OCTOBER 2013 – PROPERTY UPDATE

1. **REPLACEMENT OF DISTRESS** – the long promised new statutory recovery procedure in place of distress is being brought into effect from 6th April 2014. The new procedure can be invoked only for commercial premises and to recover pure rent thereby excluding insurance premiums and service charges. It is subject to a number of restrictions mentioned in the note below.

2. RECTIFICATION AND CONSTRUCTION – in an earlier note I discussed the Court of Appeal decision in Cherry Trees v Landmain which introduced a new and significant limitation on the weight to be given to documentary evidence in respect of a registrable disposition. This limitation has been applied recently in relation to a lease by the court of Appeal in Ahmad v Secret Garden. However, the resulting problem was overcome by rectifying the registrable document containing part of the lease. A course that will not always be open.

3. COMMUNITY INFRASTRUCTURE LEVY – there is no information as to what will finally come out of the recent consultation save that there is certain to be a relief for self builds. Some guidance on CIL is being gained from the appeal decisions being posted on the VAO website but due to the heavy redacting it is a battle to understand them.

4. OVERAGE – it is heartening to read a case involving a dispute relating to overage – Walton Homes v Staffordshire CC. It suggests that activity in the property market is picking up. The dispute concerned the rejection by an expert of the argument that an open market valuation of land without a planning permission still allowed account to be taken of matters such as the planning officer's recommendation. Smith J. dismissed a challenge to the expert's decision on the ground that there was a manifest error. It illustrates how hard such challenges will be and applied good commercial sense as to what is meant by an open market valuation without a planning permission.

5. HOLDING OVER – Barclays Wealth Trustees v Erimus Housing reminds tenants and practitioners that care has to be taken when holding over after the expiry of a lease. Whilst holding over the person's status may change from tenant at will to periodic tenant with heavy financial consequences.

6. ADVERSE POSSESSION - claims based on moored boats or "roots" are in full flow. Two more Chancery cases have been reported with not identical findings. Interestingly one holds that if the mooring is an obstruction of a public right of navigation then it can not be relied on to found a claim based on adverse possession. This could have serious implication for boat owners particularly on the Thames.

More detail on these topics is given here…

1. Commercial rent arrears recovery – the long promised reform of distress has now been enacted with effect from 6th April 2014 together with accompanying alarmist cries of agony. Material points to note about the new procedure are:-

1.1 commercial premises – it is allowed only in relation to exclusively commercial premises and not to residential or mixed user premises;

1.2 pure rent – it is available only to recover actual rent (including interest and VAT) but not other payments such as service charges and insurance premiums payable by way of rent;

1.3 lower limit – at all times there must be at least 7 days rent outstanding. If it goes below that limit the process must stop;

1.4 notice – a notice of enforcement must be given before the process is operated and at least 7 days notice must be given although there is a dispensation if there are grounds for believing that goods will be removed

1.5 statutory demands – the rules governing the service of a statutory demand will not be affected.

Although accompanied by cries of alarm will it make a lot of difference in practice with commercial premises?

2. Rectification/Construction – in the earlier Court of Appeal decision in Cherry Tree Investments v Landmain a new and significant limitation was imposed on the weight that could be attached to documentary evidence when construing a registrable document. No weight should be attached to a document if it would not have been taken into account by a third party. This applies to documents in the same transaction which are not registered and not referred to in the registrable document. This decision has been applied in the recent Court of Appeal decision in Ahmad v Secret Garden [2013] EWCA Civ 1005. The terms of a lease were found to be contained in two documents but only the second was registrable. It was held that the second could not be construed by reference to the first because that first document would not appear on the register. However, it was held that the second document could be rectified to include the terms contained in the first. This was possible because it was found that there was not a deliberate decision to divide the terms between the two documents. If there had been such a deliberate intention then rectification would not have been possible.

3. Community Infrastructure Levy –

3.1 self-builds - from recent statements made by the politicians it is clear that a relief in respect of self-builds will definitely come out of the latest round of consultation;

3.2 Appeals – the results of five appeals to an appointed person in relation to CIL have been posted on the VAO website but with every item of information which could possibly identify the individuals and property removed plus more. It makes the decisions hard to read let alone understand. They are concerned with fairly basic points

(a) Conversion of house to two flats – a CIL liability notice was issued which was set aside on appeal as the conversion of one dwelling to two is exempt. The authority was not represented so there was no real argument. It has been suggested that to take the benefit of the exemption the conversion has to be to two houses rather than flats but there was no suggestion of such a limitation in this decision. It should be noted that a conversion from a number of dwellings to one will not be exempt from CIL.

(b) Delayed grant of planning permission – a planning permission was granted conditional on implementation within three years and this period expired so a fresh application was made. Before the new permission was granted the CIL regime was introduced in the area. The site owner appealed against a CIL liability on the ground that the authority had delayed and the new permission should have been granted earlier. The appeal was rejected as it was outside the statutory remit of the appeal which is only to consider whether or not the chargeable amount is wrong. Although mentioned was made of reg. 65 2010 Regulations in my view the timing of a grant is not a matter governed by the CIL regime. The solution if there is delay must come from planning law.

(c) new build less than 100 square metres – there is an exemption in respect of new builds developments under 100 square metres. So far this has thrown up two appeals but in both cases there was not any real doubt as to the outcome.

(i) very strangely CIL was charged when unconditional planning permission was granted to use a building for worship and to carry out minor works on the basis it would seem that the whole area of the building was to be used for the computation. Prior to this there had been a temporary permission to use the building for this purpose. The CIL liability was set aside. On the papers the appointed person considered that there was no increase in floor space so the exemption applied. The temporary permission was sufficient to cause the building space prior to the grant of the unconditional permission to be in lawful use and so the internal floor area of the original building was deductible.

(ii) the second appeal concerned the claim by the site owner that if the development was more than 100 square metres then the exemption operated to exclude the first 100 square metres from the CIL calculation. This was easily rejected. The exemption only applies to new build developments under 100 square metres.

(d) Class C3 use (residential) – with some authorities differential CIL rates have been fixed and the planning use classes have been used for this purpose. This is

likely to throw up a number of appeals. In this one the issue was whether the conversion of five units for holiday lets into a single nine bed roomed unit for holiday lets gave rise to a CIL liability. It had been charged by the authority on the basis that the new use is a Class C 3 use (residential). There are a fair number of authorities on this issue in the context of planning law and in particular the Court of Appeal in Moore v SSCLG [2012] EWCA 1202. In this appeal it was held not to be a residential use within Class C3. It was not enough that the building was going to be used exclusively for commercial holiday lets. Account was taken of the planning permission, the applicant's planned use of the building and a number of enquiries for lettings. The conclusion was reached that it was likely that a significant number of future occupiers would not be occupiers living together as a family and thus it fell outside Class C 3. As a result no CIL was payable.

4. Overage – the recent decision of Smith J. in Walton Homes Limited v Staffordshire CC [2013] EWHC 2554 throws up an interesting point. The Council had sold land to Walton Homes for a price including an overage which simplified was half the difference between the open market value with the triggering planning permission and without it and the valuation was to be as at the date of the notice of the permission given to the Council. As is common disputes were to be determined by an expert whose decision would be final and binding "in the absence of manifest error". Walton Homes sold to Bellway conditional upon a planning permission being obtained which condition was satisfied. This was about 11 years after the original transfer by the Council.

Walton argued that when valuing the land without the planning permission account should still be taken of the other matters relating to the planning permission including the planning officer's recommendation and the decision of the planning committee. This approach would result in only a small difference between the two open market valuations and thus a reduced overage.

The surveyor appointed to act as expert obtained the advice of counsel who advised that such an interpretation was a commercial absurdity and so Planning Permission for the purposes of the transfer included all the matters leading up to the actual grant. The expert followed this advice as stated in his decision. There was no appeal route available to Walton Homes so the decision was challenged on the ground that there was a manifest error. Two points come out of the judgment.

(a) the counsel's advice and the expert's decision were based on sustainable arguments and in consequence it was impossible to say that any mistake was manifest. It emphasises the difficulty of mounting such a challenge.

(b) the judge was not required to decide the construction point but clearly considered it correct. However, to avoid such arguments consideration should be given to extending the definition of planning permission if the uplift in value as a result of a grant of planning permission is to be used as the basis for calculating overage.

5. Holding over after expiry of lease –the recent decision in Barclays Wealth Trustees v Erimus Housing [2013] EWHC 2699 (Ch) reiterates that holding over after the expiry of a fixed term can produce a periodic tenancy even if at the start there was only a tenancy at will because the landlord and tenant were in the throes of negotiating a new tenancy. In that case the tenant subsequently reviewed its letting needs and decided not to take a new lease but to move when convenient. Instead of the three months notice it gave through its solicitors it was liable to pay rent for another thirteen months because a yearly tenancy was held to have come into existence subsequent to the expiry of the fixed term. An intention to create a tenancy was found and as it could not be for an uncertain period it had to be a periodic tenancy.

6. Adverse possession and moored boats – claims to have acquired title to a river bed based on adverse possession by mooring boats have become all the rage. Two more have been decided – Couper v Albion Properties [2013] EWHC 2993 (Ch) and Port of London v Tower Bridge Yacht & Boat Company limited [2013] EWHC 3084 (Ch). In both numerous points arose but as regards adverse possession Arnold J. in the Couper case accepted that any mooring which was a public nuisance because it obstructed a public right of navigation could not be a good basis for an adverse possession claim applying the Court of Appeal decision in R (Smith) v Land Registry [2010] EWCA Civ 200 (failed claim based on caravan located on layby which part of public highway). This will have a significant effect on such claims as the point had not been raised in PLA v Ashmore [2009] EWHC 954 which held that moored boats could result in the acquisition of title to the river bed below by adverse possession.

PLA v Tower Bridge Yacht and Boat Co. supra is concerned with "roots" in the Thames which are large blocks or anchors sunk in the river bed to be used for moorings. Mann J. held that a claim to have acquired title by adverse possession failed because such roots are a use of the river bed and not the taking of possession. Additionally there was insufficient evidence as to the precise space claimed.