Neighbours and the Law

Supplement to the Fifth edition

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SWEET & MAXWELL

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Neighbours and the Law

On-line Supplement to the

5TH Edition

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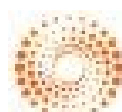

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Preface

This cumulative supplement, the third for this edition, is intended as a means of updating readers of the fifth edition of *Neighbours and the Law*. It aims to summarise recent developments in case law and relevant legislative and other changes. New text is highlighted in **red**.

Amongst the more significant cases have been the Supreme Court's decisions in *R (Lewis) v Redcar & Cleveland BC*, that "deference" or courtesy shown by local inhabitants towards other land users shall not defeat a claim to town or village green status, and in *Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water)* concerning the right to connect to public sewers, regardless of capacity and the risk of causing a nuisance. Parliament has since demonstrated a desire to remove this automatic right by passing the Flood and Water Management Act 2010, s.42, which inserts a new s.106B into the Water Industry Act 1991 requiring parties to conclude adoption agreements prior to exercising the right to connect. However, as the provision (like so many these days) has not yet been brought into force it is not mentioned any further in the text of this supplement.

Elsewhere there have been three cases concerning the powers exercisable by the Adjudicator to HM Land Registry. Other recent developments concern the application of the measured duty of care to liability for flooding of adjacent land, some cases on the Protection from Harassment Act, commons and village greens, nuisance, open-air cremation, a neighbour's right to seek security under the Party Wall, etc Act, the proper measure of damages in trespass, and the implications of a school's healthy eating programme on a local authority's decision to grant planning permission for a nearby fast-food outlet. I have also taken this opportunity to expand upon the existing treatment in the main work of rentcharges and public navigation rights. The introduction of the Building Regulations 2010 is noted.

In the area of planning the coalition government, although once rebuffed in the courts, has issued guidance that Regional Spatial Strategies are to be abolished. With a view to curtailing "garden-grabbing" Planning Policy Statement 3 (Housing) has been amended so as no longer to include residential gardens within the definition of previously developed or "brown-field" land.

With the passing and partial bringing into force of the Marine and Coastal Access Act 2009 the first preparatory – but different – steps are being taken by the Secretary of State and Welsh Ministers to extend public access to coastal paths in England and Wales.

Finally, within a few months of publication of the main work significant revisions were made both to CPR Part 35 and to its Practice Direction. These appear in Appendix C to this Supplement.

While I strive to keep abreast of relevant developments in the law the breadth of subject-matter covered by the book is such that errors and omissions are inevitable, for which I take full responsibility. Devolution, with its resulting different commencement dates and Orders, has made the task even more complicated. May I therefore apologise to Welsh readers if I have failed accurately to record the current status of legislation affecting the principality.

February 2011

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[no updating material]

1.40 *Highways*

Footnote 18 : Although there were circumstances in which a highway would cease to be so designated, it could not be extinguished by adverse possession : *R (Smith) v Land Registry* [2010] EWCA Civ 200; [2010] 21 EG 92. See more extensive note under **1.63** below.

1.63 **Adverse possession** *Principles applicable to unregistered land*

Footnote 97 : The declaration made in *Port of London Authority v Ashmore* was regarded by the Court of Appeal as unsatisfactory, and was set aside. Although the appellant (PLA) accepted, in principle, that there could be circumstances in which the owner of a vessel moored on a tidal river might acquire title by adverse possession to a part of the river bed or foreshore, a decision on assumed facts which were neither definitive nor exhaustive could not be determinative of the outcome at a trial : *Port of London Authority v Ashmore* [2010] EWCA Civ 30; [2010] 1 All ER 1139 (Note)

Footnote 98 : The public right of way over land could not be extinguished by adverse possession because the squatter could acquire only the title of the owner that he had dispossessed. The public right to use the highway could not be terminated by actions that affected only some members of the public since the right belonged to them all, and the public was an ever-changing mass. Moreover, the 12-year limitation period laid down by the Limitation Act 1980 applied only to actions to recover land and did not apply to rights of way. Further, public rights were overriding interests by virtue of section 29 of and para 5 of Schedule 1 to the Land Registration Act 2002, such that any title that a squatter might acquire would be subject to the right of way on first registration. Accordingly, a squatter could not legally terminate the public's right of passage by occupying land forming part of the highway : *R (Smith) v Land Registry* [2010] EWCA Civ 200; [2010] 21 EG 92

1.69 *Principles applicable to registered land*

Add : The procedure in the Land Registration Act 2002 Sch.6 para.2 to Sch.6 para.5 was not necessarily conclusive of an applicant's entitlement to be registered. Although an applicant would automatically be registered under Sch.6 para.4 if no counter-notice was served requiring the application to be dealt with under Sch.6 para.5, the former proprietor of the land could still apply for rectification of the register on the basis that the registration was a mistake, on the ground that the applicant did not satisfy the test of 10 years' adverse possession. It was implicit in the wording of Sch.6 para.1 that a person who was not in fact in adverse possession of land was not entitled to apply to be registered as its owner. A registration obtained by a person not entitled to apply for it would be mistaken, so putting the register back in the condition it was prior to that application would be correction of a mistake within the meaning of Sch.4 para.1 and para.5. There was no reason to limit the jurisdiction to correct a mistake to official errors in the course of examination of a relevant application. To otherwise conclude would be an invitation to fraud : *Baxter v Mannion* [2011] EWCA Civ 120

2.33 Right to light

Add : See also *Hkruk II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch) (Leeds); [2010] 44 EG 126, where HH Judge Langan held that an injunction, rather than damages, was the appropriate remedy where the claimant had committed an actionable interference with the access of light to the defendant's building by the addition of two floors to its own building.

2.60 Profit of pasture

In determining whether a profit a prendre subsisted in law there was no test of real or appreciable benefit to the dominant tenement which had to be passed before a right claimed could be said to accommodate it or to establish the necessary connection or nexus between the right and the dominant tenement. It was not the case that a profit of grazing could not exist simply because the dominant tenement could manage perfectly well without it and that it brought very little, or perhaps no, practical benefit : *Polo Woods Foundation v Shelton-Agar* [2009] EWHC 1361 (Ch); [2010] 1 All ER 539; [2010] 1 P&CR 12

3.32

A covenant not to do anything which might be or become a nuisance or annoyance to other owners or occupiers of a residential estate was wide enough to cover the building of an extension to an existing house which, when built, would be such an annoyance : *Davies v Dennis* [2009] EWCA Civ 1081; [2010] 1 P&CR DG13; [2010] 3 EG 104, applying *Wood v Cooper* [1894] 3 Ch 671

Chapter 4 Miscellaneous rights and restrictions

4.06 Rentcharges

Add new text : Where a management company is providing services, effecting insurance, and carrying out maintenance and repairs on a mixed estate of freehold houses and leasehold blocks of flats the residential leaseholders are able to challenge the reasonableness and payability of the amount sought by way of service charge, on grounds of cost, quality or for non-compliance with various statutory safeguards, before the Leasehold Valuation Tribunal. The owners of freehold houses on the same estate, and liable to pay a share of the same overall expense, enjoy no such rights; as their share of expenditure is recoverable by way of an estate rentcharge. The amount sought can only be challenged in the County Court under s.1(5) on the ground that it does not represent a payment for the performance by the rent owner of any such covenant which is reasonable in relation to that covenant.

Chapter 5 Public rights over private land

5.01 Commons

The Commons Act 2006 (Commencement No. 5) (England) Order 2010 [SI 2010/61] brought sections 26 to 37 of the Commons Act 2006 into force in relation to England on 20th January 2010. Those sections comprise Part 2 of the Act, and allow for the management of registered common land, or of a registered town or village green that is subject to rights of common, by a commons council. The sections being commenced provide for the establishment of commons councils, their status and constitution, and their functions, together with supplementary provisions.

5.02 *Position prior to implementation of Commons Act 2006*

Add to first subsidiary paragraph : In *Dance v Savery & ors* [2011] EWHC 16 (Ch) Kitchin J held that the inclusion in the register of a right of common in respect of one register unit of land of a purported right to graze over another unit could not confer any right over that other unit under the Commons Registration Act 1965. Any person claiming a right of common over a register unit is required to make an application for the provisional registration of that right in the rights section of the register relating to that unit.

5.05 Town and village greens *Locality and neighbourhood*

Add : The area from which users must come under the amended s.22(1A) includes a "neighbourhood" as well as a locality. On any view that makes qualification much easier because it was accepted in *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire CC* [2010] EWHC 530 (Admin), [2010] 14 EG 108 (CS) that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a locality. Further, there was nothing in the amended definition in s.22(1A) which limited the neighbourhood to a single neighbourhood, and there was no logical reason why there could not be two or more neighbourhoods from which the qualifying users came : *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438

5.06 *"As of right"*

Delete point d & footnote 23

Insert : The above proposition that "as of right" was sufficiently described by the tripartite test, not by force, nor stealth, nor the licence of the owner, was established by high authority. It was right to say that the English theory of prescription was concerned with how the matter would have appeared to the owner of the land, but where local authority land which formed part of a golf course was also used by local inhabitants for informal recreation, the fact that the inhabitants deferred to those playing golf did not mean that they were not using the land "as of right" for the purposes of registration as a green under the Commons Act 2006, s.15. A reasonable owner would not have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility or, in the inspector's word, deference towards members of the golf club who were out playing golf. The fact remained that they were regularly, in large numbers, crossing the fairways as well as walking on the rough and a reasonably alert owner of the land could not have failed to recognise that that user was the assertion of a right and would mature into an established right unless the owner took action to stop it : *R (Lewis) v Redcar & Cleveland Borough Council & anor* [2010] UKSC 11; [2010] 2 WLR 653; [2010] 2 All ER

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5.09 Public rights of way *Extinguishment*

Footnote 35 : Although there were circumstances in which a highway would cease to be so designated, it could not be extinguished by adverse possession : *R (Smith) v Land Registry* [2010] EWCA Civ 200; [2010] 21 EG 92

NEW PARAGRAPH (replacing 5.16, footnote 50)

5.19 Marine and Coastal Access Act 2009

By Part 9 of the Act (Coastal Access) Natural England and the Secretary of State must exercise the relevant functions in order to secure the following objectives :

- The first objective is that there is a route for the whole of the English coast which consists of one or more long-distance routes along which the public are enabled to make recreational journeys on foot or by ferry, and (except to the extent that it is completed by ferry) passes over land which is accessible to the public.

- The second objective is that, in association with that route (“the English coastal route”), a margin of land along the length of the English coast is accessible to the public for the purposes of its enjoyment by them in conjunction with that route or otherwise, except to the extent that the margin of land is relevant excepted land.

This duty imposed on Natural England and the Secretary of State is referred to as the coastal access duty, and is to be discharged by them in such stages and within such period as appear to them to be appropriate. Within 12 months of the relevant section coming into force (ie by 12th January 2011) Natural England must prepare a scheme setting out the approach it will take when discharging the coastal access duty, and submit it to the Secretary of State for approval, with or without modification. If dissatisfied, the Secretary of State may reject it and require the preparation and submission of a fresh scheme.

Section 310 grants powers to the Welsh Assembly for the establishment and maintenance of a route (or a number of routes) for the coast to enable the public to make recreational journeys and for securing public access to relevant land for the purposes of open-air recreation. The Welsh Assembly Government programme consists of two geographically based components : a Wales Coast Path and Wales Coastal Zone.

6.12 *Access and passage*

Add new text : According to the House of Lords[69a] a public right of navigation on non-tidal waters has the following characteristics :

a. it depends not only upon the theoretical navigability of the river, but also on proof of its regular and habitual use as a channel of communication or transportation from time immemorial;
b. a right of navigation is not a servitude and cannot be lost by non-use;
c. use for mere recreation is as effective to prove navigability as use for transporting goods or other commercial use;
d. no question arises as to whether the use is of sufficient public benefit;
e. the establishment of a right of navigation in a river is not subject to the same requirements as the constitution of a right of way on land, and in particular a right of navigation need not be established between two public places; and
f. a public right of navigation would permit navigation by any vessel that could be reasonably described as a boat, including a canoe.

Add new footnote 69a : *Wills Trustees v Cairngorm Canoeing & Sailing School Ltd* 1976 SC (HL) 30. Although a Scottish case, Lords Wilberforce and Hailsham considered with some relish cases on the right to float logs downstream, from Quebec (based on its pre-revolutionary French civil code) and New York State (based on English common law); Lord Hailsham observing that "what I have now held to be the law of Scotland happens to coincide with what I believe to be the law of England".

6.13 *Boats*

Footnote 74 : The declaration made in *Port of London Authority v Ashmore* was regarded by the Court of Appeal as unsatisfactory, and was set aside. Although the appellant (PLA) accepted, in principle, that there could be circumstances in which the owner of a vessel moored on a tidal river might acquire title by adverse possession to a part of the river bed or foreshore, a decision on assumed facts which were neither definitive nor exhaustive could not be determinative of the outcome at a trial : *Port of London Authority v Ashmore* [2010] EWCA Civ 30; [2010] 1 All ER 1139 (Note)

7.17 **Party walls** *Expenses*
An adjoining owner's right to request security under the Party Wall etc. Act 1996, s.12(1) applies to all cases where a building owner exercised rights under the Act, including where works are carried out under s.6(1) and s.6(2). Security is not limited to cases where the building owner proposes to carry out work to the adjoining owner's property : *Kaye v Lawrence* [2010] EWHC 2678 (TCC); [2011] 1 EG 66

7.18 *Resolution of disputes*
Surveyors appointed under the Party Wall etc. Act 1996 do not have the power to direct payment of costs incurred for the purpose of actual or contemplated litigation in court to enforce common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them : *Reeves v Blake* [2009] EWCA Civ 611; [2010] 1 WLR 1; [2010] 1 P&CR 6

Chapter 8 Civil causes of action

8.03 *Protection from Harassment Act 1997*
Footnote 7 : This is now doubtful. In *Smithkline Beecham Plc v Avery* [2009] EWHC 1488 (QB) Jack J held that "person" in s.1(1A)(c) was not limited to individuals and may be a body corporate; thus corporate applicants were entitled to claim relief under s.1(1A)

Add : The Protection from Harassment Act 1997 s.3A widened the scope of the Act to encompass non-parties but not to the extent of allowing, without the court's permission, enforcement of an injunction against protestors who were not named defendants in the order : *AGC Chemicals Europe Ltd v Stop Huntington Animal Cruelty* (2010) QBD (David Pittaway QC) 10/6/2010

8.08 Nuisance
It is not possible for a seller of land to exclude any right to complain of nuisance under a conveyance as the origin of the right to sue in nuisance was a right conferred by the law of tort and was not a real property right which passed under a conveyance : *Thornhill & ors v Sita Metal Recycling Ltd & ors* [2009] EWHC 2037 (QB); [2009] Env LR 35

8.12 *Negligence or strict liability?*
Footnote 28 : On the measured duty of care owed to those who have suffered loss see also *Lambert & ors v (1) Barratt Homes Ltd (2) Rochdale MBC* [2010] EWCA Civ 681, where the Court of Appeal held that it was not fair, just or reasonable to impose on a local authority a duty to carry out and pay for relief work to an existing drainage system which had been blocked by a developer and caused water to accumulate on the local authority's land and subsequently overflow and damage the claimants' nearby properties.

8.46 *Measure of damages in trespass*
In *Stadium Capital Holdings v St Marylebone Properties Co Plc* [2010] EWCA Civ 952 an advertising hoarding intruding into the airspace of neighbouring land and damages in trespass were awarded on the basis of the entirety of income the trespasser had earned from the operation of the hoarding. The Court of Appeal held that trespass was an unusual tort in that it was actionable per se, and the law had developed away from awarding damages on the basis of how the subject land could have been used by a claimant to the basis upon which a defendant had actually used the land and the benefit thereby obtained. There was, therefore, a flexible basis for assessment of damages, and in most cases it would be appropriate to make an award based on the charging of a reasonable fee for occupation of the land by the trespasser. Trespass cases required damages on a restitutionary basis using the principle of a hypothetical license fee which, by definition, did not amount to 100 per cent of profits.

9.46 Statutory nuisances *Procedure*

An abatement notice served on a recycling company by a local authority without the prior consent of the secretary of state was not a nullity under the Environmental Protection Act 1990, s.79, as consent was only required for instituting "summary proceedings", which did not include the service of an abatement notice. The secretary of state's consent was only required prior to the commencement of proceedings for failure to comply with the notice : *R (Ethos Recycling Ltd) v Barking & Dagenham Magistrates' Court* [2009] EWHC 2885 (Admin); [2010] PTSR 787

9.51 *Pollution control & Environmental permitting*

Add : For the relationship between the IPPC regime and the planning process see **10.48** below and the note of *Harrison v (1) Secretary of State for Communities & Local Government (2) Cheshire West & Chester Council (Successor to Vale Royal Borough Council)* [2009] EWHC 3382 (Admin); [2010] Env LR 17

9.61 *Cremation*

Delete whole paragraph and insert : While the burning of human remains other than in a building, such as on an open air funeral pyre, would be an offence under the Cremation Act 1902, the wishes of an orthodox Hindu that his remains be cremated on a traditional fire in direct sunlight could be accommodated under the Act and the Cremation (England and Wales) Regulations 2008, because the kind of structure that he found acceptable for his cremation was a "building" within s.2 of the Act, as that word was to be given its ordinary, wide meaning. The obiter view in *Moir v Williams* [1892] 1 QB 264 (CA) that the ordinary meaning of "building" was "an inclosure of brick or stonework, covered in by a roof" could only be justified in the context of that case; it did not have wider application : *R (Ghai) v Newcastle City Council & ors* [2010] EWCA Civ 59; [2010] 7 EG 101 (CS)

NEW PARA 9.88a Masts and pylons

On the proper construction of the Telecommunications Act 1984 Sch.2 para.13(2)(e), a network operator had to pay for the right to carry out the works, which right carried with it the right to keep the works on (or under or over) the relevant land in accordance with whatever items and conditions the arbitrator awarded. The price payable had to be fair and reasonable but would take into account everything that the operator acquired by carrying out the works. The requirement that the price be a fair and reasonable one precluded the extraction of a ransom payment by the person in control of the linear obstacle : *Bridgewater Canal Co Ltd v GEO Networks Ltd* [2010] EWHC 548 (Ch); [2010] RVR 171; [2010] 13 EG 82 (CS) (applying *Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd* [2002] EWCA Civ 720).

9.115 Trespassers

Footnotes 40 & 41 : Where a defendant occupied woodland owned by a claimant, the court did not have the power to make a possession order in respect of a separate piece of land owned by the claimant which was not being occupied by the defendant. The decision in *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200, [2004] 1 WLR 1906 to allow such an order had been incorrect : *Secretary of State for the Environment Food & Rural Affairs v Meier & ors* [2009] UKSC 11; [2009] 1 WLR 2780; [2010] HLR 15

9.137 Water *Discharges to sewers*

Footnote 21 : This has now been upheld by the Supreme Court. The exercise of the right of a property owner to discharge into a public sewer pursuant to the Water Industry Act 1991, s 106 was an absolute right which could not be prevented on the ground that the additional discharge would create a nuisance. That was for the sewerage undertaker to deal with : *Barratt Homes Limited (Respondents) v Dwr Cymru Cyfyngedig (Welsh Water) (Appellant)* [2009] UKSC 13; [2010] 1 All ER 965; [2010] Env LR 14

10.45 *Considering the neighbours*
Footnote 58 : In *R (Copeland) v Tower Hamlets LBC* (2010) QBD (Admin) Cranston J held that a local authority had acted unlawfully in granting planning permission for the change of use of a premises to a hot food takeaway by failing to have regard, as a material consideration, to the proximity of a secondary school which was promoting a healthy eating programme. In determining a grant of planning permission a local authority was required to have regard to the provisions of the development plan and development had to be in accordance with the development plan unless there were material considerations which indicated that it should not be : *R (on the application of J (A Child)) v North Warwickshire BC* [2001] EWCA Civ 315, [2001] 2 PLR 59. It was apparent that a consideration was material if it was relevant to whether a grant of planning permission should be refused : *R (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370; [2003] 1 P&CR 19. Promoting social objectives could be a material consideration in the context of planning law and planning controls : *Stringer v Minister for Housing and Local Government* [1970] 1 WLR 1281 (QBD). Further, it was clear that the "human factor" could be considered in exceptional cases as part of land use : *Westminster City Council v Great Portland Estates Plc* [1985] AC 661.

10.48 *Environmental impact assessment*
Footnote 80 : The planning system, which had to determine whether a development of land was acceptable use in the light of the impact of those uses, was distinct from the integrated pollution prevention and control (IPPC) regime. Even where a site which had changed its use from agricultural to the processing of animal by-products had been granted a conditional IPPC permit, an inspector was entitled to reach his own conclusions as to the impact of the proposed development on amenity, particularly the effect of odour emissions, and whether the site under consideration was the appropriate location for such development : *Harrison v (1) Secretary of State for Communities & Local Government (2) Cheshire West & Chester Council (Successor to Vale Royal Borough Council)* [2009] EWHC 3382 (Admin); [2010] Env LR 17

Add : There is a clear obligation, enshrined in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, reg.21, on a local planning authority to publish a notice to the public informing them of any planning decision. Merely placing a planning permission on the local authority's website was insufficient since the Regulation required positive steps to inform the public, such as by local advertisement, although such a failure would not render the grant of planning permission itself unlawful : *R (The Friends of Hethel Ltd) v South Norfolk District Council & Ecotricity (Interested Party)* [2009] EWHC 2856 (Admin); [2010] PTSR (CS) 9

10.90 Listed building control
The Planning (Listed Buildings and Conservation Areas) Act 1990 clearly envisaged there being a "list" of listed buildings, and although listing by the correct name and address should be the general practice, there is no statutory requirement that the name takes precedence over other identifying detail. Information such as verbal descriptions, map references, post codes, explanatory notes and photographs, singly or combined, could enhance the clarity and precision of the list, and might suffice to identify a building even where the stated name and address is wrong : *Barratt v Ashford Borough Council* [2011] EWCA Civ 27 (applying *Edinburgh City Council*

v Secretary of State for Scotland [1997] 1 WLR 1447 (HL))

10.98 Conservation areas

Footnote 82 : A local authority had acted improperly by using its powers under the Planning (Listed Buildings and Conservation Areas) Act 1990, s.69(1) to designate an area of land as a conservation area where the true purpose of the designation had been to prevent the demolition of an unlisted monastery rather than enhancing or preserving the area. It was important to remember that the planning laws sought to balance the public interest in protecting the environment and the quality of life for those who inhabited particular areas against the right of owners to use their land as they wished. Locally listed buildings that were not dwelling houses did not have protection from demolition. It was apparent from para. 3.14 of the guidance issued by English Heritage on the Management of Conservation Areas that the desire to protect unlisted buildings, and *a fortiori* a single unlisted building, could not justify a designation unless there was an area to which that building or those buildings made a real contribution. Thus if the motive for designation was to protect an unlisted building, that would suggest that the statutory powers were being used for the wrong purpose : *Metro Construction Ltd v Barnet London Borough Council sub nom R (on the application of Metro Construction Ltd) v Barnet London Borough Council* [2009] EWHC 2956 (Admin)

Note :

From June 2010 the government has amended Planning Policy Statement 3 : Housing (PPS3) with the following changes :

a. private residential gardens are now excluded from the definition of previously developed land in Annex B
b. the national indicative minimum density of 30 dwellings per hectare is deleted from paragraph 47.

The Secretary of State also announced his intention to abolish Regional Spatial Strategies, so that powers on transport, housing and planning be returned to local councils.

Chapter 11 Building control

11.01 Building regulations. [footnote 2]
The Building Regulations 2000 and the many amendments thereto have now been consolidated in the Building Regulations 2010 [SI 2010/2214]

11.17 *Criminal penalty*
Add : By s.35A an information relating to an offence under s.35 may be tried by a magistrates' court if it is laid at any time within the period of two years beginning with the day on which the offence was committed, and within the period of six months beginning with the date on which evidence sufficient to justify the proceedings comes to the knowledge of the person commencing the proceedings ("the relevant date").

12.30 *Experts' immunity*
Add : As the decision in *Stanton v Callaghan* [2000] QB 75 was binding on the court and could not be distinguished, a claim for negligence against an expert psychologist, who raised a defence of witness immunity, had to be struck out. However, it was appropriate to grant a certificate under the Administration of Justice Act 1969, s.12 enabling the Supreme Court to decide whether to grant leave to appeal : *Jones v Kaney* [2010] EWHC 61 (QB); [2010] 2 All ER 649

13.10 The Adjudicator to HM Land Registry

Insert after first paragraph : There was no good reason to confine the registrar's jurisdiction under Sch.4 para.5(a), and hence that of the adjudicator, to the correction of mistakes of a procedural nature. There was a "mistake" in the register, which the registrar had power to correct, if any statutory condition which was a prerequisite for registration was shown not to have been satisfied. There was no reason to limit the jurisdiction to correct a mistake to official errors in the course of examination of a relevant application. To otherwise conclude would be an invitation to fraud : *Baxter v Mannion* [2011] EWCA Civ 120

Add : A purported notice of withdrawal of an objection given to the registrar while a matter was referred to the adjudicator is ineffective to stop the adjudicator from proceeding to determine the underlying dispute on its merits. There is no provision in either the Act or the Rules for the adjudicator to receive or act on a withdrawal of the original objection. A party is not obliged to participate in the proceedings, but in order to extricate himself from the reference he would need either to settle with the applicant or concede the relief he was seeking : *Silkstone v (1) Tatnall (2) Chief Land Registrar* [2010] EWHC 1627 (Ch)

Add : Where the adjudicator's cancellation of an application to the Land Registry for registration of title to certain land claimed by adverse possession has been set aside by a judge on appeal, it is not appropriate to require the applicants to make a fresh registration application as that would deprive them of a benefit of a transitional overriding interest through no fault of their own and provide a windfall benefit to the registered owners. Instead, in *Franks v Bedward* [2010] EWHC 1650 (Ch); [2010] 41 EG 12 the court ordered the re-entry of their registration application with its original entry date in the day list maintained under the Land Registration Rules 2003 r.12, with liberty to any chargees over the registered property to apply to vary or set it aside.

Appendix A Precedents

[no updating material]

Appendix B Access to Neighbouring Land Act 1992

[no updating material]

Appendix C Experts

CPR Part 35 and the Practice Direction were amended in October 2009. The versions below replace in their entirety the text appearing in Appendix C to the main work.

PART 35 – EXPERTS AND ASSESSORS

Duty to restrict expert evidence
35.1
Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

Interpretation and definitions
35.2
(1) A reference to an 'expert' in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings.

(2) 'Single joint expert' means an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the claimant) to the proceedings.

Experts – overriding duty to the court
35.3
(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Court's power to restrict expert evidence
35.4
(1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When parties apply for permission they must identify –
    (a) the field in which expert evidence is required; and
    (b) where practicable, the name of the proposed expert.

(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2).

(3A) Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.

(Paragraph 7 of Practice Direction 35 sets out some of the circumstances the court will consider when deciding whether expert evidence should be given by a single joint expert.)

(4) The court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party.

General requirement for expert evidence to be given in a written report
35.5
(1) Expert evidence is to be given in a written report unless the court directs otherwise.

(2) If a claim is on the small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

Written questions to experts
35.6
(1) A party may put written questions about an expert's report (which must be proportionate) to –
- (a) an expert instructed by another party; or
- (b) a single joint expert appointed under rule 35.7.

(2) Written questions under paragraph (1) –
- (a) may be put once only;
- (b) must be put within 28 days of service of the expert's report; and
- (c) must be for the purpose only of clarification of the report,

unless in any case –
- (i) the court gives permission; or
- (ii) the other party agrees.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where –
- (a) a party has put a written question to an expert instructed by another party; and
- (b) the expert does not answer that question,

the court may make one or both of the following orders in relation to the party who instructed the expert –
- (i) that the party may not rely on the evidence of that expert; or
- (ii) that the party may not recover the fees and expenses of that expert from any other party.

Court's power to direct that evidence is to be given by a single joint expert
35.7
(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.

(2) Where the parties who wish to submit the evidence ('the relevant parties') cannot agree who should be the single joint expert, the court may –
- (a) select the expert from a list prepared or identified by the relevant parties; or
- (b) direct that the expert be selected in such other manner as the court may direct.

Instructions to a single joint expert
35.8

(1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, any relevant party may give instructions to the expert.

(2) When a party gives instructions to the expert that party must, at the same time, send a copy to the other relevant parties.

(3) The court may give directions about –

(a) the payment of the expert's fees and expenses; and

(b) any inspection, examination or experiments which the expert wishes to carry out.

(4) The court may, before an expert is instructed –

(a) limit the amount that can be paid by way of fees and expenses to the expert; and

(b) direct that some or all of the relevant parties pay that amount into court.

(5) Unless the court otherwise directs, the relevant parties are jointly and severally liable for the payment of the expert's fees and expenses.

Power of court to direct a party to provide information

35.9

Where a party has access to information which is not reasonably available to another party, the court may direct the party who has access to the information to –

(a) prepare and file a document recording the information; and

(b) serve a copy of that document on the other party.

Contents of report

35.10

(1) An expert's report must comply with the requirements set out in Practice Direction 35.

(2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

Use by one party of expert's report disclosed by another

35.11

Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

Discussions between experts

35.12

(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring

the experts to –

(a) identify and discuss the expert issues in the proceedings; and
(b) where possible, reach an agreed opinion on those issues.

(2) The court may specify the issues which the experts must discuss.

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court setting out those issues on which –

(a) they agree; and
(b) they disagree, with a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

Consequence of failure to disclose expert's report
35.13
A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

Expert's right to ask court for directions
35.14
(1) Experts may file written requests for directions for the purpose of assisting them in carrying out their functions.

(2) Experts must, unless the court orders otherwise, provide copies of the proposed requests for directions under paragraph (1) –

(a) to the party instructing them, at least 7 days before they file the requests; and
(b) to all other parties, at least 4 days before they file them.

(3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.

Assessors
35.15
(1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 1981 or section 63 of the County Courts Act 1984 as an assessor.

(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.

(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –

(a) prepare a report for the court on any matter at issue in the proceedings; and
(b) attend the whole or any part of the trial to advise the court on any such matter.

(4) If an assessor prepares a report for the court before the trial has begun –

(a) the court will send a copy to each of the parties; and
(b) the parties may use it at trial.

(5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.

(6) The court may order any party to deposit in the court office a specified sum in respect of an assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.

(7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

PRACTICE DIRECTION – EXPERTS AND ASSESSORS

This Practice Direction supplements CPR Part 35

Introduction

1 Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by only one expert. Experts and those instructing them are expected to have regard to the guidance contained in the Protocol for the Instruction of Experts to give Evidence in Civil Claims annexed to this practice direction. (Further guidance on experts is contained in Annex C to the Practice Direction (Pre-Action Conduct)).

Expert Evidence – General Requirements

2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

2.3 Experts should consider all material facts, including those which might detract from their opinions.

2.4 Experts should make it clear –
(a) when a question or issue falls outside their expertise; and
(b) when they are not able to reach a definite opinion, for example because they have insufficient information.

2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

Form and Content of an Expert's Report

3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

3.2 An expert's report must:
(1) give details of the expert's qualifications;
(2) give details of any literature or other material which has been relied on in making the report;
(3) contain a statement setting out the substance of all facts and instructions which are

material to the opinions expressed in the report or upon which those opinions are based;
(4) make clear which of the facts stated in the report are within the expert's own knowledge;
(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
(6) where there is a range of opinion on the matters dealt with in the report –
(a) summarise the range of opinions; and
(b) give reasons for the expert's own opinion;
(7) contain a summary of the conclusions reached;
(8) if the expert is not able to give an opinion without qualification, state the qualification; and
(9) contain a statement that the expert –
(a) understands their duty to the court, and has complied with that duty; and
(b) is aware of the requirements of Part 35, this practice direction and the Protocol for Instruction of Experts to give Evidence in Civil Claims.

3.3 An expert's report must be verified by a statement of truth in the following form –
"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

(Part 22 deals with statements of truth. Rule 32.14 sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.)

Information

4 Under rule 35.9 the court may direct a party with access to information, which is not reasonably available to another party to serve on that other party a document, which records the information. The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance.

Instructions

5 Cross-examination of experts on the contents of their instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice.

Questions to Experts

6.1 Where a party sends a written question or questions under rule 35.6 direct to an expert, a copy of the questions must, at the same time, be sent to the other party or parties.

6.2 The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under rule 35.6. This does not affect any decision of the court as to the party who is ultimately to bear the expert's fees.

Single joint expert

7 When considering whether to give permission for the parties to rely on expert evidence and whether that evidence should be from a single joint expert the court will take into account all the circumstances in particular, whether:
(a) it is proportionate to have separate experts for each party on a particular issue with reference to –
(i) the amount in dispute;
(ii) the importance to the parties; and
(iii) the complexity of the issue;
(b) the instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts;
(c) expert evidence is to be given on the issue of liability, causation or quantum;
(d) the expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute or there is likely to be a range of expert opinion;
(e) a party has already instructed an expert on the issue in question and whether or not that was done in compliance with any practice direction or relevant pre-action protocol;
(f) questions put in accordance with rule 35.6 are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert;
(g) questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial;
(h) a conference may be required with the legal representatives, experts and other witnesses which may make instruction of a single joint expert impractical; and
(i) a claim to privilege makes the instruction of any expert as a single joint expert inappropriate.

Orders

8 Where an order requires an act to be done by an expert, or otherwise affects an expert, the party instructing that expert must serve a copy of the order on the expert. The claimant must serve the order on a single joint expert.

Discussions between experts

9.1 Unless directed by the court discussions between experts are not mandatory. Parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts' discussion and if so when.

9.2 The purpose of discussions between experts is not for experts to settle cases but to agree and narrow issues and in particular to identify:
(i) the extent of the agreement between them;
(ii) the points of and short reasons for any disagreement;
(iii) action, if any, which may be taken to resolve any outstanding points of disagreement; and
(iv) any further material issues not raised and the extent to which these issues are agreed.

9.3 Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone.

9.4 Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts discussions.

9.5 If the legal representatives do attend –
(i) they should not normally intervene in the discussion, except to answer questions put

to them by the experts or to advise on the law; and
(ii) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.

9.6 A statement must be prepared by the experts dealing with paragraphs 9.2(i) - (iv) above. Individual copies of the statements must be signed by the experts at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 7 days. Copies of the statements must be provided to the parties no later than 14 days after signing.

9.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.

9.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion.

Assessors

10.1 An assessor may be appointed to assist the court under rule 35.15. Not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

10.2 Where any person has been proposed for appointment as an assessor, any party may object to that person either personally or in respect of that person's qualification.

10.3 Any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in paragraph 10.1 and will be taken into account by the court in deciding whether or not to make the appointment.

10.4 Copies of any report prepared by the assessor will be sent to each of the parties but the assessor will not give oral evidence or be open to cross-examination or questioning.

PROTOCOL FOR THE INSTRUCTION OF EXPERTS TO GIVE EVIDENCE IN CIVIL CLAIMS

This document has been subject to only one minor change.

Para 13.5 : The wording of the statement of truth has been altered to conform with the amended Practice Direction, and now reads :

> " I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

Appendix D Useful website addresses

[no updating material]