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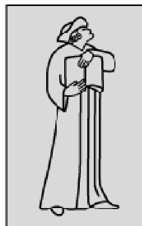

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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ACCESS TO COUNTRYSIDE

The Court of Appeal considered a challenge to the inclusion of a private estate within the New Forest National Park boundaries by order of the Secretary of State under the National Parks and Access to the Countryside Act 1949. It was held that absent a track record of granting access to the relevant area, any current desire to do so and any prospect of asserting a public right to access, the criterion in s.5(2)(b) of the 1949 Act of affording *"opportunities...for open-air recreation"* was not fulfilled. Something more than vague aspirations or references to views from public roads was required. As such 'aspirations' might not be sufficient even after the 2006 amendments to the 1949 Act, it was held that the quashing order should be granted. The Court of Appeal did not express a conclusion on the application of the criterion of 'natural beauty' to the land in question. ***Meyrick Estate Management Limited & ors v The Secretary of State for Environment Food and Rural Affairs*** [2007] EWCA Civ 53.

ADVERSE POSSESSION

The Court of Appeal held that in applying the conditions for adverse possession set out in ***Prudential Assurance Limited v Waterloo Real Estate Inc.*** [1999] 2 EGLR 85, the evidence must be considered as a whole, rather than assessing each and every event on its individual merit. The case involved a wall. On the facts the judge had been entitled to infer dispossession from the lack of interest of the paper owner in the face of repairs to and other actions in respect of the wall carried out by the dispossessors. Further, although raising the height of a wall will not of itself confer ownership upon the builder, it is capable of supporting a claim that he has asserted rights of possession over the whole wall. Here, raising the wall by three feet was an unequivocal act of possession. The Court distinguished ***Waddington v Naylor*** (1889) 60 LT 480 in which Chitty J dismissed a claim for trespass to the top section of a wall added on by the plaintiff and held that a person who builds onto a wall, whether or not with permission, makes a gift. ***Palfrey v Wilson & anor*** [2007] EWCA Civ 94.

In order to establish that permission had been given to use the land so as to defeat a claim of adverse possession, there must have been some overt act by the land owner or some demonstrable circumstances from which the inference can be drawn that permission was in fact given. It is irrelevant whether the users were aware of those matters. It must also be established that a reasonable person would have appreciated that the user was with the permission of the land owner. There is a real difference between permission on the one hand, and mere non-objection or acquiescence by the land owner. Adverse possession is typically achieved during periods of non-objection or acquiescence by the land owner. The question is whether permission was in fact given, whether expressly or by necessary implication. It is not enough that overt acts or demonstrable circumstances are consistent with there having been permission: they must be probative of it. ***Hicks Development Ltd v Chaplin & ors*** [2007] EWHC 141 (Ch).

Note: The periods of adverse possession in both of the above cases pre-dated the change in the law of adverse possession brought about by the Land Registration Act 2002. The relevant provisions of the LRA 2002 came into force on 13th October 2003 and 13th October 2004.

ARBITRATION

When considering the decision of trustees under an estate management scheme, the role of the arbitrator was not to consider whether in his opinion, consent should have been given. The test was whether the decision of the trustees was reasonable. The position of the trustees was analogous to that of a landlord considering a tenant's application for consent to an assignment. The arbitrator had erred in law by reaching his own decision in respect of the relative disadvantages that would be suffered. ***The Dulwich Estate v Baptiste*** [2007] 08 EG 137 (CS).

CONSTRUCTIVE TRUSTS

The court considered the common intention constructive trust and compared it to the doctrine of proprietary estoppel. There was an affinity between the two types of claim for a beneficial interest, but a common intention constructive trust tended to focus on a current state of affairs, whereas proprietary estoppel was more concerned with promises to do something in the future which would change the pre-existing situation. In addition the remedies available to the court were different. The claimant's father had purchased a flat to provide accommodation for the claimant whilst she was at university. The flat was purchased through a Guernsey based company (the defendant) owned by the claimant's father. The claimant's claim for beneficial ownership of the flat based on common intention constructive trust or proprietary estoppel was dismissed on a summary basis. The claimant's father had not made the necessary promises and/or there was insufficient detrimental reliance. ***Lalani v Crump Holdings Ltd*** [2007] EWHC 47 (Ch); [2007] 08 EG 136 (CS).

DAMAGES

In a judgment running to almost 1,000 paragraphs, HHJ Peter Coulson QC sitting in the TCC considered the appropriate measure of damages where a defective house had been demolished. The Claimant sought some £3.6 million in damages, being the cost of demolishing and rebuilding, or alternatively some £2.5 million being the cost of repair. The claim was brought against the builders (who were in liquidation), the architects, the engineers and the quantity surveyors. The house was demolished between February and April 2005 and the claim form was issued in May 2005. The house was not structurally unsound and the defects were primarily aesthetic. It was held that the appropriate measure of damages was the cost of repair. The architects were held liable for some £438,000 and the engineers for some £135,000. A claimant who carries out repair or reinstatement must act reasonably. ***The Board of Governors of the Hospital for Sick Children & anor v McLaughlin & Harvey Plc & ors*** [19] Con LR 25 (the ***Great Ormond Street*** case) was distinguishable. That case was authority for the narrow proposition that, if two remedial schemes are proposed to rectify a defect which is the result of a defendant's default, and one scheme is put in hand on expert advice, the defendant is liable for the cost of that scheme unless it could be said that the expert advice was negligent. Reliance on an expert will always be a highly significant factor in any assessment of loss and damage, but it will not on its own be enough in every case to prove that the claimant has acted reasonably. Here the claimant <u>may</u> have acted reasonably in deciding to demolish the house, but he could not recover the costs of demolition as damages against a particular defendant where only a handful of defects were the responsibility of that defendant. ***McGlinn v Waltham Contractors Ltd & ors*** [2007] EWHC 149 (TCC).

HOUSING

The Court of Appeal considered a challenge to the lawfulness of the London Borough of Barnet's housing allocation scheme under Part VI Housing Act 1996, for failing to give homeless applicants any, or any sufficient preference, as compared with other preference groups, and failing sufficiently to explain a specific part of the scheme. It was held that in comparing homeless applicants with other preference groups the question was whether they were given 'reasonable preference', not how successful their applications tended to be. On the facts they were given a preference, the reasonableness of which was principally a matter for Barnet LBC's discretion. In addition Barnet LBC were permitted to give preference to non-statutory preference groups, the question being whether the non-statutory groups were permitted to dominate at the expense of the statutory ones. It was held that within Barnet LBC's scheme they were not. The 'lease-end points' part of the scheme did not comply with section 167(1) of the 1996 Act as it was insufficiently explained. *The* ***Queen (Mei Ling Lin) v London Borough of Barnet*** [2007] EWCA Civ 132.

The Court of Appeal held that where premises are let for mixed business and residential use they are not *"let as a….dwelling"* and accordingly the tenant is not protected under the Rent Act 1977, following ***Pulleng v Curran*** [1980] 44 P & CR 58, ***Wagle v Trustees of Henry Smith Charity*** [1990] 1 QB 42 and ***Webb v Barnett LBC*** [1988] 21 HLR 228. In a comprehensive review the Court criticised the reasoning in those cases, but declined to overrule them. This was mainly on the policy ground that it was unfair on the landlord and generally undesirable for a tenant of a mixed use premises to be able to shut down his business but continue in occupation under an artificially reduced 1977 Act rent. In addition

something more was needed to establish a change in the nature of the letting based on the landlord's positive assent than the landlord's knowledge of the change of use and acceptance of rent. Rent being paid directly in the form of housing benefit was not enough, as that could happen with mixed use. ***Tan & Tan v Sitkowski*** [2007] EWCA Civ 30; [2007] 06 EG 165 (CS).

HOUSING BENEFIT

Where there has been a lawful suspension of housing benefit the local authority has no residual discretion to pay benefit pending an appeal. However there is a discretion under Regulation 4 of the Housing Benefit and Council Tax Benefit (Decisions and Appeal) Regulations 2001 whereby the local authority can revise an original decision. This discretion allows the local authority to revise a decision where it was based on ignorance of or mistake as to a material fact, or where an appeal has been made against the original decision. Here the local authority did not act unlawfully in maintaining its position that the original decision was correct. It had good reasons for refusing to exercise the power to revise its decision. In relation to Article 8, a power to withdraw housing benefit where a person fails to comply with an information requirement which is lawful is not unnecessary or disproportionate. ***The Queen on the application of Hall v Chichester District Council*** [2007] EWHC 168 (Admin).

LEASES: BREAK CLAUSE

Two ten year leases of commercial premises contained an option to determine at the end of December 2004, three years into the terms. The break clause required not less than six months' prior notice to be given to the appellant landlord. It was conditional upon the respondent tenant having paid the yearly rent and complied with the relevant covenants in the leases up to the date of expiry of the notice, and on delivery up of vacant possession on the date of expiry. Time was stated to be of the essence. The tenant served notice pursuant to the break clause in June 2003. Negotiations relating to the tenant's liabilities for repair under the leases were resolved by payment of a sum by the tenant to the landlord and an undertaking from the tenant to keep the premises in no worse a condition than they were as at an inspection in August 2004. The tenant had not vacated completely by the end of December 2004, and the landlord contended that the break clause had not operated. The judge disagreed. The landlord's appeal was dismissed by the Court of Appeal. In order to give business efficacy to the repairs settlement, it was necessary to imply a term that the leases would come to an end whether or not the tenant succeeded in giving vacant possession by the end of December 2004. As a matter of construction, the effect of the settlement agreement was that the break notices were to take effect irrespective of the provisions of the break clause in the lease. The landlord was entitled to compensation for the failure to deliver up vacant possession, but the break clause was still operative. ***Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd*** [2007] EWCA Civ 7; [2007] 05 EG 307 (CS).

NOTICES

Following ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** [1997] AC 749 and ***Lancecrest Limited v Asiwaju*** [2005] EWCA Civ 117, Henderson J held that a notice to extend an option agreement was valid. A preparatory letter was sent prior to the letter purporting to exercise the option, but the second letter was a day late. It was held that the preparatory letter could constitute an exercise of the option. In ***Lancecrest***, a letter sent by the tenant was not consciously intended by him to operate as a counternotice for the purposes of the rent review machinery in the lease, but it was nevertheless construed by the majority in the Court of Appeal as having that effect and as being a valid counternotice. It is inherent in the objective nature of the ***Mannai*** test that a document which was never intended by its sender to be a valid notice may nevertheless operate as one, and vice versa. ***Rennie v Westbury Homes (Holdings) Ltd*** [2007] EWHC 164 (Ch).

RIGHT TO LIGHT

The court assessed damages for loss of the ability to prevent an infringement of a right to light. When assessing damages before any infringement took place, the overall principle was that the court should determine what would constitute a fair result of a hypothetical negotiation between the parties. The context had to be borne in mind, including the nature and seriousness of the breach. The right to prevent a development or part of it gave the owner of the right a significant bargaining position. They would normally expect to receive some part of the potential profit from the development. If the profit figure was known, the court should award a sum which incorporated a fair profit percentage, and if not, the court should award a suitable multiple of the damages for loss of amenity. The size of the award should not be so large that it would have prevented the development from taking place had it been payable at the time. Having considered the figures, the court awarded £50,000, which although it was substantially more than the sum available for loss of amenity, felt right in terms of the price of avoiding an injunction. ***Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*** [2007] 07 EG 143 (CS).

SERVICE CHARGES

The defendant tenants occupied premises in the Edmonton Green shopping centre pursuant to a lease granted by the borough council for a term of 99 years from September 1973. The lease provided for payment of service charges to *"the Council"* in an amount to be certified annually by *"the Council's Borough Treasurer"*. When the claimant acquired the freehold, a dispute arose as to the proper person to certify the service charges. Toulson J held that the mechanism provided for in the lease no longer took effect. The new landlord retained its contractual right to recover service charges but as there was no contractual mechanism for doing so, it had to bring its claim in a court, subject to the arbitration provisions in the lease. Certificates issued by the claimant's finance director had no contractual force but served the practical purpose of setting out the sums for which the claimant sued. ***St Modwen Developments (Edmonton) Ltd v Tesco Stores Ltd*** [2006] EWHC 3177 (Ch); [2007] 06 EG 166.

OTHER DEVELOPMENTS

COMMONS

The Commons Act 2006 (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007 SI 456 brings s.15 of the Commons Act 2006 into force on 6th April 2007. S.15 makes new provision about the registration of land as a town or village green. Various other related provisions will also come into force on that date. Regulation 4 of the Order contains transitional provisions. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 SI 457 also come into force on 6th April 2007. These Regulations enable registration authorities to register land which meets the criteria for registration set out in ss.15(1) or 15(8) of the Act, pending the bringing into force of ss.1 to 3 of the Act. An application form for registration is set out in the Schedule to the Regulations. The Commons Registration (Objections and Maps) (Amendment) (England) Regulations 2007 SI 540 amend the Commons Registration (Objections and Maps) Regulations 1968 so as to enable the registration of certain land or rights whose provisional registration in the register of common land or town or village greens could not otherwise become final. As with the first two sets of regulations, these regulations also come into force on 6th April 2007.

HOUSES IN MULTIPLE OCCUPATION

Where housing benefit has been paid in relation to an unlicensed HMO, ss. 73, 74, 96 and 97 Housing Act 2004 provide that the residential property tribunal may make a rent repayment order on the application of a local housing authority. These provisions are supplemented by the Rent Repayment Orders (Supplementary Provisions) (England) Regulations 2007 SI 572, which come into force on 6th April 2007.

LANDLORD AND TENANT ACT 1954: CONSULTATION PAPER

The Department for Communities and Local Government has published a consultation paper relating to s.57 LTA 1954. S.57 makes special provision for landlords of commercial properties who are public bodies or providers of public services. Where a certificate has been obtained under s.57 this enables eligible landlords in certain circumstances to regain possession of properties they have let to business tenants but now need for their own purposes. The proposal is that s.57 should be repealed and that s.30(1) LTA 1954 should be amended so as to enable public bodies in England and Wales to oppose renewals of business tenancies on wider grounds. A copy of the consultation paper is available online at www.communities.gov.uk and responses should be sent no later than Friday 25th May 2007 to John.Bryan@communities.gsi.gov.uk or to the postal address given online.

RIGHT TO BUY

The Housing (Right to Buy) (Service Charges) (Amendment) (England) Order 2007 SI 384 amends the definition of *"index figure"* in the Housing (Right to Buy) (Service Charges) Order

1986. The 1986 Order sets out the calculation for the inflation allowance to be added to a landlord's estimate of the service charges payable by the tenant for repairs and major works in the initial period of a right to buy lease. The amendment comes into force on 26th March 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.

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