



N A B A R R O

CLARITY MATTERS

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### Ask a question

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### Quarter Day Michaelmas Edition

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# Take the right climate change measures to protect the value of your assets

## Summary and implications

Climate change presents a complex and confusing landscape of often conflicting schemes and initiatives. It is an easy trap to devote resources to compliance, but fail to realise the effects on asset values.

The situation is both worse and better than it appears: failing to comply with the rules can damage the value of assets; but there are opportunities to lower costs and make your assets more attractive to potential buyers and investors. Property owners and asset managers should:

- Identify those climate change initiatives and requirements which are either mandatory or can increase profitability (the regulations are complex, but expert advice is available)
- Focus corporate effort on the initiatives you have identified as relevant or which are mandatory (don't be distracted)
- Act now – a wait-and-see approach is more likely to bring fines and asset value impairment than a clearer picture.

## Business has adjusted to environmental legislation

Over the years, industry has grown comfortable with a vast array of environmental legislation, including that dealing with water pollution and contamination to land; the effect of these rules has been reflected in asset valuations. We are yet to see such a developed approach in relation to climate change issues and direct energy consumption. For example, if a property has an inefficient boiler then the operational cost of that property will be higher (in terms of both running cost and compliance with green regulations) than a competitor property. This makes the site less attractive to prospective occupiers and, in time, as valuation methodologies evolve, should be reflected in rentals and capital values.

## The effects of climate change legislation on assets is not yet clear

Property owners and fund managers face a baffling array of new legislation, regulation, other initiatives and advice in the field of climate change and energy efficiency (whether it be water use, energy use, asset life cycle maintenance or waste). Navigating through this to focus on the key issues for your assets presents a tricky challenge.

### Ask a question

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### The Climate Change and Energy team

To find out more about the team, and our capabilities and to read our other recent publications [click here](#)

The climate-change legislation maze: four examples	
<b>Climate Change Levy (CCL)</b>	The additional tax charge levied on industrial and commercial energy bills which has been with us since 2001.
<b>Renewables Obligation (RO)</b>	The UK's principal incentive for renewable electricity generation, which incentivises renewable technologies at differential rates.
<b>CRC Energy Efficiency Scheme (CRC)</b>	The new energy efficiency scheme to take effect on 1 April 2010 which is being watched across the world.
<b>Feed in Tariff (FIT)</b>	A long term subsidised tariff for renewable or low carbon electricity generation.

This is particularly tough for those businesses which do not have the size or resource to employ a sustainability director to focus on climate change issues and deal with all of the information.

Whatever an organisation's views are on climate change, financial performance will be impaired if certain rules and trends are ignored. An organisation that responds actively to the challenges of climate change may actually increase profits by delivering additional revenue and saving money. In these difficult times, preserving profitability will be the main focus of any business executive.

Whatever an organisation's views are on climate change, financial performance will be impaired if certain rules are ignored

### **Some legislation brings opportunities to enhance asset values**

Those who fail to meet obligations such as the requirements to properly participate in and report under CRC, will face stiff penalties,

Those who fail to embrace energy efficiency will, over time, see a significant increase in already high energy costs.

In addition, low carbon generation (such as distributed energy and heat) and the incentives supporting some of these technologies can create new revenue streams to property owners. Obsolescence of plant delivers an opportunity to cut energy bills by installing more efficient replacement plant, including on-site generation which can deliver new (subsidised) revenue streams for asset owners.

Realising an improved total return from your real estate assets should go some way to abate any possible 'green impairment' to those assets and make your assets more attractive than comparables.

### **A wait-and-see approach is risky for property owners**

A number of the energy efficiency requirements will have very real effect on real estate owners. Large numbers of landlords and property occupiers will be required to participate in the CRC from 1 April 2010 (see details on next page). The CRC will bring energy performance into sharp focus as participants will need to:

- **Buy carbon allowances** in respect of the emissions attributed to you (the calculation may include tenant's energy use) and your group companies
- **Identify and delivery energy efficiencies** in order to reduce cost of scheme participation.

## The sticks and carrots of climate change regulations

To date, the UK government seems to have preferred specific (generally market based) schemes rather than subsidies or a fiscal regime, such as a carbon tax. However, recently the UK seems to be making moves towards greater use of a subsidised tariff model.

### Incentives for low carbon generation

The Renewables Obligation (RO) is the UK's current principal incentive for renewable electricity generation. The RO will, in April 2010, be supplemented by a Feed in Tariff (FiT) and, in April 2011, by the Renewable Heat Incentive (RHI).

A FiT is a system of fixed price subsidies for a guaranteed period. The RO is a market-priced trading system under which energy producers deliver a certain amount of renewable energy and are issued with tradeable certificates (known as ROCs) for the renewable energy produced. The RHI will, once in force, operate as a subsidised tariff for heat with an additional charge on fossil fuel energy sources.

There has been much recent debate over whether FiTs or ROCs deliver better carbon abatement. Continental European jurisdictions (but not the UK) have generally followed the FiT route, but the recent UK FiT and RO amendment proposals and RHI proposals indicate a shift in position. Investors are waiting expectantly to see what the legislation actually says and whether new tariffs will be structured at such a level to incentivise investment. The FiT proposals would deliver a return on capital of between 6% and 8%, widely considered to be insufficient to incentivise investment, particularly when the cost of capital is taken into account: hopefully, the Government will improve this offer.

### CRC Energy Efficiency Scheme

FiTs and ROCs are the principal carrots being offered by the UK Government to encourage low carbon energy investments. The CRC is unusual as it represents both a stick and a carrot. The scheme has been designed to reduce annual carbon dioxide emissions from the UK by approximately 1.2m tonnes through a UK based new cap and trade system which is in addition to the existing EU emissions trading scheme.

Groups (including property owners, funds and fund managers) with attributed electricity consumption in excess of 6,000 MWh through half hourly meters will be obliged to participate. For the purposes of the CRC a landlord will often be attributed with the electricity consumption of its tenants.

The CRC scheme will be effective from 1 April 2010. From 1 April 2011 it will be necessary to buy allowances in respect of energy use at an imputed 'carbon rate' – initially the Government sale rate will be £12 per tonne. Over time, the cost of carbon in the scheme should rise, thus increasing the incentive to deliver efficiency savings. The CRC is designed to deliver behavioural change and make energy users realise that using less energy can deliver savings.

### Feed in Tariffs (FiTs) and Renewables Obligation Certificates (ROCs)

#### Feed in Tariffs (FiTs)

Fixed power price subsidies for a guaranteed period favoured by countries such as Germany, France, Italy and Spain

#### Renewables Obligation Certificates (ROCs)

Credits for renewable electricity generation which are the basis of a market based obligation on suppliers to source an element of electricity from renewable sources

### CRC Energy Efficiency Scheme

- The carbon reduction commitment is the new carbon trading scheme which will:
- capture total energy use;
- be effective from 1 April 2010; and
- apply to organisations which used more than 6,000 MWh of electricity through half hourly meters in calendar year 2008.

# Green planning requirements: negotiate a route to profitable sustainability

## Summary and implications

Developers now have to comply with a complex three-tier system of national, regional, and local green-planning policies.

While the regulations are complex and increasingly stringent, often there are several 'green' solutions which developers can employ to comply. Developers can negotiate how they comply with regulations, and balance sustainability and profit. If you are a developer who is considering a scheme you should take care to:

- Ensure your advisers brief you thoroughly and keep you up to date so that you understand the national and regional policy-objectives that inform the local planning-policy that controls your development
- Sort out the practicalities of how your development will comply with green regulations before planning permission is granted; some routes to compliance can be costly
- Talk to the local planning authority; you can sometimes negotiate how you comply with policy (e.g. provide parking spaces for a car-share scheme and reduce your contribution to transport improvements).

## Developers have to square the cost and sustainability circle

The Government aims to reduce the UK's carbon emissions by 34% by 2020, and greener planning is part of the plan (residential and commercial buildings account for nearly 40% of the UK's carbon output).

Green planning requirements are already a reality. The Department for Communities and Local Government has adopted national planning-policy statements which directly tackle green issues. National policy requires local planning authorities to consider environmental impacts when they review planning applications for new developments.

While the Government wants to use the planning system to green-up new buildings, it is developers who will have to find a commercially viable way to meet increasingly stringent regulations (e.g. regional planning policies can step up CO<sub>2</sub>-reduction targets by 5% every five years). Whilst this might assist in meeting their corporate responsibility goals, it can be expensive.

## Three levels of green planning-policy requirements

Planning Policy Statement 1 makes it clear that new developments should incorporate green features; from prudent use of non-renewable energy, to minimising the need for private cars.

This national policy informs regional and local policy – together they create a 'green framework' that developments must comply with.

## Ask a question

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## The Planning team

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## How national, regional, and local planning-policy fits together

### National policy

Planning Policy Statement 1 sets out the Government's overarching policies on sustainable development and the planning system.

### Regional policy

Can set priorities and criteria for developments within one region. For example, The London Plan, London's regional planning policy includes a CO<sub>2</sub> emissions target of a 20% reduction by 2015.

### Local council planning policy

Sets out the site- and development-detail which places specific parameters on development.

## Developers can negotiate the detail of how they comply with green planning-regulations

These three examples show that there is no single approach to complying with green requirements.

With careful thought and drafting, developers can tailor how they comply with green requirements, negotiate the best approach for a particular scheme, and avoid unduly onerous costs.

### *a) Flexibility v certainty: define details now or leave them open*

Where there is a policy requirement to meet a proportion of a scheme's energy from on-site renewable sources, some developers may prefer a planning condition/obligation to specify the type of technology to be used.

This means that a developer can be certain about the cost implications of green measures and start work without requiring further approval for that element of the scheme.

Where a scheme is not expected to come forward for some time the developer may want to build flexibility into the planning permission by leaving the details to be agreed at a later stage.

This means that the developer can take advantage of any advances in technology over the period until implementation. However, to provide a degree of certainty the developer could negotiate a cap on the cost of the technology to be used.

With careful thought and drafting, developers can tailor how they comply with green requirements, and negotiate the best approach for the scheme

### *b) Financial contributions v providing green facilities*

Developers should explore how they can mitigate particular environmental impacts. It may be appropriate to pay a one-off, up front financial contribution, or it may be better to offer planners another option.

For example, on student-accommodation schemes developers are often asked to contribute to enhanced public transport services. Some local authorities may be willing to offset part of this contribution if developers can provide facilities which offer similar environmental benefits - like reserved parking-spaces for people who have joined a shared-car scheme.

Planning policies can offer a degree of flexibility; not all green requirements will work for every scheme

### *c) Policies allow more flexibility than you might expect*

Planning policies (and supporting text), particularly at a national and regional level, sometimes offer a degree of flexibility and recognise that not all green requirements will work for every scheme.

For example, there may be health and safety reasons why renewable-energy technology cannot be located on site at a school or care home. In these instances the local authority may be prepared to accept an alternative such as the use of off-site renewable energy or connection to a green energy supplier.

**Two further factors that developers need to bear in mind:***a) Requests for changes will be assessed under the most recent policy*

However hard developers try to get satisfactory planning permission and related statutory agreements at the date of grant, changes may be required. Developers may need to apply for a variation to a condition, or seek to amend a section 106 obligation.

Developers, with help from their advisors, need to keep on top of any changes in planning policy between the date of grant and the application for amendment. The local planning authority are entitled to apply any new policy to the requested change, and the amendment may have to meet tougher requirements.

The planning authority can apply new requirements to the requested change, and the amendment may have to meet a tougher set of conditions

*b) Significant cost savings – but no reduction in environmental benefits*

Developers should also be aware of the interaction between green policy requirements and other planning policy requirements.

For example, a developer who is required to install a green roof may also be asked to provide public access to that roof. If there is no policy requirement attached to that type of building that requires the developer to provide public open space, then access to the roof can be restricted to the building's occupants.

Limiting access to the roof does not reduce the environmental benefits of the green roof, but the cost savings on things such as public-liability insurance could be significant.

# The green lease toolkit: a way to make 'green' changes to new and existing leases

## Summary and implications

The green-lease toolkit gives landlords and tenants a practical way to cooperate on the changes required to reduce the environmental impact of real estate.

We co-authored the toolkit now published by the Better Buildings Partnership (BBP) and have recently used it to make changes to the Land Securities standard form of lease (including, the new Clearlet form of lease recently publicised by Land Securities) (see details in box at end of this article). The green lease toolkit includes guidance, model clauses, and a model Memorandum of Understanding (MOU) that will help landlords:

- Tailor green amendments so that they can easily be incorporated into standard forms of lease
- Agree an MOU that captures the operational detail of a particular building/shopping centre
- Make 'green' changes without slowing down lease negotiations.

## The green lease toolkit

In our May newsletter we highlighted the work our Climate Change and Energy Group has done with the BBP to develop the green lease toolkit. The BBP is a group of leading property owners (including Hermes, British Land, Grosvenor, Hammerson, Legal & General, Land Securities and Transport for London).

The aim of the toolkit is to promote best practice and recommend drafting which is approved and promoted by BBP members. The toolkit includes the legal framework that will help landlords and tenants to work together to reduce the environmental impact of real estate.

Graham Lust (Real Estate partner) co-authored the toolkit, which has also been published by the Practical Law Company as a recommended precedent for the legal profession.

## Ask a question

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## The Better Buildings Partnership's Green Lease Toolkit

To download the toolkit, including a form of Memorandum of Understanding [click here](#)

### **A framework that helps landlords and tenants cooperate**

Green leases enable landlords and tenants to cooperate to reduce the environmental impact of their building or buildings. A green lease can put obligations on landlords and tenants to find mutually acceptable and cost-effective ways to reduce energy and water consumption.

But until now there has been little guidance on what wording should be incorporated in new leases, and how to deal with existing leases. The green lease toolkit addresses these problems, as it:

- Includes guidance and model clauses for landlords and their advisers
- Lets landlords adapt the lease to fit the type of property and use
- Uses an MOU that works with new and existing leases to capture the operational detail of the changes that have to be made to the building.

### **How the toolkit can work in the current market**

It is common ground for landlords that the green agenda can no longer be ignored and with legal obligations in respect of the Carbon Reduction Commitment on the horizon it is even more important to address these issues, as far as possible, in leases. However, in the current climate landlords will want to strike a balance between fulfilling their sustainability aspirations and getting new and renewal leases completed.

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The toolkit can be adapted to incorporate some of the clauses with the MOU being used as the framework for communication and cooperation between the parties.

By way of example and as mentioned above, Nabarro (Graham Lust and Keeley Ellaway (Senior Associate, Real Estate)) have been working with Land Securities on 'greening' their standard form of lease. Some of the toolkit clauses have been added but with use being made of the MOU for the more detailed aspects of CO2 reductions and energy efficiency.

Land Securities, like the other members of the BBP, believe the MOU builds on the partnership they have with their tenants to enable them to work together to reduce the environmental impact of their buildings.

**How the MOU works**

The toolkit includes a model-form MOU, and recommendations on what should be included in it. The extent of the MOU will be governed by the size and nature of the building and existing sustainability commitments. We suggest that as a bare minimum the MOU should include provisions on sharing metering data and co-operation on CO2 reduction strategies.

Finally, the MOU is flexible as it:

- Is non-legally binding but it will provide a framework for landlords and tenants to agree actions on environmental issues
- Can be time limited and need not cover the entire period of the lease
- Can be part of a continuation when there is a change of occupation or change of ownership.

**The BBP’s ten green lease principles**

The toolkit is based on the best practice recommendations adopted by the BBP Green Leases Committee:

<b>New and renewal leases</b>	Owners and occupiers should seek to incorporate the model clauses for which specific drafting is provided
<b>Cooperation</b>	Under the auspices of a non legally binding MOU to ensure the building is run in an efficient manner
<b>Environmental management plan</b>	To create a plan for the building, tailored to its size and occupancy, with the aim of running the building in an efficient way, minimizing its environmental impact
<b>Communication</b>	Between the landlord and tenant by means of a building management committee or if one already exists, to ensure sustainability is on the agenda
<b>Data sharing and metering</b>	Reciprocal rights to install meters in the tenant's demise to allow sub-metering of utilities together with obligations to share data.  This type of clause is seen as a bare minimum, especially in view of the obligations contained in the carbon reduction commitment which comes into force in April 2010 and which landlords should be preparing for now
<b>Flexibility</b>	To allow landlords and tenants the flexibility to unilaterally take steps aimed at reducing energy or water use or improving waste management in the event that agreement cannot be reached
<b>Restriction on works</b>	Require parties to take into account and where possible to minimise adverse impact on any EPC or DEC of works which they may be carrying out
<b>Dilapidations</b>	To consider sustainability issues in connection with the imposition and scope of any reinstatement requirement
<b>Rent review</b>	No specific drafting but a suggestion as to the principles which represent a fair position as between the parties
<b>Dispute resolution</b>	No specific drafting but a suggestion to consider what remedies should be available for the breach of the green clauses

# Why extension of time clauses are in both parties' interests

## Summary and implications

Extension of time provisions often strike clients as odd: you prepare a contract that includes a carefully calculated completion date and then add clauses that accommodate delays.

Extension of time provisions give both parties (referred to in this article as the developer and the purchaser) certainty, and a flexible way to deal with unexpected (and almost inevitable) delays. Extension of time provisions help clients:

- Avoid conflicts where one side causes a delay and then claims for damages caused by that delay (the 'prevention principle')
- Change the completion date to accommodate delays without disapplying liquidated-damages clauses; with no way to adjust a completion date any liquidated-damages clauses cannot apply
- Allocate delay-risks between parties (see table on next page), and give parties a way to agree a revised completion date.

## The prevention principle: a party cannot take advantage of its own default

A series of cases have supported the principle that a party cannot take advantage of its own default – the 'prevention principle'.

One contracting party cannot claim breach of contract against the other when it prevented the other party from performing the obligation.

The point was expressed in *Robert -v- Bury Improvement Commissioners* as:

*"it is a principle well established at common law, that no person can take advantage of the non fulfilment of a condition, the performance of which it has hindered itself."*

## Without a way to alter the completion date time may be 'at large'

*Peak Construction -v- McKinney Foundations* stated that if the purchaser causes a delay that makes the target date impossible to achieve (e.g. by seeking a variation or impeding access to the site), then the completion date becomes 'at large'.

This means that works must be completed 'within a reasonable time', and determining what a 'reasonable time' is would involve a detailed analysis of all the events surrounding the works; which means costs and delay for the purchaser.

## Ask a question

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*Robert -v- Bury Improvement Commissioners*  
(1870) LR 5 CP 310

**A party cannot claim damages for failure to achieve the target date if it contributed to causing the delay.**

*Peak Construction (Liverpool) Ltd -v- McKinney Foundations Ltd* (1970) 1 BLR 114

Also, if time is 'at large' then liquidated-damages clauses for late completion will not apply due to the prevention principle (although the purchaser can claim general damages for late completion, these will need to be proved).

**A way to adjust the completion date gives both sides certainty**

Without any extension of time provisions, if the purchaser causes delay then the developer is only obliged to complete the works within a reasonable time.

This would leave uncertainty for both parties: there would not be a clear target against which to assess contract compliance or default.

**A way to allocate delay risks**

Extension of time provisions often look beyond the acts or defaults of the purchaser and focus on how to allocate delay risk between the parties. The table below sets out the four main types of delay and how they are sometimes allocated.

Most development agreements include provisions that deal with delays, list the matters that will entitle the developer to extra time, and then set a mechanism for establishing the entitlement.

There is no 'correct' allocation of delay risks between the parties – it has to be negotiated. Risks are usually primarily allocated according to which party is best able to manage a particular risk, or where neither party can control or manage the risk (eg extreme weather) it can be a purely commercial decision.

Extension of time mechanisms cover delays caused by purchaser act or default, protect the purchaser, and give certainty to both parties if there is a delay

Delay-risk types and how they are usually allocated		
Risk type	Examples of risks	How the risk is usually allocated
<b>Delays caused by purchaser act or default</b>	<ul style="list-style-type: none"> <li>• Variation requests</li> <li>• Failure to give site access</li> </ul>	Generally purchaser risk as the purchaser can control or manage these.
<b>Delays due to developer act or default</b>	<ul style="list-style-type: none"> <li>• Failure to appoint its construction team at the appropriate time</li> <li>• Failure to manage the project effectively</li> </ul>	Generally developer risk as the developer can control or manage these.
<b>Delays due to act or default of the construction team</b>	<ul style="list-style-type: none"> <li>• Inefficient contractor</li> <li>• Negligence</li> <li>• Poor workmanship</li> <li>• Construction team insolvency</li> </ul>	Often allocated to the developer who has the chance to do due diligence prior to selection of the construction team, will have performance obligations in its contracts with them, can seek performance bonds and guarantees from them as appropriate, and is best placed to manage the construction team.
<b>Delays outside the control of either purchaser or the developer</b>	<ul style="list-style-type: none"> <li>• Insured perils</li> <li>• Extreme weather</li> </ul>	These are matters that neither party can control or manage. Allocation will often form part of a wider development-risk assessment and is often related to level the developer's fee/profit on the project.

# Chancel repair liability: an ancient liability alive and kicking in the 21st century

## Summary and implications

The House of Lords' decision in *Aston Cantlow v Wallbank*\* confirmed that the Church of England and the Church in Wales can (and will) recover the cost of chancel† repairs (circa £250,000 in the case) from unsuspecting property owners.

Five years have passed since the Wallbank decision and no further cases have come before the courts, but the risk and uncertainty surrounding chancel repair liability remains. It is a highly technical area of law, where many exceptions exist; without expert advice, a burdened landowner could face significant financial consequences.

Many commentators have speculated that the Wallbank decision was a one-off. However, there is still the potential for this issue to come before the courts for the following reasons:

- The Church of England still has until 2013 to register its right at the Land Registry (to ensure that successive owners of registered land are bound by the liability). There may well be a flurry of chancel repair registrations as this deadline approaches
- The Church of England's hands are tied. As charitable trustees, church councils have a fiduciary duty to maximise church funds, including recovering money for chancel repairs from individuals
- After 2013 the liability continues to affect both unregistered land and those individuals who continue to retain ownership of their properties, whether or not the liability is registered (only new buyers will take the property free from the liability if the right is not registered).

For the above reasons, a chancel repair search should be carried out **in each and every property transaction**. This is an area of substantial risk where cost cutting strategies simply cannot be adopted (see search-to-insurance strategy overleaf). A failure to do so could have massive financial consequences.

## The history

Chancel repair liability is a medieval legal anomaly, which benefits some 4,000 – 6,000 pre-Reformation\* churches of the Church of England and the Church in Wales. In its simplest form, it is the liability of a rector to maintain the chancel of a church.

After the Reformation, rectorial land was distributed to lay people. When lay people acquired the land, they adopted the role of 'lay-rectors'. In doing so, they took on responsibility for the repair of the chancel. As a result, the liability now affects current day lay-rectors, who have purchased or inherited land that previously formed part of the rectory.

## Ask a question

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\* *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 A.C. 546.

† The chancel is the eastern end of the church, where the rector officiates. It usually contains the altar and the choir.

\* The key date for chancel repair is 1534 when the Act of Supremacy came into force. This confirmed Henry VIII as the Supreme Head of the Church of England and extinguished the Pope's power over English tithe.

Fortunately, property owners can carry out a search for chancel repair liability and buy insurance to cover the risk. However, the issues involved are complex and a poorly thought through search strategy could make it almost impossible to obtain insurance. This could, in turn result in a significant dent to the value of the property.

**Land Registration Act 2002; the Church has until 2013 to register chancel repair rights**

The Land Registration Act 2002 marked a significant change in the history of the liability. The liability will continue to function as an overriding interest for 10 years from 13 October 2003. This means that until 13 October 2013 chancel repair liability will bind existing owners and new purchasers, even if the liability is not recorded on the register of the property in question. During this period, the Church will be able to register its right to recover repair monies from lay rectors.

After 2013 the liability continues to affect both unregistered land and those individuals who continue to retain ownership of their properties, whether or not the liability is registered (only new buyers will take the property free from the liability if the right is not registered). After this period, the liability will only bind new owners of registered land if it is protected by an entry in the property register. However, it will continue to affect unregistered land (as no such register exists) and will also affect people who continue to retain ownership of their property.

Clearly, there remains great scope for a dispute in this area to arise for some time to come.

**The Wallbanks' story**

In *Aston Cantlow*, the Wallbanks were forced to pay £186,969 for the cost of chancel repair, plus VAT and costs (totalling around £250,000). This sum did not include their own legal fees, which amounted to over £200,000. The sums involved demonstrate the massive potential liability an individual may face if the Church of England (or the Church in Wales) chooses to enforce its right.

The case has appeared again in the national press over the last few weeks as the Wallbanks are being forced to sell 'Glebe Farm' to cover the near £500,000 bill the House of Lords decided they have to pay. The auction took place on 20 October 2009.

Rather than face a hefty chip in the price obtained for Glebe Farm, the Wallbanks chose to compound the liability, by making a one-off payment to the Church of £37,000. In doing so, they were effectively 'buying' themselves and future owners out of the costs of future chancel repairs, from the date of the payment onwards. But this is not a straightforward process and this option is not available in all cases.

**A search-to-insurance strategy\***

<b>Basic search and insurance</b>	<ul style="list-style-type: none"> <li>• Will reveal if the property is in an area where chancel repair liability exists.</li> <li>• Insurance is relatively inexpensive if liability exists in the area, but the policy will contain stringent conditions.</li> </ul>
<b>Detailed search</b>	<ul style="list-style-type: none"> <li>• Can – but will not always – reveal whether a specific property is burdened.</li> <li>• If the property is burdened, it may prove impossible or prohibitively expensive to get insurance cover for the potential risk.</li> </ul>

\*Beware: these are all outline points – take specialist advice before you do a search or ask for insurance quotes

**It could be you: debunking chancel-repair myths**

- Chancel-repair liability **can affect properties in urban areas**, although it is more common in rural areas;
- It **affects commercial and residential** property;
- **Size doesn't matter**: it can affect all types of property, from a one bedroom flat located on an urban housing estate, to a large country farmhouse; and
- Lay rectors are **'joint and severally liable'**: the Church of England could decide to pursue one 'lay rector' for the entire cost of repair.

# Now it's finally here: how the Companies Act 2006 affects you

## Summary and conclusions

It has been a long time coming, but the Companies Act 2006 has been fully in force since 1 October 2009. We have looked back through the hundreds of pages of legislation in the Act to find four areas where changes are particularly relevant to directors of property companies:

- **Share capital and shareholder protection:** share capital requirements have been simplified
- **Filing requirements:** despite the intention being to simplify things, directors and company secretaries face a raft of new forms when they file at Companies House
- **Articles of association:** companies should consider adopting new articles of association based on the new model-form rather than Table A to avoid complexity and future confusion and to reap the deregulatory benefits of the new law
- **Directors' residential addresses:** directors can use a separate service address, but, unless you move house, your current address will remain on the register.

## 1. Share capital and shareholder protection

A number of simplifications have been made to company share capital, including:

- The abolition of authorised share capital
- A new statement of capital to assist visibility
- The abolition of unlawful financial assistance for most private companies (note that financial assistance remains unlawful for all public companies and private companies giving security in connection with a sale of shares in a parent public company).

Because a number of former statutory controls have been removed, to a greater extent than ever, shareholder protection rests back on directors properly considering the options and discharging their duties in the best interests of the company.

A private company can now reduce its share capital without consent of court. Particularly through the current recession, a simple paper process will be useful to improve a company's profit and loss account, enabling it to pay a dividend. This is available to companies with large share capital and/or share premium account balance.

## Ask a question

If you have any questions about topics covered in this article please contact:

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## Companies Act 'at a glance guide'

We've put together an 'at a glance' guide to some of the key aspects of company law and other relevant regulations; [click here](#)

## Companies Act; a practical guide

For a more extensive guide to the Companies Act 2006 [click here](#)

## 2. Filing requirements

The administration of companies has supposedly been simplified. However, additional filing requirements have not made life simpler for directors and company secretaries – a completely new set of forms needs to be used and additional forms are required. Limited partnerships and LLPs also have to use new forms.

Assume that you will not be able to file any document at Companies House without an accompanying form

As a general rule, assume that you will not be able to file any document at Companies House without an accompanying form. The list of forms is very long and will take some time to get used to.

During the current transitional phase it is important to draft resolutions very carefully and file the correct form, otherwise the documents will be rejected and the corporate action delayed.

## 3. Articles of association

The changes to a company's constitution are complex. In order to reduce the risk of future errors and to benefit from the deregulatory provisions of the new law, we recommend that companies adopt new articles of association based on the new model form rather than Table A.

Table A is no longer the default set of articles but it remains possible for an existing or new company to use it as a base document.

## 4. Directors' residential addresses

A director must still advise both the company and Companies House of his or her residential address. However, if the director so wishes, the residential address does not need to be made public and a separate service address (such as the company's registered office) can be used.

This change is good news for directors concerned about excessive interference from members of the public. However, remember that:

- Government bodies and credit reference agencies can still access the confidential register of directors' residential addresses
- A director must still advise Companies House when he moves home and
- Residential addresses currently on the register will remain there (except in limited circumstances)

The only way to ensure no member of the public can find your residential address is to move house.

# Our winter seminars

Tuesday 24 November 2009

## Planning issues

- Keeping permissions alive
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Tuesday 1 December 2009

## Property joint ventures; how, when and why

This interactive presentation will cover:

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- How the joint venture is run day-to-day
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### How to register

To register for one or more of these seminars, please email [events@nabarro.com](mailto:events@nabarro.com) with your full contact details and please specify which seminars you would like to attend.

### Fee

There is no charge for these seminars.

### CPD points

CPD points are available.

### Programme

08.30 Registration and breakfast  
09.00 Start  
10.00 Finish

### Venue

Nabarro, Lacon House, 84 Theobald's Road, London WC1

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