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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

CAR PARKING

The appellant management company, which was owned and controlled by the lessees, had attempted to introduce a scheme to regulate the use of congested car parking areas in Barking Industrial Park. At first instance the scheme was declared to be unreasonable, and so in breach of the leases, but it was reinstated on appeal. Principles three and four from *International Drilling Fluids Ltd v Louisville Investment (Uxbridge) Ltd* [1986] Ch 513 were considered and applied (onus is on the tenant to show that consent has been unreasonably withheld; not necessary for landlord to show that conclusions leading to refusal of consent were justified if they were conclusions which might be reached by a reasonable man in the circumstances). Neither of the two points on which the judge relied for striking down the scheme provided a justification for doing so. The failure of the appellant to investigate local rates for overnight parking was irrelevant by itself. The rates liability in respect of the car park was part of the expenditure that fell to be passed on to the lessees by way of the service charge. It did not follow from this that the appellant was not entitled to recover parking charges for overnight parking at a rate exceeding that required to run the scheme. The car parking system on the estate needed regulation and an overnight ban was not unreasonable as such. *Shah & ors v Colvia Management Co Ltd* [2008] EWCA Civ 195.

The appellant was the tenant of business premises in a building used mainly as a multi-storey car park. Three parking spaces on the first floor were included in the original demise. After expiry of the original term the tenant agreed to take a new lease which would involve moving from the second floor to the ground floor, and giving up two car parking spaces in return for two designated spaces on land at the front of the building. A dispute then arose between the landlord and the local authority, which owned the forecourt, about parking on the forecourt. The landlord gave the tenant a letter stating that parking would be allowed for a maximum of 30 minutes at a time. A lease was entered into in 2003 which made no reference to designated spaces at the front of the building. In 2006 the tenant applied to the county court for a new lease under the Landlord and Tenant Act 1954, seeking to include an express right to park two vehicles on the forecourt for no more than 30 minutes at a time. This issue was decided against the tenant and an appeal failed. S.32(3) LTA 1954 permits the

inclusion of rights where the current tenancy includes rights enjoyed by the tenant in connection with the holding, but the 2003 lease contained no rights to external parking. Whatever rights the tenant had were outside the lease and so outside s.32(3). S.35 could not be used to create a right that the tenant had not previously enjoyed. The licence granted in the letter was supported by consideration when regarded as part of the transaction as a whole, but was not intended to be irrevocable. In the circumstances the tenant should be left to rely on the terms of the letter for such rights as it conferred. **The Picture Warehouse Ltd v Cornhill Investments Ltd** [2008] EWHC 45 (QB); [2008] 12 EG 98.

CONSENTS

The Court of Appeal has held that City Inn (Jersey) Ltd does not require the consent of Ten Trinity Square Ltd in order to carry out alterations to Mariner House in the City of London. The original agreement transferring Mariner House had contained provisos that alterations were not to be carried out without the consent of the Transferor. It was held that “Transferor” only meant the Port of London Authority, the original transferor, and did not include its successors in title (which would have included Ten Trinity Square Ltd). The transfer used the expression “Transferor” 28 times. It was clear on some occasions that this could only have meant the PLA. There were a few occasions when the draftsman had expressly referred to “the Transferor and its successors in title”. There was no commercial imperative to read “the Transferor” as “the Transferor and its successors in title” where these words did not appear. There were also references to the “Estate Officer of the Transferor”, which were clearly meant to refer specifically to the PLA’s Estate Officer and not to successors in title. When conveyancers want to include a successor in title they generally use the time-hallowed phrase “which expression shall, where the context permits, include its successors in title.” The phrase had not been used here. The word “Transferor” in the transfer meant the PLA alone. No successor was contemplated. **City Inn (Jersey) Ltd v Ten Trinity Square Ltd** [2008] EWCA Civ 156; [2008] 10 EG 167 (CS).

DEPOSITS

This was a case concerning the application of s.49(2) Law of Property Act 1925 (“where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit”). The claimant had paid the deposit of £216,000 (being 10% of the purchase price) and then failed to secure a mortgage. The defendant served notice after the deadline for completion passed, making time of the essence, and then purported to rescind the contract and forfeit the deposit. The court had already held that an express term of the contract purporting to exclude s.49(2) did not oust jurisdiction to apply that provision. Floyd J considered the circumstances under which it would be equitable to order the return of a deposit and applied **Omar v El Wakil** [2001] EWCA 1090. The starting point was that the deposit should not normally be ordered to be repaid. Where at the material time the purchaser simply could not perform the contract or offer an alternative it would be exceptional to order the return. The economic impact of the breach is something that the court may take into account. The court concluded that even though the vendor had profited by some £366,000 from re-sale in a rising market that there would be no order for the return of the deposit. **Aribisala v St. James Homes (Grosvenor Dock) Ltd** [2008] EWHC 456 (Ch); [2008] 12 EG 96 (CS).

DISABILITY DISCRIMINATION

The Court of Appeal held that a district judge had not erred in refusing an adjournment and making an order for possession on ground 8 of Schedule 2 Housing Act 1988 (eight weeks' rent due), even though there was some doubt as to the defendant's mental capacity at the time of the hearing. There was no evidence that the defendant lacked capacity. The judge was entitled to refuse an adjournment. It was not appropriate to put any gloss on the test of capacity set out in **Masterman-Lister v Brutton & Co (No.1)** [2002] EWCA Civ 1889. No adjournment had been sought on the basis that the rent arrears could be paid, and non-receipt of housing benefit cannot of itself amount to an exceptional circumstance. No question of unlawful discrimination under the Disability Discrimination Act 1995 arose. It is not unlawful to evict a disabled person from premises by lawful process. It could only become unlawful if it involved unjustified discrimination against the disabled person. Submissions based on **Lewisham LBC v Malcolm (DRC intervening)** [2007] EWCA Civ 763 were rejected. The mandatory provisions of s.7(3) HA 1988, which give the landlord a statutory right to an order for possession against a tenant who is more than eight weeks in arrears with the rent, did not apply in **Malcolm**. The court in **Malcolm** had found that the subletting which resulted in the possession claim related to the tenant's disability. In the present case the tenant had never suggested that his disability was a reason for the non-payment of rent. The Court of Appeal noted that the House of Lords was due to hear **Malcolm** in the week commencing 28th April 2008, and commented on the urgent need for clarification of the scope of DDA 1995 in possession proceedings. **S v Floyd (Equality and Human Rights Commission intervening)** [2008] EWCA Civ 201.

EASEMENTS

The claimant and defendant owned adjacent industrial units, and the defendant owned a yard to the rear of the units. The claimant had an easement of access onto "such part of the yard...as is necessary for the purpose of carrying out maintenance repair renewal rebuilding or renewal to the Property..." subject to the minimum disturbance and inconvenience being caused to the owners of the adjoining property. The claimant had planning permission to demolish the existing single-storey building on its land and to construct a five or six storey block containing commercial units and flats. The claimant sought but was refused a declaration that the easement would allow it to enter onto the defendant's yard for the purposes of the proposed works. The terms of the grant indicated that it was intended to be construed strictly and to derogate to the minimum possible extent from the servient owner's enjoyment of its land. The right did not extend to redevelopment by the construction of something different. It was a question of fact whether the proposed development fell within the scope of the right, and on this occasion it did not. **Risegold Ltd v Escala Ltd** [2008] EWHC 21 (Ch); [2008] 12 EG 102.

Wimbledon and Putney Commons are held by the Conservators on the terms of the Wimbledon and Putney Commons Act 1871. The appellants claimed that their house enjoyed the benefit of a prescriptive right of way to and from the public highway on foot and with vehicles over a strip of land forming part of the commons. They relied on uninterrupted user, openly and as of right for a period of more than forty years, and sought to register an easement, which was opposed by the Conservators. It was held that the Conservators had power to grant a right of way. S.35 of the Act placed an important restriction on the Conservators' powers to dispose of any part of the commons: "It shall not be lawful for the

Conservators, except as in this Act expressed, to sell, lease, grant or in any manner dispose of any part of the commons...” However, the grant of an easement would not be incompatible with the Conservators’ overriding duty to conserve the commons as an unenclosed, unbuilt-on open space. The wording of s.35 was reasonably open to an interpretation enabling the Conservators to grant easements in circumstances consistent with the conservation of the commons in their existing state as an open space. **Housden & anor v Conservators of Wimbledon and Putney Commons** [2008] EWCA Civ 2000; [2008] 12 EG 97 (CS).

HOUSING

HHJ Holman had ordered Manchester City Council to convey the freehold of a six bedroom property to Ms. Benjamin pursuant to her right to buy and had dismissed the Council’s claim for possession on Ground 16 (property exceeds tenant’s reasonable requirements). The Council succeeded on appeal. Ms. Benjamin was a woman of “*exemplary character*” who had served in the British Armed Forces for many years and had competed for Britain at the Commonwealth and Olympic Games. The six bedroom property had been her home since childhood. She had inherited the secure tenancy from her mother, who she had nursed through cancer. At the time of the hearing she was a single mother of one child with the “*genuine intention*” and “*real capacity*” to do further good by becoming a full time foster carer. The Court of Appeal held that the judge had erred in holding that alternative accommodation would not be suitable because Ms. Benjamin would lose the time accrued on her right to buy. Pursuant to s.121 HA 1985, she would not lose the time accrued if transferred to a secure tenancy of another Council property. Further the judge had erred in finding it would be unreasonable to order possession. The inference he drew that the Council sought simply to avoid losing housing stock was “*plainly wrong*”. It was clear that the Council wished to make the best use and deployment of existing housing stock. The appeal was allowed and possession ordered for the Council. **Manchester City Council v Benjamin** [2008] EWCA Civ 189.

The appellant had been a secure tenant and had failed to comply with the terms of a suspended order for possession made in August 1997 on the basis of rent arrears. It was common ground that the secure tenancy had terminated in September 1997, so that the appellant had become a tolerated trespasser. A warrant for possession had been suspended on terms in August 2000, but the terms of this order had also been breached. In 2006 the appellant applied to discharge or rescind the August 2000 order under s.85(4) Housing Act 1985. Shortly after making the application he paid off the rent arrears. The application was dismissed and the Court of Appeal dismissed a second appeal. Notwithstanding various additional points argued by counsel for the appellant on the basis of earlier authorities, the CPR and Article 8 ECHR, the court took the view that it was bound by recent caselaw. When the arrears were paid, the order ceased to be enforceable by a warrant for possession but the secure tenancy did not automatically revive. The tenancy could not be revived by an order under s.85(4) HA 1985 because the conditions imposed under s.85(3) HA 1985 had not been complied with. The powers under s.85(2) could not be exercised once a possession order ceases to be enforceable on payment of all monies due thereunder. It was not appropriate to use case management powers under CPR 3.1 to amend the 1997 order. The court was concerned about the state of the law but took the view that it was for a higher tribunal to resolve the difficulties. **Porter v Shepherds Bush Housing Association** [2008] EWCA Civ 196; [2008] 13 EG 148 (CS).

Newham LBC's housing allocation scheme, adopted pursuant to s.167 Housing Act 1996, has been held to be unlawful. The claimant was married with four children and was living in a two bedroom property. The eldest child, aged 15, had been disabled from birth and required full-time care. She suffered from epileptic seizures, screaming fits, vomiting and irregular sleep. The second child, aged 10, suffered from constant tiredness, allergies, incontinence and behavioural problems. The claimant suffered from chronic depression. He had been on the waiting list for a transfer for many years. The Court of Appeal agreed with Blake J that Newham's scheme was unlawful because it did not sufficiently reflect cumulative need. The scheme had two relevant bands. One consisted of applicants at the top of the spectrum of need, where the categories were highly restrictive. The other consisted of all others qualifying for reasonable preference, including the claimant. The claimant's priority in the bidding process was determined solely by the length of time on the housing list. The Code of Guidance clearly contemplated a more nuanced approach than this when it referred to banding applicants into "a number of groups reflecting different levels of housing need." Among those who fall into s.167(2), some will have greater needs than others. A local authority must take this into account and reflect it rationally in the determination of priorities under its scheme. Cases of multiple claims to priority on the basis of both overcrowding and medical or social need, or overcrowding and medical or social need of more than one person in the household, had to be capable of being considered a greater case of need than a single factor applying to a single person. **R (Ahmad) v Newham LBC** [2008] EWCA Civ 140.

LEASEHOLD VALUATION TRIBUNAL: COSTS

Following service of notices and counter-notices the respondents had applied to the LVT under s.84(3) Commonhold and Leasehold Reform Act 2002 for determinations that they were on the relevant date entitled to acquire the right to manage the premises. The appellants then identified failures to comply with various mandatory conditions, and alleged that they had not been validly served with the claim notices. At the hearing the respondents conceded that the claim notices had not been properly served and the LVT held that it had no jurisdiction. The appellants then sought their costs, which they were awarded in part on appeal to the Lands Tribunal. Both parties were in an unmeritorious position. The appellants had clearly been served with the claim notices, and the respondents had only conceded that the notices had not been served for tactical reasons. The appellants could not contend that the claim notice had been "given" for the purposes of s.88(1) (costs), yet also say that it was not "given" for the purposes of s.79(1) (notice of claim to acquire right). However the respondents were estopped from denying the appellants' right to costs from the date of the reply onwards, having maintained until the first LVT hearing that the claim notices were valid and properly served. **Plintal SA & anor v 36-48A Edgewood Drive RTM Company Ltd & anor** [2008] EWLands LRX/16/2007.

LEASES: VARIATION

The Lands Tribunal declined to interfere with a decision of the LVT varying a lease on a limited basis under s.35 Landlord and Tenant Act 1987. S.35 allows variation of a lease where it fails to make satisfactory provision for repairs and maintenance, among other things. The appellant was the tenant of the upper flat in a Victorian terraced house divided into two flats. The intended arrangement was that the two flats should be maintained both

internally and externally by the respective tenants. The appellant had applied to the LVT to vary her lease because of difficulties she had encountered when trying to sell it. She sought to remove the obligation on the tenant to maintain the exterior of the flat, to impose that obligation on the landlord, and to add a service charge regime. The LVT held that although the proposed rewriting might be desirable, it had no power to deal with such a sweeping variation in the context of s.35. The President of the Lands Tribunal agreed. A lease does not fail to make satisfactory provision simply because it could have been better or more explicitly drafted. The need to imply a term is not necessarily an indication that the lease fails to make satisfactory provision. **Gianfrancesco v Haughton** [2008] EWLands LRX/10/2007.

RECTIFICATION

Rectification under s.2 Law of Property (Miscellaneous Provisions) Act 1989 (a disposition of an interest in land can only be in writing and only by incorporating all the terms which the parties have agreed) is only available where there has been a mistake of fact in recording a written agreement and not a mistake of law as to the efficacy of an incomplete agreement. This appeal concerned the availability of rectification under s.2(4) LP(MP)A 1989 where the written document did not contain all the express terms of the contract. Morgan J meticulously reviewed the availability of rectification in previous case law and concluded that there were no special rules concerning rectification in s.2 cases. He identified two types of case. The first is where by reason of mistake in the recording of the agreement the parties failed to include an express term. Rectification in such cases is no more than, “setting the record straight” and ought be allowed. The second type of case will involve a situation where the parties, for example, agree five express terms, but agree only to record four of them in the written agreement. There is no mistake in the way the transaction is expressed or recorded. There may be a mistake of law, in that the parties do not realise the agreement is not a binding contract under s.2. In that second type of situation rectification will not be available. There is no need to set the record straight where the form of the agreement has been expressly agreed. The appeal fell into the second type of case and the appeal was therefore dismissed. **Oun v Ahmad** [2008] EWHC 545 (Ch); [2008] 13 EG 149 (CS).

RESTRICTIVE COVENANTS

The applicants sought the discharge or modification of a restrictive covenant burdening land at their home, so as to allow the construction of a conservatory. The covenant had the effect of restricting any building on the land to the private dwelling house and garages in accordance with detailed planning consent granted for the development of the estate as a whole in about 1988. The applicants argued that the covenant was now obsolete, that the proposed user was reasonable, there would be no material impact on visual amenity and no injury to the objectors. The refusal to grant consent impeded the reasonable use of the land. The objectors argued that the covenant being only recently imposed was not obsolete, the ability to control development and protect the visual amenity of the area was of substantial practical value and advantage to them, and that discharge or modification in this instance would create a precedent (the thin end of the wedge) for further applications from occupiers of properties on the estate. It was held that the covenant was not obsolete. Although many conservatories had been permitted, the restriction was still capable of preventing development that might have a material effect on visual amenity. However the application succeeded on the basis that preventing the erection of the conservatory impeded

a reasonable user of the land. The covenant was modified in the terms suggested by the applicants. **O'Brien & anor** [2008] EWLands LP/8/2005.

RIGHT OF FIRST REFUSAL

The claimant challenged two disposals made by the landlord of Dartmouth Court, London SE10, on the basis that the tenants had the right to first refusal under Part I Landlord and Tenant Act 1987. The two disputed disposals were a transfer of three garages, the plant room, the caretaker's office and a substation; and secondly a lease of the airspace above the roof, the lightwell, the basement rooms and a small area of land adjoining the rear wall of the main building. The claim succeeded in relation to the lease. The premises affected by a disposal within the meaning of ss.1(1) and 4(1) were not merely the property of which the landlord was disposing. The relevant premises were to be ascertained in an objective way, disregarding the disposal in question. Here the premises consisted of the entire block of flats. S.1(2) had to be applied to see whether the premises were those to which Part I applied, which they were. It would defeat the purpose of Part I if, by defining the relevant premises as the area disposed of, the landlord could dispose of common parts separately from any flat without the qualifying tenants being able to acquire them. For the purposes of s.1(2)(a) the word "building" could include appurtenances. What was and was not appurtenant was a question of fact and degree, and reflected the definition of "appurtenant premises" in s.4(4). The transfer did not attract Part I rights because the items disposed of were not appurtenant to the main building. However the lease did attract Part I rights because all the items disposed of could be regarded as forming part of the main building, including the airspace. **Dartmouth Court Blackheath Ltd v Berisworth Ltd** [2008] EWHC 350 (Ch); [2008] 09 EG 200 (CS).

RIGHTS TO LIGHT

The decision of Lewison J in **RHJ Ltd v FT Patten (Holdings) Ltd & anor** (summarised in the July 2007 bulletin) has been upheld by the Court of Appeal (at [2008] EWCA Civ 151; [2008] 11 EG 93 (CS)). The court had to consider the correct interpretation and application of s.3 Prescription Act 1932. That section provides for one way of preventing the acquisition of a right to light, namely if the enjoyment of light was by virtue of a consent or agreement. The question in the appeal was what was necessary to constitute such consent or agreement. The judge had been correct to hold that a provision in a lease of the claimant's land did amount to such a consent or agreement for the purposes of s.3. It was not necessary for the clause to use the word "light", nor was it necessary for the clause to provide that the enjoyment of light is "permissive." The clause must make it clear that the enjoyment of light is not absolute and indefeasible. The question whether any particular document satisfies the exception in s.3 must depend on the true construction of the document, in the relevant surrounding circumstances, taking the document as a whole, though focussing on the part of the text which is said to constitute the agreement or consent. The judge had reached the right conclusion for the right reasons.

OTHER DEVELOPMENTS

ENERGY PERFORMANCE CERTIFICATES

The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2008 SI 647, coming into force on 6th April 2008, amend the 2007 Regulations. Regulations 2(2) and 2(4) amend regulations 14 and 36 of the 2007 Regulations to provide access to the register of energy performance certificates and associated documents for local authorities, and to allow disclosures of the information contained in the register by and to local authorities. Regulation 2(5) inserts transitional arrangements which last until a building is taken off the market or until 1st October 2008, whichever is sooner. For future phases, no energy performance certificate need be made available for buildings which are on the market at the date of commencement of the requirement so long as they are continuously marketed. An exemption also applies if buildings are put back on the market following withdrawal or rejection of an offer within 28 days. An energy performance certificate must be requested when contracts are entered into for a sale or rental of such a building and supplied to the new owner when received. There are some other minor amendments to the 2007 regulations.

HOUSING BENEFIT

A variety of amendments are made to the housing benefit scheme by the following statutory instruments:

- The Housing Benefit (Local Housing Allowance and Information Sharing) Amendment Regulations 2007 SI 2868.
- The Housing Benefit (State Pension Credit) (Local Housing Allowance and Information Sharing) Amendment Regulations 2007 SI 2869.
- The Housing Benefit (Local Housing Allowance, Miscellaneous and Consequential) Amendment Regulations 2007 SI 2870.
- The Rent Officers (Housing Benefit Functions) Amendment Order 2007 SI 2871.
- The Housing Benefit (Local Housing Allowance, Information Sharing and Miscellaneous) Amendment Regulations 2008 SI 586.
- The Rent Officers (Housing Benefit Functions) Amendment Order 2008 SI 587.

These regulations collectively provide for the national rollout of Local Housing Allowance on 7th April 2008, and make some other changes. More information is available at: www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/On_a_low_income (click on Local Housing Allowance).

RIGHTS OF WAY

The Public Rights of Way (Combined Orders) (England) Regulations 2008 SI 442 come into force on 6th April 2008. They apply s.53A of the Wildlife and Countryside Act 1981 to the types of Order listed in Regulation 3. Before the coming into force of these Regulations the

required modifications to the definitive maps and statements could only be effected by means of a separate modification Order.

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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