



MANCHES

LAND MARKS

LEGAL NOTES ON PROPERTY

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“The sun is shining. There does seem to be activity in the market. But every deal takes longer than expected. Something to do with the banks perhaps.

We were very pleased to welcome Siobhan Jones, head of our Property Litigation team as a partner on 1st July.”

Louis Manches

Real estate partners

Giles Clifford | Stephen Goldstraw (tax) | Joe Griffiths
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Siobhan Jones

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Can tenants be liable for acts of their subtenants?

Are tenants responsible for acts of their sub-tenant? That was the question at the heart of the recent case of **Roadside Group Ltd v Zara Commercial Ltd (2010)**. The case serves as a reminder of the importance of ensuring that tenant covenants are precisely drafted as the absence of key words may have a profound effect on the ability of the landlord to enforce the covenant.

This case centred on the right to park cars for sale on part of a site comprising a petrol filling station, car showroom and service garage. The landlord, Zara, granted a lease of the whole of the property to Roadside. Roadside traded from the petrol station and hardstanding, and granted a sublease of the car showroom and service garage to Triple Eight.

Roadside allowed Triple Eight to park cars for sale around the edge of the site. Zara claimed that this parking amounted to a breach of Roadside's covenant "... not to use the demised premises or any part thereof for the sale of motor vehicles by auction or for the parking of motor vehicles for sale on any forecourt". Zara purported to forfeit Roadside's lease accordingly (thereby also ending Triple Eight's sublease).

Zara argued that covenants affecting land are deemed to be given by the covenantor (in this case Roadside) and persons deriving under him (Triple Eight), unless a contrary intention is expressed. Zara's argument therefore was that both Roadside and Triple Eight were deemed to have covenanted with the landlord not to breach the parking clause.

Roadside defended the claim and itself claimed relief from forfeiture, arguing that all the restrictive covenants in the lease, *except* the covenant relating to parking, also required Roadside "not to permit" the relevant activity. As this wording was not applicable to the parking covenant, Roadside argued that this covenant could only be breached by Roadside itself. Thus the actions of Triple Eight could not amount to a breach by Roadside of the covenant.

Roadside's arguments were rejected by the judge at first instance who ruled that parking cars at the edge of the site did indeed breach the covenant. The judge agreed with the landlord's argument that the interpretation advanced by the tenant made no commercial sense. It was clear to him that the parties to the lease had intended that there should be no parking on the forecourt of cars for sale. Roadside was granted permission to appeal this point.

On appeal the High Court agreed with Roadside's interpretation of the covenant. The judge considered that the covenants had been defined with some care and the distinctions in wording were significant. He concluded that the precise wording of the parking covenant reflected the intention of the parties to limit the scope of that covenant. Roadside had not covenanted on behalf of

anyone except itself. The appeal succeeded and Roadside was not liable for the activities of Triple Eight.

It is worth noting however that the judge found that Triple Eight would be bound by the covenant in Roadside's lease in equity, so Zara was therefore able to bring proceedings against Triple Eight directly seeking an injunction requiring it to remove the offending cars.

Landlords should be aware that seemingly subtle differences in the wording of covenants can have a profound impact and should ensure that covenants not to do an act include an obligation not to permit or suffer the act to be done.

Subtenants should be aware of any restrictive covenants in their immediate landlord's lease, as they could inadvertently be liable for breach of those covenants in equity.

A developer who ignores rights of light does so at his peril

The recent case of **HKRUK II (CHC) Limited v Heaney (2010)** focused on the question of which remedy, injunction or damages, the court should award for the infringement of the right to light.

The Claimant (HKRUK) owned an office building which it planned to redevelop by adding additional floors. HKRUK and Mr Heaney entered into discussions about Mr Heaney's right to light, but did not reach an agreement. After the construction work was completed, HKRUK sought a declaration from the court that it was free from any liability towards Mr Heaney. Mr Heaney counter-claimed for an injunction requiring the removal of the offending floors or, in the alternative, damages. He was awarded an injunction, despite the fact that he had taken no steps to seek any remedy at all during the course of the redevelopment.

The judge considered whether damages should be substituted as the appropriate remedy in this case, using the criteria historically established in **Shelfer v City of London Electric Lighting Company (1895)**. In this case it was held that if a developer is to avoid an injunction:

- the injury to the adjoining owner's legal rights must be small;
- the injury must be capable of being estimated in money;
- the injury must be able to be adequately compensated by a small money payment; and
- the case must be one in which it would be oppressive to grant an injunction.

All four criteria need to be satisfied in order for an award of damages to be made in lieu of an injunction.

Although the loss of light affected less than 1% of Mr Heaney's building, the Judge was not prepared to say that the injury was small, ruling that the infringement to Mr Heaney's right to light was not trivial. The court held that the injury could not be compensated by a small monetary payment and did not think that an injunction would be oppressive.

Although it would be expensive for the additional storeys to be demolished, the judge was influenced by the fact that HKRUK proceeded to build with a view to realising a profit, knowing that they would be infringing Mr Heaney's rights. As far as Mr Heaney's failure to apply for the injunction at an earlier stage was concerned, the court considered that this was justified by the possible consequences of the onerous cross-undertaking that Mr Heaney would have been required to give.

The decision is a warning to developers to resolve any potential rights of light issues before commencing development as the risk of an injunction being granted after the development is built (and space within it let), is real. It is no longer safe simply to assume that a Court will only order damages after the event, (although the Court will continue to examine the criteria and principles in **Shelfer** which are not overridden by this case. The decision does however have implications for banks that fund such investments, those seeking to invest in buildings being subject to redevelopment, and potential tenants of such buildings.

A much anticipated appeal of this decision has now been settled by the parties. This leaves the decision at first instance intact and developers, and their advisors, will no doubt be wary of the fact that courts may uphold a tougher interpretation of the law relating to right of light.

JCT or NEC3 - Time for a Re-think?

With so many different standard form contracts available, we are perhaps spoilt for choice when it comes to choosing a construction or engineering contract for our projects.

Since its launch in 2005, NEC3 has not managed to knock the JCT suite of contracts off the top spot for construction contract of choice. NEC3 is however currently being used (reportedly successfully) on a number of high profile projects. It is also the preferred contract of central and local government.

Possibly one reason for the slow but steady shift towards NEC3 is the perception that NEC3 appears to result in fewer disputes. Evidence of this is the notable lack of court decisions relating to NEC contracts as compared with other standard contracts such as JCT, ICE, IChemE or GC/Works.

To get the most out of NEC3 it is necessary to abandon the traditional adversarial approach in favour of a more collaborative working style. It is this partnering ethos which underpins NEC3 entirely. In practice this translates as maintaining transparency and focussing intently on active management of risk and uncertainty by both employer and contractor. The following key differences may help you decide whether NEC3 is suitable:

JCT	NEC3
<ul style="list-style-type: none"> Focus is on delivery of project rather than dealing with claims as they arise 	<ul style="list-style-type: none"> Claims dealt with as they arise due to strict 8 week cut off period for notification of "compensation events"
<ul style="list-style-type: none"> Less "up front" costs during project but more expensive claims stored up 	<ul style="list-style-type: none"> More "up front" costs due to heavy administrative burden but less expensive claims later on
<ul style="list-style-type: none"> Allocating risks to one party 	<ul style="list-style-type: none"> Allocating risks to the party best able to manage the effect of the risk as and when it arises
<ul style="list-style-type: none"> Ignoring the implication of risks 	<ul style="list-style-type: none"> Open debate about creative ways to manage risks via early warning system and risk register
<ul style="list-style-type: none"> Recording progress as it happens 	<ul style="list-style-type: none"> Planning activities before they are carried out
<ul style="list-style-type: none"> Re-measurement usually at the end of the contract 	<ul style="list-style-type: none"> Accurate payment for work done on a regular basis
<ul style="list-style-type: none"> Leaving details of change to later 	<ul style="list-style-type: none"> Forecasting the effects of a change and agreeing on it before the change is undertaken
<ul style="list-style-type: none"> Only correcting defects as instructed 	<ul style="list-style-type: none"> Correcting defects whether notified or not
<ul style="list-style-type: none"> Specification is a technical document whose content does not dictate contractor's key contractual obligations 	<ul style="list-style-type: none"> Works Information is both technical and legal and must be competently prepared as it is inextricably linked with contractor's key obligations

Rather than offering a multitude of different contracts depending on the size and nature of the project, the NEC3 contract is just one contract with various pricing options depending on whether you want a lump sum, target cost, cost reimbursable or "cost plus fee" arrangement. There are optional secondary clauses which

deal with matters such as damages for delay, sectional completion, copyright and limiting of liability. Finally there is an option for the parties to add their own “Z” clauses allowing them to tailor the contract further.

Clearly, NEC3 has a lot going for it. A few words of warning though; firstly, educate yourself and your team on the NEC and its processes, perhaps by a pre-commencement joint workshop. Secondly, choose your project manager with care as the onus is on him proactively to manage and deal with the paperwork generated by early warning notices, quotations and so on. Open and continuous communications with the contractor throughout the project should reap the benefits in the long term.

Overage agreements can be so frustrating

If the performance of obligations in a contract becomes impossible or illegal (and the contract has not contemplated or provided for that happening) then the common law doctrine of frustration operates to terminate automatically those obligations in a contract.

This is what happened in the case of **Hildron Finance Ltd v Sunley Holdings Ltd (2010)**.

In 1986, Sunley Holdings Ltd (Sunley) sold the freehold interest in a block of flats to Hildron Finance Limited (Hildron). All flats in the block were let on long term leases, save for one flat which was occupied by a porter. The leases allowed the landlord (at its discretion) to employ a porter as a service to the tenants in the building. The parties foresaw that there may come a time when the landlord would no longer want to employ a porter but, instead, sell the flat. Accordingly, the contract for sale provided that if there came a time over the succeeding 21 years when the porter’s flat was no longer required as accommodation for a resident porter then it would be sold in the open market and the net sale proceeds split between Sunley and Hildron.

1993 saw the introduction of the **Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act)**, following which it became possible for a group of lessees to purchase the freehold of their block of flats.

In 2004 (subsequent to the 1993 Act) the tenants in the block collectively made a claim against Hildron to acquire the freehold interest in the building. In 2006, Hildron granted an assured shorthold tenancy of the porter’s flat to a non-employee, making it clear that it was no longer required as accommodation for a resident porter. The sale of the freehold interest in the building was then completed and, in that transaction, the value attributed to the porter’s flat was £200,000. Sunley claimed that it was

entitled to receive a proportion of the £200,000 under the overage provisions contained in the 1986 contract for sale.

Sunley’s claim failed both at first instance and on appeal. Since the tenants had made a claim to exercise collectively their right to enfranchise Hildron was, by virtue of the provisions of the 1993 Act, prevented from selling the porter’s flat in the open market. It would have been unlawful for it to do so. As such, the illegality of any sale of the porter’s flat in the open market brought about by a change in the law frustrated the overage provisions in the 1986 contract of sale.

It is always difficult to draft documents with the unexpected in mind. However, to try to avoid this type of problem happening again in the future, an overage provision should be drafted in such a way that makes it clear that its overwhelming purpose is to ensure that the seller is entitled to share any profit realised by the purchaser - however that profit is made.

Sale of Land and Issues Preventing Sub-sales

It is not uncommon for a buyer of land to seek to “sub-sell” prior to completion. Sellers are often resistant to this.

In the case of **Pittack v Naviede (2010)**, the parties exchanged contracts to buy and sell a leasehold property. Pittack (the buyer) subsequently agreed a sub-sale of the property; however the contracts for the sub-sale were never exchanged. The buyer decided that the sub-sale would be by way of a direct single transfer from Naviede (the seller) to the sub-purchaser. However Pittack failed to inform Naviede of this intention. On completion, Naviede refused to agree to this, claiming that he was not prepared to transfer the property to anyone other than Pittack (the contracting party). He relied upon Standard Condition (SC) 1.5 which prohibits the buyer from transferring the benefit of the contract.

SC 1.5 does not prohibit the transfer of the property to someone apart from the buyer at completion. Pittack argued that he was entitled, in absence of a provision to the contrary, to require Naviede to transfer the property to a third party of his choosing upon completion.

In addition, SC 8.3.3 provides that either party can rescind the contract unless the necessary licence to assign the lease is provided no later than three working days before completion. It is the seller’s obligation to provide the licence, although under SC 8.3.2 the buyer is required to provide all information and references reasonably required. The completion date in this case was 20th June 2008, so the requirement was to receive the licence by 16th June 2008.

Naviede failed to produce the necessary licence to assign in the timescale given. The freehold owner had not required any references, or any other information, from Pittack.

Pittack rescinded the contract on two counts. First, he treated Naviede's failure to complete the sub-sale as a repudiatory breach, and secondly, Naviede had not obtained the licence to assign by the required date. The court was asked to determine whether the contract was at an end.

The court found in favour of Pittack, holding that there is a clear distinction between transferring the benefit of a contract (prohibited by SC 1.5) and a direct transfer to a chosen third party. In the absence of an express provision forbidding a sub-sale, a buyer is entitled to require a seller to transfer the property to a sub-purchaser. Accordingly, sellers would be wise to include express provisions allowing the seller to refuse to transfer the property to anyone other than the buyer.

The licence to assign had not been provided by the date required. Consequently, Naviede was in breach and Pittack was entitled to rescind the contract on both counts. This gave him the right to the return of his deposit with interest. The court reached this decision "without a great deal of satisfaction", clearly feeling that Pittack's practice was a little sharp.

Another Good Harvest?

The courts have recently held that an authorised guarantee agreement (AGA) under which a sub-tenant's guarantor purported to guarantee an assignee's obligations was unenforceable (**Good Harvest Partnership LLP v Centaur Services LTD (2010)**). By requiring the guarantor to give a further guarantee on assignment, the parties fell foul of the automatic release provisions in section 24 of the Landlord and Tenant (Covenants) Act 1995 (the 1995 Act). The judge also indicated that other lease guarantee arrangements, such as the requirement of a parent company guarantee for intra-group assignments, were also probably unenforceable under the anti-avoidance provisions of section 25.

The case of **K/S Victoria Street v House of Fraser (Stores Management) Ltd and others (2010)** revisited some of the issues debated in **Good Harvest**. In January 2006, the landlord, K/S Victoria, granted a lease to one of the House of Fraser group companies, House of Fraser (Store Management) Ltd (HSFM). The tenant's obligations were guaranteed by its parent company, House of Fraser Limited (House of Fraser).

Under the agreement for lease, HSFM had agreed to assign the lease to another company within the group by April 2006, and House of Fraser had agreed to give a further guarantee in respect of the assignee's obligations under the lease. When the

assignment did not take place, the landlord brought proceedings seeking enforcement of HFSM's obligation to assign the lease, and of House of Fraser's agreement to guarantee the assignee's obligations.

Relying on the decision in **Good Harvest**, the defendant, House of Fraser, argued that the requirement for a further parent company guarantee of the assignee's obligations was void under section 25 of the 1995 Act as it frustrated the fundamental principle of the Act; namely limiting the former tenant's future liabilities. Conversely, K/S Victoria argued that **Good Harvest** had been wrongly decided and should not be applied.

The High Court ruled the facts of **House of Fraser** were not materially different to those in **Good Harvest**. The decision in **Good Harvest** was therefore applied and the agreement for lease was declared void to the extent that it required House of Fraser to provide a further guarantee, although the rest of the agreement remained enforceable.

It is clear that the only direct guarantees on which a landlord can now rely are those given by a current tenant's guarantor, or a former tenant under an AGA. Given that the strength of AGAs has effectively been undermined, pressure on landlords will certainly increase.

The decisions in **Good Harvest** and **House of Fraser** may create future difficulties for tenants and landlords alike, particularly in so far as inter-company arrangements and parent company repeat guarantees are concerned. Landlords who think they have the benefit of a parent company guarantee given as part of an intra-group assignment need to be aware that it is probably unenforceable. Likewise, tenants who have given this type of guarantee should take advice if the landlord tries to enforce it.

Suggestions have been made as to how companies might be able to organise commercial arrangements involving leases held within a group of companies in such a way as would avoid falling foul of section 25. One suggestion might be to assign a lease (under which a parent company had provided a guarantee) to the parent guarantor and new tenant (subsidiary) jointly. A further option could be to assign the lease to the parent guarantor and then assign again to the new tenant (subsidiary) with the parent then giving an AGA.

These arrangements have yet to be analysed by the court and no doubt advisors will sound a substantial note of caution to clients seeking to enter into these types of arrangements. Despite the measure of reluctance shown by the courts in giving the **Good Harvest** and **House of Fraser** judgments, the court will need to decide the question of whether the arrangement is ultimately in place to circumvent the anti-avoidance provisions of the Act. If the answer to that question is yes, then **Good Harvest** and **House of Fraser** will no doubt be followed unless a sympathetic judge is able to distinguish the facts.

Finally, a further point of interest relates to the enforceability of “sub-guarantees”, where a guarantor covenants (in the lease itself) to guarantee the original tenant’s obligations in the lease and its obligations under any future AGA the original tenant enters into (rather than purporting to guarantee the assignee’s obligations directly). In **Good Harvest** the High Court clearly acknowledged some uncertainty on this point but declined to rule on the issue. This point did not arise in **House of Fraser**.

At present sub-guarantees can arguably be distinguished from the type of guarantee which has fallen foul of the **Good Harvest** and **House of Fraser** decisions. Whether or not a sub-guarantee remains enforceable is a question left to be debated on another day. No doubt we will have the benefit of further decisions on all these issues in the not too distant future.

Can a landlord claim damages for nuisance?

The dispute in the case of **John Smith & Company (Edinburgh) Limited v Hill (2010)** concerned a six-storey building, the freehold of which was owned by a company in liquidation. The claimant (JS) held a long lease of the ground and basement of the building in question for a term of 999 years. The first and second defendants (X and Y) were the company’s administrators. The third defendant, (E) held a sublease of the ground floor and basement for a term of 30 years but was no longer in occupation.

Before becoming insolvent the freehold company had intended to redevelop the upper floors of the property and had erected scaffolding around the building for this purpose. Both JS’s lease, and the sub-lease, permitted the erection of scaffolding on condition that it be removed “as quickly as possible, causing as little nuisance as possible.” The scaffolding erected by the freeholder in fact remained in place for nearly a year.

E refused to pay its rent to its landlord, JS, arguing that the scaffolding constituted a breach of the covenant of quiet enjoyment and it was thwarting its attempts to assign the sublease. JS in turn brought a claim against E for the unpaid rent.

JS also brought a claim against X and Y claiming damages for nuisance and an indemnity in respect of any sum JS might be ordered to pay E.

Both JS and X and Y applied for summary judgment, leaving the judge to address two issues: (i) can a landlord bring a claim in respect of a temporary nuisance effecting only a reversionary interest ; and (ii) can administrators incur personal liability for a nuisance committed by the insolvent (freeholder) company.

On the first point the judge was required to contend with the established rule that a reversioner not in occupation cannot

sue in respect of a nuisance unless he can prove permanent damage to his reversionary interest. JS argued that the right to receive rent was a right which, if denied, caused lasting damage to the reversion. Such a loss, it was argued, permanently deprived JS of a valuable part of its rights under the reversionary interest. This claim, however, hinged on E having a valid set-off for damages against his liability to pay rent under the sublease. The judge made no ruling on summary judgment on the grounds that JS’s claim had a real prospect of success and should, therefore, proceed to trial.

On the second point the judge ruled that, given the limited facts, it was not possible to determine whether X and Y would be personally liable and decided this could only fairly be decided by a full trial.

While many of the facts of this case remained undecided, the judgment clearly caveats the general rule that a reversioner cannot sue for temporary nuisance. If loss of rent to a reversioner is interpreted as a permanent nuisance, then the scope for landlords to claim damages accordingly is greatly broadened.

When will the conduct of parties to a lease amount to a surrender?

A lease can be surrendered either expressly by way of deed, or by implication (by operation of law). The preferred method is of course by deed as the landlord and tenant’s intentions are clear and unequivocal. When surrender occurs by operation of law, the surrender is inferred from the conduct of the landlord and the tenant. The conduct must evidence a clear intention to hand back the leasehold property by the tenant, and a clear acceptance of this by the landlord. The combination of these acts will then extinguish the lease.

The recent case of **QFS Scaffolding Ltd V Sable (2010)** provides useful guidance when dealing with surrender by operation of law.

In this case, the landlord (Sable) let a builder’s yard (the Property) to London Demolition Company Limited (LDC) for a term of 21 years from August 2001 (the Lease). LDC used the builder’s yard for two businesses, a demolition business and a scaffolding business. In 2005, LDC encountered financial difficulties and, prior to the appointment of administrative receivers in January 2006, formed two separate companies one of which, QFS Scaffolding Limited (QFS) was to take over scaffolding business of LDC. During 2006, QFS commenced negotiations with Sable to take a new lease of the Property. QFS were in possession of the Property at the time of the negotiations and Sable, acting on its belief that the Lease had already been surrendered by operation of law, regarded QFS’s occupation as a tenancy at will.

QFS' negotiations with Sable proved unsuccessful, so QFS approached the administrative receivers of LDC seeking an assignment of the Lease. The Lease was duly assigned.

Meanwhile Sable sought to determine the tenancy at will and brought proceedings against QFS claiming possession of the Property arguing that LDC's Lease had been surrendered by operation of law. QFS defended the claim, contending that the Lease was not surrendered but had been validly assigned to QFS. At first instance the Court held that the Lease had been validly surrendered by operation of law and granted an order for possession against QFS. QFS appealed.

The Court of Appeal found in favour of QFS and held that they had taken a valid assignment of the Lease.

In reaching its decision the Court of Appeal set out guidelines which included the following points:

- There must be some act by the parties which is inconsistent with the continuance of the tenancy;
- The conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended;
- The circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ended;
- An agreement that the tenancy shall end which results in the tenant's quitting of the premises and the landlord taking possession will amount to a surrender by operation of law;
- Where the tenant requests the landlord to let the property to a third party, the lease is surrendered at the time of the new letting;

Even though LDC had vacated the Property, left QFS in the property, did not acknowledge any liability to pay the rent, and did not refer to the lease in their creditors report, this was not considered enough to constitute surrender.

QFS Scaffolding Ltd does not develop any new legal principles; however, it provides a useful illustration of the conduct required to infer surrender by operation of law. The case also emphasises the point that landlords will only achieve certainty by entering into a formal deed of surrender with the tenant.

What price for an underground trespass?

In the case of **Star Energy Weald Basin Limited v Bocardo SA (2010)**, the Supreme Court had to consider whether it was trespass for a company to drill for oil under land owned by another, and what compensation should be payable in the event that a trespass had occurred

Bocardo was the freeholder of the Oxted Estate in Surrey, under which lies part of the Palmers Wood Oil Field. Star Energy had a licence (under the Petroleum (Production) Act 1934) to search for and extract petroleum from that underground reservoir. It did so by sinking wells diagonally into the reservoir. The well heads were not on Bocardo's land. The wells ran 1000 to 3000 feet beneath Bocardo's land but did not affect the surface.

There is a medieval principle of law that an owner of soil also owns everything above it, up to heaven, and everything below it, down to hell. The Supreme Court applied that principle to hold that the owner of the surface also owns the strata beneath the surface, including the minerals there (unless those minerals have been alienated by conveyance, common law or statute). Bocardo did not own the petroleum - by the 1934 Act that belongs to the Crown - but it did own the subsurface strata through which the wells had been bored.

Star Energy had not negotiated any contractual licence or wayleave to drill through Bocardo's land, nor had it applied for any statutory right to do so. Drilling below Bocardo's land was, therefore, trespass.

How should damages for that trespass be assessed? The High Court had held that damages should be based on the income that Star Energy received from the extracted petroleum, awarding damages of over £600,000 accordingly.

The Court of Appeal, and the Supreme Court, disagreed. They held that Star Energy, as the holder of an extraction licence from the Crown, had a statutory right compulsorily to acquire a wayleave allowing extraction, for which it would have had to pay a "fair and reasonable" price.

The principles which apply to compulsory purchase of land include the "Pointe Gourde" principle, by which the calculation of compensation for compulsory acquisition must ignore "any increase in value which is entirely due to the scheme underlying the acquisition". The value of the development must be ignored. By analogy, the value of the oil had to be ignored. The wells themselves were much too far down to have any effect on Bocardo's land and caused no inconvenience to Bocardo. The Supreme Court awarded Bocardo nominal damages of £1,000.

The case reached the national press because Bocardo's land was the country seat of Mohammed Al Fayed. His response to the judgement was that it was outrageous for the Supreme Court to award "paltry damages" and that he would seek justice under the European Convention on Human Rights.

Planning - what next for Regional Strategies?

The case of **Cala Homes (South) Limited v Secretary of State for Communities and Local Government & Others (2010)** questions whether the government's intention to scrap regional strategies (RSs) as part of the Localism Bill can be taken into account by Local Planning Authorities (LPAs) as a material consideration when considering planning applications.

The Claimant, Cala Homes ("Cala"), had submitted a planning application to build 2,000 residential properties near Winchester. The application was unsuccessful and Cala appealed to the Secretary of State. The appeal was to take place in September 2010.

In May 2010 the Secretary of State wrote to all LPAs informing them to regard the proposed revocation of RSs as a material consideration when considering planning applications. In July 2010 the Secretary of State made a parliamentary statement revoking all RSs in place on 6 July 2010.

Cala, whose planning appeal was still to be heard, applied for judicial review of the parliamentary statement arguing that the Secretary of State had no authority to revoke RSs and that it was unlawful for Parliament to require that LPAs consider the government's intention to revoke RSs as a material consideration.

The High Court agreed with Cala and on 10 November 2010 held that the Secretary of State's parliamentary statement had been unlawful and that any revocation of RSs required legislation.

Also on 10 November 2010 the Secretary of State issued a further statement that LPAs should continue to regard the government's intention to revoke RSs as a material consideration when considering planning applications.

Cala applied again to the court, which directed that the effect of the Secretary of State's parliamentary statement, and further statement of 10 November 2010, should be stayed until further notice. The Secretary of State applied for the stay to be lifted and on 3 December 2010 the court accordingly held that the issues raised were of such importance that the stay should be lifted.

Meanwhile, on 19 November Cala issued a second claim for judicial review of the Secretary of State in relation to the statement and letter issued on 10 November. The grounds for Cala's claim was that the statement and letter were unlawful, irrational, and a

breach of the legislation concerning strategic environmental assessment. Cala again sought a declaration that it would be unlawful for LPAs to consider the government's intention when making planning decisions.

Cala's judicial review application failed and LPAs will need to consider the future revocation of RSs when making planning decisions. There is an argument that the court's decision does not in fact change the legal position as the weight of the material consideration is for each LPA to gauge in the circumstances of any particular application.

This will not be the last of the matter as Cala has embarked on an appeal of the court's decision. The appeal will be heard later this year.

Planning and the Budget

As a result of the recent Coalition budget, there will be a number of changes to the planning system. These are set out below.

1. There will be a new presumption in favour of sustainable development. However, there will continue to be protection of the Green Belt and Areas of Outstanding Natural Beauty. A draft wording of the presumption will be published for consultation in May 2011.
2. All national planning policies will be combined into one document to be entitled the National Planning Policy Framework. This will contain the Government's key economic, social and environmental objectives and the planning policies necessary to deliver them. The framework will echo the presumption in favour of sustainable development.
3. At present planning permission is required for a change of use from office to residential. The Coalition wishes to speed up the process of providing housing. It is anticipated that there will be amendments to the Use Classes Order to enable a change of use from commercial use such as offices, warehouses and business parks to residential in order to speed up the delivery of housing numbers. There will be a review of the Use Classes Order to examine the role the Use Classes system can play in supporting necessary growth.
4. In order to prioritise growth and jobs the Government has announced that it expects local authorities to press ahead with up to date development plans which set out the opportunities for growth in their areas. The Government has signalled that it expects local authorities to agree to review Section 106 agreements at the request of developers where projects have stalled.

5. The Government has announced that it is interested in testing the potential for land auctions in order to bring forward development at a pace. One of the main barriers to growth has been the lack of availability of land benefitting from planning permission. It is intended that surplus public land with planning permission will come forward for auction and it is intended to begin this process through a pilot scheme in order to test its potential for success. Government will also be testing the concept of “build now, pay later” as a technique to quicker delivery.
6. The Government intends, through the Localism Bill, to extend to businesses the right to initiate Neighbourhood Plans and Neighbourhood Development Orders which essentially are approved by a local referendum. If successful these will obviate the need for planning permission.
7. Local Planning Authorities have had their hands tied by targets affecting development on previously developed land. These targets have now been removed. However, there will remain strong policy protection for the Green Belt and Areas of Outstanding Natural Beauty.
8. The Government intends to simplify and speed up the planning application process. This will include a 12 month guarantee for the processing of all applications through to appeal. Such measures will be the subject of consultation.
9. The Localism Bill will place a new duty on local authorities to work together in order to bring forward development such as necessary infrastructure which impact across boundaries.
10. Applications for major infrastructure projects will be handled by the new Major Infrastructure Unit under the umbrella of the Planning Inspectorate. Applications will continue to be subject to the fast track system already in place but ultimately decisions will be taken by Ministers.

Watch out in future issues of Land Marks for comment on how these proposals work in practice!

Renewable Heat Incentive Regulations

The regulations establishing the Renewable Heat Incentive (“RHI”) have been published and likely to come into effect on 30th September 2011, encouraging the use of renewable heating technologies in buildings in the UK.

Nature of payments

The RHI consists of periodic payments made to the owners of installations for the generation of heat used in buildings to heat water or space, or for use in certain processes; and also in certain circumstances for the injection of biomethane into the gas grid. The scheme is administered by Ofgem; draft guidance is available on the Ofgem website (www.ofgem.gov.uk).

Payments run for 20 years from the date of accreditation of an installation, adjusted annually in line with RPI.

Payments are not yet available for any installation that serves just a single dwelling, although the intention is that such installations will become eligible from a later date. Payments are available for installations serving multiple domestic premises such as a block of flats, as well as those serving commercial or other non-domestic premises.

Tariffs are banded according to the technology used and the scale of the installation. In the case of solar collectors and biogas combustion, no tariff is payable for installations with a capacity of 200kW thermal or greater.

The government does not wish to subsidise wasted heat, so the regulations oblige participants not to generate heat for the overriding purpose of increasing their RHI payments. There are other measures to ensure that only useful heat is supported. For example, ‘building’ is defined as a structure that is wholly enclosed, other than doors or windows.

Eligible Technologies

The eligible technologies are solid biomass (including from municipal waste and biomass used in CHP); ground and water source heat pumps; deep geothermal; solar; biogas combustion (other than landfill gas) and biomethane injection to the gas grid.

Who is eligible for the payments?

RHI payments are due to the ‘owner’ of an installation. Unlike Feed-in Tariff payments, there is no mechanism to assign payments independently of ownership.

Detailed administrative provisions apply to changes in ownership, placing a very significant record-keeping burden on participants, and creating a trap for purchasers who do not check that information has been kept properly by the seller.

Accreditation and preliminary accreditation

Installations have to be accredited in order to qualify.

Applicants can seek preliminary accreditation once planning permission has been granted. Although this does not guarantee that accreditation will be given, this mechanism helps reduce development cost risk for applicants.

Relationship with grant

Installations will not be eligible if public grant has been or will be paid in respect of any costs of purchasing or installing the installation. If an installation was installed using public grant before the date of the regulations, eligibility can be protected by repayment of the grant before applying for accreditation.

There are no exceptions for 'de minimis' levels of grant.

Treatment of existing installations

Subject to additional requirements for CHP plants, existing installations are eligible if they were commissioned on or after 15 July 2009, and were new at the time of commissioning.

Obligations of RHI recipients

RHI imposes significant ongoing obligations on the recipients to maintain records and provide continuing information to Ofgem. These include, for example, records of the type of fuel used and the fuel purchased throughout the duration of the scheme and evidence of the maintenance of metering equipment.

Inspection and sanctions

Ofgem may request entry onto a participant's premises to verify eligibility, and can suspend future payments and recover overpayments where the regulations have been breached.

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