.com

Compensation & Compulsory Purchase
Tony Chase Tel. 020 7333 6282
tchase@geraldeve.com

Building Consultancy
Michael Robinson Tel. 0161 830 7091
mrobinson@geraldeve.com

Environment & Contamination
Keith Norman Tel. 020 7333 6346
knorman@geraldeve.com

Landlord & Tenant
Graham Foster Tel. 020 7653 6832
gfoster@geraldeve.com

Leasehold Reform
Julian Clark Tel. 020 7333 6361
jclark@geraldeve.com

Minerals & Waste Management
Philip King Tel. 0113 244 0708
pking@geraldeve.com

Planning & Development
Hugh Bullock Tel. 020 7333 6302
hbullock@geraldeve.com

Rating
Jerry Schurder Tel. 020 7333 6324
jschurder@geraldeve.com

Real Property
Annette Lanaghan Tel. 020 7333 6419
alanaghan@geraldeve.com

Valuation
Mark Fox Tel. 020 7333 6273
mfox@geraldeve.com

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For more information on our research services please contact:
Robert Fourt
Partner
Tel. 020 7333 6202
rfourt@geraldeve.com

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EVEBRIEF

Legal & Parliamentary

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04 Scotland – General
05 Wales – Planning

SCOTLAND

Planning

01 Statutory Instrument

SI 2010/280 The Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment (No 2) Regulations 2010

These Regulations, which come into force on 09.08.10, amend the 2004 Regulations by removing redundant references to 'deemed applications'. Where an appeal was made against an enforcement notice an application for planning permission was previously deemed to have been made by virtue of s133(7) of the Town and Country Planning (Scotland) Act 1997 and this section has been repealed by the Planning etc (Scotland) Act 2006.

http://www.opsi.gov.uk/legislation/scotland/ssi2010/pdf/ssi_20100280_en.pdf

02 Consultation

Permitted Development Rights for Microgeneration Equipment on Non-Domestic Properties

Deadline for Comments: 08.10.10

This consultation sets out the Scottish Government's proposals for amending the General Permitted Development (Scotland) Order 1992 in order to fulfil the requirements of s71 of the Climate Change (Scotland) Act 2009. This requires the Scottish Government to provide permitted development rights for the installation, alteration or replacement of microgeneration equipment (eg solar panels, wind turbines etc) within the curtilage of a non-domestic building.

http://www.scotland.gov.uk/Resource/Doc/318686/0101724.pdf

03 Consultation

Resourcing a High Quality Planning System: A Consultation Paper
Deadline for Comments: 15.10.10

This consultation seeks views on how the Scottish Planning Service could be more effectively resourced and focused on quality of service. Views are also sought on options for amending the fee structure.

http://www.scotland.gov.uk/Resource/Doc/317790/0101200.pdf

GENERAL

04 Scottish Government Guidance

Disposal of Land by Local Authorities (Scotland) Regulations: General Guidance

The purpose of this guidance is to provide local authorities in Scotland with information that will assist them when considering the disposal of land in accordance with s74 of the Local Government (Scotland) Act 1973 as amended by s11 of the Local Government in Scotland Act 2003. It is a legal requirement that local authorities must sell any land for the best consideration that can reasonably be obtained, unless s74(2A) applies, or the disposal is made in accordance with regulations made under s74(2C), but the legislation recognises that there may be circumstances when a local authority considers it appropriate to dispose of land for less than the best consideration.

http://www.scotland.gov.uk/Resource/Doc/319642/0102183.pdf

WALES

Planning

05 Technical Advice Note (TAN)

TAN 6 – Planning for Sustainable Rural Communities

The purpose of this TAN is to provide practical guidance on the role of the planning system in supporting the delivery of sustainable rural communities. It provides guidance on how the planning system can contribute to sustainable rural economies, housing, services and agriculture.

The TAN should be read alongside Planning Policy Wales (Edition 3, July 2010), which sets out the Welsh Assembly Government's land use planning policies for supporting sustainable rural communities, and TAN 2 Planning and Affordable Housing which contains planning guidance that relates to this TAN.

http://wales.gov.uk/docs/desh/policy/100722tan6en.pdf

06 Welsh Assembly Government Consultation

Flood and Coastal Erosion Risk Management: Development of a National Strategy for Wales

Deadline for Comments: 08.10.10

This consultation is the first step in producing a National Strategy for Flood and Coastal Erosion Risk Management in Wales. It poses questions about objectives, action that needs to be taken and how to fund flood and coastal erosion risk management. It also includes information on the roles and responsibilities of the Risk Management Authorities.

http://wales.gov.uk/consultations/environmentandcountryside/floodstrategy/?lang=en

07 Welsh Assembly Government Consultation

Planning Policy Wales: Section 12.8 Planning for Renewable Energy

Deadline for Responses: 08.10.10

Views are invited on the Welsh Assembly Government's proposed update to national planning policy on renewable energy in Wales. This update is intended to enable the delivery of A Low Carbon Revolution – Wales' Energy Policy Statement as well as renewable energy and climate change commitments. This is not a consultation on Wales' renewable energy policy as such, which is contained in s12.8 of Planning Policy Wales (June 2010) and Technical Advice Note 8 Planning for Renewable Energy, but is intended to ensure that the planning system is capable of delivering Wales' energy aspirations, following research into how the planning system can facilitate renewable energy.

http://wales.gov.uk/consultations/planning/ppwrenewableenergy/?lang=en

08 Welsh Assembly Government Consultation

UK Marine Policy Statement: A draft for consultation

Deadline for Comments: 13.10.10

This consultation invites views on the proposed new system of marine planning. The Marine Policy Statement (MPS) is the framework for preparing Marine Plans and decision-taking that affects the marine environment and it will also set the direction for new marine licensing and other authorisation systems. The consultation invites views on the draft MPS and supporting documents, the draft MPS having been the subject of an eight week pre-consultation held between March and May this year.

http://wales.gov.uk/consultations/environmentandcountryside/marinestatement/?lang=en