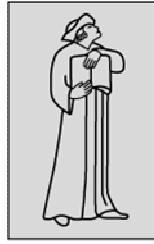


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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

BREAK CLAUSES

A lease contained a break clause under which the tenant could terminate the lease at the end of the fifth or the tenth year of the term by giving six months' notice. The notice was only valid if sent by registered post or recorded delivery, or if sent by other means but acknowledged by the receiving party or its authorised agent. Notices sent by letter on 29th and 30th July 2005 were posted by a process server in the wrong letter-box. Notices sent by fax out of business hours on 29th and 30th July 2005 were "acknowledged" for the first time in a letter dated 8th December 2006 sent by the landlord's solicitors to the tenant's solicitors. The judge held that this "acknowledgement" retrospectively validated the break clause notice. The Court of Appeal disagreed, allowing the landlord's appeal. The intention of the provisions in the lease was that an informal notice, if made and acknowledged in time, was a valid break clause notice; otherwise it was ineffective. If it was ineffective at the critical moment six months before the lease anniversary in question, it could not be made effective later. It did not matter that the landlord had no obligation to acknowledge an informal notice, as the tenant retained the ability to serve a formal notice at least until it became too late to do so. If the tenant could rely on the possibility of a late acknowledgement (perhaps even in the course of proceedings) this would be a recipe for disastrous uncertainty. There is always uncertainty in litigation because of disputes about past facts. However it is another matter to build in a forever ongoing uncertainty which depends on a future acknowledgement which may or may not be given. **Orchard (Developments) Holdings Plc v Reuters Ltd** [2009] EWCA Civ 6.

COMMONS

Local residents in Redcar failed on appeal when challenging the decision of Redcar and Cleveland Borough Council not to register part of Coatham Common as a town green under s.15 Commons Act 2006. The land had been used at least since the 1920s as part of a busy local golf course. Local residents had also used the land, mainly for recreational walking, but had deferred to the use by the golf club. The Court of Appeal held that whether or not the uses by the local inhabitants and the landowner are competing, the question is still

whether the user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to the use of the land. There is no principle of “interruption” or “deference” as such, but interruption and deference may be relevant to a determination of whether the user has been sufficient. User may be so trivial or sporadic as not to carry the outward appearance of user as of right. It is a question of fact and degree in every case. User of the kind required to found an entitlement to registration, such as walking, picnicking or playing football, is by its nature intermittent and may not in any event interfere with the owner’s use of the land. Where there could be interference, but local inhabitants voluntarily desist from interfering with the owner’s activities (for example by not walking across the golf course whilst the golfers were playing), the label (“interrupting”, “deferring” etc) is not important. What matters is how it would have appeared to the reasonable landowner at the time and in particular whether it would have appeared that the local inhabitants were asserting a right to use the land. Those who always defer to the owner are not likely to convey the impression that they are claiming the right to use the land. Here the local residents had overwhelmingly deferred to the golfers and so had not shown that they were using the land as of right. **Lewis, R (on the application of) v Redcar & Cleveland Borough Council & anor** [2009] EWCA Civ 3; [2009] 03 EG 103 (CS).

GYPSIES AND TRAVELLERS

The Court of Appeal allowed an appeal by Basildon District Council against a judgment of Collins J. Collins J had quashed a decision of the council to take direct action pursuant to s.178 Town and Country Planning Act 1990 to force compliance with enforcement notices in respect of land in Billericay, Essex. There were about fifty pitches on Dale Farm (on Green Belt land) in breach of planning controls, and several others locally. Enforcement action had been taken by the council and the claimants had sought to defeat it by applying for planning permission. In each case the Secretary of State for Communities and Local Government had upheld the enforcement notice and refused planning permission. When the council took the decision to act under s.178, there were no lawful alternative sites available in the Basildon District. However there is no positive obligation of general social policy to provide as many sites as the Gypsy community seek. The judge’s criticism of the council could be summarised as a failure to perform sufficiently its homelessness duty, and a failure to give consideration to individual families in a context in which further consideration had not been given to finding alternative sites. A homelessness procedure had been instituted in 2005 and put on hold pending the proceedings. The Court of Appeal had no doubt that the council was aware of its duties under the 1996 Act and would give effect to them. It was fanciful to conclude that the claimants would have co-operated with offers of bricks and mortar accommodation. Before the decision under s.178 was taken, a balancing exercise which had regard to the appropriate factors was carried out. The judge was in error in holding that consideration had not been given to the needs of individual families. The council’s decision was a lawful decision lawfully taken. **Basildon DC v McCarthy & ors** [2009] EWCA Civ 13; [2009] 04 EG 117 (CS).

HOUSING

The House of Lords has overturned a decision of the Court of Appeal relating to the provision of housing when a shared residence order is made by the family courts. The Court of Appeal had held that the scarcity of public housing should be disregarded when

considering whether it was reasonable for a child to have two homes, one with each parent. Lord Hoffman said, robustly, that he could not agree with this proposition “*whether as a matter of law, logic or social policy.*” It would only be in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII Housing Act 1996 with another so that he can reside with the other parent as well. There might be such a case, for example where the child was disabled and care was shared between the parents, but this would be unusual. The reviewing officer was quite right to ignore the order of the family court that residence should be shared. It is not the business of a court exercising jurisdiction under the Children Act 1989 to try to exert pressure upon a housing authority to provide resources for one or other of the parties. Family courts have no power to conjure up resources where none exist. Nor can they order local authorities or other public agencies to provide particular services unless there is a specific power to do so. The family court should not use a residence order as a means of putting pressure on a local housing authority to allocate their resources in a particular way despite all the other considerations which the housing authority have to take into account. ***Holmes-Moorhouse (FC) v Richmond-upon-Thames LBC*** [2009] UKHL 7.

HUMAN RIGHTS

The local housing authority was not liable for the murder of one secure tenant by another, either in negligence or under the Human Rights Act 1998. Mr Drummond had behaved anti-socially towards his neighbour Mr Mitchell for a long period of time. Amongst other things he had made repeated threats to kill Mr Mitchell. On 31st July 2001 he was summoned to a meeting with the local housing authority, where he was told that a notice of proceedings to recover possession would be served on him and that continued anti-social behaviour could lead to his eviction. Mr Drummond returned home and attacked his neighbour Mr Mitchell, who died a few days later. The local housing authority was under no duty to warn Mr Mitchell. If there was a duty to warn, it could follow that there would be a duty to warn in every case where a social landlord had reason to suspect that his tenant might react to steps to address his anti-social behaviour by attacking the person or property of anyone he suspects of informing against him. Imposing a duty to warn would deter and distract social landlords from intervening to reduce the risk of anti-social behaviour. The situation would be different if the authority had assumed a responsibility to advise Mr Mitchell of the steps that they were taking. Article 2 ECHR can impose a positive obligation in well-defined circumstances, but here there was no basis for saying that the authority ought to have known that there was a real and immediate risk to Mr Mitchell’s life. Mr Drummond had threatened to kill Mr Mitchell on countless occasions but he had never actually used violence against him, save in December 1994 when he had damaged his door and broken some windows. ***Mitchell (AP) & anor v Glasgow City Council*** [2009] UKHL 11.

The Court of Appeal considered the availability of damages under Article 8 HRA to occupiers affected by odours and mosquitoes from a local sewage works in Isleworth, Middlesex. On considering ***Hunter v Canary Wharf*** [1997] AC 655 in detail, it was obvious that damages in nuisance are for injury to the property and not to the sensibilities of the occupier(s). That is so as much for the case of transitory nuisance interfering with comfort and enjoyment as it is for the case of nuisance which causes permanent injury to the land and to its capital value. A claimant must show that he has in truth suffered a loss of amenity from transitory nuisance before substantial damages will be awarded, so an absent homeowner may not recover damages. It follows that the actual impact on the occupiers of

the land, though not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of damages in many cases. Occupiers who have no legal standing to claim in nuisance (such as the children of homeowners) may be able to recover damages under Article 8 pursuant to the principles set out in s.8 Human Rights Act 1998. However an award of damages in nuisance to a person with a proprietary interest in a property will be relevant to the question whether an award of damages is necessary to afford just satisfaction under Article 8 to a person who lives in the same household but has no proprietary interest. The award of damages at common law to a property owner will normally constitute just satisfaction for the purposes of s.8(3) HRA 1998 and no additional award of compensation under that Act will normally be necessary. It is most improbable, if not inconceivable, that damages at common law will be exceeded by any award to the same claimant for infringement of Article 8. **Dobson & ors v Thames Water Utilities Ltd & anor** [2009] EWCA Civ 28; [2009] 05 EG 106 (CS).

SALE OF LAND

A decree of specific performance granted to the vendors in a sale of land dispute was upheld on appeal. The parties had agreed by a one page document in September 1999 to buy and sell three plots of land. The vendors, the Kohalis, did not have registered title to all of the land agreed to be sold. The trial judge found as a fact that the purchasers, the Ezekiels, had actual knowledge of the extent of the Kohalis' title. This rebutted an implied legal obligation to make good title on the sale of the plots of land. The Ezekiels had no defence to a claim for specific performance at the agreed price. Their claims for damages for oral misrepresentations as to title were dismissed as there had been no reliance on such misrepresentations. It was not demonstrated on appeal that the trial judge's conclusion on the Ezekiels' actual state of knowledge as to the extent of the Kohalis' title was wrong. There was ample evidence from which the judge could reasonably and properly infer that on the balance of probabilities the Ezekiels actually knew of the extent of the Kohalis' registered title to the plots, that the titles did not cover the entirety of the plots and there was no other documentary evidence to prove their title. All parties to the contract knew of the vendors' lack of title. This common knowledge was inconsistent with the implication of an obligation on the part of the vendors to confer a good title to what, as all parties knew, they did not own. **Ezekiel & Ezekiel v Kohali & Kohali** [2009] EWCA Civ 35.

SERVICE CHARGES

The LVT determined on an application pursuant to s.27A Landlord and Tenant Act 1985 that the charges challenged were not properly to be regarded as service charges, as the premises were not a "dwelling." The premises consisted of a ground floor which could be used pursuant to permission under the lease as consulting rooms for medical or dental practitioners; and a basement residential flat. The sole disputed issue was whether the premises consisted of a dwelling within the meaning of ss.18 and 38 LTA 1985, and so whether the charges were service charges under s.18. The LVT distinguished **Oakfern Properties Ltd v Ruddy** [2006] EWCA Civ 1389. **Oakfern** related to a solely residential holding, so the comments by Jonathan Parker LJ regarding commercial property did not provide clear authority in the present case. In addition, it was clear in **Oakfern** that each individual unit was a "separate" dwelling for the purposes of s.38 LTA 1985. It was common ground on the present facts that there was an outside doorbell which rang in both the

ground floor and the basement, and that there was an internal staircase linking the basement and the ground floor, with a connecting door. It followed that the dwelling was not “separate” within the meaning of s.38 and so was not a dwelling within the meaning of s.18. **Buckley v Bowerbeck Properties Ltd** [7th October 2008] LVT; [2009] 01 EG 78.

OTHER DEVELOPMENTS

CONVEYANCING

The Licensed Conveyancers (Compensation for Inadequate Professional Services) Order 2009 SI 501 increases the maximum compensation that the Council for Licensed Conveyancers may direct a licensed conveyancer to pay his client for inadequate professional services from £5,000 to £15,000. The Order comes into force on 31st March 2009. An earlier order which set the limit at £5,000 is revoked.

HOME INFORMATION PACKS

The Home Information Pack (Amendment) Regulations 2009 SI 34 have been issued because of a defect in the Home Information Pack (Amendment) (No.3) Regulations 2008 SI 3107. The new Regulations come into force on 6th April 2009. The HIP Regulations 2008 SI 3107 made provision for a new required document to be included in the HIP, namely a Property Information Questionnaire. The PIQ is to be completed by the seller and will contain basic information about the property that is likely to be of assistance to potential buyers. Apparently as a result of an oversight the HIP Regulations 2008/3107 did not provide for the PIQ to be made available by the seller at the very beginning of the marketing process. This has now been remedied so as to provide that the PIQ must be part of the HIP when marketing begins, and cannot be added later. The editors of this bulletin feel that there must be scope for a comic song based on all these acronyms.

HOUSING

The Housing and Regeneration Act 2008 (Commencement No.1 and Saving Provisions) Order 2009 SI 415 brings into force, on 2nd March 2009, s.314 of and Schedule 15 to the Housing and Regeneration Act 2008. These provisions make changes to housing legislation in response to the decision of the Court of Appeal in **Morris v Westminster City Council** [2005] EWCA Civ 1184 (summarised in the November 2005 bulletin), which declared that s.185(4) Housing Act 1996 was incompatible with the ECHR. Article 2 commences the provisions in relation to England and Wales and provides that the amended provisions will apply only to applications for an allocation of social housing or housing assistance (homelessness) made on or after 2nd March 2009.

A minor amendment is made to the duties of managers of houses in multiple occupation by the Houses in Multiple Occupation (Management) (England) Regulations 2009 SI 724. The Regulations come into force on 13th April 2009 and amend the definition of “recognised engineer” to an engineer approved under regulation 3 of the Gas Safety (Installation and Use) Regulations 1998.

The Housing and Regeneration Act 2008 (Commencement no.3) Order 2009 SI 363, brings into force ss.64(1) and (2) of the Housing and Regeneration Act 2008 on 16th February 2009. The provisions commenced enable the Secretary of State to make provision for the dissolution of the Housing Corporation. The Housing and Regeneration Act 2008 (Commencement no. 4 and Transitory Provisions) Order 2009 SI 803, made on 26th March 2009, brings into force further provisions of the HRA 2008 relating to the new regulatory regime and the dissolution of the old one. The Housing Corporation is finally dissolved by the Housing Corporation (Dissolution) Order 2009 SI 484, coming into force on 1st April 2009. The main regulatory functions of the Housing Corporation were transferred to the Regulator of Social Housing by the Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008 SI 2839.

LAND REGISTRATION

The Land Registration Fee Order 2009 SI 845 comes into force on 6th July 2009, replacing the Land Registration Fee Order 2006 and making changes to land registration fees. A summary of the changes is set out in the Explanatory Note to the Order.

RESIDENTIAL MANAGEMENT

A new code of practice relating to the management of residential property by landlords and others who discharge the management function is approved by the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 SI 512. The Order comes into force on 6th April 2009. The new Code is published by the Royal Institution of Chartered Surveyors (ISBN 978 1 84219 168 2). Approval for the earlier code (approved by SI 1996/2839) is withdrawn. Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings the codes of practice are admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account. The new code applies only to the management of residential properties in England.

SERVICE CHARGES

Presumably with a view to helping homeowners who are struggling financially the Housing (Purchase of Equitable Interests) (England) Regulations 2009 SI 601 give a housing authority which is the landlord of a flat under a long lease a power to purchase an equitable interest in the flat in order to assist the tenant to meet some or all of the costs of service charge payments. The tenant’s agreement is required. The Regulations come into force on 6th April 2009. A similar function is performed in a different way by the Housing (Service Charge Loans) (Amendment) (England) Regulations 2009 SI 602, also coming into force on 6th April 2009. These regulations amend the Housing (Service Charge Loans) Regulations 1992, which

provide for housing authorities to make loans to their tenants in respect of service charges for repairs or improvements. The new regulations provide that a loan may be on terms that do not require the payment of interest or that require the payment of interest on only part of the loan.

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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