Welcome to this month’s edition of Hot Property.

We have an interesting round up of recent cases this month with an emphasis on easements. We also have a longer article on the NPPF and another planning related article about the issues that need to be addressed when dealing with large development sites. There is also a brief reminder about the VAT changes to alterations to listed buildings.

As always, if you have any queries relating to an article, please do not hesitate to contact the individual author.

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In trivial pursuit of an easement

A trivial interference with an easement is unlikely to be actionable, according to a recent High Court case concerning a collective enfranchisement claim.

The question arose as to whether the tenants of a residential property whose leases gave them the right to use the property's garden, could obtain an injunction to prevent the landlord from constructing two lightwells in the garden (or to require the landlord to remove them). In this case the primary objective of the easement to use the garden was for decorative enjoyment rather than any significant leisure activity, due to the garden's size. The court decided that the lightwells did not constitute a substantial or unreasonable interference with the tenants' easement. However, the digging of a trench as part of their construction was an actionable interference, as this was a decorative impairment. A successful claim for interference with an easement must rely on much more than a merely trivial interference.

Barrie House Freehold Ltd v Merie Bin Mahfouz Company (UK) Ltd (2012)

Use it (properly) or lose it

The facts of this case are quite extreme, but show the willingness of the court to go further than one might expect in dealing with excessive use of a private road.

The case involved the unlawful development of a traveller site, accessed by means of a private right of way. Use of this road was limited to agricultural purposes only.

The development resulted in increased use of the road by lorries, vans, trailers and construction traffic. A temporary stop notice issued by the planning authority to halt development and an interim injunction against use of the road for non-agricultural purposes, both went unheeded. Ashdale finally decided to take self-help measures and blocked the road with concrete blocks.

A court application was made by Ashdale seeking a declaration that its actions were lawful. The court took the pragmatic view that anything short of physically blocking the road would be ineffective and issued the
This decision was challenged in the Court of Appeal, but the declaration was upheld in its practical effect. The road could be blocked whilst the risk of non-agricultural use of the road continued to subsist or the court ordered otherwise, even if this also prevented proper use of the road.

_Maioriello and others v Ashdale Land and Property Company Ltd (2011)_

## Don't give away a right of way

If you are aware of someone using your land without your permission, you need to take action quickly to prevent them acquiring a prescriptive easement.

The land in this case was owned by the council and was used informally by a neighbour to gain access to his garage. The council offered the neighbour a licence for access outside of working hours, but the neighbour ignored the letter and continued to use the land. Years later the council tried to erect a fence and stop the neighbour using the land. It was held that as the neighbour had used the land for over 20 years he had acquired a prescriptive easement. This case acts as a reminder for landowners to be pro-active in managing their property, particularly where a prescriptive easement could have a significant impact on the value of the land.

To prevent this, landowners can:

- Refuse access to users periodically.
- Check the identity of users at regular intervals.
- Grant express permission for the continued use, for example by a licence.
- Where a licence includes provision for payment, demand payment of the licence fee.

_Keith Webb and another v Walsall Metropolitan Borough Council (2011)_

## Conditional break clauses: a tenant trap?

A somewhat harsh decision in a recent case reminds tenants that pre-conditions to a break clause require strict compliance, not substantial compliance.

The case looked at two of the pre-conditions to the break, which required compliance before expiry of the break notice:

- That a sum equal to six months’ annual rent had been paid to the landlord. This payment was rendered by cheque the day before the break date. In general, debts have to be settled by legal currency
(which does not include a cheque), unless this presumption can be displaced by a previous course of dealings. In this case, acceptance by the landlord of rent by cheque in the first three years of the term was sufficient to amount to an established course of dealings.

- That any payments under the lease due on or before the break date had been paid. The landlord successfully claimed that the tenant had not paid default interest in the sum of £130, which had accrued before the break date on late payments under the lease. It was no defence that this was only discovered after the termination date, no demand for these sums had been made, the break notice had been served correctly nor that the tenant had written to the landlord in advance of the break date to confirm it had complied with the pre-conditions to which no response had been received. The tenant now finds itself liable for £300,000 of additional rent.

Avocet Industrial Estates LLP v Merol Limited and another (2011)

Pylons prevail

Another recent case will be welcomed by electricity undertakers, but highlights some of the tensions in the topical debates around sustainable development and national infrastructure.

It involved an unsuccessful application for judicial review of a decision made by the Secretary of State pursuant to section 37 Electricity Act 1989 to allow seven new pylons to be erected, and to grant associated wayleaves over private land in the green belt. It was common ground that there was an urgent need to increase electricity supply in the locality.

The Secretary of State’s decision letter made it clear that the development was inappropriate for the green belt, but that the potential harm was outweighed by other factors, including the uncertain amount of delay and the additional costs which would result from any of the alternative proposals involving underground cabling. The judgment found that the Secretary of State had made his decision balancing the correct factors and reached a valid decision, even if he had differed from his own inspectors as to the amount of weight to be given to some of them.

Several technical grounds were rejected including two alleged breaches of the Human Rights Act 1998. In particular, the court found that the Secretary of State, in exercising his power under the Electricity Act to direct that planning permission for the pylons was deemed to be granted, had no duty to have regard to the local development plan.

For further information please contact Dwight Patten.
Village greens: a question of timing

Developers will be particularly interested in two recent Court of Appeal decisions, both of which concerned applications to rectify village green registrations under the Commons Act 1965. Both applicants were developers who had acquired the property after a number of years had elapsed since registration.

For the court to order rectification, it must consider not only that the original registration was erroneous but also that it is just to make the order. There are no time limits for making an application, but the Court held that there is a strong public interest in any application being made promptly. The register is a public document and is intended to be conclusive. The longer the delay in making an application, the less likely it will be that it will be just to order the register to be rectified.

The application in the Betterment case succeeded. It had been made just over four years after registration and the landowner had taken steps to make it clear that it objected to the public use of the land in the intervening period. However, the application in Paddico was dismissed; the delay had amounted to nearly thirteen years. There was nothing unjust in refusing the application: a property developer who takes a commercial risk in buying land and so “buys litigation” cannot complain of injustice if his speculation is unsuccessful.

*Taylor v Betterment Properties (Weymouth) Ltd (2012)* and *Adamson v Paddico (267) Ltd and others (2012)*

JCT update: naming names

After just four months, the JCT has introduced its first update to the 2011 form of building contract.

An employer is now able to identify an individual specialist to act as a domestic sub-contractor for specific parts of the work in the three standard form JCT building contracts, (ie, with quantities, without quantities and with approximate quantities).

The amendment can be incorporated into the building contract either by amending the contract document itself, or by attaching the update (downloadable free from the RIBA bookshop website) and referring to this within the provisions of the contract.

The update gives the contractor the right of reasonable objection in the case of replacement specialists and specialists named at a later date. If the contractor does object or the specialist becomes insolvent, the contractor is entitled to claim for an extension of time and any loss or expense claim that arises.

It is likely that employers' advisers will amend the update to remove the right to reasonable objection and place the risk of the specialist's insolvency...
on the contractor.

**Contaminated land regime: changes large and small**

The contaminated land regime, now 12 years old, has generated only a handful of legal cases, yet has radically altered the behaviour of those working in the property sector by its mere existence and the threat of its application. A number of changes are now afoot, in relation to what triggers clean-up when controlled waters are affected as well as new statutory guidance on what is, and isn't, "contaminated land".

To read Rebecca's longer article please click [here](#).

For further information please contact Rebecca Carriage.

**A partitioned approach to planning obligations**

A planning obligation binds the original landowner entering into the section 106 agreement in relation to all of the land affected, until that landowner has sold the whole of its interest in the whole of the relevant land. This can create problems on larger or more complex sites. One seldom-used solution is for the planning obligations to be partitioned up from the start.

To read Christine's longer article please click [here](#).

For further information please contact Christine de Ferrars Green.

**NPPF finally lands**

The National Planning Policy Framework (NPPF) was finally published on 28 March and came into effect immediately. Distilling previous policy guidance into a mere 50 or so pages, the document has running through it a "golden thread" of sustainable development.

To read Caroline's longer article please click [here](#).

Have you seen our plan-it law blog? Here you will find more commentary on NPPF as well as other topics including:

- non-retrospective effect of enforcement provisions under the Localism Act
- What's New in Planning from 6 April?

For further information please contact Caroline Bywater.
### Listed buildings: VAT changes on alterations

There were some surprises in this year’s Budget, including the removal of certain VAT “anomalies”. Although the “pasty tax” (ie, consolidating the VAT treatment of takeaway foods) generated the most headlines, there was also a change to the VAT treatment of alterations to listed buildings.

The Budget announced that the current VAT zero rating for building materials/construction services supplied in relation to approved alterations to listed residential or charitable use buildings, will be removed with effect from 1 October 2012 (subject to anti-forestalling provisions from now until that date). In future, these kinds of alterations to listed buildings will be subject to VAT at the standard rate rather than being zero rated. This may, for example, make a material difference to educational institutions undertaking works to their college buildings; charity landowners; famers altering their listed farmhouses; or anyone else contemplating alterations to a listed building.

Many of the taxpayers likely to be affected by this change are unlikely to be able to recover much of the VAT which becomes chargeable as a result of the change, so it is likely that the real overall cost of alterations to listed buildings will, in many cases, increase.

### Capital allowances: new restrictions on buyers’ claims for fixtures

New restrictions took effect from the start of April 2012 for buyers seeking to claim capital allowances on fixtures included in buildings acquired secondhand. Section 198 elections are now essential for buyers, who should focus more on capital allowances at the time of purchase to avoid missing out on potentially valuable tax reliefs.

To read Charlotte’s longer article please click here.

### SDLT: two Budget changes

The Government’s determination to crack down on what it perceives to be widespread SDLT avoidance was widely trailed before this year’s Budget. However, the severity of the new measures took some commentators by surprise.

To read Matthew’s longer article please click here.