

NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

New guidance on construction compensation

New guidance on assessing breach of contract and damages for delays in the completion of construction projects has been released by the Royal Institution of Chartered Surveyors (RICS).

Damages for delays to completion addresses the legal and financial repercussions associated with breaches of contract in relation to missed completion dates. It also highlights how sums can be determined where a contract is breached.

Where a contractor is liable in damages for being late completing a project, compensation levels are in some cases contractually predetermined; where contracts do not contain damage clauses, however, an assessment is generally required into the impact of the delay on the client. In both cases, independent arbitration is generally needed and this new guidance is designed to assist all parties throughout the process.

RICS director Alan Muse said the issue of damages is extremely important for those involved in the construction industry.

"Potential sums are not always entered into contracts before a project is undertaken. Therefore, guidance is required in order to determine an appropriate sum, as the impact of the delay on earnings and any difficulties incurred must be correctly assessed."

He added: "Assessing the level of damages can sometimes be problematic and, through publishing this new guidance, we are aiming to make the process as straightforward and transparent as possible."

Government announces rise in right to buy discounts

Right to buy discounts are to be increased in a bid to raise the scheme's popularity and rejuvenate the housing stock, Prime Minister David Cameron has promised.

Following Cameron's announcement at the Conservative conference, the Department for Communities and Local Government (CLG) has pledged that for every council house bought under the right to buy scheme, a new affordable home will be built – over and above the government's existing plans.

In a statement, CLG said: "Every additional pound generated by the sales will be invested in paying down the debt associated with that property and on building new housing for affordable rent."

Under the previous government, the statement

said, discounts were reduced to very low levels, which resulted in fewer people being able to take up this opportunity.

"We want to help people meet their aspiration for home ownership, whilst using the receipt to build more housing for affordable rent."

Details of the new-look scheme will be set out in the upcoming Housing Strategy, but the intention is that the offer will apply to tenants with the right to buy and preserved right to buy. Tenants with the right to acquire will not be included under this scheme.

Any changes to the right to buy scheme will be made through secondary legislation. The government has, however, pledged to consult widely with the sector about details before changes are made.

Cameron said that the proceeds from the sales could be used to build up to 100,000 homes. However these would be let at higher "affordable" rents at around 80% of the market rent than those they replaced.

Housing Minister Grant Shapps said: "Right to buy was a fantastic, liberating policy which assists where people are hardworking and aspire to own their own home.

"However it was a mistake then [when the policy was introduced in the 80s] and would be now not to replace the homes that are sold off. There will be no net loss of housing – this is a one-for-one policy."

Property-related bankruptcies rise

The number of property and construction companies falling into administration in the third quarter of this year increased by 11%, according to new research by Deloitte LLP.

A total of 117 property companies and builders went into administration in the period, up from 105 a year earlier, Deloitte said, with rising energy prices and cuts to public and private sector building projects blamed for bringing many projects to a halt.

Nigel Shilton, real estate industry partner at Deloitte, predicted that the next quarter is also going to be tough for the construction sector, hitting medium-sized firms, particularly hard.

He said: "The property market continues to remain flat, and reflects the current concerns around unemployment and declining

incomes. While it is welcome that the Bank of England's new mortgage approval figures for August 2011 increased to 52,000, the housing market still remains subdued."

Low interest rates have done little to stimulate sales in the housing market, he said, as tough credit conditions have locked thousands of first-time buyers out of the market, with only those with a substantial deposit able to get a mortgage approved.

He added: "We are already seeing sentiment turning and property yields falling off which is being evidenced by deals either not completing or 'price chipping' by purchasers before they commit to complete.

Therefore, the next quarter is not going to bring any relief from the pressures that property and construction companies are currently facing."

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Editor:

Lucy Trevelyan
lucy.trevelyan@lexisnexis.co.uk

Designer & Typesetter:

Heather Pearton
heather.pearnton@lexisnexis.co.uk

Customer Services:

0845 370 1234
customerservices@lexisnexis.co.uk

Publishing Director: Simon Collin

Published by LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL

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Printed by Headley Brothers Ltd.

ISSN: 2040-0128



A kind of magic

The future of the statutory magic of registration must now be open to doubt following recent court decisions, as Timothy Polli explains

Section 58(1) of the Land Registration Act 2002 provides that:

“If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.”

This is often referred to as the “statutory magic” of registration.

Barclays Bank v Guy

In *Barclays Bank v Guy* [2008] EWCA Civ 452, Guy was the registered proprietor of a large parcel of land in Manchester. In circumstances that he alleged were fraudulent, that land came to be registered in the name of Ten Acre Limited, which charged the land to Barclays Bank plc to secure its debts. Barclays sought to exercise its power of sale and Guy sought to resist by setting up his right to have the land registered back into his own name, free from Barclays’ charge.

Guy failed at first instance and in his subsequent application for permission to appeal ([2008] EWCA Civ 452) for two reasons. Firstly, it was accepted by Lloyd and Carnwath LJ that references to “mistake” in Sch 4 of the 2002 Act (permitting the amendment of the register) were to be read narrowly as though they referred to mistakes in the registration of the entries that it was sought to remove. As the registration of Barclays’ charge was not a mistake (because Ten Acre was the registered proprietor when it granted the charge and, as such, was entitled to charge the property), Guy was not entitled to recover the land free of it. Secondly, there were no real prospects of Guy proving that Barclays had known of the defect with Ten Acre’s title.

On 20 May 2009, Guy applied to reopen the question of whether he should be granted permission to appeal his defeat at first instance (*Barclays Bank v Guy* (No 2) [2011] 1 WLR 681). Most of Lord Neuberger MR’s judgment

deals with why Guy’s case was not an appropriate case in which to exercise the exceptional jurisdiction to re-open an application for permission to appeal. In the course of his judgment, however, he commented:

“It...seems to be clear that Lloyd LJ’s analysis proceeded on the basis that the alleged ‘mistake’ for the purposes of para 2(1) of Sch 4 was the registration of the charge in the charges registers. However, there are other ways of putting Mr Guy’s case, namely (a) that the removal of his name from the proprietorship register was a mistake and, in order to correct that mistake, the charge would have to be removed from the charges register, or (b) that the registration of the charge flowed from the mistake of registering the transfer, and therefore should be treated as part and parcel of that mistake.”

Lord Neuberger, although not expressly differing from the previous judgments, appears to be of the view that the substantive result in *Barclays Bank v Guy* (No 1) might not be correct.

Knight’s Construction

The issue arose again recently before Michael Mark, sitting as a deputy Land Registry adjudicator in *Knight’s Construction (March) Ltd v Roberto Mac* [2011] EWLandRA 2009 1409. By mistake, land belonging to Knight’s Construction came to be registered in the name of the Salvation Army, which subsequently sold land including the disputed land to Roberto Mac, who became the registered proprietor thereto. Roberto Mac commenced building works on the land, but was met with protests from Knight’s Construction. Knight’s Construction applied to be registered as proprietor of the disputed land. Knight’s Construction contended that the registration of Roberto Mac was a mistake which could be rectified; Roberto Mac contended that there was no mistake

because it had acquired title from the registered proprietor, the Salvation Army.

The deputy adjudicator directed that the chief land registrar be joined as a second respondent to the application to enable the relevant statutory provisions relating to rectification and the availability of an indemnity to be fully considered between all parties affected. His judgment sets out a detailed analysis of the law relating to this issue.

The deputy adjudicator started by making the point that, under the Land Registration Act 1925, the availability of an indemnity was inextricably linked with the availability of rectification of the register. He considered in detail the two joint reports produced by the Law Commission and the Land Registry: “Land registration for the twenty-first century: a consultative document” and “Land registration for the twenty-first century: a conveyancing revolution”, the latter of which included the draft Bill.

He noted that there was nothing in either document to suggest that it was the intention of the Law Commission or the Land Registry to change the law in relation to the availability of rectification or an indemnity, and certainly that there was no intention to alter the law so as to remove from a former owner the right to have the register rectified just because, following a mistake, a third party had acquired an interest in it for valuable consideration.

He then discussed *Argyle Building Society v Hammond* (1985) 49 P & CR 148 and *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, which together established that, under the Land Registration Act 1925, anything flowing from the mistaken registration of a void transfer was, in principle, susceptible to rectification, but if the transfer was merely voidable, title was lost and irrecoverable where it had been sold on to an innocent third party for valuation consideration.

The deputy adjudicator then turned his attention to the authorities. *Pinto v Lim* [2005] EWHC 630 (Ch)

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was a forgery case that fell to be determined under the 1925 Act as far as rectification was concerned, but under the 2002 Act as far as any claim for an indemnity was concerned. He noted that Blackburne J had clearly proceeded on the basis that there had been two mistakes: the original registration of the forged, void transfer, and the subsequent registration of the transfer by the forger to the innocent third party. He drew attention to Blackburne J's conclusion that he had jurisdiction to rectify the register against the innocent third party, but that were he not to do so, the wronged party would be entitled to an indemnity from the land registry.

The deputy adjudicator emphasised that the judge at first instance in *Barclays Bank v Guy (No 1)* had found that the transfer to Ten Acres was voidable – not void – and, in the light of that finding, had expressly not considered what the result would have

been had the transfer been void. He pointed out that the decision of the Court of Appeal to refuse permission to appeal did not constitute binding precedent, and referred to Lord Neuberger's comments in *Barclays Bank v Guy (No 2)*. He cited with approval *Ajibade v Bank of Scotland*, REF/2006/163 & 174, in which deputy adjudicator Rhys had concluded that "mistake" should be construed broadly, such that the registrar was entitled to amend the register not only to correct the original mistake, but also the consequences of that mistake, but criticised the contrary decision of deputy adjudicator Holland in *Stewart v Lancashire Mortgage Corporation Limited* REF/2009/0086 & 1556 which concluded that the narrow construction of "mistake" was to be preferred.

He therefore concluded that he was not precluded by binding precedent from finding that, as a matter of law, rectification remained available to

Knights' Construction, even though the original mistake was no longer on the register, he proceeded to conclude that, in the circumstances, the register should be rectified.

Conclusion

There is, of course, an inherent tension between, on the one hand, a system of land registration that is intended to be both conclusive and up to date and, on the other hand, a jurisdiction that permits the rectification not only of an original mistake, but also subsequent transactions flowing from that mistake. For a short period, it appeared that, under the regime introduced by the Land Registration Act 2002, the statutory magic of registration might prevail. Following the decision in *Knights' Construction*, that must now be open to doubt.

Timothy Polli is a barrister at Tanfield Chambers

Micro management

New regulations confer permitted development rights for the installation of certain microgeneration equipment on or within the curtilage of blocks of flats or dwelling-houses, or on buildings within their curtilage

The government hopes that increasing the take-up of microgeneration will reduce greenhouse gas emissions, increase energy security and potentially lead to increased investment within the industry, resulting in efficiency improvements in microgeneration technology.

New rights

The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2011 (SI 2011/2056), which comes into force on 1 December 2011, means that – subject to restrictions – planning permission will no longer be required for the installation, alteration or replacement of air source heat pumps, wind turbines mounted on a building or stand-alone wind turbines on or within the curtilage of a dwelling-house or block of flats.

The installation of solar PV or solar thermal equipment on the wall or roof of a dwelling-house or a building within

its curtilage will also be permitted, provided the equipment does not protrude more than 200mm. Stand-alone solar will be permitted if its height does not exceed four metres above ground level and is more than five metres from the boundary. Restrictions apply to solar in conservation areas, world heritage sites and listed buildings.

Microgeneration is the small-scale production of heat and/or electricity from low carbon sources. Planning permission is currently required for the installation of many types of microgeneration technologies which can be complex, costly, time consuming and uncertain, deterring householders from installation.

From 1 October 2011, permitted development rights will also apply to:

- the installation, alteration or replacement of electric vehicle charging points in off-street car parks; and

- the erection or construction and maintenance, improvement or alteration of electric vehicle charging points and associated infrastructure by local authorities or urban development corporations.

Compensation

The new Town and Country Planning (Compensation) (England) Regulations 2011 (SI 2011/2058), most of which come into force on 1 October 2011, limit the circumstances where compensation is payable for minor operations relating to electric vehicle charging points and the installation of domestic microgeneration equipment. Town and Country Planning Act 1990, s 108 provides for the payment of compensation in cases where planning permission granted by a development order or a local development order is withdrawn and where an application for planning permission is refused or permission is granted subject to conditions.

The new regulations prescribe the types of development, the manner in which planning permission is to be withdrawn, and the manner and maximum period in which notice of withdrawal, revocation, amendment or directions is to be given is restricted.

Jen Hawkins

Polluter pays

Proposals by the Department for Environment, Food and Rural Affairs (Defra) would require business to bear the cost of local air quality regulation

Defra has published a consultation proposing the revision of fees and charges for local air pollution prevention and control (LAPPC) and local authority (LA) integrated pollution prevention and control (LA-IPPC) regimes for 2012–13. The consultation covers changes to the prescribed fees and charging schemes in England levied by LAs to recover the full costs of undertaking their functions under Environmental Permitting Regulations 2010 (EPR). The changes will affect businesses which wish to apply for the grant, variation, transfer or suspension of an LAPPC or LA-IPPC permit.

The aim of the consultation is to ensure that the fees and charges payable are sufficient to cover the LA's expenditure in exercising its functions

under the EPR. The revisions reflect Defra's "polluter pays" principle, ie, that those who directly benefit from a regulatory service should bear the cost of providing that service. However, the changes will actually result in reduced costs for operators.

Proposed changes

Proposed changes include:

- a freeze in charging levels for all applications relating to LAPPC and LA-IPPC applications;
- extending the simplified permitting approach to additional industry sectors (Part B activities, undertaken mainly in factories), resulting in reduced regulatory effort and lower application and subsistence charges;

- allowing operators to request reduced annual subsistence charges indefinitely if they have mothballed (stopped using) their installation, or are operating at reduced levels (below the level at which a permit is required), and still want to retain their permit;
- scrapping the repeat transfer fee for the temporary transfer of a mobile plant permit, where the same plant user and operator jointly apply for a second time to the same authority for a further fixed period transfer;
- discontinuing the Environment Agency's water fees for A2 facilities (those with the potential to cause pollution to water).

The consultation (*Consultation on Partial Bi-ennial Review of Local Authority Environmental Regulation of Industrial Plant: 2012/13 Fees and Charges*) closes on 23 December 2011.

See www.defra.gov.uk/consult/files/industrial-plant-condoc-110929.pdf for further details.

Joanna Bhatia

Proximity alert

A planning authority must take account of the distance between dangerous land uses and public buildings even where it has no discretion to refuse a planning application, the European Court of Justice has ruled

Planning decisions in EU member states must include assessment of the distance between dangerous land uses and public buildings or spaces. Member states are not required to have laws that prohibit the siting of incompatible land uses within specified distances of each other. However, they must not have laws or planning policies that omit or preclude risk assessment. The potential for major accidents arising from a hazard is a material consideration for UK planning purposes and planning conditions may be used to restrict proximity between such land uses.

On 15 September 2011, the ECJ made a preliminary ruling concerning the interpretation of art 12(1) of the Directive on the Control of Major Accident Hazards Involving Dangerous Substances (Dir 96/82). The case

was referred to the ECJ by Germany's Federal Administrative Court, and concerned the siting of a garden centre in the vicinity of a chemicals plant where the relevant planning authority had no discretion to refuse the garden centre's application for consent.

The ECJ's decision

The ECJ decided that art 12(1) of Dir 96/82 must be interpreted so that the obligation to ensure that account is taken of the need to maintain appropriate distances applies to a public authority responsible for issuing planning permissions, even when it has no discretion in the exercise of that function. The ECJ confirmed that:

- land use planning for the purposes of the directive is based on the

principle that uses incompatible with each other must be separated by appropriate distances; and

- controls on new developments in the vicinity of existing establishments must be carried out where those developments increase the risk or consequences of a major accident.

The ECJ case was prompted by an objection to the siting of the garden centre made by the operator of a chemicals plant, concerned that an increase in public use of nearby land might exacerbate the consequences of any accident, and so increase its potential liabilities.

In the UK, local planning authorities will have to bear the ECJ's ruling in mind when drafting local planning policies – hazardous establishments should be separated from other uses as far as possible. Any risk of a major accident resulting from a nearby hazard will be a material consideration for the authority in granting planning permission for a building of public use. Planning conditions may be used to restrict proximity between such land uses.

Joanna Bhatia

Stepping into the breach

The local authority could not take steps to enforce enforcement notices where the enforcement action itself could breach planning control

Town and Country Planning Act 1990, s 178 provides that where steps required by an enforcement notice are not taken within the period for compliance, the local planning authority (LPA) may enter the land and take the steps and recover reasonable expenses from the landowner.

In *Egan v Basildon Borough Council* [2011] All ER (D) 128 (Sep), the LPA issued enforcement notices requiring occupiers to take steps to rectify the breaches of planning control identified in the notices. The residents did not take any steps to comply with the notices, so the LPA proposed to carry out the works itself.

The court continued an injunction preventing the LPA from enforcing

enforcement notices on the ground that there were triable issues as to the extent that the notices could be enforced. It held that:

- an LPA could do anything reasonably necessary to achieve compliance with the steps required by an enforcement notice, provided the enforcement action could not itself breach planning control. Therefore the LPA could not demolish buildings or structures that had been erected unlawfully before the issue of the enforcement notice, which were not the subject of an enforcement notice;
- as the structures did not exist at the time that the enforcement notice was

issued, the LPA could not exercise a statutory power to remove them;

- as the walls, fences and gates were unlawfully in place when the enforcement notices were issued, they could not be subject to enforcement action under the guise of “enabling works”, ie, works which may facilitate, or are conducive or incidental to, the discharge of any of the LPA’s functions;
- there were triable issues as to what buildings, walls, fences and gates were present and amounted to a breach of planning control at the time of issue of the relevant enforcement notices;
- there were also triable issues as to whether the caravans on the site were within the dimensions prescribed in Caravan Sites and Control of Development Act 1990 and Caravan Sites Act 1968, which meant they might not fall within the requirement in the enforcement notices to remove caravans.

Jen Hawkins

Case digests

R (on the application of Peat and others) v Hyndburn Borough Council [2011] All ER (D) 86 (Jul); [2011] EWHC 1739 (Admin) 25 May 2011

Local authority – Breach of statutory duty – Challenge to validity of public authority’s decision – Failure correctly to make decision – Defendant local authority conducting consultation prior to designation – Whether authority taking reasonable steps to consult with persons affected by designation – Whether authority erring – Housing Act 2004, s 80(9).

In August 2008, the defendant local authority sent letters to landlords stating that “the [authority] is considering introducing a requirement that anyone who wishes to rent out residential property, in certain parts of Accrington and Church will need to have a licence. Whilst the area or areas to be designated have yet to be finally decided, as you are a landlord with properties in the borough I want to give you the opportunity to comment on the proposal”. The consultation document gave no details

of the boundaries of the scheme areas, the considerations that had gone into the authority’s view that the area or areas were ones of low housing demand or otherwise why areas had been chosen. No details of proposed licensing conditions or fees were given. No further details of the designation to be made were either circulated, published or made publicly available before submission to the secretary of state. The secretary of state raised concerns about the consultation that had taken place and details of publication of the results. As a result, modifications were made. No further consultation took place. The authority made its decision in March 2010, the secretary of state confirmed the designation, which was then due to come into force on 1 October 2010. The claimants applied for judicial review.

They contended that: (i) the consultation did not accord with the terms prescribed in s 80(9) of the Housing Act 1994 (HA 1994); and (ii) the consultation was stale by the time of the designation decision.

The application would be allowed. (1) Applying established authority, the established principles were first, that a

consultation had to be at a time when proposals were still at a formative stage. Second, the proposer had to give sufficient reasons for any proposal to allow intelligent consideration and response. Third, adequate time had to be given for consideration and response, and finally, the product of consultation had to be conscientiously taken into account in finalising any statutory proposals. The process of consultation had to be effective and looked at as a whole and it had to be fair. That required that consultation took place while the proposals were still at a formative state. Those consulted had to be provided with information that was accurate and sufficient to enable them to make a meaningful response. They had to be given adequate time in which to do so and there had to be adequate time for their responses to be considered. The consulting party had to consider responses with a receptive mind and a conscientious manner when reaching its decision.

In the circumstances, the authority had not taken reasonable steps to consult with the persons likely to be affected by the designation. Without some fleshing out of the reasons for the proposals, the nature of the proposals as regards the licensing

Case digests

conditions and as to fee structure, an informed response had been impossible. The consultation had been merely perfunctory in the extreme and could not conceivably have put the consultees in the position of being able to give an informed response to that which was really being proposed by the authority. Taken as a whole, the authority had failed to comply with s 80(9) of HA 1994.

R v Brent London Borough Council, ex p Gunning 84 LGR 168 applied; *R (on the application of Wainwright) v Richmond upon Thames London Borough Council* [2001] All ER (D) 422 (Dec) considered.

- (2) The fact that so long had passed and so much had evolved in the formulation of the scheme between the perfunctory consultation and the designation should have raised in the authority's mind a serious question whether by March 2010 it had taken the reasonably necessary steps to consult, so as to inform it adequately of the views of those affected in order to decide rationally whether the decision should have been taken or not. Accordingly, the designation would be quashed.

Maroussem v Director General, Mauritius Revenue Authority
[2011] All ER (D) 45 (Sep); [2011] UKPC 30
9 August 2011

Commonwealth and dependencies – Mauritius – Income tax – Returns – Gross income – Taxpayer appealing against assessment of income tax due on property – Supreme Court dismissing appeal and finding that comparables method used by government valuer appropriate – Whether Supreme Court erring – Appropriate method of valuing land and assessing income tax payable on sale of land – Income Tax Act (Mauritius) 1974, s 11(1)(h) – Income Tax Act (Mauritius) 1995, 130(2).

Section 11(1) of the Income Tax Act 1974 required particular receipts to be brought into account as gross income. The taxpayer, who owned the residue of a lease in Mauritius, entered into a scheme with a developer (the Société) and the owner of land (the property) subject to the taxpayer's lease, under which the developer expended money to bring the development land into a state in which building plots could be sold off to

individual purchasers (the morcellement of the land). When the plots of land were sold the taxpayer took a proportion of the sum paid. The taxpayer did not include any of his morcellement receipts in his returns for the years 1989/90 to 1994/95. The income tax commissioner (the commissioner) made assessments under s 129 of the Income Tax Act (Mauritius) 1995 (the 1995 Act) in which he treated the whole of the sums received as taxable income and no deductions representing the capital value of the land before the implementation of the scheme were made. The taxpayer contended that the whole of his receipts under such a scheme constituted capital and were not to be brought into account under s 11(1)(h) as "gross income". The taxpayer's valuator used a different method to value the property, described as the residual method, which was guided by the actual amount received for the sale of the subject land in plots and as the gross realisation from sale from which he deducted the actual cost of infrastructure. The government valuer adopted the approach of looking at comparable transactions. The commissioner made an assessment in respect of the years 1989/90 and 1991/92 pursuant to s 130(2) of the 1995 Act on the basis that they were not out of time as there had been wilful neglect on the part of the taxpayer. The taxpayer appealed against tax liability assessments in 1995 and 1997 arising out of the sales. The tax appeal tribunal found against the taxpayer on the morcellement payments point. It also held that there had been wilful neglect on the part of the taxpayer with regard to the returns for the years 1989/90 and 1991/92. A case was stated for the opinion of the Supreme Court. That court dismissed the taxpayer's appeal. The matter came before the Board of the Privy Council in 2004 when the main issues were whether (i) all or (ii) none or (iii) the part representing profit or gain of the taxpayer's receipts representing his share of the proceeds of sale of the development land was caught by s 11(1). The Mauritius Revenue Authority contended that the whole share was caught. The taxpayer contended that the other extreme applied. The board decided (see [2004] All ER (D) 430 (Jul)) that the intermediate view was correct and it held that the commissioner could amend the assessments and re-calculate the tax due on the property. On 8 November 2005, the taxpayer lodged representations with the Assessment Review Committee (ARC) pursuant to s 19 of the Mauritius Revenue

Authority Act 2004. The ARC decided in favour of the director-general. The matter came before the Supreme Court, which directed (by consent) that the matter be remitted to the commissioner for re-assessment in the light of the decision of the Privy Council. The commissioner wrote to the taxpayer enclosing a revised computation of the chargeable income and tax payable. There was no formal amendment of the assessments under s 132 of the 1995 Act. The taxpayer appealed by way of case stated to the Supreme Court, which dismissed the appeal. The Supreme Court held that the government valuer had been entitled to use the comparable method of valuation and that comparables were appropriate in characteristics and timing, subject to making the necessary adjustments. It held that the residual method should be reserved for exceptional cases and that in any event the taxpayer's valuer had wrongly applied that method in particular by using actual figures, when the method implied a hypothetical development. The taxpayer appealed to the Privy Council.

The issues for consideration were: (i) whether, as contended by the taxpayer, the ARC had erred in law by accepting the comparables method of valuation as opposed to the residual method of valuation; and (ii) whether, in 2005, the Supreme Court, in giving directions (by consent) for a reassessment to be conducted had essentially required the commissioner to do something he had no power to do, namely to amend the assessment out of time (s 132 of the 1995 Act). It was submitted on behalf of the taxpayer that the ARC had erred in law by accepting the comparables method of valuation as opposed to the residual method of valuing land. Consideration was given to the Tax Appeal Tribunal Act 1984 (TATA 1984).

The appeal would be dismissed.

- (1) There was no error of law in the decision of the Supreme Court. The board agreed with the Supreme Court that the taxpayer's valuer had erroneously applied the residual method by making use of the actual receipts and cost of the project available to him at a later date. The hypothetical vendor and purchaser in 1988 before the start of the morcellement scheme would have known none of the information used by the taxpayer's valuer. They would have had to estimate or guess, with unknown degrees of accuracy, the receipts and costs. The fact that the

taxpayer's valuer had resorted to an improper application of the residual method emphasised the difficulties inherent in that method and the absence of any irrationality in the ARC's decision to reject it. The board could see no basis for regarding the comparables method of valuation as inappropriate, since property comparables were available, nor did it regard the eventual valuation using that method as in any way irrational.

- (2) Amendment of an assessment under s 132 of the 1995 Act was something that would be expected to happen before the assessment had been made the subject of an appeal to ARC. At a hearing ARC itself had jurisdiction under s 6(4) of TATA 1984 to confirm, amend or cancel any decision, including an assessment made by the commissioner. If at an appeal hearing ARC amended an assessment under s 6(4) it was not acting under s 132 but in exercise of its own adjudicative function. There had been no formal amendment of the assessments under s 132, nor had there been any need for any amendment. The assessments under appeal remained those made in 1995 and 1997. While the Supreme Court had referred to a "reassessment" there was no need to construe that as meaning a formal assessment for which there had been no need, and for which the commissioner had had no statutory authority. Accordingly, counsel for the taxpayer's assessment of the Supreme Court's directions had not been correct.

S v AG
[2011] All ER (D) 143 (Oct); [2011] EWHC 2637 (Fam)
14 October 2011

Divorce – Financial provision – Financial relief in England and Wales after overseas divorce – Husband and wife marrying in Columbia – Wife winning lottery during marriage – Divorce being decreed in Columbia – Husband applying for financial relief – Whether lottery prize to be matrimonial or non-matrimonial property.

The husband and wife married in Columbia in 1984. There were two children of the marriage. In 1999, the wife and her friend entered into a lottery syndicate. The ticket won £1 million. In January 2000, £500,000 was paid into an account in the wife's name. In May 2000, the wife purchased a property (the house) in her sole name for £275,000. She

expended £25,000 on purchase costs and £90,000 on a complete renovation of the property. In January 2004, H was removed from the house by the police as a result of an episode of serious domestic violence and the parties were fully separated from that date. In October 2005, the husband registered a notice of matrimonial home rights against the house. In August 2006, the wife mortgaged the property for £300,000. In May and June 2007, a total of £300,000 was paid to MR, the second respondent. The husband issued divorce proceedings and in May 2007, a *decree nisi* was pronounced. However, divorce proceedings had also been issued by the wife in Columbia. In August, a divorce was decreed in Columbia. The effect of that divorce, provided that it was entitled to recognition in the UK, was to overreach the *decree nisi* and to nullify the husband's English divorce proceedings. The English divorce proceedings were subsequently dismissed and the husband was granted leave to apply for financial relief following an overseas divorce. The wife remarried.

The principal issue that fell to be determined was the treatment to be accorded to the lottery prize. It was agreed that the husband had been wholly ignorant of the wife's participation in the lottery. It was also agreed that her contribution to the winning ticket came from her earnings.

The court ruled:

Whether a lottery prize was to be regarded as matrimonial or non-matrimonial property was highly fact specific and did not depend centrally on the origin of the amount used to purchase the lottery ticket. If the parties were in effect operating a syndicate, whether formal or informal, where both were aware that tickets were being bought and where both had agreed tacitly or expressly to their purchase, then it was easy to see that prize as a joint venture and therefore as matrimonial property. However, if one party was unilaterally buying tickets, from his or her owned income, without the knowledge of the other party, then it was equally easy to see the prize as a receipt by that party alone akin to an external donation, and therefore as non-matrimonial property. That case would be fortified if the party in question was buying the tickets as part of a syndicate with others, and more so if the marriage had become troubled and unhappy with the parties drifting into separate lives socially and economically (the second scenario).

It was established law that, in the application of the sharing principle, as opposed to the needs principle, matrimonial property would normally be divided equally. By contrast, it would be a rare case where the sharing principle would lead to any distribution to the claimant of non-matrimonial property. However, while matrimonial property would normally be divided equally, that was not an invariable rule. The reason for that was sometimes the matrimonial property in question would not be the product of the endeavours of the parties within the social-economic partnership that was marriage. In *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1 it was specified that the matrimonial home should always be designated matrimonial property, whatever its source. But even the matrimonial home was not necessarily divided equally under the sharing principle; an unequal division might be justified if unequal contributions to its acquisition could be demonstrated.

In this case the first port of call was to apply the needs principle. The marriage was long and both parties had needs, particularly to provide for themselves in old age. H had a need for a lump sum to be paid now of £82,000. On that basis the wife would be left with a capital base of just over £350,000. By downsizing her home at the point of retirement the wife and her new husband would have ample funds to provide for their old age. Turning to the application of the sharing principle, the initial receipt of the lottery was non-matrimonial property. The case clearly fell into the second scenario. However, when the wife purchased the house she converted that part of her non-matrimonial assets into matrimonial property. Given that the source of that matrimonial property was not joint endeavour but rather non-matrimonial property of the wife, and given the relatively short period that the husband actually lived in the house, the husband was not entitled to an equal sharing of it, or anything approaching that. A sharing of 15 to 20% would be fair. The value of the property after costs of sale, but ignoring the mortgage was £480,150. The assessment of the application of the sharing principle gave a range of award to the husband of £72,000–£96,000. Standing back and weighing together the application of both the sharing and needs principles, a lump sum award of £85,000 was warranted in the circumstances. The compensation principle was not applicable in the instant case.

Legislation update

<p>Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2011</p>	<p>Enactment Citation SI 2011/2452</p> <p>Commencement Date 6 April 2012</p> <p>Legislation Affected SI 2007/991 amended</p> <p>Enabling Power European Communities Act 1972, s 2(2)</p>	<p>Amend the Energy Performance of Buildings (Certificate and Inspections) (England and Wales) Regulations 2007, SI 2007/991.</p> <p>Provide that it is mandatory for owners of air-conditioned buildings to lodge inspection reports of air-conditioning systems (above 12kW) on the England and Wales central register.</p> <p>Make a number of changes to the system of compliance and enforcement in respect of energy performance certificates by, in particular, extending the compliance and enforcement regime to all buildings marketed for sale or rent.</p>
<p>Home Energy Assistance Scheme (Scotland) Amendment (No 2) Regulations 2011</p>	<p>Enactment Citation SSI 2011/350</p> <p>Commencement Date 30 November 2011</p> <p>Legislation Affected SSI 2009/48 amended</p> <p>Enabling Power Social Security Act 1990, s 15(2)(c)</p>	<p>Amend the Home Energy Assistance Scheme (Scotland) Regulations 2009, SSI 2009/48, to extend eligibility for the receipt of grants for improving the thermal insulation and energy efficiency of dwellings. Eligibility is extended to include applicants who are, or who live with a partner who is, in receipt of carer's allowance and to those caring for a severely disabled person, subject to certain conditions.</p>
<p>Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011</p>	<p>Enactment Citation SI 2011/2304</p> <p>Commencement Date 16 September 2011</p> <p>Legislation Affected SI 2001/1177 amended</p> <p>Enabling Power Financial Services and Markets Act 2000, ss 419, 428(3)</p>	<p>Amends the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001, to clarify the circumstances in which a person who carries on the regulated activity of entering into a sale and rent back agreement as an agreement provider is carrying on that activity "by way of business".</p> <p>Provides the amendment will cease to have effect at the end of 2014. The Treasury is required to review the operation and effect of the amendment and to publish a report before the end of 2012.</p>
<p>Landfill (Maximum Landfill Amount) Regulations 2011</p>	<p>Enactment Citation SI 2011/2299</p> <p>Commencement Date 1 October 2011</p> <p>Legislation Affected SI 2004/1936 revoked, except for regs 1 and 2</p> <p>Enabling Power Waste and Emissions Trading Act 2003, ss 1(1), 2(1)</p>	<p>Specify the maximum amount by weight of biodegradable municipal waste that is allowed to be sent each target year to landfills, for each of the UK – England, Scotland, Wales and Northern Ireland – as required by the Waste and Emissions Trading Act 2003, s 1(1). The amounts set are consistent with the obligations of Directive 1999/31/EC on the landfill of waste.</p>

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