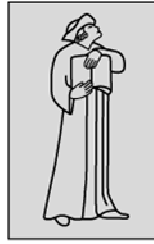


THOMAS · MORE · CHAMBERS



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

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CASE LAW UPDATE

AGRICULTURAL TENANCIES

There is a statutory right to succeed to an agricultural tenancy where a person is an eligible person under s.36 Agricultural Holdings Act 1986, or where they should be treated as such a person pursuant to s.41 of that Act. One of the factors to be satisfied under s.36 is whether, in the seven years ending with the death of the tenant, the potential successor's only or principal source of livelihood has derived from his agricultural work on the holding throughout a continuous period of five years, or two or more discontinuous periods of not less than five years. For the purposes of s.41 this test must be satisfied to a material extent. "Material" means substantial in terms of time and important in terms of value. Percentages of fulfilment are a useful guide to put the facts of finance or time in perspective and to help to judge their weight, but there is no mathematical cut-off point. ***Thomson v (1) Church Commissioners for England (2) Agricultural Lands Tribunal Northern Area*** [2006] EWHC 1773 (Admin).

BUILDING CONTRACTS

Letters of intent are often used in the construction industry as a way of putting off potentially difficult questions as to the final make-up of a contract. However they are not necessarily wrong in principle. They can be appropriate where (i) the contract workscope and price are agreed or there is a clear mechanism for them to be agreed; (ii) the contract terms are (or are very likely to be) agreed; (iii) the start and finish dates and the contract programme are broadly agreed; (iv) there are good reasons to start work in advance of the finalisation of all the contract documents. It would only have been appropriate for the Defendants to advise the Claimants not to enter into the letter of intent if they believed that the Claimants should not do so. Additionally, it was not negligent of an architect to recommend the use of the JCT Minor Works Form (MW 98, recommended for works with a value of up to £100,000) for a project where the works had a value of around £500,000. The recommendation as to which standard form of building contract should be used for a

particular project will usually come down to the consultant's personal preference and his previous experience. Unless there is a very good reason why it should not be used on a particular project, this is something which will generally benefit the parties. **Cunningham & ors v Collett and Farmer** [2006] EWHC 1771 (TCC).

DISREPAIR

In a claim by a long lessee of a top floor residential flat for damages for disrepair of the lessor's covenant to repair the roof, the court considered the approach to the assessment of damages. The tariff used in **Wallace v Manchester City Council** [1983] 3 EGLR 3, where the tenant was a secure tenant of the local authority, is not applicable in all cases regardless of the nature and value of the property. It is perfectly acceptable to use a notional rack rent as a means of assessing reduction in value even where the property is lived in rather than held as an investment. If the property became uninhabitable then either full rental value or the cost of renting alternative accommodation could be the measure of the loss. It is not necessary to provide expert valuation evidence. In the present case the claimant lessee was well able to carry out his own researches into the rental values of equivalent properties and the judge was entitled to accept his figures in the absence of evidence to the contrary. In assessing damages the court should not forget that the landlord should have had a reasonable period following notice to carry out repairs before liability for damages for breach of covenant would arise. **Earle v Charalambous** [2006] EWCA Civ 1090.

The claimant tenant occupied business premises in a basement and ground floor under a 2000 lease. In 2003 the basement showed signs of damp and the fault was identified as a defective damp-proof course. In 2004 the premises became unusable and the tenant had to move out. It was held that the defendant landlord was not liable to carry out works to remedy the defect. A landlord's obligation to repair arose when the subject of the covenant deteriorated from a previous condition so that it fell below the standard to be expected by a reasonable tenant. It would only be in a state of disrepair if it could be shown that the structure had previously been in a better condition. There was no implied term that the landlord was obliged to put the structure in good condition. The landlord had a right but not an obligation to repair. **Janet Reger International Ltd v Tiree Ltd** [2006] EWHC 1743 (Ch); [2006] 30 EG 102 (CS).

HOUSING

Where a local authority owes duties under the Housing Act 1996 to a child approaching the age of 18, it is not entitled to delay those duties so that the child reaches the age of 18 and is no longer in priority need. If the original decision was unlawful because it held that the child was not in priority need, the review decision cannot state that the appellant is now 18 and so not in priority need. The review decision maker should have held that the original decision was unlawful and made a decision that would have restored to the appellant the rights she would have had if the original decision had been lawful. It is not legitimate to take the view that enquiries normally last 28 days and because a person will be 18 before the end of that period, that person has no priority need. Family mediation is desirable but the time that it takes should not be used to deprive a child of a right to housing that she would have had without mediation. If an authority are of the view that a child genuinely has no place to go unless a mediation can sort matters out, and a mediation cannot take place without

depriving the child of a right it would otherwise have had, then the authority has to take the view that its full duty must be performed, and use mediation in order to fulfil that duty. There is no power to defer making inquiries and making a decision pursuant to s.184 HA 1996 on the ground that there is a pending mediation. **Robinson v Hammersmith & Fulham LBC** [2006] EWCA Civ 1122.

S.102 Housing Act 1980 sets out the ways in which a secure tenancy may be varied, namely by agreement between the landlord and the tenant; in accordance with a provision in the lease; and by service of notice under the procedure in s.103. It provides that the terms of a secure tenancy may not otherwise be varied. Basildon District Council had inserted a clause into its secure tenancy agreements providing that it would only change the terms of the agreements if a majority of the Tenants' Representatives agreed to this at a special meeting where at least 25% of the Representatives were present. McCombe J held that this was an unlawful fetter on the Council's statutory powers of variation and so ineffective and void. There could not be any legitimate expectation that the procedure in the clause would be followed, as the clause was void from the outset. **Kilby v Basildon District Council** [2006] EWHC 1892 (Admin).

The respondent tenant held a Rent Act 1977 tenancy. The premises became uninhabitable due to disrepair and the tenant withheld the rent and moved out. Possession proceedings were compromised by a Tomlin order pursuant to which the landlord agreed to carry out specified work to the satisfaction of an independent expert, whereupon the tenant would again become liable for the rent. The tenant was dissatisfied with the work done and did not return to live in the flat. He continued to withhold the rent. New possession proceedings were issued for rent arrears and on the ground that as the tenant had ceased to occupy the premises he was no longer a statutory tenant. The judge held that the tenant was still a statutory tenant. The Court of Appeal agreed. The agreement in the Tomlin order could not be treated as a bare statement of law but must be clothed with its underlying facts. The agreement in the Tomlin order settled the issue of the tenant's intention to return to the flat once it became habitable. Although the landlord had evidence that the tenant had not occupied the flat as his residence since 1994, by the agreement in the Tomlin order it had waived its right to contend for that as a conclusion of law. **The Carphone Warehouse UK Ltd v Malekout** [2006] EWCA Civ 767; [2006] 31 EG 90.

LEASEHOLD ENFRANCHISEMENT

A barrister was not negligent in failing to advise service of a second, protective, notice to acquire a freehold where it would have been difficult to frame a valid second notice and it would in any event have undermined the first notice, even if served without prejudice. Two different experienced leading counsel had attempted to draft a second, protective notice and it was by no means obvious how this should have been done. It had not been demonstrated that service of a second notice was a reasonably practical possibility which would have protected the claimant's overall position. In a field where an adviser is only negligent if his advice falls outside the range of reasonable competence, negligent conduct may be expected to be readily and easily identifiable by fellow professionals. **Jassi v Gallagher** [2006] EWCA Civ 1065.

MORTGAGES

A mortgaged property was sold when the respondent fell into arrears with his repayments. There was a shortfall on sale and in open correspondence the appellant offered to waive part of the debt if the respondent agreed to make a substantial lump sum payment. The respondent wrote to say that he would pay the outstanding balance once his financial situation had stabilised. He offered in a later open letter to pay £500 as a final settlement. There was no further correspondence and no payment was made. The appellant eventually brought proceedings for the outstanding sum with interest. The respondent argued that the appellant was out of time under s.20 Limitation Act 1980, but the House of Lords agreed with the appellant's contention that the respondent's letters were an acknowledgement of the claim which would start time running afresh pursuant to ss.29(5) and 30. Acknowledgements were not confined to admissions of debt that were indisputable as to quantum as well as liability. Acknowledgements would attract without prejudice privilege where the extent of the liability was genuinely in dispute and the parties were attempting to settle that difference. However the rule did not apply to apparently open communications which were discussing repayment of an admitted liability rather than attempting to negotiate and compromise a disputed liability. **Bradford & Bingley plc v Rashid** [2006] UKHL 37; [2006] 29 EG 132 (CS).

ORDERS FOR SALE

Time does not start to run for the purposes of s.20(1) Limitation Act 1980 when a charging order is made under s.313 Insolvency Act 1986. A right to enforce a security may precede or follow the right to receive the sums secured. In the case of charges imposed by orders made under s.313 the right to receive cannot predate an order for the sale of the property. It follows that time does not start to run until after sale. **Gotham v Doodes** [2006] EWCA Civ 1080.

A court in a division of the High Court other than the Chancery Division has jurisdiction to make an order for sale to enforce a charging order. Although paragraph 4.2 of the practice direction to CPR 73 suggests that the claim must be started in the Chancery Division, CPR 73.10 suggests otherwise, and the rule takes precedence over the practice direction. The fact that there was an ongoing arbitration between the parties did not mean that an order for sale should not be made. There are a number of authorities which make it clear that a party who is ordered to make a payment pursuant to an adjudicator's decision cannot seek to avoid making such payment by setting off other claims that it has or might have. In ordering that there should be a sale, the judge took into account that the properties were not the matrimonial home, but rather investment properties; that the Defendant was in contumelious default; that the judgment debt would not be paid without a sale; and that the amount of the judgment debt was approaching the value of the property. **Harlow & Milner Ltd v Teasdale** [2006] EWHC 1708 (TCC).

RIGHTS OF WAY

Collins J applied the decision in **R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs; R (Dr Leslie Drain) v Same** [2005] EWCA Civ 1597 in quashing a decision of an inspector relating to a right of way. **Godmanchester** had established that the proviso in s.31(1) Highways Act 1980 (evidence of a lack of intention to dedicate) is concerned with intention and proof, not with communication of intention to users of the way in question. Where there has been little use of the way and/or little knowledge of it by the landowner, it may be that a private “overt” act would suffice, because there would be little or no reason for the landowner to protest to users and/or other third parties. The inspector’s approach was flawed in that he had disregarded or given insufficient weight to evidence from the landowner about a lack of intention to dedicate. There was evidence of interruption of use of the way which would support the evidence of intention. **Norman & Bird v Secretary of State for the Environment, Food and Rural Affairs** [2006] EWHC 1881 (Admin).

RIGHT TO LIGHT

Not every interference with the light entering a building will constitute a nuisance, even if the building undoubtedly has a right to ancient lights. Generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, or for the beneficial use and occupation of the house if it is a warehouse, shop or other place of business. The 50/50 rule (by which a room may be regarded as adequately lit if 50% or more of its area receives not less than one lumen of light at table level) is not a rule of law but a very useful guide which will apply to the majority of cases concerning infringements of rights to light, especially where the infringement relates to the living room of a dwelling house. The question is not whether other people are prepared to live locally in conditions with significantly less available daylight. As to whether an injunction should be granted, whatever may be the position in cases of other wrongful conduct, in the case of an infringement of a right to light it could not be said that refusing an injunction and awarding damages in lieu was an exceptional course. The Claimant would be awarded damages. **Regan v Paul Properties DPF No 1 Ltd & ors** [2006] EWHC 1941 (Ch).

VALUATIONS

The court had to consider the value of a lease in order to award damages for professional negligence where the defendant had failed to advise the claimant to seek relief from forfeiture, which it would almost certainly have obtained. The lease was of a golf course, and the normal method of valuing a trading property of this type would be the profits basis, supplemented by cross referencing to comparables where possible. This was not possible because of the lack of trading information. It was not appropriate to try to construct a hypothetical profit and loss account. Instead, the best method of assessing value was to seek to identify comparable golf courses and derive a value from them. The fact that only 43 years of the term was left to run did not mean that the lease had only nominal value. The lost lease only represented part of the total golf course but it was more appropriate to value it as part of the whole than as a separate entity. **Vision Golf Limited v Weightmans (a firm)** [2006] EWHC 1766 (Ch).

OTHER DEVELOPMENTS

COMMONS ACT 2006

The Commons Act 2006 received Royal Assent on 19th July 2006. There are around 572,000 hectares of common land in England and Wales. Part 1 of the Act provides for commons registration authorities to continue to keep registers of common land and town or village greens, and to permit amendments to the register in accordance with the provisions in Part 1. These provisions replace and are intended to improve the registration system under the Commons Registration Act 1965, though the existing registers remain. Part 2 enables the appropriate national authority to establish commons councils with functions related to the management of agricultural activities, vegetation, and the exercise of rights of common on common land. Part 3 contains provision to prohibit the carrying out of works on common land without appropriate consents, and provides how consent may be obtained. It replaces s.194 of the Law of Property Act 1925, which is repealed. Parts 4 and 5 contain miscellaneous and general provisions.

SOCIAL LANDLORDS AND TRAVELLERS

The Social Landlords (Permissible Additional Purposes) (England) Order 2006 SI 1968 came into force on 24th August 2006. Section 2 of the Housing Act 1996 specifies the three types of body that are eligible for registration as social landlords, and the conditions of eligibility. Certain social landlords are restricted to limited purposes or objects. The regulations add to the list of purposes or objects the provision, construction, improvement or management of caravan sites for gypsies and travellers.

Note: Where cases are given a universal reference but no other reported reference a transcript can be found in full at www.bailii.org

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