



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

FEBRUARY 2008

### CASE LAW UPDATE

#### ADVERSE POSSESSION

The appellants, the Ofulues, had become freeholders in 1979, but had been resident in Nigeria. A previous tenant had allowed the respondent and her father into possession in 1981. In 1983 and 1987 the appellants had asked the respondent to leave. In 1989 they instituted possession proceedings. The defence and counterclaim to the 1989 proceedings included an assertion that the appellants had offered a tenancy during the 1983 visit and that the offer had been accepted. In 1992 the respondent made a without prejudice offer to purchase the freehold. The 1989 proceedings were stayed and fresh proceedings for possession were issued in 2003. For the first time the respondent claimed adverse possession. HHJ Levy QC found adverse possession was established. Arden LJ, delivering judgment for the Court of Appeal, dismissed the appeal. The case of ***Pye (Oxford) Ltd v Graham*** [2002] UKHL 30 required only possession without the consent of the paper owner, and intention to possess. There were no grounds for disapplying the ECHR finding of compatibility in that case. A pleading, such as here the assertion of a tenancy in the 1989 defence, could constitute an acknowledgement for the purposes of s.29 Limitation Act 1980, but did not in the circumstances of this case. The appellants could not rely on the 1992 without prejudice offer as an acknowledgement of title, having failed to overcome the usual rule excluding without prejudice correspondence from evidential consideration. ***Ofulue v Bossert*** [2008] EWCA Civ 7.

#### CHARGES

In a decision of some practical significance for mortgagees and borrowers, the Court of Appeal upheld a first instance decision that Natwest's right to possession of a residential dwelling-house was statute barred. Natwest acquired an immediate right to possession on the granting of the legal charge on 8<sup>th</sup> June 1989. Adverse possession is necessary in cases of mortgaged land and paragraph 8 of Part I of Schedule I to the Limitation Act 1980 applies. The requirement of adverse possession must be applied in accordance with the exposition of it by the House of Lords in ***Pye***. Adverse possession refers to the capacity of the person in possession of the land and not to the nature of that person's possession. Possession is to be

given its ordinary meaning. Mr and Mrs Babai were in ordinary possession of the property in the period following the legal charge and following the last payment by Mr Babai in respect of the mortgage debt in January 1993. This payment caused Natwest's right of action to accrue afresh. Mr and Mrs Babai were in adverse possession of the property at all material times and time ran in their favour under LA 1980. Natwest did not give them any express permission to occupy the property. The fact that Natwest did not enforce its right of action did not mean that it had given some form of implied permission. Mr and Mrs Babai's possession of the property was referable to their own registered title to the property. Natwest's charge over the property had been extinguished by the operation of ss.15 and 17 LA 1980. **National Westminster Bank Plc v Ashe (Trustee in Bankruptcy of Djabar Babai)** [2008] EWCA Civ 55; [2008] PLSCS 33.

## COMMONS

The Court of Appeal upheld Lightman J's decision on both issues in dismissing an appeal in **Betterment Properties (Weymouth) Ltd v Dorset County Council** [2008] EWCA Civ 22; [2008] 06 EG 130 (CS). The first instance decision was summarised in the March 2007 bulletin. Where land has been registered as a town or village green, the court has power under s.14 Commons Registration Act 1965 to amend the register if it appears that no amendment or a different amendment ought to have been made and it is just to rectify the register. Lightman J was right to hold that the court's powers under s.14 were not limited to those of a court on appeal or review. The court was free to adopt the procedure best calculated to enable a just and fully informed decision to be reached as to whether the register should be rectified. In particular the court was free to hear additional evidence. An amended definition of town or village green had come into force on 30<sup>th</sup> January 2001, but Lightman J had been right to apply the unamended definition. The application had been pending on 30<sup>th</sup> January 2001 and the applicant and the owner of the land were entitled to have the application determined on the basis of the law as it then stood. Note: The 1965 Act is to be repealed by the Commons Act 2006, not yet fully in force.

## ESTATE AGENTS

An estate agent was not guilty of making a misleading statement under the Property Misdescriptions Act 1991 when he advertised a house and garden for sale in circumstances where title to the garden was probably held by way of adverse possession. Particulars advertising a property for sale do not usually make representations as to title. No reasonable person reading the particulars of the house and garden offered for sale would infer that any representation as to title was made, still less as to the nature of the title. The particulars in question were headed "subject to contract" in accordance with normal practice. A reasonable person would have appreciated that issues as to title would be dealt with during the process of conveyance. **Lancashire County Council v Buchanan** [2007] EWHC 3194 (Admin).

A purchaser's agent was entitled to commission even though he had not been the effective cause of the purchase, which had been arranged privately between the purchaser and the vendor. Although there were similarities between a normal estate agent's (vendor's) contract and a purchaser's contract, there were also differences. There is usually an implied term in a vendor's contract that the agent must be the effective cause of the transaction

before he is entitled to commission. The rationale for this rule is that it avoids the risk of the vendor having to pay more than one set of commission if he has engaged more than one agent. Sellers often engage more than one agent, but it is unlikely that purchasers often do, so the rationale for the implied term was absent. In any event the express terms of the contract were inconsistent with any implied term that the agent should be the effective cause of the transaction. There was no doubt about the meaning of the express terms so as to bring the Unfair Terms In Consumer Contracts Regulations 1999 SI 2083 into operation. ***The County Homesearch Company (Thames & Chilterns) Ltd v Cowham*** [2008] EWCA Civ 26.

## FORFEITURE

In a case relating to forfeiture of a long residential lease, the Court of Appeal upheld the trial judge's decision that there had not been a waiver. There were arrears of rent and there had also been an assignment in breach of covenant. Letters sent relating to the rent arrears did not amount to a waiver. No demand for rent had been made of the assignee, who was then the tenant. Demands for payment were only made to the assignor, who at the time of the demands was not the tenant. In any event there had not been an unequivocal demand to pay rent. The letters made it quite clear that it was only on payment of rent that the landlord would accept the tenancy as continuing. In addition the trial judge had not erred in exercising his discretion to refuse relief from forfeiture. He had looked at all of the circumstances relating to the history of the tenancy, the breach, the conduct and the financial effects. He approached the matter on the basis that he was exercising a broad discretion. There was no basis for interfering in the exercise of the judge's discretion. He had been entitled to conclude that the tenant's conduct demonstrated over a number of years wilful bad behaviour with regard to the tenancy, that he had acted without regard to the rights of the landlord and that he had sought to make himself unamenable to the order of the court or any enforcement process. ***Greenwood Reversions Ltd v World Environment Foundation Ltd & Mehra*** [2008] EWCA Civ 47.

## GUARANTORS

The Court of Appeal has held that Mr Ayres and Mr Grew are liable as guarantors under covenants contained in an underlease of premises at Hasilwood House, Bishopsgate. The underlease was assigned to a firm of American lawyers, Altheimer & Gray, in June 2001. A&G subsequently went into bankruptcy in the US and the lease was formally disclaimed in June 2006. The outstanding liability was a little over £1.5 million. Mr Ayres and Mr Grew had attempted to rely on the terms of a supplemental deed between the Prudential (the landlord) and A&G in order to limit their liability, and had succeeded in doing so at first instance. On a careful construction of the supplemental deed against its background, Moore-Bick LJ, giving the judgment of the court, did not accept that the liability of Mr Ayres and Mr Drew was intended to be limited as they contended. The supplemental deed was poorly drafted but was not intended to alter in a significant way the nature of the relationship between the Prudential and Mr Ayres and Mr Drew that had been established under the licence to assign. Moore-Bick LJ was fortified by the approach taken to a not dissimilar problem in ***IRC v West Bromwich Building Society***. There too the judge felt that the construction he favoured as reflecting the parties' intention might be open to the criticism that it did violence to the language of the document, but his approach was upheld by a

majority of their Lordships, who clearly did not draw the line at correcting errors of syntax in the course of interpreting the document in a manner that reflected the intention of the parties. ***The Prudential Assurance Company Ltd v Ayres & Grew*** [2008] EWCA Civ 52.

## HOUSING

Wandsworth LBC had not acted unlawfully in deciding that Mr Dixon was ineligible for housing accommodation because he was guilty of unacceptable behaviour within s.160A Housing Act 1996. He had been a tenant since 1983 and prior to the unacceptable behaviour was to be offered a tenancy of a new property. A small amount of cocaine had been found at the premises in February 2006 and Mr Dixon had pleaded guilty to an offence of possession of a Class A drug. A small amount of herbal cannabis had been found in March 2006 and Mr Dixon had been cautioned. During a review of the decision it became known that Mr Dixon had been cautioned in August 1996 for possessing cannabis and supplying cocaine. The decision not to offer Mr Dixon a tenancy was upheld on review. The effect of the provisions in HA 1996 and the Code of Guidance is that the local authority must be satisfied that a notional county court judge would probably make an order for possession in the circumstances of the case. Wandsworth LBC was entitled to approach the case on the basis that Mr Dixon's drug abuse was long-standing and that it included abuse of Class A drugs. Proper, adequate and intelligible reasons for Wandsworth's decision were set out in the decision letter and the decision reached was one that it was entitled to make. ***Dixon v Wandsworth LBC*** [2007] EWHC 3075 (Admin).

In ***Sandwell MBC v Hensley*** [2007] EWCA Civ 1425 the Court of Appeal allowed the council's appeal against a decision to suspend an order for possession made against a defendant for two years, on condition that he abided by the terms of his tenancy agreement. The defendant had a number of criminal convictions for drugs offences, including three convictions for the cultivation and production of cannabis on this particular property. It was partly as a result of the most recent of these that the council had sought possession, claiming under Part 1 of Schedule 2 Housing Act 1985 that the defendant was guilty of conduct likely to cause a nuisance or annoyance to anyone residing, visiting or otherwise engaging in lawful activity in the locality. In the court below the defendant had relied upon the fact that there was no evidence of any further offending or such conduct since the last conviction and upon statements from the defendant's neighbours who said they had not been aware in any way of his activities. The court agreed with the council's case on appeal that the district judge should have made an outright order for possession, commenting that the offence was a very serious one and that the council, as a provider of social housing, have a duty to make sure that its properties are properly managed and free from this sort of activity.

## LEASEHOLD ENFRANCHISEMENT

The House of Lords held that 21 Upper Grosvenor Street, London W1, was a house within the meaning of s.2(1) Leasehold Reform Act 1967, so as to enable the tenant to enfranchise. To be a house for the purposes of s.2(1), a property must be designed or adapted for living in, and must also be reasonably called a house. It was common ground that the question whether or not the property constitutes a house was to be determined as at the date the tenant gave notice seeking to acquire the freehold on 14<sup>th</sup> October 2003. The house was built as a single private residence in the 1740s, and was used as such until around 1942.

From about 1946 the three upper floors were fitted out for residential use and the three lower floors for a dress-making business. The commercial use of the three lower floors continued until around 1990, after which they were vacant. The residential use of the three upper floors continued until the late 1990s. By 2003 the upper floors had been stripped back to their basic structure and it was clear that the property was not fit for immediate residential occupation. It was held that this did not matter. The property was designed for living in when it was first built, and nothing that had happened subsequently has changed that. There is no requirement that the property should be fit for immediate residential occupation. The upper three floors were and remained designed to be lived in, and the lower three floors appeared to be structurally laid out substantially as they were when the property was in single residential occupation. It was not necessary to decide what would happen if a property had been designed for living in and subsequently adapted to another use. **Boss Holdings Ltd v Grosvenor West End Properties & ors** [2008] UKHL 5; [2008] 05 EG 167 (CS).

In **Hildron Finance Ltd v Greenhill Hampstead Ltd** [2008] EWLands LRA/120/2006; [2008] 04 EG 168 (CS), the Lands Tribunal were not prepared to depart from the general 5% deferment rate set for flats in **Sportelli** despite detailed evidence and argument on the point. They noted that Carnwath LJ had agreed in **Sportelli** that an important part of the role of the Lands Tribunal was to promote consistent practice in land valuation matters. There was no reason to depart from the 5% rate. The LVT had been correct to take the date of the counter-notice as the valuation date, as the counter-notice had taken no issue as to the extent of the leasehold interest. In any event the appellant was estopped from disputing that this was the correct date as it had given a clear impression that there was no dispute on this issue. The appellant did not argue the hope value point in light of the decision of the Court of Appeal in **Sportelli** but left the point open pending a possible appeal to the House of Lords in **Sportelli**. A dispute about the value of the porter's flat was also resolved. Mrs Szkeres sought to enfranchise a six-storey house containing four flats, including a flat for a resident caretaker. She held underleases of two of the flats. The Lands Tribunal allowed an appeal against an LVT decision that Mrs Szkeres was entitled to acquire the interest created by the intermediate lease in the caretaker's flat. It was common ground that the intermediate lease in the caretaker's flat fell within s.2(2) LRHUDA 1993 (the interest of a tenant under any lease superior to the lease held by a qualifying tenant of a flat). The question was whether it was excluded from the obligation to buy under s.2(1)(a). It would be excluded unless it fell within s.2(4)(a) as "*a flat contained in the relevant premises which is held by a qualifying tenant*" or s.2(4)(b) as "*any common parts of those premises.*" The Lands Tribunal held that the intermediate leaseholder was not a qualifying tenant for the purposes of s.2(4)(a) because under the intermediate lease it was not the tenant of the caretaker's flat alone, but also of the three other flats. The caretaker's flat was occupied for residential purposes and since residential parts and common parts are distinct, it could not be acquired as part of the common parts pursuant to s.2(4)(b). Mrs Szkeres was not obliged or entitled to acquire the intermediate lease interest in the caretaker's flat. **Re 29 Eaton Place** [2008] EWLands LRA/85/2006.

The decision in **Re 146 Pavilion Road** [2008] EWLands LRA/59/2006 is a useful example of the valuation process in a claim under Part I Leasehold Reform Act 1967. The Lands Tribunal upheld and agreed with the valuation of the LVT, having dealt with the appeal by way of a rehearing and having heard detailed valuation evidence from three expert witnesses. It held that the LVT had been correct to use a developable space approach, using the developable areas known at the time of purchase rather than larger areas achieved on

revised planning permissions. Valuations based on both the cleared site approach and the standing house approach were considered.

On a preliminary issue, HHJ Hollis considered the meaning of “common parts” in s.4 LRHUDA 1993. The property was an art deco building on the seafront at St Leonards, containing 168 residential flats and 20 shops at ground level. The freeholder disputed the right to enfranchise on the basis that more than 25% of the internal floor area was neither residential nor comprised in the common parts. The central question was whether or not common parts that were used exclusively by the commercial occupiers but in common with each other came within the definition of “common parts.” The judge had no hesitation in preferring the tenant’s argument. Common parts do not have to be common to both residential and commercial occupants of the building to be common parts for the purpose of the Act. The Act could have excluded common parts exclusively serving commercial areas but did not do so. Courts should not embark on an exercise of classifying the different nature of different common parts. ***Marine Court (St Leonards on Sea) Freeholders Ltd v Rother District Investments Ltd*** [11<sup>th</sup> October 2007] Hastings County Court HHJ Hollis; [2008] 02 EG 148.

## MINERAL EXTRACTION

The principles applicable to reservations and exceptions of minerals include the following: (1) Unless the meaning is clear from the four corners of the relevant instrument itself, the first duty of the court in construing a grant of mines and minerals is to try to ascertain what the phrase meant in the vernacular of “the mining world, the commercial world and landowners at the time of the grant”. (2) The meaning of the phrase in this vernacular sense may be derived either from direct evidence as to the vernacular meaning at the relevant time or by inference drawn by the court. (3) Where it is clearly established that, at the date of the grant, a particular vernacular meaning was attributed to the phrase “mines and minerals”, the court will be predisposed to adopt that meaning, but the vernacular test is not a rigid test to be applied without regard to all the other terms of the instrument in question and the circumstances in which it is used. (4) The court must never overlook the commercial background and apparent commercial purpose of the transaction. (5) One pointer to the parties’ intentions may be to consider whether or not the substances in question are exceptional in use, in value and in character. (6) Another pointer is the evidence as to the general state of knowledge of the relevant substance at the date of the grant and the way in which it was then regarded and treated as a commercial matter. (7) A third, significant pointer may be derived from any express powers of working that are conferred by the instrument in question. (8) In considering whether a grant or reservation of mines and minerals includes a specified substance, it is irrelevant that the parties did not actually have that substance in mind. The test of their intention is an objective one. Here the judge at first instance had been right to hold that brickshale and fireclay were not within the expression “other minerals” in the exception and reservation to a conveyance of 1921. Strata of brickshale were ubiquitous in the area, and not especially valuable. The surrounding circumstances strongly supported the judge’s conclusion that the underground working restriction was a strong pointer against brickshale being a mineral for the purposes of the 1921 conveyance. ***Coleman & Lim v Istock Brick Ltd*** [2008] EWCA Civ 73.

## NUISANCE

A landlord was not liable in nuisance for water ingress to a residential flat caused by defective laying of concrete. In some circumstances such a defect giving rise to the ingress of water could amount to a nuisance, but as the defect was present prior to the granting of the lease in 1996 the principle of “*caveat lessee*” applied and the landlord had no liability to the tenant. The case contains a useful review of the authorities on nuisance in the context of a landlord/tenant relationship. There was no liability under the landlord’s repairing covenants in the lease: if the state of the premises was no worse than at the commencement of the lease then there was no want of repair. ***Jackson v J. H. Watson Property Investment Ltd*** [18<sup>th</sup> February 2008] Leeds County Court HHJ Behrens; [2008] 02 EG 147 (CS).

## OPTION TO PURCHASE

An option to purchase unregistered land must be registered as a Class C(iv) land charge so as to enable it to be enforced against purchasers of the property. Here the trustees of a working men’s club had an option to purchase the clubhouse from Samuel Smith Old Brewery (Tadcaster). They did not register the option and before the purchase was completed, the Brewery sold the clubhouse to a wholly owned subsidiary, Rochdale and Manor (Builders) at a substantial undervalue. On appeal it was held that although the option was void against Rochdale for want of registration, there was clear authority that the Brewery could be compelled to procure Rochdale to transfer the clubhouse to the trustees (***Jones & anor v Lipman & anor*** [1962] 1 WLR 832). ***Coles & ors (Trustees of the Ward Green Working Men’s Club v Samuel Smith Old Brewery (Tadcaster) & anor*** [2007] EWCA Civ 1461.

## RESTRICTIVE COVENANTS

Although it is undoubtedly the case that the court has power to rule that a covenant has ceased to be enforceable through obsolescence, the power should only be exercised in a very clear case. The Lands Tribunal has a discretionary and more flexible power to modify or discharge restrictive covenants, including in circumstances where the restriction should be deemed obsolete. The fact that s.84(9) Law of Property Act 1925 contemplates a stay of enforcement proceedings to enable the Lands Tribunal to consider exercising its powers suggests that Parliament considered the primary forum for determining issues such as obsolescence to be the Lands Tribunal. These considerations had particular force in a case of a building scheme such as the present one where identical covenants were imposed on a large number of properties. An injunction was granted to prevent breach of the covenant. ***Turner & Turner v Pryce & Pryce & ors*** [2008] EWHC B1 (Ch).

## RIGHT TO BUY

Three countryside rangers and the widow of a fourth sought to exercise the right to buy under Part V Housing Act 1985. They all failed on the basis that they fell squarely within the terms of paragraph 2(1) of Schedule 1 to HA 1985. Paragraph 2(1) provides that a tenancy is not a secure tenancy if the tenant is an employee of the landlord or of a local authority, and his contract of employment requires him to occupy the dwelling-house for the better

performance of his duties. This provision is to be construed as laying down two distinct conditions. First, the contract requires him to occupy the dwelling-house. This is a question of the terms of the contract. Secondly, he is required so to occupy for the better performance of his duties. This raises an issue of fact outside the contract, which is to be judged objectively. There was good reason to consider that the rangers' duties would be better performed if the rangers lived reasonably close to the sites for which they were responsible. **Wragg & ors v Surrey County Council** [2008] EWCA Civ 19.

## **SERVICE CHARGES**

The respondents, who were assured tenants of properties in a sheltered housing development, sought to challenge payments of service charges under their tenancy agreements pursuant to s.27A Landlord and Tenant Act 1985. The Lands Tribunal held that the LVT had no jurisdiction to entertain the application. The sums payable under the tenancies were not service charges within the meaning of s.18(1) LTA 1985. In particular it could not properly be said that these were sums "*the whole or part of which varies or may vary according to the relevant costs.*" (s.18(1)(b)). The rent could be altered by the landlord on a yearly basis and the tenant had the right to refer the rent to the Rent Assessment Committee (s.13 Housing Act 1988). There was nothing in the tenancy agreements indicating that any altered rent was to be calculated in any particular manner, or linking an alteration in rent including service charges with an alteration in the costs of providing any relevant services. **Home Group Ltd v Lewis & ors** [2008] EWLands LRX/176/2006.

## **OTHER DEVELOPMENTS**

### **CONSULTATION ON CHARGES FOR PROPERTY SEARCH SERVICES**

There is an ongoing consultation in relation to local authority property search services, specifically charges for property search services. The consultation seeks views on proposals for the future direction of local authority charging for property search services and related draft guidance. The consultation paper was published on 18<sup>th</sup> January 2008 and the closing date is 18<sup>th</sup> April 2008. Details are available online at [www.communities.gov.uk/publications/housing/lachargesearchconsult](http://www.communities.gov.uk/publications/housing/lachargesearchconsult)

## **COUNTRYSIDE AND RIGHTS OF WAY ACT**

There is a further commencement order for this Act, namely the Countryside and Rights of Way Act 2000 (Commencement No.15) Order 2008 SI 308. This Order brings into force on 18<sup>th</sup> February 2008 in relation to England that part of paragraph 2 of Schedule 5 to CRWA 2000 which inserts s.53A into the Wildlife and Countryside Act 1981. S.53A will permit any Order of a specified kind (Orders which provide for making changes in respect of certain types of highway) to provide additionally for the required consequential modification of the definitive maps and statements which record such highways. The Order must be of a kind described in s.53A and as prescribed by regulations made under s.53A(1)(a). Without s.53A, the modifications to the definitive map would have to be made by a separate modification order under s.53(2)(b) WCA 1981.

**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](http://www.bailii.org). Statutory instruments can be found on [www.opsi.gov.uk](http://www.opsi.gov.uk).

### **Disclaimer**

The information and any commentary on the law contained in this bulletin are provided free of charge for information purposes only. No responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by any member of Thomas More Chambers. The information and commentary does not, and is not intended to, amount to legal advice and the writers do not intend that it should be relied upon. You are strongly advised to obtain specific personal advice from a lawyer about any legal proceedings or matters and not to rely on the information or comments in this bulletin.