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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

BUSINESS TENANCIES

A business tenancy was terminated under s.25 LTA 1954 and the tenant commenced proceedings for the grant of a new tenancy. The landlord did not oppose the grant of a new tenancy, and filed and served an acknowledgement of service. Thereafter the parties negotiated the terms of the new lease, including a tenant only break clause. The court proceedings remained pending although no evidence had been served, and on the eve of the trial the landlord sought to amend its acknowledgment to claim a landlord's break clause. The application was refused but allowed on appeal. The recorder had wrongly introduced the public law concept of legitimate expectations and had attached too much weight to the timing of the application. The trial would have been adjourned anyway. The landlord had altered the nature of its case from that which it had negotiated, but this was not sufficient reason to refuse the amendment. The personal circumstances of the tenant company's main shareholder were irrelevant to the question whether the company would suffer prejudice. The fact that a landlord's break clause would make the business less saleable was not a legitimate consideration. It was no part of the policy of the 1954 Act to place a saleable asset in the hands of the tenant. The discretion was exercised afresh and the amendment allowed. ***Davies Attbrook (Chemists) Ltd v Benchmark Group plc*** [24th November 2005] TLR Ch Div.

The defendant tenant served a termination notice in accordance with a break clause in the lease. It undertook substantial renovation and repair works to ensure compliance with the repairing covenants. The claimant landlords sought to argue that the break clause had not been operative because the premises remained in disrepair. The claim was dismissed and it was held that the lease had been terminated. Any breaches were minor or trivial and the overall effect was negligible. Not every defect had to be remedied. The obligation was to put and keep the premises in substantial repair. Regard should be had to the age, type, location and established use of the building, and the choice of repair methods was left to the tenant. A breach of a repairing covenant would be material only if it jeopardised the interests of the landlord so as to prevent it from re-letting speedily, maintaining the value of the reversion,

and preserving its income stream. ***Fitzroy House Epworth Street (No 1) Ltd and another v The Financial Times Ltd*** [2005] EWHC 2391 (TCC); [2005] 46 EG 176 (CS).

CHARGES

Where a trustee in bankruptcy wanted to enforce a charge on a bankrupt's dwelling house, the trustee's right to receive the money arose at the date of entry into the charge. Accordingly any action had to be brought within 12 years from the due date on which the right to receive the money accrued. An unusual feature of a charge made under section 313 of the 1986 Act was that, unlike a commercial mortgage or charge, there would have been no enforceable debt immediately before the charge was imposed by the court. The charging order absolute was made on 29th May 1992 and the trustee applied for an order for sale in June 2004. It was held that the trustee's action was time-barred by s.20(1) Limitation Act 1980. ***Doodes v Gotham and Another*** [2005] EWHC 2576 (Ch); [25th November 2005] TLR Ch Div.

A mortgagee's power to vary interest rates was subject to an implied power that it would not do so improperly, capriciously or arbitrarily. However, a commercial lender was free to conduct its business in what it genuinely believed to be its best commercial interest. Consideration of the interest rates actually charged by the claimant provided no support for the allegation that such rates were grossly exorbitant or that they contravened ordinary principles of fair dealing. There was no basis for categorising the legal charge as an extortionate credit bargain as defined in s.138 Consumer Credit Act 1974. ***Paragon Finance plc v Pender & another*** [2005] EWCA Civ 760; [2005] 1 WLR 3412.

COMMONS

Registration of a class c town or village green did not imply any formal legal right to its use, whether by the public in general or by any particular group. Registration under the Commons Registration Act 1965 had the effect of bringing a town or village green within the scope of 19th century legislation applicable to town or village greens. On a true construction, s.22(1A) CRA 1965 required the use necessary for registration as a town or village green to continue to the date of registration. S.22(1A) governed all applications made after the commencement date of the Countryside and Rights of Way Act 2000, as such applications could only be made under the 1965 Act as amended. In appropriate cases the registration authority had power to amend an application for registration. ***Oxfordshire County Council v Oxford City Council and another*** [2005] EWCA Civ 175; [2005] 3 WLR 1043.

FORFEITURE

The appellant tenant acquired a lease containing a covenant against assigning, underletting or parting with possession of the demised premises, and against sharing possession. Not long after the applicant acquired the lease a takeaway pizza company started trading from the premises. The respondent landlord served a s.146 notice alleging a breach of covenant by assigning, subletting or parting with possession, and subsequently re-entered the premises. On appeal it was held that the appellant had in fact shared possession in breach of covenant but as this was not complained of in the s.146 notice the landlord could not rely on it. The

landlord had not informed the tenant of the breach nor indicated to him whether he could remedy it. A reasonable recipient could reasonably have taken the view that the landlord was not objecting to the sharing of possession. **Akici v LR Butlin Ltd** [2005] EWCA Civ 1296; [2005] 45 EG 168 (CS).

HIGHWAYS

Under s.56 Highways Act 1981 a definitive map and statement are conclusive evidence as to the particulars contained therein. For the purpose of s.56, the definitive map was the primary and source document. In deciding whether a statement could be reconciled with the map a degree of tolerance was permissible. Extrinsic evidence was not relevant to that exercise, save for a comparison between the documents and the situation on the ground at the relevant date. The map was conclusive evidence unless and until a review was carried out under s.53(2) Highways Act 1981. At such a review, neither the map nor its accompanying statement was conclusive evidence of its contents. In the case of an irreconcilable conflict between the two there was no evidential presumption in favour of the map. The map and the statement should each be accorded appropriate weight based on analysis of the documents themselves and on the extrinsic evidence. **R (on the application of Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs** [2005] EWHC 119 (Admin); [2005] 4 All ER 994.

HOUSING

The defendant tenants succeeded on appeal in their submissions that increases of rent which the claimant landlord had sought to impose were invalid. The issue of the rent increases had arisen in possession proceedings brought by the landlord and based on rent arrears under an assured tenancy. As a matter of construction of the tenancy agreement, the only date from which a rent increase could take effect was the first Monday of June each year. The landlord had not followed the procedure set out in the tenancy agreement in attempting to increase the rent. There was a potential estoppel but this could not be used by the claimant landlord as this would be to use it as a sword and not a shield. There was no waiver by the tenants. The assumption by the tenants that the claimed rent arrears were lawfully due when they did not object to the statement of arrears did not amount to a clear and unequivocal representation that they were not going to insist on their rights. The Court of Appeal expressed unease at the decision they had reached, in part because of the wider consequences for the landlord, who is housing association. **White and White v Riverside Housing Association Ltd** [2005] EWCA Civ 1385; [6th December 2005], transcript available on www.bailii.org.

LANDLORD AND TENANT (COVENANTS) ACT 1995

The object of the LT(C)A 1995 was that on lawful assignment of a tenancy or reversion, and irrespective of the terms of the tenancy, the tenant or landlord should have an exit route from his future liabilities. That route should be available in accordance with the statutory provisions. The legislation was not intended to close any other exit route already open to the parties: in particular, that by agreement their liability could be curtailed from the outset or later released or waived. The possibility that the parties might limit their liability by

agreement was not perceived as having unfair consequences in practice although landlords normally had greater bargaining power than tenants. There was nothing in the language or scheme of the 1995 Act to suggest that the statute was intended to exclude the parties' ability to limit liability under their covenants from the outset in whatever way they might agree. An agreed limitation could operate within the lease itself or in a separate document by way of waiver or agreement to release. **London Diocesan Fund and Another v Phithwa and Others, Avonridge Property Co Ltd, Part 20 defendant** [2005] UKHL 70; [5th December 2005] TLR HL.

LANDS TRIBUNAL

A refusal by the Lands Tribunal to grant permission to appeal from a leasehold valuation tribunal could only be judicially reviewed in exceptional circumstances, where there was jurisdictional error or procedural irregularity such as to deny the right to a fair hearing. This was so even though in cases before the tribunal no judge, in the narrow sense of the term, would have considered the point of law involved. The judge had been right to reject the judicial review application. **Regina (Sinclair Investments (Kensington) Ltd) v Lands Tribunal and Others** [28th November 2005] TLR CA.

RIGHT TO BUY

The proceedings related to the appellants' right to buy their home of 20 years. Earlier proceedings had established the right to buy but there was still an issue as to the valuation date. The appellants were arguing for a valuation as at 21st March 1991, when they had first served s.122 Housing Act 1985 notice claiming the right to buy. The respondents argued for 30th June 2001, when a second notice had been served. The Court of Appeal upheld the conclusion if not the reasoning of Nelson J. The correct valuation date was 30th June 2001. S.138 HA 1985 expressly requires the right to buy to be established before the duty to convey arises. S.125(1) provides that the right can be established by way of a landlord's admission "or otherwise", which must include s.181 proceedings. Here the appellants' right was established by s.181 proceedings, which were based solely on the 2001 notice. Note: The decision of Nelson J was summarised in the September 2005 bulletin. **Copping v Surrey County Council** [2005] EWCA Civ 1604; [6th December 2005], transcript available on www.bailii.org.

The issue was whether the tenant had served the right to buy form on the council before 26th March 2003, when the discount rules were changed. The tenant maintained that the form had been posted by first class post on 6th March 2003. S.176 HA 1985 provides that a notice under that part of the Act may be served by post. S.7 Interpretation Act 1978 provides that where an Act authorises or requires any document to be served by post, service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time in which the letter would be delivered in the ordinary course of post. Deputy Judge Michael Supperstone QC was satisfied that the form had been sent by first class post on 6th March 2003. The form was properly served when it was received by an agent of the Defendant who was authorised to accept it on the Defendant's behalf. There were only a limited number of transfers of the letter within the Royal Mail, and a greater number within the Defendant's internal system. There was no evidence about the performance of the Royal

Mail. It was much more likely that the letter was mislaid by the Defendant. There was evidence that the Defendant's systems and procedures had not operated efficiently in other respects. **Terry v London Borough of Tower Hamlets** [2005] EWHC 2783 (QB); [2nd December 2005], transcript available on www.bailii.org.

Islington LBC brought proceedings against a former council tenant, Miss Dornan, for recovery of a right to buy discount. A company called Megaplace Ltd had obtained title to the flat through a scheme intended to enable council tenants to dispose of their properties before the three year time limit in return for a modest sum (Miss Dornan had received £12,000). Although Islington LBC had a statutory charge for the repayment of the money, the obligation to repay rested on Miss Dornan and her successor in title. It was not satisfactory that proceedings had not been taken against Megaplace Ltd, and formal notification of the proceedings should be given to them. **Islington London Borough Council v Dornan** [8th November 2005] TLR CA.

RIGHTS OF WAY

The Court of Appeal gave detailed consideration to the proviso to s.31(1) Highways Act 1980. S.31(1) provides a rebuttable presumption of the dedication of a way as a highway after user of it by the public as of right and without interruption for 20 years. It was held that the court may find that the proviso to s.31(1) is satisfied even if the evidence from which it infers that the owner had no intention to dedicate is not evidence of overt acts or acts communicated to or directed at users of the way. A finding that there was no such intention must relate to the period of user, but it is not necessary for the owner to show that he did not have the intention to dedicate continuously throughout the 20 year period. **R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs & another; R (Drain) v Same & another** [2005] EWCA Civ 1597; [19th December 2005], transcript available on www.bailii.org.

SERVICE CHARGES

The defendant long leaseholders had, together with other leaseholders, brought unsuccessful challenges against the claimant landlord in the LVT in respect of service charges. The LVT had declined to make an order under s.20C Landlord and Tenant Act 1985 which would have prevented the landlord from adding the LVT costs to the service charge. The landlord then brought county court proceedings for £3,152.32, most of which consisted of legal costs from the LVT proceedings. Judge Levy QC held that as a matter of construction, the lease allowed for recovery of the legal costs incurred by the landlord in defending the LVT proceedings. He also held that paragraph 10(4) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 did not prevent the landlord from recovering legal costs as part of the service charges. **Staghold Ltd v Takeda and another** [8th August 2005] Central London County Court; [2005] 47 EG 146.

TRESPASS

The claimant landlords were entitled to damages for trespass and were entitled to forfeit the defendant's sublease. They had granted a limited licence allowing the defendant tenant to

display works of art and signage, but were entitled to revoke this licence and were not estopped from so doing. Clause 4.13 of the lease provided that every visitor, other than those entitled to concessions, had to be charged a minimum amount for entry. The defendant had breached this clause by running a commercial promotion offering two tickets for the price of one. No proper response had been made to the s.146 notice and a reasonable time was deemed to have elapsed for the defendant to have remedied its breach. Relief from forfeiture was not appropriate in view of the defendant's conduct. The defendant had continued to breach its obligations and had made, then abandoned, serious allegations against the claimant landlords without any attempt to justify them. ***Shirayama Shokosan Co Ltd and others v Danovo Ltd*** [21st October 2005] Ch Div; [2005] 44 EG 134 (CS).

OTHER DEVELOPMENTS

CODE OF PRACTICE FOR PRIVATE RETIREMENT HOUSING

The Approval of Code of Management Practice (Private Retirement Housing) (England) Order 2005 SI 3307 approves a code of practice for landlords and other managers in that sector. The Order comes into force on 2nd January 2006. S.87(7) Leasehold Reform, Housing and Urban Development Act 1993 provides that failure to comply with any provisions of an approved code of practice does not of itself render any person liable to any proceedings, but that the code of practice shall be admissible as evidence and shall be taken into account where relevant. The approved code is The Code of Practice for Private Retirement Housing (ISBN 0-9526691-2-9). By this order the Secretary of State also withdraws approval for previous codes of practice and revokes related orders.

HOUSING STATISTICS 2005

The Office of the Deputy Prime Minister has released Housing Statistics for 2005 (ODPM Statistical Release 2005/0276). These show that general housing expenditure accounts for, on average, 18% of household disposable income. In the mortgage and private rented sector this figure is 25%. Under-occupation is much more common than overcrowding, with 36% of households under-occupied and only 2.5% overcrowded. There is an ongoing tendency towards the building of smaller residential properties: the number of flats as a proportion of all new properties built rose from 20% in 2000/2001 to 41% in 2004/2005. Nearly 155,000 new dwellings (excluding change of use and conversions) were completed in England in the year ending 31st March 2005. This was a 6% increase on the previous year. Further details are available on the website www.odpm.gov.uk.

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