

DBRIEF

Issue 46



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Public Benefit – An Excuse for More Paperwork?

As many headed for the beach in mid July, the Charity Commission published its findings from its initial round of public benefit assessments. The majority of the assessments were on particular private schools and drew the attention of the media.

However, of more interest to RPs involved in operating care homes, the findings also included assessments on three care homes. These homes were chosen because, like public schools, they charge “high” fees.

Of the three care homes reviewed, one passed the ‘public benefit’ test laid down by the Charity Commission, another was found to be suffering from “mission drift” and so was not carrying out

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its purposes. The third, Pennylan House Jewish Retirement and Nursing Home, did not pass. The trustees of the third have been asked to confirm, within three months, that they have considered the Charity Commission assessment report and will put a plan in place to enable the care home to meet the public benefit requirement. The plan then has to go to the Charity Commission.

The Charity Commission are due to announce the next round of assessments. In the meantime, care home operators may want to examine their publications, websites, and annual reports to ensure that their public benefit is clearly explained.

view of the new arrangements that may affect them. As indicated in the last DBrief, it is proposed that exempt charities (such as RPs) will have a "Principal Regulator". This supervising body (which, in the case of charitable Registered Providers, many expect to be the TSA) will have to promote compliance by the boards of exempt charities with their legal obligations to control and manage the administration of their charity. This is likely to include compliance with the Charity Commission's public benefit requirements.

It is unwise to extrapolate the Charity Commission's policy on public benefit in relation to care homes on the basis of just two assessments. However, in

By way of background, the twelve assessments were made on the basis of the recently published Charity Commission public benefit guidance. The Charities Act 2006, among other matters, highlighted the requirement for all charities' aims to be, demonstrably, for the public benefit. "Public benefit" is the legal requirement that every organisation set up for one or more charitable aims must be able to demonstrate that its aims are for the public benefit if it is to be recognised, and registered, as a charity in England and Wales.

Although the Charity Commission's guidance does not constitute the law on public benefit, it is a guide to how the Charity Commission interprets and applies that law. Many advisors are concerned that the Charity Commission guidance does not have a formal basis in law. However, RPs, who are exempt charities, will want to be aware of the guidance in

the two assessments (the Cornwall Old People's Housing Society which passed the private benefit test and Pennylan House, which did not, the Charity Commission appeared to be concerned as to whether the resident may be denied or deterred from seeking access because of an inability to pay the fee.

It will be interesting to see whether, if appointed Principal Regulator, the TSA will want to 'second guess' the Charity Commission's stance on public benefit for RPs operating care homes.

Therefore, as indicated above, RP care home operators will need to highlight how they satisfy the public benefit test. This can be done in the annual reports and in their promotional literature and on their website. The sample reports on the Charity Commission's website on public benefit may well provide some "food for thought".

Widening the Net of Discrimination

A recent case involving a local authority and an arms-length management organisation has found that an employer may be liable for discrimination against a worker who is not their employee if the work being carried out is for the employer's benefit and the employer is able to influence the worker's working conditions.

This decision has ramifications for all organisations involved in tri-partite arrangements such as outsourcing or agency work, who may find themselves liable for discrimination against workers who are not their own employees.

party (the principal). In particular, it is unlawful for the principal to subject a contract worker to a detriment or to harassment on the grounds of race.

The Facts

Leeds Council manages its council houses through three ALMOs owned by the council, including West North Homes Leeds Ltd (WNHL). As part of its arrangement with the council, WNHL outsourced maintenance services to the council's property services division.

Mr Woodhouse, who is of African-Caribbean origin, was employed by WNHL as a principal registration

“There is surprisingly little case law in this area, and so the decision is a useful illustration as to the scope of protection under the RRA.”

The case of Leeds Council v Woodhouse considered the circumstances in which an individual carrying out work for a third party who is not their employer could claim protection as a contract worker under the Race Relations Act 1976 (RRA).

The circumstances involved an individual working under the terms of a management agreement between his employer (an ALMO) and Leeds Council. There is surprisingly little case law in this area, and so the decision is a useful illustration as to the scope of protection under the RRA.

The Law

The RRA protects contract workers from discrimination where they are supplied by their employer on a contract basis to work for a third

officer. He had originally been employed by the council and had transferred to WNHL under the Transfer of Undertakings (Protection of Employment) Regulations 2006 when WNHL was set up. As part of his duties he had to ensure that the work carried out by one of the council's employees, Mr Chapman, complied with the terms of the maintenance services sub-contract with the council.

During the course of his employment with WNHL, Mr Woodhouse issued race discrimination proceedings against Mr Chapman, the ALMO and the council, alleging Mr Chapman had made racially derogatory remarks about him whilst they were working together. The council and Mr Chapman argued that the employment tribunal had

no jurisdiction to hear the case against them and made an application to strike out Mr Woodhouse's claim.

However the employment tribunal rejected the application, holding that it did have jurisdiction against the council and Mr Chapman. The employment tribunal went on to consider the circumstances in which the Council as a third party principal may be liable for a discrimination claim made by a contract worker who is not its employee, but is the employee of its contractor. The tribunal held that the correct test for establishing whether the Council could be found

employed by the council), this was not a pre-requisite for the purpose of protection under the RRA.

The test for determining liability of the third party is whether the work done by the individual is for the benefit of the third party and the discrimination is in relation to that work. In addition, although not a central requirement in this case, it would seem that the third party must be able to influence or control the individual's working conditions.

Mr Woodhouse's solicitor stated that the ruling 'makes it clear that councils cannot escape

liable would be to determine for whose benefit Mr Woodhouse had been doing the work in relation to which he was claiming discrimination,

It found that the quality control work Mr Woodhouse did was as much for the benefit of the council as it was for the ALMO that employed Mr Woodhouse. The council was therefore potentially liable to Mr Woodhouse under the RRA. The council and Mr Chapman appealed against the decision to the EAT Employment Appeal Tribunal (EAT), arguing that it has interpreted the words 'work for' too widely.

The EAT disagreed and upheld the employment tribunal's decision. The EAT acknowledged that in spite of the unique proximity of the relationship in this case (as Mr Woodhouse had previously been

responsibility for discrimination against employees of ALMOs'.

'ALMOs across the country should pay close attention to this case and its impact on the way in which a council can treat employees of the ALMOs that were created by them,' he added.

Whilst it is the first case of its kind involving a local authority and an ALMO, the case has wider implications than those of just a council and its ALMO and will affect all end-users in a tri partite relationship. Although judgment in the case was given in April 2009, the decision has only recently been published, it is understood that the council has applied for leave to appeal the EAT's decision.

Practical advice

As a consequence of this case, end-users in a

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tri-partite relationship should be alive to the potential discrimination of contract workers.

Employers in this situation should therefore ensure that their managers working with contract workers are aware that it is unlawful for them to discriminate against their contract workers, in the same way that it is unlawful to do so against their own colleagues. Employers should also revisit their policies and procedures on equal opportunities to reflect this and arrange for managers and employees working with contract workers to receive up-to-date equal opportunities and diversity training.

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High Maintenance - The Importance of Asset Management in the Current Market

Efficient and effective maintenance of existing stock has never been more important to providers of social housing than during the economic downturn that Britain has experienced in recent years. A prudent and progressive maintenance strategy will provide not only cost benefits and assist with staff efficiencies, but is also a key driver in improving resident satisfaction.

Greater emphasis on asset management is one of the quickest routes to increasing approval ratings amongst social housing tenants at large, and with this being one of the most important goals of any

Regulations. A maintenance contract will typically be regarded as a works contract for the purposes of the Regulations. However, specific advice should be taken if the contract is also to involve the carrying out of grounds maintenance and/or property management services as this could mean that the contract should be regarded as a services contract under the Regulations.

A works contract will be subject to the Regulations if the amount that the Registered Provider expects to pay to the contractor under the contract is in excess of a certain threshold - currently

social housing provider, the relevance of pro-active and pro-resident maintenance strategies could not be starker.

There are a number of options available and issues to bear in mind when considering asset management strategies as summarised in this article. However, should any of the issues discussed in this article arise then our teams would be more than happy to discuss it in more detail and assist however possible.

A. EU Procurement

Before procuring a contract for maintenance works the social housing provider will need to consider whether the contract needs to be competitively tendered in accordance with the Procurement

£3,497,313 (exclusive of VAT). If the Regulations apply, the contract will need to be advertised in the Official Journal of the European Union (OJEU) and the appropriate tender procedures set out in the Regulations will need to be followed to select a contractor. The tender process will need to be fully transparent, non discriminatory and fair.

A failure to comply with the Regulations could lead to a formal legal challenge from an aggrieved contractor. It could also attract an adverse reaction from the Regulator so it is clear that EU Procurement should be considered at the earliest opportunity.

B. Section 20 Notices

The provider of social housing will also need to consider whether it needs to consult with any residents under section 20 of the Landlord and Tenant Act 1985 before procuring and entering into the maintenance contract. In very brief terms, if residents are going to be required to contribute to the costs of the works to be carried out under the contract through payment of their service charges, resident consultation may be required. A failure to comply with the consultation requirements could mean that the social housing provider is unable to

The JCT Measured Term Contract 2005 is appropriate for Employers who have a regular flow of maintenance work to be carried out by a single contractor over a specified period of time. The JCT Measured Term Contract 2005 is based on a priced Schedule of Rates to be followed by a series of Orders issued by the Contract Administrator.

The TPC 2005 has a partnering element to it, which isn't quite as prevalent in the JCT Measured Term Contract. However, people occasionally find the JCT Measured Term Contract 2005 easier to

“A failure to comply with the consultation requirements could mean that the social housing provider is unable to recover the costs of the works from the residents.”

recover the costs of the works from the residents.

C. Forms of Contract

A host of different forms of contracts are used to procure maintenance works, but increasingly the most popular standard forms are the JCT Measured Term Contract 2005, the TPC 2005 and the NEC Term Service Contract. All of these contracts are well drafted contracts and are effectively used to procure maintenance works. However, they are standard forms so there may be project specifics which the standard form does not address. As such, a prudent Employer will also agree a Schedule of Amendments with the Contractor which will amend the standard form and deal with any additional risks or issues.

read and operate given the plain English which is used throughout. The NEC Term Service Contract adopts the strategies and procedures from the NEC suite of contracts at large. As such, for those unfamiliar with what are very much working contracts, the NEC Term Service Contract can potentially be daunting and off putting. Users of this contract must be prepared to study the wording and become acclimatised to the processes if the contract is to run effectively and without running into disputes.

Another option is the Conditions of Contract attached to the NHF Schedule of Rates (currently at version 6). However, care must be taken when using these Conditions of Contract as the defined terms are often considered confusing and

contradictory. There is also sometimes an attempt to use these Conditions of Contract with other standard forms without a full assessment of the problems this will cause in terms of two clauses dealing with the same issue in different ways and also contradictory use of definitions.

D. Employment Issues

Employment issues can become a real headache if they are not managed from the outset.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protects employees where a service in which they are

new contractor. The importance of ensuring the existing contractor co-operates with this process cannot be overstated: the social housing provider will need the existing contractor to provide accurate employment information to be disclosed in the ITT so bidders can properly price their bids; it also needs the existing contractor to co-operate so that the new contractor can obtain the appropriate information to allow the transfer of employees to take place and obtain protection for any liabilities that should be the responsibility of the existing contractor.

employed is taken over by a new service provider. This protection ensures that these employees will transfer to the new service provider on their existing terms and conditions. TUPE also operates to transfer all these employees' employment liabilities to the new provider. This can cover liabilities such as unpaid salary and any compensation due to them for any claim they have against their old employer.

Unless you are contracting out services for the first time, the procurement process will mean that social housing providers will have an existing contractor in place who is at risk of losing the existing maintenance contract. If a new provider is appointed to take over the maintenance contract, the existing contractor will have little appetite to assist in the smooth transfer of staff over to the

Social housing providers will often stay out of the transfer process taking the view that this is a matter for the existing and new contractor to battle out. Whilst this is one way of dealing with it, this can lead to problems for the new contractor which could sour the relationship early. There have been many instances where the existing contractor tries to get rid of staff by (wrongly) putting them on the transfer list and refused to co-operate in the handing over of employment information.

There is a lot the social housing provider can do to ensure the risk of these headaches is minimised and the relationship with its new provider starts out on a good footing. The most important issue is ensuring the contract with its contractors is clear about their responsibilities and obligations when the

contract comes up for retender and if the existing contractor loses it. In this way you can ensure the existing contractor provides accurate information and takes responsibility for any employment liabilities for which it is responsible.

E. Added Value

When procuring maintenance works, it is often incorrect to adopt the idea that the best price available will also be the best option available. Contractors are becoming increasingly more attuned to the ethos of resident satisfaction being of paramount importance to providers of social

payment where there has been an overcharge (such as an incorrect schedule of rates item, or more than one) or paying on time. Most disputes arise because Employers do not have the time to comply with the tight deadlines most standard form contracts impose. It is essential that maintenance contracts are drafted to allow the Employer sufficient time to consider and then certify invoices for payment received from a Contractor and this will be accounted for in a strong and robust set of Schedule of Amendments. It is also important to ensure that invoices are sent through in an ordered and efficient way and contain all of the information

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housing and an output driven mindset. As such, Contractors are looking to provide diverse and long term solutions that are mutually beneficial to both the Employer (social housing provider) under the maintenance contract and the Contractor. Contractors are now realising that aside from cost and general service, added value can be achieved in a myriad of different ways e.g. through sophisticated customer satisfaction surveys and text message services providing notice of appointment times and cancellations (should they arise).

F. Maintenance Disputes and Problems

Maintenance contracts invariably generate large quantities of invoices. This can create difficulties when seeking to inspect works, withholding

required by the social housing provider Employer in order to assess it, and that adequate time is given to withhold payment if there is a reason for non-payment. It is also essential that the Employer is given the ability to inspect samples of work and then given a remedy where that sample includes examples of poor workmanship or overcharging. Once these safeguards have been built into the contract, the possibility of disputes arising will decrease dramatically.

Lease or Licence?

Inside:

- What is a lease?
- What is a licence?
- Looking beyond the label and why it matters

Introduction

When a party is occupying land belonging to another, the basis of that occupation is of critical importance to both parties. If the occupier has a lease of the land, valuable rights may be conferred upon them. If only a licence is granted, this merely

and third parties from it (save to the extent that the actual owner has reserved rights of re-entry within the lease). There is no need for the tenant to actually be in occupation of the land in order for them to have exclusive possession. For example, if the land in question is an electricity sub-station then it will generally be too small for the tenant to physically occupy it but this will not prevent them from having exclusive possession.

2. A determinable period of time: The term of the lease must be less than the interest held by the landlord and be for a

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authorises what would otherwise be a trespass. Simply labelling a document a lease or a licence will not necessarily mean that is what it actually is. It is necessary to look to the substance of the document itself and the rights and obligations it contains.

What is a lease?

A lease confers an interest in land on the tenant. As a general rule and subject to certain exceptions (for example, lack of intention to create legal relations), a lease consists of three key components:

1. Exclusive possession of land: A tenant will have exclusive possession of land if they can exercise the rights of a landowner and exclude both the owner of the land

duration that is certain or capable of being ascertained.

3. A rent.

What is a licence?

A licence grants the licensee a personal right or permission to do something on the licensor's property. The licence prevents the act from being an encroachment but no interest in land is created.

A licence is often used where office space is to be made available for a short time or for the period between exchange and completion of a sale contract or the agreement for and grant of a lease.

Whether a licence is in reality a lease will often turn on the question of exclusive possession. For example, if the owner of a car park grants a party

the right to park their car in a specific parking space within the car park, this is indicative of a lease as the party can enjoy exclusive possession of a particular parking space. However, if the owner grants the party a general right to park their car in any parking space within the car park, this cannot be a lease as there is no exclusive possession. This is as the licensee cannot prevent anyone else with rights to use the car park from occupying any particular parking space.

Looking beyond the label and why it matters

Parties to an agreement cannot transform what

occupation of the property until the lease is ended by one of the ways specified in the Landlord and Tenant Act 1954. Secondly, the business tenant will have a statutory right to renew their tenancy and this new lease will be on similar terms to the expired tenancy. The landlord will only be able to resist renewing the tenant's tenancy on certain limited statutory grounds. Any tenancy that is renewed in this manner will also enjoy the protection of security of tenure.

It is possible to for a landlord and tenant to agree to exclude the security of tenure provisions by

is in reality a tenancy into a licence simply by labelling it a licence. The court will consider the document as a whole and the landowner's rights and abilities will be assessed cumulatively in determining whether an agreement grants exclusive possession. The court will take care to "detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy" (Street v Mountford).

It is important to know whether or not a lease or a licence has been granted as a business lease grants an occupier a valuable right known as security of tenure. Security of tenure protects a business tenancy in two ways. Firstly, the tenancy will not automatically come to an end on the expiry of the fixed term of the lease. Instead, the tenancy will continue and the tenant can remain in

following a set procedure before the lease is granted. However, there is a danger that if the owner of land incorrectly believes that they are granting a licence when they are in fact granting a lease, the procedure to exclude security of tenure will not be followed and the tenant will end up with a protected tenancy if the "licence" arrangement has lasted for more than 6 months. It is therefore of vital importance that if the landowner only wishes to grant a licence to an occupier that the documentation is properly drawn up so that what is created is actually a licence and no additional unintended rights are granted.

Administration and Administrative Receivership not Available to Industrial and Provident Societies

There has been a recent case in the High Court (in the matter of Dairy Farmers of Britain Limited [2009] EWHC 1389 (CH)), which has considered whether the holder of a qualifying floating charge over the assets and undertaking of an Industrial and Provident Society (IPS) could appoint receivers to an IPS. The question for the court was whether the bar on the appointment of administrative receivers contained in section 72A(1) of the Insolvency Act 1986 (the 1986 Act) applied so as to prevent a receivership appointment.

The court held that an IPS was not a “company”

Background

IPS' are regulated by the Industrial and Provident Societies Act 1965 (IPSA 1965) and the Industrial and Provident Societies Act 1967 (IPSA 1967).

An IPS may create fixed charges and floating charges over its assets. Neither IPSA 1965 nor IPSA 1967 restrict the ability of the holder of a charge over an IPS' assets to enforce that charge by appointing a receiver.

From 15 September 2003, the provisions relating to administration that were contained in Part II of the 1986 Act were replaced by those in Schedule

for the purposes of the relevant sections of the 1986 Act. This meant that the bar on the appointment of an administrative receiver did not apply to an IPS. However, the appointment could not take effect as an administrative receivership appointment. Instead, the appointment was of a receiver and manager to the property of the IPS secured by the floating charge.

The case is of interest and relevance to housing associations that are IPSs and are negotiating new loan agreements with any of their Lenders.

It is current market practice that Lenders to housing associations which are IPSs do not require their borrowers to grant floating charges to them. In light of this case, this should remain the position.

B1 to the 1986 Act. Schedule B1 applies only to companies registered under the Companies Act 1986 and the Companies Act 2006 (the Companies Acts) and to such other forms of corporate entity as HM Treasury may order.

Although HM Treasury has authority to extend the provisions of schedule B1 to IPS', to date it has not done so. As a result, an IPS cannot go into administration.

A receiver, appointed by the holder of a floating charge (or floating charges) over all (or substantially all) of a company's property and business, takes office as an administrative receiver. The holder of a floating charge, created after 15 September 2003, cannot (except in certain prescribed circumstances) appoint an administrative

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receiver to a company, but can only appoint an administrator.

The 1986 Act does not define “company” but instead imports the definition from the Companies Acts. A “company” for the purpose of the Companies Acts means a company formed and registered under either the Companies Act 1985 or the Companies Act 2006, unless the context in which the term company is used requires it be given an extended meaning.

- If an appointment of receivers was not prohibited, whether the receivers took office as administrative receivers of D.

Decision

The court answered the questions as follows:

- The appointment of receivers was not prohibited.
- The receivers took office as receivers and managers, not administrative receivers.

The court held that an IPS was not a “company” within the meaning given to the word by the Companies Acts and there was nothing in the

“The court held that an IPS was not a “company” within the meaning given to the word by the Companies Acts and there was nothing in the context of the 1986 Act that required the court to give the word “company” an extended meaning in this case.”

Facts

D, an IPS, was in breach of its banking covenants. H, which provided D’s banking facilities, indicated that it was not prepared to support further trading by D.

H held a floating charge over all of D’s business and undertaking, which was created in 2008 (the floating charge). D’s board requested H to appoint receivers to D under the floating charge.

H was prepared to agree to that request, but first sought directions from the court on the effect of any such appointment. In particular:

- Whether an appointment under the floating charge was prohibited by section 72A of the 1986 Act.

context of the 1986 Act that required the court to give the word “company” an extended meaning in this case.

The prohibition in section 72A of the 1986 Act was on the appointment of administrative receivers to a company. The definition of administrative receivers in section 29 of the 1986 Act referred to receivers of the whole of a company’s assets. That meant that H could appoint receivers and that the receivers, once appointed, could not take office as administrative receivers.

Community Infrastructure Levy

– Planning for the Future

The Department for Communities and Local Government has recently issued proposals and draft regulations in relation to the Community Infrastructure Levy ("CIL"). The consultation will run until 23 October 2009. The Government announced in the March 2009 Budget that the introduction of CIL will be delayed until April 2010; this of course could be subject to further change.

What is CIL?

CIL came into existence due to the adverse reaction to the proposed planning-gain supplement which would require a developer to

- Schools and other educational facilities
- Medical Facilities
- Sporting and recreational facilities
- Open Spaces

This list is not definitive as the PA 2008 contains a power to amend the definition of Infrastructure so that CIL can be kept up to date as and when required.

CIL will in the majority of cases, take the place of the current section 106 (of the Town and Country Planning Act 1990) Agreement.

pay a levy based on the increased value of their land following the grant of a planning permission. CIL was introduced within the Planning Act 2008 ("PA 2008").

In a nutshell, CIL will allow a charging authority, which includes such bodies as District and unitary authorities, London boroughs, the National Parks Authorities and the Mayor of London (or any other body which prepares development plans), to raise money to fund infrastructure by charging owners and developers of land a levy to fund the infrastructure in their area to support the development for which planning has been granted.

Infrastructure includes the following –

- Roads and other transport facilities
- Flood defences

How will CIL be calculated?

This has still not been decided as yet and could (and probably will) vary between each individual charging authority.

The Government has proposed that CIL rates will be expressed as a cost per square metre of floor space. A charging authority will need to prepare a draft charging schedule and the amount of CIL for a planning permission will be calculated with reference to the charging schedule. The planning permission will state the number of chargeable units and the charging schedule will set the rate per square metre.

The current proposal is that CIL will be levied on buildings rather than development. There is a right of appeal in relation to the calculation of CIL.

Who will pay CIL?

The person who “assumes liability” to pay CIL. Prior to development being commenced (at least one day) an assumption of liability notice will need to be submitted to the relevant charging authority (or London Borough if within London). If this notice is not served the liability will fall onto the owner or owners of the land (they would be ‘liable in default’).

CIL will be payable when planning permission first permits the development. This will mean full planning permission (not outline permission),

late payments and will have the power to issue a CIL stop notice which will require a developer to cease works until the CIL is paid or the CIL stop notice is withdrawn. The charging authority can also recover any CIL debts through seizing and selling goods, seizing and selling land and recover the debt through the courts. It will be a criminal offence for failure to comply with a CIL stop notice.

Who is exempt from CIL and Affordable Housing?

Charities will be exempt from CIL on the basis that they will use a development wholly or mainly for

“There is a further discretionary relief for charities in respect of developments used by charities for investment activity where the profits are to be applied to its charitable purpose.”

planning permission for change of use and approval of reserved matters. Developments by home owners to their home will not be liable for CIL.

Protecting CIL

The charging authority will register a local land charge against the property for which planning permission has been granted stating the CIL due. The local land charge will be removed once the CIL has been paid.

There will be financial penalties for failure to submit prior to development being commenced an assumption of liability notice (up to a maximum of £1,000) and/or a commencement notice (up to a maximum of £2,500).

The charging authority can also charge interest on

their charitable purpose and they would be ‘liable in default’ to pay were it not exempt. This therefore means that non-charitable Registered Providers will be subject to CIL.

There is a further discretionary relief for charities in respect of developments used by charities for investment activity where the profits are to be applied to its charitable purpose. It will be down to the decision of the charging authority to confirm whether the discretionary relief will apply.

The charging authority will have the power to clawback any CIL where the development no longer qualifies for the relief. This will occur if the development is not used for a charitable purpose, the claimant is no longer a registered charity or the development does not fulfil the criteria on which

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the relief was originally granted. Clawback will apply up to seven years following development being commenced

The Government is considering whether a reduced rate or discount of CIL will apply to affordable housing development which has been provided with the benefit of public funding and we will need to watch this space on this point once the consultation period is over. It seems highly likely that section 106 Agreements will continue to be used for affordable housing provisions.

Charitable Registered Providers will therefore



be exempt from CIL and the current regime of entering into a section 106 Agreement with the Local Planning Authority will continue. Non-charitable Registered Providers will not be exempt from CIL and will be subject to the same as a private developer. As stated above, there may be a reduced rate for a non-charitable Registered Provider who intends to provide affordable housing (with public funding) on a development.

The Government intends to limit the scope of obligations which a local planning authority can use within a section 106 agreement. The obligations within a section 106 Agreement will only relate to the development and therefore off-site works will not be covered and CIL will need to be used.

Payment of Deposits Under Golden Brick Agreements

In their Business Brief 36/09, HMRC have confirmed that deposits paid on a property sale that are released to the seller before contractual completion are part payment for the anticipated property sale and so the same VAT treatment will apply as applies to the property sale. This is good news for grant funded RSLs purchasing partially completed dwellings from developers under golden brick development agreements.

Where a developer sells completed dwellings to an RSL, the developer pays up front for the land and associated costs and has to wait until after it

effects. If on a sale of land the developer does not exercise an option to tax for VAT then the developer will make an exempt supply of the land to the RSL. This will mean that the developer will not be able to recover the VAT that it may have incurred on its purchase of the land and any associated fees. If the developer opts to tax the land then the RSL has to pay VAT on the price and, if the RSL's intention is to use the dwellings for rented housing, the RSL will not be able to recover that VAT as the VAT relates to intended exempt supplies.

“This will mean that the developer will not be able to recover the VAT that it may have incurred on its purchase of the land and any associated fees.”

has completed the construction of the dwellings before the RSL pays the consideration for them. The RSL has to pay a price which includes the developer's holding costs of providing finance for the purchase of the land and the development up to the point where the land is transferred to the RSL. If the developer sells bare land to the RSL before constructing the dwellings for the RSL the RSL would be able to negotiate a lower overall price for the land and dwellings because it would not have to pay the developer for its holding costs. An RSL purchasing with grant funding would also be in a better position in this case as it would be able to draw down the grant on the purchase of the land.

But a sale of bare land may have adverse VAT

However, the developer can make a zero rated supply of the land to the RSL (and thus recover its related input tax) if the supply is the first grant of a major interest in the land by the developer and the developer is in the course of constructing dwellings on the land. A major interest is the grant of a freehold or a lease of over 21 years. HMRC agree that a developer is in the course of constructing dwellings on land when the works have progressed beyond the foundation stage and the construction is out of the ground. This is known as 'golden brick'. Thus when the construction reaches golden brick the developer can transfer the freehold of the land and partially completed dwellings to the RSL as a zero rated supply.

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Notwithstanding the golden brick transfer, the developer will still incur the costs of holding the land and financing the works to reach golden brick. These costs could be avoided to the extent that the RSL pays a deposit on exchange of contracts on terms that the deposit is released to the developer. But if a deposit on a land sale is paid to a developer or his solicitor as agent, and released to the developer, a tax point for VAT purposes occurs in respect of that part of the price which arises on the date of payment of the deposit.

from the contract that what will be supplied at completion will be partly completed dwellings (i.e. the works will have progressed beyond golden brick), the deposit is part payment for the grant or supply that will occur at the time of completion. It follows that the VAT liability of the deposit is determined by the anticipated nature of that supply and that zero rating will apply if the conditions for zero rating will be satisfied at the time of completion.

This will mean that in a situation where the RSL may have grant to cover the land cost, the RSL

Under the golden brick arrangement the land is still bare land at contractual exchange so to date there has been a perceived risk that if an RSL pays a deposit as agent before the commencement of construction, a tax point would be triggered not in relation to the zero rated supply (as golden brick stage would not then have been achieved), but instead to a supply of opted bare land and therefore subject to VAT. For this reason, deposits under golden brick arrangements have generally been held as stakeholder and not released until practical completion at golden brick stage.

What HMRC have now made clear in their Business Brief 36/09 is that if a deposit is paid by the RSL and released to the developer on exchange of contracts, provided that it is clear

would be in a position to draw down that grant at exchange of unconditional contracts and pay the land cost to the developer by way of a deposit, thus avoiding paying the developer's holding costs for the land up to golden brick stage.

Ambiguous Overage Clause

House of Lords saves developer £3,500,000 on rectification of overage clause

The long running case of Chartbrook Limited v Persimmon Homes Limited was finally concluded last month in the House of Lords, and provides some clarification as to how the Courts will deal with ambiguous provisions in contracts. Whilst the case has implications for all contract provisions, it is particularly interesting in the context of overage clauses, as it was in the case itself. Overage clauses are drafted well in advance of their operation and seek to cover all possible

2. The contract contained a clear mistake so it should be rectified to make clear the lower sum was payable.

The Court of Appeal followed the long standing “Exclusionary Rule” i.e. that pre-contract negotiations could not be taken into account in the interpretation of contracts. It also held that the relevant provision was not ambiguous so there was no basis for considering rectification which would have allowed them to admit evidence of pre-contract negotiations, despite the fact the negotiations pointed strongly in favour of Persimmon.

“The case started over an argument about an ambiguity in the drafting of an overage clause in the development agreement between the parties. ”

circumstances. As current market conditions show there are many situations today which may not have been imagined a couple of years ago.

The case started over an argument about an ambiguity in the drafting of an overage clause in the development agreement between the parties. The ambiguity lay in the formula for calculating the overage which, it was argued, could produce two different figures: £4,600,000 and £900,000.

Chartbrook, who was to be paid the overage, argued that on a literal reading of the contract the higher sum was payable. Persimmon had two counter arguments:

1. The background negotiations should be taken into account which would lead to a different interpretation; and

The House of Lords however took a different view. They reaffirmed the Exclusionary Rule and dismissed Persimmon’s first argument. However it found that it was clear that something had gone wrong with the language of the contract and therefore pre-contract negotiations could be taken into account in the application for rectification. In order to resolve the grammatical ambiguity in the contract the Court had to look at the business purpose of the provision. It was held that a reasonable person with knowledge of the background information, including the pre-contract negotiations, would have taken the parties’ intention to be that Chartbrook would only benefit from the overage if the project performed better than expected. It was decided Persimmon’s

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interpretation reflected this intention and therefore the appeal was allowed.

Despite the result the House of Lords confirmed the primacy of the Exclusionary Rule in interpreting contracts. Interpretation had to be approached objectively and pre-contract negotiations were likely to be “drenched in subjectivity”. The Lords felt that to abandon the rule would lead to greater uncertainty over interpretation and therefore longer and more expensive disputes.

To rely on pre-contract negotiations therefore a party must demonstrate a clear mistake so that the



“As many scenarios as possible should be examined against the relevant formula to ensure a rational and agreed result is achieved at all times.”

Courts can consider rectification.

The clear lesson that can be learned is that all overage clauses need to be robustly tested before exchange of contracts. As many scenarios as possible should be examined against the relevant formula to ensure a rational and agreed result is achieved at all times. If time allows, it is sensible to include one or more worked examples of the overage clause in a schedule to the agreement – ideally with best and worst case scenarios. The case also highlights the importance of keeping evidence of pre-contract negotiations as, even if the Exclusionary Rules prevents their use in interpretation, they can still be used in an action for rectification of the contract.

Housing PFI Round 6

The HCA have recently announced ten local authorities who have been successful in bidding for £1.7 billion of Housing PFI credits in Round 6.

The bidding round closed in October last year and competition was strong as the HCA received bids from twenty four local authorities, which is reported to equate to over £4 billion of funding. The HCA looked to allocate credits to those schemes which will deliver transformational change, requiring intervention on a significant scale. The successful local authorities cover six out of the nine English regions and are made up of seven estate based regeneration schemes and three new build housing schemes, two of which include extra care housing. If carried through the proposals will provide around 4,500 local authority homes.

In addition to Round 6 Housing PFI credit allocations the HCA have announced £35 million for Housing Market Renewal Pathfinder areas which equates to 10% of the 2009-2010 allocation.

Local authority	Scheme	Type
Birmingham City Council	Erdington Housing PFI	HRA
Cornwall City Council	Affordable Housing for Cornwall	Non HRA (Extra Care and General Needs Housing)
Hull City Council	Transformation of Orchard Park	HRA
Leeds City Council	Lifetime Neighbourhoods For Leeds	HRA
Northampton Borough Council	Northampton East Regeneration Scheme	HRA
Nottingham City Council	Meadows Housing PFI	HRA
Portsmouth City Council	Somerstown and North Southsea PFI	HRA
Shropshire County Council	Extra Care Housing	Non HRA (Extra Care Housing)
London Borough of Southwark	Aylesbury Estate Regeneration	HRA
Stoke City Council	Suburban Estates Investment Programme	HRA (Extra Care Housing)

Energy Performance Certificates

– Questions and Answers

The government has introduced ways to tackle climate change and reduce emissions through greater energy efficiency and the introduction of Energy Performance Certificates (EPC). There may be some confusion as to when EPCs are needed and what is involved. We set out below our EPC questions and answers to help:

Do you need an EPC?

Yes, for the following:

- Newly built properties and for any property sold (including lease assignments) or rented out (including underlettings). These

buyer/tenant or

- Exchange of contract for the sale/letting of the property

Who is responsible for obtaining an EPC?

If a building is in the course of construction, the person carrying out the work must obtain the EPC, provide the owner with it and inform the building control officer or approved inspector that this has been done within the specified period.

If a building is being sold or let, responsibility for provision of the EPC will rest with the seller or landlord. The EPC is to be made available free of

“If a building is being sold or let, responsibility for provision of the EPC will rest with the seller or landlord.”

triggers create an absolute obligation to provide an EPC.

- Display Energy Certificates (DECs) for larger buildings with a total useful floor area of more than 1,000 square feet which are occupied by public authorities and institutions providing public services.
- Regular inspection of air-conditioning systems with an output of more than 12kW.

When?

The EPC is to be provided by the earlier of the following:

- Marketing of the property to a prospective buyer/tenant;
- Viewing of the property by a prospective

charge to any prospective buyer or tenant prior to entering into a sale or lease agreement.

It is sufficient for the seller/landlord to provide a copy of a valid EPC and an electronic copy is permissible if the recipient consents to receiving the certificate electronically.

In the case of an underletting, the head tenant may either obtain an EPC for the whole building (where there is a common heating system) from the head landlord. Alternatively a head tenant may obtain a certificate itself for the part that is being underlet.

Who issues EPC's and what must it include?

- An EPC is issued by an “accredited energy assessor”.
- The EPC must include an asset rating for

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the building, which indicates the amount of energy estimated to meet the different needs associated with a standardised use of the building

- The asset rating is given on a scale from A-G based on the carbon dioxide emissions per m² with “A” being the most energy efficient.
- Additionally, the energy assessor must issue a recommendation report which suggests improvements for the energy performance of the building.
- Once issued, an EPC is valid for 10

(provided it is not a dwelling) or

- Buildings that are to be demolished or redeveloped

How much is it likely to cost?

The price of an EPC is set by the accredited organisations which issue them.

The market cost of acquiring an EPC for a commercial property will depend on size, complexity and use of the building. We have seen estimates of between £100-£1750 for commercial buildings, although costs could be a lot higher for larger buildings. As for domestic dwellings, we

years unless a new EPC is issued in the meantime.

- If an EPC has to be produced as part of a Home Information Pack, it should be no older than three years old when the property is marketed.

Exemptions

The following do not require an EPC:

- Buildings that are used primarily or solely as places of worship;
- Temporary buildings with a planned time of use of two years or less;
- Industrial sites, workshops and agricultural buildings with low energy demand;
- Stand-alone buildings with a total useful floor area of less than 50 square metres

have seen estimates ranging from £55 to £120.

Enforcement

The enforcement of the regulations will be carried out by the Trading Standards Officer who will issue a penalty notice if the regulations were not complied with.

Not having an EPC is a criminal offence punishable by a fine. For commercial property, the penalty is 12.5% of the rateable value of the property, with a minimum charge of £500 and a maximum of £5,000. The penalty charge for a dwelling is £200.

Can a Planning Permission Allow for Variations?

In the recent case of *R (on the application of Midcounties Co-Operative Ltd) v Wyre Forest District Council*, the High Court was asked to determine the lawfulness of a planning permission granted for the development of a supermarket.

The decision provides guidance as to the scope of the ability to vary planning permissions, which is extremely limited as a result of the 2002 case *Henry Boot Homes Ltd v Bassetlaw District Council*. This is particularly helpful to developers as it confirms the (albeit limited) flexibility to make minor changes to the terms of a planning permission,

Section 190 of the Planning Act 2008 (not yet in force) will include a new provision giving LPAs in England the power to make a change to any planning permission relating to land in their area if they are satisfied that the change is not material.

Midcounties case

In the recent case there were 2 relevant conditions:

- **Condition 4:** A condition that the development must be carried out strictly in accordance with certain plans and drawings that had been stamped

without having to make a fresh planning application.

How can planning conditions be varied?

Section 73 of the Town and Country Planning Act 1990 provides that, if a planning permission has been granted with conditions attached to it, an application can be made for permission to carry out the development without complying with some or all of the conditions.

The *Henry Boot* case held that the scope for varying or discharging a planning condition, other than by an application, was extremely limited. Making this sort of change should not be a matter for agreement between a developer and the LPA as the public should be involved.

“approved”, unless minor variations were agreed in writing with the council.

- **Condition 6:** A condition that specified the maximum floor space allocations unless otherwise agreed in writing with the council:

The parts of conditions 4 and 6 that allowed the council to agree variations (in italics above) were referred to in the decision as “tailpieces”.

The application to quash the permission on the basis that the conditions were uncertain was unsuccessful but the Court ordered that the tailpiece to condition 6 should be excised from the permission.

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Lawfulness of the tailpieces

The court held that condition 6 allows the permission to be varied, without any limit, on the basis of an informal request from the applicant. Both the council and the applicant maintained that there was scope, albeit extremely limited, for an LPA to allow immaterial variations without the need for a formal application.

The court was happy that Henry Boot did not exclude a limited power to make immaterial variations and did not consider that the ability to make immaterial variations to planning permissions

In contract the tailpiece to condition 4 was held to be lawful. It permitted only minor variations to an obligation that otherwise had to be strictly complied with. This limited the extent to which the tailpiece could allow variations.

The court further considered the scope of power to make variations that was acknowledged in Henry Boot. This included variations, which were immaterial in the sense that no reasonable LPA could:

- refuse them;

“The difficulty was that although the tailpiece to Condition 6 could be used for immaterial variations it was not drafted to limit it in this way.”

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informally was precluded.

The difficulty was that although the tailpiece to Condition 6 could be used for immaterial variations it was not drafted to limit it in this way. As drafted it allowed the applicant to build something that was very different to that which had been applied for and granted.

The court held therefore that this type of provision was not appropriate for a planning permission even though it would be unlawful for the council to allow anything other than a minor variation, because the public would not be aware of the legal technicality.

The tailpiece would therefore have to be excised and quashed as, otherwise, the condition and the whole permission would be unlawful.

- lawfully take enforcement action if these variations were implemented.

Guidance

The different treatment of the tailpieces of Conditions 4 and 6 provide some guidance as to the limited scope to vary planning permissions. It also demonstrates that variations are possible provided they are immaterial which is useful in itself as LPAs have been somewhat cautious to permit variations following the Henry Boot case.

Limited Liability Partnerships – The Post October Regime

Company secretaries staggering under the weight of new company legislation should not overlook the changes to the Limited Liability Partnership (LLP) regime.

By way of background, an LLP is a corporate business vehicle that combines the flexible structure and tax advantages of a flexible structure and tax advantages of a partnership with the benefits for its members of limited liability. Company secretaries may find that recent and proposed changes are generally helpful. For example:

- There will be no significant changes to the way in which LLPs are incorporated and

- New procedures simplifying the restoration to the register of companies that have been struck off or dissolved in the Companies Act 2006 will also apply to LLPs.
- Whilst the Companies Act 2006 makes electronic communication with shareholders the default position for companies, (subject to shareholder consent), the government had decided not to apply these provisions to LLPs. It will be a matter for agreement between Members as to means of communication between members, employees and the LLP.

For these groups who are members of an LLP

“The government has stated that it does not intend to apply the directors’ duties provisions of the Companies Act to members of an LLP.”

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structured, save for the mirroring of the new position on members’ residential addresses which will be kept on a separate register and not be made a matter of public record (which is not relevant where all members are corporates).

- A similar regime for the execution of deeds by LLPs as for companies is made explicit. For example, after 1 October 2009, unless the agreement governing the relationship between the members provides otherwise, a single member can execute a document as a deed.
- The requirements on LLPs names will be aligned with those for companies to deal with concerns that an LLP can take the same name for a company (and no other way round.

which have appointed individuals to act for them in the running of the LLP’ s, established as joint ventures, and who have been concerned about the legal liabilities of representatives appointed by each member of an LLP, the law is clarified.

The government has stated that it does not intend to apply the directors’ duties provisions of the Companies Act to members of an LLP. This is because, among other reasons, the position of members of an LLP do not equate to that of the directors of a company. This is a logical conclusion. However, where members do appoint individuals to act for them in the running of the LLP, as is often the case, the risk of confusion may be reduced if the individuals appointed by each of the members to act as their representatives are called “members representatives” (or similar) rather than directors or board members.

For further information please contact: Andrew Crawford on 020 7880 4283 or andrew.crawford@devonshires.co.uk

Help Devonshires go the Extra Mile

Once again, we (Gareth Hall, Philip Barden, Nick Billingham and Jonathan Ebsworth) have successfully cycled 500 miles in 3 days in aid of Devonshires chosen charity, Help for Heroes.

The 2009 Extra Mile Loire Challenge took place on 25-27 September and after 3 days of staying in the cheapest hotels and eating nothing but gruel, we are happy to have completed the challenge and be raising money for such a worthy cause as Help for Heroes.

Last year, thanks to your fantastic support, we raised £7,500. This year, we would ask you to



help us to support Help for Heroes by contributing whatever you can afford on whatever basis (per mile, per day or on completion). At the same time you can reflect on us having suffered immeasurable pain - standing up on day three whilst cycling was a rip roaring experience!!

Two thirds of what we raise goes to Help for Heroes and one third to the charities selected by the organisers, Extramile Challenges. These are MK SNAP, the Prostate Cancer Charity and the RNLI.

Please log on to <http://www.justgiving.com/devonshireshelp4heroes/> or send us a cheque to Extra Mile Challenges. Make the pain worthwhile please - there is no gain without pain.

Diary Dates

The following seminars are being held over the coming months:

22 October - Housing Law Update - Iod Hub, New Broad Street House, 35 New Broad Street, London EC2M 1NH.

16 November - Housing Law for Beginners - Iod Hub, New Broad Street House, 35 New Broad Street, London EC2M 1NH.

22 November - Bond Issues - The In's and Out's of the New World - Iod Hub, New Broad Street House, 35 New Broad Street, London EC2M 1NH.

8 December - Development Partnerships with Small Registered Providers: How to Make them Happen - Iod Hub, New Broad Street House, 35 New Broad Street, London EC2M 1NH.

Further information can be obtained from our Marketing Department on 020 7628 7576 or email info@devonshires.co.uk or from the events section of our website at www.devonshires.com.

The DBRIEF is a quarterly newsletter from Devonshires Solicitors on legal developments.

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Partnering Duncan Brown Projects, PFI and LIFT

Paul Buckland

Property Acquisition, Development and Sale

Allan Hudson and
Julie Bradley

Property Litigation and Planning

Nick Billingham

Regeneration

Julie Bradley

Homebuy

Allan Hudson and

Julie Bradley

Stock Transfers

Julie Bradley