



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7831 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

PROPERTY LAW BULLETIN

APRIL 2007

CASE LAW UPDATE

ASSIGNMENT

A clause in a lease allowing assignment (landlord's consent not to be unreasonably withheld) was subject to various requirements, including an entitlement on the part of the landlord to require a surety in some circumstances. *Williams J* held that the clause set out the agreement of the parties as to what alienations were not absolutely prohibited and could be made with consent, and accordingly restricted the circumstances in which the tenant could properly apply for consent to an assignment. This meant that the clause was valid and binding. Had the clause set out conditions which the landlord could impose for the giving of consent, or circumstances in which refusal of consent was deemed to be reasonable, it would be void by s.19(1) Landlord and Tenant Act 1927. As the lease had been entered into prior to the coming into force of s.19(1)(A) LTA 1927 in 1996 it was not appropriate to consider that section, as it had no proper bearing on its proper interpretation. (See also RENT REVIEW below). ***Level Properties Ltd v Balls Brothers Ltd & anor*** [2007] EWHC 744 (Ch).

BOUNDARY DISPUTES

In a case relating to multiple boundary disputes any single joint expert should have his brief strictly defined. On the issue of the boundaries the directions to the expert should have been that he should: (i) inspect all relevant plans; (ii) carry out a site examination; (iii) examine any available objective evidence, such as photographs, showing changes to the properties or boundary markers since the properties had been built; and (iv) prepare a report and plan, possibly with photos. The plan should show the position of the properties and any relevant features, such as fences. It should also transpose onto the plan, if and insofar as this was possible, the lines of the boundaries shown on the original transfer plans. If that was problematic or uncertain, the report needed to explain the reasons. It would be wholly improper for one party to have any discussion about the case with a joint expert at court in the absence of another party, unless the other party had given fully informed consent. ***Childs & anor v Vernon*** [2007] EWCA Civ 305.

CONSTRUCTION OF DOCUMENTS

In a case relating to access to a fire escape it was a term of the assignment of property to the defendant that it possessed "...the right in the case of emergency only to cross the roof of the retained land and to exit to ground level... provided always that the said roof and external staircase still exist and also reserving to the owner of the retained land from time to time right in any event to change the route of the said emergency exit." Chadwick LJ confirmed that the Claimant was not obliged to preserve the Defendant's emergency exit: "The court does not, through the guise of interpretation, make for the parties a bargain which they did not themselves choose to make. It is not for the court, through the guise of interpretation to substitute for the bargain which the parties did make a different bargain which in its view they would have made if they had been better advised or had had better regard for their own interests.... There is nothing in the proviso which imposes an obligation on the claimant, or the owner of the claimant's property, to provide a substitute right in circumstances where the original right has ceased to exist in accordance with the terms of the provision. That was not the bargain made..." **Megaro v Di Popolo Hotels Ltd** [2007] EWCA Civ 309.

EASEMENTS

A claim for an easement of necessity over land had failed at first instance and was rejected on appeal. The basic principles are as follows: (i) there must be a common owner of a legal estate in two plots of land; (ii) access between one of these plots and the public highway can be obtained only over the other plot; (iii) there has to be a disposition of one of the plots without any specific grant or reservation of a right of access. In these circumstances it may be possible as a matter of construction of the relevant grant to imply the reservation of an easement of necessity. The principle is one of implication from the circumstances of a grant of land, not a freestanding rule of public policy. The classic case of an easement of necessity is where the land of one party to a grant is entirely surrounded by that of the other. As between the two of them, it is not difficult to infer that the landlocked property, whether of the grantor or the grantee, was intended to have some form of access over the surrounding land. Where the surrounding land is shared with strangers to the grant, the issues are much more complex. Where there is a realistic possibility of alternative access over the land of third parties, the case for an easement of necessity is much less clear. Here there was no basis for an implied right. The original disposal of the land was to an associated company, and so it was not surprising that the grantor was not concerned about reserving a specific right of access to the north. The grantor's main concern was to control the possibility of future access to the south, even though the prospects were speculative. There was nothing to overcome the ordinary presumption that had the grantor required an easement to the north he would have made a specific reservation in the grant. **Adealon International Proprietary Ltd v Merton LBC** [2007] EWCA Civ 362.

GUARANTORS

The Prudential were the head-lessees of substantial office premises in the City of London, of which the US law firm Altheimer & Gray had taken an assignment of an underlease. Following the bankruptcy of A&G in the US and in the UK, the Prudential Assurance Company Ltd sought to recover £1.5 million in rent arrears from the Defendants, Mr Ayres

and Mr Grew, who were the guarantors of A&G and the previous underlessees. Lindsay J held that the wording of clause 2 of the Supplemental Deed to the lease protected the guarantors. Clause 2 provided that while the lease was vested in A&G the liability of the tenant (and any previous tenant) was limited to the assets, income and accounts of the partnership and did not extend to the personal assets of individual partners. It was not for the court to consider what commercial motive Prudential could have had for so limiting its liability against A&G or its guarantors. It was plain that A&G had insisted on a provision for limited recourse and plain that the Prudential had agreed to this. Judicial approval of clause 2 may be of use to those drafting guarantees in the future, though there may not be many commercial contexts where such a clause will be accepted. ***The Prudential Assurance Company Ltd v Ayres & Grew*** [2007] EWHC 775 (Ch); [2007] 16 EG 190 (CS).

HOUSING

Ms Ansell had formerly been a secure tenant of London & Quadrant Housing Trust from around September 1987. On 19th February 2001 a suspended order for possession was made based on rent arrears. The terms of the order were breached and so on the date of breach (probably 19th March 2001) the secure tenancy came to an end and Ms Ansell became a tolerated trespasser. On 26th October 2004 all of the monies ordered to be paid by the order of 19th February 2001 had been paid. However it was not possible to revive the secure tenancy under s.85(4) HA 1985 because the suspended order had been breached. Nor was the order of 19th February 2001 enforceable after all of the sums due under it had been paid, so there was no power to suspend or stay execution of the order under s.85(2). There was no question of a fresh tenancy having arisen. As the order of 19th February 2001 was unenforceable, the judge was entitled to hold that London & Quadrant were entitled to an order for possession in fresh proceedings based on the fact that Ms Ansell was a trespasser. The Court of Appeal was uneasy about this outcome. The fact that the s.85(2) powers were no longer exercisable once all sums due under the order were paid created a trap for former tenants and their advisers, particularly if the suspended order had been breached, which would often be the case. However the solution to this problem lay with Parliament rather than the courts. ***London & Quadrant Housing Trust v Ansell*** [2007] EWCA Civ 326.

Mr & Mrs Elrify applied to City of Westminster Council for accommodation under Part VII Housing Act 1996 on the basis that their premises were so overcrowded it was not reasonable for them to live there. The council argued that Mr & Mrs Elrify were not homeless as defined in s.175 HA 1996 because their current accommodation was reasonable for them to occupy. May LJ, applying the Table II test as set out at s.326(3) HA 1996, found that the Council had miscalculated the level of overcrowding. The overcrowding was by two and a half people, rather than the one that the Council had assessed. This was a material error and so Mr & Mrs Elrify's appeal was successful to the extent that the Council was obliged to reconsider its review. In considering issues of overcrowding, s.326 HA 1996 demands that the council should consider both Table I and Table II and take the lesser of the product of those two enquiries. It is important that the calculation of the extent of the overcrowding is correct as it is an important part of the decision as to whether or not the current accommodation is reasonable for the occupation of its residents. ***Elrify v City of Westminster Council*** [2007] EWCA Civ 332.

LANDLORD AND TENANT (COVENANTS) ACT 1995

After a lease was entered into, the Defendant landlord, Wembley (London) Ltd (“WLL”) transferred the freehold of the land to four companies known as Gideon 1 to 4 Ltd (the other Defendants in the proceedings). The Gideon companies had executed declarations that they held the freehold as nominee and trustee for WLL absolutely. In these circumstances it was held that WLL was entitled to the benefit of the tenant’s covenants, specifically to pay the service charge and advance payments. By s.6(2) Landlord and Tenant (Covenants) Act 1995, the original contractual entitlement of WLL was not discharged. As absolute beneficial owner WLL had always been entitled to sue for the service charge and advance payments either in its own name, if necessary, joining Gideon as a defendant, or in the name of Gideon. The various declarations of trust were assignments within the meaning of s.28(1) LT(C)A 1995 and entitled the absolute beneficial owner of the rents and profits under the tenancy, namely WLL, to enforce the tenant’s covenants pursuant to s.15(1). The terms of s.23 indicate clearly that the equitable assignee is entitled to the benefit of a tenant’s covenant at least after its assignment to him and before if it expressly so provides. In any event the Claimant tenant would have been estopped by convention from denying that WLL was the lessor for all purposes connected with the lease. In relation to the service charges provisions in the lease it was observed that it was appropriate for the interpretation of such a clause to be more restrictive in the case of residential tenancies than in a commercial transaction between two substantial parties. **Wembley National Stadium Ltd v Wembley (London) Ltd & ors** [2007] EWHC 756 (Ch); [2007] 16 EG 191 (CS).

PART 36 OFFERS

S.2 Law of Property (Miscellaneous Provisions) Act 1989 does not operate so as to prevent the acceptance of a Part 36 offer involving the disposition of an interest in land. The mischief that s.2 of the 1989 Act must have been intended to redress had no relevance whatever to the settlement of existing court proceedings under the machinery now provided by CPR Part 36. There is no question of lack of mutuality, nor of the uncertainties said to arise out of the doctrine of part performance. If a Part 36 offer is made and accepted according to the rules there can be no doubt that the acceptance should be read together with the offer. The parties know that they are entering into a solemn and binding legal transaction. Acceptance of a Part 36 offer may well create a contract and probably does so in the vast majority of cases. However it need not be a contract to be enforced and the regime of Part 36 does not depend upon contract law, except in the special case mentioned in rule 36.15.6. Subject to outstanding issues about mistake, rectification and rescission the parties had arrived at a binding settlement notwithstanding the fact that the settlement involved the disposition of an interest in land and s.2 of the 1989 Act had not been complied with. **Orton v Collins & ors** [2007] EWHC 803 (Ch).

PROCEEDS OF CRIME

The CPS failed to establish that Mr Benye, a convicted fraudster, owned or had an interest in a residential leasehold property. The leasehold had been purchased by Mrs Benye on 15th January 2004 under the right to buy scheme. The CPS sought to argue that Mr Benye was the sole beneficial owner of the leasehold. However it was held in Mrs Benye’s sole name. Mr Benye had asserted that he owned a 100% interest in the leasehold but this might well

have been to avoid a potential claim against him for much larger sums. He had made cash payments which had been used as a deposit for the purchase, but it was more likely than not that his intention was to make a gift of these sums to Mrs Benye. Walker J was not prepared to infer that there had been a discussion between Mr and Mrs Benye as to ownership, or that Mr Benye had acquired any beneficial interest in the leasehold. **CPS v A. Benye; Interested Party: S. Benye** [2007] EWHC 772 (Admin).

RENT REVIEW

The House of Lords held that Riverside Housing Association had validly implemented rent review provisions contained in a weekly assured tenancy. Although the decision is based on the construction of the particular rent review clause, it had wider implications for Riverside and may be of interest to other Housing Associations with similarly worded clauses in their tenancy agreements. It was noted that the drafting of the rent review provisions was wholly different from that contained in any rent review clause which had come before the court previously. Broadly speaking, the issues related to the validity of rent review notices on the basis that they had not been served on the rent variation date as defined in the rent review clause of the tenancy agreement. Lord Neuberger, giving judgment for their Lordships, noted that the rent review clause had not been entered into in a commercial context. Even in the commercial context, he observed that *“there is a presumption which can fairly be characterised as strong, that time is not of the essence for the service of notices in relation to rent reviews.”* Riverside was entitled to increase the rent once a year on 28 days’ notice, which notice could take effect at any time on or after the first Monday in June (the rent variation date). **Riverside Housing Association Ltd v White (FC) & anor** [2007] UKHL 20.

Following **National Grid Company PLC v The M25 Group Ltd** [1999] EGLR 65, the landlord and the tenant were not bound by the decision of an independent expert under a rent review clause if the expert took an erroneous view of provisions within the lease which were germane to the expert’s ultimate determination of the rent. (See also ASSIGNMENT above.) **Level Properties Ltd v Balls Brothers Ltd & anor** [2007] EWHC 744 (Ch).

HHJ Peter Coulson QC declined to remit an arbitrator’s award on a rent review for reconsideration pursuant to s.68(2) Arbitration Act 1996 (serious irregularity causing substantial injustice). The arbitrator is fully entitled to make use of his own experience in reaching his conclusions, provided that it is of a kind and in the range of knowledge that one would reasonably expect the arbitrator to have, and providing that he uses it to evaluate the evidence called and not to introduce new and different evidence. He must not use his expertise to introduce new evidence which he then fails to allow the parties to address; or make an award based on arguments or evidence that were not presented to him, or upon a basis that is contrary to the common assumptions of the parties as represented to him. The arbitrator is entitled to arrive at his award by deploying the evidence that he has heard in a way that is materially different from the way in which the parties’ valuers deployed that evidence, provided that the point has been put into the arena by the valuers and/or they have had a chance to deal with it. Here the arbitrator gave directions which envisaged the exchange of submissions, followed by an inspection of certain properties. There was no objection to this course, which is normal in this type of rent review arbitration. The parties were offered the opportunity to accompany him on his inspection which they declined. No criticism could be made of the fact that the arbitrator inspected the properties after written submissions and without the attendance of the parties. The disputed figure had been dealt

with in detail by the valuers. The arbitrator was entitled to arrive at a valuation which reflected his own approach and was part way between the figures advocated by the respective valuers. There was no serious irregularity and nor was there any substantial injustice. **JD Wetherspoon PLC v Jay Mar Estates** [2007] EWHC 856 (TCC).

REPAIRING COVENANTS

A business lease provided that the appellant landlord, pursuant to clause 5.5.2, was not to be liable to the tenant in respect of any failure to provide the specified services “*unless and until the Tenant has notified the Landlord of such failure and the Landlord has failed within a reasonable time to remedy the same*”. It was held that the landlord’s obligation to repair the roof existed independently of clause 5.5.2 because it was created by other provisions in the lease. Clause 5.5.2 existed for the landlord’s protection since without it the landlord would be liable from the moment the roof fell into disrepair. However the landlord could not rely upon the notice requirement in the first limb of clause 5.5.2 as a defence to the respondent tenant’s claim. The landlord had waived the notice requirement by informing the tenant that it intended to repair the roof in the summer of 2003, and had made it clear that it was not relying upon the requirement of notice. Where a provision was for the protection of one party it was possible to waive it unilaterally. On the evidence before him the judge had been entitled to come to the conclusion that, had the landlord used all reasonable endeavours, it could have completed the works by the end of 2003. It was not appropriate to restrict damages to the cost of patch repairs until 2004. Patch repairs were reasonable while the landlord was working up a scheme for replacement. Once the landlord had been advised that replacement was required and had devised a scheme, patch repairs were not longer sufficient. **Princes House Ltd & anor v Distinctive Clubs Ltd** [2007] EWCA Civ 374; [2007] 14 EG 104 (CS).

RIGHTS OF WAY

An appeal against the quashing of a modification order was dismissed. The issue in dispute was whether or not a landowner had, in keeping with the proviso which excepted land from becoming a public right of way after 20 years where there was evident opposition by a landowner, shown his contrary intention to challenge a public right of way by proof of some overt and contemporaneous act. **Godmanchester** [2005] EWCA Civ 1597 was considered. The landlord gave evidence to the effect that he had disabused users of the belief that there was a public right of way along the relevant land by challenging and interrupting users and turning people away. This evidence was not properly considered by the inspector in the course of his considerations. Laws LJ found that the inspector should have made findings of fact in relation to the landowner’s evidence. He had not properly carried out his task as fact-finder at the inquiry. This amounted to an error of law. **Norman & anor v Secretary of State for the Environment, Food & Rural Affairs** [2007] EWCA Civ 334.

TRUSTS OF LAND

In an important case on the rights of cohabitants, the House of Lords considered the position where the parties had bought the property in joint names but had not made an express declaration of their beneficial interests. Mr Stack and Ms Dowden had cohabited since 1983.

In 1983 Ms Dowden bought a property in Purves Road, NW10, in her sole name. In 1993 a property was bought in the parties' joint names in Chatsworth Road, NW2. The parties separated in October 2002 and Mr Stack claimed an equal share of the proceeds of Chatsworth Road. The Court of Appeal's decision that the proceeds should be divided 65%/35% in favour of Ms Dowden was upheld by their Lordships. However Baroness Hale, giving judgment with which three of their Lordships concurred, observed that in joint names cases an outcome where the beneficial interests will be held to be different from the parties' legal interests will be very unusual. A full examination of the facts in such cases was likely to lead to disproportionate costs. The burden will be on the party seeking to show that the beneficial interests are different from the legal interests. Each case will turn on its own facts. A non-exhaustive list of potentially relevant factors is set out at paragraph 69 of the judgment. Readers should note paragraph 52 of the judgment, where there is a reminder that the Land Registry TR1 form now contains a box in which the parties can make an express declaration of the beneficial interests (though the transfer is valid whether or not the box is completed). **Stack v Dowden** [2007] UKHL 17.

In a case relating to investment properties in which judgment was given two days after judgment in **Stack v Dowden**, though without reference to that case, Peter Smith J held that the relevant intention of the parties was that at the time of the acquisition. Intention was not to be assessed by reference to later conduct. The property was held in Miss Nishida's sole name and there was no definitive arrangement in relation to the beneficial interest. Mr Simm was entitled to a share in a property which represented his financial contribution to the purchase on resulting trust principles. There was no evidence that the property had been put into Miss Nishida's sole name at the time of purchase so as to conceal it from Mr Simm's wife. The fact that Mr Simm had lied in divorce proceedings some years later by omitting reference to his interest in the property did not rebut the presumption that he acquired a share in the property at the time of purchase. **Slater (Administrator of the estate of Wakako Nishida deceased) v Simm** [2007] EWHC 951 (Ch).

OTHER DEVELOPMENTS

HOME INFORMATION PACKS

Surrounded by much controversy, the Home Information Pack Regulations 2007 SI 992 are due to come into force on 1st June 2007. A HIP must include an index, information about the energy efficiency of the property, a sale statement, title information, additional information for commonhold and leasehold properties, and property searches. Other categories of information may be included: a home condition report, translations, Braille versions, summaries or explanations of pack documents, additional title information, additional information about commonhold and leasehold properties, and additional information about physical condition. There is a transitional period from 1st June to 31st December 2007. Where a person makes public that a property is on the market during the transitional period, that person does not become a responsible person for the purposes of HIP duties if it was put onto the market before the start of the transitional period, provided that marketing was sustained to a reasonable extent prior to 1st June 2007. Under the Home Information Pack (Redress Scheme) Order 2007 SI 560, every estate agent is required to be a member of an approved redress scheme from 1st June 2007 onwards.

SERVICE CHARGE DEMANDS

The Commonhold and Leasehold Reform Act 2002 (Commencement No. 6) (England) Order 2007 SI 1256 brings into force s.153 of the Act in relation to England on 1st October 2007. S.153 inserts s.21B into the Landlord and Tenant Act 1985, which requires that a demand for service charges must be accompanied by a summary of the rights and obligations of the tenant. The content of the summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 SI 1257. Where the first demand for the payment of service charges was served prior to 1st October 2007 in relation to service charges due for payment before that date, the new requirements do not apply to a further demand. However they do apply where a first demand was made prior to 1st October 2007 but the service charges are due for payment on or after that date. Similar provision in relation to administration charges is made in the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 SI 1258, which also come into force on 1st October 2007.

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.

Disclaimer

The information and any commentary on the law contained in this bulletin are provided free of charge for information purposes only. No responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by any member of Thomas More Chambers. The information and commentary does not, and is not intended to, amount to legal advice and the writers do not intend that it should be relied upon. You are strongly advised to obtain specific personal advice from a lawyer about any legal proceedings or matters and not to rely on the information or comments in this bulletin.