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NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Prospects still gloomy in construction

Construction levels were broadly flat during the third quarter of this year, according to the latest Royal Institution of Chartered Surveyors *Construction Market Survey*.

One per cent more chartered surveyors reported workloads falling not rising – the lowest reading since Q4 2010. Many said they are continuing to provide quotes for work, but a lot of these projects are not going ahead.

Public sector housing saw the biggest fall, with 20% more surveyors reporting workloads in this area falling rather than rising – the most negative reading since Q4 2009.

Economic uncertainty and lack of confidence were the factors most commonly cited by surveyors as those they felt were inhibiting the construction industry, with 80% stating this as a reason; 66% cited cutbacks in government spending and 63% cited lack of finance.

RICS chief economist, Simon Rubinsohn, said the construction sector suffered in Q3 this year, "as a combination of economic uncertainty, large cuts in public sector programmes and a lack of available finance for development impacted on the industry".

"The government's housing announcement should gradually provide some help and we are particularly attracted to the provision of funds for small and medium-sized developers. However, it remains to be seen whether the scale of the package really is sufficient to counter the negative factors depressing activity and profits across the sector," he added.

Rival to Conveyancing Quality Scheme launched

A rival to the Law Society's Conveyancing Quality Scheme is being launched by the Society of Licensed Conveyancers (SLC).

To be introduced next year, the SLC Quality Assured scheme aims to crack down on mortgage fraud and has been developed with the Council for Licensed Conveyancers (CLC).

SLC chairman, John Clay, said the scheme will provide lenders with reduced fraud risk and additional transaction protection.

"While the CQS has gone some way to addressing the issues associated with lenders' panels, it has been our experience that lenders see it as just part of the overall solution. We felt there was a gap in the market for a universally accepted standard, designed specifically for licensed conveyancers, which builds on the strong regulatory framework provided by the CLC."

Under the scheme, firms will have to register every new transaction with the SLC system. Information on the transaction's progress will be made available to the lender at critical points throughout the process and also made available to the regulator.

Constant monitoring of the firm managing the transaction will be undertaken by a central operations team, provided by the SLC, alongside monitoring of the lawyers on the other side.

The system is linked to more than 100 data sources and various events will raise a flag at the SLC. These can then be referred to the CLC. The regulator will also feed its risk data into the system.

In its recent report on voluntary quality schemes, the Legal Services Consumer Panel said that while it supported efforts to promote high standards in conveyancing, effectively requiring firms to sign up to CQS "could end up creating a situation in which market players and not the Solicitors Regulation Authority effectively become the regulators in relation to entry standards".

Huge fall in new affordable housing construction

The number of affordable homes being built has fallen 96% compared with the same period last year, new statistics from the Homes and Communities Agency (HCA) show.

Just 454 affordable houses were started in the six months to 30 September 2011, compared with more than 13,000 in same period last year.

The HCA figures were released as the government announced the introduction of what it claims is "the most radical and fundamental reforms to social housing for a generation".

The government is replacing Labour's affordable housing programme with its own, said housing minister, Grant Shapps, and contracts had now been put in place for the new programme which suggested 170,000 affordable homes would be built within this Parliament – more than the 150,000 target.

The social housing will: allow social landlords to issue flexible tenancies; enable access to internet-based mutual exchange schemes; strengthen landlord accountability to tenants; make changes to reflect the introduction of the Affordable Rent mode; and clarify that social housing providers are expected to maintain their stock at a decent level.

Shapps said for too long social housing has been seen as a second-class option, and these changes would restore its original purpose – to provide a flexible alternative to help tenants achieve their aspirations.

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Tenancies: a degree of certainty required?

A recent Supreme Court decision underlines the importance of the written agreement and reveals how the judiciary will interpret the written document as reflecting the intention of the parties. ***Gemma de Cordova*** *reports*

In November 2011 the Supreme Court handed down its judgment in *Berrisford v Mexfield Housing Co-operative Limited* [2011] UKSC 52. The case concerned the determination of an "occupancy agreement".

The decision sheds light on the following interesting points of principle:

- Section 149(6), Law of Property Act 1925 (LPA 1925) applies to agreements entered into both before and after LPA 1925 coming into force and thus an agreement that might otherwise be invalid as a tenancy agreement for lack of certainty (or other essential ingredient), might yet be converted into a lease for 90 years by virtue of LPA 1925;
- Even though an agreement might not constitute a valid tenancy agreement in law because any of the essential ingredients are missing, it appears likely that the parties will nevertheless be bound by the terms that they have agreed;
- The Supreme Court has called very persuasively for the legislature to take steps to abandon the requirement for certainty.

Background

The parties had entered into an "occupancy agreement" (the agreement) in December 1993. Ms Berrisford was one of a number of individual borrowers who had fallen into difficulties with their mortgage repayments. Mexfield purchased Berrisford's property from her and subsequently let it back to her under the terms of the agreement.

Clause 1 of the agreement provided: "[Mexfield] shall let and [Berrisford] shall take the [premises] from 13 December 1993 and thereafter from month to month until determined as provided in this agreement."

The only provisions that dealt expressly with the determination of the agreement were found in cll 5 and 6. Clause 5 entitled Berrisford to terminate the agreement by giving one month's notice in writing. Clause 6 began as follows: "This agreement may be brought to an end by [Mexfield] by the exercise of the right of re-entry specified in this clause but ONLY in the following circumstances..." Thereafter cl 6 defined four different circumstances in which Mexfield could terminate the agreement. It was not in dispute that none of the circumstances set out in cl 6 applied.

Section 149(6) LPA 1925

Mexfield had argued that a finding that the agreement should be construed as creating a tenancy for 90 years determinable on the tenant's death would be inconsistent with "high modern authority"; notably the cases of *Prudential Assurance Company Limited v London Residuary Body* [1992] 2 AC 386 and *Lace v Chantler* [1944] KB. Lord Neuberger rejected this. A crucial point of distinction in his analysis was the fact that in neither of those particular cases was the "tenancy for life arising as a matter of common law" nor the "90-year term arising as a result of s 149(6)", advanced. It was in that light that he considered that some of the statements about the law made by Lord Greene and Lord Templeman could "now be seen to be extravagant or inaccurately wide..." (para 53).

Lord Neuberger held, having considered extensive authority, that prior to LPA 1925, the agreement would, being an agreement for an uncertain term, have been treated as a tenancy for the life of the tenant determinable before the tenant's death according to its terms (para 39). It is clear from the wording of s 149(6) that it applies to agreements made "before or after" the commencement of LPA 1925 and therefore Berrisford had a tenancy for 90 years.

TANFIELD CHAMBERS

The s 149(6) LPA 1925 aspect is probably the part of the appeal that has attracted the most attention; not least because of the vast numbers of tenants of fully mutual housing co-operatives, for whom this decision has confirmed that they have (or are entitled to) a tenancy for 90 years. Mexfield itself had entered into a number of very similar occupancy agreements and so this was effectively a test case. The other aspects of the case, however, are equally important and will be considered below.

Terms of an agreement may be binding

In its claim for possession, Mexfield sought to rely on service of a notice to quit giving four weeks' notice, in compliance the Protection from Eviction Act 1977, believing Berrisford to be either a weekly or monthly periodic tenant by virtue of the payment and acceptance of rent. Mexfield relied on *Prudential* to argue that no valid tenancy had been created.

Lord Neuberger found: whether or not the agreement gave rise to a monthly tenancy, as a matter of contractual interpretation, the effect of cll 1, 5 and 6 was that the agreement could only be determined by Berrisford pursuant to cl 5, or by Mexfield pursuant to cl 6, and in no other way (save consensually) (para 22).

Parties should be aware that even if a tenancy agreement might fail for technical deficiencies, where the agreement contains express provisions as to the determination of the agreement, these should be complied with if attempts to end the agreement are to be successful.

An indication of how far the Supreme Court would be willing to go to see that justice is done between the parties is to be found in Lord Neuberger's comments, which although *obiter*, are of particular interest. In his view, had Berrisford failed to establish that she had a subsisting tenancy of the premises by virtue of s 149(6), she would nevertheless have been entitled to enforce her contractual rights. Lord Neuberger could see no reason why the agreement would not be capable of taking effect as a

contract enforceable between the parties personally (although, of course, not binding their successors, given that no estate in land had been created). In doing so Lord Neuberger disagreed with the conclusions reached by Lord Greene and Lord Templeman in *Lace* and *Prudential* respectively: "The fact that the parties may have thought they were creating a tenancy is no reason for not holding that they have agreed a contractual licence any more than in '*Street*' [1985] AC 809..." (para 63).

No longer any need for certainty?

Both parties accepted, as the Supreme Court held, that the agreement could not take effect as a tenancy according to its terms because the "term" of the agreement was uncertain. This accords with the historic principle that a tenancy will be void for uncertainty if at the outset the term is not expressed with certainty, nor by reference to something which can at the outset of the term be looked to as a certain ascertainment of what the term is meant to be.

However, the Supreme Court voiced strong criticism of this historic principle, while not seeking (or indeed needing) to depart from the principle in this particular case. Lord Neuberger said:

> *"As the judgment of Baroness Hale... demonstrates (and as indeed the disquiet expressed by Lord Browne-Wilkinson and others in the* Prudential *case itself shows), the law is not in a satisfactory state. There is no apparent practical justification for holding that an agreement for a term of uncertain duration cannot give rise to a tenancy, or that a fetter of uncertain duration on the right to serve a notice to quit is invalid. There is therefore much to be said for changing the law, and overruling what may be called the certainty requirement, which was affirmed in the* Prudential *case, on the ground that, in so far as it had any practical justification, that justification has long since gone, and, in so far as it is based on principle, the principle is not fundamental enough for the Supreme Court to be bound by it."* (para 34).

Conclusion

Lord Neuberger's comments regarding "certainty" were echoed in the judgments of his fellow Justices. While we must be mindful of the separation of powers, it would seem unfortunate if such passionate and persuasive calls for reform were overlooked. However, it remains to be seen how quickly, if at all, the legislature takes heed of these latest calls for reform; and indeed whether time can be found in the political calendar for this issue to be considered.

Some may find that of particular concern, is the fact that s 149(6) LPA 1925 applies only to individuals, which leaves corporate tenants without any protection where there is doubt as to the certainty of the term. It is difficult to see why in circumstances such as these, any difference in treatment between individuals and companies is justified.

This decision underlines the importance of the written agreement and how the judiciary will interpret the written document as reflecting the intention of the parties. The strong indication given is that this will be so, even where there are question marks as to the validity of the agreement in law.

Gemma de Cordova
barrister, Tanfield Chambers

Last orders

Will the government call time on restrictive covenants on pub use? ***Andrew Francis*** *investigates*

The public house has a special place in the heart of the British public. George Orwell depicted the ideal public house (The Moon Under Water) as one possessing certain qualities such as one where it is quiet enough to talk and "if anyone knows of a pub that has draught stout, open fires, cheap meals, a garden, motherly barmaids and no radio, I should be glad to hear of it, even though its name were something as prosaic as the Red Lion or the Railway Arms."

But in recent years the British pub has come under threat. Many factors have led to their closure, particularly in rural areas. Once closed, the heart of many communities is lost and the former pub is converted to another use.

Consultation

On 2 August 2011 (when much of Britain was on holiday) the department for Communities and Local Government published a consultation paper (the paper). It called for evidence on the use of restrictive covenants which prevent pubs from being used as such once they are sold, and the impact this has on local communities. The result of the consultation – *The use of restrictive covenants in the pub industry and their impact on local communities* – (which expired on 25 October) will be used by the government to assess whether further action needs to be taken, and that will be the subject of a detailed assessment, consultation and impact assessment.

The problem is that once pubs have closed down, restrictive covenants are being placed on it preventing it from being re-opened as such. Even where a community wants to continue the pub use, the covenant prevents that. There is no power to prevent such a covenant from being imposed under the present law.

Options for change

There are four options for change set out in the paper:

1. Bringing the pub within the list of community assets. If it is on that list and comes up for sale, the local authority would be able to prevent any covenant taking effect which would prevent the future use of the site as a pub.
2. To require the pub and brewing industry to regulate itself to outlaw the use of restrictive covenants on future pub use. Some organisations already adopt that policy, but others do not and do not wish to do so.
3. To impose a nationwide ban on the use of restrictive covenants preventing pub use following a sale.
4. To give local authorities the power to impose a local ban on restrictive covenants preventing future pub use.

Whichever option, or proposal is the subject of further consultation, it seems clear that any legislation preventing the imposition of restrictive covenants against future pub use will have to deal with the following issues:

(i) What initial factors will have to be satisfied before any decision is taken to prevent a restrictive covenant on any future pub use being applied? Who will have an interest in this question? The pub or brewery company may have an interest in managing its estate by local closures and improving its pubs that remain open. Who will weigh the views of that company against the local community and others? How will the relevant "interest" be defined?
(ii) How will compensation for the loss of the value of the right to impose the covenant be assessed?
(iii) What happens if the pub is sold free from any restriction, and later the new pub ceases trading and market changes mean that a pub restriction might be needed? Can the pub company apply to re-impose the covenant? What happens about compensation paid? Will the old covenant revive on a subsequent sale? (Compare overriding of covenants under s 237 of the Town & Country Planning Act 1990).
(iv) Rights under the Human Rights Act 1998 (HRA 1998) are mentioned briefly in the paper under option one (as is compensation) but complex issues arise. If the pub company has the benefit of the covenant, any scheme whereby that right is taken away must be HRA 1998 compliant.

Curiouser and curiouser

It is curious that it seems that the Law Commission was not consulted prior to the paper's publication, barely two months after the former published its report and draft bill in June 2011 on the reform of covenants. It is also curious that the paper came less than six months after the lifting in April of the exclusion from completion law of land agreements. The paper refers to that event, but makes no mention of the apparent conflict between competition law and the potential distortion of competition caused by the inability to impose covenants over land against pub use, which the pub and brewery industry might perceive.

Finally, those of us who advise on restrictive covenant law may want to keep an eye on proposed changes in the future in this area, and be alert to our clients' interests, whether as pub or brewery companies, or as member of local communities.

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No mistake; no rectification

No rectification is available where the commercial purpose was clear, but unfavourable to a party's interests, the High Court has ruled

The High Court has refused to rectify a lease to allow for assignment to a group company regardless of covenant strength where there was no evidence of common or unilateral mistake. The commercial purpose of the provision was clear, and there was no evidence of either common mistake or of a unilateral mistake of which the benefiting party took advantage.

The ruling in *KS Victoria v House of Fraser* [2011] EWHC 3179 (Ch) is the latest part of the continuing dispute concerning the ability of a company with an insubstantial tenant covenant to negate the effect of an agreement that would allow its landlord to insist on assignment to a tenant of sufficient financial strength. Having lost in the Court of Appeal on the construction of the relevant provisions, the tenant sought permission to rectify them.

The agreement

The agreement provided for the grant of a lease to a tenant of poor covenant strength, provided that there would be a further assignment to a company with the financial means to meet the tenant's obligations under the lease. In default of agreement on the identity of the new tenant, the landlord reserved the right to insist on assignment to a named company (Stores). The agreement also required there to be a parent company guarantee both before and after the assignment. A provision in the lease permitted the tenant, or any group company, to assign to another group company without consent provided that the parent company acted as guarantor (group assignment provision).

No action was taken to enforce the agreement while rents were being paid. However, in 2009 and early 2010 the tenant's group was in such financial difficulties that it threatened to reduce the rent payable under the lease to £1m per annum, and to rearrange the group's assets so that the companies responsible for payment were shell companies. This prompted the landlord, with the advice of new solicitors, to look more closely at the provisions of the agreement and the lease, and in May 2010 the landlord sought specific performance of the agreement to assign the lease to Stores.

Stores resisted the claim for specific performance on a number of grounds, including "futility" as under the group assignment provision any assignment to Stores could immediately be undone by a reassignment to the insubstantial tenant, resulting in the loss of the parent company guarantee. The tenant argued that the other conditions in the lease to be satisfied on any assignment (eg, relating to the financial standing of the assignee) did not apply to an assignment under the group assignment provision. The landlord sought and obtained an interim and then a final injunction to prevent such an assignment and re-assignment. The Court of Appeal confirmed that the conditions on assignment were cumulative. The group assignment clause meant only that consent was not required. The financial comfort conditions still applied. Any other interpretation made "commercial nonsense".

Having failed in their contention that the clause in the agreement requiring assignment to a sufficiently strong covenant was void and their argument on the construction of the lease so that the group assignment provision should be construed on a stand-alone basis, the tenants sought rectification of the lease, alleging common or unilateral mistake (and, if a unilateral mistake was made, that the landlord had used it to

advantage). The alleged mistake was that the group assignment provision was intended to operate independently of the remainder of the assignment provisions. Those arguments were rejected.

No abuse of process

However, the judge held that there was no abuse of process. Counsel "frankly conceded" that the arguments on rectification, *res judicata* and estoppel by convention only occurred to the tenants after their defeat in the Court of Appeal. The judge noted that as a matter of case management, the court will often decide a question of construction before hearing a related rectification claim, because evidence concerning the course of negotiations and the parties' subjective intention is irrelevant to construction, but possibly relevant to rectification. The tenant's argument failed on the facts, but that was no abuse of process.

Malcolm Dowden

Into the breach

Damages for breach of a post-completion obligation in a contract should be for the losses flowing from the breach, not to restore the buyer to the position he would have been in if the contract had never been entered into

The term "rescission" is used to describe two different remedies:

- rescission *ab initio*, and
- rescission for breach.

Rescission "*ab initio*" is where the contract is treated as if it never existed. This remedy is available: where the contract was entered into on the basis of a common/mutual mistake; or where a misrepresentation by one party induced the other to enter into it.

Rescission for breach is more accurately "discharge by breach". It is available where one party "accepts" the other's repudiatory breach. A repudiatory breach is where a party fails or refuses to perform an essential or fundamental term of the contract and is taken to have decided to set the contract aside.

In the case of an accepted repudiatory breach the contract has come into existence, but has been put to an end or discharged. Both parties are discharged from further performance of the contract.

In *Howard-Jones v Tate* [2011] All ER (D) 178 (Nov), it was a condition of a sale contract that the seller, Tate, would, within six months of completion, arrange for a separately metered mains water and electricity supply to the property. The judge below held that Tate's breaches went to the root of the contract. Howard-Jones was not entitled to rescind the contract *ab initio*, but Tate was liable for damages.

The Court of Appeal held that the judge had been correct that Tate's breaches did not entitle the buyer, Howard-Jones, to rescind the contract *ab initio*, but had erred in his approach to damages. However, the appeal judges differed slightly in their analysis insofar as the breach related to a post-completion obligation.

Discharge by breach

Kitchin LJ confirmed that Tate was not in breach of his obligation until six months after completion. Upon the breach, which it was accepted for the purposes of the appeal went to the root of the contract, Howard-Jones became entitled to treat himself as discharged. He was then no longer bound to accept the further performance by Tate of his obligations and, following *Photo Productions v Securicor Transport* [1980] 1 All ER 556, there was substituted a secondary obligation on Tate to pay monetary compensation to Howard-Jones for the losses he had sustained by reason of Tate's breaches of the contract.

Damages

Howard-Jones was not entitled to recover all the monies he had paid under the contract unless he could say that the consideration for his payment had wholly failed. He had not sought to do so, nor could he properly have done so. He had used the property which plainly had some value and he could arrange for the services to be installed himself.

The losses suffered by Howard-Jones were primarily the costs of having the services installed within a reasonable time after acceptance of Tate's repudiation and any other losses suffered as a result of the services not being installed in due time. The judge had been wrong in approaching damages on the basis of putting Howard-Jones back into the position he would have been in had the contract never been entered into.

The appeal was allowed and the matter referred back to the county court for damages to be re-assessed.

Post-completion obligation

Lloyd LJ agreed but added some observations on the breach of post-completion obligations. He thought it questionable that a contract can be discharged retrospectively after completion, on the ground of the seller's fundamental breach of contract. Rescission *ab initio* is a remedy which undoes what has already been done. However, discharge for breach on the basis of accepting a repudiation of the contract can only operate prospectively. All the references in case law are to the plaintiff being entitled "to treat the contract as at an end" and of being "discharged from further performance of the contract". The damages here were those that flowed from the services not being connected and, in principle, ought to be the same as if Howard-Jones had been let down by a contractor independently of the property's sale.

Lloyd LJ confirmed that it was "unnecessary to decide the point" as Kitchin LJ had pointed out that a post-completion breach could not justify either setting aside what had been done or awarding damages to Howard-Jones on an equivalent basis.

However, while Kitchin LJ did refer to this being a case where Tate failed to comply with a post-completion obligation, he did appear to proceed on the basis that this was a case of discharge by breach. He referred to Howard-Jones as "treating himself as being discharged" and that he had been entitled to and did elect to "treat the contract as at an end".

It may be that the end result in terms of losses, and so damages, is the same. However, the decision does not appear to provide any further clarity on whether a contract can be discharged for a repudiatory breach post-completion or whether the remedy is simply damages for breach of a continuing obligation under the contract. (See *Case digests*, p6).

Joanna Bhatia

Access allowed

A tenant could not dictate the identity of the landlord's agent who was permitted, under the lease, to enter to examine the state and condition of the premises. The individual in question was properly an agent for the landlord and so the tenant had to permit him entry to inspect

A landlord of a long lease of a dwelling cannot serve a s 146 notice (under the Law of Property Act 1925) in respect of a breach of covenant by the tenant unless, among other matters, the Leasehold Valuation Tribunal (LVT) has finally determined that a breach has occurred.

In *Beaufort Park Residents Management v Sabahipour* [2011] UKUT 436 (LC), the landlord management company applied for a determination that the tenant, Mr Sabahipour, was in breach of his lease.

Mr Sabahipour complained of a leak that he wanted fixed. The landlord wanted to inspect it through its agent Mr O'Brien. Due to personal difficulties with Mr O'Brien, Mr Sabahipour would not allow him entry, but would allow entry to any other qualified agent.

Entitled to access

The Upper Tribunal (Lands Chamber) held that Mr O'Brien was entitled to access the premises to inspect the cause of the leak, but not for any other purpose.

The clause in the lease dealing with access was very widely worded. The tenant was obliged to permit the landlord, its surveyor or agents, with or without workmen, access to the premises to examine their state and condition. Mr Sabahipour could not dictate who carried out the inspection.

Mr O'Brien was secretary and director of the management company and had a management role dealing with day-to-day issues and emergencies, involving service charges, repairs and maintenance, He was paid an annual stipend for this work. He was clearly an agent for the management company and investigation of the pipes and potential cause of the leak was plainly an examination of the state and condition of the premises.

However, the tribunal declined to make a determination that Mr Sabahipour was in breach, which would permit the landlord to serve a s 146 notice. That would be a draconian step if Mr Sabahipour permitted Mr O'Brien access in light of the tribunal's decision. If Mr Sabahipour failed to give access, on reasonable notice, within six weeks, the landlord had permission to apply for a determination that there had been a breach.

Joanna Bhatia

Case digests

Howard-Jones v Tate
[2011] All ER (D) 178 (Nov); [2011] EWCA Civ 1330
24 November 2011

Contract – Condition – Breach – Effect – Right of other party to terminate contract – Claimant contracting to purchase property from defendant – Contract containing post-conveyance term to supply water and electricity – Defendant in breach by not supplying terms – Claimant issuing proceedings – Court finding claimant not entitled to recession ab initio *– Whether court erring in awarding claimant damages equivalent to putting claimant in pre-contract position*

The claimant agreed to purchase a warehouse and outbuildings (the property) from the defendant in 2007 for £140,000. Prior to the agreement, the property had been supplied with water and electricity from the farm on the defendant's land. The agreement contained a special condition that the defendant would, no later than six months after the completion date, arrange separately metered electricity and water supplies to the property. The defendant did not comply with his obligations by the relevant date. The claimant issued proceedings seeking rescission of the contract and/or damages. The county court found that the defendant had been in breach of his obligations. It found that the breaches went to the root of the contract as it rendered the property worthless for the purposes the claimant had intended to use it. It held that the claimant was not entitled to rescind the contract *ab initio*, but rather that the defendant was liable in damages. It found that the claimant was entitled to a return of the purchase price, although as a corollary of that, he had to re-convey the property to the defendant. Additionally, it held that the claimant had been entitled to recover, as consequential damages, his mortgage lender's survey fee, his solicitors' fees in respect of the purchase and mortgage of the property, his mortgage arrangement fees, accountant's fees, charges incurred for early redemption of the mortgages, mortgage interest payments, building insurance premium and council tax. In total, the defendant was ordered to pay a sum in excess of £190,000. The defendant appealed.

The defendant submitted that the judge had erred in that, notwithstanding that he found the claimant had not been entitled to rescind the contract, he had proceeded to assess damages on the basis that he had been.

The appeal would be allowed.

Applying established authorities, it was clear that the breaches of contract had not entitled the claimant to rescind the contract *ab initio*. On the breach of the post-completion obligation to provide water and electricity, the claimant became entitled to treat himself as discharged. After that time, he was no longer bound to accept the further performance by the defendant of his obligations, but he was not entitled to recover all the money he had paid under the contract unless he could say that the consideration for his payment had wholly failed. He was not able to do so. Accordingly, the judge had erred in his approach to the assessment of damages. He had sought to assess the cost of putting the claimant back into the position he would have been in had the contract never been entered into. In the circumstances, that was not a permissible approach.

Foxtons Ltd v O'Reardon and another [2011] All ER (D) 151 (Nov); [2011] EWHC 2946 (QB) 21 November 2011

Estate Agent – Commission – Entitlement – Claimant estate agent acting for defendant in sale of property – Sale being aborted – Whether commission payable

The claimant carried on business as an estate agent. The defendants were the freehold owners of the property and had retained the claimant to seek prospective purchasers for the property. On 19 June 2007, the retainer was agreed in writing in a document in a standard form used by the claimant. The standard form indicated that the claimant was being instructed on a sole agency basis at a commission of 2.5% plus VAT, and a note that the asking price of the property was to be £2,500,000. On about 20 July 2007, ML, a man introduced to the property through the claimant, offered to pay the sum of £3,300,000 to purchase it. The defendants accepted that offer, subject to contract. By a contract in writing dated 1 August 2007, ML, AK and JH agreed with the defendants to purchase the property unconditionally for the sum of £3,300,000. Following the exchange of the parts of the contract, under cover of a letter dated 2 August 2007, the claimant dispatched to the claimant's solicitors an invoice dated 1 August 2007 in the sum of £82,500 (that was 2.5% of £3,300,000) plus VAT at 17.5% of £14,437, making a total of £96,937. That sum was not paid by or on behalf of the defendants. A formal demand for payment was made by letter dated 21 October 2008 written to the defendants by the legal department of the claimant. By that letter payment was demanded within seven days. The sale of the property to ML, AK and JH did not proceed smoothly, and was aborted. Contracts for the sale of the property at a price of £1,800,000 were exchanged between the defendants and EL Ltd on 10 March 2011. The claimant issued proceedings claiming £96,937.

The defendants claimed it was an express term of the contract, agreed orally, that the purchaser to be introduced by the claimant had to be a "cash buyer". The claimant submitted that this seemed improbable.

The court ruled:

The evidence adduced on behalf of the claimant was to be preferred to that of the defendants. The alleged express term had not been agreed between the parties. It was thus immaterial whether, had it been agreed, it had been breached in the circumstances of this case.

Accordingly, there would be judgment for the claimant against the defendants in the sum of £96,937, together with interest at 2% above the base rate of HSBC as at 21 October 2008, such interest to be calculated from 18 November 2008 until the date of judgment.

Zarb and another v Parry and another [2011] All ER (D) 100 (Nov); [2011] EWCA Civ 1306 15 November 2011

Land – Adverse possession – Exclusive possession – Claimants' predecessor in title selling strip of land to defendants' predecessors in title – Claimants attempting to recover possession – Court finding transfer documents supporting claimants' right to strip – Court finding defendants acquiring right to strip by adverse possession – Whether court erring – Land Registration Act 2002, Sch 6, para 5(4).

In 1992, the previous owner of the claimants' property sold a portion of the garden to the defendants' predecessor in title, who occupied the adjoining property. The transaction was recorded in a transfer that contained a plan and a description. There was a hedge which the defendants' predecessor in title believed marked the limit of the southern boundary (the strip), and a post and wire fence by the hedge. The claimants acquired their property in 2000. They raised a dispute about the strip with the defendants' predecessors, but the defendants believed it to have been resolved by the time of their purchase. In 2002, the defendants purchased the property adjoining the claimants' property. They built a balcony on their house, which was partly on the strip. Later, the boundary dispute resurfaced. In 2007, the claimants entered the strip. They removed the post and wire fence, cut down an elderflower tree which had been used by the defendants to make elderflower champagne, and started to erect a new fence several feet inside the hedge. When they were interrupted by the defendants, the claimants abandoned the attempt. In 2008, the parties jointly instructed a surveyor, who concluded that the boundary of the strip had been the hedge. The claimants issued proceedings, contending that the boundary marked on the plan in the transfer was not that of the hedge, and that they were entitled to possession of the strip in accordance with the plan. The county court concluded that the plan supported the claimants' contentions, and that the hedge did not correctly mark the boundary. However, the judge held that the defendants were in adverse possession of, and had acquired the right to possession of, the strip.

The claimants submitted that: (i) the judge erred in rejecting their argument that the defendants' predecessors in title had been in possession of the strip with the claimants' predecessors' consent so that the possession had not been adverse; (ii) that the judge erred in holding that the defendants' adverse possession had not been interrupted by their attempt to fence off the strip in 2007, so that time had started running afresh; and (iii) that the defendants had not satisfied the requirement in para 5(4)(c) of Sch 6 to LRA 2002 that, throughout the past ten years, they reasonably believed they had owned the strip.

The appeal would be dismissed.

(1) The judge had been entitled to find that the claimants' predecessor had not consented to the use of the strip. The possession had therefore been adverse.

(2) If an adverse possessor lost exclusive physical control, his adverse possession would be interrupted and would end. Time would begin to run again. The paper title owner had the advantage in law that, to effect repossession of property, it would be sufficient to show that possession had been resumed for a short period of time. The adverse possessor would be, therefore, at risk of losing possession for a brief period of time, perhaps while he was out talking a walk or doing some shopping. The fact that the paper title owner could interrupt his possession in that way lent support to the view that the act of interruption had to be effective to bring the adverse possessor's exclusive possession to an end.

The claimants had not, in 2007, really retaken possession. Although they had embarked on an enterprise which would have involved their retaking possession of the strip, they had abandoned this. The cutting down of the tree had been little more than a spiteful act and was not one showing possession of the strip. Accordingly, the judge had been entitled to come to the conclusion on that issue that he had.

(3) The defendants' belief that they had ownership had been reasonable. When they purchased their property, the dispute was dormant. By 2007, the land had been in their and their predecessors' possession for over ten years.

Legislation update

Commission for Architecture and the Built Environment (Dissolution) Order 2012	**Enactment citation** SI 2012/Draft **Legislation affected** Greater London Authority Act 1999, Clean Neighbourhoods and Environment Act 2005 amended; SI 2006/1466 amended **Enabling power** Clean Neighbourhoods and Environment Act 2005, ss 90, 95(2)	Dissolves the Commission for Architecture and the Built Environment (CABE). Provides for the transfer of the property, rights and liabilities of CABE immediately before the dissolution date to the Secretary of State for Culture, Olympics, Media and Sport. Makes related provision for the preparation and audit of CABE's final accounts and the preparation of its final report.
Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2011	**Enactment citation** SI 2011/2741 **Commencement date** 21 December 2011 **Legislation affected** SI 2009/2263 amended **Enabling power** European Communities Act 1972, s 2(2)	Amend the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, SI 2009/2263 to ensure that recent changes made to the European rules on environmental impact assessments will be reflected in domestic legislation. They also insert a review clause into the domestic legislation and correct an omission.
Planning (Listed Buildings) (Amount of Fixed Penalty) (Scotland) Regulations 2011	**Enactment citation** SSI 2011/424 **Commencement date** 1 December 2011 **Enabling power** Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, ss 39A(5), (13)	Prescribe the increasing amounts of the penalty payable under a fixed penalty notice served under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, s 39A. There are three amounts – the initial £2,000 increasing to £3,500 in respect of a breach of the second listed building enforcement notice and then £5,000 in respect of the breach of a subsequent notice.
Crofting Commission (Elections) (Scotland) Regulations 2011	**Enactment citation** SSI 2011/Draft **Enabling power** Crofters (Scotland) Act 1993, Sch 1, para 7(1)	Set out the arrangements under which elections to the Crofting Commission are to be conducted. Allow for one vote per croft, for the registered tenant or owner-occupier crofter. Crofters not ordinarily resident on or within 16km of the croft will not be able to vote. There are to be six constituencies each to return one elected member using the alternative vote system.
Royal Parks and Other Open Spaces (Amendment) Regulations 2012	**Enactment citation** SI 2012/Draft **Legislation affected** SI 1997/1639 amended **Enabling power** Parks Regulation (Amendment) Act 1926, s 2(1)	Extend the coverage of the Royal Parks and Other Open Spaces Regulations 1997 to Canning Green, and to remove Abingdon Street Garden from the list of parks and open spaces in those regulations.