

Hot Property

Updating you on property issues



Welcome to the May edition of *Hot Property*. We are in a change over period at present with certain old policies still coming online but with a new direction becoming apparent. CRC is here to stay - the UK has signed up to ambitious carbon reduction targets that will have to be met - but it remains to be seen what will happen to CIL. Taxation is going to be an interesting and challenging area for the Government and the property industry alike.

I hope you find this month's edition of *Hot Property* interesting and if you have any particular queries on any of the articles please do feel free to contact the author.

In this issue:

- [CRC – are you committed?](#)
- [Is your overage secure?](#)
- [Consumer Code for Home Builders](#)
- [CIL – a reminder](#)
- [Once a highway, always a highway....](#)
- [Lessons to be learned where rent review delayed](#)
- [Lease assignments within a group of companies – negotiate with care](#)
- [Rent threshold increase for assured shorthold tenancies – watch out!](#)
- [Budget news](#)
- [VAT update](#)
- [Retention and defects](#)
- [Stop press - The coalition government's vision for academies](#)

Editor



Richard Noble
01223 222399
richard.noble@mills-reeve.com

www.mills-reeve.com

CRC – are you committed?

After a lengthy consultation process, the CRC Energy Efficiency Scheme finally came into force on 1 April.

The CRC is a new compulsory carbon emissions trading scheme that will have a significant impact on many large UK public, private and third sector organisations including companies, partnerships, universities, local authorities and NHS bodies. Those required to participate must register between now and September this year. From April 2010, participants will have to monitor and record emissions and, from April 2011, pay to emit carbon dioxide. The scheme provides financial and public relations incentives to reduce emissions and to invest in energy efficiency programmes.

The CRC forms part of the Government's wider climate change policy agenda as set out in the Climate Change Act 2008. In that Act, the Government entered into a legally binding commitment to reduce the UK's greenhouse gas emissions by 80 per cent by 2050, with an interim target of a 34 per cent cut by 2020.

A link to our briefing note on the CRC can be found [here](#). Please contact us if you would like more information about the CRC and whether or not your organisation must participate.



For further information contact
[Rebecca Carriage](#)

Is your overage secure?

Particular care must be taken when drafting overage provisions in sale contracts.

There are numerous potential pitfalls and the drafting of such clauses can be the subject of lengthy pre-contract negotiations. Do not let this effort be in vain by not seeking security for the overage payment.

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



For further information contact [Sarah Falvey](#)

Consumer Code for Home Builders

1 April 2010 saw the introduction of the Consumer Code for Home Builders.

It is mandatory for all members of NHBC, Premier Guarantee and LABC New Home Warranty to comply with the [Code](#), which concerns marketing and after-sales practice in sales of new or newly converted residential premises. Intended to benefit consumers, the Code sets out the information that buyers ought to receive from reservation until occupation. It does not apply to sales of part-exchange properties, self-build homes, or premises bought by corporate bodies as an investment or by registered social landlords.

On reserving a flat or plot, homebuyers can now expect to receive details including:

- management costs, such as service charges;
- relevant warranty cover;
- the standard to which the home will be constructed;
- layout, appearance and position; and
- any contents included.

Reservation fees will be linked to a set period and buyers advised of the timeframe during which the offer price remains valid. Fees will be repaid if a reservation is cancelled.

Following exchange of contracts, builders will be unable to "significantly and substantially" change the design or materials to be used in a new home without consultation because buyers will be able to end the contract if changes are unacceptable to them. Rights to withdraw due to unreasonable delay have also been introduced. Contracts must set out an anticipated date for completion. If the new home is committed to at an early stage of construction, the contract can be ended if the property is not ready within a year of the anticipated date for an apartment, or within six months for a house.



For further information contact [Andrea Newman](#)

CIL – a reminder

The CIL regulations came into effect on 6 April 2010.

CIL is a levy which local authorities can choose whether to adopt and is intended to ensure that the cost of providing infrastructure to support development is funded wholly or partly by owners or developers of land.

CIL is payable when chargeable development is commenced. This relates to new buildings or works to existing buildings and payments are to be calculated based on a figure per square metre matrix. There are different payment periods and provisions for phased developments.

CIL is payable by anyone who has assumed liability. If no-one assumes liability



For further information contact [Caroline Bywater](#)

or the CIL is not paid, the landowners of the land within the planning application site (or relevant phase) are liable. Liability is apportioned by reference to the value of the landowner's interest. Landowners are liable regardless of whether they agreed to the planning application being made.

There are a number of exemptions to CIL liability, principally relating to charities and social housing, and there is a de minimis threshold such that new builds of less than 100 square metres are not caught.

CIL is not intended to cover affordable housing so section 106 agreements are still needed even if a local authority charges CIL. Of course, section 106 agreements will also still be in use in non-adopting authorities.

Once a highway, always a highway....

....or so the legal maxim goes. Whilst there are a number of ways in which a highway can cease to be a highway, a recent case has confirmed that acquiring title by adverse possession is not one of them.

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



For further information contact [James Falkner](#)

Lessons to be learned where rent review delayed

Another recent case provides lessons for both landlords and tenants where rent reviews have been significantly delayed.

The case related to a rent review that had been delayed for a number of years (due in 1994, actioned in 2009). The lease was assigned to the tenant in 2005 and in 2006 the landlord acquired the freehold.

The tenant then stopped paying the rent and in 2007 the landlord sought to review it. There was no constructive response from the tenant so the review was referred to arbitration.

In 2009, the arbitrator awarded a new rent of £1,700 per annum (quite a hike from £60), and the landlord made a claim for the new rent from 1994 onwards and for arrears of the old rent from 2006.

The rent review was upheld because:

- delay in itself did not constitute abandonment of the landlord's right to review;
- the tenant did not participate in the arbitration and then argued in court that it was implied that time was of the essence.

Lessons for tenants:

- due diligence on assignment highlights outstanding rent reviews and the original tenant may provide an indemnity;
- instigate a rent review (where possible) or serve notice on the landlord making time of the essence.

Lessons for landlords:

- clear drafting will make it apparent that time is not of the essence;
- mere delay is not abandonment but be careful not to waive the right to review.

Idealview Ltd v Bello (2009) EWHC 2808 (QB)



For further information contact [Elinor Childs](#)

Lease assignments within a group of companies – negotiate with care

In today's unpredictable market tenants need to retain flexibility with their properties and often need to dispose of leased properties which they no longer require, or restructure where their properties are held within the group.

Modern commercial leases will set out the conditions to any assignment, one of which is often "no assignment to a group company". Such a condition can sometimes be overlooked by a tenant during negotiations. If a tenant company wants to assign within the group, that condition allows the landlord to refuse its consent. The assignment provisions need to be negotiated with care.

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



For further information contact [Jodie Hosmer](#)

Rent threshold increase for assured shorthold tenancies – watch out!

The recent legislation to raise the assured shorthold tenancy maximum annual rental threshold from £25,000 to £100,000 was flagged in the last edition of *Hot Property*.

One significant effect of the Order has so far gone largely unnoticed in the property and legal press.

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



For further information contact [James Hordern](#)

Budget news

The new Chancellor, George Osborne, will be delivering the first Budget of the coalition Government on 22 June.

We wait to see whether it will include any real estate related announcements. In the meantime, here is a reminder of some points which were announced in Labour's last Budget in March and legislated for in the first Finance Act of 2010 immediately prior to the dissolution of the old Parliament.

- Increase in SDLT threshold from £125,000 to £250,000 for first time home buyers. This relief is temporary for two years from 25 March 2010. Buyers must never have owned property in the UK or elsewhere. On a joint purchase both must be first time buyers.
- New top rate of five per cent SDLT for residential properties costing more than £1 million from 6 April 2011. This increase will be permanent. The top rate of SDLT for commercial property continues at four per cent.
- New anti-avoidance provisions added to the already complex rules on SDLT and partnerships introducing further uncertainty even to innocuous transactions.
- Doubling of the Annual Investment Allowance (to £100,000) from April 2010 providing full first year tax relief on plant and machinery. However, the temporary one year first year allowance of 40 per cent has not been extended after April 2010.

The old Labour Government also made other proposals in their Budget which were not put into effect before the election. These include allowing REITs to meet the requirement to distribute 90 per cent of their property rental profits by issuing stock dividends as well as cash dividends and extensions of small business rates relief and empty property rates relief. It remains to be seen whether these proposals survive the change of government.



For further information contact [Charlotte Wicks](#)

VAT update

There have been two important recent relaxations of VAT legislation in the context of property transactions.

Option to tax

On 1 April 2010 three amendments to the option to tax legislation came into effect. These changes are welcome developments, and the two key ones are as follows:

- the anti-avoidance rules which can disapply a developer's option to tax where a person financing the development goes into occupation of the site are relaxed so that "minor occupation" of the building by such a person will not result in disapplication; and
- the rules which stipulate that an option to tax cannot be revoked once the land has been "used" by the taxpayer have been softened.

Construction supplies to housing associations

Supplies made to a "relevant housing association" in the course of its conversion of the whole or part of a non-residential building into a building to be used as a dwelling or for a "relevant residential purpose" (eg, hospice, nursing home, student accommodation etc) can be zero-rated for VAT purposes. (This zero-rating does not apply to fees charged by consultants, architects or surveyors.)

From 1 April 2010, the definition of "relevant housing association" has been expanded to include private registered providers of social housing. This new definition means that zero-rating can apply to supplies made to profit-making bodies registered as providers of social housing as well as non-profit bodies. The change reflects an amendment to Part 2 of the Housing and Regeneration Act 2008.



For further
information contact
Matthew Short

Retention and defects

When redeveloping or refurbishing a site, a developer as employer under a building contract will ordinarily wish to retain a percentage (usually three per cent or five per cent) of certified payments to the building contractor to incentivise the contractor to finish the works and remedy any defects.

The standard form building contracts all create a right for the employer to hold such retention.

Retention is released in two halves. The first half is released on practical completion. The JCT and NEC forms deal with the release of the second half in subtly different ways.

JCT provides for a fixed period after practical completion (usually six months or a year) during which time the contractor must rectify any defects notified to it (the Defects Liability Period or "DLP"). At the end of the DLP, if, but only if, all of the notified defects have been rectified a "certificate of making good defects" is issued. The issue of the certificate of making good defects triggers the release of the second half of the retention.

NEC3 also provides for a fixed period for the rectification of defects, ending on the "defects date", which is usually six months or a year after the completion date. At or shortly after the defects date, a "Defects Certificate" is issued which sets out any defects which the contractor has not corrected. The issue of the Defects Certificate triggers the release of the second half of retention. If there are outstanding defects noted on the Defects Certificate, the employer must serve a withholding notice in order to continue to hold the retention until all notified defects are rectified.



For further
information contact
Alexandra Price

Stop press - The coalition government's vision for academies

The recent Queen's Speech introduced radical and exciting plans for academies, which are state funded schools outside of local authority control.

All schools in England, including primaries, will now be able to apply to become academies. Depending upon the take-up, this could mean thousands of schools leaving council control. Specifically, schools currently judged by Ofsted to be "outstanding" will be able to be fast-tracked to become academies.

Having advised on six per cent of all academies projects in England, the Mills & Reeve academies team is ideally placed to help you through the process. For further information please contact [Stuart Pemble](#) on 0121 456 8335 and [Christian Bull](#) on 0121 456 8223 or visit www.mills-reeve.com/academies



For further information contact [Christian Bull](#).

www.mills-reeve.com

BIRMINGHAM • CAMBRIDGE • LEEDS • LONDON • MANCHESTER • NORWICH

Mills & Reeve LLP is a limited liability partnership registered in England and Wales with registered number OC326165 and VAT number GB 104 8345 88. Its registered office is at Fountain House, 130 Fenchurch Street, London, EC3M 5DJ, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP. Mills & Reeve LLP is regulated by the Solicitors Regulation Authority and is subject to the Solicitors' Code of Conduct 2007, which can be viewed at: <http://www.sra.org.uk/code-of-conduct.page>.

If this newsletter has been forwarded to you and you would like to receive future editions, please email newsletter@mills-reeve.com. If you do not wish to receive emails or other marketing material from Mills & Reeve LLP please email newsletter@mills-reeve.com or contact our marketing department on +44 (0)1223 222460. The articles featured in this newsletter have been selected and prepared with a view to disseminating key information and may not deal with individual concerns. No liability can be accepted in relation to particular cases. However, the authors would be pleased to respond to individual queries, and before taking action you should seek specific legal advice, particularly as the legal position is liable to change over time. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites. This newsletter is copyright © Mills & Reeve LLP 2010. Extracts may be copied with our prior permission provided that their source is acknowledged. Some/all images are copyright © Microsoft Corporation, and these may be distributed solely as part of this newsletter.