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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

CONSTRUCTIVE TRUSTS

A property had been purchased in the respondent's sole name but at trial it had been established that both parties had a beneficial interest in it. The parties had cohabited at the property for less than a year between 1979 and 1980, and the respondent had thereafter lived elsewhere. On appeal the Court of Appeal had regard to **Stack v Dowden** [2007] UKHL 17. Giving the judgment of the court, Lloyd LJ noted that if it is accepted that both parties had a beneficial interest, there need not necessarily be any difference according to whether the legal estate is in one or two names. The court's enquiry is for what was intended between the parties, or if that cannot be identified directly, what they must be taken from their conduct to have intended; it is not for that which the court considers fair. The judge had not erred in failing to consider various post-acquisition matters which were not indicative of any agreement between the parties, past or later. However on the particular facts, which were unusual, the Respondent was estopped from obtaining an order for sale without the consent of the Appellant. **Holman v Howes** [2007] EWCA Civ 877.

HOUSING

The Court of Appeal dismissed Mrs Ahmed's appeal against a decision that she should not have refused an offer of accommodation. Mrs Ahmed had been harassed and threatened when she had visited the property with her children to view it, and refused the offer because of a fear of further harassment and violence. The Court of Appeal considered the meaning of the reasonableness test in s.193(7F) Housing Act 1996 (whether it is reasonable for an applicant to accept an offer of accommodation). The test set out by Ward LJ in **Slater v Lewisham LBC** [1996] HLR 3 (summarised in the April 2006 bulletin) was considered and approved. The test of reasonableness is not subjective. The housing authority must consider factors personal to the applicant including her own hopes and fears, but a belief may be genuinely held without being a reasonable belief within the meaning of the subsection. The genuineness of a belief in the existence of a state of affairs is not conclusive. If the evidence available to a right thinking local authority entitles it to consider that the belief which led to the decision not to accept was objectively unreasonable, it is entitled to be satisfied that it

was reasonable for the appellant to accept the offer. **Ahmed v Leicester City Council** [2007] EWCA Civ 843.

The landlord sought to argue on appeal that the tenants were not protected under the Rent Act because there was a gap between their occupation of room 74 in the property and the start of their occupation of room 79, so that they fell outside the transitional protection of s.34(1)(b) Housing Act 1988. The point had not been pleaded and it had not been dealt with in evidence. It was first raised by counsel for the landlord at the start of his closing submissions. The Court of Appeal held that it was well within the ambit of the judge's discretion to refuse to allow the gap point to be raised at that stage. The evidence on the point was slender in any event. **Santos & anor v Compatriot Holdings Ltd** [2007] EWCA Civ 863.

NUISANCE

Residents living in the vicinity of Mogden Sewage Treatment Works in Isleworth, Middlesex, brought proceedings against Thames Water Utilities Ltd which were founded in negligence, nuisance and under the Human Rights Act 1998 (Article 8 and Article 1 of Protocol 1). On a hearing of preliminary issues it was held that the Claimants were seeking to enforce duties which arose under s.94(1)(b) Water Industry Act 1991. This would preclude them from bringing a claim in nuisance in the absence of allegations of negligence. However in the present case there were some causes of action in nuisance based on negligence, and in negligence, that could exist alongside the duties under the WIA. It was also possible that there were causes of action based in negligence and the HRA 1998. **Marcic v Thames Water Utilities Ltd** [2004] AC 42 was considered in detail. In relation to damages, an award for diminution of capital values could not be made because the damage was not permanent. Damage for nuisance caused to a property by smells and mosquitoes was to be based in diminution in letting value. A sum by reference to physical inconvenience and distress was not the appropriate measure, but general loss of amenity could be an appropriate measure where ascertainment of diminution in letting value was not practicable. Where a court awards damages for nuisance to those with a proprietary interest those damages will usually afford just satisfaction to partners and children, but not always. It was possible for separate damages to be awarded under the HRA 1998 if these were necessary for just satisfaction. **Dobson & ors v Thames Water Utilities Ltd (Ofwat intervening)** [2007] EWHC 2021 (TCC).

RENT

S.13(1) Housing Act 1988 sets out a procedure by which a landlord can increase the rent under an assured periodic tenancy. S.13(1)(b) provides that s.13 does not apply to a tenancy "...in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period..." The Court of Appeal has held that this excludes from s.13 not only cases where the amount of the increase in rent is set by the tenancy agreement, but also cases where the tenancy agreement merely provides a machinery for increasing the rent. This was the proper textual construction of s.13 and also made sense on a purposive construction. It was difficult to see why Parliament should have drawn a distinction between different types of contractual provisions for increases in rent. The jurisdiction of the rent assessment

committee was entirely statutory so it was not possible for the parties to confer jurisdiction on the committee by consent, estoppel or otherwise. **Contour Homes Ltd v Rowen** [2007] EWCA Civ 842.

REPAIRS

Business premises had been sublet and were in disrepair at the end of the term. By s.18(1) Landlord and Tenant Act 1927, damages for breach of a covenant to keep or put premises in repair during or at the end of a lease shall not exceed the amount by which the value of the reversion has been diminished. The subtenant had been given a letter by the tenant's parent company limiting the subtenant's repairing obligations to keeping the property wind and water tight and stating that if the landlord required repairs in excess of this these would be at the expense of the parent company. The landlord did not know of this letter. The Court of Appeal agreed that the judge was entitled to conclude that the letter did not adversely affect the value of the reversion. The existence of an agreement between the tenant's parent company and the subtenant could have no effect on the subtenant's obligations to repair under the sublease. At worst the effect of the letter was neutral. A reasonable purchaser would not worry about the uncertainty created by the letter. **Lyndendown Ltd v Vitamol Ltd** [2007] EWCA Civ 826; [2007] 29 EG 142 (CS).

RIGHTS OF WAY

The Court of Appeal upheld a decision that the defendants had acquired a right of way over a piece of land known as the blue land. In **Pwillback Colliery Co Ltd v Woodman** [1915] AC 634, Lord Parker noted the implication of rights of way by necessity, but went on to hold that there were two other classes of implied grants. The first, which did not apply in the present case, is where the implication arose because the right in question was necessary for the enjoyment of some other right expressly granted. The second applied where the grant was necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. It was plain that the parties at the time of the 1976 conveyance intended that the building conveyed should be used for the repair and servicing of motor vehicles, as it had been before. It was necessary for the fulfilment of this common intention that at least in the case of larger vehicles the vehicle could be driven straight in and out of the garage across at least some of the blue land. This was fair and square within the principle in **Pwillback Colliery. Davies & anor v Bramwell & ors** [2007] EWCA Civ 821.

SERVICE CHARGES

The Lands Tribunal considered procedural issues under ss.20 and 20B Landlord and Tenant Act 1985, in particular in relation to service of notices. The tenant lived in a particular block of flats and contractors had been asked to quote for works to four blocks. The Lands Tribunal held that "the works" in s.20(4)(a) LTA 1985 meant the qualifying works, which were the works to the tenant's own block of flats. The landlord should have provided to the tenant copies of all of the estimates that it had obtained for the works to the tenant's own block, and it had failed to do so. The landlord's own summary had been provided, but LTA

1985 requires that the landlord should copy the actual estimates required, and not just provide a summary of them. The landlord had also failed to comply with the requirements of s.20B LTA 1985 in that the s.20B notice did not show what costs had been incurred by the date of the notice. The landlord's appeal was dismissed and the costs recoverable from the tenant limited to those under s.20(2) LTA 1985. *Islington LBC v Abdel-Malek* [2007] EWLands LRX/90/2006.

OTHER DEVELOPMENTS

COMMONS

There are a number of recent statutory instruments relating to commons. They all come into force on 1st October 2007 and are:

- The Commons Registration (General) (Amendment) (England) (No. 2) Regulations 2007 SI 2404. These revoke, in relation to England, provisions of the Commons Registration (General) Regulations 1966 relating to official searches of the commons registers and certificates of search, and make a related amendment to those Regulations. From 1st August 2007 it has instead been possible to search the commons registers by means of Form CON290 Optional Enquiries of Local Authority (2007 Edition).
- The Commons Act 2006 (Commencement No. 3, Transitional Provisions and Savings) (England) Order 2007 SI 2584, which brings the following provisions of the Commons Act 2006 into force in relation to England: ss.16 and 17, which make provision about the deregistration and exchange of land registered as common land or as a town or village green; ss.38 to 43, and ss.44 and Schedule 4 (insofar as they are not already in force), which make provision about works on common land; and ss. 48 and 53 and Schedule 6 (both partially), which contain repeals. The Order also contains transitional and saving provisions.
- The Works on Common Land (Exemptions) (England) Order 2007 SI 2587 which applies in relation to England only. This Order prescribes exemptions to the prohibition in s.38(1) Commons Act 2006 on the carrying out, without the consent of the Secretary of State, of any restricted works on land to which that section applies. Exemptions include the erection of temporary fencing to restrict the movement of grazing stock, to allow the recovery of vegetation, and for nature conservation; and the installation of bollards or stones to restrict vehicular access. Where works are carried out pursuant to an exemption contained in this Order, there are requirements for a notice to be displayed at the site of the works and for notification to be given to the Secretary of State. The exemptions apply only in relation to registered common land.
- The Works on Common Land, etc. (Procedure) (England) Regulations 2007 SI 2588 relate to England only and prescribe the procedure for applications to the Secretary of State under s.38 Commons Act 2006 for consent to carry out restricted works on common land, and certain related types of applications. They enable the Secretary of State to appoint a person to exercise his functions in relation to such applications

(regulation 3). They include provisions about: making and publicising applications (regulations 5, 7-8, 18, 21(1) and 23(1)); making representations in relation to applications (regulation 9); and the management and determination of applications, including provision for holding site inspections, hearings or inquiries in appropriate cases (regulations 6, 10-17 and 19).

- The Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007 SI 2589 apply in relation to England only. They prescribe the procedure for applications to the Secretary of State under s.16 Commons Act 2006 for the deregistration, or the deregistration and exchange, of areas of registered common land. They enable the Secretary of State to appoint a person to exercise his functions in relation to such applications (regulation 3). They include provisions about: making and publicising applications (regulations 5(1)-(2) and 7-8); making representations in relation to applications (regulation 9); the management and determination of applications, including provision for holding site inspections, hearings or inquiries in appropriate cases (regulations 6 and 10-18); and the fee payable by applicants (regulation 5(3)).

DISABILITY

The Disability Discrimination Act 1995 (Amendment etc.) (General Qualifications Bodies) (Alteration of Premises and Enforcement) Regulations 2007 SI 2405 insert new provisions into Part 4 of the Disability Discrimination Act 1995 in relation to the enforcement of the duties placed on general qualifications bodies. General qualifications bodies are authorities or bodies which can confer relevant qualifications. The Regulations make provision, among other things, for cases in which premises that are required to be altered are occupied by the general qualifications body under a lease. In these circumstances the lessor can be joined as a party to any court proceedings. There is also provision in relation to consent from the lessor to alterations that the general qualifications body is required to make to the premises for the purposes of section 31AD DDA 1995. The Regulations came into force on 1st September 2007.

HIGHWAYS

S.31A(1) Highways Act 1980 requires the appropriate council, as defined in s.31(7) of the 1980 Act, to keep a register containing information relating to maps and statements deposited and declarations lodged with that council, under s.31(6) of the 1980 Act, relating to dedicated highways. The Dedicated Highways (Registers under Section 31A of the Highways Act 1980) (England) Regulations 2007 SI 2334 make provision for the information which is to be included in a register (regulation 3) and for the manner in which the register is to be kept (regulation 4). The Regulations also provide for the circumstances in which an entry may be removed from the register (regulation 5). The Regulations come into force on 1st October 2007. A related piece of legislation is the Countryside and Rights of Way Act 2000 (Commencement No. 13) Order 2007 SI 2335, which brings into force on 1st October 2007, in relation to England, para 4 of Schedule 6 to the 2000 Act and s.57 of that Act in so far as it relates to that paragraph. Para 4 of Schedule 6 to the 2000 Act inserts s.31A Highways Act 1980 which makes provision relating to registers to be kept by local

authorities in relation to maps, statements and declarations deposited or lodged under s.31(6) of the 1980 Act concerning dedicated highways.

The Countryside and Rights of Way Act 2000 (Commencement No. 14) Order 2007 SI 2595 brings into force on 1st October 2007, in relation to England, the remainder of s.69 of the Countryside and Rights of Way Act 2000. S.69(2) is already in force. S.69(1) of the 2000 Act inserts subsections (2A) and (2B) in s.147 of the Highways Act 1980. S.147(2A) requires a competent authority exercising their powers under s.147(2) (in considering whether to authorise the erection of stiles, gates or other works) to have regard to the needs of persons with mobility problems. S.147(2B) permits the Secretary of State to issue guidance to competent authorities as to matters to be taken into account by competent authorities when exercising their powers under s.147(2), and requires those authorities to have regard to any such guidance. S.69(3) of the 2000 Act inserts a new s.147ZA into the 1980 Act which enables competent authorities to enter into agreements with owners, lessees or occupiers of land for the replacement or improvement of stiles, gates or other structures so as to result in a structure that is safer or more convenient for use by persons with mobility problems.

HOME INFORMATION PACKS

The Housing Act 2004 (Commencement No. 9) (England and Wales) Order 2007 SI 2471 brings Part 5 of (and Schedule 8 to) the Housing Act 2004 into force in England and Wales on 10th September 2007. These provisions relate to home information packs. They are being brought into force in relation to residential properties with three bedrooms, other than properties to which Reg 17C (which imposes minimum energy performance requirements) of the Building Regulations 2000 applies. Part 5 of the Housing Act 2004 already applies in relation to properties with four bedrooms or more by virtue of the Housing Act 2004 (Commencement No. 8) (England and Wales) Order 2007 SI 1668. Once in force, the provisions will apply to a residential property with three bedrooms unless it is excepted under Part 6 of the Home Information Pack (No.2) Regulations 2007.

HOUSING

A Performance Improvement Toolkit for housing management was published on 11th September 2007. It is intended for anti-social behaviour managers and others seeking to develop performance measures in order to improve their anti-social behaviour services. For more information see www.communities.gov.uk

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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