EVEBRIEF

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EDITORIAL

Hilary Wescombe
Editor

In an issue dominated by cases I draw attention to three in particular. The decision reported at item 3 Marks and Spencer PLC V BNP Paribas has been welcomed for providing certainty although M & S must be disappointed at the requirement to pay for the portion of the quarter that fell after the break date. The decision set out that an unexpressed term can only be implied if the court finds that the parties must have intended that the term forms part of their contract. Tenants will only receive a refund of rent for a period after a break date if the lease makes express provision for doing so.

Gallagher Homes Limited V Solihull MBC at item 10 concerns local plans and the assessment of housing need. The National Planning Policy Framework has brought about a radical policy change requiring an express identification of a figure for full objectively assessed housing need which cannot be met by transposing the previous PPS3 approach.

Finally, item 11 LB of Southwark V The Information Officer, Lend Lease and Adrian Glasspool concerns the disclosure of a financial viability assessment (FVA) forming part of an outline planning application. The purpose of the FVA was to establish the case for departure from the expected 35% affordable housing within the development. Balancing the requirements of the Freedom of Information Act and Environmental Information legislation with the protection of commercially sensitive information the Tribunal decided to split the information in the disputed FVA. The Tribunal accepted that the development model in the FVA was subject to intellectual property rights and that information relating to commercial negotiations with other businesses in relation to sales and rentals was confidential information such that neither had to be disclosed. The remaining information in the FVA (e.g. in relation to sales to private purchasers, and to social housing providers) should be disclosed once the development model and projections on commercial negotiations had been safeguarded.

GERALDEVE

LANDLORD & TENANT

01 Supreme Court

Removal of alterations and reinstatement of premises – whether written notice required to trigger obligations

**L BATLEY PET PRODUCTS LTD V NORTH LANARKSHIRE COUNCIL
[2014] PLSCS 140 – Decision given 08.05.14

Facts: In 2007 the appellant, BPP, acquired the residue of a headlease of commercial premises in Cumbernauld, part of which were underlet to NLC until February 2009. The lease contained an obligation on the tenant "At all times through the period of this lease at the Tenant's expense well and substantially to repair, maintain and where necessary to renew, rebuild and reinstate and in general in all respects keep in good and tenantable condition the Premises…". There was also an obligation to obtain the landlord's prior written consent for any alterations and a further provision requiring that any "notice, request, demand or consent" under the lease be in writing. In April 1998 a minute of agreement recorded the fact that BPP's predecessor in title authorised certain alterations to the premises on condition that NLC removed them and reinstated the premises by the expiry or sooner determination of the underlease "if so required by [BPP]". The minute also provided that all NLC's obligations and undertakings made in it should be deemed to be incorporated in the underlease. Before the underlease expired LPP's surveyor verbally requested NLC to remove the alterations and reinstate the premises. When this was not done BPP claimed £253,700 for the cost of those works.

Point of dispute: Whether NLC were liable to pay the cost of removing the alterations and reinstating the premises. NLC disputed liability on the grounds that on the proper construction of the minute of agreement, the headlease and the underlease they had no obligation to repair or reinstate where no written request to that effect had been made. At first instance the judge had held that it was sufficient for BPP to communicate orally its wish that the premises be instated, but that decision was overturned on appeal.

Held: BPP's appeal was allowed and the first instance judge's decision was reinstated.

i. No requirement for written notice to repair and reinstate could be read into the obligations imposed by the underlease and headlease. It was a continuing obligation on the tenant which did not require any notice, written or otherwise, from the landlord to activate it.

ii. Properly construed, the minute of agreement did not impose a requirement for written notice in relation to the removal of the licensed works at the end of the lease. The words "if so required" in relation to the reinstatement obligation contrasted with the other provisions of the agreement which expressly required written forms. No requirement for written notice could be read into the minute of agreement by reference to the provision in the headlease and underlease requiring notices, requests, demands and consents to be in writing. NLC's undertakings and obligations in the minute of agreement were incorporated into the underlease, but, conversely, nothing was incorporated into the minute of agreement. It was a separate contract which did not require all communications for all circumstances to be in writing. Nor, in the interests of business common sense, was there any need for written notice.

02 Court of Appeal

Trespass – appellant carrying works to raise ceiling of his flat

*POTEL V YEUNG
[2014] PLSCS 216 – Decision given 11.04.14

Facts: The appellant, Y, and the respondents, P, were the long lessees of two flats in a four-storey building in London W14 which had been converted in the 1960s. When the conversion works were carried out a gap was left between the ceilings of the lower flats and the floors of the flats above in order muffle sound and inhibit the spread of fire. The ceiling of Y's flat was attached to joists, with a gap above and a separate set of joists supported the floor of P's flat above. The leases specifically stated that the demise included the ceilings and floors, the joists to which the floors were attached, but not the beams to which the ceilings were attached. They also included the free and uninterrupted passage of utilities to the flat and a right to enter other parts of the building for the purpose, inter alia, of "laying down" new sewers, drains, pipes, cables and wires. However, the corresponding Exceptions and Reservations clause did not mention the laying of new equipment. In November 2008 Y commenced extensive building works to his flat, including the removal of internal walls and raising the ceiling. The new ceiling was to be attached to a metal frame affixed to the underside of the floor joists of P's flat.

Point of dispute: Whether Y's appeal would be allowed against the decision of the judge in the court below to award damages to P on the grounds that Y had committed a trespass on P's property, as well as causing damage to it and a nuisance from the noise and dust. The judge had also dismissed Y's counterclaim for an injunction requiring P to grant Y access to their flat and switch off the gas supply to enable Y to reroute the gas pipe and move the gas meter to a space above the original ceiling.

Held: The appeal was dismissed.

i. Y had committed a trespass by raising the ceiling of his flat. Since it was his intention to move the gas pipe and meter into an area outside the bounds of his flat, he had no right to enter P's flat and turn off the gas to enable him to achieve this objective.

ii. It was not appropriate to imply into the reservations clause the additional words "or laying new" so as to entitle Y to enter onto P's property to install new equipment. Rights which a vendor sought to reserve had to be done expressly and reservations would not be implied save in exceptional situations such as necessity.

03 Court of Appeal

Break clause in commercial lease – respondent paying full quarter's rent in advance – whether entitled to be repaid for part of the quarter falling after the break date

**MARKS & SPENCER PLC V BNP PARIBAS SECURITIES SERVICES TRUST CO (JERSEY) LTD
[2014] PLSCS 150 – Decision given 14.05.14

Facts: The appellant (BNPP) was the landlord and M&S the tenant of an office building in London for a term of 12 years to February 2018. The leases were contracted out of the security of tenure provisions of Part II of the Landlord & Tenant Act 1954. The leases reserved a basic rent of £919,800 p.a. to be reviewed periodically and paid "yearly and proportionately for any part of a year by equal quarterly instalments in advance on the Quarter days". M&S was also liable to pay a car park licence fee, insurance costs, and a service charge. A break clause entitled M&S to terminate the leases in January 2012 or 2016 if certain conditions were satisfied at that date and on payment of a break premium amounting to one year's rent. M&S gave appropriate notice that it wished to terminate the lease in January 2012 after which it paid for insurance in respect of the period July 2011 to June 2012 and in December 2011 it paid a full quarter's rent, car park licence fee and service charge. The lease came to an end on the break date.

Point of dispute: Whether BNPP's appeal would be allowed against the decision of the judge in the court below that it had to repay M&S all the sums it had paid in advance which related to the period after termination of the lease on the basis that implying such a term would reflect what the parties would have intended and was consistent with the reference to payment of rent "proportionately for any part of a year". BNPP did not dispute repaying the service charges for services not provided by the break date, but it disputed the judge's findings as to rent, insurance charges and car park fees.

Held: The appeal was allowed.

i. The starting point for the court was that if the parties had intended a particular term to be included they would have done this expressly and the courts would not imply a term unless it was necessary to give effect to the parties' express agreement, as construed against the admissible background.

ii. With regard to service charges it would be wrong to infer that moneys that had not been spent by the break date should not be returned. However, with regard to rent there was no general principle that a lessee under a lease should pay only for what it actually received. The parties would have been aware when they entered into the lease that it was probable that one quarter's rent would have to be paid in advance for a period that went beyond the break date. At the time when the lease was entered into there was no precedent in case law for implying a term requiring repayment of rent for the period after the break date. If the parties had intended to incorporate such a term into the lease they would have done so expressly.

iii. The position regarding the car parking fee and insurance charges also differed from the service charges. The former was a relatively small amount and the break premium did not include any element for its loss; nor did it take into account any insurance charges that the lessor might incur during any subsequent void.

04 High Court

Service charges – whether tenant entitled to reduction in service charge where major works done after termination of tenancy

*FRIENDS LIFE MANAGEMENT SERVICES LTD V A&A EXPRESS BUILDING LTD
[2014] PLSCS 146 – Decision given 09.05.14

Facts: The claimant, FL, was the tenant and the defendant, AA, the landlord of office accommodation in a substantial 1930's building in Manchester. The lease, which was for a 15 year term from March 1998, included a break clause permitting the tenant to determine the lease in March 2010 on certain conditions. FL successfully exercised this clause. By this time FL had already paid almost £800,000 in respect of major works to be carried out in future years as an element of its service charge paid for 2006-09, reflecting its obligation to pay almost 91% of a total sum of £875,000. These major works did not commence until after FL had vacated the premises and were completed in 2011.

Point of dispute: How the amount of service charge FL was liable to pay for the final period of the lease should be calculated. AA considered that the entire cost of just over £1m for works carried out in 2010 and 2011 should be taken into account, while FL argued that the relevant period ended when the lease was terminated leading to a reduction in the service charge.

Held: FL's claim was allowed in part.

i. The express terms of the lease had to be given effect which meant that the relevant financial year for the last accounting period under the lease was the year to December 2010. The payments made by AA to contractors and consultants in respect of the major works had spanned 2010 and 2011 and only some of those sums qualified as costs incurred during the financial year in question. There was no distinction between a lease which expired by effluxion of time and one where the lease ended pursuant to the tenant's express right to determine the lease.

ii. The definition of service charge in the lease required the landlord to determine a "fair and reasonable proportion" of the annual expenditure attributable to the premises in respect of each individual item of the services and the ancillary items. The correct method to imply in this case was apportionment on a daily basis.

iii. AA's accountant had departed from the instructions contained in the lease when preparing the account showing the gross annual expenditure for the purposes of the lease. He had proceeded on the incorrect legal basis that he could include in an account of the costs incurred in 2010 the costs actually incurred in 2011.

iv. The sum of £875,000 for future works was to be taken into account in assessing the service charge from January to March 2010. AA also had to certify an account for the year to the end of December 2010 including the costs actually incurred on the major works in 2010 but not in 2011.

If you require advice on landlord & tenant issues, contact Graham Foster on Tel. +44 (0)20 7653 6832 gfoster@geraldeve.com

PLANNING

05 Court of Appeal

Inspector dismissing appeal against refusal of outline planning permission for residential development by reference to matters not identified as main issues in her statements under r7 and r16 of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 ("the 2000 Rules") – decision quashed on grounds of procedural unfairness – whether issues sufficiently raised where debated in evidence although not identified as main issues

*HOPKINS DEVELOPMENTS LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2014] PLSCS 216 – Decision given 15.04.14

Facts: The lpa refused a developer (HD) outline planning permission for a residential development of 58 dwellings on land in Wincanton, Somerset. HD's appeal to the Sec of State against that decision was determined by a planning inspector who conducted a local inquiry under the procedure laid down by the 2000 Rules. The parties prepared a statement of common ground and when the inquiry opened there were only two outstanding issues: (i) whether the proposed development was needed to meet the council's five year housing supply target; and (ii) its effect on the safe operation of the nearby cottage hospital. Notwithstanding her finding that the council could not demonstrate a five year supply of deliverable housing sites the inspector refused permission because of potential risk to motorists and pedestrians, because the new housing estate would detract from the tranquil and rural character of the area and because the site was not in a sustainable location. HD successfully applied to have this decision quashed on the grounds of procedural unfairness, the judge holding that the inspector had erred in taking into account issues relating to sustainability and the character and appearance of the area without notifying the parties that she regarded them as significant.

Point of dispute: Whether to allow the Sec of State's appeal against the judge's decision. The Sec of State contended that the issues had been sufficiently raised where they had been debated in evidence, even though they had not been identified as main issues.

Held: The appeal was allowed. The principle of natural justice and procedural unfairness entitled a participant in adversarial proceedings to know the case that it had to meet and to have a reasonable opportunity to adduce evidence and make submissions. This principle would be breached where there had been procedural unfairness which materially prejudiced the applicant. The 2000 Rules provided a framework within which both the inspector and the parties operated and the inspector had a duty to conduct proceedings in such a way that each party had a reasonable opportunity to adduce evidence and make submissions on the material issues. In this case there had been no procedural unfairness. Since neither sustainability nor the character and appearance of the area had been included in the parties' statement of common ground these had both been live issues at the inquiry. The parties had adduced evidence on the issue of sustainability and the character and appearance of the area had been raised by a number of third parties. Even though the inspector had not identified those issues in her r7 and r16 statements that was only an indication of her preliminary views and did not remove them from the arena. Given the surrounding circumstances HD should have been aware that those issues were part of the case it had to meet and it had been given a reasonable opportunity to adduce evidence and make submissions on them.

06 Court of Appeal

Application to quash planning permission for exclusive golf club with hotel and spa facilities in protected landscape area – whether developer demonstrating "need" for further golfing facilities in the area as required by applicable planning policies

*R (ON THE APPLICATION OF CHERKLEY CAMPAIGN LTD) V MOLE VALLEY DISTRICT COUNCIL [2014] PLSCS 138 – Decision given 07.05.14

Facts: A developer applied to MVDC for planning permission to develop a Grade II listed building with an estate which was situated within the green belt in the Surrey Hills as an exclusive 18-hole golf course, hotel, health club and spa. The site was in a designated area of great landscape value, part of it was within an AONB and it also included or adjoined land that was of scientific, conservation or archaeological significance. Although there were many objectors to the proposals and the planning officers recommended refusal of permission, the development control committee disagreed and granted permission in September 2012. They indicated that the development would meet a need for recreation facilities in the countryside and achieve economic benefits overall. However, the respondent campaign group successfully challenged the grant of planning permission in judicial review proceedings. Its argument that the development would damage a landscape of national importance and that no need for golf facilities had been demonstrated was accepted by the judge in the court below. (See Evebrief Volume 35(13) i3). The judge held that the word "need" meant required in the interests of the public and the community as a whole and that, in the context of planning policy proof of private demand for exclusive golf facilities did not equated to "need". He further held that para 116 of the NPPF which imposed stringent tests for major development in designated landscape areas, applied to the proposed development.

Point of dispute: Whether to allow the appellants' appeal against the decision of the court below.

Held: The appeal was allowed.

i. The local plan policy set out several criteria against which proposals for new golf courses were to be measured, but it contained no requirement to demonstrate need.

ii. The provisions of the Planning and Compulsory Purchase Act 2004 and the saving direction made under it served to underline that position.

iii. The judge had adopted an overly exacting and narrow interpretation of need. The word could encompass necessity at the one end of the spectrum and desire at the other, depending on context. The saved local plan did not support the judge's interpretation.

iv. The proposed golf course development was not one to which para 116 of the NPPF applied so as to attract its stringent tests of exceptional circumstances and pubic interest imposed by that paragraph. Only one fairway and one tee would be within the AONB and this could not be regarded as a major development in the AONB.

v. Although the appellants' planning officers had given strong evidence–based advice that the proposed development would have a detrimental impact on the landscape they had not gone so far as to suggest that the expert evidence pointed unequivocally in that direction. It was open to the appellants to conclude as a matter of planning judgment and in the light of written material and their impressions from site visits that the overall landscape character would not be compromised. They had properly understood the requirements of relevant planning policies, including the saved local plan policy ad PPG 2 on development in the green belt, and had given an adequate summary of their reasons for granting permission.

07 Court of Appeal

Appeal against enforcement notice requiring demolition of whole building

*AHMED V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2014] PLSCS 144 – Decision given 07.05.14

Facts: In 2005 A obtained planning permission to demolish a property in Stoke Newington and replace it with a new building which would include a ground floor retail unit and six flats above. Work had to commence within five years by June 2010. This condition was complied with, but the new building differed in material respects from that permitted as it had a different style of roof and an additional storey. The lpa refused retrospective planning permission for the development and issued an enforcement notice which required the breach of planning control to be remedied by the demolition of the entire building and the restoration of certain parts of the old building to their previous position. A's appeal, under s174(2) (a) and (f) of the Town and Country Planning Act 1990 was initially dismissed by the Sec of State's planning inspector who found that permission could not be granted for the new building under ground (a) as it did not accord with the local development plan, and that, with regard to ground (f), there was no fallback position which could be implemented as the 2005 permission had expired.

Point of dispute: Whether to allow the Sec of State's appeal against the decision of the judge in the court below, who quashed the inspector's decision in relation to ground (f). The judge held that the inspector should have considered exercising his powers under s177(1) and 176(1)(b) of the 1990 Act, retrospectively, by granting a planning permission in terms of the 2005 consent and then varying the enforcement notice to require partial demolition and remodelling to conform to that consent.

Held: The appeal was dismissed. A planning inspector had wide powers to decide whether there was any solution, short of a complete remedy of the breach, which was acceptable in planning and amenity terms. If there was he should be prepared to modify the terms of the enforcement notice and grant permission subject to conditions. An appellant relying on ground (f) should state his fallback position, but if there was an obvious alternative the inspector should consider it. A's point was that all that was needed to make the development acceptable in planning terms was for it to be modified to comply with the scheme approved in 2005. That should have led the inspector to consider the grant of planning permission for the 2005 scheme under ground (a) with a consequential variation of the enforcement notice under ground (f) in respect of the steps required to be taken to remedy the breach of planning control. He had erred in law in failing to consider that possibility as an obvious alternative.

08 Administrative Court

Community Infrastructure Levy (CIL) – judicial review of defendant council's CIL charging structure – whether adopting charging schedule without regard to development plan policy on new housing unlawful

*R (ON THE APPLICATION OF FOX STRATEGIC LAND AND PROPERTY LTD) V CHORLEY BOROUGH COUNCIL
[2014] PLSCS 222 – Decision given 22.04.14

Facts: The claimant, FSLP, owned a large amount of land in the North West of England and promoted housing development schemes. In order to ensure that the value of its estate was not unduly reduced by CIL it applied for judicial review of the CIL charging schedule for residential development adopted by CBC and two other neighbouring authorities in Lancashire. Each of the councils was a charging authority under s206(2) of the Planning Act 2008. The proposed rate of CIL for residential development, excluding apartments, was set at £65 per sq m. Following an examination the councils adopted the charging schedule under Regulation 25 of the Community Infrastructure Levy Regulations 2010.

Point of dispute: Whether FSLP's application for an order to quash the councils' charging schedule for development would be allowed. The issues were: (i) whether the examiner's approach to the evidence before him had been irrational; (ii) whether the examiner had taken into account an immaterial consideration, i.e. that cost was directly proportionate to the size of a dwelling; and (iii) whether it was unlawful to adopt the charging schedule for dwelling–houses without allowing for the requirement in development plan policy that new housing had to meet level 6 of the Code for Sustainable Homes.

Held: The application was dismissed.

1. On a claim for judicial review the court could not interfere with the examiner's judgment on matters of valuation or planning merit. To justify intervention the decision under challenge had to fall outside the bounds of one that was open to a reasonable decision–maker to reach and the court would only intervene on Wednesbury grounds. Regulation 14 of the CIL regulations required a charging authority to make a number of judgments when setting rates in a charging schedule. It had to aim to strike a balance between the desirability of funding necessary infrastructure and the possible effects of CIL on the viability of a development. Although there was government guidance on the nature of the charging exercise, the judgments to be made under Regulation 14 were ultimately for the charging authority; the examiner's conclusions had been reasonable, sufficiently reasoned and founded on appropriate available evidence.
2. There was no error of law in the examiner's conclusion that the information on which the councils' assumptions on dwelling size and density were based was appropriate available evidence.
3. Neither the statutory provisions nor government guidance required the examiner to ask the councils to provide evidence that the CIL charge would not prejudice the viability of housing development to meet level 6 of the code for sustainable homes. There was a strong statutory incentive for a charging authority to keep its CIL effective as a means of securing, through development, the funding it needed for providing infrastructure in its area. The examiner's report showed that he was aware of the need for developers not to be deterred by unrealistically high rates of CIL.

09 Court of Appeal

Enforcement of unilateral undertaking under s106 of the Town and Country Planning Act 1990

*NEWHAM LONDON BOROUGH COUNCIL V ALI
[2014] PLSCS 153 – Decision given 19.05.14

Facts: The appellants were trustees of a charitable trust which operated a faith centre in East London which was used intensively by large numbers of people. The site comprised a mosque, located in some pre–existing commercial buildings, some new buildings and a car park. A temporary planning permission for the trust's use of the site expired in 2006 and in 2010 NLBC issued an enforcement notice requiring cessation of the faith–based use, and removal of certain buildings, fixtures and hardstanding in the car park. The trust appealed against that notice and entered into a unilateral deed of undertaking under s106 in which it covenanted to submit a planning application for a mixed-use development which would incorporate an element of community and faith-based use and that if it did not do this it would carry out the removal works specified in the enforcement notice. A further temporary planning permission for the current use of the site was granted, expiring in May 2013. When NLBC adopted its core strategy in 2012 the site was allocated to a mix of residential and employment uses. The trust did not comply with its undertaking and in 2012 its application applied for permission for a single faith-based use was refused. The trust appealed against this decision, non-determination of another application for an extension of the temporary planning permission and another enforcement notice. NLBC obtained a mandatory injunction requiring the trust to carry out the removal works.

Point of dispute: Whether the trustees' appeal would be allowed against the ruling of the judge in the court below that NLBC was entitled to an injunction to enforce the trust's contractual obligations and that it would not be appropriate to exercise the court's discretion to refuse or suspend the injunction. The trustees contended that in the light of the outstanding planning appeal and the balance of benefits and detriments an injunction should either have been refused or suspended until their appeal was determined.

Held: The appeal was allowed in part.

i. Planning obligations entered into under s106 of the 1990 Act were contractual in nature and enforceable by injunction (s106(5)). Damages would not usually be an adequate remedy. The judge had been entitled to conclude that he should grant an injunction in this case. There had been a substantial breach of a s106 planning obligation and to refuse an injunction would defeat the whole purpose of entering into it.

ii. The judge had the power to suspend the injunction and he appeared not have given separate proper consideration to that issue. The power to suspend a s106(5) injunction should be used sparingly but there might be circumstances when it was fair and reasonable to do this. In this case the existence of the impending planning appeal justified suspension. The outcome of the appeal, which was one of unusual sensitivity and importance for the area, could not be predicted with any certainty. Carrying out the removal works could cause considerable hardship to the trustees and members of the community and if the appeal succeeded they would have served little purpose. As allowing the status quo to continue for a short period of time until the planning future of the site was determined would not cause any planning detriment the injunction should be suspended until the outcome of the appeals was known.

10 High Court

Local plan – claimants applying for judicial review – objective assessment of housing need – revision of green belt boundaries – NPPF

**GALLAGHER HOMES LIMITED V SOLIHULL METROPOLITAN BOROUGH COUNCIL
[2014] PLSCS 135 – Decision given 30.04.14

Facts: The claimants, GHL and another property development company, owned two sites in Solihull which they wished to develop for housing. In December 2013 SMBC adopted the Solihull Local Plan which placed both sites within the green belt. Before the plan was adopted an inspector appointed by the Sec of State conducted an examination in public which concluded with a report that the local plan would be approved with modifications. Thereafter any application for permission for housing development on the sites was likely to be refused on the grounds that it was inappropriate development in the green belt.

Point of dispute: Whether to grant GHL's application for an order under s113(3) of the Planning and Compulsory Purchase Act 2004 that SMBC had acted unlawfully in adopting the local plan with its allocation of sites to the green belt. GHL contended that SMBC:–

i. had adopted a plan which was not supported by a figure for objectively assessed housing need, contrary to the requirements to have regard to the NPPF and adopt a sound plan;

ii. had not fulfilled its duty to cooperate with other local planning authorities; and

iii. had failed to have regard to the proper test for revising green belt boundaries set out in the NPPF which provides that green belt boundaries should only be altered in exceptional circumstances.

Held: The application was granted.

i. A local authority was required to have regard to national policy and guidance when preparing development plan documents, in this case the NPPF. Each plan is subject to an examination in public by an independent inspector who must determine whether it complies with various procedural requirements, whether the plan is sound and whether the local authority has complied with any duty to cooperate. In this case the inspector had erred in law with regard to his approach to housing provision and he had failed to grapple with the issue of fully objectively assessed housing need, as he was required to do by the NPPF. He had not complied with relevant procedural requirements and the modified local plan he had endorsed was not sound because it was not based on a strategy which sought to meet objectively assessed development requirements, nor was it consistent with the NPPF.

ii. This question could not be answered as the inspector had not properly addressed himself to the questions of whether there was a shortfall between the need for housing and the provision made, and, if there was, the amount of that shortfall.

iii. Exceptional circumstances are required for the revision of a green belt boundary. In this case the inspector's approach to include previously unallocated sites within the green belt had not been correct. The exercise he had conducted of balancing various policy factors and coming to the conclusion that it was unlikely that either of the two sites would, under current policies, be found suitable for development fell far short of the stringent test for exceptional circumstances that any revision of the green belt boundary had to satisfy. A different view on where the boundary should lie could not constitute an exceptional circumstance.

11 First Tier Tribunal General Regulatory Chamber

Information Rights

**LONDON BOROUGH OF SOUTHWARK V THE INFORMATION COMMISSIONER (1) LEND LEASE (ELEPHANT AND CASTLE) LIMITED (2) & ADRIAN GLASSPOOL (3)
Tribunal Reference: EA/2013/0162 – Before N.J.Warren – Date of decision: 09.05.14

Facts: This case concerned the redevelopment of the Heygate Estate in Elephant and Castle. The estate was built in 1974 but by 1998 was in need of complete refurbishment due to defects in its design and construction. A proposed regeneration scheme collapsed in 2002. The new plan for the area proposes the delivery of 4,000 new homes and 5,000 new jobs over the next 20 years. In July 2010 LB Southwark and Lend Lease (LL) entered into a regeneration agreement which included a formula for possible profit–sharing with Southwark, and both parties undertook to keep secret and confidential any discussions or negotiations with regard to the agreement, provided that this did not prevent any disclosure necessary to comply with the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR). It was hoped that there would be at least 25% social housing and a 50/50 split between social rent and shared ownership. Departure from the expected 35% in Southwark requires the submission of a viability assessment. In April 2012 LL submitted an outline planning application in respect of the major part of the estate and one month later this was followed by a viability assessment (VA). VA is an assessment on whether or not a scheme will break even, allowing for the developer's profit. LL's VA included a number of appendices, including Appendix 22 which was a financial model developed by LL for use as an analytical tool on large projects.

Point of dispute: Whether Appendix 22 should be disclosed under the FOIA or the EIR.

Held: Appendix 22 was environmental information and fell within Regulation 2(1)(e) of the EIR. It did not have to be disclosed as it was subject to the intellectual property rights exception on the grounds that it was a trade secret and subject to the exception in Regulation 12(5)(c). To the extent that the information in the VA related to LL's commercial negotiations with other bsuinesses in relation to sales and rentals it was subject to the confidentiality of commercial information exception in Regulation 12(5)(e) and (f). However, the remaining information in the VAT (e.g. information relating to sales to private purchasers and to social housing providers) should be disclosed. LL and LB Southwark were given 28 days to identify which information needs to be disclosed. Their decision would be sent to the ICO for agreement, but if the three parties could not reach agreement the Tribunal would reconvene to settle the matter.

http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20(09.05.14).pdf

12 Consultation outcome

Government response to the consultation on the review of the nationally significant infrastructure planning regime

This document summarises the responses received to this consultation which ran from 04.12.13 to 24.01.14. It also sets out the action that the government is intending to take as a result of this consultation in the following key areas:

- improving pre-application and examination;
- making changes to development consent orders post consent
- streamlining consents; and
- improving engagement with communities and local authorities.

https://www.gov.uk/government/consultations/reviewing-the-nationally-significant-infrastructure-planning-regime-a-discussion-document

If you require advice on planning issues, contact Hugh Bullock on Tel. +44 (0)20 7333 6302 hbullock@geraldeve.com

HOUSING

13 Homes and Communities Agency Bulletin

Housing Market Bulletin – April 2014

The Housing Market Bulletin provides the latest information on the housing market, the economy and the housebuilding industry. Recent trends indicate that:

- Average house price inflation continues to increase, led by London and the South East. According to the lowest estimate house prices have risen by 5.6% over the past year (Land Registry) while the highest estimate of 9.5% comes from the Nationwide;
- The volume of housing transactions also continues to increase with numbers of mortgage advances growing rapidly; and
- The number of new construction orders is also increasing.

http://www.homesandcommunities.co.uk/ourwork/market-context

14 CLG Statistics

House building in England: January to March 2014

These statistics were released on 15.05.14. Key points are as follows:

- it is estimated that there were 36,450 seasonally adjusted housing starts during this period, 11% more than in the previous quarter and an increase of 31% on the same quarter one year ago;
- it is estimated that there were 27,670 seasonally adjusted housing completions in the March quarter 2014, 3% lower than the previous quarter. In the March quarter of 2014 there were 12% more seasonally adjusted completions than during the same period last year;
- seasonally adjusted starts are now 113% above the March 2009 trough but still 26% below the March quarter 2007 peak; completions are 43% below their March quarter 2007 peak; and
- in the 12 months to March 2014 there were 133,650 housing starts, up by 31% compared with the year before; annual housing completions totalled 112,630 in the same period, an increase of 4% compared with the previous 12 months.

https://www.gov.uk/government/publications/house-building-in-england-january-to-march-2014

REAL PROPERTY

15 Administrative Court

Title to land – adverse possession – whether claimant's criminal offence of trespass prevented reliance on period of adverse possession

*BEST V CHIEF LAND REGISTRAR
[2014] PLSCS 141 – Decision given 07.05.14

Facts: In November 2012 the claimant, B, applied to be registered as proprietor of a residential property based on ten years' adverse possession within the meaning of para 1 of Schedule 6 to the Land Registration Act 2002. He first entered the property after being informed that the owner had died and her son had not been seen since 1996. At the time the property was empty having been vandalised and B undertook various repairs to make it habitable. He moved into it at the end of January 2012 and stated in his application for registration that he had treated the house as his own since 2001.

Point of dispute: Whether to allow B's application for judicial review of the defendant's decision to cancel B's application for registration on the ground that s144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which criminalised acts of trespass that consisted of "living in" a residential building, prevented B from relying on any period of adverse possession to establish a claim for registration as proprietor of the property.

Held: The claim was allowed.

i. The defendant's decision had been founded on an error of law as to the effect of s144 of the 2012 Act on adverse possession. The public policy advantages of adverse possession at common law meant that the fact that the adverse possession was based on criminal trespass did not preclude a successful claim to adverse possession. Before any claim could arise in reliance on adverse possession ten or twelve years of adverse possession had to pass without effective action by the owner or by an enforcement authority in criminal or civil proceedings. There might be special circumstances where adverse possession of itself was not a sufficient basis for the extinguishment or transfer of a title. Those circumstances would arise, not where the trespass was a crime, but where the land in respect of which adverse possession was claimed was itself subject to rights that could not be extinguished, as with a highway or where statutory provisions under which the land was held made it inalienable.

ii. No offence would be committed by someone who had not lived in the house but had possessed it through acts of repair, maintenance and exclusion intending to use it for tenants.

iii. B had never had possession in the sense protected by the European Convention on Human Rights which required possession sufficiently established to amount to a legitimate expectation of obtaining effective enjoyment of a property right. Until the relevant ten year period had passed without possession being a criminal offence the claimant could have no more than a hope that he would complete ten years tortious but not illegal possession. After that he had the right to make an application but no right to succeed.

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TORT

16 Court of Appeal

Solicitors negligence – failure to investigate planning matters in conveyancing transaction – whether loss caused to appellant

*AW GROUP LTD V TAYLOR WALTON (A FIRM)
[2014] PLSCS 142 – Decision given 07.05.14

Facts: The appellant, AWG, engaged the respondent firm of solicitors, TW, to act for it in connection with the acquisition of some land next to the A5 near Luton to replace a truck stop site from which it and associated companies had been operating and from which it had to move. TW's instructions were, inter alia, to investigate title and planning matters. The companies which moved to the site included a haulage business and a vehicle repair business and AWG made a hardstanding area at the rear of the site on which to park HGV lorries. Later it emerged that there was no planning permission for this use and when permission could not be secured AWG had to cease using the area for parking. The associated companies went into liquidation, but not before sufficient business continuity had been established to enable AWG successfully to claim roll–over capital gains tax relief.

Point of dispute: Whether to allow AWG's appeal against the ruling of the judge in the court below who dismissed its claim against TW for negligent advice in relation to the planning position. The judge found that although TW had breached its duty to AWG that duty had not caused any loss since, on the evidence, AWG would have proceeded with the purchase in any event. AWG's appeal related to the judge's findings on causation.

Held: The appeal was dismissed. AWG's challenge to the judge's findings on causation was without foundation.

i. The judge had given several good reasons why, by the time that TW should have warned of the planning difficulties, AWG was already too committed to the site to be able to pull out. These included potentially losing its deposit, incurring a financial penalty under the agreement for the sale of its original truck stop site for failing to move by the agreed date, the fact that AWG would probably have taken the view that enforcement action was unlikely and that even if such action had been taken it was unlikely to happen before AWG could take advantage of CGT roll–over relief.

ii. The financial position of AWG's associated companies had been relevant and the judge could not be criticised for admitting late evidence on this. The judge had been entitled to conclude, having heard evidence, that the main reason for moving them was to obtain roll-over relief rather than their long term survival.

iii. The judge had not erred in his approach to the attitude of the mortgagee bank. There was no evidence to show that if it had been appraised of the full planning difficulties it would not have been prepared to lend on the purchase.

COMPENSATION

17 Government Policy Paper

Property Compensation Consultation 2013 for the London to West Midlands HS2 route: Decision document

In January 2012 the Government announced that it had decided to proceed with plans to build a high speed rail network (HS2) to address the capacity problems faced by Britain's transport network and that it would be built in two phases:

- Phase One between London Euston and the West Midlands with a new station in Birmingham and linking to the West Coast Main Line; and
- Phase Two from the West Midlands to Manchester and Leeds with connections to both the East Coast Main Line and the West Coast Main Line.

In 2013 the Government consulted on the HS2 property compensation package. This will be as follows:

- Express purchase for owner–occupied properties within the safeguarded are which typically extends to 60m around the railway line for most of its route. The Government will buy all property in this zone under an expedited process;
- A Voluntary Purchase Offer available to people up to 120m from the railway in rural areas. They will be able to ask the Government to buy their property at un–blighted market value and the scheme will commence in the autumn of 2014;
- A Need to Sell Scheme to assist property owners who have a compelling need to sell their home but cannot do so because of the HS2 plans. There is no outer boundary to this scheme which will succeed the current Exceptional Hardship Scheme for Phase One, and
- Rent–back – if a property that the Government has purchased under any of the above schemes is suitable for letting the previous owner can, if they wish, be considered for a Crown tenancy.

During the summer the Government will consult on two supplementary cash payment schemes.

https://www.gov.uk/government/publications/hs2-property-compensation-consultation-2013-for-the-london-to-west-midlands-route-decision-document

If you require advice on compensation & compulsory purchase issues, contact Tony Chase on Tel. +44 (0)20 7333 6282 tchase@geraldeve.com

ENVIRONMENT

18 CRPE Report

Shedding Light – A survey of local authority approaches to lighting in England

The 2012 NPPF contained the first planning policy on light pollution and the aim of this study was to investigate how local authorities are responding to this change. The survey results have provided a better understanding of the following:

- how decisions are made about lighting at the local level;
- how lighting is dealt with in local planning; and
- what local authorities are doing to make street lighting more energy and cost efficient.

The following are the key findings of the survey:

- the NPPF policy to control light pollution does not appear to have made any real impact in local policies;
- local authorities can potentially make substantial savings by switching off street lighting in suitable locations between midnight and 5am and by dimming lights;
- such schemes would also reduce carbon emissions and save energy; and
- communities are more supportive to dimming lights than turning them off altogether.

The report goes on to make a number of recommendations.

http://www.cpre.org.uk/resources/countryside/dark-skies/item/3608-shedding-light

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CONSTRUCTION

19 CLG Guidance

Improving the energy efficiency of our buildings: Local Weights and Measures Authority guidance for the enforcement of the requirements of the Energy Performance of Buildings (England and Wales) Regulations 2012

It is the duty of every weights and measures authority to enforce in their area:

- the making available of energy performance certificates;
- the appropriate commissioning and obtaining of energy performance certificates;
- the displaying of energy performance certificates;
- the inclusion in advertisements of energy performance indicators;
- compliance with requirements regarding air–conditioning systems; and
- ensuring that documents are produced within seven days.

This guidance is intended to help enforcement agencies to understand:

- how the requirements of the Energy Performance of Buildings (England and Wales) Regulations, and the Directive on which these regulations are based, may work in practice;
- how to apply the Regulations;
- what the responsibilities for sellers, landlords, their agents, building owners and occupiers are; and
- the role of enforcement agencies in ensuring that all responsibilities regarding energy performance certificates, displaying energy certificates and air conditioning inspection reports are met.

https://www.gov.uk/government/publications/local-weights-and-measures-guidance-for-energy-certificates-and-air-conditioning-inspections-for-buildings

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20 CLG Guidance

Improving the energy efficiency of our buildings: A guide to Energy Performance Certificates for the marketing, sale and let of dwellings

The EU Directive on the energy performance of buildings started to come into effect in 2007 and its implementation is an important part of the strategy for combating climate change. The current requirements are set out in the Energy Performance of Buildings (England and Wales) Regulations 2012, which came into effect on 09.01.13, and the Building Regulations 2010. The principle underlying the Directive and the Regulations is to make the energy efficiency of a building more transparent by using an energy performance certificate (EPC) to show the energy rating of a building when it is sold or rented out and to make recommendations on how to improve energy efficiency. This guidance is concerned with how the 2012 Regulations apply to buildings which are designed for domestic use.

https://www.gov.uk/government/publications/energy-performance-certificates-for-the-construction-sale-and-let-of-dwellings

21 CLG Guidance

Accessing register data under the Energy Performance of Buildings (England and Wales) Regulations 2012

This Energy Performance data guidance is aimed at authorised recipients and describes the processes for obtaining the data in bulk. It describes who is entitled to this data, what data will be provided, how to obtain it and the costs involved.

https://www.gov.uk/government/publications/making-energy-performance-certificate-and-related-data-publicly-available-guidance-for-authorised-recipients

LONDON

22 Future of London report

Crossrail as Catalyst: Realising regeneration and development around stations

"Crossrail as Catalyst" is a programme designed to share best practice from areas which have realised regeneration opportunities from Crossrail and its predecessors, to identify options which remain before the route opens and to examine how future infrastructure projects could help deliver greater local benefits.

This report examines how London communities can make the most of the regeneration potential of Crossrail stations and of future infrastructure projects.

http://www.futureoflondon.org.uk/2014/04/23/crossrail_as_catalyst/

23 Greater London Authority Supplementary Planning Guidance

London Planning Statement

The NPPF revoked Government Office for London Circular 1/2008 which "provided advice and guidance on the arrangements for strategic planning in London". This document is intended to fill the gap that this leaves by providing information about the Mayor's planning functions and the way in which he intends to carry them out. In particular, it:

- sets out principles of fundamental importance to the planning system in London;
- explains the Mayor's role in London's planning system both in preparing strategic planning policy through the "London Plan" and in the taking of planning decisions about strategic developments;
- highlights the issues that the Mayor considers are particular priorities for the London planning system; and
- sets out the Mayor's intended programme of planning–related work for the next four years.

http://www.london.gov.uk/priorities/planning/publications/london-planning-statement

GENERAL

24 CLG Prospectus

Large Sites Infrastructure Programme
Deadline for expressions of interest: 30.05.14

The delivery of locally-led large scale housing schemes is seen as of key importance in meeting the UK's housing needs. However, many of these schemes are facing a number of barriers which are hampering their progress. These may be planning issues, problems with coordinating advice and sources of Government funding, or difficulties with finding capital upfront to pay for major infrastructure. This six year support programme is designed to help accelerate and unlock housing developments of at least 1500 units that have slowed down or stalled completely. This Prospectus sets out what support is available and how to access it. Briefly, the programme comprises:

- access to expert planning and technical support;
- brokerage support from central Government;
- a Local Capacity Fund to enable local authorities to progress schemes through the planning consent process; and
- access to a £1 billion Large Sites Infrastructure Fund to enable delivery of major infrastructure.

https://www.gov.uk/government/publications/large-sites-infrastructure-programme-prospectus

GERALD EVE'S UK OFFICE NETWORK

Gerald Eve LLP is an independent firm of chartered surveyors and property consultants, employing more than 350 people across the UK.

We provide a comprehensive range of services to our private and public sector clients — including more than 40 per cent of the FTSE100 — covering agency, corporate property management, professional and transaction–based advice.

Our philosophy is to serve clients by identifying opportunities and solving problems relating to property through the provision of high quality, thoroughly researched cost effective advice.

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

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

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EVEBRIEF

Legal & Parliamentary

Volume 36(04) 2 June 2014

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SCOTLAND

LANDLORD & TENANT

01 Court of Session: Outer House

Validity of break notice

*ARLINGTON BUSINESS PARKS GP LTD V SCOTTISH & NEWCASTLE LTD
[2014] PLSCS 136 – Decision given 29.04.14

Facts: Adjacent office premises in Edinburgh were let to the tenant for terms which expired in 2023. The tenancy agreements contained break clauses which allowed the tenant to bring the tenancies to an end in May 2013 on giving 12 months' notice, provided that it was not "in breach of any of their obligations (under the lease in question) at the date of service of such notice and/or the termination date". When the tenant served the necessary notices to exercise the break clause in May 2012 it had not fully performed all its repairing obligations under the leases. The landlord demanded payment of rent from May 2013, claiming that the tenant had been in breach of its obligations on the date of the notices and had therefore failed to comply with the requirements of the break clause.

Point of dispute: Whether the tenant's May 2012 notice was effective to operate the break clause and bring the lease to an end in May 2013. The tenant contended that non-performance of the repairing obligations as at May 2012 was not the same as a breach of those obligations. It argued that: (i) even if there was a breach at the date of the notice the break clause allowed the break to be exercised so long as there was no breach at the termination date, which was the operative date for that purpose; and (ii) in the context of the break clause the word "breach" meant a material non-remediable breach of contract; the non-performance of the repairing covenant had been remedied and substantial expense incurred to ensure that by May 2013 the premises were back in good condition.

Held: Judgment was given for the landlord.

i. On the proper construction of the break clause the notice would be invalid if the tenant was in breach at the date of the notice, the date of termination or both.

ii. The word "breach" in the tenancy agreements was unqualified; there had been no intention to distinguish between breach of the tenants's obligations on the one hand and non-performance on non–observance on the other. The tenant admitted that it was not in compliance with its repairing obligations at the date of the notices and on a proper construction of the break clause this failure disentitled it from relying on the break notices served in May 2012. The commercial purpose of requiring compliance with the repairing obligations as at the date of the break notice was to reassure the landlord that the property would be in a proper condition at the termination date and to enable it to market the premises during the intervening 12 month notice period.

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ENVIRONMENT

02 Scottish Assembly Government Consultation

Consultation on Statutory Guidance on the General Purpose for the Scottish Environment Protection Agency and its Contribution Towards Sustainable Development
Deadline for Comments: 04.08.14

This consultation invites views on the Statutory Guidance on the General Purpose for the Scottish Environment Protection Agency (SEPA) and its contribution towards sustainable development. The draft statutory guidance has been developed by the Scottish Government as a result of the new general purpose inserted into the Environment Act 1995 by the Regulatory Reform (Scotland) Act 2014.

http://www.scotland.gov.uk/Publications/2014/05/9242

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TAXATION

03 Scottish Assembly Government Consultation

Moving Forward with Land and Buildings Transaction Tax: A Consultation on Proposed Subordinate Legislation (May 2014
Deadline for Comments: 25.07.14

This consultation seeks views on draft subordinate legislation which the Scottish Government plans to bring forward to the Scottish Parliament under the powers in the Land and Buildings Transaction Tax (Scotland) Act 2013. Land and Buildings Transaction Tax is designed to replace UK Stamp Duty Land Tax in Scotland and it is expected that it will apply to land transactions taking place on or after 01.04.15.

http://www.scotland.gov.uk/Publications/2014/05/8387

WALES

GENERAL

04 Welsh Assembly Government Research Paper

Town Centres and Retail Dynamics: Towards a Revised Retail Planning Policy for Wales

This study examines the appropriateness of current national planning policy in achieving the Welsh Government's aspirations for town centres. It forms part of a wider review of the Welsh planning system and is intended to form part of the evidence base to inform a review of current national planning policies in so far as they relate to retail development and town centres. The research covered the following areas:

- retail statistics;
- threats and opportunities facing town centres in Wales;
- the effectiveness of retail planning policy in Planning Policy Wales and Technical Advice Note 4 "Retailing and Town Centres"; and
- recommendations for appropriate changes to retail planning guidance.

http://new.wales.gov.uk/topics/planning/planningresearch/publishedresearch/town-centres-and-retail-dynamics/?lang=en

NORTHERN IRELAND

PLANNING

05 Statutory Instrument

NISR 2014/118 The Planning (Control of Advertisements) (Amendment) Regulations (Northern Ireland) 2014

These Regulations, which came into force on 23.04.14, amend the 1992 Regulations which control the display of advertisements, including those relating to an election. The Regulations remove Class F which means that advertisements relating to a pending Parliamentary, European Parliamentary, Northern Ireland Assembly or district council election now need consent. However, the consent of the owner of a site on which such an advertisement is displayed is not required.

http://www.legislation.gov.uk/nisr/2014/118/contents/made

06 Statutory Instrument

NISR 2014/127 The Planning (Fees) (Amendment) Regulations (Northern Ireland) 2014

These Regulations, which came into force on 28.05.14, amend the 2005 Regulations by increasing planning fees by approximately 1.3% overall. Some new nil fee and reduced fee categories are also introduced, as well as some other detailed changes to the calculation of charges.

http://www.legislation.gov.uk/nisr/2014/127/contents/made

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