EVEBRIEF

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LET THE VISITOR BEWARE

For the second successive edition of Evebrief we are reporting on a case where an individual has been injured due to alleged negligence or omissions by the owner of the land on which the injury occurred.

In our previous edition (Volume 38(08) – Item 14 and Editorial) a Mr Edwards was seriously injured when he fell in a public park from an ornamental bridge with no guard rails. In the latest case (Debell v Dean and Chapter of Rochester Cathedral – Item 19) Mr Debell suffered a shoulder injury and a hernia when he tripped over a lump of concrete protruding from the base of a traffic bollard in the Cathedral grounds.

A key aspect of the Court of Appeal's decision in the Edwards case was that the duty of care on landowners to ensure the safety of visitors is not 'one-sided' but extends to those entering the land, who have a duty of care to themselves in respect of their own safety and need to take particular care where a potential hazard is clearly apparent. In the Debell case the Court pointed out that tripping and falling are everyday occurrences on roads and pavements and no highway authority, or occupier of premises such as the Cathedral, could possibly ensure that their roads etc were maintained in a pristine state – and accidents would still happen even if they did. It was relevant that in this case the largest piece of protruding concrete was about one inch high and extended some two inches from the base of the bollard; the Court again exercised common sense and decided that this could not be said to constitute a real danger to pedestrians.

The Evebrief editorial team wishes all readers a happy and peaceful – and safe – Christmas and New Year.

Tony Chase
Editor

GERALDEVE

AUTUMN STATEMENT

01 Five Takeaways from Hammond's First and Last Autumn Statement

1. *National Productivity Investment Fund (NPIF)* – this fund will provide for £23bn of spending between 2017-18 and 2021-22. It will support a housing infrastructure fund which will enable new private housebuilding to commence in areas where it is most needed. It is anticipated that 100,000 new homes will be delivered. Restrictions on grant funding are to be released in order to allow providers to deliver a mix of homes for affordable rent and low cost ownership. The NPIF will also provide £1.4bn to deliver an additional 40,000 housing starts by 2020-21 and will be used to increase construction of homes on public sector land. The NPIF will also be spent on investment in transport, digital communications and research and development.
2. *Infrastructure* – the National Infrastructure Commission is to set out recommendations to the government on the assumption that spending on infrastructure should be between 1% and 1.2% of GDP each year from 2020 to 2050.
3. *Cambridge-Milton Keynes-Oxford corridor* – The Government is to commit to £137m of funding: £27m for the Oxford-Cambridge Expressway, £100m for the East-West Rail line western section and £10m for the eastern section.
4. *Local Enterprise Funds* – to get £1.8bn to fund local infrastructure projects such as transport connections and digital connectivity.
5. *Business rates* – properties with rateable value over £100,000 will see transitional relief caps on rates increases lowered from 45% to 42% in 2017-18 and then from 50% to 32% the year after.

PLANNING

02 Court of Appeal

Residential development – planning permission refused by lpa as contrary to saved local plan policies – inspector allowing appeal – inspector's decision quashed on grounds of failure to consider extent to which policies consistent with NPPF

*GLADMAN DEVELOPMENTS LTD V DAVENTRY DISTRICT COUNCIL
[2016] PLSCS 321 – Decision given 23.11.16

Facts: GDL applied for permission to construct 121 dwellings on an open field adjacent to a village in Northamptonshire. The lpa, DDC, refused permission on the grounds that the development would be contrary to two saved local plan policies that restricted development outside existing village perimeters and in open countryside. These policies formed part of a local plan adopted in 1997 in accordance with a 1989 structure plan, both of which had been saved in 2007 by the direction of the Sec of State. A planning inspector allowed GDL's appeal against the refusal of permission on the grounds that the saved policies were out of date and thus should be given less weight. He considered that they were outdated due to their age and inconsistent with para 47 of the NPPF which was aimed at boosting housing supply. In the court below DDC's application to quash the inspector's decision was allowed.

Point of dispute: Whether to allow GDL's appeal against the decision of the court below where the judge held that the inspector was required by para 215 of the NPPF to analyse in what way and to what extent the saved local plan policies were or were not consistent with the policies set out in the NPPF, but had failed to do so. He also held that the inspector had confused the functions of plan-making and decision-taking.

Held: The appeal was dismissed.

i. The inspector had failed to give proper or any consideration to para 215 of the NPPF under which weight was to be given to the relevant policies in existing plans according to their consistency with the NPPF, and his focus had been too narrow on paras 47 and 49.

ii. The two saved local plan policies were part of the development plan and they did not cease to be part of it just because they were old. The weight to be given to particular policies in a development plan might vary as circumstances changed over time.

iii. The fact that a particular development plan policy was old was, in itself, irrelevant for the purposes of assessing its consistency with policies in the NPPF.

iv. Paragraph 49 of the NPPF created a special category of deemed out-of-date policies, namely policies for the supply of housing where a lpa could not demonstrate a five year supply of deliverable housing sites.

v. Development plans sought to encourage residential development in centres and to protect the openness of the countryside. The two local plan policies had originally been adopted to promote these objectives and that was also the case when they were saved in 2007. In general terms those objectives remained relevant today, which was something that the inspector should have considered when the case was remitted, along with the question of consistency of those policies with the NPPF as a whole in an exercise required by para 215.

vi. In the circumstances of this case, para 47 of the NPPF did not qualify as "more recent guidance" such as might justify a planning inspector treating the two local plan policies as being out of date, or inconsistent with para 47 for the purposes of the assessment required under para 215.

03 Administrative Court

Sustainable development – application by local authority to quash inspector's decision to allow appeal against refusal of planning permission for residential development on the edge of Burton on Trent – para 14 of NPPF

**EAST STAFFORDSHIRE BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2016] PLSCS 318 – Decision given 22.11.6

Facts: ESBC, refused planning permission for a residential development of 150 homes on the outskirts of Burton on Trent, but that decision was overturned on appeal by an inspector appointed by the defendant Sec of State. Paragraph 14 of the NPPF created a presumption in favour of sustainable development where it was consistent with the local plan. In this case it was common ground that the proposed development was in conflict with the local plan, but the inspector found that he could apply a broader presumption in favour of sustainable development in the NPPF as the harm to the countryside and the area's character and appearance would be "limited" and outweighed by the social and economic benefits of the proposal.

Point of dispute: Whether to allow ESBC's application to quash the inspector's decision. The Sec of State indicated that he did not contest the application and opposed the broad interpretation of the presumption in favour of sustainable development in para 14, but the developer resisted ESBC's application. ESBC argued that the inspector had misdirected himself as s38(6) of the Planning and Compulsory Purchase Act 2004 required him to make his determination in accordance with the local plan unless a material consideration indicated otherwise.

Held: The application was granted.

i. In line with s38(6) of the 2004 Act, para 12 of the NPPF stated that a proposal which was inconsistent with the local plan should be refused unless other material considerations indicated otherwise. Paragraph 14 was capable of being a material consideration. However, there had to be some residual scope to exercise discretion and approve a proposal that was inconsistent with the local plan; this dispute was about the scope of that power.

ii. In a case where a proposed development conflicted with the local plan and, therefore, prima facie should be refused permission under paras 12 and 14 there would have to be substantial and demonstrable objective benefits to outweigh that starting point. The court favoured a relatively narrow construction of the residual discretion outside of para 14.

iii. Granting permission in cases of conflict with local plans should be "the exception rather than the norm" and the inspector had misdirected himself in principle.

iv. The inspector had made a material error in deciding that he did not need to conduct a balancing exercise. In a case where a decision maker was approving a proposal that was inconsistent with the local plan, the reasons for doing so had to be set out in his decision. Merely stating that the development plan had been taken into account and balanced was not enough.

v. The inconsistency between the proposal and the local plan was a potentially weighty and substantial matter militating in favour of refusal of the proposal. The inspector had erred in failing to address relevant considerations and/or to give reasons for his conclusions.

04 Administrative Court

Permitted development – appeal against refusal of approval of proposed development of barn to automatically approved dwelling – whether conversion or rebuild

*HIBBITT V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2016] PLSCS 307 – Decision given 09.11.16

Facts: The claimant, H, owned a large steel framed barn which he wished to convert into a dwelling house. H sought approval for the conversion on the basis that it was a "permitted development" within Class Q in Part 3 of Schedule 2 to the Town and Country (General Permitted Development) (England) Order 2015 but this was refused by the lpa and H's appeal to an inspector appointed by the Sec of State was dismissed.

Point of dispute: Whether to allow H's application to quash the inspector's decision. H argued that in order to fall within the scope of the permitted development it was sufficient that the conversion was from an "agricultural building" to a dwelling and that the existing structure was sufficient to bear the load of the development work needed for the conversion works. However, the inspector found that for the development to amount to an automatically permitted conversion, the extent of the works had to fall short of a full-scale rebuild. In this case the barn was currently open on three sides which meant that that all four exterior walls would have to be built and this went beyond what could reasonably be described as a conversion.

Held: The application was dismissed. The works required in this case went beyond what could sensibly be described as a conversion. Class Q was intended to be used for clear cut, fast track developments and was not a short cut for complex cases which might raise issues under para 55 of the NPPF (guidance on the balance to be struck between the desire to increase the housing stock and rural developments). Measured against the criteria in para 55 it could be seen that the proposed development raised an issue about the need to "avoid in the countryside" new isolated homes. This was a skeletal structure which would require a great deal of fundamental work more in the nature of a rebuild than a conversion to turn it into a dwelling.

05 Planning Court

Referendum – Neighbourhood development plan – whether local authority acting in breach of obligations under and requirements of Strategic Environmental Assessment Directive

*R (ON THE APPLICATION OF RLT BUILT ENVIRONMENT LTD) V CORNWALL COUNCIL
[2016] PLSCS 314 – Decision given 10.11.16

Facts: The draft neighbourhood development plan for St Ives in Cornwall included Policy H2 which required new open-market housing to have a restriction to ensure that it was only occupied as a principal residence. This policy had been included because of the high proportion of second homes and holiday lets in the town. The submission of Policy H2 was accompanied by a sustainability appraisal which purported to comply with the Strategic Environmental Assessment Directive (the SEA Directive) and an independent examiner concluded that the draft plan would contribute to sustainable development. A referendum on the draft plan was held and 83% of those who voted were in favour of using the plan to help decide planning applications in the area. The claimant, RLT, applied for judicial review of the lpa's decision to hold the local referendum.

Point of dispute: Whether to allow RLT's application. RLT contended that the lpa had failed to discharge their obligations under the SEA Directive and that there was a risk that policy H2 would interfere with rights under Article 8 of the European Convention on Human Rights.

Held: The application was dismissed.

i. The aim of Policy H2 was to safeguard the sustainability of settlements in the area by meeting the housing needs of local people and strengthening the local community and economy; there was no sign of the demand for second homes in the area abating and any increase in market housing would not meet the policy objective behind Policy H2. The plan did not breach EU obligations imposed by the Directive and progressing it to a referendum was not in breach of, or incompatible with, the relevant Regulations.

ii. Under the TCPA 1990 a draft neighbourhood development plan could not be progressed to a referendum unless the planning authority was satisfied that it was compatible with European Convention rights, including Article 8. No one apart from RLT had complained of a risk to their Convention rights. Policy H2 was in pursuit of legitimate public interests identified in Article 8(2), namely economic wellbeing and the protection of the rights and freedoms of others and any interference with Article 8 rights was therefore justified. The defendants had been entitled to conclude that further development in the local area was unsustainable without the restriction in policy H2 and it was not open to RLT to challenge that exercise of planning judgment on its merits.

06 Planning Court

Paragraphs 22 and 51 of the NPPF – appeal against refusal of permission to convert commercial premises for commercial use

*SAN INVESTMENTS LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2016] PLSCS 300 – Decision given 09.11.16

Facts: The claimant owned commercial units in the Jewellery Quarter Conservation Area in Birmingham. The lpa granted permission for the construction of town houses and duplexes and six class B1 commercial units, but once the development had been completed the claimant was unable to sell or rent the commercial units and sought permission to convert them to commercial use. This was refused and the inspector dismissed the claimant's appeal against that decision.

Point of dispute: Whether to allow the claimant's renewed application for permission. This raised a point of broader significance about the relationship between paras 22 and 51 of the NPPF in the context of applications to convert commercial units into residential units in conservation areas. Paragraph 22 provided that planning policies should avoid long term protection of sites allocated for employment use where there was no reasonable prospect of a site being used for that purpose. Under para 51, lpas were to bring back into residential use empty housing and buildings, and should normally approve planning applications for changing commercial buildings to residential use where there was an identified need for additional housing in the area, provided there were no strong economic reasons why such development would be inappropriate.

Held: The application was dismissed.

i. Paragraph 22 was not directly applicable since it applied explicitly to allocated employment uses and the appeal site had never been so allocated.

ii. Paragraphs 22 and 51 addressed different but related matters and operated in parallel with each other. Paragraph 22 covered a change of use from a specific allocated employment use. Paragraph 51 governed the situation of non-allocated uses. Paragraph 51 provided a broader basis for permitting a change of use than would para 22. Paragraph 22 would not apply unless there was no reasonable prospect of a site being used for an employment use.

iii. The pre-condition in para 22 was not met anyway as the inspector did not accept that the unsuccessful marketing initiatives for the commercial units undertaken by the claimant were indicative that they would not be successful at some time in the future.

07 CLG Publication

Improving planning performance: criteria for designation

This document sets out the government's criteria for assessing local planning authority performance in determining applications for major and non-major development. The explanatory memorandum explains the changes to the criteria for assessing performance.

https://www.gov.uk/government/publications/improving-planning-performance-criteria-for-designation

08 Statutory Instrument

SI 2016/1040 The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2016

This Order, which came into force on 24.11.16, substitutes Class A of Part 16 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 to incorporate minor and drafting amendments and the following changes of substance:

- *Emergency development* – the period for which land may be used in an emergency is extended from 6 to 18 months (Class A(b));
- *Installation of masts* – The height of masts which may be installed on unprotected land is increased from 15 metres to 25 metres (or 20 metres on a highway) (para A. 1(1)(c);
- *Alteration or replacement of existing masts* – the height limitation which applies to the permitted development right to alter or replace an existing mast on unprotected land is increased from 20 metres to the greater of the height of the existing mast or 25 metres (20 metres on a highway);

- *Building-based apparatus* – Small antenna and small cell systems are excluded from the limitations on building-based apparatus contained in para A.1(2) of Class A; and
- *Prior approval* – para A.2(3) sets out the descriptions of development in Class A for which prior approval is required.

http://www.legislation.gov.uk/uksi/2016/1040/contents/made

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

RATING

09 Court of Appeal

Valuation for Rating (Plant and Machinery) (England) Regulations 2000 – retail store selling mainly refrigerated and frozen food – whether air cooling system to be ignored when valuing premises for rating purposes – whether system used "in connection with services mainly or exclusively as part of manufacturing operations or trade processes"

*ICELAND FOODS LTD V BERRY (VO)
[2016] PLSCS 320 – Decision given 23.11.16

Facts: Iceland, the respondent, installed a larger air handling unit than was the norm in their Liverpool store. This enabled them to deal with the excess heat generated in their premises as a result of their business model selling high volumes of refrigerated products. The VTE determined that the air handling unit was used mainly in connection with a trade process and was not therefore rateable, but that decision was reversed by the Upper Tribunal. (See Evebrief, Vol 37(02) i15).

Point of dispute: Whether to allow Iceland's appeal against the UT decision.

Held: The appeal was dismissed.

i. Under the scheme of the 2000 Regulations plant and machinery described in the four scheduled Classes was rateable as part of the hereditament. Class 2 contained a general exception for plant and machinery used "in connection with services mainly or exclusively as part of manufacturing operations or trade processes." This exception was directed towards services used as part of some manufacturing or process activity undertaken by the occupier on the hereditament.

ii. The term "trade process" should be considered in the context of the exemption which primarily relates to "manufacturing operations", the defining characteristic of which is activity bringing about a transition from one state or condition to another. The display or storage of goods, as carried out by Iceland, did not involve any trade process. Iceland could not rely on the exception in Class 2 and the air handling system should be valued.

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

LEASEHOLD REFORM

10 Court of Appeal

Leasehold Enfranchisement – lease extension claim – amount payable to intermediate landlord – notice of separate representation – agreement reached between leaseholder and competent landlord – whether agreement binding on intermediate leaseholder

**KATEB V HOWARD DE WALDEN & ACCORDWAY LIMITED
[2016] EWCA Civ 1176 – Decision given 29.11.16

Facts: H de W (the "competent landlord") owned the freehold of a flat and garage in Harley Street, London W1. A, the claimant occupational leaseholder, held a long lease and served notice for a new lease, and H de W admitted the claim. Subsequently K, the intermediate leaseholder, served a notice of separate representation. A LVT hearing was listed, prior to which the premium was agreed at £269,000 between H de W and A only, with the apportionment being £265,600 to H de W and £3,400 to K as intermediate leaseholder. A new lease was then granted on the agreed terms. However, K did not agree with the apportionment. The LVT determined that the agreement was not binding on the intermediate leaseholder, but this decision was overturned in the Upper Tribunal. K appealed.

Point of dispute: Whether there is a statutory right for the intermediate landlord to be separately represented in proceedings relating to lease extension claims.

Held: The appeal was dismissed. A competent landlord can bind an intermediate landlord by an agreement reached with the claimant tenant, so that the tenant is not burdened with having to resolve disputes between the various landlords. The protection for an intermediate landlord is the right to apply to the County Court as to how the competent landlord conducts proceedings in the event of a dispute, and also a right to seek damages for negligence and bad faith if there is a failure to discharge its duty of care.

The Court took note of the contrasting provisions of the Act relating to collective enfranchisements. These entitle an intermediate landlord to give notice to deal directly with the nominee purchaser, as well as to be separately represented in proceedings. Furthermore, an agreement in a collective claim as to the terms of acquisition has to be an agreement of all the parties. There is no corresponding provision for lease extensions, which indicates that Parliament intended the competent landlord's authority to be unrestricted.

11 Upper Tribunal: Lands Chamber

Lease extension under the Leasehold Reform, Housing and Urban Development Act 1993 – correct approach to valuation of existing leases for determining premium payable under Schedule 13 to the Act – whether evidence of market transactions to be preferred over graphs of relativity

*MALLORY V ORCHIDBASE LTD
[2016] PLSCS 316 – Decision given 02.11.16

Facts: The appellants, who were long leaseholders of three similar two-bedroomed flats on a 1970s estate in Hemel Hempstead, exercised their right to acquire extended leases pursuant to Chapter II of Part I of the 1993 Act. At the valuation date in May 2015 each lease had an unexpired term of 57.68 years and the FTT determined that the premium payable in each case was £21,915.

Point of dispute: The proper approach to be taken to the valuation of the unexpired lease terms as a percentage relative to the value of the freehold/extended lease value, for the purpose of determining the premium payable. The appellants sought to rely on graphs of relativity to arrive at an average relativity of 82.75%. The respondent landlord contended that there was sufficient comparable evidence of actual market transactions to provide an accurate valuation of the appellants' leases without the need to rely on relativity graphs. Using this evidence it arrived at a valuation of £110,565 (a relativity figure of 76.2% against the long leasehold/freehold value).

Held: Market evidence was to be preferred over using relativity graphs so long as it could be shown that the market evidence was reasonably comparable and did not require extensive manipulation to apply it to the valuation in question. There was sufficient relevant market evidence in this case. All the relativity graphs relied on by the appellants had limitations. The tribunal adopted the respondent's short lease value, unimproved and without Act rights, of £110,565. On that basis the premium payable for each extended lease was £21,908.

12 Upper Tribunal: Lands Chamber

Leasehold Reform, Housing and Urban Development Act 1993 – collective enfranchisement – existing leases conferred revocable license to use garden – respondent freeholder to retain garden – nature of rights in lieu to be granted over garden under s1(4)(a) – application to determine disputed terms of acquisition

*4-6 TRINITY CHURCH SQUARE FREEHOLD LTD V CORPORATION OF THE TRINITY HOUSE OF DEPTFORD STROND
[2016] PLSCS 317 – Decision given 07.11.16

Facts: The applicant was the nominee purchaser for the purposes of a claim by the long leaseholders of three adjoining town houses in London SE1 to acquire the freehold of the building from the respondent freeholder by collective enfranchisement under the 1993 Act. The leaseholders were entitled to use a garden behind their houses pursuant to a revocable licence which was set out in their leases. The respondent intended to retain the garden and offer rights over it to the applicant.

Point of dispute: The nature of the rights over the garden that the applicant would acquire pursuant to s1(4)(a) of the 1993 Act. The applicant argued that it was entitled to an irrevocable right to use the garden, while the respondent contended that since the right under the existing leases was a revocable licence the right to be acquired by the applicant should similarly be of a revocable nature.

Held: The application was determined in favour of the applicant.

i. Section 1(4) entitled the freeholder to offer in lieu of the acquisition of the freehold of certain land alternative rights which were to be taken to satisfy the right of acquisition. The right of acquisition would only be taken to be satisfied where the freeholder granted "such permanent rights" as would ensure that thereafter the occupier of the flat had "nearly as may be the same rights as those enjoyed" on the relevant date. The substituted rights did not have to be identical, but instead had to be as close as possible to those enjoyed on the relevant date. The characteristics of permanence and equivalence were difficult to reconcile in cases where the rights originally enjoyed by the qualifying tenant were revocable at the will of the landlord.

ii. To comply with s1(4)(a) the rights offered had to be free of any condition for termination. Where the rights originally enjoyed by the qualifying tenant under the lease of the flat were revocable the requirement of permanence meant that they had to become irrevocable upon completion of the transfer.

iii. Section 1(4)(a) contemplated that the rights to be granted might not be identical in every respect to the original rights and it was quite feasible that temporary rights would be replaced by permanent ones. The purpose of the enfranchisement legislation was to replace limited leasehold rights enjoyed by qualifying tenants with permanent rights. To avoid transferring the freehold of the garden to the appellant the respondent had to grant an irrevocable right to use it.

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

HOUSING

13 CLG Statistics

Housing supply: net additional dwellings, England: 2015 to 2016

This publication presents estimates of changes in the size of the dwelling stock in England due to new house building completions, conversions, changes of use, demolitions and other changes to the dwelling stock.

- In 2015-16 there were 189,650 net additional dwellings in England, 11% more than in 2014-15.
- 163,940 of these net additions were new build homes, 30,600 resulted from change of use between non-domestic and residential, 4,760 from conversion between houses and flats and there were 780 other gains. These additions were offset by 10,420 demolitions.

https://www.gov.uk/government/statistics/housing-supply-net-additional-dwellings-england-2015-to-2016

14 CLG Statistics

House building: new build dwellings, England: July to September 2016

This release presents figures on new build housing starts and completions in England.

- In the September quarter of this year it is estimated that there were 38,730 new build dwelling starts in England, 6% more than during the previous quarter and 10% higher than a year earlier. In the same period there were 37,280 completions, 6% higher than the previous quarter and 7% more than a year ago.
- Annual new build dwelling starts totalled 147,880 in the year to September 2016, up by 4% compared with the year to September 2015. During the same period there were 141,690 completions, 4% more than last year.

https://www.gov.uk/government/statistics/house-building-new-build-dwellings-england-july-to-september-2016

REAL PROPERTY

15 Upper Tribunal: Lands Chamber

Modification or discharge of restrictive covenants – scheme of mutual covenants affecting riverside land – applicant wishing to modify restrictions in order to construct a new boathouse – s84(1) Law of Property Act 1925

*RE UNIVERSITY OF CHESTER'S APPLICATION
[2016] PLSCS 299 – Decision given 18.10.16

Facts: The University of Chester ('the applicant') owned some land next to the River Dee in Chester on which was a single-storey boathouse. In 2015 the applicant obtained planning permission to demolish it and replace it with a larger two-storey building for competitive rowing by students and local academies. The applicant's land was affected by restrictive covenants which formed part of a scheme of mutually enforceable covenants contained in an 1896 deed under which a 2.5 acre stretch of riverside land had been partitioned into 12 separate lots and allocated to the owners of houses in the surrounding neighbourhood. The covenants prohibited the carrying on of any trade or business on the lots, their use was restricted to private occupation as gardens or pleasure grounds and the height of any building was limited to 4'6" above the level of the pavement on the adjoining road.

Point of dispute: Whether to allow the applicant's application to modify the covenants so as to enable it to build the new boathouse. It contended that they had become incapable of enforcement and therefore obsolete, that a local motorboat club had breached them and that an apartment block had been built on one part of the affected riverside land. It also argued that the restrictions secured no practical benefits of substantial value or advantage to those entitled to their benefit and that they should therefore be modified. The owners of other riverside plots objected.

Held: The application was dismissed.

i. The proposed use of the new boathouse would be a breach of the restriction that the land could only be used for private occupation. The applicant's proposed future use of the land was too intensive, involving too many individuals with remote connections to it. The new boathouse would occupy a large part of the applicant's land and it would cease to have the characteristics of a garden or pleasure ground.

ii. The covenants were not obsolete. They continued to play an important role in preserving the particular character of the land.

iii. Ground (aa) was not made out on the facts of the case. The ability to prevent the construction of a relatively tall building in such close proximity to the boundary of the garden of the adjoining owner was a practical benefit of substantial value or advantage secured by the covenants.

iv. Although the University's proposed use of the land for the new boathouse could be said to be in the public interest this was outweighed by the degree of damage to the amenity and enjoyment of the adjoining garden by the scale, location and design of the proposed building.

If you require advice on real property issues, contact Annette Lanaghan on Tel. +44 (0)20 7333 6419 alanaghan@geraldeve.com

TORT

16 High Court

Surveyor's negligence – valuation of care home – errors in method of valuation – whether valuation within permissible bracket of error

*BARCLAYS BANK PLC V TBS & V LTD
[2016] PLSCS 313 – Decision given 18.11.16

Facts: A Grade II listed building in Lynmouth, owned by the local authority, was let out as a care home. The owner wished to sell the home as a going concern. W was interested in buying it and approached the claimant bank, B, for funding. B instructed TBS, a valuer, to value the property and following receipt of a valuation by the defendant TBS of £350,000, loaned money to W to enable him to acquire the business. After a few years it failed and B took action to forfeit the lease and claimed that its loss was the result of TBS's negligent valuation of the property.

Point of dispute: Whether B's claim for negligence would be allowed. TBS contended that the valuation it had given fell within an appropriate margin of error, bearing in mind the complexities of valuing this property.

Held: The claim was dismissed. Based on the evidence before it, the court had to determine what the correct valuation would have been, applying the professional standards pertaining at that date. It then had to decide the appropriate margin of error to apply to this valuation which would depend on the particular facts of the case e.g. the type of property in question, whether it had exceptional features etc. If the valuation was outside the bracket of potential non-negligent valuations, the court would then consider whether the valuer had acted in accordance with practices which were regarded as acceptable by a respectable body of opinion in his profession. In this case the circumstances were challenging: there were few comparables, it was very rare to find a leasehold interest of this length in a care home, and there were other idiosyncratic features about the property. However, the circumstances of the valuation did not justify a higher than 15% margin of error. The court accepted TBS's evidence that it had approached valuing the property in accordance with the GN1 guidance note in the RICS Red Book on trade related property valuations and good will and an EBITDA (potential earnings before interest, taxes, depreciation and amortisation)/multiplier approach and was satisfied that the correct valuation had been reached.

LONDON

17 Greater London Authority Report

Economic Evidence Base for London 2016

This report provides an economic evidence base to help inform and support strategy development for London. It outlines how London's economy has developed over time and the forces acting upon it, and identifies the risks and issues facing London's economy. A number of areas are covered including:

- trade and London's international competitiveness;
- the spatial characteristics of London;
- commuting and transport;
- land use and housing;
- the risks to London's economy;
- London's environment;
- people and the labour market; and
- some of the socio-economic issues faced by London.

https://www.london.gov.uk/what-we-do/research-and-analysis/economy-and-employment/economic-evidence-base-london-2016?utm_campaign=Economic+Evidence+Base+for+London+2016&utm_source=emailCampaign&utm_medium=email&utm_content=

GENERAL

18 Court of Appeal

Estate agent's commission

*WELLS V DEVANI
[2016] PLSCS 308 – Decision given 15.11.16

Facts: In early 2008 the appellant developer was put in touch with the respondent estate agent in connection with the sale of some flats which the appellant had built in Hackney, East London eight of which remained unsold. The appellant and respondent had a telephone conversation after which the respondent contacted a local housing association which later agreed to buy all eight of unsold flats. Thereafter the respondent emailed his terms of business to the appellant. After completion the respondent claimed commission of £42,000 plus VAT, but the appellant disputed that the respondent was entitled to a fee.

Point of dispute: Whether to allow the appellant's appeal against the finding of the judge in the court below that the parties had made an oral contract for the payment of a commission. The judge found that a legally binding agreement had been reached during the course of the parties' initial telephone conversation. Although the event that was to trigger entitlement to commission was not defined at that time, the judge implied a term that payment would be due on the introduction of a person who actually completed the purchase.

Held (by a majority of 2:1): The appeal was allowed.

i. The judge had been incorrect to find that the parties had made a binding oral agreement since they had not discussed or agreed on the event that would trigger the respondent's entitlement to commission. The oral agreement was insufficiently complete to amount to a binding contract. A court could imply terms into a completed contract, but it was not legitimate to do so where no contract existed.

ii. The event giving rise to an estate agent's entitlement to commission was of critical importance and there were a variety of events that could be specified. The trigger event could not be decided by reference to a standard of reasonableness and the law did not provide a default rule.

iii. There was no concluded contract between the parties before the introduction of the housing association to the property or before it made its offer to purchase.

19 Court of Appeal

Occupiers' liability – duty of care – proper application of test of foreseeability of risk in relation to tripping hazards

**DEBELL V DEAN AND CHAPTER OF ROCHESTER CATHEDRAL
[2016] PLSCS 301 – Decision given 09.11.16

Facts: The respondent, D, was injured when he tripped and fell over while he was walking within the precincts of the appellants' cathedral. Pedestrians had to pass through a 2 foot gap between a bollard placed in a road to prevent cars from entering and a low wall, but the concrete into which that bollard was embedded was broken and a piece protruded into the gap; it was on this that D had tripped.

Point of dispute: Whether to allow the appellants' appeal against the finding of the judge in the court below that they had breached their duty of care under the Occupiers' Liability Act 1957. The judge found that the narrowness of the gap between the wall and the bollard made it especially important that it was not obstructed in any way so as to cause a danger and that the state of the concrete gave rise to a foreseeable risk of injury to a pedestrian walking through the gap.

Held: The appeal was allowed.

i. The 1957 Act included an obligation to remove dangers that had materialised even though the occupier had not caused them. Various factors might however be relevant when determining whether inaction led to a breach of duty of care including the likelihood of the risk of injury, the system in place for identifying and then removing a danger, and the difficulty and cost of doing so.

ii. Tripping, slipping and falling were everyday occurrences on roads and pavements. An occupier had to make its land reasonably safe for users, but was not obliged to guarantee their safety.

iii. A breach of duty by failure to maintain was only established where there was a danger to traffic or pedestrians in the sense that danger might reasonably have been anticipated from its continued use by the public. The test was reasonable foreseeability in this particular context – the risk was reasonably foreseeable when there was a real source of danger which a reasonable person would recognise as obliging the occupier to take remedial action.

iv. The judge was entitled to find that D's accident had been caused by the jutting out piece of concrete

v. The judge had however misdirected himself as to the proper application of the foreseeability test. He had failed to recognise that not all foreseeable risks give rise to the duty to take remedial action and he should have taken a more practical and realistic approach to the kind of dangers which the appellants were obliged to remedy. The piece of concrete was very small and could not be said to pose a real danger to pedestrians. Although D's accident was unfortunate it was not one for which the appellants should be liable.

20 Government Response to House of Lords Select Committee Report

Government response to the report of the House of Lords Select Committee on the Built Environment

A House of Lords Select Committee was appointed on 11.06.15 to consider the development and implementation of national policy for the built environment. The Committee considers that the power of place needs to be more widely recognised and that the country needs to be more ambitious when planning, designing, constructing and maintaining the built environment. In its report it set out measures that it considered to be important to achieve this aim and this response addresses those recommendations.

https://www.gov.uk/government/publications/the-built-environment-government-response-to-the-select-committee-report

21 RTPI Policy Statement

Where should we build new homes

In this statement, released on 10.11.16, the RTPI argues that greenfield sites, including green belts, need to be considered alongside brownfield land as locations for new housing. Although reaffirming the continued importance of prioritising brownfield land, the RTPI argues that this policy will fail if there is insufficient funding and a lack of remedial programmes to make sites ready for development and accessible to transport.

http://www.rtpi.org.uk/briefing-room/news-releases/2016/november/rtpi-fresh-approach-needed-for-housing-location/

22 CBI Report

No place like home

In this report the CBI argues that the shortage of housing is becoming a serious problem for business as the lack of affordable homes continues to hamper firms' ability to recruit and retain staff with the skills they need while long commutes affect the productivity of workers. It would like to see a more flexible approach to the delivery of new housing so that the types of houses built are matched to the needs and aspirations of the people who are going to inhabit them. In order to meet the UK's current housing challenge the CBI argues that the following need to be done:

- the Department for Communities and Local Government needs to prepare a strategic housing plan;
- the government should help small and medium-enterprise housebuilders through improved release of small sites of public land and by making access to finance easier; and
- the importance of the Private Rented Sector should be recognised and supported.

The report also makes some other recommendations.

http://www.cbi.org.uk/news/step-change-needed-in-housing-delivery-and-mindset-cbi/

23 CPRE Report

Housing capacity on suitable brownfield land

This report argues that the Government has underestimated the capacity of brownfield sites available for building new housing. The CPRE estimates that a minimum of 1.1 million new homes could be built on brownfield sites across England, while more ambitious methodologies put this figure much higher at 1.4 million. It believes that brownfield registers are needed across the country to provide a comprehensive picture of England's brownfield capacity and that local authorities should conduct detailed investigations to ensure that these registers only include land that is suitable for new development. It also calls for national policies that prioritise brownfield development over greenfield, and support the delivery of new homes on suitable brownfield sites.

http://www.cpre.org.uk/resources/housing-and-planning/housing/item/4416-housing-capacity-on-suitable-brownfield-land

24 Historic England Paper

Preserving Archaeological Remains

This advice is aimed at developers, owners, archaeologists and planners working on projects where the intention is to retain and protect archaeological sites beneath or within the development. There is a particular focus on decision-taking on waterlogged archaeological sites.

https://www.historicengland.org.uk/images-books/publications/preserving-archaeological-remains/

25 Government Statistics

Land use change statistics 2015 to 2016

These statistics show amounts and location of land changing use in England. It provides estimates for 2015 to 2016 on the creation and deletion of residential addresses and changes in density.

https://www.gov.uk/government/statistics/land-use-change-statistics-2015-to-2016

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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

PLANNING

01 Scottish Government Report

Planning and Architecture Division – Planning Performance Framework 2015-16

If you require advice on planning & development issues, contact Hugh Bullock on
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This is the annual performance report and improvement plan for the Scottish Government's Planning and Architecture division.

https://beta.gov.scot/publications/planning-performance-framework-annual-report-2015-16/

RATING

02 Statutory Instrument

SSI 2016/402 The Valuation for Rating (Decapitalisation Rate) (Scotland) Regulations 2016

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These Regulations, which will come into force on 01.03.17, prescribe the decapitalisation rate to be applied when valuing lands and heritages in Scotland in accordance with the contractor's basis for the purposes of any valuation roll which comes into force on or after 01.04.17. The contractor's basis is the method of ascertaining the net annual value of lands and heritages by reference to their cost of construction or provision or to their capital value.
The decapitalisation rate prescribed is 2.9% in the case of certain church property, healthcare property and educational establishments (as defined in Regulation 2) and 4.6% in any other case.

http://www.legislation.gov.uk/ssi/2016/402/contents/made

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GENERAL

03 Statutory Instrument

SSI 2016/369 The Council Tax (Variation for Unoccupied Dwellings) (Scotland) Amendment Regulations 2016

These Regulations amend the 2013 Regulations in relation to the variation in council tax liability which may be granted in respect of second homes. At present a local authority may grant a discount of between 10% and 50% of normal liability, but w.e.f 01.04.17 it can also decide to grant no discount.

http://www.legislation.gov.uk/ssi/2016/369/contents/made

04 Scottish Government consultation

Building Warrant Fees
Deadline for comments: 09.01.17

The purpose of this consultation is to seek views on increasing building warrant and other associated fees to make the building standards system achieve full cost recovery and place it on a sustainable footing for the future.

https://consult.scotland.gov.uk/procedures-and-verification/building-warrant-fees

WALES

Compensation

05 Statutory Instrument

WSI 2016/1072 The Home Loss Payments (Prescribed Amounts) (Wales) Regulations 2016

W.e.f. 05.12.16 these Regulations increase to £55,000 and £5,500 respectively the maximum and minimum amounts of home loss payments payable under the Land Compensation Act 1973 to those with an owner's interest in the dwelling they occupy. The Regulations also increase the amount of home loss payment payable under the Act in any other case to £5,500.

http://www.legislation.gov.uk/wsi/2016/1072/contents/made

NORTHERN IRELAND

ENERGY

06 Statutory Instrument

SRNI 2016/395 The Energy Performance of Buildings (Certificates and Inspections) (Amendment) Regulations (Northern Ireland) 2016

W.e.f. 01.12.16 these Regulations amend the 2008 Regulations by changing certain definitions in order to reflect the wording of the 2010 European Directive on the energy performance of buildings.

http://www.legislation.gov.uk/nisr/2016/395/contents/made