Easements - can a right to park a car in a single space be an easement?

Key points

- A right to park a car in a single defined space is upheld as capable of existing as an easement
- There is no general right for a burdened landowner to relocate an easement which affects his land, unless the grant expressly provides for this

Background

Car parking can be a remarkably contentious issue. There are a number of different ways in which car parking rights may be granted in property transactions - for example, by way of a lease, an easement or a simple contractual licence.

For some years, there was doubt over whether a right to park a car was capable of being an easement at all. This doubt was laid to rest by the decision of the House of Lords (as it then was) in *Moncrieff v Jamieson*.

However, doubt remained over a right to park a car in a single defined space, as opposed to a general right to park anywhere in a larger area. This is because an easement is essentially a right to do something over someone else's land. A right cannot be an easement if its effect is to deprive the owner of the burdened land of the benefits of ownership altogether. The way the law on easements has developed in the context of car parking means that a right to park a car cannot be an easement if the owner of the burdened land is left without any reasonable use of it. Another way of describing the test would be to ask if the restrictions imposed on the owner by the easement would make his ownership of the land 'illusory' (*Batchelor v Marlow*).

The exact nature of this test has however come under scrutiny in recent years. The House of Lords in *Moncrieff* suggested that the test should instead be whether the burdened owner retains possession and, subject to the reasonable exercise of the right in question, control of its land. The Court of Appeal decision in *Batchelor v Marlow* has however not been overruled and remains the binding test to be applied.

Facts of *Kettel v Bloomfold Ltd*
In *Kettel v Bloomfold Ltd*, the claimants each owned a long lease of a residential flat in a block in the East End of London. The defendant owned the freehold of the development. Each flat had the benefit of the use of a designated parking space.

The developer took the view that it was entitled to relocate the car parking spaces, in order that it could build another block of flats on the car park. It wrote to the tenants advising them to get in contact to arrange to park somewhere else. The developer's contractors then, without warning, fenced off the existing spaces. Faced with objections from the tenants, construction work did not proceed, but the area remained fenced off.

There were two main issues arising in the case. The first was the nature of the tenants' rights to use the car parking spaces. The second issue was what remedy the tenants should be entitled to for the interference with those rights.

**Nature of the car parking rights**

The tenants had initially argued that the spaces were included within the demise of each of their leases, so that the lease extended not just to the flat itself, but also to the car parking space. This argument was rejected by the court because of the way the leases had been drafted, although it is possible to draft a lease so that it does include a car parking space (and some leases are drafted that way).

The distinction between having a lease of the space, and a right to use it by way of an easement, is important because it affects whether the landlord can still do anything with the space. Even if the tenant has an easement over the space, the landlord may still be able to make some use of it. If on the other hand the tenant has a lease of the space, then the tenant will have exclusive possession, not just of the floor space, but usually the air space above it as well, and the landlord will effectively be excluded from it altogether.

Having discounted the possibility of the spaces being included in the tenants' leases, the court then had to consider whether each tenant's right to use their designated space was an easement.

**Can a right to park a car in a single space be an easement?**

Both parties - and the court - accepted that the right to park a car is in principle capable of existing as an easement.

Applying the test in *Batchelor v Marlow*, the court thought that the rights which could be exercised by the developer over the car parking spaces meant that the developer was not left without any reasonable use of the land, and its ownership of the car parking spaces was not rendered illusory. The developer could do anything that a freeholder could normally do, save to the extent that it would be inconsistent with each tenant's right to park a car. So, for example, the developer could:

- pass across the space (on foot or in a vehicle), as long as there was no car parked in it
- choose, change and repair the surface
- lay pipes and other service media underneath it
- run overhead wires above it
• build above it (and this was indeed the developer's alternative proposal, if it was not able to relocate the tenants).

The court ruled that, far from being illusory, these rights were important and even necessary. On that basis the tenants' individual rights to park in designated spaces did take effect as easements.

**Could the developer move the spaces?**

The developer tried to argue that it had a right to change the designated parking spaces. The court rejected this. A burdened landowner does not in general have the unilateral right to extinguish an easement over one area of land simply by providing an equivalent easement somewhere else. An easement may be granted on terms which expressly permit the burdened landowner to vary the space which is allocated from time to time, or for example in the context of a right of way to vary the route of the easement. The easement in this case had not however been drafted in that way, and no right to vary the space would be implied.

**Things to consider**

The Law Commission has recommended that the jurisdiction of the Lands Chamber of the Upper Tribunal to modify restrictive covenants should be extended to easements. If this recommendation is enacted then it may provide an alternative route for developers in this situation. But, at present, there is no indication of when, or indeed whether, the Law Commission's proposals will be taken forward by the government.

One final point to note is that the leases did purport to reserve a right to develop the rest of the site to the landlord. However, this was not well drafted and in any event the court thought that it would not give the right to erect a building which constituted a substantial interference with an express easement to park.

In our article "When the courts will grant an injunction to prevent development?", we review the remedy that the tenants were entitled to for the interference with their easements.

**Development - when will the courts will grant an injunction to prevent development?**

**Key points**

• Where a developer has breached a property right such as a restrictive covenant or an easement, the starting position is that an injunction will be granted

• Where damages are granted instead of an injunction, they may be calculated as a percentage of the profit the developer stands to make from the development

**Background**

In our article "Can a right to park a car in a single space be an easement?", we reported on the case of *Kettel v Bloomfold Ltd*. 

http://www.wragge.com/analysis_8841.asp 02/07/2012
In that case the court found that, by fencing off some car parking spaces next to a block of flats for a proposed development, a developer had unlawfully interfered with the flat tenants' rights to park in those spaces. The court had to decide what remedy the tenants were entitled to. The principal decision was whether the tenants should get an injunction, restraining the development from being carried out, or simply be limited to a claim in damages.

The principles which apply to determine the remedy for breach of a property right are the same, whether the right which has been interfered with is a right to park a car, or another easement such as a right of way or a right to light, a breach of a restrictive covenant, or even a claim in trespass.

**Discretion**

The grant of an injunction is a discretionary remedy. However, the starting position is that the claimant is entitled to an injunction where a property right is being interfered with. It is not for the claimant to show why they should get an injunction - it is for the developer to show why the claimant should not get an injunction.

The 19th century decision of the Court of Appeal in *Shelfer v City of London Electric Lighting Company* is sometimes cited as authority for the proposition that a claimant should not be entitled to an injunction where:

- The injury to the claimant's legal rights is small
- It is capable of being estimated in money
- It can be adequately compensated by a small money payment
- It would be oppressive to the developer to grant an injunction.

However, the reality is that the discretion which the court has is wider than this. While it may take these factors into account in deciding whether to award an injunction, this is not a 'tick-box' list which, once worked through, will bind the court to decide the matter one way or the other. In addition to these considerations, the court may also have regard to how the developer has behaved, and to the conduct of the claimant (including whether the claimant has indicated that he or she only wants money). The discretion to award damages instead of an injunction will normally only be exercised in exceptional circumstances.

**Should the tenants get an injunction?**

In the present case, before fencing off the spaces the developer had written to the tenants advising them to get in contact to arrange to park somewhere else. The developer argued that the injury to the tenants' rights was trivial (for the purposes of the *Shelfer* principles), because the replacement car parking spaces on offer were only a few yards away from the original ones. However, the defendant had not actually committed itself to supplying alternative spaces.

The court thought that "to allow [the defendant's] offers to exclude the remedy of injunction amounts to permitting the defendants to expropriate the rights presently held by the claimants, and then choose for themselves the remedy to which the claimant would be entitled, by offering to make amends in a particular way".
While the offer of an alternative easement was not entirely irrelevant, this case was very different from *Greenwich NHS Trust v London & Quadrant Housing Association* where the court agreed that damages could be awarded instead of an injunction. In *Greenwich*, an NHS Trust wanted to redevelop a hospital site. Planning permission depended on realigning an access road which was the subject of a right of way. The Trust was not able to proceed unless it had effectively eliminated the possibility that the beneficiaries of the right of way could seek to prevent the works by applying for an injunction. In the circumstances, the court declared that it would not grant injunctive relief to any applicant, who would instead be restricted to a claim for damages.

The court thought that what the developer in *Kettel* had done, by fencing off the parking spaces, amounted to "the entire abrogation of the claimants' express easements to park on those spaces". The court also thought that the conduct of the developer in fencing off the spaces had been "somewhat high-handed". In contrast to *Greenwich*, the development was not being undertaken for the wider public benefit, but for the private profit of the developer. The court thought that "the very essence of a property right is that it is a matter for the owner to decide whether to exercise it and not for the court or the holder of a subordinate interest to compel him to not do so".

The court therefore granted an injunction to prevent the development being carried out.

**Damages**

In the event that they did not succeed in obtaining an injunction, the tenants had sought damages from the developer. Having awarded an injunction, the court did not technically need to go on and consider the issue of damages, but it did so because it had received considerable argument on the point. The damages discussion proceeded on the assumption that each tenant would be given an alternative car parking space that was equally convenient.

The measure of damages sought was based on the 'release fee' or 'buy-out' measure. This was the amount which would be agreed to be paid in a hypothetical negotiation between willing parties. In this case, this was the amount the developer would have paid for a release of the easement to enable it to build on the site. This measure of damages is often referred to as 'Wrotham Park' damages, after *Wrotham Park Estate Company v Parkside Homes Ltd*. It can be applied to negotiations for the release of any easement, including rights to light, as well as other property rights such as restrictive covenants. It can also be applied in cases of trespass - such as where an advertising hoarding overhangs third party land.

Such damages are usually calculated as a percentage of the profit that the developer stands to make from the development. The actual percentage awarded can vary widely from case to case - from 5 to 50%. It is important not to look at the percentage figure in isolation, because its significance will depend on what sum the percentage is applied to. In this case, the court decided that the profit should be split 50:50 between the tenants and the developer - but crucially that was after the developer had already taken a 25% cut to reflect the risk of taking on the project.

The final figure arrived at in this case was just over £500,000, which would have been split between the eight different tenants. As we have seen, the court had awarded an injunction in favour of the tenants, so the damages figure was only hypothetical.
Things to consider

This case does appear to be quite a rigid application of the rule that a claimant is, on the face of it, entitled to an injunction. But the judge was entitled to exercise his discretion and so it may not be capable of being overturned on that ground alone if there is an appeal.

Injunctions are every developer's nightmare, and claimants know it. While some claimants do genuinely object to the development itself, for others the prospect of an injunction is undoubtedly a blunt tool to extract money from the developer. The Law Commission is currently undertaking a review of rights to light, and has been talking to the property industry about how the rules are applied in that context. There is a difference of course between a 'prohibitory' or 'anticipatory' injunction such as the one granted in this case, which stops the development from going ahead, and a 'mandatory' injunction such as was awarded in *HKRUK II (CHC) Limited v Heaney*, which compels the developer to undo work which has already taken place.

One of the factors which seemed to weigh heavily in the court's decision to award an injunction in *Kettel* was that the developer had not made formal offers of alternative car parking spaces to the tenants, so that there was no equivalent legal right available to them in substitution for their existing spaces. Developers can be more pro-active in formalising the offers to third parties whose rights they need to acquire to ensure that this argument cannot be used. On a more general note, it is worth engaging with those who may have rights which could adversely affect a development at an early stage in the process. Developers can, for example, hold meetings with local residents and businesses and offer to pay their legal costs (in appropriate cases).

We also saw in this case how the court will take account of the parties' behaviour. 'High-handed' actions by the developer are unlikely to be looked upon kindly.

Restrictive covenants - identifying the land which benefits from a covenant is key to its enforceability

Key point

- In an application to modify or discharge a restrictive covenant, only the advantage secured by the covenant to the benefiting land will be relevant

*Perkins v McIver*

In the July 2011 edition of Property Update, we considered the decision of the Upper Tribunal in *Re Perkins* to refuse a developer's application to modify a restrictive covenant. The developer was seeking to build a second house on a plot that was burdened by a covenant not to build more than one dwellinghouse. The site comprised a corner plot on a small suburban square which had central communal gardens. The developer appealed, and the case (now known as *Perkins v McIver*) has recently been heard by the Court of Appeal.

One of the main grounds for the tribunal's decision was the disturbance that would be caused during construction works. The roads around the square were narrow and would not easily accommodate
construction vehicles. The tribunal held that while the primary consideration was the value of the
covenant in providing protection from the effects of the ultimate use of the land (i.e. as a plot with
two houses), the facts of the case were exceptional in terms of potential disturbance during the
construction period.

Decision of the Court of Appeal

The developer pointed out that the disturbance identified by the Upper Tribunal was to parked cars,
roadways, verges and planting on the square. This was not disturbance caused by construction
operations on the development site itself (which was the land burdened by the covenant), but on the
public highway leading to it.

The Court of Appeal accepted that increased traffic to and from a site was capable of being relevant
for the purpose of an objection to a modification of a restrictive covenant. However, it ruled that the
focus of such an objection must be the impact of any disturbance on those whose land has the benefit
of the covenant. In this case, the land affected was the square itself, and no objection had been raised
by the owners of the square.

Things to consider

In last month's Property Update we reported on the case of Re Stanborough. In that case the court
confirmed that the only benefits secured by a covenant which can be taken into account are those
which are attributable to land which has the benefit of the covenant.

In Perkins v McIver, the land with the benefit of the covenant comprised a number of houses around
the square. However, the alleged disturbance would affect the square itself, which did not have the
benefit of the covenant.

These cases emphasise the importance of clearly identifying which land has the benefit of a covenant,
and examining carefully whether the alleged benefits do indeed benefit that land. If not, the covenant
will be unenforceable.

Land registration - alteration of the register and the
presumption of ownership where land adjoins a road

Key points

• The principle that the owner of land adjoining a highway also owns the soil up to the middle of
  the highway does not apply to a footpath
• Anyone can apply for the register to be altered; it is not necessary to have an interest in the
  relevant land
• A boundary of a registered title may be altered by the court under the 'general boundaries' rule
• However, this may not be the case where the dispute is a 'property dispute' rather than a
  'boundary dispute'
Facts of *Paton v Todd*

In *Paton v Todd*, P argued that an accessway which was included in T's registered title should in fact form part of P's title.

A Land Registry adjudicator ruled that the accessway should not have been included in T's title when it was first registered. However, he also held that P did not own the accessway either. This meant that, prior to its mistaken registration in T's name, the accessway was owned by an unknown third party.

The question was whether, in the circumstances, P was entitled to apply for the accessway to be removed from T's title. The adjudicator held that P was entitled to do so, but on the facts refused to amend T's title. P appealed to the High Court.

Ownership where land adjoins a highway

There is a presumption that the owner of land adjoining a highway also owns the soil up to the middle of the highway. The presumption applies in relation to private, as well as public roads. There is also a presumption that a conveyance of land adjoining a highway will include the soil up to the midway point of the highway if the landowner can be shown, or is presumed, to own it. Both presumptions can however be rebutted.

The accessway in *Paton v Todd* was not capable of being used by vehicles, but only on foot. The court thought that it was difficult to apply either of the two presumptions above to a footpath. The way in which a footpath comes into existence was very different from the way in which a public or even a private road comes into existence.

P could not therefore rely on the presumptions to establish title to the accessway.

Entitlement to apply to alter the register

In *Wells v Pilling Parish Council*, it was decided that an application to alter the register is an issue of private (as opposed to public) law, and as such an applicant must have sufficient 'standing' (meaning entitlement) to make the application. It was conceded in that case that this meant having an interest in the land in question.

However, in July 2011, the High Court in *Mann v Dingley* decided that there was no requirement that an applicant for alteration of the register had to show an interest in the registered land. The court in *Paton v Todd* therefore proceeded on the basis that P could apply for alteration of T's title even though P could not show that they ever owned the accessway.

Should the register be altered?

The register can be altered for the purpose of correcting a mistake. In this case, a mistake had clearly occurred when the accessway was included in the title on first registration. However, T was not the applicant for first registration but had bought the land subsequently from the first registered proprietor. The court was prepared to assume, without deciding, that it had the power to correct the mistake as against T.
The court has more limited powers to correct a mistake where the correction would amount to rectification, and the registered proprietor is in possession of the land in question. Rectification is defined in the Land Registration Act 2002 as the correction of a mistake which would prejudicially affect the title of a registered proprietor. However, in a line of decisions including Derbyshire County Council v Fallon, Strachey v Ramage and Drake v Fripp, the court has ruled that an alteration to the boundary on the filed plan will not necessarily prejudicially affect the title of the proprietor. This is because the boundaries shown on the filed plan are general only and do not show the precise location of the boundary.

In the present case the court thought that the dispute over the accessway was more than just a boundary dispute, and ruled that the alteration would amount to rectification. Since T was not in possession of the accessway however, this had no bearing on the outcome.

Under the Land Registration Act, the court was obliged to alter the register unless there were 'exceptional circumstances' which justified its not doing so. The Land Registry adjudicator considered that there were exceptional circumstances, essentially because if the register was altered the land would be left with no known owner. The High Court disagreed.

The High Court acknowledged that the fact that P did not themselves own the land which they were seeking to remove from T's title could amount to an exceptional circumstance preventing alteration. However, it did not think that this circumstance alone justified the alteration not being made. It ruled that the correct approach was to consider the effect on both parties of both an alteration and a refusal to alter the register. This would involve for example consideration of what T wished to do with his remaining land and the effect on those proposals of the accessway being removed from his title.

Since the High Court did not have the necessary evidence before it to evaluate these matters, it remitted the case back to the Land Registry Adjudicator for re-determination.

**Things to consider**

In previous cases on the general boundaries rule (see above) we have commented that there appears to be no limit to the extent of land which can be affected by the rule. Paton v Todd is interesting because it shows the court moving away from this view where the dispute can be more accurately categorized as a 'property dispute' rather than a 'boundary dispute'.

The difference between the two types of dispute will be a matter of fact and degree, but the court commented that the ratio of the area of the land in dispute to the area of the other land in the registered title may be a relevant consideration. With respect, this would seem to be a difficult basis on which to draw the distinction, as the extent of land within an individual registered title may simply be an incident of its conveyancing history. The court went on to say that this was not the only factor to consider, and in this case the fact that the disputed land was an accessway gave it additional importance with the result that it could be said that an alteration of the register would prejudicially affect T.

Following Paton v Todd, it now also seems clear that anyone may apply for an alteration to be made to the register. This conclusion tallies with the express position under the Land Registration Act in relation to objections to an application to the Land Registry. Under section 73 of that Act, anyone can object to an application, but someone who objects without reasonable cause may be liable in damages for any loss caused.
Contract - will a notice served by only one of two licensors be valid?

Key point

- A notice terminating a licence must be given by all the licensors, even if one of the licensors is also a licensee (and so would not wish to terminate the licence)

**Fitzhugh v Fitzhugh**

In the March 2012 edition of Property Update, we considered the case of *Fitzhugh v Fitzhugh*. In that case, a licence was granted to the defendant and his partner to use some land for grazing animals. The licence was granted by the claimant and the defendant, who together were the administrators of their father's estate.

The agreement provided that it could be terminated by the licensor in the event of a breach by the licensee which was not remedied. The defendant did not pay the annual fee required under the agreement. The claimant (alone) gave notice to terminate the licence. The High Court held that the notice was valid, even though the agreement defined the 'licensor' as comprising both the claimant and the defendant. The defendant appealed.

**Appeal**

The Court of Appeal allowed the appeal. The defendant was expressly defined as one of the individuals making up the 'licensor'. It was improbable that in a short and simple, professionally drawn, document the defined term was intended to mean one thing in one part of the document but something different somewhere else.

Since the document was workable, even if its working may prove cumbersome or expensive (see below), it was not necessary to imply a term that in the termination provision 'licensor' was to be read as excluding any person who was also the licensee.

The notice was therefore invalid as it had not been served by all the licensors.

**Things to consider**

The claimant was not left entirely without a remedy. The court ruled that the defendant's duties as an administrator would require him to subordinate his own conflicting personal interests and concur in service of the notice. If he did not do so, it would be open to the claimant to seek his removal as an administrator (if necessary by court proceedings), which would then enable the claimant to act alone.

However, removing the defendant as administrator would take time and could be expensive. The parties could have avoided this result by expressly providing that notice to terminate could be given by the licensor, other than any licensor who was for the time being a licensee.
Green Deal - further details published

Key points

- The government has published a suite of documents on the Green Deal, including a response to its November 2011 consultation
- The rules on obtaining consents from property owners appear largely unchanged

Background

In the December 2011 edition of Property Update, we reported the publication of a consultation on the detail of the Green Deal. That consultation closed on 18 January 2012. More than 600 responses were received. The third largest group of respondents were property practitioners. The Government has now published its response to the consultation.

For general background on the Green Deal, see our Alert on the Energy Act 2011.

Consent to include a Green Deal charge in the electricity bill for the property

Before a Green Deal plan can be taken out, consent must be obtained from the electricity bill payer for the property (if different from the person who wishes to make the energy efficiency improvements to the property). The revised draft of the "Framework Regulations", which accompanied the publication of the consultation response, confirms that consent must be obtained from:

- The person who will be the bill payer at the time the Green Deal plan is taken out
- A person who, at the time the Green Deal plan is to be taken out, will have contracted to buy the property, or to become a tenant or licensee of the property (or will have a right to occupy the property under some other arrangement)
- The owner of the freehold of the property
- A landlord under a lease of the property
- A licensor under a licence of the property.

However, consent does not have to be obtained under the regulations from the following people (even if they would fit one of the descriptions above):

- A mortgagee which is not in possession of the property
- A landlord under a lease of the property which was granted for a fixed term of more than 21 years, where the unexpired term of the lease exceeds the payment period of the Green Deal plan and where the lease does not contain a right to terminate the lease by either the landlord or the tenant (forfeiture clauses are ignored for this purpose).
- A person who has only a beneficial interest in the property.
A number of respondents to the consultation raised the issue that the need for the consents outlined above could present barriers to the take-up of the Green Deal. They apparently suggested that legislation should be introduced preventing certain parties from withholding consent to the entry into a Green Deal plan.

The government states that at present it does not see sufficient tangible evidence to warrant such changes to the legal framework. However, it intends to monitor this issue once the Green Deal is operational. If evidence shows the need, it may then look again at the policy on consent and consider whether legislative action is necessary.

**Other consents**

Consents may also be required outside those stipulated by the regulations. For example, a mortgage deed may require the mortgagee's consent to be obtained, or a lease may require landlord's consent to the improvement works to be obtained (even if their consent to the charge being attached to the energy bill is not required under the regulations).

**Further information**

The full government response to the consultation can be found here.

An outline of the progress made with the Green Deal to date, along with the next steps, can be found here.

The Government's aim is to have the first Green Deals up and running early in 2013.

The above analyses were written by Sarah Dawe, associate in Wragge & Co's Real Estate group.

**Planning**

**Local heritage listing**

While the effect of the statutory listing of a building of special architectural or historic interest is well known, local listing may not be so widely understood.

Unlike with a statutory listing, it is not a criminal offence to carry out unauthorised works to a locally listed building or structure. But, proposals to demolish such a building will meet with strong policy resistance from the planning authority.

Local listing could become another tool in the kit of those seeking to prevent development, along with Town or Village Green applications and the provisions of the Localism Act (soon to come into force) which prevent the disposal of land or buildings which are claimed to be community assets.

English Heritage have published a Good Practice Guide for Local Heritage Listing which can be accessed here.

'Salami Slicing' to avoid environmental impact assessment

http://www.wragge.com/analysis_8841.asp
Where a development proposal falls within one of the 'Schedule 2' categories in the Environmental Assessment Regulations, the developer must seek a screening opinion from the local planning authority. The authority will consider whether the development proposal would be likely to have significant effects on the environment. If the opinion is positive, the developer must carry out and submit an environmental impact assessment. If the opinion is negative, no such assessment is required.

Developers have tried to divide a project into parts, each of which would either not trigger the thresholds in Schedule 2 (and therefore not require a screening opinion), or would produce a negative opinion because the environmental effects of the development would not be significant.

The European and domestic courts have found this to be unlawful.

In R (on the application of Burridge) v Breckland District Council the claimant alleged that a developer had tried 'salami slicing' its original proposal for an anaerobic digester to produce biogas and a combined heat and power (CHP) plant which converts the biogas into electricity. The original proposal was for a single site. A second application was made for the digester to be built on the original site but for the CHP plant to be moved to a second location, linked to the first by an underground pipeline.

The court found that the two sites were interdependent and that the change was at least in part prompted by objections of the parish council. This was not a case where the developer had intentionally divided the development to avoid environmental assessment.

A second point arose from the claimant's allegation that the authority had failed to properly deal with the environmental impact of the second proposal and in particular the cumulative effects of development on the two separate sites. The authority had issued a negative screening opinion in the original application and in view of the small scale of the development of the CHP plant in the second proposal, no further screening opinion was issued.

The court held that the authority had carried out the procedures correctly in granting permission for both the original and the second applications. The authority was obliged to consider whether a proposal met the Schedule 2 criteria. Only if it did so would it be appropriate to take account of other sites in assessing the environmental impact of the proposal.

**Judicial Review of Planning consent - Elementary, my dear Watson!**

The High Court has quashed planning permission and listed building consent for proposals to redevelop Sir Arthur Conan Doyle's former home. The property was listed because of its historic interest and had been used as a hotel until its closure in 2005. The building was in some disrepair at the time of the planning applications in 2010.

In February 2010, the owner applied for permission to convert the property into three terraced houses with a new build three storey extension to provide five town houses. The accompanying planning statement confirmed that there was no market interest in reinstating the single dwelling house use. The council notified English Heritage but received no response.

In June, a prospective purchaser applied for permission to change the use to a single dwellinghouse. It had offered the owner £600,000 but was told that no offers were being considered.
A few days later the owner's application was reported to committee and the planning officer recommended approval on the basis that the scheme represented a financially viable proposal to ensure the maintenance of the building. The committee was made aware of the later proposal, but were advised that each application should be considered on its own merits. The committee resolved to approve the application subject to the completion of a section 106 agreement.

In August the single dwellinghouse application was granted permission. In September the section 106 agreement was completed for the owner's scheme. Permission and listed building consent were issued. Neither was referred back to committee.

Judicial review was sought on the basis that the single dwelling permission and the offer to purchase were material considerations and that the owner's application should have been referred back to committee before the permission was granted.

The court held that where there are alternative schemes which would secure viable use, the optimum use is the one which has the least harmful impact on the significance of the listed building, even where that use is not the most profitable. The single dwelling use was the optimum viable use and was a highly material consideration which the council should have considered.

Another issue was the notification to English Heritage. Although the council sent the notification, it was never received. The court found that the council had failed to meet its statutory notification obligations. It should have followed up the notification when it became apparent that English Heritage had not commented.

Finally, the owner's marketing strategy in support of its claim that there was no interest in the property as a single dwelling was flawed. It made no mention of the offer made by the prospective purchaser and the marketing was inadequate.

The court quashed the multiple-house permission and the listed building consent, so the council will be obliged to determine those applications again, this time having regard to the later single house application. Bearing in mind the court's comments on the inadequacy of the marketing report, it is highly likely that permission will be refused.

R (Gibson) v Waverley Borough Council and another

The above analysis was written by Jan Hebblethwaite (jan_hebblethwaite@wragge.com), associate in Wragge & Co's Real Estate group.

**Tenant insolvency - another chance to read our Alert on Company Voluntary Arrangements**

In our Alert earlier this month, we reported on Fitness First's proposal to enter into a company voluntary arrangement (CVA) with its creditors.

Although the CVA has now been approved, Fitness First is unlikely to be the last tenant to propose a CVA in the foreseeable future. Our alert sets out the basics and provides practical tips for landlords faced with a CVA to consider.
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This analysis may contain information of general interest about current legal issues, but does not give legal advice.

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