EVEBRIEF

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PLANNING FOR GROWTH AND FAMOUS CONNECTIONS

In this 'new year' (just about) edition we highlight two RTPI studies that argue that planning constraints need not stifle development and economic growth and that planning can act as a driver. They highlight how tactics used by planners in Northern Europe (Item 11) enable planning to be the "market maker" to stimulate development, and how Chinese economic growth has been supported by central planning policy (Item 12).

In the courts, planning cases with links to 'notable characters' have taken centre stage. Donald Trump has finally had his appeal against the development of an offshore wind turbine near his golf course development in Aberdeenshire dismissed by the Supreme Court (Item 03). At Item 05 we report the decision in a Judicial Review of the grant of permission for a change of use of Arthur Conan Doyle's former Grade II residence in Haslemere from a hotel to a school, which was being opposed for failing to consider other viable uses, potentially risking the heritage asset and failing to comply with local plan policies.

Finally, in the rating world, we report at Item 14 an appeal decision where the point of dispute was whether the VO had been entitled to alter the 2005 list from 1 April 2005 with an alteration made on 22 March 2011, almost six years later. As we move further into 2016, backdated alterations and other rating issues remain high on the property agenda. We are fast approaching the 31 March deadline when the Valuation Officer is prevented from making alterations to the 2010 Rating List that can be backdated to 1 April 2010. Looking forward to the 2017 Revaluation, strategies developed now will allow ratepayers to budget and forecast more accurately. To find further information on how Gerald Eve can support clients' business in the lead up to the 2017 Revaluation please visit our dedicated website **www.mybusinessrates.com.**

William Arkell
Editor

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LANDLORD & TENANT

01 Upper Tribunal: Lands Chamber

Service charges – respondent landlord incurring costs in settlement of claim brought by another leaseholder for breach of repairing covenants – whether such costs recoverable from leaseholders through service charge – whether incurred in "proper management administration and maintenance" of blocks of flats

*FAIRBAIRN V ETAL COURT MAINTENANCE LTD
[2015] PLSCS 360 – Decision given 20.11.15

Facts: The appellant, F, owned a long lease of a flat in a development maintained by ECM, a company whose members were all leaseholders of the flats. The leases provided for the payment of a service charge to ECM in respect of its costs incurred in carrying out its obligations under the leases. In 2010 another leaseholder noticed cracking in the floors of her ground floor flat. A dispute ensued as to who was responsible for repairing the damage; ultimately ECM accepted responsibility and carried out remedial works at a cost of £27,000, but in the meantime the ground floor leaseholder had commenced proceedings against ETM for breach of its repairing covenants. After the repair work was completed that claim was settled with ETM agreeing to pay compensation of £2,500 to the leaseholder together with her costs of the proceedings. Including ETM's own costs, the liability from the dispute came to almost as much as the cost of the repairs.

Point of dispute: Whether ETM was entitled to recover the costs of the ground floor flat dispute from the leaseholders through the service charge. F appealed against the decision of the first tier tribunal which determined the application under s27A of the Landlord and Tenant Act 1985 and found that the legal fees were reasonably incurred pursuant to ETM's obligation to "do all other acts and things for the proper management administration and maintenance of the blocks of flats as the Lessor in its sole discretion shall think fit."

Held: The appeal was allowed. ETM could not recover the costs of unsuccessfully defending a claim for damages for breach of a landlord's repairing covenant under the provision that it relied on as they did not fall within the scope of expenditure incurred "for the proper management administration and maintenance of the block of flats". The expenses were not recoverable unless they fell within any of the heads of expenditure which ETM was entitled to recover through the service charge. The fact that ETM was a company without means did not require any assumption to be made that all expenditure by ETM was intended to be reimbursed through the service charge. Although a general charging provision was in principle wide enough to cover expenditure on legal advice or the conduct of litigation, it did not allow recovery where the steps undertaken by the landlord or managing company were the result of its breach of its own obligations under the lease. A sum paid in satisfaction of a successful claim for damages for breach of covenant did not readily fall within the scope of expenditure on proper management and administration of the buildings. The FTT had erred in holding that the settlement sum and the legal costs incurred in securing the settlement could form part of the service charge.

02 Central London County Court

Right to buy – Landlord & Tenant Act 1987 – whether defendant freeholder obliged to transfer absolute title to property to qualifying tenants for no consideration

*ARTIST COURT COLLECTIVE LTD V KHAN
[2015] PLSCS 313 – Decision given 26.10.15

Facts: The defendant, K, owned the freehold of a property in London comprising eight residential flats and three shops on the ground floor. The claimant company, ACC, was incorporated by the tenants of the majority of the flats, as qualifying tenants, for the purpose of acquiring title to the property pursuant to the Landlord and Tenant Act 1987. K appointed M as his agent in connection with the property and M incorporated a company, SGR, whose directors were M and K. A trust deed signed by M and K purported to transfer the property to SGR for £225,000 to be held on trust for K absolutely. K then entered into a contract to sell the property to SGR with full title guarantee for £225,000, K lent the money to SGR for that purpose and SGR was registered as proprietor (the first transfer). No notices were served on the qualifying tenants in accordance with s5 of the 1987 Act. After the first transfer the tenants served a notice on SGR requiring details of the transactions. K then arranged for the property to be retransferred to him as legal and beneficial owner (the second transfer) for no consideration to "stop" the proceedings. The majority tenants served notices on K under s12B of the 1987 Act requiring him to dispose of the property to ACC, and under s19(2) requiring him to make good the default. After proceedings commenced K disclosed the trust deed.

Point of dispute: Whether to allow ACC's claim that the property should be transferred to it on the basis that: (i) K had a duty to transfer the property to ACC for no consideration (or alternatively for £225,000); (ii) K was in default in complying with that duty; and (iii) the court should order K to make good the default by ordering K to transfer the property to ACC for no consideration (alternatively for £225,000).

Held: The claim was allowed.

i. Before the contract was signed K had been the absolute owner of the property. The contract and the first transfer had the effect of transferring to SGR absolute ownership of the property for £225,000. By the trust deed SGR declared a trust of the property in favour of K.

ii. The second transfer was a relevant disposal for the purposes of the 1987 Act.

iii. The purchase notice served by the majority tenants had adopted the language of s12B and made clear to K that they were adopting their rights under that section and gave the new landlord adequate notice that the qualifying tenants wished to acquire the freehold on the terms of the original disposal. There were two "original disposals" by SGR to K, the trust deed which transferred the beneficial interest and the second transfer which transferred the legal title.

iv. A person who received a valid purchase notice was obliged to dispose of the estate or interest that was the subject matter of the original disposal on the terms on which it was made. K was obliged by the 1987 Act to transfer absolute title to the property to ACC.

v. There was no evidence that K had given any consideration for the transfer to him by SGR of the property. Accordingly K was obliged to transfer absolute title to the property to ACC for no consideration.

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

PLANNING

03 Supreme Court

Planning consent for wind farm close to golf resort – appellant seeking to quash consent – ss5, 6, and 36 Electricity Act 1989 – whether condition in consent void for unenforceability or uncertainty

**TRUMP INTERNATIONAL GOLF CLUB SCOTLAND LTD V SCOTTISH MINISTERS
[105] PLSCS 362 – Decision given 16.12.15

Facts: The appellant, TIGCS, owned a golf club and resort in Balmedie, Aberdeenshire. In 2013 the Scottish Ministers granted consent to a developer to construct and operate an off-shore wind farm with 11 wind turbines in Aberdeen Bay under s36 of the Electricity Act 1989. TIGCS objected to the proposal on the grounds that the turbines would be visible from its resort and would substantially diminish its amenity. Its attempts to challenge the grant of consent failed in the courts below.

Point of dispute: Whether to allow TIGCS's appeal against the lower court decisions. It argued that:

i. the Ministers had no power to grant consent under s36 of the 1989 Act to a person who was not subject to any of the environmental duties imposed by para 3(1) of Schedule 9 to the 1989 Act because it did not hold a licence to generate, transmit or supply electricity under s6, nor was exempted under s5. TIGCS argued that it was a necessary implication of para 3 that only licence holders or exempt persons could obtain a s36 consent and that the statutory policy was to ensure that only suitably qualified operators within the electricity industry should be able to apply for consent to construct an electricity generating station; and

ii. the condition in the consent requiring the submission of a design statement for approval by the Scottish Ministers was invalid since it was unenforceable and uncertain.

Held: The appeal was dismissed.

i. The power to grant a consent under s36 of the 1989 Act was not limited in the way contended for by TIGCS. The Act contained no prohibition against constructing a generating station without a licence, although the grant of a s36 consent would not enable an applicant to operate the generating station without a licence. The policy considerations underlying the Act supported the view that a s36 consent could be granted to a person who did not have a licence or exemption – the 1989 Act aimed to liberalise the British electricity market by privatisation, and it was not a necessary part of the statutory model that the persons who built the new generating stations would also be the persons who later ran them. The Act contained two separate regulatory regimes, one dealing with the construction of electricity stations and overhead lines and the other with the licensing of electricity supply, including generation.

ii. Even if the condition relating to the design statement was unenforceable that would not invalidate the s36 consent. The consent required that the development had to be constructed in accordance with the supplemental environmental information statement (SEIS). The SEIS contained elements of the benefits which the design statement condition promoted and the Scottish Ministers could insist on compliance with the SEIS. The design statement condition was not fundamental to determining the scope and nature of the development and its invalidity therefore would not invalidate the consent. Even if the design statement condition could not be enforced it was not uncertain. Construing the conditions as a whole the consent contained a mechanism enabling the Scottish Ministers to use both the design statement and the construction method statement required by another condition to regulate the design of the wind farm in the interests of the environmental protection and to require compliance with those statements.

Per curiam: Had it been necessary to decide the issue, the court would have held that the design statement condition was enforceable.

04 Administrative Court

Application for judicial review of grant of planning permission – whether defendant lpa under duty to give reasons for distinguishing earlier relevant planning decisions

*R (ON THE APPLICATION OF SIENKIEWICZ) V SOUTH SOMERSET DISTRICT COUNCIL
[2016] PLSCS 6 – Decision given 17.12.15

Facts: The defendant local planning authority, SSDC, granted planning permission to a third party for the erection of a building for office, light industrial and warehouse uses at a former nursery site, most of which was allocated for employment uses in the local plan. Planning permission granted by SSDC on an earlier identical application had been successfully challenged by the claimant, S, on the single ground that it contained an invalid planning condition limiting occupation to the third party applicant.

Point of dispute: Whether to allow S's application for judicial review of the decision to grant permission. S contended that SSDC had been inconsistent in their decision-making in the application of development plan policies and had ignored earlier relevant planning decisions. S relied on the Court of Appeal decision in *North Wiltshire District Council v Sec of State for the Environment* which held that a previous planning decision was a material consideration if it was legally indistinguishable; if the decision-maker was to depart from it reasons had to be given. This approach was followed in the 2014 case of *R (on the application of Midcounties Co-Operative Ltd) v Forest of Dean District Council.*

Held: The application was dismissed. The *Midcounties* case had been wrong to follow the *North Wiltshire* case since the latter had been a statutory challenge to a planning inspector's decision to which the statutory duty to give reasons applied. There was no such duty for local planning authorities.

05 Planning Court

Grade II listed building previously occupied by Sir Arthur Conan Doyle – judicial review of lpa's decision to grant planning permission for change of use from hotel to educational use – whether officers adopted incorrect approach to planning application – alternative optimum viable uses

*R (ON THE APPLICATION OF GIBSON) V WAVERLEY BOROUGH COUNCIL
[2016] PLSCS 002 – Decision given 23.12.15

Facts: Undershaw in Haslemere, Surrey was a Grade II listed house which had been built in 1890 as the private residence of Sir Arthur Conan Doyle. Although the house had little architectural merit it had been listed because of its literary associations. It was converted into a hotel and purchased by the interested party in 2004 with a view to redevelopment. However, it had remained empty since 2005 and been allowed to deteriorate. A grant of planning permission for residential development was quashed in court proceedings in 2012 and subsequently permission was granted for change of use from a hotel to an educational establishment for 64 pupils.

Point of dispute: Whether to allow G's application for judicial review of WBC's decision to grant planning permission for the change of use. G argued that:

i. the planning officers had adopted an incorrect approach to the application since the optimum use for the property was a single private dwelling and the non-viability of that option had not been established;

ii. another viable option was as a school for 30 pupils, planning permission for which had already been granted and which would have been a lawful fallback position;

iii. the current application would cause direct harm to the property and prevent a more viable heritage deal from being realised; and

iv. WBC had erred fundamentally in failing properly to apply the test under s38(6) of the Planning and Compulsory Purchase Act 2004 because it was not compliant with certain local plan policies.

Held: The application was dismissed.

i. WBC had to form a judgment on whether single residential use of the building was the optimum viable use; there was no substance in the argument that it had failed adequately to consider other viable uses as other uses had been previously considered. The court accepted that it was necessary to consider alternative, less harmful, uses of the same site when evaluating a proposal that would cause harm to a heritage site and the way in which that evaluation was carried out would vary from case to case. The planning history of the site since 2005 had been fully set out in the officers' report and had been a material consideration.

ii. There had to be a balancing exercise of weighing the harm of the proposal against its public benefits which was a matter of planning judgment with which the court would not be inclined to interfere. In this case the exercise had been carried out lawfully. The planning committee had seen strong grounds for accepting the proposal as it would provide much-needed facilities for a section of the disabled community as well as preserving an important heritage asset from further deterioration.

iii. The planning committee's attention had been drawn to s38(6), but it would have been familiar with its requirements in any case. It could not sensibly be argued that the considerations which led to the final decision would have been any different if the officers' report had set out in full every potentially relevant local plan policy and explained why there was a need to make a decision that departed from it; in any event the provisions of the local plan essentially conformed with the NPPF.

06 CLG Consultation

National Planning Policy: consultation on proposed changes
Deadline for Comments: 22.02.16

We reported on this consultation in the last edition of Evebrief (see Volume 37(09) i12) – the deadline for comments has been extended.

https://www.gov.uk/government/consultations/national-planning-policy-consultation-on-proposed-changes

07 CLG Guidance

Changes to Development Consent Orders

This guidance explains the procedures for making changes to Development Consent Orders for nationally significant infrastructure projects under the Planning Act 2008. It covers the two types of change that may be made to these Orders (material or non-material).

https://www.gov.uk/government/publications/changes-to-development-consent-orders

08 Historic England Advice Note

Tall Buildings

This advice has been published as a guide to planning amid a surge in proposals for new tall buildings. It emphasises that tall buildings have a profound effect on the character of cities which means that careful consideration needs to be given to their location and design. The advice is a new edition (last published in 2007) reflecting the National Planning Policy Framework which recognises the importance of protecting the historic environment and the need for high-quality design, as well as the need for sustainable development.

https://historicengland.org.uk/news-and-features/news/new-advice-tall-buildings

09 CLG Statistics

Planning applications in England: July to September 2015

This release presents National Statistics on authorities that undertake district and county level planning activities in England. Between July and September 2015 district planning authorities in England:

- received 120,400 applications for planning permission, up by 1% on the corresponding quarter in 2014;
- granted 98,700 decisions (88%), 3% more than the same quarter in 2014;
- decided 79% of major applications within 13 weeks, up from 78% in the same quarter in 2014; and
- granted 12,200 residential applications, a 12% increase on a year earlier.

In the year to September 2015 district level planning authorities:

- granted 366,000 decisions, up 4% on the year ending September 2014; and
- granted 46,200 decisions for residential developments, 5,800 of which were for major developments and 40,300 for minor.

https://www.gov.uk/government/statistics/planning-applications-in-england-july-to-september-2015

10 CLG Publication

Notes on neighbourhood planning: edition 17

This bulletin was published by the neighbourhood planning team of the Department of Communities and Local Government and provides an update on the latest news and policy developments, how the neighbourhood planning team can help communities and how communities' varied work on the ground fits in with the national picture.

https://www.gov.uk/government/publications/notes-on-neighbourhood-planning-edition-17

11 RTPI Study

Planning lessons from Europe

An RTPI-commissioned study "Planning as 'market maker': How planning is used to stimulate development in Germany, France and the Netherlands" argues that tactics used in these countries have successfully tackled housing shortages and regeneration. It is argued that the five tactics identified, which have seldom been used in the UK, have led to faster and better housing development in Europe:

- upfront infrastructure investment to shape future development;
- this investment builds support for urban extensions;
- land assembly and readjustment whereby an overarching body actively seeks out and temporarily pools together private development rights;
- strong planning institutions to coordinate development; and
- regional coalition-building and strategic planning across administrative boundaries to reflect functional economic areas.

http://www.rtpi.org.uk/briefing-room/news-releases/2015/november/planning-lessons-from-europe/

12 RTPI Research Briefing

Planning China's Future: How planners contribute to growth and development

This research report, which was written by three academics from the Bartlett School of Planning, University College London, examines evidence from China to demonstrate the benefits in economic, social and environmental terms of a robust planning system. The research found that planning can be a leading force in fostering economic growth by stimulating the market for land developments and shaping and regulating markets. The report uses case studies from China to illustrate this, including new town developments in Songjiang, industrial developments in Kunshan and regional development strategies in the Yangtze River Delta. The report argues that in order to achieve growth, planning should be given central funding and political support to lead new developments rather than relying on private initiatives. The UK and China have recently committed to building a global strategic partnership including cooperation and economic development that form part of major projects and investments such as the National Infrastructure Plan and the Northern Powerhouse. These findings from China may prove useful in providing a more positive perception on planning and help to counter the perception that planning is a passive obstacle to economic growth.

http://www.rtpi.org.uk/planninginchina

13 Nathaniel Lichfield & Partners Paper

DCO: Friend or Foe? Does the Nationally Significant Infrastructure Projects Regime Deliver

This paper analyses the time that it has taken for those Nationally Significant Infrastructure Projects that have completed, to go through the Development Consent Order (DCO) application process. It aims to come to an understanding of the timescales involved and ascertain whether decisions are being made efficiently and concludes that the DCO process is achieving its objectives and proving itself to be an effective mechanism for delivering faster decisions on major infrastructure projects.

http://nlpplanning.com/nlp-insight/dco-friend-or-foe-does-the-nationally-significant-infrastructure-projects-regime-deliver#

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

RATING

14 Court of Appeal

Alteration of list – Regulation 14 of Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 – effective date of alteration – whether date when list first compiled or later date of alteration

*BMC PROPERTIES & MANAGEMENT LTD V JACKSON (VO)
[2015] PLSCS 366 – Decision given 18.12.15

Facts: The appellant, BMC, owned a large Victorian house in South London which was divided into 19 self-contained units used for short term holiday lets. This use had been going on for many years before BMC acquired the property in 2007. Until 2011 the premises were treated as a domestic dwelling, but in March that year the VO altered the 2005 rating list to include the premises as a new hereditament with RV £104,000 and an effective date of March 2008. On appeal to the VTE it was agreed that the RV should be reduced to £62,500, but the parties could not agree on the effective date of the alteration: by now the VO was contending for 01.04.05, being the date when the list first came into force, and BMC for 22.03.11 being the date on which the entry itself had been made and, since that date fell outside the period of the 2005 list, that the entry for the premises should be deleted altogether. The VTE determined that the effective date was 01.04.05 on the basis that the case was governed by Regulation 14(2) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 applying to alterations to correct an inaccuracy in the list, such that the effective date was "the day on which the circumstances giving rise to the alteration first occurred". The VTE interpreted that expression to mean the first day within the period of the list on which the hereditament met the criteria for inclusion and it consequently determined the effective date to be 01.04.05. It rejected BMC's argument that the position was governed by Regulation 14(5) such that the effective date was the date on which the alteration to the list was made.

Point of dispute: Whether to allow BMC's appeal against the decision of the Upper Tribunal which upheld the VTE's ruling. BMC argued that a valuation officer had no power to alter a rating list once it was compiled, challenging the widely held view that such a power existed as a corollary of the duty to maintain an accurate list.

Held: The appeal was dismissed.

i. The scheme of the present legislation was to impose a statutory duty on the valuation officer, under s41(1) of the Local Government Finance Act 1988, to compile and maintain the list and to take such steps as were reasonably practicable to ensure that it was accurately compiled. The list should not be preserved as a historic snapshot of the position on the ground at the date when it came into effect. Section 55 of the 1988 Act included an express power for the Sec of State to make regulations about the alteration of the lists by valuation officers and s17 of the 2009 Regulations had done this. Section 55 was an enabling power designed to facilitate the execution of the s41 duty and that had been accomplished by Regulation 17.

ii. The VTE (first tier tribunal) and the Upper Tribunal had correctly applied Regulation 14(2) of the 2009 Regulations as governing the date from which the alteration should take effect.

iii. It was common ground that the commercial use of the property had commenced well before April 2005. Regulation 14(5) did not apply to a case such as this one where changes in circumstances which predated the compilation of the relevant list had occurred.

If you require advice on rating issues, contact Jerry Schurder on Tel. +44 (0)20 7333 6324 jschurder@geraldeve.com

LEASEHOLD REFORM

15 Court of Appeal

Collective enfranchisement – Leasehold Reform, Housing and Urban Development Act 1993 ("1993 Act") – appellant serving counternotice claiming leaseback of top flat – later seeking to extend leaseback – whether extent of demise confined to premises specified in counternotice

*TIBBER V BUCKLEY
[2015] PLSCS 363 – Decision given 16.12.15

Facts: The appellant owned the freehold of a building containing three flats. The two lower flats were let out on long leases to the respondents and the appellant retained the top flat which he let out on assured shorthold tenancies. In 2010 the respondents gave notice to the appellant of their claim to acquire the freehold of the property under the collective enfranchisement provisions of the 1993 Act. The appellant served a counternotice admitting the respondents' right to acquire the freehold and seeking a leaseback of the top flat pursuant to Schedule 9. She specified the extent of the proposed demise as the top two floors of the building, including all roofs and windows and the staircase leading to the top flat. She also claimed the right to undertake future development of the flat by enlarging the dormer windows and/or converting the property into two separate units with amendments to the roof line. When the appellant applied to the LVT to determine the terms of the leaseback she sought to extend the leaseback demise by including other parts of the building not mentioned in the counternotice such as the roof, the airspace above, a mezzanine landing and the front garden.

Point of dispute: Whether to allow the appellant's appeal against the decision of the LVT, subsequently upheld by the Upper Tribunal, that the leaseback should be confined to the top flat itself with rights over the common parts and a term forbidding alterations to the flat without landlord's consent. The judge in the Upper Tribunal ruled that any proposed departures from the standard terms provided for in Part IV of Schedule 9 to the 1993 Act had to be specified in the counternotice, so the appellant could not subsequently seek a more extensive leaseback than she originally proposed.

Held: The appeal was allowed in part.

i. As a matter of law, a reversioner had only one chance of claiming a leaseback, which was the counternotice in which he had to identify the flat or other unit that was the subject of the leaseback claim. In cases where the counternotice misdescribed the true extent of the relevant flat, the reversioner should not be prevented from his right to have a leaseback of the whole flat or unit. The terms of the leaseback did not have to be specified in the counternotice as these would be worked out between the tenants and the reversioner.

ii. The leaseback to be granted to the appellant should be confined to the top flat, excluding the exterior structural elements of the flat. Under the 1993 Act the reversioner was entitled to a leaseback of any relevant unit which was not, immediately before the appropriate time, let to a qualifying tenant. The assured shorthold tenants were not qualifying tenants. The mezzanine landing should be excluded from the leaseback as it was not "let with" the top flat and consequently was not an "appurtenance" belonging to the flat within the meaning of para 1(2) of Schedule 9 and the appellant's claim to the front garden failed for the same reason.

iii. The leaseback should, however, include an easement for the top flat to use part of the mezzanine for storage of one bicycle as tenants of the flat had been exercising a right to leave bicycles there and this right could reasonably be regarded as necessary for the enjoyment of the flat.

Per curiam: The better view was that if the mezzanine landing and front garden had been an appurtenance to the top flat for the purposes of para 1(2) of Schedule 9 then the failure to refer to them in the leaseback proposals would not have been fatal to the appellant's claim.

16 Upper Tribunal: Lands Chamber

Leasehold Reform, Housing and Urban Development Act 1993 – Lease extension – purchase price – deferment rate and relativity percentage to be applied to find value of lease compared to freehold

*HONG XUE V CHERRY
[2015] PLSCS 365 – Decision given 30.11.15

Facts: The appellant sought an extension to the lease of his flat in Shepherd's Bush, London W12 pursuant to Chapter II of Part I of the Leasehold Reform, Housing and Urban Development Act 1993. The flat was the upper of two flats in a converted Victorian terraced house and was held on a long lease at a low rent of which 72.167 years remained unexpired at the valuation date in October 2013. In calculating the price payable, the first tier tribunal (FTT) found that the value of the freehold with vacant possession was £653,250. In line with the decision in *Earl Cadogan v Sportelli [2007] 1 EGLR 153,* it applied a deferment rate of 5%, rejecting the appellant's argument that 5.75% was the appropriate rate in order to reflect differences between W12 and prime central London (PCL):– the increased risk of obsolescence, the increased risk of investing in the W12 area and the increased burden of administration. The appellant argued that those risks were not reflected in the open market value of the flat beyond the 11 years which an occupier purchaser, as opposed to an investor in the reversion, would be expected to keep the flat. The FTT decided that a percentage of 91.4% should be adopted for relativity (the value of the unexpired lease term as a percentage of the freehold value). This was based on relativity graphs produced by the RICS, whereas the appellant contended for 96% based on calculations and graphs prepared by his expert witness.

Point of dispute: Whether to allow the appellant's appeal against the FTT's determination that the purchase price should be £39,000. The appellant appealed in relation to the deferment rate and relativity.

Held: The appeal was dismissed.

i. Although the FTT had not given clear reasons for rejecting the appellant's case which meant that its decision could not stand, the UT reached the same conclusions as the FTT on deferment rate and relativity.

ii. The appellant had made a false distinction between the length of time that an occupier purchaser and investment purchaser of the reversion would own it for. There was no extra risk associated with holding property in the Shepherd's Bush area compared to PCL and therefore no reason to depart from the 5% deferment rate indicated in *Sportelli.*

iii. The appellant's expert had not produced any evidence of freehold values, only sales of long leases. Accordingly, his analysis had been defective as data on both leasehold and freehold sales was required to establish the appropriate relativity.

iv. The flat was not in, but was close to, PCL. The relativity should be assessed by reference to Cluttons PCL graph, the Nesbitt & Co graph and the South East Leasehold graph. Taking the figures in those graphs and producing a weighted average to reflect the fact that the appellant's property was outside PCL resulted in a relativity of 91.4% which was the figure adopted by the FTT.

v. The FTT's price had erroneously applied the relativity to the long leasehold value rather than the freehold value. Correcting this meant that the price payable was £37,545.

If you require advice on leasehold reform issues, contact Julian Clark on Tel. +44 (0)20 7333 6361 jclark@geraldeve.com

HOUSING

17 CLG Prospectus

Rent to Buy 2015 to 2017

This prospectus invites applicants to bid for up to £200 million of recoverable loans to support building of fixed term affordable homes between 2015 and 2017, setting out the detail of the funding and bidding process. Bidders can repay the loan at any time but must retain and let their homes at affordable rent for a minimum of seven years after completion. The loan must then be repaid no later than 16 years after construction. Please note that following the Government's Autumn Statement (November 2015) the Rent to Buy programme has now closed to new applications.

https://www.gov.uk/government/publications/rent-to-buy-2015-to-2017-prospectus

COMPENSATION

18 Court of Appeal

Grant of right to electricity company to operate and maintain overhead electric line over respondent's land – company to pay compensation if notified of planning permission to develop respondent's land – date at which compensation to be assessed

*G PARK SKELMERSDALE LTD V ELECTRICITY NORTH WEST LTD
[2016] PLSCS 10 – Decision given 21.10.15

Facts: The respondent, GPS, owned some undeveloped land near Skelmersdale. An overhead electricity line owned and operated by the appellant, ENW, crossed the land pursuant to a 1967 deed of grant at which time the land was in agricultural use. The deed provided that within six months of receiving notice from the grantor that planning permission had been obtained for the development of the land "for residential or industrial purposes" the grantee would pay compensation for any diminution in the value of the land which was attributable to the presence of the overhead line. In 2010 GPS obtained outline planning permission for industrial and business warehousing development on the land. In 2007, it obtained reserved matters approval for the erection of a single large building for B2/B8 uses with ancillary offices, access, parking and landscaping, but the approved building could not be erected without removing the electricity line. In March 2008, GPS notified ENW of the permission and then applied to the Upper Tribunal (UT) to determine the amount of compensation payable under the deed. The UT determined that the proposed development was for industrial purposes and that the date for assessing compensation was the date of reserved matters approval in 2007.

Point of dispute: Whether to allow ENW's appeal from the UT decision. ENW contended that the relevant date for the payment of compensation was March 2008 when it had been notified of the decision.

Held: The appeal was dismissed.

i. The essential nature of the bargain between the original grantor and grantee was that compensation was to be given for the effect of the power line on the value of the land with planning permission. The triggering event for the obligation to pay compensation was the grant of the relevant planning permission, not the claim for compensation. Compensation should therefore be assessed as at the date of the relevant permission.

ii. For that purpose the relevant permission was the reserved matters approval. The asset to be valued was the land with the full benefit of the planning permission, which had to include the benefit of the approval of reserved matters. The deed contemplated a valuation with full planning permission, comprising both the outline permission and approved reserved matters.

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

REAL PROPERTY

19 Upper Tribunal: Lands Chamber

Discharge or modification of restrictive covenant to enable construction of second house – s84(1)(a) and (aa) Law of Property Act 1925 – whether restriction obsolete – whether impeding reasonable user of applicants' property

*RE SNOOK 'S APPLICATION
[2015] PLSCS 356 – Decision given 20.11.15

Facts: The applicants, who owned a residential property in Sheffield, fenced off part of their garden in order to construct a second house on it. A restrictive covenant prohibited the construction of more than one single dwelling on the property and the applicants applied to the Upper Tribunal under s84(1) of the Law of Property Act 1925 for the covenant to be discharged or modified so that the development could proceed. The adjoining owners, who had the benefit of the covenant, objected. Relying on grounds (a) and (aa) in s84(1), the applicants argued that the restriction was obsolete or that it impeded a reasonable user of the land and did not secure any practical benefits of substantial value or advantage to the persons entitled to its benefit. The applicants had not secured planning permission for the new house, although a planning officer had confirmed that a dwelling on the site would be acceptable in principle.

Point of dispute: Whether to allow the application to discharge or modify the restrictive covenant. The applicants argued that the covenant was obsolete underground (a) as there had been extensive residential development in the neighbourhood. In relation to ground (aa) the issue was whether the proposed user was reasonable in circumstances where planning permission had not been secured for the development.

Held: The application was refused.

i. The application could not succeed on ground (a). The area was a leafy suburb of Sheffield and any development that had taken place was in keeping with the original Victorian houses. The original purpose of the covenant was to protect the amenity of the adjoining property and since that purpose could still be achieved the covenant was not obsolete.

ii. When considering an application under ground (aa) the question to be decided was whether the proposed user was reasonable. In this case it was not possible to find this was the case when the drawings for the new house were incomplete and its impact on the objectors' property could not therefore be assessed.

iii. Even if planning permission had been granted the application would have failed under ground (aa) because the restrictions still secured practical benefits of substantial value or advantage to the objectors. The new house would considerably affect the amenity of their property and would cause its value to fall by approximately £50,000 (on the valuation evidence).

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LONDON

20 Report by Atkins Global

Future Proofing London

This report argues that the level of development needed in London in order to keep up with the city's growth in coming decades has been significantly underestimated. The report forecasts that London's population will reach 12 million by 2050, not 11.3 million as projected in the Greater London Authority's London Infrastructure Plan and that by 2050 there will be a shortfall of 1.5 million homes in the South East if new homes continue to be delivered at the current rate of 26,000 per year. It argues that London's position as one of the world's leading cities is under threat due to housing and infrastructure problems which are going to lead, inter alia, to the following problems:

- displacement of population to outer areas of the city;
- growing inequality;
- overcrowding;
- pressure on the transport network;
- lack of affordable residential and commercial property;
- unbalanced economic growth;
- environmental problems; and
- professionals not wanting to move to London.

The report suggests a number of possible solutions to these problems.

http://www.atkinsglobal.com/en-GB/media-centre/news-releases/2016/jan/2016-01-07uk

GENERAL

21 CLG Guidance

Land value estimates for policy appraisal 2015

This document contains land value estimates for policy appraisal, with residential land value estimates by local authority and average industrial and agricultural values for England.This includes an estimate of a 'typical' residential site in each of England's local authorities, along with an average industrial and agricultural land value for England. Values of individual sites are highly sensitive to plot-specific characteristics and the report does not present estimates of market value. As a result the estimates are not suitable for use other than for policy appraisal.

https://www.gov.uk/government/publications/land-value-estimates-for-policy-appraisal-2015

22 Nathaniel Lichfield & Partners: News Release

Places for All Ages: Delivering the Future of The Garden Village

A new paper by the house builder, Barratt, highlights how private sector-led garden villages, capable of delivering up to 5,000 homes, could play a key role in addressing the UK's current housing shortage. The report sets out how Barratt might conceive, design and deliver Garden Villages in partnership with local communities with new and innovative forms of governance and stewardship.

http://nlpplanning.com/news/places-for-all-ages-delivering-the-future-of-the-garden-village

23 HM Treasury and National Infrastructure Commission consultation

Consultation on National Infrastructure Commission
Deadline for Comments: 17.03.16

This consultation is concerned with the governance, structure and operation of the Commission which will advise on the UK's most complex infrastructure challenges. The Chancellor has asked the Commission to report on three initial projects by Budget 2016:

- northern transport connectivity, especially east-west across the Pennines;
- large-scale investment in London's transport infrastructure, including Crossrail 2; and
- investment in energy infrastructure to ensure that future demand can be met in the most efficient way possible.

https://www.gov.uk/government/news/consultation-on-national-infrastructure-commission-launched

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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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EVEBRIEF

Legal & Parliamentary

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SCOTLAND

LANDLORD & TENANT

01 Scottish Government Publication

Business and Regulatory Impact Assessment – Third Party Applications to the Private Rented Housing Panel

This assessment considers the impact of the introduction of regulations to enable local authority applications to the Private Rented Housing Panel to enforce the repairing standard.

http://www.gov.scot/Publications/2016/01/6393

02 Scottish Government Publication

Business and Regulatory Impact Assessment – Landlord Applications to the Private Rented Housing Panel

Provisions in the Housing (Scotland) Act 2006 enable private landlords to apply to the Private Rented Housing Panel for assistance in exercising their legal right of entry to a property in connection with enforcing the repairing standard. This assessment considers the impact of the introduction of these regulations.

http://www.gov.scot/Publications/2016/01/9241

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GERALDEVE

PLANNING

03 Scottish Government Statistics

Planning Performance Statistics, 2015/16, Q2

This report presents the latest summary statistics on planning decision-making and timescales for July to September 2015 (quarter two), as well as historic data going back to quarter one of 2012/13.

- There were 7,540 local applications decided during the second quarter of 2015/16, with an overall average decision time of 9.6 weeks, an improvement of almost 4 days when compared to quarter two in 2014/15 (10.1 weeks).
- There were a total of 57 major applications decided during the second quarter of 2015/16 with an overall average decision time of 28.3 weeks, the fastest decision time since the start of data collection in quarter one of 2012/13.

http://www.gov.scot/Publications/2015/12/4499

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WALES

PLANNING

04 Welsh Government Consultation

Proposed changes to Technical Advice Note 20: Planning and the Welsh Language
Deadline for comments: 30.03.15

This note provides advice on considering the use of the Welsh language in development planning and in development management. The changes proposed to the current TAN 20 are as a result of bringing into force provisions contained in the Planning (Wales) Act 2015.

http://gov.wales/consultations/planning/tan-20-planning-and-the-welsh-language/?lang=en

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HOUSING

05 Statutory Instrument

WSI 2015/2046 The Housing (Wales) Act 2014 (Commencement No. 5) Order 2015

W.e.f. 16.12.15, this Order brought into force s139 of the Housing (Wales) Act 2014 which amends the Local Government Finance Act 1992 by inserting new ss12A and 12B. The new s12A gives billing authorities in Wales the discretion to increase the council tax payable on long-term empty properties in their areas, while s12B gives them discretion to increase the amount of council tax payable on second homes. The maximum increase in both cases is an additional 100% of the standard council tax charge.

http://www.legislation.gov.uk/wsi/2015/2046/contents/made