

PROPERTY LAW BULLETIN

FEBRUARY 2003

This bulletin summarises case law and other developments since the last bulletin in October 2002. An important decision in the Court of Appeal, *Ghaidan v Mendoza*, now allows same sex partners to succeed to a statutory tenancy in the same way as a surviving spouse. Another decision relating to residential tenancies was *Sumeghovo v McMahon*, where the Court of Appeal held that in deciding whether a place was being occupied as a person's only or principal home, the fact that they slept there, even on a temporary basis, was enormously important and influential.

An interesting case about easements which will have some practical significance is *Central Midlands Estates Ltd v Leicester Dyers Ltd*. In this case it was held that although in some circumstances an easement of parking may exist, you cannot have an easement to park an unlimited number of vehicles upon a piece of land qualified only by the amount of space available. This would render the residual ownership illusory. Another case which will be of practical importance, particularly for local councils, was *L.E. Jones (Insurance Brokers) Ltd v Portsmouth City Council*. Here it was held that contractual control could amount to a sufficient degree of control for nuisance liability. The local council's duty was not excluded by the potential liability of the highway authority for the same negligence.

On the procedural side, several cases concerning service or delivery of notices are summarised in this bulletin, and we give details of three new statutory instruments changing or amending prescribed forms, two relating to leasehold enfranchisement and one for proposing a new rent under an assured periodic tenancy.

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CASE LAW UPDATE

COVENANTS

**Court should be slow to depart from natural meaning of words;
covenant was discharged by dissolution of company**

Crest Nicholson Residential (South) Ltd v McAllister (2002) EWCA 2443 Ch; (2003) 1 All ER 46

Neuberger J found that a covenant not to use land "for any purpose other than those of or in connection with a private dwellinghouse" prevented the erection of more than one dwelling house on a plot of land. As a matter of ordinary language "a" suggested singularity rather than plurality. Although the court had to be careful when relying on authority to construe an expression in a document, certainty and consistency in the court's approach in relation to common expressions in conveyances, leases and other documents was desirable. Where the Court of Appeal had taken a clear view as to the natural meaning of an expression such as "a private dwelling-house", the court should be slow to depart from the natural meaning without some reason. A second covenant, that nothing was to be built on the plot without the prior approval of the plans by the company who were selling the plots, approval not to be unreasonably withheld, was held to have been discharged by the dissolution of the company. It would be perverse to attribute to the parties an intention that the covenant could prevent any development at all if the company ceased to exist. It was much more sensible and realistic and more likely to accord with the parties original intentions to find that the covenant was discharged by the company's dissolution. It followed that the second covenant was no longer enforceable.

HOUSING

Restrictions on sale of green belt land not applicable to right to buy

R (on the application of O'Byrne) v Secretary of State for the Environment, Transport and the Regions & anor (2002) UKHL 45; (2003) 1 All ER 15

The tenant of a secure tenancy served a right to buy notice (under Part V of the Housing Act 1985) on the local authority. The local authority accepted the right to buy but because the flat was on land designated as Green Belt land it sought the consent of the Secretary of State under s.5 Green Belt (London and Home Counties) Act 1938. After a local inquiry, the Secretary of State refused consent. The tenant sought judicial review. The House of Lords found that s.5 1938 Act did not apply to the right to buy under Part V Housing Act 1985. The proposal to sell in s.5 was the local authority's proposal, and when s.5 was read with s.6 it was clear that s.5 was not intended to deal with compulsory acquisitions under compulsory powers. The 1938 Act did not operate to deprive the tenant of the right to buy.

No breach of human rights in preventing relative from succeeding to secure tenancy

Wandsworth Borough Council v Michalak CA (2002) EWCA Civ 271; (2002) 4 All ER 1136

The defendant occupied a bedroom in a flat let on a secure tenancy to the brother-in-law of his first cousin once removed. He had lived there for several years. When the tenant died the local authority obtained an order for possession against the defendant. The Court of Appeal (Brooke and Mance LJ and Park J) held that the list of relatives who could succeed (s.87 & 113(1) Housing Act 1985) was exhaustive. Although an exhaustive list could lead to unfairness at the edges it provided certainty, which was very desirable in relation

to local authority housing. It also avoided expensive and time-consuming litigation as to who was and was not able to succeed to a tenancy. There was no breach of Arts 8 and 14 of the Human Rights Act 1998. There was an objective and reasonable justification for any difference in treatment. The court should defer to the decisions of Parliament which had determined the manner in which public resources should be allocated for local authority housing.

Same-sex partner can succeed to statutory tenancy in same way as husband or wife

Ghaidan v Mendoza (2002) EWCA Civ 1533; (2002) 4 All ER 1162

The Court of Appeal (Kennedy, Buxton and Keene LJJ) held that a same-sex partner who lived with his partner as if they were spouses was entitled to succeed to a statutory tenancy under para 2 sch 1 Rent Act 1977. The fact that the partners were of the same sex did not mean that the surviving partner could only succeed to an assured tenancy as a member of the family. Para 2(2) had to be construed to mean, "as if they were his or her wife or husband." As previously construed, para 2 infringed articles 8 and 14 of the Human Rights Act 1998 but the breach was remedied by the new construction.

LEASEHOLD ENFRANCHISEMENT

Property divided vertically is not a house under s.2 Leasehold Reform Act 1967; "material part" under s.2(2) means part of house not part of whole structure

Malekshad v Howard De Walden Estates Ltd (2002) UKHL 49; (2003) 1 All ER 193

The respondent was the lessee of two residential properties under a single lease. The properties were not detached but were divided vertically from roof to basement. Part of the basement of the first property lay below the ground floor of the second (to the extent of 2% of its total floor area). The lessee lived in part of the first property but not the second. He sought to enfranchise the two properties together under the Leasehold Reform Act 1967. That Act allows a lessee of a house the right to acquire the freehold of that house where he occupies it as his residence. The Court of Appeal considered the definition of "house" under s.2 of the Act and found that the lessee was entitled to enfranchise both of the properties since the building comprising them could reasonably be called a house. The House of Lords held that s.2(1)(b) prevented the building from being a "house" under the Act. That subsection provided that where a building was vertically divided the building as a whole is not a house. In s.2(2), "material part" referred to a material part of the house to be enfranchised, not a material part of the structure to which the house or part of the house was attached. The part of the first property's basement which was below the second property was not a material part of the house to be enfranchised, which was the first property. Accordingly s.2(2) did not operate to prevent the enfranchisement of the first property.

LEASES

Construction of rent review clause

First Property Growth Partnership LP v Royal & Sun Alliance Property Services Ltd (2002) EWCA Civ 1687; (2003) 1 All ER 533

A 35-year lease which had commenced on 7th May 1975 contained a rent review clause which provided that notice of a review was to be given "at any time not more than twelve months before the expiration of each or any of the following years of the said term that is to say every fifth year thereof but not at any other time..." The Court of Appeal, dismissing the lessor's appeal, held that on a true construction of the clause, notice had to be given before the end of the relevant five-year period. "Before" covered the twelve month period and the five year period and the words "but not at any other time" reinforced this. The lessor's notice, given on 25th April 2001, was therefore invalid.

Tenant unable to set-off counterclaim against manager appointed by court

Maunder Taylor v Blaquiére (2002) EWCA Civ 1633; (2003) 1 WLR 379

A manager appointed under 24(1) of the Landlord and Tenant Act 1987 is required to carry out the functions given him by the leasehold valuation tribunal that appointed him. He is not obliged to carry out the landlord's functions under the lease. The manager's right to monies arose from the appointment by the court, not the lease, so there is no mutuality between the manager's claim to monies for work done and the claims of the tenant against the landlord. Where a manager appointed under s.24(1) makes claims against a tenant, the tenant is not entitled to set off sums he may be entitled to claim by way of damages from the landlord for the landlord's breach of covenants.

MORTGAGES

Where mortgagee sold property at undervalue in breach of statutory duty, prima facie measure of damages is reduction in value of equity of redemption

Adamson v Halifax plc (2002) EWCA Civ 1134; (2003) 1 WLR 60

The claimant had had a mortgage with the Halifax. The claimant also owed £5,000 to another bank, who obtained judgment against her and then a charging order over her flat. The claimant fell into arrears with her mortgage payments and her flat was repossessed and sold by the Halifax. She issued proceedings for breach of statutory duty to take reasonable care to obtain the best possible price. She succeeded and it was found that the difference between the sale price and the proper value was £6,000. However she was only awarded damages of £1,000 as the district judge found that if the Halifax had sold the property at the correct price it would have accounted to the bank for the £5,000. On appeal it was held that where a mortgagee, in breach of its statutory duty, sold mortgaged property at an undervalue the prima facie measure of damage was the reduction in the value of the equity of redemption. Damages were to be assessed with the benefit of the knowledge of what had happened up until the time of trial. At the time of trial there had been no claim by the other bank and such a claim seemed unlikely. Since limitation had expired there was no longer any prospect of the Halifax being sued by the other bank. The claimant was entitled to recover all of the loss caused by the defendant's breach of duty.

NUISANCE

Contractual control can amount to a sufficient degree of control for nuisance liability

L.E. Jones (Insurance Brokers) Ltd v Portsmouth City Council (2002) EWCA Civ 1723; (2003) 1 WLR 427

The defendant local council was contractually responsible for maintaining trees. It acted as agent for the local highway authority. This gave it a sufficient degree of control in fact and in law to be liable for the nuisance caused as a result of the tree roots encroaching onto the claimant's property. The court emphasised that the key to liability in the law of nuisance was the degree of control over the thing or activity causing the nuisance. The existence of a contractual duty to A could not prevent a tortious duty to B where sufficient control existed. The defendant's duty was not excluded by the potential liability of the highway authority for the same negligence.

PROCEDURE

Service by recorded delivery is deemed regardless of actual delivery

WX Investments Ltd v Begg (Fraser, Part 20 defendant) (2002) EWHC 925 (Ch); (2002) 1 WLR 2849

A business lease incorporated s.196(4) Law of Property Act 1925 (as amended by s.1(1) Recorded Delivery Service Act 1962), which provides that notices under the lease are sufficiently served if sent by the recorded delivery service. Patten J, dismissing the landlord's appeal, held that s.196(4) does not merely provide for service by recorded delivery at the time at which delivery is actually effected. The words "*and that service shall be deemed*" introduced a presumed date of delivery regardless of when, or if, delivery actually took place. Service of the tenant's counter-notice to the landlord's notice specifying an increase in the annual rent was deemed to have occurred on the first occasion on which the Post Office attempted to deliver it. This was notwithstanding the fact that the landlord did not actually receive it until several days later, by which time the period for service of the counter-notice had expired.

In brief

Conveyancing

Commissioner for New Towns & anor v J.J. Gallagher Ltd (27th December 2002) TLR Ch Div

The phrases "*enjoyed with*" and "*appurtenant to*" in s.62 Law of Property Act 1925 referred to incorporeal hereditaments such as easements, and not to physical property. Accordingly the statutory presumption did not operate to include a road not otherwise referred to in a conveyance.

Costs

Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions (7th November 2002) TLR CA

A successful claimant in the Lands Tribunal should be entitled to his costs incurred in the proceedings in the absence of a special reason to the contrary. The principles underlying an award of costs by the Tribunal were not the same as those under the Civil Procedure Rules.

Covenants

Williams & anor v Kiley (trading as CK Supermarkets Ltd (5th December 2002) TLR CA

The principles behind a building or letting scheme whereby restrictive covenants could be mutually enforceable as part of local law by the owners or lessees of individual plots or buildings without the need to rely on the original grantor could be extended to a commercial context where competing traders held business leases within a single development. It was necessary to ensure that the scheme was fully agreed by everyone and in clear terms.

Easements

Massey & anor v Boulden & anor (27th November 2002) TLR CA

A person driving a motor vehicle without lawful authority on land not forming part of a road (such as, here, a track over a village green) was guilty of an offence. Consequently prescriptive rights to vehicular access could never be acquired save over a public highway or over a road to which the public already had de facto access. However an easement could be purchased under s.68 Countryside and Rights of Way Act 2000.

Abbahall Ltd v Smee (28th December 2002) TLR CA

Where there is a flying freehold and the roof protects the claimants' and the defendant's premises equally, each party who will share the benefit of the works must also share the burden of paying for them. It is not correct to adjust the parties' share of liability to contribute to the cost of such repairs in the light of their respective financial circumstances.

Central Midlands Estates Ltd v Leicester Dyers Ltd (18th February 2003) TLR Ch Div

In appropriate circumstances an easement of parking may exist. However, in this particular case the suggestion that the right to park an unlimited number of vehicles upon a piece of land qualified only by the amount of space available on the land could amount to an easement was wrong. Such an easement would render the residual ownership of the land illusory and was not possible.

Housing

Westminster City Council v National Asylum Support Service (18th October 2002) TLR HL

A local authority is obliged to provide accommodation for a destitute asylum seeker who is in need of care and attention and whose need for accommodation arises from infirmity as well as from destitution (s.21(1)(a) and (1A) National Assistance Act 1948, s.95 Immigration and Asylum Act 1999).

Regina (Hetoja) v Secretary of State for the Home Department (11th November 2002) TLR QBD

The Secretary of State was not required to have regard to an asylum seeker's preferences as to locality and nature of accommodation when considering their right to be accommodated. However he was obliged to provide adequate accommodation and in doing so to take into account individual circumstances. While regard could not be had to preferences, regard could be had to factors underlying those preferences.

Regina (Cumpsty) v The Rent Service (5th December 2002) TLR QBD

Although a rent officer's determination of a person's local reference rent was a determination of his civil rights and obligations under article 6 to sch 1 of the Human Rights Act 1998, the statutory scheme did not breach the right to a fair trial under art 6. The rent officer was an independent and impartial tribunal for the purposes of article 6 provided that sufficient reasons were given for the determination.

Sumeghovo v McMahon (6th November 2002) TLR CA

The place where a person sleeps, even on a temporary basis, is enormously important and influential when deciding whether that place was being occupied as his only or principal home. Mr McMahon was not liable for damages to his former tenant under the Protection from Eviction Act 1977 as at the relevant times he had occupied the property as his only or principal home and so the tenancy was excluded from the Act.

Akram v Adam (19th November 2002) TLR CA

An order requiring an unwilling statutory tenant to give his landlord access to enable work to be carried out to make the tenant's premises into suitable alternative accommodation did not fulfil s.116(3) Rent Act 1977 and was not lawful. In the absence of a consensual arrangement there was no basis on which the judge could require the tenant to give access to allow such works.

Stonebridge Housing Action Trust v Gabbidon & anor (13th December 2002) TLR Ch Div

A court is not compelled to refuse to suspend an order for possession under s.85 Housing Act 1985 where premises had been used for a serious criminal offence (in this instance dealing drugs).

Ibrahim v Redbridge London Borough Council (27th December 2002) TLR QBD

A local authority housing scheme which gives preference to current, as opposed to historic, past, need is not unlawful.

Human rights

Regina (Bernard & anor) v Enfield Borough Council (8th November 2002) TLR QBD

Where a local authority has breached article 8 of the ECHR (right to private and family life), damages should not be minimal and should reflect the policy of the HRA 1998 that Convention rights were to be respected by all public authorities. Sullivan J awarded £10,000 for failure to provide adapted accommodation for a period of 20 months (s.21 National Assistance Act 1948).

Leases

St Mary's Mansions Ltd v Limegate Investments Co Ltd, Sarruf & ors QBD (13th November 2002) TLR CA

A long lease contained provisions that entitled recovery of "the costs of all other services which the lessor may at its absolute discretion provide" and for the "reasonable and proper fees" for general management of the building. The Court of Appeal held that these did not, on a proper construction of the lease, entitle the lessor to include its legal costs of proceedings for arrears of charges and ground rent as part of the lessee's service charge.

Pennycook v Shaws (EAL) Ltd (9th December 2002) TLR Ch Div

Where a landlord has served notice to terminate a business lease and the tenant has served a counter-notice accepting termination but later served a second counter-notice indicating the contrary, the tenant will not always be precluded from applying to the court for a renewal of the lease. Provided that the second counter-notice was served within two months of the original notice, it could revoke the first counter-notice. Whether it did or not depended on all the circumstances including whether the landlord had changed his position in reliance on the first counter-notice.

Smith v Spaul QBD (28th December 2002) TLR CA

A mortgagee in possession of leasehold premises is not a lessee for the purposes of s.146 Law of Property Act 1925. Where a lessor served a notice of breach of repairing covenant under s.146 on a mortgagee in possession, the mortgagee's counter-notice (claiming the benefit of the Leasehold Property (Repairs) Act 1938) was ineffective. The lessor was not required to obtain the permission of the court under s.1(3) of the 1938 Act before issuing proceedings for possession.

Go West Ltd v Spigarolo & anor QBD (10th February 2003) TLR CA

Under s.1(3) Landlord & Tenant Act 1988, the landlord's written notice of decision whether to grant permission to the tenant to assign the lease ends the reasonable time allowed for giving or withholding consent. Where the landlord was held to be in breach of s.1 by withholding consent unreasonably he would be liable for breach of statutory duty.

Mortgages

Household Mortgage Corpn plc v Whitehead & anor QBD (29th November 2002)
TLR CA

Where a mortgage lender made a claim in a voluntary arrangement as an unsecured creditor and accepted a dividend in respect of that claim, it was not to be treated as having elected to abandon its security for any part of the mortgage debt which was secured. It was entitled to insist that its security be redeemed for the full amount of the mortgage debt.

Corbett & anor v Halifax Building Society & ors (28th December 2002) TLR CA

A sale by a mortgage lender in possession could not be set aside merely because the sale was at an undervalue. There had to be some impropriety or bad faith on the part of the mortgagee in the exercise of its power of sale.

Procedure

Van Aken v Camden Borough Council (28th October 2002) TLR CA

For the purposes of a homeless person's appeal to the county court, the 21-day time limit laid down in s.204(2) Housing Act 1996 was complied with by the appeal documents being put through the court's letter-box after it had closed for business on the 21st day. Mere delivery is sufficient, there is no need for someone to be in the court office to receive. *Swainston v Hetton Victory Club Ltd* (1983) 1 All ER 1179, 1184, followed.

Regina (Lester) v London Rent Assessment Committee (25th November 2002) TLR QBD

A tenant's application to a rent assessment committee under s.13(4) Housing Act 988 was referred to the committee on the date the application was delivered rather than the date on which it was sent. "Refers" in that section, bears the ordinary and obvious meaning "delivered", rather than "sent".

Services

British Waterways Board v London Power Networks plc & anor (21st November 2002) Ch Div

"Land" includes buildings and structures for the purposes of paragraph 6 sch 4 to the Electricity Act 1989. The Secretary of State for Trade and Industry consequently had power to grant a wayleave to an electricity company entitling it to install cables through a tunnel owned by a landowner who had refused his consent for a wayleave.

OTHER DEVELOPMENTS

All of the statutes and statutory instruments referred to can be found on the HMSO website, at www.hmso.gov.uk

HOMELESSNESS ACT 2002: COMMENCEMENT

The Homelessness Act 2002 (Commencement No. 3) (England) Order 2002 SI 3114 brings into force various provisions of the Homelessness Act 2002 in relation to England. Article 2, which comes into force on 5th December 2002, gives the Secretary of State power to make regulations under a new section 160A of the Housing Act 1996 (allocation only to eligible persons). The following provisions specified in article 3 relate mainly to the allocation of housing accommodation under Pt 6 Housing Act 1996: s. 13 (application of Part 6 to existing tenants); s. 14 (abolition of duty to maintain housing register); s. 15 (application for housing accommodation); section 16 (allocation schemes); s. 18 (minor and consequential amendments). These provisions come into force on 31st January 2003 except insofar as they are already in force.

HOUSING (OVERCROWDING) BILL

This was introduced in the House of Commons on 22nd January 2003. Its main effects will be to reform the overcrowding provisions in the Housing Act 1985, to introduce a new "bedroom standard" and to modernise the "space standard" in the 1985 Act. It will also require authorities to inspect their districts and to prepare reports on overcrowding, and require the Secretary of State to take these reports into account when disbursing funds for housing purposes.

NEW PRESCRIBED FORMS AND NOTICES

Assured periodic tenancies: form for proposing new rent

The Assured Tenancies and Agricultural Occupancies (Forms) (Amendment) (England) Regulations 2002 SI 260 amend the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997 ("the 1997 Regulations") by prescribing two new forms to replace Form No. 4A. The first, Form No. 4B, is for use by landlords proposing, under section 13(2), a new rent for an assured periodic tenancy. The second, Form No. 4C, is for use by landlords or licensors proposing, under section 13(2), a new rent or licence fee for an assured agricultural occupancy. For the period of two months beginning on 11th February 2003, either Form No. 4A or Form No. 4B can be used to propose a new rent for an assured periodic tenancy, and either Form No. 4A or Form No. 4C can be used to propose a new rent or licence fee for an assured agricultural occupancy.

Leasehold enfranchisement forms and notices

The Leasehold Reform (Collective Enfranchisement) (Counter-notices) (England) Regulations 2002 SI 3208 come into force on 10th April 2003. A person who receives a notice for a claim for collective enfranchisement made under Part I of the Leasehold Reform Housing and Urban Development Act 1993 must respond by giving a counter-notice admitting or opposing the claim under s.21. The Regulations prescribe a requirement that a counter-notice shall contain (in addition to the particulars required by s.21) a statement as to whether or not the specified premises are within the area of a scheme approved as an estate management scheme under section 70. These Regulations only apply to counter-notices given on or after the date these Regulations come into force.

The Leasehold Reform (Notices) (Amendment) (No. 2) (England) Regulations 2002 SI 3209 also come into force on 10th April 2003. They amend the Leasehold Reform (Notices) Regulations 1997 by providing a new form to be

used by landlords replying to claims for enfranchisement and extension of long leaseholds under the Leasehold Reform Act 1967. Provisions of this Act which are relevant to the Form in the Schedule to these Regulations have been amended by the Commonhold and Leasehold Reform Act 2002 as mentioned in the Notes to the Form. The new Form is to be used for notices in reply given on or after the date these Regulations come into force. Forms which are substantially to the same effect as those prescribed may also be used.

Sources

The following sources have been used in the compilation of this bulletin: The Law Reports 2002 (QBD, Ch Div and HL parts 9-12) and 2003 (QBD, Ch Div and HL part 1:January); 2002 4 All ER parts 4 to 12 and 2003 1 All ER parts 1 to 7 covering 10.10.02 to 19.2.03; 2002 WLR parts 37 to 46 and 2003 WLR parts 1 to 7 covering 18.10.02 to 21.2.03; TLR from 10.10.02 to 21.2.03; recent legislation.

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