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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ADVERSE POSSESSION

In *Ofulue & anor v Bossert* [2009] UKHL 16 the House of Lords considered acknowledgements of title within s.29(2)(a) Limitation Act 1980, which operate to interrupt the acquisition of rights by way of adverse possession. The main issue was whether the title of the claimants in a possession action had been defeated by the adverse possession of the defendants. The Committee held that an admission of the claimants' title in a defence was sufficient to constitute a s.29 acknowledgment. They also held that an offer to purchase an interest from the claimants, made in without prejudice correspondence by the defendant, as part of negotiations toward a compromise, amounted to an implied acknowledgement of the claimants' title. However the defence pre-dated the 12 year period of adverse possession and the Committee went on to hold that the acknowledgement in the defence was not continuing. In the context of s.29, an acknowledgement in a signed document more naturally means one which arises on the date of the document. A continuing acknowledgement was also contrary to the policy of the 1980 Act. Any 'revival' of the acknowledgment would require a written and signed affirmation of the contents of the previous defence, not just general reliance upon it at a subsequent stage. In addition the majority of the Committee reaffirmed the importance of the without prejudice rule and refused to extend the exceptions to cover this case. The acknowledgement in the without prejudice correspondence was inadmissible. First, it made no difference that title was not in dispute in the proceedings in which the correspondence was written. Although there might be an exception to the without prejudice rule where the matter sought to be relied upon was wholly unconnected to the issues which were the subject of the negotiations in the correspondence, this plainly was not such a case. Secondly, an exception based on acknowledgments relied upon for the fact that they are made rather than for the truth of their contents was impractical, and a distinction based on acknowledgments as opposed to admissions was inconsistent with the need to protect without prejudice discussions. Thirdly, public policy did not justify that the rule be overridden for s.29 cases, nor did the fact that the defendant had changed its stance and might therefore be seen to be taking an unattractive point.

COMMONS

Luckwards Hill in Worcestershire is common land subject to registered rights of pasture. Those entitled to registered rights of common included the trustees of an abbey. These rights were registered as attached to a farm adjacent to Luckwards Hill. In 1998, the appellant was granted a tenancy of the farm by the trustees. In 2005, Luckwards Hill was purchased by the respondents. Thereafter, the respondents restricted the appellant's access to Luckwards Hill. The appellant brought proceedings for injunctive relief to enforce his rights as a commoner. He argued that his tenancy agreement impliedly granted him the trustees' rights of common attached to the farm. The trial judge disagreed and held that a clause in the tenancy agreement which stated that "*the benefit of all existing and future wayleaves, easements and rights affecting the farm and all rents and moneys payable in respect thereof*" expressly reserved the rights of common to the trustees. He found that the appellant had no common rights by virtue of his tenancy on the farm and granted injunctions restraining him from entering Luckwards Hill. In allowing the appeal, the Court of Appeal held that the word "affecting" in the clause was not referring to rights benefiting the farm. It was referring to rights burdening the farm which was the usual sense of the word. In the instant case, the rights of common were attached to the farm and benefited the farm. The reservation could not be interpreted as reserving the rights to the trustees. **Hall v Moore & ors** [2009] EWCA Civ 201; [2009] 24 EG 86.

EASEMENTS

In **Waterman & anor v Boyle & Gwilt** [2009] EWCA Civ 115; [2009] 21 EG 104 the Court of Appeal took the opportunity once again to mark its disapproval of boundary litigation and to urge parties to resolve disputes without resorting to complex and expensive proceedings. The Court also emphasised the limits within which a right to park on an access route would be implied into a right of access. The test was whether the right to park on the access route was reasonably necessary for the exercise or enjoyment of vehicular access (**Moncrieff v Jamieson** [2007] 1 WLR 2620, HL applied). Further, where there was an express right to park already attached to the property an additional right would only arise in exceptional circumstances. Here there were already two designated parking spaces and there was nothing exceptional in the fact that there might sometimes be more visitors than spaces. **Moncrieff** (which involved a house at the foot of steep cliff) was entirely distinguishable and turned on its very special facts. Nevertheless the Court deprecated the appellants' reaction to their neighbours' parking encroachments which included the engagement of a clamping firm and deployment of warning notices. On another issue the court held that although it was possible to interfere with an access route by an act on adjacent land, the circumstances would have to be exceptional. The construction of a wall which, although preventing the access of larger vehicles, did not encroach on the lane in question and which was an ordinary user of the land did not qualify as an interference.

FORESHORE

In *Isle of Anglesey County Council & anor v The Welsh Ministries & ors* [2009] EWCA Civ 94 the Court of Appeal affirmed the public interest in the preservation of mussel fisheries and rejected an attempt to circumvent an order made under the Sea Fisheries Act 1868 and provisions of the Sea Fisheries (Shellfish) Act 1967. The claimants wished to build a marina on a part of the foreshore so critical to the cultivation of the seed mussels that it would, according to the defendants, have reduced the mussel stock by up to 40%. The Court of Appeal rejected the argument that the fishery right under the order upon which the defendants relied was personal and non-heritable and was *ultra vires* the order. The court relied both on ancient common law principles to the effect that the ordinary incidents of a 'several fishery' were a form of incorporeal property well known since before Magna Carta, and on the practice under the 1868 Act over more than a hundred years. Although recognising that reliance on subsequent history in statutory interpretation was controversial, the court held it was permissible so to rely where, as here (i) legislation had been interpreted in a particular way without dissent over a long period (ii) the case involved an esoteric area rarely before the courts in which established practice is the only available guide to operators and (iii) where Parliament's involvement in the established practice has gone 'much deeper' than in many of the reported cases (Lord Nicholls' *dictum* in *R (Jackson) v Attorney-General* [2006] 1 AC 262 applied). This conclusion was also consistent with the approach in the 1967 Act. The claimants' proposed marina would therefore have amounted to a criminal interference with the fishery pursuant to the 1967 Act.

GYPSIES AND TRAVELLERS

The appellant traveller occupied a pitch under a licence granted by the respondent council. Following a number of breaches of the licence, the council served a notice to quit and issued possession proceedings. At the possession hearing, the appellant sought to raise a public law defence. The trial judge concluded that the council was entitled to summary judgment on the basis that the licence had been validly determined by the notice to quit and that on the authorities the appellant had no public law defence. On appeal, the Court of Appeal held that where a licensee raises a public law defence against the making of a possession order, the court must be satisfied that the licensee has a seriously arguable case. That aside, there were no formulaic restrictions on the factors which may be relied upon by the licensee in support of his defence. Such factors were not automatically irrelevant because they included the licensee's personal circumstances. The reasonableness of the council's decision was decided by applying public law principles as they had been developed at common law and not through the lens of the ECHR. If the decision to serve a notice to quit was not unlawful at the time of service, it could not retrospectively be invalidated by later developments. The court should make a decision on the reasonableness of the council's decision based on the facts as they reasonably appeared, or should have appeared, to the council at the time of its decision making. In the instant case, the Court of Appeal dismissed the appellant's appeal as hopelessly unarguable in view of her repeated breaches of the licence agreement. *Doran v Liverpool City Council & anor* [2009] EWCA Civ 146.

HOUSING

The new, largely non-points based policy for allocating social housing, adopted by Newham LBC pursuant to s.167 Housing Act 1996, is not unlawful. Two criticisms of the scheme, sustained at first instance and in the Court of Appeal, have been rejected by the House of Lords. First, in the allocation of the bulk of the housing, the Court of Appeal said that the determination of relative priority within those groups who qualified for 'reasonable preference' under s.167(2) by length of waiting time, rather than an assessment of relative need, was plainly insufficient for identifying those in greatest need. Secondly, it was said that it was irrational to allow 5% of the housing to be allocated to those who were not preferential groups within s.167(2). In rejecting the first criticism the Committee held that the authority was not required to assess the individual gravity of the needs because s.167(2) only provided that 'reasonable preference' be given and the 2002 Act was intended to be a move away from points based systems. Newham's scheme had the attraction of simplicity, which would avoid the need for litigation and for judicial consideration of the detail of housing policy decisions, which judges were not best equipped to assess. It was also held that although it was rough and ready this aspect of the scheme was not irrational. Lord Neuberger pointed out that courts should not be overly swayed by individual circumstances of claimants in assessing the validity of such a scheme and that cases decided prior to the amendments of the 2002 Act (in particular **R (A) v Lambeth LBC** [2002] EWCA Civ 1084, [2002] HLR 57 and cases therein approved) could no longer be relied upon. As to the second criticism the Committee (Lady Hale) held that it could not be sustained in face of a statutory requirement for reasonable preference as opposed to absolute priority. Her Ladyship also pointed out that there was little point in castigating a scheme unless a rational alternative was identified (a point echoed by Lord Scott). **Ahmad, R(on the Application of) v Newham LBC** [2009] UKHL 14.

In **Ugiagbe v Southwark LBC** [2009] EWCA Civ 31 the Court of Appeal considered the meaning of 'good faith' within s.191(2) Housing Act 1996, which excludes from the ambit of acts leading to intentional homelessness 'an act or omission in good faith' on the part of someone unaware of a relevant fact. It was common ground that the appellant had left her council accommodation in ignorance of a relevant fact, namely her security of tenure. The court rejected the submission that wilful ignorance, in the sense of deliberately failing to take suggested advice, would bring someone outside the 'good faith' provision. The use of the phrase 'good faith' connotes some kind of impropriety or misuse or abuse of the legislation so that dishonesty and wilful blindness in the Nelsonian sense would prevent a finding of 'good faith'. However to act foolishly or imprudently was insufficient. The appellant had deliberately chosen not to take advice from the Homeless Persons Unit (HPU), who would have told her about security of tenure. However she had been given to understand that going to the HPU would result in her being treated as homeless. She had acted in good faith.

In **Bracknell Forest BC v Green & anor** [2009] EWCA Civ 238 the Court of Appeal confirmed that the existence of suitable alternative accommodation was only one of the factors to be considered in assessing whether it was reasonable to make a possession order under Ground 16 of Schedule 2 to the Housing Act 1985. Although in this case the tenant's accommodation was more extensive than he reasonably required and the council were offering suitable alternative accommodation, the judge had been right in holding it unreasonable to make an order for possession. The facts were unusual. The tenant was advanced in middle age and had lived in the property all his life. It was a three bedroom semi-detached house and the tenant's sister lived there with him. The Recorder had been

concerned that the making of a possession order would have a permanently destabilising effect on the tenant. The Court of Appeal wondered how many people in their 50s still lived in the house in which they were born.

LEASES: ALTERATIONS

The digging of a hole for a swimming pond in the garden of the demised premises, being two conjoined garden flats in Hampstead, involving the removal of 34 cubic metres of earth, did not amount to an 'alteration in the construction' of the premises. However it did constitute an 'alteration' in the 'arrangement' of the premises. In so holding the Court of Appeal endorsed the concession that there was 'quite a bit of earth' to be removed amounting in practical terms to four large lorry loads. Removal and redistribution on such a scale inevitably amounted to altering the arrangement of the garden, as did the fact that the original boundary between the two conjoined gardens was removed and where it stood appeared a 6.45 metre long swimming pond. **Guignabaudet v Scott-Moncrieff** [2009] EWCA Civ 485.

LEASES: ASSIGNMENT

The landlord had acted unreasonably in refusing consent to the assignment of a lease unless the guarantor of the assignee agreed that he would not be released on a subsequent assignment until a 'reasonable alternative security' was provided by the subsequent assignee. The purpose of a covenant against assignment was to protect the lessor from undesirable use or occupation of his premises. It would not normally be reasonable for a landlord to seek to impose a condition which was designed to enhance or increase his rights under the lease. It followed that a lessor cannot normally reasonably require a guarantor of the liabilities of an assigned to undertake a liability extending beyond the period for which the term is vested in the assignee (**Mount Eden Land Limited v Straudley Investments Limited** (1996) 74 P & CR 306 applied). In this case the protection in respect of subsequent assignment lay in the right to refuse consent, not in an additional right to refuse to accept the discharge of the assignor's guarantor. **Landlord Protect Limited v St Anselm Development Company Limited** [2009] EWCA Civ 99; [2009] 08 EG 115 (CS).

LEASES: SURRENDER

In **Artworld Financial Corporation v Safaryan & ors** [2009] EWCA Civ 303; [2009] 23 EG 94 the Court of Appeal upheld a finding of surrender by operation of law where landlords had accepted back the keys and allowed new occupants to enter for their own benefit as opposed to as caretakers. The key question was whether the landlord had done something significantly beyond anything consistent with the continued existence of the tenancy so that it is consistent only with surrender, or in other words the landlord's actions had unequivocally amounted to an acceptance that the tenancy was at an end. The burden lies on the party asserting surrender. The test is objective, so it is the intention of the landlord as demonstrated by its conduct as a whole, not any expressed intention, which matters. The Court of Appeal agreed that going in and living in the property was sufficiently unequivocal. Other findings in relation to redecoration and the parking of cars at the property merely illustrated the nature of the re-occupation.

PROPRIETARY ESTOPPEL

In *Thorner v Major & ors* [2009] UKHL 18 the House of Lords considered the three part test for proprietary estoppel, (i) assurance/representation (ii) reliance (iii) detriment. They concentrated on the nature of the representation required. Lords Scott and Neuberger agreed that the assurance must be 'clear and unequivocal', however Lord Neuberger insisted that this test should not be applied in an unrealistically rigorous way. Lords Walker and Rodger preferred to say that the assurance must be 'clear enough' to the representee. However both Lords Walker and Neuberger emphasised that the question whether an assurance was sufficiently clear had to be decided in the context of the case and was essentially one of fact for the first instance judge. In addition Lords Scott and Neuberger pointed out that where someone reasonably acted upon a representation to his detriment it would not usually be germane to consider what the representor actually intended. In reversing the decision of the Court of Appeal and restoring the first instance decision, the Committee addressed two forms of uncertainty in respect of the assurances and/or representations relied upon. First, they held that in the unusual circumstances of this case the oblique remarks of a taciturn, inarticulate farmer, over a substantial period of time, amounted to sufficiently clear assurances that the representee would inherit his farm and justified an order giving effect to those assurances in equity. They held that the Court of Appeal were wrong to have interfered with the judge's findings in that regard. Secondly they held that uncertainty as to the geographical extent of the farm from time to time did not undermine the certainty of the assurances. Lord Neuberger pointed out that uncertainty as to the nature of the interest (which had prevented an estoppel in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, HL) was entirely different from uncertainty as to the extent of the property. Equitable estoppel looks back from the point the promise falls due to be performed and the farm was a recognisable entity at any one time. Lord Scott was in 'broad agreement' and reached the same conclusions but would have preferred to use a remedial constructive trust, which he held was better suited to the future uncertainties of an inheritance case such as this.

TOLERATED TRESPASSERS

The personal representative of a deceased 'tolerated trespasser' is not able to make an application under s.85 Housing Act 1985 to postpone the date for possession until after the death of the tolerated trespasser, in order to obtain a 'Lazarus order' reviving the tenancy. The application of CPR 19.8(1) meant that the only potential surviving 'claim' was that under s.85. *Brent LBC v Knightley* (1997) 29 HLR 857 was binding authority to the effect that the right to make such an application under s.85(2) was neither transmitted to the personal representative, nor was it vested pursuant to s.85(5) in anyone other than a party to the proceedings or one deriving title from such a party. Article 1 of Protocol 1 of the ECHR was not engaged. The right to apply under s.85 was not a right of which a tolerated trespasser could be deprived nor with which interference was possible after his death, because the right did not survive his death. *Austin v Southwark LBC* [2009] EWCA Civ 66; [2009] 25 EG 138. However, note the statutory changes in relation to tolerated trespassers which are considered below.

OTHER DEVELOPMENTS

DISTRESS FOR RENT

The Distress for Rent (Amendment) Rules 2009 SI 873 came into force on 30th April 2009. They amend the Distress for Rent Rules 1988 by requiring that lists of certificated bailiffs be published on the website of Her Majesty's Courts Service, and requiring that applicants for bailiffs' certificates provide an up to date criminal conviction certificate, a standard criminal record certificate or an enhanced criminal record certificate with their applications. The explanatory note states in relation to policy background that: *"There is a high level of public interest in the behaviour of bailiffs and other enforcement agents in the light of media coverage and the current financial climate. The changes made by this instrument are designed to introduce further safeguards to the scheme for certification of bailiffs, by requiring further evidence of the suitability of applicants to act as certificated bailiffs, and by making it easier for members of the public to make complaints about the conduct of certificated bailiffs."*

LANDS TRIBUNAL

The jurisdiction of the Lands Tribunal is being transferred into the Lands Chamber of the Upper Tribunal as part of an ongoing series of transfers of tribunals into the new tribunal structure created by the Tribunals, Courts and Enforcement Act 2007. The First Tier and Upper Tribunal (Chambers) (Amendment No.2) Order 2009 SI 1021 comes into force on 1st June 2009. It creates the Lands Tribunal in the Upper Chamber and allocates functions to the new chamber. The Upper Chamber (Lands Tribunal) Fees Order 2009 SI 1114 also comes into force on 1st June 2009 and provides for the fees payable in respect of proceedings before the Lands Tribunal of the Upper Chamber.

TOLERATED TRESPASSERS

The Housing and Regeneration Act 2008 (Commencement no.5) Order 2009 SI 1261, and the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 SI 1262, both deal with the vexed question of tolerated trespassers. SI 1261 brings into force on 20th May 2009 various provisions of Parts 3 and 4 Housing and Regeneration Act 2008. In summary, Part 1 of Schedule 11 amends the law relating to the termination of residential tenancies, so that a tenant subject to a possession order in favour of the landlord will not lose tenancy status while continuing to live in the property. Part 2 of Schedule 11 provides that, subject to conditions being met, new tenancies will arise for tenants subject to possession proceedings who have already lost tenancy status. SI 1262 also comes into force on 20th May 2009 and provides that in specified circumstances Part 2 of Schedule 11 will apply to successor landlord cases. There is a very long explanatory note to SI 1262 which contains among other things the information that tolerated trespasser status is currently estimated to affect at least 250,000 to 300,000 residential occupants of social housing.

Note: Where the only case reference given is a universal reference, readers will find a full transcript of the decision available on www.bailii.org. Statutory instruments can be found on www.opsi.gov.uk.

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