

**MARCH 2011**

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## COMMERCIAL PROPERTY

### *THE BUDGET 2011*

Below is a brief summary of those parts of the Budget directly affecting property:

- New planning rules to require planners to prioritise growth and job
- A Government backed shared equity scheme designed to help 10,000 first time buyers
- The extension of the Business Rate relief holiday for a further year
- 21 incentive backed Enterprise Zones are to be launched
- 3 forms of SDLT avoidance are to be shut down along with other tax avoidance schemes

Detailed analysis of the Budget's affect on property will appear in the next edition

### *COMMUNITY INFRASTRUCTURE LEVY*

The Government has laid the *Community Infrastructure Levy (Amendment) Regulations 2011* before the House of Commons for approval. These represent changes that do not require primary legislation and follow the Government's announcement that it would retain but reform the CIL.

The regulations will:

- Enable councils to set their own flexible payment deadlines
- Offer developers the option to pay the CIL by installments
- Remove the £50,000 minimum threshold for payments in kind
- Reduce the administrative burden on councils
- Make minor changes to clarify and correct the operation of the 2010 regulations.

If approved the 2011 regulations will come into force on 6 April 2011

### *THIRD PARTIES SECURING GUARANTEES*

A husband's over-optimistic assessment of the likelihood of success of a business venture did not amount to a misrepresentation such as to entitle his wife to have a guarantee she had given in respect of certain liabilities set aside according to the Court of Appeal. The court held that as there was no misrepresentation or undue influence it had no need to decide whether the bank benefitting from the guarantee should have followed the guidelines in the case of *Royal Bank of Scotland v Ettridge*.

## **SPV'S – LIABILITY OF DIRECTORS**

Developers may find themselves exposed if they control risk on a development through the limited liability of an SPV vehicle. A recent case held directors personally liable for the debts of their SPV after they should have realised there was no reasonable prospect of paying them. In the recent case of *Roberts v Frohlich and Another* the directors of an SPV were found to have traded after there was no reasonable prospect of avoiding insolvency. They were held to be personally liable for the build costs after they should have realised that there was no reasonable prospect of paying them. This was a breach of duty to the company and, therefore, wrongful trading.

The directors had juggled the contractor, the bank and a potential buyer while trying to resolve some fundamental conflicts. Neither the bank nor the contractor knew that the other was not yet committed. In the meantime the directors got the contractor to carry out works with no facility to pay for them. The directors knew that the cash flow that the contractor and the bank had relied on could not be met. The directors were driven, in the words of the judge, by “*wilfully blind optimism; the reckless belief that... something might turn up.*”. Directors simply cannot speculate wildly with other people’s money, even if was willingly lent into a non-recourse vehicle like an SPV.

## **ENTIRE AGREEMENT CLAUSES**

In a recent case the Court of Appeal found that an entire agreement clause which consisted of a basic entire agreement statement was ineffective to exclude misrepresentations. It was also held that it was unable to exclude terms being implied to give the contract business efficacy, but it did exclude collateral warranties and other implied terms. The court’s decision was based on the particular wording of the clause before it but they are significant for practitioners because the court also provided general guidance on the use of entire agreement clauses to exclude liability for misrepresentation. The court also considered the application of the Unfair Contract Terms Act to entire agreement statements and held that the Act applies to entire agreement statements as well as to the other elements of an entire agreement clause.

This is significant for those involved in property agreements as they often purport to contain the entire agreement between the parties notwithstanding that there may have been replies to enquiries which have clearly been relied upon.

## **ENERGY ISSUES**

Two recent announcements by the European Commission and the Government deal with energy issues affecting property.

Firstly, the European Commission has published its *Energy Efficiency Plan 2011* setting out how it proposes to meet its target (albeit non-binding) to improve energy efficiency by 20% by 2020. One of the main areas of focus is on the energy efficiency of buildings. The Commission will:

- Encourage the promotion of renovation of existing buildings and the use of energy efficient appliances
- Look at options for heat consumption in buildings including district heating
- Require member states to legislate to counter the problems posed by lack of clarity as to who will benefit (landlords or tenants) from split incentives when seeking to improve the energy efficiency of buildings
- Launch an initiative for improved training in the construction sector relating to energy efficiency expertise
- Develop the market for energy service companies.

Secondly, the Government has announced the details of its *Renewable Heat Incentive Scheme*. The intention is to introduce the scheme in two phases:

- Phase 1: long term tariff support target for the industrial, business and public sectors expected from later this year together with support of around £15m for domestic users via the *Renewable Heat Premium Payment* from July.

- Phase 2: the domestic sector will move to the same form of long term tariff support as the non-domestic sector. This is intended to take effect at the same time as the *Green Deal* which is scheduled to be introduced in late 2012