Pre-Budget Report

Proposals for a planning gain supplement are withdrawn

The Chancellor has announced that proposals for a new planning gain supplement have been withdrawn. The new tax would have resulted in a tax on increases in the value of a property following the grant of planning permission. Instead, a new planning charge to fund infrastructure will be introduced in the Planning Reform bill. In relation to stamp duty land tax, the Chancellor has announced that an increase in the minimum thresholds will mean that fewer small property transactions will have to be notified to HM Revenue and Customs for SDLT purposes. In addition, retrospective changes will be introduced next year to ensure that transfers of an interest in a property within an investment partnership are not subject to SDLT and there are proposals to prevent the use of special purpose vehicles to avoid tax on substantial residential property transactions. Other measures include a proposal to allow local authorities to levy a local supplemental business rate and increased expenditure on flood and coastal erosion defences, although the Association of British Insurers has voiced its concern that the amounts promised are not sufficient.

Know your rights

European Court rules that a claim for adverse possession was not contrary to human rights

_J A Pye (Oxford) Ltd and another v United Kingdom : Lawtel 1st October 2007_

The European Court, sitting as a Grand Chamber, has delivered its judgment in relation to this case which concerns the acquisition of title by adverse possession under the Land Registration Act 1925. The European Court had previously ruled that Mr and Mrs Graham's acquisition of title to grazing land by adverse possession was contrary to the European Convention on Human Rights. By a majority vote, the Grand Chamber ruled that the old registered land regime did not violate Article 1 of the Convention which confers an entitlement to the peaceful enjoyment of possessions. The Grahams had occupied some grazing land owned by J A Pye (Oxford) Ltd. The occupation had initially been under the terms of a grazing licence. However, the Grahams continued in occupation when this licence came to an end and claimed to have acquired title to the property after they had been in possession for more than 12 years.

Article 1 of the Convention confers the right to the peaceful enjoyment of possessions and the right not to be deprived of those possessions. However, a member state can enforce such laws that it deems necessary to control the use of property in accordance with the general interest of its people. Any interference with the right to peaceful enjoyment must strike a "fair balance" between the general interest of the community and the need to protect the individual's rights. Normally, it would be a disproportionate interference not to pay compensation to a person who had been deprived of his possessions. However, compensation was not guaranteed in all circumstances. The relevant provisions of the Land Registration Act 1925 and the Limitation Act 1980 were not intended to deprive landowners of their paper title but were part of general property law intended to regulate limitation periods in connection with the use and ownership of land. Limitation periods were an important means used by member states to ensure legal certainty and finality and to prevent injustice. The law had provided the legal owner of the land with sufficient opportunity to do something about the Grahams' occupation, either by charging rent or issuing possession proceedings within the 12-year period.

The decision is important because it means that there are unlikely to be any further challenges in relation to successful claims for title by adverse possession. The Land Registration Act 2002 introduced a new regime for adverse possession and registered land which, on the basis that it offers greater protection to registered proprietors, is unlikely to be vulnerable to a successful challenge in the European courts.
Common people

Prescriptive right could not be acquired over common

Housden and another v Conservators of Wimbledon and Putney Commons: Lawtel 4th June 2007

The claimants owned a house adjoining Wimbledon Common and, for more than 40 years, they and their predecessors in title had gained access to the house using an accessway over the common. The claimants sought to register this access as a private right of way acquired by prescription under the Prescription Act 1832. The Land Registry dismissed the claim on the ground that the Conservators, as owners of the common, did not have the power to grant the easement and therefore it could not arise by prescription. The Court of Appeal confirmed that the Conservators were not capable grantors. Their function under the Wimbledon and Putney Commons Act 1871 prevented them from disposing of any interest in the common including the grant of an easement over any part. The court confirmed that a claim for a right based on long user under the Prescription Act 1832 had to be lawful. The law of prescription was based on the presumption that the right enjoyed was a lawful right and, as a matter of common law, there could be no presumed grant where the servient landowner was not capable of lawfully granting the right.

Age of consent

Court considers the meaning of transferor in a restrictive covenant

City Inn (Jersey) Ltd v Ten Trinity Square Ltd: [2007] EWHC 1829

The Port of London Authority had been the owner of three London sites. In 1962, one of the properties was transferred to the predecessor in title of the claimant. The transfer contained a restrictive covenant which was expressed to be for the benefit of the Port of London Authority’s retained sites. The transferee covenanted not to make external alterations to the property without the approval of “the Estate Officer for the time being of the Transferor” and also covenanted not to use the property other than as offices without the “consent of the Transferor”. The Transferor was defined as the Port of London Authority and the definition did not specifically refer to successors in title or assigns although this expression did appear elsewhere in the transfer. The claimant acquired the property and obtained planning permission to redevelop the property as a hotel. The claimant obtained the consent of the Port of London Authority to the development works and the change of use. The defendant subsequently acquired one of the Authority’s two remaining sites which it also planned to develop as a hotel. The defendant argued that the claimant had to obtain its consent to the claimant’s proposed development in addition to the consent given by the Port of London Authority.

The court granted a declaration that the defendant had no right to insist that the claimant’s proposed development also required the defendant’s approval. The court considered the meaning of “the Transferor” in the relevant covenants. In relation to the first covenant, the court held that the reference to the “Estate Officer for the time being of the Transferor” always meant the estate officer of the Port of London Authority. In addition, a literal interpretation of “the Transferor” meant the Port of London Authority and did not extend to its successors in title. Accordingly, the defendant had not acquired the benefit of the relevant restrictive covenants and the claimant only required the approval of the Port of London Authority. When drafting a restrictive covenant, it is important to consider its effect on subsequent owners of the dominant and servient land.

LANDLORD AND TENANT

Raise the roof

Patchwork repairing programme was appropriate for dilapidations

Carmel Southend Ltd v Strachan & Henshaw Ltd: Lawtel 4th July 2007

The claimant landlord was seeking to claim damages for breaches of the defendant tenant’s repairing obligations. The lease of industrial premises was for a 15-year term and included a covenant to keep the property in good and substantial repair and to yield up the property in accordance with that covenant. It was accepted that at the expiry of the lease in 2004, the roof of the property was in a state of disrepair. The landlord commenced a programme of works involving the comprehensive over-cladding of the roof. The tenant argued that the significantly cheaper option of a “patch repair” programme was sufficient. The issue before the court was whether the damages for wants of repair should be based on the over-cladding programme chosen by the landlord or the patch repair proposed by the tenant. The landlord claimed that the patch repair programme was not an appropriate method of repair and would be futile and impracticable.

The court decided that the evidence provided to it supported the patchwork scheme. Such repairs were
very common in the industry and were appropriate given the nature of the building, the disrepair and the terms of the repairing obligations. The landlord’s decision to carry out the comprehensive over-cladding works had been made with the prospect of reletting the property in mind and the landlord had not taken any advice as to whether the costs of its programme would be recoverable under the terms of the lease.

It’s raining again
Side letter did not affect the value of a landlord’s reversion

Lyndendown Ltd v Vitamol Ltd: [2007] 29 EG 142 (CS)

The claimant landlord held the reversion to leases of two industrial units let to the defendant. The leases contained usual repairing and yielding-up provisions and restrictions on underletting. The leases enjoyed security of tenure under the Landlord and Tenant Act 1954 and the terms expired in January 2002. The defendant had applied for consent to underlet and the undertenant covenanted in the licence to observe and perform the terms and conditions of the head lease. However, as part of the underletting transaction, the defendant’s parent company gave a side letter to the undertenant to the effect that, notwithstanding the provisions of the underlease and licence to underlet, the undertenant’s repairing obligation would be limited to keeping the property wind and water-tight and that the parent company would pay for any works required over and above this standard. The undertenant remained in possession following the expiry of the head leases. The landlord issued proceedings for breach of the repairing obligations against the defendant tenant. Under S18 of the Landlord and Tenant Act 1927, a landlord’s right to recover damages is limited to any diminution in the value of the reversion caused by the breach. The landlord accepted that unless the side letter altered the position, any damage to the reversion on the expiry of the leases was nil or nominal because the subtenant remained in possession under the sublease.

The Court of Appeal held that the side letter did not affect the value of the reversion. The arrangement contained in the side letter between the undertenant and the defendant’s parent company could not affect the landlord’s ability to enforce the repairing covenant and the undertenant’s obligation to repair under the sublease. The letter was either a benefit to the landlord because the undertenant’s repairing obligation was backed by the tenant’s parent company or neutral in its effect.

(Just like) starting over
Residential tenants were not precluded from serving a further enfranchisement notice

Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Co Ltd: [2007] NPC 968

Section 13(8) of the Leasehold Reform, Housing and Urban Development Act 1993 provides that a further notice may not be served by tenants seeking to exercise their right to collective enfranchisement for so long as an earlier notice remains in force. Under S13(9), where an initial notice is withdrawn by the tenant or deemed to have been withdrawn under the Act, a subsequent notice cannot be served for a period of 12 months. In this case, the initial notice served by the tenants on the landlord was invalid and the tenants purported to serve a further notice within 12 months. The court held that because the first notice was invalid, it was not a notice under S13 and was not in force. Accordingly, it did not have to be withdrawn and it did not preclude a further initial notice from being served.

PLANNING AND ENVIRONMENT
Don’t leave me this way
Planning application can be refused in part

Johnson v Secretary of State for Communities and Local Government: [2007] EWHC 1839

The claimant owned two dwellings and a detached garage. He applied for planning permission for an extension to the garage and for the conversion of the properties to a single dwelling. Both proposals were contained in a single planning application. The claimant was subject to overage obligations which would be triggered by the grant of planning permission. Although the planning authority was happy with the proposed conversion, it objected to the proposed extension and refused the whole application. The claimant was unable to implement the consent for the conversion on its own without further works, which would require further planning consent. Because of the potential liability under the overage obligations, the claimant applied for the planning permission for the conversion to be quashed. The claimant argued that it was not lawful for the inspector to grant permission for part of the application and to refuse permission for the other part, and that the claimant should have had the opportunity to explain the problems that a split decision would cause.
The court held that the inspector had jurisdiction under S79 of the Town and Country Planning Act 1990 to grant permission for part and to refuse permission for part. In addition, the inspector had acted fairly because the potential issues associated with a split decision had not been put before him.

Smoke on the water
Statutory control did not preclude a claim in nuisance where a water company had been negligent

*Dobson and others v Thames Water Utilities Ltd and another : Lawtel 30th August 2007*

The claimants owned or occupied properties in the vicinity of a sewage treatment works works owned by the defendant. They had complained about odours and mosquitoes emanating from the works and had issued a claim in nuisance and negligence and also claimed that the defendant was in breach of the Human Rights Act 1998. The water services regulation authority, Ofwat, became involved because the case raised matters regarding the duties of a sewerage undertaker under the Water Industry Act 1991. The court was required to decide on three preliminary issues including the extent to which the Water Industry Act 1991 affected a claim at common law. The defendant contended that the complaints about odours and mosquitoes were complaints in respect of a failure to comply with its statutory duties and that, accordingly, no common law remedy was available because such duties were enforceable by Ofwat. Under the 1991 Act, a sewerage undertaker was required to "effectively deal" with the contents of sewers and had a duty to treat waste water in accordance with the Urban Waste Water Treatment (England and Wales) Regulations 1994.

The court held that, where the sewerage treatment works caused odours and mosquitoes, the contents of the sewer had not been effectively dealt with pursuant to the undertaker’s statutory duties. Accordingly, because the claimants were seeking to enforce duties under the Act, in the absence of any negligence, they would be precluded from bringing a claim in nuisance. The Act did not prevent certain causes of action in nuisance based on negligence. The court also considered the appropriate award of damages for those claimants who owned their property interests and those who were merely occupiers. Where a court awarded damages for nuisance to those with a legal interest in the property, that would usually be just satisfaction for partners and children living at the property. However if, taking into account damages awarded for nuisance and the availability of other remedies, damages under the Human Rights Act 1998 were necessary, they might include an award for inconvenience, mental distress and physical suffering caused to the occupiers.

**OUR RECENT TRANSACTIONS**

We advised Barceló on the acquisition of leases of 20 hotels owned by the Paramount Hotel chain. The hotels included the Lygon Arms in the Cotswolds, the Carlton Hotel in Edinburgh and the Oxford Hotel in Oxford. The hotels are valued at £530 million and the initial rent is £28 million per annum.

We acted for Whitbread on the £44 million acquisition of six hotels currently operated under the Tulip Inn and Golden Tulip brands together with a secured pipeline of nine further sites. The hotels will be converted to the Premier Inn brand.

**AND FINALLY**

A New South Wales criminal appeals court has ruled that it is not a fundamental requirement that a judge should be constantly attentive during a hearing. This followed an appeal by convicted drug smugglers on the ground that the judge had been snoring at their trial.