RESIDENTIAL CONVEYANCING UPDATE

(Updated)

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Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

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BUILDING REGULATIONS AND GRENFELL

Prior to the Grenfell disaster the Welsh Government had already introduced a requirement for sprinkler systems in new residential buildings. In December 2018 similar requirements were introduced in England but only for residential buildings of 30 metres or more in height. There is also a ban on various types of cladding in relation to buildings more than 18 metres in height. This is not retrospective but is under review. The provision came into force in England on November 29 2019 and in Wales on January 13 2020.

FIRE SAFETY BILL 2019 – 2020

The Bill has now passed through Parliament on September 7th 2020 and is awaiting the Royal Assent. It amends the Regulatory Reform (Fire Safety) Order 2005. If a building has two or more dwellings then, not merely communal areas, but also structure, external walls, doors and windows require fire safety risk assessments. The effect of non-compliance may vitiate building's insurance.

THE EWS1 FORM AND EXTERNAL CLADDING

As a consequence of the Grenfell disaster, mortgage companies were refusing to lend on blocks of flats unless there were assurances about any cladding and on occasion are valuing flats at £0.00 unless the cladding is removed. This can be very expensive and time-consuming. As a consequence, UK Finance and the RICS introduced an EWS1 certificate in December 2019. It is designed so that chartered professionals can assess the safety level of any external wall systems based on composite cladding. The report will last for five years and applies to any high-rise residential building of more than 18 metres height or where there is a need for assessment due to other circumstances. Some mortgagees are now requiring the certificate, and where need be, replacement work, before lending. Some mortgagees do not seem to be accepting certificates. In any case, many chartered surveyors are reluctant to do the assessments because of the potential public liability risk. Other surveyors seem to have difficulty in obtaining public liability insurance to do the assessments.

As a consequence of a fire in a student halls of residence in Bolton in November 2019, there are now concerns about high pressure laminate which has been used as a building material.

PLANNING PERMISSIONS CHANGES

The Town and Country Planning Regulations 2020

Part of these came to force on 1 August 2020. Purpose built blocks of flats will be able to build two additional stories of no more than 7 metres in extent and the new building must be no more than 30 metres. This is subject to prior approval which can be refused because of flooding, external appearance, natural light, traffic and highway impact or defence assets.

Planning Permission and proceeds of crime

With the exception of demolishing in a conservation area, breaching planning permission is not a criminal offence. Breaching and enforcement notice and also not obtaining listed building consent is a criminal offence. In the case of **R v Del Basso [2010] EWCA Crim 1119** the Court of Appeal accepted that where a park and ride scheme did not have planning permission and the owner ignored enforcement notices then a confiscation order would be available based on profits under the **Proceeds of Crime Act 2002**. Local Authorities are increasingly using the Act in relation to breaches of enforcement notices and listed building status as they get to keep 37.5% of any compensation. In 2017 Southwark Borough Council obtained 1.2 million pounds when the owner of three flats near London Bridge converted them into 20 bedsits and subsequently breached an enforcement notice. The compensation was based on the rental profits that had been made.

Wokingham Borough Council v Scott [2019] EWCA Crim 205. In this case the Court of Appeal held that a local authority could not bring a prosecution merely because it intended to gain financially.

LAND REGISTRY AND CORONAVIRUS

As of 4 May 2020 HLMR have temporarily amended their rules in relation to verification of identity and execution of deeds.

Identity verification

In addition to conveyancers and chartered legal executives, verification can now be undertaken by people who work, or have worked, in certain professions including:

- retired conveyancers, chartered legal executives, solicitors and barristers
- bank officials and regulated financial advisers
- medical doctors, dentists and veterinary surgeons
- chartered and certified accountants
- police officers and officers in the UK armed forces
- teachers and college and university teaching staff
- Members of Parliament and Welsh Assembly members
- UK civil servants of senior executive officer (SEO) grade or above
- magistrates

The verification can also be done by way of a video call.

HMLR amended the guidance on September 7th 2020. Both sides will no longer need a conveyancer unless the sale is by Donee of a Power of Attorney, personal representative or on discharge of a mortgage. The guidance only applies to registerable dispositions and not, eg to a deed of variation of a restrictive covenant.

Signing deeds

HM Land Registry will accept deeds that have been signed using the 'Mercury signing approach'.

This means that, for land registration purposes, a signature page will need to be signed in pen and witnessed in person (not by a video call). The signature will then need to be captured, with a scanner or a camera, to produce a PDF, JPEG or other suitable copy of the signed signature page. Each party sends a single email to their conveyancer to which is attached the final agreed copy of the document and the copy of the signed signature page.

This is effective from Monday 4 May.

Note**:** As of 27 July 2020 HMLR will accept witnessed electronic signatures to enable an individual to sign a legal document but also allow a witness in their presence to sign. HMLR have published guidance for conveyancers on this.

CONVEYANCING PROTOCOL

This became compulsory for firms who are part of the CQS as of August 19 2019. Firms can always agree not to be bound by the protocol and it does not apply to new builds. Some major points are as follows:

This came into force on August 19th 2019 and replaces the 2011 edition.

1. The leasehold information should be expressed clearly to the client and the protocol envisages that the client should be quite clear about the nature of leasehold and in particular any ground rent increases, potentially with worked examples.

2. For SDLT and Land Transaction Tax, clients should be made aware that tax advice has not been given and in more complexed transactions they should be advised to see an independent tax specialist or accountant or a tax lawyer within the firm.

3. Bank account details should not be sent via email and clients should be told about some of the ways in which conveyancing frauds are perpetrated by the fraudsters.

4. Other provisions include that the purchaser should not raise enquiries about identity unless there is a fraud indicator.

5. There is no need to see original certification (e.g. FENSA) if they can be seen on a website or on a search.

6. The seller's solicitor should ensure that the money is paid into a bank account which has been opened for at least a year. This could cause major problems e.g. on an executor sale.

The Protocol and Additional Enquiries

Stage 15 replaces the previous Stage 32 but is similar in content. To quote:

Seller's Solicitors

- Obtain the seller's responses to additional enquiries. Explain that if inappropriate enquiries have been raised, answers need not be given.

- Respond to the additional enquiries from the buyer's conveyancer. You do not have to answer inappropriate enquiries.

- The seller should not be required to supply more information than is available in the documents.

- Inform the seller and the estate agent of any matters likely to delay exchange of contracts.

Buyer's Solicitors

Raise only specific additional enquiries required to clarify issues arising out of the documents submitted, or which are relevant to the title, existing or planned use, nature or location of the property or which the buyer has expressly requested.

Do not raise any additional enquiries about the state and condition of the building unless arising out of your conveyancing search results, your buyer's own enquiries, inspection or their surveyor's report.

Indiscriminate use of 'standard' additional enquiries may constitute a breach of this Protocol. If such enquiries are submitted, they are not required to be dealt with by the seller/seller's conveyancer.

THE SELLER'S CONVEYANCER DOES NOT NEED TO OBTAIN THE SELLER'S ANSWERS TO ANY ENQUIRY SEEKING OPINION RATHER THAN FACT.

THE NEW RESIDENTIAL ENQUIRIES

A new edition of the TA6 form was introduced on February 7th 2020. The changes are as follows:

- There is a warning in relation to Japanese Knotweed that the clients have not ticked the 'No' box unless they are certain that there is no Japanese Knotweed, and if unsure they should tick 'Don't Know'.
- It also makes clear that the rhizomes may be underground but not seen and the property may be affected by knotweed if it was within three meters of the boundary. Details of any insurance must also be provided.
- If radon gas is present any test reports must be provided.
- In relation to septic tanks which drain into a watercourse there is an enquiry as to when it was last replaced or upgraded (see later).

ON 5 JUNE 2020 THE FOURTH EDITION WAS REVISED. SECTION 12.5 NOW STATES THAT IF A SEPTIC TANKS DRAINS INTO A WATER COURSE IT WILL NEED TO BE EITHER CONNECTED TO THE MAIN SEWER, REPLACED BY A DRAINAGE FIELD OR REPLACED BY A SMALL TREATMENT PLANT. THIS SHOULD BE DONE AS SOON AS IS REASONABLY PRACTICABLE, EG. WITHIN TWELVE MONTHS.

COMPLETION AND THE CORONAVIRUS

The Law Society suggests that any delay in the completion date should be agreed amicably by the parties and that completion should be delayed until after the end of the current stay at home period with a possibility of further extension. UK Finance suggests that mortgage companies should be prepared to extend any mortgage offer for a further three months. If searches are needed to be updated then the conveyancer should advise their client accordingly and advise as to any further costs.

Government guidance states that removal work in people's homes can still go ahead as long as no one displays symptoms of coronavirus.

A major issue relates to the fact that the mortgage company can withdraw the mortgage offer at any time before completion. if their client must lose their job or have a reduction in pay then the mortgage company will consider this to be a material change of circumstance and expect the conveyancer to report the fact. however, there would be a conflict of interest and the conveyance would have obtain the client's consent. if this is not forthcoming then the conveyancer would have to refuse to act. If property prices start to fall then the mortgagee may revalue and withdraw the mortgage offer. If they have already exchanged they would still be bound to complete and if they could not do so they could be sued for any consequences and risk loss of any deposit.

Deferred Completion

The Law Society suggest that existing contracts may be varied although there is no 'one size fits all' approach. It is suggested that some of this may be applicable for new contracts in the future. There may be a provision allowing deferred completion with a long stop date. The contract might be rescinded on the long stop. The parties may also agree a delay event. If the parties do not agree that the delayed event has ceased to apply then completion would be 30 days after the Regulations are withdrawn. This may be difficult to achieve to achieve if there is a chain.

HELP TO BUY

Help to Buy in England is ending in its current form on 31 March 2021. Its replacement will last for two years. We do not know the detail but it will only be available to first time buyers and will have different maximum purchase prices in different regions.

New Help to Buy regional price caps

Region	Price cap for properties eligible for Help to Buy from April 2021 to March 2023	
North East	£	186,100
North West	£	224,400
Yorkshire and the Humber	£	228,100
East Midlands	£	261,900
West Midlands	£	255,600
East of England	£	407,400
London	£	600,000
South East	£	437,600
South West	£	349,000

Source: HM Treasury

On 31 July 2020 the deadline for Help to Buy homes to be built under the old regime was extended from 31 December 2020 to 28 February 2021. If a purchaser has reserved a house prior to 30 June 2020, Homes England has a discretion to extend the completion date to 31 March 2021.

RECENT CASE LAW

Signatures

Neocleous v Rees [2019] EWHC 2462

Here solicitors had sent a series of emails in relation to a transaction. The emails contained a footer stating the name, address, firm and occupation of the solicitors. The trail of emails was held to constitute one single document with all the expressed terms of the contract. The footer was held to be a signature which complied with S2(3) of the Law of Property [miscellaneous provisions) 1989 and the contract was valid.

Adverse Possession

Thorpe v Frank [2019] EWCA 150

To claim adverse possession then there must be a factual possession and an intention to possess. Fencing is clear evidence of factual possession but not essential. Here the Court of Appeal accepted that paving a piece of neighbouring land could give rise to adverse possession where due to the layout of the land and the existence of restrictive covenants fencing was inappropriate.

Fencing Covenants

Churston Golf Club v Haddock [2019] EWCA544

Several past cases had accepted that there may be an easement to fence which arises through custom. This is an acception to the normal rule that easements cannot require positive expenditure on the part of the servient owner. In the present case the High Court had accepted that a positive covenant to maintain boundary walls and fences forever hereafter could constitute an easement. The Court of Appeal have reversed this decision. It could not be an easement as it referred to the right being a positive covenant. The Courts left open the question as to whether there may be a general easement to fence.

VAT on Searches

Brabners LLP v HM Revenue & Customs (HMRC) [2017] UKFTT 0666 (TC) the tribunal confirmed that there was no concession on VAT for electronic searches as there is for property searches and VAT was payable. In June 2018 The Law Society amended their guidance on VAT. It should now be charged on electronic searches.

It is understood that HMRC are now investigating several other firms.

The Issues

The problem arose as the search provider were not charging VAT on their searches. If they had done so, the client could on the gross amount if the solicitor was not claiming back VAT. If HMRC claimed output tax against the solicitors, they could then claim back input tax and would not be out of pocket.

If the firm is charged VAT by the search provider but then claims it back against VAT and only charges the client the net amount, then they should be paying VAT to the revenue anyway.

Postal Property Searches have a concession whereby they are not charged.

In the case of BA Plc – v - Prosser (2019) the Court of Appeal recognised that medical reports may give rise to VAT if they were used for the solicitor to perform their job. In October 2019 the Law Society produced new guidance and stated that VAT should be added to electronic searches. It is thought that Land Registry fees are not chargeable to VAT.

Airbnb

Triplerose v Beattie [2020] UKUT 180

In the case of **Nencova v Fairfields Rents 2016 [UKUT] 303** it was held that providing short term lettings under Airbnb was both a breach of a covenant against using other as a private dwelling and also a covenant not to carry out a trade or business on the premises. In the present case, it was held that Airbnb constituted a breach of a private dwelling covenant but none business user covenant as there was regular use of the premises by the tenant when not let out on short lettings.

ENFORCEABILITY OF POSITIVE COVENANTS

Enforceability of Positive Covenants

1. Positive Covenants and Restrictions

The problem here is that in freehold land a positive covenant will not burden third party purchasers. See **Austerberry v Oldham Corporation [1885]** - this was confirmed by the House Lords in **Rhone v Stephens [1994] 2 All ER 65** where maintenance of a flying freehold roof could not be required against third party purchasers. Mortgage companies may be required to be told about flying freeholds and insurance may be available. It is suggested that the best manner of enforcement would be to include direct covenants and restrictions on the register. There are many ways of circumventing this, e.g. estate rentcharges and the doctrine of mutual benefit and burden, i.e. if a right is claimed, a corresponding obligation must be taken on. The classic example of this is in relation to maintenance of private roads and drains in small estates. This is not suitable however in relation to overage.

Direct covenants and restrictions

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

Stamp Duty Land Tax

SDLT will attach to positive overage but not to negative. A best estimate of the total consideration based on the contingent event occurring, no matter how remote, must be made and the tax calculated accordingly, e.g., ransom strips and restrictive covenants. When the triggering event actually occurs a further return must then be made. Developers should accommodate any extra SDLT liability in their tendering process.

A deferral form may be obtained from the Birmingham Stamping Office. How any estimate of final liability may be made is debatable but note that the client must be made aware that if a trigger event occurs, they will have to fill in a new return with a balancing payment. If the estimate were to tip the SDLT liability from one band to another, the higher payment must be paid initially.

On subsequent transfers where there is clawback post 1 December 2003, enquiry must be made as to whether a deferral was requested. If this has occurred then the subsequent purchaser will have a further tax bill on the trigger event occurring. The CPSE Enquiries envisage that a request to see the Land Transaction Return must be made.

2. Section 33 Local Government (Miscellaneous Provisions Act) 1982

As above, Local Authorities may enforce positive covenants if they invoke their powers under the Act and the transfer refers to the 1982 Act, or its predecessor, the Housing Act 1974.

3. Estate Rentcharges

In some parts of the country freehold properties are subject to fixed sum rentcharges, a sum of money is paid per annum to the rent owner. In such rentcharges cannot be created since 21st July 1977 when the Rentcharges Act of that year came into force. Existing fixed sum rentcharges will come to an end on 21st July 2037 or within 60 years of first becoming

payable whichever is the latter. However, rentcharges which reasonably reflect maintenance costs can be created. The relevant provisions as thus:

Rentcharges Act 1977 s2

(1) Subject to this section, no rentcharge may be created whether at law or in equity after the coming into force of this section.

(2) Any instrument made after the coming into force of this section shall, to the extent that it purports to create a rentcharge the creation of which is prohibited by this section, be void.

(3) This section does not prohibit the creation of a rentcharge—

(a) in the case of which paragraph 3 of Schedule 1 to the Trusts of Land and Appointment of Trustees Act 1996 (trust in case of family charge) applies to the land on which the rent is charged;

(b) in the case of which paragraph (a) above would have effect but for the fact that the land on which the rent is charged is settled land or subject to a trust of land;

(c) which is an estate rentcharge;

(d) under any Act of Parliament providing for the creation of rentcharges in connection with the execution of works on land (whether by way of improvements, repairs or otherwise) or the commutation of any obligation to do any such work; or

(e) by, or in accordance with the requirements of, any order of a court.

(4) For the purposes of this section "estate rentcharge" means (subject to subsection (5) below) a rentcharge created for the purpose—

(a) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or

(b) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land.

(5) A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant.

Note: HSBC appear not to give mortgages where the estate rentcharge has right of entry.

Smith Brothers Farms Ltd v Canwell Estate Company Ltd [2012] EWCA 237. An Estate Rentcharge, to be valid, needs to reflect maintenance costs and cannot have a profit element – S.2(5) Rentcharges Act 1977. Here, the Estate Rentcharge covered maintenance

for the whole of an estate including roads which would not be used by the covenantor. It was still valid as maintenance need not be in relation to the particular piece of land of the covenantor.

The estate rentcharge was still reasonable even though it referred to maintenance of the estate and a private road that the property owner would never use. It seems to be very difficult to question apportionments of rent charges.

Extinguishment of Rentcharges

Fixed sum rentcharges can be extinguished under s8-10 of the Rentcharges Act 1977. This is done by application to the Department of Housing, Communities and Local Government. There is a statutory formula as to the amount which is usually around 16 times the annual rentcharge. A certificate of redemption will be obtained which can be used to notify HMLR. This can only be done if the rent owner is known. Otherwise, insurance may be appropriate. However, make sure that the policy covers not just debt but other remedies (see later).

The Tribunals, Courts & Enforcement Act 2007 treats rentcharges as normal rent in relation to remedies. If there has been no collection of the rentcharge for more than six years, it is statute barred from that moment onwards.

If the rentcharge applies to land which is then sub-divided then each plot will have joint and several liability. For a fixed sum, rentcharge application may be made under s4 of the Act for an apportionment. This does not apply to estate rentcharges.

The Problem

S1 of the Rentcharges Act 1977 provides that a rentcharge created since implementation is void if it has any profit elements. The rentcharge must collect purely from maintenance. However, administration charges can be expensive and clients should be warned of this. Unlike leasehold flats and administration charges there is no statutory ability to question the reasonableness of administration charges. It must be made clear in the provisions that charges must be reasonable. Even then application through the Courts, and not Tribunals, to question reasonableness may be difficult.

Note: Currently there is no obligation that the estate rentcharge administration costs are reasonably incurred. Even if such an obligation existed, there is no ability to question the estate rentcharge in the tribunals and there would have to be much more costly court proceedings.

Note: **Roberts v Lawton [2016] UKUT 396 (TCC)** s121 (4) of the Law and Property Act 1925 allows the holder of a rentcharge to appoint trustees who will be tenants under a 99 year lease if a rentcharge is not paid within 40 days of being due. This will be the case whether the charge is formally demanded or not. Here the arrears amounted to between £6 and £15. This was held to be a lease which can be registered at HMLR. The lease will continue even if the arrears are paid. In the present case, the holder of the rentcharge used this fact to hold home owners to a ransom in order for them to pay administration charges. S121 (4) will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

Note also s121 (3) allows possession of the land by the rent owner under similar circumstances. These provisions only apply if the rentcharge was created from 1st January 1881 onwards when the Conveyancing Act of that year came into force.

Any possession or long lease would bind a mortgage company if the rentcharge was created before the mortgage and not if the lease was created before the mortgage.

Some estate rentcharges include an express right of entry but the effect of s121 (3) is to have a statutory right anyway. It is suggested that there should be a clause whereby the mortgagee is given at least 28 days notice by the rent owner prior to proceedings being brought. This may cause problems with newbuild Help to Buys for reasons we have seen in relation to ground rents.

Some mortgagees e.g. Barclays are requiring such a mortgagee protection clause and exclusion of s121, especially where the residents are not members of the management company.

4. Mutual Benefits and Burden: The rule in Halsall v Brizell (1957)

If a landowner wants to obtain a benefit, then it must submit to any corresponding burden. This may be by way of enforcing obligations in relation to private roads in smaller developments. However, the **Thamesmead Town v Allotey (1999)**, payments for maintenance of private roads and drains was able to be collected, but not for gardening and landscaping if the owner does not wish to avail themselves of such rights.

Note: Post the above case, a mortgage company may well require direct covenants and restrictions on the register in relation to maintenance of private roads and drains. This will often be the case in anything but the smallest of developments.

Wilkinson v Kerdene Ltd [2013] EWCA 44. Here, the doctrine of mutual benefit and burden was held to apply to the whole of a holiday village in Cornwall. This included maintenance of roads, car parks, footpaths and other recreational facilities and also maintenance to the outside of bungalows and the foul sewer system.

5. Long Leases

If the lease was created pre 1 January 1996, both positive and negative covenants will pass with the land if they touch and concern the land, i.e. they are leasehold covenants.

Note: **Woodall v Clifton (1909)** Options to purchase, as opposed to options to renew the lease, will not pass with the land. If the lease was created from 1 January 1996 onwards, then all covenants will pass unless expressed to be personal under Sections 2 and 3 of the Landlord and Tenant (Covenants) Act 1995. On enlargement of a long lease without a rent and without forfeiture provisions, positive covenants will pass onto the freeholds under Section 153 of the Law of Property Act 1925.

6. Commonhold

Under Part 1 of the Commonhold and Leasehold Reform Act 2002, a Commonhold Association may be set up, and the various freeholders will become members. They will agree to be bound by positive and restrictive covenants via the Memorandum and Articles of Association. Since September 2004, very few commonholds have been set up, mainly as there is no right to sublet in relation to a dwelling for more than seven years and thus affordable housing cannot be built into the developments via shared ownership leases. Moreover, as the mortgage companies are concerned at the Commonhold Association being struck off, thus giving rise to a series of flying freeholds, many are reluctant to give mortgages.

JAPANESE KNOTWEED

Japanese knotweed is a notifiable substance. It is illegal to cause it to be propagated in the wild under the Wildlife and Countryside Act 1981. The Local Authority can issue remediation notices and charge for its removal. The new residential enquiries, TA6 (4th Edition), raise an enquiry as to whether the property is affected by Japanese knotweed. It allows the responses of yes, no or don't know. No would be a statement of fact and potentially actionable. Don't know may be a representation that attempts have been made to investigate. Moreover, the property may be affected by Japanese knotweed if it is within the neighbourhood. It is suggested that responses should make clear that there has been no attempt to find out. The presence of knotweed is also required in response to the CPSE enquiries sections 8 and 15 as it constitutes a contaminated substance and an infestation.

The mortgagee must be told of the existence of knotweed, although valuation reports may pick this up. The mortgage offer may be withdrawn unless the knotweed can be controlled by experts before reaching any building.

Note: Under the Anti-social Behaviour Crime and Policing Act 2014 local authorities may serve community protection notices on property owners who fail to control their knotweed. In 2019 Bristol City Council became the first local authority to prosecute for a breach of a community protection notice. The recipient was fined £18,000.

Williams & Waistell v Rail Infrastructure Ltd [2018] EWCA Civ 1514 here Rail Infrastructure Ltd were successfully sued in nuisance for not removing knotweed growing on neighbouring land to dwellings owned by Williams & Waistell. Damages were assessed at £10,000 plus £5,000 towards remedial costs.

Ryb v Conway consultants, June 2019. In this case a surveyor was successfully sued for not spotting Japanese Knotweed in a residential garden in North London. He should have taken photographs and made a record of the knotweed. The claimant successfully argued that he would not have bought the property or would have wanted a reduced price if he had known. Damages were assessed at £50,000.00.

The Court of Appeal have now confirmed the first instance decision but on different grounds. Loss of value cannot be claimed as this is pure economic loss. However, damages were available for lost development potential and possible future damage to property.

In 2020 a case was settled where the purchaser was suing the seller for 23% of the value of the property.

SEPTIC TANKS

As of 6 April 2010 Consent to Discharge is being phased out, to be replaced by the need for a Discharge Permit or Exemption from the Environment Agency. By 1 January 2012 all septic tanks will need to be registered, no matter how old. New tanks which are fully compliant with modern Building Regulations will be registered as being exempt. In August 2011 it was announced that the registration of small septic tanks would be reviewed in England. Registration for an exemption may occur, but will not be necessary by 1 January 2011.

The provisions came into force on 1 January 2012 in Wales however.

In England most domestic tanks will not need to be registered. However, there are three exceptions

If the tank is within 50 metres of a drinking supply such as a well or borehole

i.e. where there is a discharge of more than $2m^3$ a day or where the discharge is within a Zone 1 ground water protection zone. The Environment Agency will advise over the telephone whether the latter is the case. In Wales registration should occur as soon as possible, but the Environment Agency will accept registrations until 30 June 2012. The Welsh Assembly intends to send leaflets to anyone with a septic tank. In England and Wales the cost of a discharge permit is temporarily set at £125.

Note: Regardless of registration, maintenance records should be kept in relation to the tank and TA6 Enquiries ask for these to be provided to the buyer.

Note: That implementation of these provisions in England was put on hold in August 2011. However, they came into force in Wales on 1 January 2012.

On 9th October 2014 the Environment Agency announced results of their consultation and draft regulations will be produced for implementation on 1st January 2015. As of 1st January 2015 large septic tanks discharging more than $2m^3$ of waste a day will need to be registered with a discharge permit costing £125. Small tanks will not need to be registered with an exemption but will need a discharge permit if in a zone 1 water protection zone area or within 50m of a drinking supply or if the discharge is above the low water mark. Tanks in areas of outstanding natural beauty will now not need to be registered. None registration is a criminal offence although the Environment Agency intend to be lenient and educate property owners rather than prosecute.

The provisions came into force in England on 1st January 2015. New tanks in designated areas will need to be registered and obtain a permit but not existing tanks. The number of designated areas has been reduced. Larger tanks will still require a permit

The above provisions are contained in the General Binding Rules. In addition, if a septic tank flows into a water course as opposed to a drainage field, this must be replaced on a sale of the property and by January 2020 at the latest. A treatment plant will not need to be replaced. These provisions came into force in January 2017.

On November 8th 2019 the Environment Agency produced new guidance. This is nearly the same as previous guidance but there is no reference to January 1st 2020.