CRC Energy Efficiency Scheme - consultation on the treatment of the CRC in the context of landlord and tenant relationships

In anticipation of the start of the CRC Energy Efficiency Scheme (CRC) on 1 April 2010, a property industry working party intended to represent all interests in the property industry has issued a consultation on the treatment of the CRC in the context of landlord and tenant relationships. This follows on from the publication called 'The Carbon Reduction Commitment: A Guide for Landlords and Tenants' published by a group of industry bodies in June 2009.

The consultation is aimed at all property owners and occupiers. The primary purpose of the consultation is to explore whether a cross-industry consensus can be reached on how CRC costs should be apportioned between landlords and tenants in new leases.

The consultation asks, among other things:

- whether, in principle, tenants should contribute towards CRC costs incurred by landlords in relation to energy used within the tenant's premises, or in the common parts
- how such costs should be apportioned between different tenants
- whether tenants should provide landlords with the money to buy allowances in respect of carbon emissions, or whether landlords should buy the allowances and charge tenants retrospectively
- how recycling payments received by landlords under the scheme should be dealt with
- what should happen when either the landlord or the tenant changes
- if CRC costs are not passed on to tenants, how landlords and tenants could be encouraged to work together to reduce carbon emissions.

If responses to the consultation suggest that a consensus is possible, it is proposed that a set of standard CRC clauses for leases could be produced. Since the CRC scheme operates at a group and portfolio-wide level, rather than in relation to individual buildings, an industry standard clause would have the advantage of consistency across the market and would reduce difficulties when landlords and tenants dispose of their interests. Standard drafting would save time, and keep costs down, when negotiating leases and (for landlords) when buying and selling buildings subject to existing leases. It would also make the ongoing management of a landlord's portfolio easier.

It is vital that as many views as possible are taken into account, both from landlords and tenants, and all those who may be affected across the property industry, including managing agents.

Please click here for details of how to respond to the consultation. The consultation closes on 5 February 2010.
Further guidance on the CRC can be found in our alerts: CRC - are you in or out? and Carbon Reduction Commitment - the basics, and in the CRC guide for landlords and tenants produced by the industry working party.

For more information on how the CRC may affect you, please contact Mark Chester +44 (0)870 733 0603 or Sarah Thompson +44 (0)121 214 1089.

**Landlord and tenant - is a virtual assignment a breach of an alienation covenant?**

In the February 2009 edition of property update, we considered the case of *Clarence House Ltd v National Westminster Bank plc*. The High Court's decision that a virtual assignment constituted a breach of a typical covenant against alienation has now been overturned by the Court of Appeal.

A "virtual assignment" is an arrangement under which all the economic benefits and burdens of a lease are transferred to a third party, but without any actual assignment of the leasehold interest. In this case, the tenant entered into a virtual assignment with a company called New Liberty. At the time of the virtual assignment, the property was let to an undertenant, who was in occupation. Under the terms of the virtual assignment, New Liberty was obliged to manage all dealings with the landlord and the undertenant as if the property had been assigned to it, and was appointed as the tenant's agent in all dealings connected with the property. To enable New Liberty to do this, the tenant granted a power of attorney to New Liberty enabling it to act in the name of the tenant in relation to the property. The document stated that all monies receivable from the undertenant belonged to New Liberty.

The High Court had ruled that the virtual assignment breached the tenant's covenant not to share or part with possession of the property. The Court of Appeal disagreed.

The Court of Appeal noted the definition of "possession" in the Law of Property Act 1925, which includes (unless the context otherwise requires) the receipt of rent, or the right to receive rent. However, it ruled that, as between New Liberty and the undertenant, New Liberty collected the rent as agent for the tenant. Its right to keep the rent, once collected, derived from the contractual arrangement it had with the tenant. This did not amount to a transfer to New Liberty of the right to receive rent in the sense envisaged by the Law of Property Act. This was demonstrated by the fact that an action against the undertenant for arrears would have to be brought in the tenant's name, not New Liberty's (albeit that the tenant was unlikely to be able to refuse consent for its name to be used). Even if the effect of the virtual assignment was to transfer to New Liberty the right to receive the rent, the consequence was not to put New Liberty in possession of the premises, but to pass to it a personal right to the debt. New Liberty could in those circumstances recover the rent from the undertenant as a debt, but could not forfeit the underlease or distrain for non-payment; those rights being attached to the tenant as holder of the reversion.

The court held that "possession" must be given its normal meaning. The hallmark of the right to possession was the right to exclude all others from the property. At all times since the virtual assignment was entered into, the tenant had not been in possession of the property at all, since it was let to the undertenant. Therefore, the tenant could not be said to have parted with possession to New Liberty, or be sharing possession, as a result of the virtual assignment. In the court's view, a covenant against sharing or parting with possession was concerned with the question of whether the tenant had allowed another into physical occupation, with the intention of relinquishing its own exclusive possession.
The Court of Appeal also agreed with the conclusions of the High Court that the virtual assignment did not constitute a breach of the covenant against assigning the property, underletting it or holding it on trust. The result was that there had been no breach of the lease by the tenant.

**Things to consider**

In giving the judgment of the Court of Appeal, Ward LJ stated that "I recognise that virtual assignments are strange new beasts in the forest; that one must circle around them suspiciously and cautiously; but the moment one gets close and has a good sniff, the overwhelming smell is of contract, not trust".

There can be powerful commercial drivers to put a virtual assignment in place. It is therefore unfortunate that, in this case, since New Liberty's involvement, the rent payable under the lease fell into arrears. However, despite that, the basis of the landlord's concerns is not entirely clear. The landlord had - and always did have - a cause of action against the tenant for non-payment of rent, whether as a debt claim or as a ground for forfeiture. It was also open to the landlord to serve a notice on the undertenant requiring it to pay the rent under the underlease directly to the superior landlord in order to cover those arrears.

Some draftsmen have amended their precedent leases to prohibit virtual assignments in the light of this case. The argument in favour of this is that a landlord may be concerned about underlease rent being diverted to a virtual assignee and the effect that this might have on the tenant's covenant strength. However, against this is the fact that landlords do not - and arguably should not - seek to regulate how tenants run their business, including what they do with income from underleases. After all, if the premises have not been underlet, having carried out its initial assessment of covenant strength, the landlord has no ongoing control over the income from which the tenant pays its rent.

**Landlord and tenant - examination of a landlord's right to refuse renewal of a business tenancy if it intends to occupy the premises itself**

A tenant whose lease is protected by Part II of the Landlord and Tenant Act 1954 has a statutory right to renew its lease, unless the landlord can make out one of seven statutory grounds of opposition (found in section 30(1) of the Act).

Section 30(1)(g) provides that the tenant will not be entitled to a new lease if the landlord intends to occupy the premises for the purposes of a business to be carried on by him, or as his residence (ground (g)). The landlord cannot use ground (g) if it purchased its interest within the last five years of the lease (section 30(2)).

In *Patel v Keles*, the tenant applied for a new lease. The landlord opposed the renewal on ground (g), claiming that he intended to carry on a newsagent's business at the property. The landlord offered an undertaking to the court that he would not use the premises for two years for any purpose other than a newsagent's carried on by him.

Section 30(1)(g) does not specify for how long the landlord must intend to occupy the property for the purposes of his business. The court noted that the tenant is protected against the landlord selling the reversion shortly before the expiry of the lease to a purchaser who wishes to occupy for the purposes of his business, because of the five-year rule referred to above. However, the tenant is not on the face of it protected against the risk that the landlord takes possession for the purposes of his own business but then quickly sells.
The Court of Appeal ruled that, if at the date of the hearing the landlord had an intention to sell the property within five years, then it would not have the necessary intention to occupy it for the purposes of ground (g). The difficulty presented by the present case was that it was not shown that the landlord had a settled intention to sell. However, the circumstances were such that it was likely that a sale would occur.

The court reached this conclusion on the basis that:

- the undertaking given by the landlord was limited to two years
- the undertaking did not impose any obligation on the landlord to trade from the premises. Rather, it was expressed negatively; not to use the premises for anything other than a newsagent's
- the landlord did not need to carry on a business from the premises as he had other sources of income
- businesses run by the landlord on his adjoining property had closed.

The court ruled that this threw doubt on the genuineness of the landlord's intention to occupy the premises for the purposes of carrying on a business. On that basis, it could not rely on ground (g), and the tenant was entitled to a new lease.

**Things to consider**

The landlord's intended occupation must be more than short-term if it is to succeed on ground (g). The court acknowledged that what is short-term will depend on the facts of a particular case. However, it ruled that, in any event, if the landlord has a settled intention to sell within five years, ground (g) will not be made out.

**Landlord and tenant - a landlord's attempt to pursue an undertenant following disclaimer of the headlease, despite a surrender of the underlease**

Tenant insolvency is increasingly common in the current climate. The disclaimer of a lease by the tenant's liquidator causes a particular headache for the landlord. Where the property is underlet, the effect of the disclaimer on the undertenant is not straightforward following the decision in *Hindcastle Ltd v Barbara Attenborough Associates Ltd*. For this reason, some landlords include a provision in the licence to underlet which requires the undertenant to take a new lease from the landlord in the event of a disclaimer of the headlease.

In *BNY Trust & Depositary Co Ltd v Bourne End One Ltd*, the relevant clause in the licence to underlet said:

"If, following an Event of Default, the Underlease ceases to subsist and the Landlord serves a Landlord's Notice, the Undertenant ... shall accept a new lease..."

An "Event of Default" included the disclaimer of the headlease by the tenant's liquidator. On 13 October 2008 the tenant's liquidator disclaimed the headlease. The landlord sought to enforce the clause in the licence to underlet against the undertenant. However, unknown to the landlord, the undertenant had surrendered the underlease to the tenant on 29 September 2008. The undertenant had paid a reverse premium of £100,000 to the tenant for the surrender.

Since the underlease had ceased to subsist prior to the disclaimer of the headlease by the tenant's liquidator, the clause in the licence to underlet was not engaged.
The landlord therefore argued that the surrender was a breach of the alienation provision in the underlease. This was in a fairly standard form, and provided that the undertenant was not to assign, underlet, part with possession or share occupation of the whole or any part of the premises, or hold the premises on trust, save as provided by the remainder of the clause. The landlord argued that, by virtue of the surrender, the undertenant had given up possession of the premises to the tenant, and that this was therefore a breach of the alienation clause. Since the undertenant had given a direct covenant to the landlord in the licence to underlet to comply with the terms of the underlease, the landlord was able to enforce the underlease covenants against the undertenant.

The High Court rejected this argument. It held that it was not the case that the surrender was a technical breach of the alienation covenant by the undertenant (albeit one which the tenant, by accepting the surrender, had waived). A surrender was not a breach of the alienation covenant at all. Surrender is, after all, a consensual matter between the landlord and tenant under a lease. It was simply not a transaction at which the covenant against alienation was aimed.

The licence to underlet also contained a covenant by the tenant not to waive any of the covenants in the underlease without the landlord's consent. The landlord argued that, since the surrender contained a release of the undertenant's obligations in the underlease, this constituted a breach of this covenant in the licence to underlet.

The court was equally unimpressed by this argument. Reviewing the terms of the underlease, it noted that it contained a clause regulating sub-underlettings. In addition to prohibiting the undertenant from waiving any of the provisions in a sub-underlease, the underlease also expressly prohibited the undertenant from accepting a surrender of a sub-underlease without the consent of the tenant. No similar covenant in relation to a surrender of the underlease had been included in the headlease, or in the licence to underlet.

In addition, the underlease contained a right of re-entry, which would have allowed the tenant to forfeit the underlease. The covenant by the tenant in the licence to underlet not to waive any of the covenants in the underlease would not have prevented forfeiture of the underlease. Since this clause would not have enabled the landlord to prevent forfeiture, nor should it be taken as preventing a surrender.

A second issue arose in the case. When the tenant failed to pay the rent due in December 2007, the landlord served a notice on the undertenant under section 6 of the Law of Distress (Amendment) Act 1908. Under this section, a superior landlord can direct an undertenant to make all future payments of rent under the underlease directly to the superior landlord until the arrears outstanding under the headlease have been paid. The notice must specify the amount of arrears. The question was whether such a direction operates only until the amount of arrears specified in the notice has been paid, or whether it continues to operate until all outstanding arrears under the headlease have been cleared.

In this case, the rents payable under the lease and the underlease were identical. The undertenant had already paid its December 2007 rent to the tenant. However, in accordance with the notice, the undertenant paid its March 2008 rent directly to the landlord. This was enough to clear the arrears specified in the landlord's notice. However, the tenant did not pay the March 2008 instalment of rent due under the lease. The landlord invoiced the undertenant directly in respect of the June instalment of rent, and the undertenant paid it to the landlord. The undertenant had therefore paid all rent which was owing under the underlease.

However, the landlord argued that the effect of the section 6 notice was that all subsequent quarterly payments which would have been due under the underlease if it had not been surrendered were payable by the undertenant to the landlord. Section 3 of the 1908 Act deems the undertenant to be the immediate tenant of the landlord for the purpose of recovering any rent
payable under a section 6 notice. The landlord argued that the tenant was therefore not in a position to release the undertenant from its liability to pay future instalments of rent to the landlord. Since the disclaimer of the lease only operated to terminate the tenant's liabilities under the lease and not the lease itself (Hindcastle), rent under the lease remained due and payable so far as the undertenant was concerned.

The court rejected this argument. It held that a section 6 direction operates only until the amount of arrears specified in the landlord's notice has been paid. A landlord must therefore serve a further section 6 notice if it wishes to operate the section 6 procedure in respect of any further arrears under the headlease. Otherwise, there would be no point in the section requiring the notice to state the amount of arrears. In any event, the court thought that if no rent is payable under the underlease (e.g. because it has been surrendered), then there is nothing on which a section 6 notice can operate.

**Things to consider**

On the first issue in the case, the court did not draw a clear distinction between the automatic release of future liabilities under a lease which occurs on a surrender, and the release of any breach of covenant which may have occurred prior to the date of the surrender. It is arguable that, while the automatic release of future liabilities may not constitute a waiver of the tenant's covenants (the liabilities simply never arise, because the lease has come to an end), the express release of any past breaches may do. However, there was no suggestion that the undertenant was in breach of covenant, which may explain why it was not considered in the case.

In relation to section 6 notices, the message for landlords is that they should serve a new section 6 notice each time additional arrears become outstanding under the headlease. The case does however also highlight how an undertenant in receipt of a notice can be in a difficult position to know to whom it should pay its rent. In this case, the undertenant would have known that once it had paid the March instalment of rent to the landlord, it had cleared the amount of arrears specified in the notice. However, it is easy to envisage instances where this may not be the case. For example, where there are several underlettings of part, one undertenant would not necessarily know whether the other undertenants had received section 6 notices, or had paid the superior landlord in accordance with those notices, and therefore whether there were any arrears still outstanding.

**Development - the right to connect to a public sewer**

Barratt Homes sought a court declaration that it was entitled to have its development connected with the public sewers. The local water authority, Welsh Water, had objected to Barratt's planning application on the grounds that it would overload the public sewerage system. Planning permission for the development was granted, subject to a condition that no development should take place until a scheme of foul drainage and surface water drainage had been submitted to, and approved by, the local planning authority.

Barratt then served a notice on Welsh Water under section 106 of the Water Industry Act 1991. Section 106 provides that the owner or occupier of premises, or the owner of any private sewer, is entitled to have its drains and sewers connected to the public sewer, and to discharge foul and surface water from those premises into the public sewer.

A sewerage undertaker may refuse to permit the connection if the mode of construction or condition of the private sewer does not satisfy the undertaker's reasonable standards, or is such that the making of the communication would be prejudicial to the undertaker's sewerage system.

http://www.wragge.com/analysis_5511.asp
Barratt's notice specified a particular connection point where the connection to the public sewer would be made. However, the public sewer downstream from this point was only 150mm wide.

Welsh Water responded, stating that they were in a position to approve the connection, but that it must be made at a different connection point. The point proposed by Welsh Water was 300 metres away, across third party land, where the public sewer had widened out to 300mm. Barratt would have to bear the cost of the link between the development and the connection point proposed by Welsh Water. Welsh Water argued that if the connection was made at its point, it would not overload the public sewer. Barratt argued that this was not a valid reason for which Welsh Water could refuse consent under section 106, since it did not relate to the mode of construction or condition of the private sewer.

In the meantime, the local planning authority discharged the planning condition, based on correspondence that Barratt had obtained from OFWAT. Barratt was therefore able to begin development.

The Supreme Court ruled that Welsh Water was obliged to deal with any discharge that was made into its sewers under section 106. If consequential works were required to accommodate the increased load on the public sewer, the cost of these works fell on the sewerage undertaker, and not the developer.

It was impossible to extend the natural meaning of "mode of construction" of the private drain or sewer in section 106 so as to include the point at which it was proposed to connect that drain to the public sewer. On that basis, Welsh Water was not entitled to refuse consent by reason of the proposed point of connection.

**Things to consider**

The court noted that this was the first occasion upon which a court had been required to resolve a dispute between a property owner and a sewerage undertaker as to the point of connection of a private drain with a public sewer. This indicated that the point of connection does not normally give rise to difficulty in practice.

The real problem, in the court's view, was not an owner's right to select the point of connection, but the fact that no objection to a connection can be made by a sewerage undertaker on the ground of lack of capacity. Section 106 gives an absolute right to an owner to connect a drain to the public sewer under section 106 on giving only 21 days' notice. The court thought that, while this created no problem in the case of an individual dwelling house, it was "manifestly unsatisfactory" in relation to a development which might increase the load on the sewer by 25% or more. The public sewer may well not have surplus capacity capable of accommodating the increased load without the risk of flooding unless the undertaker has received sufficient advance notice of the increase and has been able to take the necessary measures to increase capacity. The problem is accentuated by the fact that the budgets of sewerage undertakers are agreed at five-yearly intervals by OFWAT.

The court suggested that the problem could be resolved by the local planning authority making the grant of planning permission conditional upon the sewerage authority first taking any steps necessary to ensure that the public sewer will be able to cope with the increased load. In order for this to happen, the court thought that it was essential that there should be input to planning decisions from both the relevant sewerage undertaker, and OFWAT. The court stated that "more thought may need to be given to the interaction of planning and water regulation systems under the modern law to ensure that the different interests are adequately protected".

*Barratt Homes Ltd v DWR Cymru Cyfyngedig (Welsh Water)*
Development - new consultation on zero carbon non-domestic buildings

In the February 2009 edition of property update, we reported on the Government's consultation on zero carbon buildings, published in December 2008. Although mainly concerned with the definition of a zero carbon home, the consultation also contained provisions relating to non-domestic buildings. The Government's aim is for all new non-domestic buildings to be zero carbon by 2019 (reducing to 2018 for new public buildings).

The December 2008 consultation stated that the Government intended to issue a further consultation, specifically on non-domestic buildings, later in 2009. On 24 November 2009, the Department for Communities and Local Government issued this second consultation. The aim of the new consultation is to seek views on the policy options available in order that the Government's zero carbon 2019 target is met.

The consultation is aimed at, among others:

- property developers and builders
- property owners and occupiers, including facilities managers
- construction industry professionals.

The latest consultation states that responses to the December 2008 consultation recognised the case for regulation. However, the paper notes that, in the light of current economic conditions, it is also important to consider the costs and potential consequences of such regulation on economic recovery for the construction sector, and balance these with the benefits of early certainty around a route-map for future regulatory steps.

The consultation states that the Government will adopt the broad framework for zero carbon that has been developed for homes, but adapted appropriately to reflect the differences in the commercial buildings market and the variation of non-domestic buildings.

This means that it will use the threefold hierarchy of:

- energy efficiency

followed by

- on-site or linked low and zero carbon technologies ('carbon compliance')

followed by

- off-site ('allowable solutions')

The consultation paper states that the most important differences that need to be reflected in the zero carbon non-domestic buildings policy are:

- the much wider variation in buildings, which can impact on both potential solutions and costs. The Government therefore proposes to adopt an "aggregate approach". This means that the overall targeted improvement will be achieved across all new build, but that individual building types will be required to contribute to different levels based upon cost-effectiveness
- non-domestic buildings are often more complex and larger scale than homes, and involve greater technical input in design and construction and a closer level of building control involvement and oversight
- non-domestic buildings often have greater potential for on-site renewables (e.g. more roof space) and to play a critical role in the viability of community heat or energy networks.

The paper also states that the government wants to work with the Royal Institution of Chartered Surveyors and stakeholders to continue to explore the issue of valuation of sustainable buildings and whether they do or could attract a premium, to ensure the additional benefits of low and zero carbon buildings are appropriately reflected in valuation in future.

The questions asked by the consultation cover issues such as:

- whether the Government should establish challenging energy efficiency standards for non-domestic buildings covering space heating and cooling
- the impact of the costs of building to zero carbon standards in different sectors
- whether the same measures and approaches should be adopted for allowable solutions for non-domestic buildings as those for homes
- ways in which the public sector could usefully provide leadership for the move to zero carbon.

The consultation is accompanied by an impact assessment which analyses the costs and benefits for different scenarios for zero carbon standards.

For more information, and to respond to the consultation, visit the Government's website. The consultation closes on 26 February 2010.

**Carbon Trust report**

Separately, a report from the Carbon Trust says that, for the UK to meet its national carbon reduction obligations, Britain's commercial, industrial and public buildings need to improve from an average of an E energy rating today to C by 2020 and A by 2050. It argues that central to this strategy is the roll out Display Energy Certificates (DECs) and Energy Performance Certificates (EPCs) to all non-domestic buildings by 2015 to provide transparency of energy performance across the sector. For more information, see the Carbon Trust's press release.

The EU is of course planning to amend the Energy Performance of Buildings Directive to increase the use of EPCs and DECs (see our alert from March 2009).

**Easements - change of use of benefited land from garden to housing does not affect easement**

In *Davill v Pull*, the claimant and the defendants each had a right of way over a track to access their respective adjoining plots. The claimant wished to redevelop its plot of land for housing. The defendants asserted that the track could not be used for access to the proposed development, as this would involve an excess use of the claimant's easement.

The right of way was granted in a conveyance of the plot together with other land. Having described the plot as "garden ground" for the purpose of identifying the land to be sold, the conveyance went on to grant "the right for the Purchaser his heirs and assigns to use for all reasonable and usual purposes such part of the ... roadway ... as [is] necessary to give access to and from the hereditaments hereby conveyed".

The defendants accepted that the claimant could lawfully build houses on the plot. They also accepted that neither the vehicles involved in the construction of the houses, nor those of the occupants once they were built, would interfere with the defendants' use of the track.
However, the defendants argued that the right of way was circumscribed by the fact that the benefited land was "garden land" at the date of the grant. The defendants' case was based on the fact that the grant of the right to use the track was not expressed as a right exercisable "at all times and for all purposes", but "for all reasonable and usual purposes". The defendant argued that that must mean "reasonable and usual" for a country track leading to an allotment.

Case law showed that, had there been an unqualified express grant of a right of way, then even though the benefited land was used as garden land at the time of the grant, the right would be exercisable for all lawful purposes for which the land could be used from time to time (including housing). The question, therefore, was whether the language of the grant, construed against the background circumstances known to the original parties, imported a limitation on it.

The claimant argued that the only effect of the phrase "reasonable and usual" was to exclude offensive or obnoxious purposes. If all gardening activities on the plot were to come to an end, there would on the defendants' case be no continuing right to access it. The easement would therefore be tantamount to a restrictive covenant not to use the plot as anything other than a garden. However, the vendor had not seen fit to impose such a covenant in the conveyance. The description in the conveyance of the benefited land being "garden ground" was there solely for the purpose of identifying the benefited land; it did not limit the purposes for which the right of way could be used.

The Court of Appeal found in favour of the claimant. There was nothing to suggest that the original parties to the conveyance intended that the easement over the track could only ever be used in connection with the use of the benefited plot as garden land.

A use "for all reasonable and usual purposes" imposed a qualification on an "all purposes" use. However, had it been the parties' intention to limit use of the right of way to the type of use to which the benefited plot was then being put, it would have been easy to achieve this by drafting to that effect. There was no question that the use of the plot for the building and occupation of houses in accordance with a planning permission was a "reasonable and usual" use. On that basis, the right of way over the track could lawfully be used for the purpose of building such houses and their occupation when built.

**Things to consider**

The scope of an easement which has been expressly granted will always be determined by the interpretation of that grant. The court emphasised that, where a grant is for "all purposes", its use will not be limited by the original use of the benefited land at the date of grant and will permit use for any purpose to which the benefited land may from time to time be put. The position is different where an easement is claimed by prescription or implied grant, when a change in the use of the benefited land may be relevant.

**Easements - the court upholds a right to turn a car as an easement, notwithstanding that access is over third party land**

In Propertyoint Ltd v Kirri, Mrs Kirri claimed a right, by virtue of long use, to enter on to land owned by Propertyoint for the purpose of turning vehicles which were to be parked in her garage, so that those vehicles could park facing in the right direction in the garage.

Between 1982 and 2001 Mrs Kirri had accessed the burdened land directly from the alleyway outside her garage. However, between 2001 and 2006 this direct access was blocked by a
hoarding. Mrs Kirri continued to use the burdened land to turn her car, but she had to take a more circuitous route over some adjoining land in order to do so.

In order to establish an easement through long use, it is necessary to show 20 years' uninterrupted use. Propertypoint argued that the two periods of use; from 1982 to 2001, and from 2001 to 2006, could not be added together, since access to the burdened land had been via a different route between 2001 and 2006.

The High Court dismissed this argument. The precise way in which the burdened land was used was not the issue. The question was whether the burdened land had been used for the right of way for 20 years. It did not matter that, between 2001 and 2006, access to the burdened land had been over land belonging to a third party, which Mrs Kirri had no right to use. Although an easement has to benefit the land to which it relates, the benefited land and the burdened land do not have to be contiguous. The absence of an enforceable legal right to use the intervening land was no barrier to the establishment of a right of way.

Finally, Propertypoint had argued that the right to turn or manoeuvre vehicles was not of the type or intensity required to establish an easement. It sought to draw a distinction between easements in North London as in the present case, and those that might be accepted in remoter parts of the country (as in Moncrieff v Jamieson).

The court disagreed. It saw no reason why a right of way should not, in theory, be established for the defined purpose of turning vehicles using the garage. The court distinguished the decision in Batchelor v Marlow (see Can a right to park a car be an easement?).

If anything, the court thought that a right of way to turn vehicles could be particularly important in the confined spaces often found in large conurbations, and that such an easement would be less likely to be necessary in a less built-up and highly populated area.

No specific part of the burdened land had been used by Mrs Kirri, and so the court held that it would be open to Propertypoint to build on the burdened land so long as sufficient space was left open to permit a normal-sized vehicle parking in the garage to turn on the remainder of the burdened land.

**Things to consider**

Batchelor v Marlow has been distinguished so many times (most notably, by the then House of Lords in Moncrieff v Jamieson) that one wonders whether any court will now have the courage to follow it. If not, then it seems that car parking easements - and now, turning easements - are here to stay.

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

**Perpetuities and Accumulations Act 2009**

This Act, which will be brought into force on 6 April 2010, abolishes the rule against perpetuities for land interests created on or after that date.
Planning

Environmental Impact Assessments - implications of recent judgments

The Secretary of State for Communities and Local Government issued a letter to all chief planning officers in November 2009 in relation to two court decisions which could impact the way in which local planning authorities approach Environmental Impact Assessments (EIAs). The Secretary of State confirms that amending legislation is being considered, but in the meantime the cases will need to be taken into account.

The two cases are:

1. **Baker v Bath and North East Somerset Council and Others**

Under the relevant EIA regulations, local authorities must screen applications to determine whether they are within the criteria under which an EIA is required. If a development proposal would be likely to have a significant impact on the environment, an EIA is required.

This case examines the screening procedure used in relation to planning applications for a change or extension to existing or approved development. The present EIA regulations require only that the screening process consider the proposed modification itself (and not the wider picture of the development as modified). The court in *Baker* ruled that, in this regard, the regulations do not comply with the EU Directive on environmental assessment, out of which they are derived.

The effect of the decision in *Baker* is that when determining whether or not an EIA is required, the authority must look at the development as modified, not just the modification alone.

This approach also applies to situations where the modification does not meet the thresholds set out in the regulations, and to development in special areas (such as conservation areas) where the thresholds do not apply.

Planning authorities are advised that where they receive an application for a modification to a permission which does not meet the thresholds in the regulations, they should ask the Secretary of State to consider making a screening direction stating whether an EIA is required.

The decision also advises that authorities should consider the requirements for consultation with members of the public who feel that the proposals might have significant effects of the environment.

For developers, this case could mean that the time taken by authorities to consider modification applications will be longer, especially if there is a referral to the Secretary of State. Possibly worse is the potential for public consultation and the generation of additional objections.

2. **R (on the application of Mellor) v Secretary of State for Communities and Local Government (decided in the European Court of Justice)**

This case considered whether, under the EU Directive, authorities are required to give reasons to the public for issuing a screening opinion to the effect that no EIA is required.

If a screening opinion is issued which requires an EIA to be submitted, there is a requirement to give reasons for making that decision. However the Secretary of State is of the view that there is no need for reasons for the decision to be given where the opinion states that no EIA is
required. If a member of the public wanted such information, an application could be made under the Freedom of Information Act.

The preliminary ruling of the European Court of Justice is that the Secretary of State's view is correct but that there is a duty to provide reasons for a negative screening opinion if a member of the public requests it. The information which should be made available may be by way of a formal statement and also by the production of relevant documents. The information provided should be sufficient to allow the member of the public to decide whether to appeal against the decision.

**Town and Village Greens - the story continues**

Following research into the registration of new Town and Village Greens (TVGs), the Department for Environment, Food and Rural Affairs (DEFRA) has recently received a final report.

Unsurprisingly, the research found that more than half of the applications reviewed related to sites for which development proposals were in place.

DEFRA states that the research indicates there is sufficient evidence to justify a review of the existing system. Consultations will commence in spring 2010 on the need for reform and the options that exist.

It is this author's firm opinion that the changes in the Commons Act 2006 favoured the case for registration of land as a TVG at the expense of legitimate development proposals. This consultation may provide an opportunity to re-examine whether the correct balance has been struck between preserving valuable recreation and amenity land and the need for development to proceed.

**Greater flexibility for planning permissions**

Recently, measures were introduced relating to:

- extensions to the time limits for implementing existing planning permissions
- non-material amendments to existing planning permissions
- minor material amendments.

See our report on the consultation in the July/August 2009 property update.

The Secretary of State for Communities and Local Government has published guidance on the use of these measures.

Annex A of the guidance contains a useful summary table of the three types of application and how they can be made.

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

**Access for disabled customers**

Another chance to read our alert on a landmark decision regarding the duty to make reasonable adjustments to premises.
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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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