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NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Council homes to get a £1bn overhaul

Nearly £1bn has been earmarked to allow councils to bring sub-standard council homes up to scratch, the government has announced.

The cash – to be allocated to 41 councils over the next two years as part of the Decent Homes Programme – aims to bring over 86,000 homes up to a decent living standard. Improvements will include everything from fitting new roofs and windows, to updating kitchens or heating systems.

Housing minister, Mark Prisk, said the cash would help kick-start the economy, support local tradesmen and create new jobs.

Indeed, the government claimed, research by Nottingham Trent University has shown that every pound spent through Nottingham's Decent Homes Programme created £1.46 spend in the local economy (see www.homesandcommunities.co.uk/news/study-reveals-total-impact-decent-homes-tenants'-lives).

Prisk said: "By improving this country's council homes we will transform many families' lives for the better, bringing their living standards up to scratch ensuring that their home is the safe haven it is meant to be.

"But the benefits of the £1bn I've confirmed reach far beyond tenants themselves and into the local economy. With every pound spent on improvements boosting local business, creating new jobs and supporting local spending, I want to see councils realising the benefits of this cash as soon as possible."

SRA review to help cut the risk of mortgage fraud

The Solicitors Regulation Authority (SRA) is re-examining the draft conveyancing strategy it published in April 2011 to ensure it provides "appropriate support" to solicitors.

As part of a review of its strategy to help firms reduce the risk of mortgage fraud, the regulator is considering measures such as cutting the need for solicitors to hold client money in conveyancing transactions.

The review, which was launched following talks with the insurance industry, will see the SRA work with stakeholders such as the Law Society, the Council of Mortgage Lenders and the Land Registry. It will also compare its approach to that of other UK regulators and international practices.

Visits to 100 firms to look at the risks they face during conveyancing work have been completed and the feedback is currently being analysed.

Conveyancing has for years accounted for a high proportion of claims on both solicitors' insurance and the compensation fund, the SRA said, and been the subject of an unacceptable volume of complaints against the profession. While some claims arise from poor quality work, most are a result of weak risk management and compliance systems within the practice resulting in a failure to detect fraudulent activities or other dishonesty on the part of third parties or, indeed, within firms themselves.

The SRA's executive director for policy, Richard Collins, said: "It is clear that we need to continue to target resources on conveyancing – both to assist firms in managing their own risks and compliance and to identify and prevent dishonest behaviour; either by third parties seeking to use solicitors' firms for fraudulent transactions or by a small proportion of firms themselves.

"As a public interest regulator we need to ensure firms take seriously the risks in this area and establish good compliance and risk management systems so as to demonstrate an effective degree of internal control."

Panel selection decisions top conveyancing lawyers' threat list

Lenders' panel selection decisions represent the biggest threat to conveyancing lawyers over the next 12 months, according to a survey by property search provider Search Flow.

Competition stemming from the introduction of alternative business structures (ABSs), so far appears to have had little effect, with only 14% of the 108 conveyancing firms surveyed citing it as a threat to their businesses.

The struggling property market was also fairly low on the threat list (22%), while only 15% said they were concerned about the increasing costs of indemnity insurance.

Nearly a fifth (21%) said they would possibly or are definitely considering becoming an ABS in the next year, while nearly half said they had no plans to adapt their business because of ABSs. Meanwhile, 15% said they would increase their marketing spend and 10% plan to offer fixed fees.

SearchFlow's business development director, Richard Hinton, said: "Despite initial concerns as to the impact of the Legal Services Act, in terms of the licensing of new forms of legal practice to deliver legal services, it appears to have made little difference so far.

"Fears that it would undermine the quality of advice appear to be unfounded, and while it is still early days, the more immediate issues are panel management and the weak property market."

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In the market for fairness?

The High Court revisits the principles which govern the terms of new business tenancies when granted by court order under the Landlord and Tenant Act 1954, as ***Paul Stevenson*** *reports.*

TANFIELD CHAMBERS

On 12 September, the High Court handed down judgment in *Edwards & Walkden (Norfolk) Ltd & Or v The Mayor and Commonalty and Citizens of the City of London* [2012] EWHC 2527 (Ch) in which tenants of stalls, shops and offices at Smithfield Market in the City of London claimed new business tenancies to be granted at rents and on terms to be determined by the court under Pt II of the Landlord and Tenant Act 1954 (LTA 1954). There was no dispute that such tenancies should have the maximum 15-year term permitted under LTA 1954 nor that, in principle, the new tenancies should include a rent review clause.

Principally, the court had to consider whether rent should be fixed from the start of the tenancies and should be all-inclusive (including rent, service charge and uniform business rates for each unit) or whether there should be an exclusive rent with each tenant's contribution to services covered by a separate – variable – service charge.

The rationale behind each party's position was clear and related to the risk of future changes in market-related expenditure. If the service charge was determined and fixed by the court at the outset of the new tenancies, any excess would have to be borne by the City as landlord. If the service charge was variable – as the City contended that it should be – the tenants feared that they would be forced to bear the potentially large unforeseen costs of major expenditure which would be required to restore and repair the buildings, some of which are Victorian. The tenants accepted that the new leases ought to include payment to the City to cover the cost of maintaining the services supplied by the City which enabled them to comply with demanding health and safety regulations.

The City put forward the argument that a higher variable service charge element would give the tenants a greater economic incentive to run their businesses in a more efficient way and to cooperate with the City in the reduction of operating costs. In an attempt to mollify the tenants, the City also agreed that it would both instruct a neutral surveyor to identify any structural issues with the market and would defray any costs in putting the fabric in good repair.

Facts

The court heard detailed evidence about the history of the landlord and tenant relationship between tenants in various parts of Smithfield who had entered leases on a variety of dates. Put simply, the claim related to leases which had been negotiated on three different dates. It was not disputed that tenants tended to hold their tenancies for long periods.

The City's original model, as shown by leases dating back to the early 1980s, had provided for an exclusive rent and a variable service charge.

Due to anticipated major redevelopment work, however, supplementary agreements had been entered which fixed a combined rent and service charge. Although anticipated to be temporary, the dispute between the parties as to the appropriate form of lease had continued throughout the 1990s.

By the time of the current applications, some leases at Smithfield operated on the basis of a fixed rent, while in other cases, temporary periods during which an all-inclusive rent was due had ended and those leases had reverted to the rent and variable service charge model. The court accepted that some leases had simply "parked" the debate about the appropriate service charge model and it needed to be resolved.

It was not disputed that the City's expenditure was weighted more towards the day-to-day costs of running the market, such as the provision of maintenance, cleaning and security staff, than to the repair of the market. The court also heard that some tenants used different services to others. Some, for example, required the use of specialist chilling systems, while others did not.

It was also not disputed that the City had run the market for "many years" at a loss in the order of £1m to £1.5m per year.

Law

There was no debate between the parties under s 26 or s 33 of LTA 1954, since the City agreed that the court should order the grant of new tenancies and accepted that the term should be 15 years.

Germane to this claim was the application of s 34(1) of LTA 1954 which provides that the rent payable under a new tenancy, if not agreed by the parties, "may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor".

The court was satisfied that s 34(1) presupposes that the terms of the tenancy have to be known because the amount of the rent will depend on the package of rights and obligations under the agreement.

By way of s 35(1) of LTA 1954, the terms of the tenancy are, in default of agreement, such as may be determined by the court and the court "…shall have regard to the terms of the current tenancy and to all relevant circumstances".

The court's starting point was *O'May v City of London Real Property Co Ltd.* [1983] 2 AC 726, in which Lord Hailsham set out three general propositions [at 740D-741D]:

i. Parliament did not intend to protect tenants from the operation of market forces in the determination of rent;
ii. unlike rent, the other terms of the tenancy are to be determined by the court, not the market, with an "almost exclusive discretion"; and
iii. in deciding the terms of the tenancy, the court must start under s 34(1) of LTA 1954 by "having regard to" the terms of the current tenancy.

As to that latter point, Lord Hailsham argued that s 34 is not intended to bind parties to the terms of the current tenancy but the burden of persuading the court to depart from those terms must rest on the party proposing the change and the change must "…in the circumstances of the case, be fair and reasonable, and should take into account…the comparatively weak negotiating position of a sitting tenant seeking renewal".

Lord Hailsham went further and said there must be "…a good reason based…on essential fairness for the court to impose a new term not in the current lease by either party on the other against his will". Subject to that, the discretion of the court is of the "widest possible kind" having regard to the "almost infinitely varying circumstances" of individual leases. Where there is a risk of fluctuation as to the cost of maintenance the risk ought, *prima facie*, to lie where the current lease provides.

Lord Wilberforce added a gloss [at 747D-H], with which Sales J apparently agreed, that the party seeking to impose new terms must rely on "strong and cogent evidence".

The legislation is not, however, intended to "petrify" the terms of the lease, and in an appropriate situation, the court might introduce new terms into a lease, such as a break clause: see *Adams v Green* (1978) 247 EG 49.

That said, it was the court's view that, generally, its discretion should not change the "basic parameters of the commercial arrangement" in question.

Expert evidence

Of further interest was the court's treatment of the impact of current market conditions. Sales J invoked *dicta* of Sachs LJ in *Hyams v Titan Properties Ltd* (1972) 24 P & CR 359, who suggested that questions related to market conditions and their impact on expenditure on services should be separated from the rent. Effective and clear expert evidence is essential in any case where market conditions are in issue. Note, however, Sales J's cautionary complaint regarding the partisan evidence in this case, given that the surveyors had been closely involved in pre-litigation negotiations.

Conclusions

Sales J was satisfied that the City had shown "good and sufficient" reasons to justify a change. Apparently crucial was the agreement between the parties that the City should be able to recover all of its costs of maintaining and operating the market on an ongoing basis from its tenants. The question was how this would be achieved most fairly and accurately. The move between the different payment structures did not involve, Sales J found, a "substantial shift" in the parties' commercial arrangement. The court also found assistance in the history of dealing between the parties which reduced the weight to be placed on the existing leasehold arrangements.

Sales J recognised that this was an unusual case under s 35 and it clearly was. It should, however, be of interest in principle to any commercial landlord which lets to a large number of long-standing commercial tenants where service expenditure varies from year to year. It is clear that the court ought always to be guided by the "essential fairness" of the situation which will always be a matter of debate.

Paul Stevenson
Barrister
Tanfield Chambers

Practical magic

The "statutory magic" of registration under the Land Registration Act 2002 has been tested again in a recent case. ***David Lytton*** *and* ***Emma Pinkerton*** *assess whether the spell remains unbroken.*

In *Metin Hussein v Clydesdale Bank plc* [2012] (Unreported), Mr Hussein brought a claim in restitution against Clydesdale Bank seeking the return of monies paid on redemption of a legal charge. He alleged that the charge was a forgery and adduced expert evidence from a leading graphologist to the effect that the signature on the charge was not that of Mr Hussein.

The bank's position was that, on the facts, the allegation of forgery was so improbable that it could be disbelieved. However, the bank submitted that even if the court was to accept that the legal charge was indeed a forgery, Mr Hussein's claim was still bound to fail. These submissions were supported by reliance on a number of legal and equitable doctrines, including estoppel by deed, estoppel by representation and the effect of registration of a legal charge pursuant to s 51 of the Land Registration Act 2002 (LRA 2002).

Mr Hussein's claims against the bank were predicated on the assertion that he was under no obligation to pay any monies over to the bank, despite acknowledging that he was obliged to grant the charge. He argued that, because of his "mistake" (ie, the payment of monies on redemption in the mistaken belief in the validity of the charge), he was entitled to the return of the monies he paid to the bank.

However, Mr Hussein's argument ignored the effect of registration of the charge.

Statutory Magic

The wording of s 51 of LRA 2002 provides:

> *"On completion of the relevant registration requirements, a charge created by means of a registrable disposition of a registered estate has effect, if it would not otherwise do so, as a charge by way of legal mortgage."*

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

The bank submitted that, even if the charge was indeed a forgery:

(a) From the moment the charge was registered at HM Land Registry it took effect as a charge by way of legal mortgage, even if it would not otherwise have done so;

(b) The bank was therefore entitled, as a matter of law, to insist on the charge being redeemed out of the proceeds of sale unless and until the register was rectified by court order (following *Commercial Acceptances v Shaikh* (ChD, Unreported, 22 June 2001));

(c) Mr Hussein had not applied for rectification, but as rectification is a discretionary remedy, it does not necessarily follow that rectification would be ordered. For example, in *Commercial Acceptances v Shaikh*, the court declined to grant rectification to remove a forged charge from the register. As such, even if Mr Hussein had detected the "forgery" at the time of the sale, there is no guarantee that he would have been able to avoid the consequences of the charge and complete the sale without redeeming the charge;

(d) Therefore, any claim which is predicated on the bank having had no right to insist on the charge being redeemed out of the proceeds of sale was misconceived. Unless and until the register was rectified, the bank was perfectly entitled to insist on the legal charge being redeemed.

Magical application

In his judgment, Master Kay QC held that "the [bank] was properly entitled to receive the sums realised upon the sale of [the property]. Accordingly those sums were not received as unjustified profits…no such application [to rectify the register] was or had been made so that the situation at the time of the payment and at present is that the [bank] was entitled to receive payment pursuant upon the legal mortgage".

Mr Hussein's claim against the bank failed. In addition to finding that the bank was entitled to rely upon the legal charge unless and until the register was rectified, the master found that the bank had a complete defence to the claim against it by virtue of Mr Hussein's reference in a deed to the existence of the charge and which thus gave rise to an estoppel by deed. Further, Mr Hussein was estopped from denying the validity of the charge by virtue of other representations he had made, including in a separate facility document that the legal charge was an existing security. On those facts, what lessons can practitioners and lenders learn from Mr Hussein's mistakes?

- **Rely on the register:** the circumstances in which the register can be altered are set out in Sch 4 to LRA 2002, and further articulated in *HMLR's practice guide 39 on rectification and indemnity*. Ultimately, alterations (including rectification) can be ordered by the court or effected by the registrar on an application to HMLR to correct a mistake. If the court makes an order for rectification, it should be served on the registrar by making an application pursuant to r 127 of the Land Registration Rules 2003, and HMLR must give effect to the rectification.
- **Understand the application of the statutory magic:** certain commentators have questioned the future of the statutory magic of registration provided by LRA 2002 (see, eg, Timothy Polli's article "A kind of magic" in Vol 3, Issue 11 of *Property Law Newsletter* from November 2011). However, unless and until the law on point evolves, the statutory magic applies. Therefore, lenders should not shy away from relying on the effect of s 51 of LRA 2002. In *Commercial Acceptances v Shaikh*, despite the court concluding that the charge in that case was a forgery, the judge refused on the facts to order rectification, expressing that "the statutory magic has operated and the statutory spell should not be broken".
- **Cross-refer to your security:** mortgagors or borrowers often allege that charges are invalid because the signature on the charge is forged. Lenders can attract extra protections by ensuring the security relied upon is referred to expressly in the suite of documentation which is usually required to evidence and record the terms of the facilities provided, such that the factual and legal weight of any arguments as to the validity of any allegedly forged document can be lessened, if not avoided altogether;
- **Adopt effective checking procedures:** given that allegations of forgery are on the increase, there is no substitute for ensuring proper systems and controls are in place at the outset to confirm and ensure (to the extent practicable) that the requisite signatures have been given by the correct person. Not only will such procedures provide evidential benefit in the event of a subsequent challenge, it will also assist to protect advisors if subsequent questions are raised.

David Lytton and Emma Pinkerton
Senior associates, Dundas & Wilson LLP.

Section 106 agreements

A builder was entitled to a VAT refund in respect of work to convert farm buildings into residential premises and an office. A s 106 agreement did not prevent the separate use or disposal of the residential premises. The works were a zero-rated supply.

The supply of construction services (other than by an architect, a surveyor or other supervisor) and building materials in the course of the construction of a building which is:

- designed as a dwelling or a number of dwellings; or
- intended for use solely for a relevant residential or charitable purpose; or
- the conversion of a non-residential building (or part) to such a building;

is a zero-rated supply for VAT purposes (Value Added Tax Act 1994, Sch 8, Group 5, item 2).

Section 35 of the Value Added Tax Act 1994, puts do-it-yourself builders in the same position as commercial builders, allowing them to obtain a refund for VAT they incur in paying for building work that is not constructed in the course or furtherance of a business.

A building is designed as a dwelling or a number of dwellings where in relation to each dwelling:

- it consists of self-contained living accommodation;
- there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
- the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
- statutory planning consent has been granted in respect of the dwelling and its construction or conversion has been carried out in accordance with that consent.

In *Jones v The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 503 (TC), the First-tier Tribunal (Tax) held that Mr Jones was entitled to a refund under the DIY scheme for work to convert former agricultural buildings into a house and office. Under a s 106 agreement (see Town and Country Planning Act 1990 (TCPA 1990)), the previous owner of the land covenanted to bind the land:

- not to permit the occupation of the office other than by an occupier of the residential premises (the barn);
- not to sell lease or otherwise dispose of the barn separately from the office and vice versa.

The tribunal said the s 106 agreement did not restrict the residential use, lease or sale of the barn by Mr Jones. It held:

- Under TCPA 1990, s 106(1)(a), the s 106 agreement was enforceable against him only to the extent that it created obligations restricting the development or use of the land in any specified way.

- The council did not have power under s 106 to restrict any sale by a successor in title. The clause preventing separate disposal was not binding on Mr Jones, a successor in title.
- The clause restricting the use of the office to the occupier of the barn bound Mr Jones, under TCPA 1990, s 106(3)(b), but there was no positive obligation to occupy the office, which could be left empty. The barn could be used on its own perfectly lawfully and so the clause did not prohibit the separate use of the barn.

Joanna Bhatia

Declaration of dividend

The declaration of a dividend was capable, in principle, of being a secondary contract for the purposes of the SFLT sub-sale relief rules. However, the rules were not engaged as the dividend was unlawful.

SDLT sub-sale relief

Under the Finance Act 2003, ss 45-45A, a "transfer of rights" occurs where:

- there is an assignment, sub-sale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which an individual other than the original buyer becomes entitled to call for a conveyance; or
- a buyer under a contract to be completed by a third party assigns the contract.

The transfer of rights is not a land transaction, but a secondary contract is deemed to arise.

Vardy Properties v The Commissioner for Her Majesty's Revenue and Customs [2012] UKFTT 564 (TC) concerned an avoidance scheme for stamp duty land tax (SDLT) using the rules relating to sub-sale relief (apparently one of the earliest such appeals to reach the First-tier (Tax) Tribunal).

Vardy Properties structured a property acquisition to avoid what would otherwise have been a 4% charge to SDLT on a purchase price of £7,250,000 (£290,000). However, the SDLT at stake in all the transactions in which this scheme (or some variant of it) was used was circa £100m.

The scheme

Instead of A (seller) and C (buyer) entering into a direct contract followed by a direct transfer from A to C, C incorporates a new unlimited company (B) to acquire the property from A. The contract for the property purchase is entered into between A and B.

Before that contract is entered into, C subscribes a cash sum slightly larger than the property purchase price for newly issued ordinary shares in B, its wholly owned subsidiary. After B has entered into the contract to purchase the property, it reduces its share capital to a nominal amount by a special resolution. Being an unlimited company, it requires no sanction from the court or further formalities to permit this. The resolution is passed by C and its nominee (which between them own all of B's issued share capital).

The amount by which B's capital is reduced becomes an unspecified reserve of B which, as a matter of company law, is distributable. That amount is slightly more than the purchase price of the property which B has contracted to pay to A. B then declares, by ordinary resolution, a final dividend in specie of the property which it has contracted to acquire in favour of C, to be made when B itself acquires the property from A.

In due course, the contract between A and B is completed by a transfer from A to B. B uses the cash it had received from C for the share subscription to fund its payment of the purchase price. Immediately afterwards, a transfer from B to C is completed, the consideration for that transfer being expressed to be nil, as the transfer was made gratuitously pursuant to the dividend in specie which had already been declared by B.

Declaration of the dividend – "other transaction"?

The First-tier Tribunal (Tax) held that, in principle, the declaration of the dividend was an "other transaction" for the purposes of the sub-sale rules. It did not matter that the declaration lacked consensual multipartite character.

Nature/timing of entitlement to call for conveyance

The tribunal held that C was entitled to call for a conveyance for the purposes of the sub-sale rules. There was nothing in the wording or the overall scheme of the legislation which requires the "transferee of rights" to hold an immediate and/or unconditional entitlement to call for a conveyance as a result of the "transaction" in question. That would require the tribunal to read extra words into the legislation.

The legislation simply requires a "transaction as a result of which" the third party's entitlement to a conveyance arises. The transaction was the declaration of the dividend. It took place when the sale contract between A and B was still uncompleted. Once B had completed the purchase of the property from A, C was entitled to call for a conveyance to it of the property. That entitlement arose as a result of the earlier declaration of the dividend. The fact that it was less than an unconditional and/or immediate entitlement immediately before B completed its purchase from A was irrelevant.

No entitlement

The tribunal held that the sub-sale rules were not engaged. B had failed to produce initial accounts which meant the lawfulness of the dividend could not be tested by reference to those accounts, as required. This meant the dividend was prohibited by the legislation and C could not be said to have been entitled to call for a conveyance of the property at any time.

Position if the sub-sale rules had applied

Under the Finance Act 2003, ss 45(3), 45A, the chargeable consideration for the secondary contract is the amount given:

- directly or indirectly;
- by the transferee under the transfer of rights ("transferee") or a connected person;
- under the original contract as relates to the transfer of rights ("limb 1"); plus
- any additional consideration for the transfer of rights ("limb 2").

Substantial performance/ completion of the original contract is ignored if it occurs:

- at the same time as; and
- in connection with substantial

performance or completion of the secondary contract.

If the tribunal was wrong, it made the following findings on the basis that the sub-sale rules did apply:

Privity

The legislation operated to attribute the consideration to the notional secondary contract arising as a result of the declaration of the dividend. It did not matter that there was no contractual obligation in force between A and C. C could still indirectly give consideration that was due under the contract between A and B. That consideration was capable of being "referable to transfer of rights under limb 1". There was no requirement in the legislation (explicit or implicit) that the giving of any consideration by C must be pursuant to the original contract.

Indirect consideration

The consideration for the secondary contract under limb 1 was the entire £7.25m purchase price paid by B and funded by C. A pre-ordained scheme had been established in which C, at an early stage, provided the cash to B which would ultimately be used by B to pay A for the purchase of the property. When, as a result of a later step in the scheme, there was a transfer of rights which ultimately entitled C to call for a conveyance of the property, it could be said that A's purchase price, though it will be received from B, is "to be given indirectly" by C within the meaning of limb 1.

Purpose of payment

The fact that £7.4m was subscribed by C for shares in B did not prevent it (or the relevant part of it) from being regarded as also indirectly given as consideration for the purchase of the property. This was not a "reattribution" of consideration from one thing to another; it was a recognition that the direct payment of consideration for an immediate purpose may also amount to the indirect provision of consideration for another.

No direct consideration for transfer of rights

There should be no "double counting" of consideration; to the extent that any amount is brought into account under limb 1, the same amount cannot also be brought into account under limb 2.

However, if the tribunal was wrong and none of the purchase price paid to A for the property should be brought into account under limb 1, the tribunal was still required to consider whether any amount was chargeable under limb 2.

No consideration would have been attributed under the second limb. In contrast to limb 1, the legislation did not include any reference to consideration given "indirectly" for the transfer of rights. There was also nothing in the language of the section which displaced the general proposition that the declaration of a dividend is a gratuitous transaction, for which no consideration is given.

HMRC sub-sale consultation

HMRC considers that the rules relating to "sub-sale" relief from SDLT have been the subject of widespread abuse. It launched a consultation on proposing changes to the legislation which closed on 9 October 2012.

Joanna Bhatia

No compensation without compulsory purchase

The right to compensation for the value of an easement only came into play where there had been an acquisition under other statutory compulsory purchase provisions. As there had been no acquisition, the only compensation payable was for injurious affection in respect of the adverse effects on the remaining property.

The Town and Country Planning Act 1990, s 237(1), provides that the erection, construction or carrying out or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes is authorised by virtue of this section if it is done in accordance with planning permission.

Section 237(4) states that in respect of an interference or breach in pursuance of sub-s (1), compensation:

(a) is payable under ss 63 or 68 of Lands Clauses Consolidation Act 1845 (the 1845 Act) or under ss 7 or 10 of Compulsory Purchase Act 1965 (the 1965 Act); and

(b) shall be assessed in the same manner and subject to the same rules as in the case of other compensation under those sections in respect of injurious affection where:

(i) the compensation is to be estimated in connection with a purchase under those Acts; or

(ii) the injury arises from the execution of works on...land acquired under those Acts.

In *Holliday v Breckland District Council* [2012] UKUT 193 (LC), the tribunal dismissed a claim for compensation in respect of the value of an easement and held that compensation was only payable in respect of injurious affection (ie, the adverse effects on the remaining property). The aim of s 237(1) was to make lawful in relation to such development interference with an easement that would otherwise constitute a private nuisance. Subsection (4) made provision for the payment of compensation for such interference.

The two limbs of para (b) covered the two ways in which compensation for injurious affection in relation to a purchase/acquisition may be payable under the Acts. Section 237 only came into play where there had been no acquisition under the 1845/1965 Acts.

As the land across which the right existed was acquired by agreement by the compensating authority and no land was acquired from the claimant, ss 63 and 68 of the 1845 Act and s 7 of the 1965 Act did not apply. These provisions only applied where land had been taken from the landowner. Section 10 of the 1965 Act applied because this provision did not require the purchase of land. Section 10 provided for compensation in respect of injurious affection for the diminution in value of the land in consequence of the interference with the right of way by the works on the land over which the right of way existed. This could not include ransom value.

Jen Hawkins

Case digests

Edwards & Walkden (Norfolk) Ltd and others v Mayor and others
[2012] All ER (D) 76 (Sep)
12 September 2012

Landlord and tenant – Tenancy – Business premises – Claims made by claimant tenants at London market for new business tenancies to be granted at rents and on terms to be determined by court – Whether tenants entitled to have rents reduced on account of income received by landlord from commercial offices in market and car park – Whether rents to be fixed by court should be all-inclusive rent, consisting of maximum recoverable rent, service charge and uniform business rates – Landlord and Tenant Act 1954, ss 24, 34, 35 – Metropolitan Meat and Poultry Markets Act 1860, ss 8, 9.

This case concerned claims made by the claimant tenants of stalls, shops and offices at a market in London for new business tenancies to be granted at rents and on terms to be determined by the court under ss 24, 34 and 35 of the Landlord and Tenant Act 1954 (LTA 1954). The defendant landlord was the Mayor and Commonalty and Citizens of the City of London. The market was a well-known and historic principal meat and poultry market in London. Three parts of the market were in issue: the east market, the west market and the poultry market. New commercial office accommodation was built above the parts of the east market and the west market occupied by the tenants, which the landlord let out to commercial tenants to generate rental income. There was also an extensive car park under the market, which was used by the tenants and the landlord but which was also open for the public to use in return for a charge. The tenants and the landlord agreed that new business tenancies fell to be granted to the tenants under LTA 1954 for a period of 15 years. They disagreed about other matters relevant to setting the rent and terms of the new tenancies to be awarded by the court. In particular, the landlord proposed that there should be a basic rent set together with a service charge varying from year to year to reflect the actual running costs of the market, divided up in an appropriate way between the tenants. The tenants proposed that there should be a simple rent with no service charge. There was no provision in any of the tenants' leases that the rent or service charge money which they paid to the landlord had itself to be treated by the landlord as funds to be spent directly on market purposes. The issues for consideration were: (i) whether the tenants were entitled to have their rents reduced on account of income received by the landlord from any part of the east and west market buildings and the poultry market building of the central markets in the City of London used for non-market purposes, including from the car park and offices let for non-market purposes, namely from the commercial offices let to commercial tenants; and (ii) whether the rents to be fixed by the court should be an all-inclusive rent, consisting of the maximum recoverable rent, service charge and uniform business rates for each unit, as under the existing leases or exclusive with the tenant's contribution to services covered by a separate service charge. In respect of issue (i), the tenants submitted that, by virtue of ss 8 and 9 of the Metropolitan Meat and Poultry Markets Act 1860 (MMPMA 1860), the landlord was obliged to bring the relevant part of the income it received from the commercial offices and the car park into account against the running costs of the market and so reduce the income which the landlord ought to be entitled to receive in the form of rent from the tenants when the court set the rent for the new tenancies. The tenants contended that the operation of ss 8 and 9 of MMPMA 1860 had the effect that the rents to be set in relation to the new tenancies under LTA 1954 should be lower. In respect of issue (ii), the tenants submitted that the best estimate of costs of maintaining and operating the market should be made at the instant time and an overall rental figure should be set by reference to those costs. The landlord submitted that there should be a lower rent element under the new tenancies, but a high variable service charge element which would be adjusted each year to cover the actual costs incurred by the landlord in maintaining and operating the market. That way, the tenants could bear the true operating costs properly attributable to running their businesses. Consideration was given to a plan of the market.

The court ruled:

(1) Tenants were not entitled to have their rents under the new tenancies reduced on account of income received by the landlord from letting any of the commercial offices or from the car park. The landlord was obliged by s 9 of MMPMA 1860 to use its income from the letting of the relevant part of the commercial premises, after deducting expenses, for the purposes of supporting the maintenance and operations of the market. The proper meaning and effect of ss 8 and 9 of MMPMA 1860 in a situation where the landlord built commercial offices within the relevant parts of the plan for the purpose of creating a source of income to support the operation of the market, and then leased them for a rent to achieve that end, was that the landlord remained bound to appropriate and use its remaining interest in the land for the purposes of the market. There was no provision in any of the tenants' leases that the rent or service charge money which they paid to the landlord had itself to be treated by the landlord as funds to be spent directly on market purposes. Nor was there any statutory limitation in MMPMA 1860 on the amount which the landlord could charge its tenants. There was no limitation in MMPMA 1860 as to which market purposes the income from the commercial offices and the car park should be spent on. It was open to the landlord to choose to spend that income on market purposes which were unrelated to the direct provision of services to tenants under the new tenancies. Accordingly, the landlord was not under any legal obligation to use the relevant commercial office and car park income for the benefit of the tenants to lower their rents. The existence of the obligations under MMPMA 1860 could not be taken to be a matter causing a lower rent to be agreed by a notional willing landlord and a notional willing tenant for the purposes of setting rent under s 34 of LTA 1954.

The answer to issue (i) was no.

It was settled law that the court should not generally exercise its discretion under s 35 of LTA 1954 to change the basic parameters of the commercial arrangement between landlord and tenant.

(2) In respect of issue (ii), the balance of justice and fairness was clearly in favour of adoption of the landlord's proposal for a variable service charge. Accordingly, the rents to be set under the new tenancies to be ordered by the court under LTA 1954 in relation to all the properties reviewed should be exclusive rents with the tenants' contribution to services covered by a separate service charge.

The preliminary issues would be resolved in favour of the landlord.

Legislation update

Town and Country Planning (Control of Advertisements) (England) (Amendment) Regulations 2012	**Enactment citation** SI 2012/2372 **Commencement date** 12 October 2012 **Legislation affected** SI 2007/783 amended **Enabling power** Town and Country Planning Act 1990, ss 220, 221, 333(1)	The Town and Country Planning (Control of Advertisements) (England) Regulations 2007, SI 2007/783, are amended. Changes include: ■ Widening the range of flags that can be displayed without local planning authority consent. ■ Relaxing the limitations on the size of characters and symbols on flags outside certain areas. ■ Permitting lag advertisements in the form of a flag attached to a flagstaff projecting from a building (other than vertically from the roof) or erected within the curtilage of a building. ■ Permitting the display of Blue Flag and Green Flag award schemes flags on appropriate sites.
Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2012	**Enactment citation** SI 2012/2395 **Commencement date** 1 November 2012 **Legislation affected** SI 2005/1868 amended **Enabling power** Finance Act 2004, ss 306(1)(a) and (b) and 318	These regulations alter the Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005, SI 2005/1868. The changes are being introduced in response to various Stamp Duty Land Tax (SDLT) avoidance schemes which currently sit outside of the disclosure requirements. They reflect the changes recently made to the SDLT and reduce the number of avoidance schemes which are exempt from disclosure. The changes have numerous effects, primarily: ■ Minimum thresholds below which avoidance arrangements did not have to be disclosed are to be removed. Increased attempts had been made to avoid the SDLT on low value transactions. ■ Arrangements made prior to 1 April 2010 are to be brought within the scope of the present disclosure requirements ■ Obsolete provisions are being removed from the schedule of excluded arrangements and new provisions are being introduced to bring the provisions in line with SDLT developments.
Localism Act 2011 (Commencement No 1) (England) Order 2012	**Enactment citation** SI 2012/2420 **Enabling power** Localism Act 2011, s 240(2)	Brings into force a range of provisions in the Localism Act 2011 concerning assets of community value from 21 September 2012. These include: • Placing a duty on local authorities in England to maintain a list of assets of community value. Listed assets will be removed from the list after five years (unless already removed) with a power to the appropriate authority (the secretary of state) to amend that period. The local authority can determine the form and content of the list, subject to any specific requirements set out in regulations. • Only including land on the list in response to a community nomination or where permitted in regulations made by the appropriate authority. It defines community nominations as nominations made by a parish council (in England) or a voluntary or community body with a local connection. • Providing for regulations to define voluntary and community body and set out the conditions for "local connection", to prescribe the contents of community nominations, and to set out procedures that local authorities will be required to follow in considering whether to list.