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Falling prices marks property upturn. Green shoots, green dreams - more tax?

Although commercial property values have dropped by over 25% since the beginning of the credit crunch, with values likely to drop further still, recent figures released by Land Securities have clearly demonstrated that there is “growing investor interest”. Many in the industry believe it is a perfect time to seize opportunities to buy ‘bargains’ and remain optimistic about the signs of recovery.

Moreover, the UK stock market has also reported its best week of the year so far, whilst US banks have encouraging results for the quarter April - June 2009 and the Chinese economy has recorded a growth rate of 7.9% for the same period.

Many believe however, it is too early to tell how sustained the signs of recovery will be, as lending remains stagnant and investment patchy. As businesses continue to feel the effects of the recession, the need to nurture confidence is paramount. Planning ahead is key.

Amid the policy announcements designed to combat the global financial crisis and boost public confidence the government has recently announced a raft of measures aimed at reducing greenhouse gas emissions by 34% within 11 years.

A key part of the government objective to deliver a future economy no longer dependant on fossil fuels is the Carbon Reduction Commitment scheme. The Carbon Trust has estimated that over 75% of the buildings which will be around in 2030, have already been built. As a consequence how we operate within our existing ‘built environment’ will be key to the success of reducing carbon emissions.

The CRC scheme is to be introduced in April 2010 and has wide implications for businesses across the UK. It is estimated that over 20,000 organisations may be affected. Failure to comply will result in financial penalties. Take a look at our detailed article to determine what you may need to do to make sure you are fully prepared.





With the subject of failing businesses never out of the news, we look at the complexities of contractor insolvency in the first of a two-part article. Insolvent contractors can often spell disaster for employers as projects are left incomplete with a resulting increase in costs.

Knowing what to do if your contractor becomes insolvent is crucial to keeping any resulting losses to a minimum.

Finally, we examine the recent case of *Heslop v Bishton* which involved a landowner who had re-routed a legal right of way.

If you are considering redeveloping land where it may be necessary or desirable to re-route an existing right of way, we consider the most effective approach to take in the light of this case.



Graham Banks
Partner

01332 378 306
graham.banks@geldards.com

Jamie Gordon
Partner

0115 983 3703
jamie.gordon@geldards.com





→ Carbon Trading Equals Higher Costs?

Mandatory scheme operational by April 2010 - are you ready?

It is generally accepted that climate change will not only affect individuals and communities all over the world but also businesses of all sizes from those in the richer and more developed countries to those in the poorest and most vulnerable countries.

UK To Reduce CO2 By 60% By 2050

Few believe that we can or should afford not to take action. At the recent 3 day G8 summit in Italy the 'most ambitious targets ever' were negotiated. A commitment to reduce total UK CO2 emissions by 80% by 2050 was agreed as part of a global goal of at least 50% reduction.

Following fast on the heels of the global resolution the government has announced detailed plans on how they intend to reduce UK greenhouse gas emissions by the 2050 deadline.

This is a fundamental shift from reliance on fossil fuels towards large-scale investment in renewable energies and nuclear power. In conjunction with ambitious targets for industry and transport, it is hoped rapid progress can also be made on the domestic front.

What Is The 'Carbon Reduction Commitment'?

Carbon trading is only one of the new 'buzz words' being bandied around despite the fact that it has been high on the environmental agenda for some time. Since 2005 the European Union's Emissions Trading Scheme has

accounted for the majority of the world's traded carbon dioxide allowances.

Many businesses may not realise that the UK will soon be operating a carbon-trading scheme of its own. The Carbon Reduction Commitment (CRC) scheme, announced in 2007 as part of the Climate Change Act will start in April 2010. Consultations are still ongoing with some important details still to be ironed out.

IMServe (an independent carbon consultancy) has estimated that over 6,000 businesses may be affected, although figures quoted by DEFRA calculate that up to 20,000 organisations may need to join the mandatory scheme because they will need to register consumption data to evidence that they don't actually qualify for the CRC.

Who Will It Affect?

The aim of the CRC scheme is to reduce carbon dioxide emissions by encouraging organisations to improve their energy efficiency which will ultimately save money. As businesses monitor their emissions it is hoped that this will lead to an improved understanding of energy consumption and how best to make sustainable energy savings.

Large businesses and public sector organisations including the NHS and state schools will need to monitor their emissions and report them to the government.

This is a mandatory scheme which principally targets businesses and public sector organisations that do not qualify for the EU emissions trading scheme, but whose





annual half-hourly metered electricity use (measured against a 2008 baseline) is above 6,000 megawatt hours.

At today's prices this is roughly equivalent to £500,000 annual electricity spend. Moreover, it is important to note that for businesses operating on more than one site, or who may be part of a group of companies, the parent company will be responsible for all its subsidiaries.

Once a business has qualified, all the energy consumed, including gas, oil, diesel, LPG and coal will be included in the CRC scheme.

At the same time any business operating with a half-hourly meter settled on the half-hourly market will need to register for the scheme whether they qualify in volume terms or not.

In the case of landlord and tenants, if your tenants pay the energy bills then they will be responsible for the energy usage under CRC. However if you are a landlord organisation with multi-let buildings and you pay the bills, then you are responsible for electricity usage.

In this instance the landlord's energy performance could be affected by his tenants, which could in turn have a significant financial impact for the landlord.

Conversely, it may be that the landlord may ultimately receive recycling repayments which tenants may wish to benefit from.

In most cases existing leases are not likely to cater for the CRC scheme and as consultation is still in process, the exact structure of the scheme may alter before the April deadline.

We will keep you posted.

How Do You Comply?

Each participant will be required to purchase allowances from the government to cover their anticipated carbon dioxide emissions for the coming year.

At the end of the 'scheme year', allowances equivalent to actual emissions will need to be surrendered.

Energy suppliers will be required to provide consumption statements for electricity and gas used during the compliance year.

Participants with insufficient allowances will be able to purchase more on the carbon market, conversely those with a surplus will be able to sell.

At the end of each scheme year the government will publish a league table showing the relative performance of all participants.

The CRC scheme is not designed to raise money for the Government. The idea is that revenue raised from selling allowances will be recycled back to the scheme participants. The participants will receive a recycling payment in the October following an allowance year.

Those organisations able to reduce their emissions will receive a recycling payment greater than the amount originally paid to purchase their carbon allowances. The hope is that between during the next 10 years CO2 emissions will be reduced by at least 4 million tonnes.

Furthermore, there will be an additional bonus payment or penalty deduction based on the participant's position in the league table.

Many businesses have already taken action but more





needs to be done. Carbon strategies need to be put in place and future budget planning for those who are required to participate should include the purchase of carbon credits. Businesses will need to make sure in advance that they comply with all the legal requirements.

Reassuringly, the recent carbon and energy summit at the Royal Society of Arts in London saw an increased awareness and acceptance amongst businesses of the scheme although it was reported that many still had serious concerns, particularly in the light of the recession.

When Does The Scheme Start?

The scheme is divided into set time periods called 'phases'. The first phase is the introductory phase commencing in April 2010 and lasts for 3 years.

During this period there will be no limit to the total amount of carbon dioxide that can be emitted by participants to each scheme.

Allowances will be sold at a fixed price. There will be no limit on the amount of allowances that a participant can purchase.

It is proposed that the fixed price for one allowance during the introductory phase will be £12. For each allowance purchased, the participant may emit one tonne of carbon dioxide.

Subsequent phases each last for 7 years (the first two years of these phases are preparatory and overlap with the previous phase).

Each phase has the following:

- A qualifying period during which organisations

must assess whether or not they qualify to make an information disclosure or to participate fully;

- A registration period during which any organisations that do qualify to participate fully must register for the scheme;
- A footprint year during which participants monitor their total emissions from energy use and produce a footprint report;

A series of compliance years during which participants must purchase allowances for each tonne of CO₂ they emit based on expected energy use and monitor their usage.

Does My Business Qualify?

There are two key criteria which, for the introductory phase commencing on 1 April 2010, are based on electricity usage during the calendar year 2008:

- The organisation must have at least one half-hourly meter (HHM) settled on the half-hourly market
- The total HHM consumption must be over 6,000 megawatt hours (MWh) in aggregate across all the organisation's HHMs.

Organisations that fulfil BOTH criteria will be full participants in the CRC and will be required to record and monitor their energy usage and purchase allowances equivalent to their yearly CO₂ emissions.

Organisations that only fulfil the first criteria will not be required to purchase allowances, but will have monitoring and reporting obligations.





Penalties

If an organisation that is eligible for CRC does not register with the scheme during the registration period there is a fixed fine of £5,000 together with a further fine of £500 for each subsequent day that the organisation fails to register.

If an organisation has monitoring and reporting obligations (but is not eligible to register for the scheme) and fails to do so there is a fixed fine of £1,000.

Exemptions

→ Transport

This exemption applies to organisations which use large amounts of electricity for the transport of people or goods. If the exemption applies, the organisation will not be required to participate in the CRC scheme as a full participant, although it will have reporting obligations.

The entire organisation will be excluded from the CRC scheme if its total electricity consumption in the qualification year, after deducting electricity consumption for transport, is less than 1000 megawatt hours.

→ Climate Change Agreement 25%

Individual organisations with more than 25% of their emissions (from all energy sources) in a Climate Change Agreement (CCA) will be exempt from the CRC scheme. Unlike transport, eligibility for this exemption will be assessed during the course of the first year of each phase.

→ CCA residual group

Where group members have been excluded from the scheme by virtue of the CCA 25% exemption, the entire group will be omitted from the scheme if its residual electricity consumption, after deducting any excluded member's electricity consumption, is less than 1000 megawatt hours in the first year of each phase.

Joining The Scheme

Qualification packs are being sent out in September 2009 to the billing address for every HHM settled on the half hourly market.

These packs will provide details of the information disclosure process and the registration process.

Businesses register online and must do so between 1 April - 30 September 2010.

Your Future CRC Strategy

Start collating information to enable you to calculate your electricity use for 2008, including the electricity use of any subsidiaries;

- Start to think of ways to reduce your energy usage;
- Consider the legal structure of your organisation and whether this will have any effect on the calculation of energy process;
- Consider the impact buying carbon allowances will have on cashflow, particularly as in April 2011





participating organisations will have to purchase two years worth of carbon allowances and wait six months before receiving recycling payments;

- Appoint an individual with responsibility for the CRC and for the formation of a compliance team.

Without doubt the CRC scheme will affect a large number of organisations in both the private and public sector and by starting to prepare your strategy for the future, taking into account the information provided by the government you will be able to keep your organisation on the right track.

[Click here for link to DEFRA and CRC guide](#)

For further advice please contact:



Graham Banks
Partner

01332 378 306
graham.banks@geldards.com





→ Construction Sector Shrinks Further

Have they gone bust? - Part 1

The first quarter of this year saw a steep rise in companies facing serious difficulties such as County Court Judgements or winding-up petitions.

In the property services and construction sectors the figure has more than doubled over the last nine months and the Construction Products Association announced in July that it expects the sector to contract by a record 16% this year.

The property slowdown in the commercial sector is only just beginning to show as lead times are much longer than in private housing or the industrial sector.

Many largescale projects dating back to 2006 are still being finished off, although it has been predicted that new commercial office building is likely to decline by up to 50% by 2010.

Anxiety over construction within the public sector is gathering pace as government borrowing has reached record levels and the effects of low interest rates is slow to take effect.

Insolvency has significant consequences for any project especially where there are numerous parties involved at various levels, as in construction.

Nevertheless, it can be surprisingly difficult to find out if a contracting counterparty is insolvent.

At this point it may be useful to set out what is meant by the different insolvency regimes.

Administration

Currently in vogue, administration is a procedure designed to rescue either the insolvent company itself or, failing that, the business of the company, (or some part of it) or, failing both of those, produce a better return for creditors than liquidation.

Administration involves the appointment of an independent insolvency practitioner to take over the insolvent company's business.

The company must be insolvent or about to become insolvent, either on a cash flow basis (it cannot pay its debts as they fall due for payment) or on a "balance sheet" basis (net assets are less than net liabilities).

The insolvency practitioner, being an accountant by training, will deal with the numbers and satisfy himself that the company is indeed "bust".

Quite often the administrator will try to trade the company's business, to enable the company's work in progress to be completed, book debts to be collected in and to see if anyone is prepared to buy some or all of the business.

Sometimes the purchaser of the business will be lined up before the administration in what is called a "pre-pack" sale. Pre-packs are controversial for a variety of reasons beyond the scope of this article.

However, the courts appear to accept them because they are very often the best option for creditors of the insolvent company.





To facilitate the trading and/or sale the administration regime gives rise to a moratorium on enforcement action against the company. This provides breathing space for the insolvency practitioner to try to do whatever is best for the insolvent company.

Consequently enforcement of judgment debts, forfeiture by landlords or presentation of winding up petitions is precluded. The moratorium is obtained by filing relevant papers at the appropriate court.

Liquidation

Liquidations tend to arise where there is no point doing an administration. Essentially there is no business worth selling and so the business must stop trading immediately to stop losing money.

Any book debts can of course still be collected in but work in progress will be much harder to realise if only partially completed. It tends to be the case that no-one will trade with a company in liquidation and no-one wants to pay it either.

Receivership

Receivership is very old, takes various forms and has to some extent it has been superseded by administration. Importantly it does not necessarily mean that the company is insolvent, but simply that it has fallen out with a third party who is entitled to appoint a receiver to enforce that third party's security.

The common example used to be that the terms of the bank loan were breached so the bank appointed a

receiver to realise the value of its security for the loan. Once that was realised the company no longer had much left and no way of carrying on trading or paying its creditors, so it would then be forced into formal insolvency i.e. liquidation.

Company Voluntary Arrangements

While a CVA requires a company to be insolvent, it simply amounts to a contract between the company and its creditors.

It arises when a company is faced with possible liquidation, but instead a proposal is put together whereby creditors forego the right to claim the full amount to which they are entitled but instead agree to accept a lesser amount in the future than they would get if the company went into liquidation.

Because CVAs attempt to predict what will happen in the future they quite often fail due to overly optimistic projections. But when they work they ensure the survival of the company and a better result for its creditors.

It is not unusual for a CVA to be preceded by an administration to buy time for the CVA proposal document to be put together. So much for the regimes.

It is usual for any one of them to be provided for in a commercial contract. Usually, in the event of insolvency or a similar event implying financial impending financial problems (with all conceivable examples usually being listed at length) a party to a contract will have certain options. But those options only become available once the event has happened.





So when has an insolvency event happened?

So Are They Insolvent?

Strangely, even in 2009, this remains a difficult question to answer.

Cash-flow insolvency and balance sheet insolvency is not information in the public domain and will be known only to the company and its directors.

Accounts published at Companies House can be well over 12 months in arrears. Credit reference agency reports are also in arrears. Even insolvency filings at Companies House will take many days to become available. The London Gazette carries details of insolvency procedures but is also inevitably behind the times.

There is a telephone number at the High Court in London which is the Central Index of Petitions. Any winding up petition or application for administration filed in any court anywhere around the country should get recorded there.

It is not clear how long it takes from a petition filed in the local county courts to become listed.

The telephone number for the Central Index is a premium rate number which is frequently engaged. There is no facility to leave a message or to queue. If it is busy then you are invited to call back. Obviously the information there is potentially out of date as soon as it is given.

Unbelievably, the best way of identifying if a company is subject to a formal insolvency regime is either (a) word

of mouth, (b) on-line newspapers and trade magazines, or (c) the company's website. The press will usually run a story, providing that the company is of sufficient size to be news worthy.

Alternatively, one of the first things that administrators will do following their appointment is to put a notice to that effect on the company's website.

Bearing in mind the sums that might be at stake, the requirement to become an amateur detective to ascertain something as fundamental as whether or not a company is actually the subject of a formal insolvency regime, is lamentable to say the least.

There can be contractual and other expensive consequences for getting this wrong. For instance, if a mistaken contractor publicises its incorrect belief that the contracting party is insolvent then that could be catastrophic.

In a worst case scenario, if the innocent company suffers losses as a result of word getting round that it has gone bust when it has not, then any resulting losses could be laid at the mistaken contractor's door.

While quite difficult to prove, those losses might include lost contracts, recall of loans, exercising of retention of title claims, different trade terms or ultimately actually going bust due to loss of reputation.

They Really Are Insolvent... What Can I Do?

Unsurprisingly, terminating a party's employment under a contract based upon an incorrect belief that it is insolvent has consequences.





It may in fact provide the party on the receiving end with a right to terminate the contract for repudiatory breach.

This would be on the basis that the party originally wishing to terminate was not entitled to and in so doing has actually placed themselves in a fundamental breach of contract.

That could give rise to a claim for damages (or other legal remedy) in favour of the other party who was believed, incorrectly, to be insolvent.

This article first appeared in the May issue of the ICES journal.

To Follow - Part 2

The consequences of termination and the procedures to be followed under the JCT, ICE and NEC forms of contract will be discussed in Part 2 of this article.

For further advice please contact:



Colin Dean
Partner

01332 378 329
colin.dean@geldards.com





→ Right This Way

Alternative route not sufficient.
Heslop v Bishton & others.

Facts Of The Case

If you are considering diverting a right of way over your land, look at the deed of grant to ensure that you have the right to do so.

In the absence of any right to divert the right of way, any diversion or stopping up of that access could be an interference which may be actionable in the courts by the owner of the land benefiting from the right of way.

In order for the interference to be “actionable”, the owner of the land which benefits from the right of way must show that the interference is of a “substantial” nature.

The interference does not have to amount to the total destruction of the right of way, but trivial acts will not give rise to a cause of action.

If action is taken in the court, the court can make one of the following orders:

- Declaratory relief (confirming the existence of the right);
- Injunction (preventing the obstruction to the right of way);
- Damages (to the owner of the land benefiting from the right of way);

→ An order for the abatement of nuisance.

In the recent case of Heslop v Bishton, Bishton had the benefit of a pedestrian right of way over part of Heslop’s property.

Heslop constructed a wall and two pillars on his property in order to erect a gate. The wall and pillars were constructed on part of the land over which the right of way passed.

In order to get around the obstruction, Bishton had to pass over land of Heslop’s which was not included in the original right of way.

Heslop offered Bishton a ten year licence to use this small piece of land.

Bishton took action in the county court claiming that Heslop had substantially interfered with his right of way.

The county court found for Bishton giving Bishton a right of way over the new route for the duration of the obstruction. Heslop appealed to the High Court.

Heslop argued that as Bishton had a common law right to deviate around the obstruction using other land owned by Heslop that there had been no “actionable” interference with the original right of way.

Nub Of The Matter

The High Court agreed that where a landowner obstructs a right of way on his land, and the obstacle cannot be easily removed, the person benefiting from the right of





way can deviate around the obstruction using other land owned by the landowner.

However, the High Court dismissed the appeal for the following reasons:

- Heslop had no right to deviate the right of way (unless the right was an express or implied term of the easement itself);
- Providing a new right of way will not prevent acts of obstruction of the old route from being, in principle, actionable;
- The availability of the new route goes towards providing a remedy, but does not extinguish the original right;
- Where an equally convenient alternative route is available, the court may decline to grant an injunction to force use of the original route, but there is no reason why it should not grant other relief such as a declaration as to the subsistence of the right or even compensation;
- In this instance, Heslop had not offered Bishton a legal right of way over the new route but had only offered him a 10 year licence.

Heslop had also refused to accept a declaration of the existence of the equitable right of deviation over this additional part of his land.

This would leave Bishton in an uncertain position at the end of the 10 year term (or earlier of Heslop

terminated the licence), if the obstruction of the right of way was not actionable.

Implications

Deviations to rights of way over property are often agreed but not documented and the original right of way not released.

Where this happens the following difficulties can occur:

- This may result in the new right of way being unenforceable against a purchaser of the land over which the right of way is granted.
- The landowner may find that their land is now subject to two rights of way rather than one.

The legal obstacle to the re-routing of a right of way lies in extinguishing the rights granted over the original route.

Until the land owners with the benefit of the right of way individually or collectively release the right granted, it will continue to exist. It is not extinguished by the grant of an alternative route.

If the deed of grant in respect of the right of way does not give the right for the owner of the land over which the right of way passes to change the route, the following two steps need to be taken:

- A deed of grant in respect of the new route should be entered into. This can be done by the owner of the land over which the right of way is granted unilaterally.





There is no need for the owner of the land which benefits from the right of way to sign this document.

- The former right of way should be extinguished. This requires the consent of both parties.

For further advice please contact:



Jamie Gordon
Partner

0115 983 3703
jamie.gordon@geldards.com

