

Hot Property

Updating you on property issues



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Welcome to the March edition of *Hot Property*. In this month's edition we have a number of articles relating to development and the pitfalls that can surround that. If you have any particular queries on any of the articles please do feel free to contact the author.

In this issue:

- [The purpose of a right of way](#)
- [Protect your property](#)
- [Well connected?](#)
- [Will you pay 10 per cent or 18 per cent capital gains tax when you dispose of your property?](#)
- [Taking a second bite of the arbitration cherry?](#)
- [Town and village greens - some thoughts on Defra's proposed consultation](#)
- [JCT project bank accounts](#)
- [Construction contracts - damages for delay](#)
- [Increase in rent threshold for assured shorthold tenancies](#)

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The purpose of a right of way

One of the most frequent legal questions that arises when deciding whether a piece of land can be developed is whether the rights of way to it will be sufficient to allow construction and then use of the development.

To read James' longer article, click [here](#).



For further information contact [James Falkner](#)

Protect your property

Fraud is on the increase and property owners need to be extra vigilant. There is one simple step that will help to ensure that owners know what is happening to their property. It often gets overlooked.

The Land Registry is urging property owners to keep their contact details up to date. The registry holds up to three addresses for the owner. Only one has to be a postal address and an email address can be included. The contact address is not necessarily the address of the property itself, particularly if the property is owned by a company or an organisation like an NHS trust.

Why does this matter? It enables the Land Registry to let the owner know when an application regarding the property is received.



For further information contact [Mark Flowers](#)

Take the situation of an owner encroaching onto neighbouring property and then seeking to become the registered proprietor of that part. When this happens, the Land Registry will contact the registered owner and give them the opportunity to object. This issue is of particular concern to owners who do not occupy themselves as if the warning is sent to an obsolete address, the opportunity to object may be lost.

It is easy to forget which addresses are on registered titles. If this is of concern, then the necessary checks and changes can be made.

Well connected?

In a recent case that will be of interest to developers, sewerage undertakers and local planning authorities, the Supreme Court looked at the nature and extent of the rights conferred by section 106 Water Industry Act 1991 to make connections to public sewers.

To read Katharine's longer article, click [here](#).



For further information contact [Katharine Pearson](#)

Will you pay 10 per cent or 18 per cent capital gains tax when you dispose of your property?

A recent case highlights the importance of how your property business is taxed. Property rents are usually taxed as investment income rather than trading income (unless the landlord provides significant services beyond those which a landlord would normally provide). As this case demonstrates, this distinction can be very important when your rental property is sold.

The taxpayers owned a property that was let as furnished bedsits. HMRC had (allegedly) given prior guidance that because of the services the taxpayers performed, their letting business amounted to a trade. Accordingly, when they sold the property, they claimed the highest rate of CGT taper relief (only available for assets used for the purposes of a trade).

HMRC denied the relief, and the tribunal upheld this decision. The activities of the taxpayers were not sufficient to comprise a trade - so only a lower taper relief was available.

Taper relief has now been abolished. However, its replacement - entrepreneurs' relief - also only applies to the disposal of assets which were used in a trade. Individuals and trusts who benefit from the relief only pay CGT at 10 per cent rather than 18 per cent. How much CGT will you pay on the disposal of your property?

Jones & another v HMRC (2009)



For further information contact [Matthew Short](#)

Taking a second bite of the arbitration cherry?

Another recent case highlights the importance of ensuring that matters to be decided in an arbitration are clearly identified. Anything that is to be left for future reconciliation should be identified as such. Pleadings and submissions should ask for jurisdiction to be reserved on any future claims.

The case involved the assignment of an underlease. The tenant applied for consent to assign. After eight weeks, the landlord intimated it would not grant consent. The tenant considered this an unreasonable delay and suggested the parties resolve the dispute through arbitration.

When asked to consider whether or not the landlord's decision to refuse consent was reasonable, the arbitrator ruled in favour of the landlord.

However, the tenant sought to assign without consent on the basis of an unreasonable delay in the time the landlord had taken to reach its decision. The landlord obtained an injunction. The court would not lift the injunction unless the tenant could show that the question relating to delay had not been part of the original arbitration.

The tenant commenced a second arbitration to resolve the matter. It was held that the first arbitration covered both points (unreasonably withholding consent and delay). The tenant was therefore not entitled to pursue the point on delay.

LIDL GmbH v Just Fitness Limited (2010)



For further information contact [Nicola Lebish](#)

Town and village greens - some thoughts on Defra's proposed consultation

The Department for Environment, Food and Rural Affairs has announced that it is to consult on the present system of registration of new town and village greens. We consider some of the issues that might be dealt with as part of that review, and some that will almost certainly not.

To read Julian's longer article, click [here](#).



For further information contact [Julian Steed](#)

JCT project bank accounts

In the present economic climate project bank accounts (PBAs) have become the subject of much discussion.

In a nutshell a PBA is a bank account into which the employer pays monies due to the contractor and to its sub-contractors. The bank pays out according to who is owed what. For further information see the Hot Topic article in our construction publication, [Building Blocks](#).

The reality of PBAs seems to be that the industry is not keen on adopting them in practice however much they are discussed.



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Last year the NEC introduced PBA documentation to use with NEC3. JCT has been promising its PBA documentation for some time and it was eventually published in July 2009. The JCT documentation comprises:

- enabling provision to be inserted into the building contract;
- a PBA agreement (to be entered into by the employer, the contractor and the relevant sub-contractor); and
- an additional party deed for subsequently appointed sub-contractors.

In addition the employer, contractor and bank will also need to agree a bank mandate. Concerns have been raised about how well thought out the JCT documentation is.

The conclusion: a party intending to enter into a PBA should seek legal advice before doing so.

Construction contracts - damages for delay

If a new development is delayed and it is the contractor's fault, the developer (as "employer" under the building contract) will want the right to recover the costs of the delay.

The building contract could allow the employer to recover by proving the losses it has suffered, known as damages "at large" or unliquidated damages.

However, the contract usually creates a right to "liquidated damages", a fixed charge for each day or week of delay. This allows the contractor to quantify his risk when entering into the contract, and the employer to know with certainty what he can recover if the contractor causes delay.

All standard form building contracts contain a liquidated damages clause with a space to fill in the amount of damages to be paid by the contractor per day or week. The amount chosen must be a genuine pre-estimate of the employer's loss. If it is not representative of the employer's loss, it will be an unenforceable penalty clause. If it is too low, the employer will be left out of pocket.

An employer may not want to use liquidated damages, perhaps because the level of losses that it will incur depends on factors which are unknown at the date of contract. If so, under no circumstances should the employer write "nil" in the space in the contract for liquidated damages, or leave the space blank, as both could mean that it has forsaken its right to claim any damages for delay. Instead, the building contract should be amended to delete the liquidated damages clause, and wording should be inserted setting out the right to claim damages at large.



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Increase in rent threshold for assured shorthold tenancies

It is currently not possible to let a property on an assured shorthold tenancy (AST) if the rent is more than £25,000 per annum. Earlier this year, the Government announced its intention to increase the rent threshold for ASTs from £25,000 to £100,000 per annum.

Originally, this was supposed to take effect from 1 April 2010 but the Department for Communities and Local Government has now announced that this change will not take effect until October 2010. The new threshold will apply to **existing** ASTs as well as to those entered into after October 2010.

As more landlords will be required to comply with the AST legislation from October, the delay should help them prepare. For example, they will need to join a Tenancy Deposit Scheme (created for the purpose of safeguarding tenancy deposits) where the tenant pays a deposit.



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