

PROPERTY LAW BULLETIN

FEBRUARY 2004

INTRODUCTION

A major piece of new legislation is proposed in the form of the Housing Bill, introduced on 8th December 2003. Its main provisions are summarised below. There has also been a further commencement order for the Commonhold and Leasehold Reform Act 2002.

In relation to caselaw, there is a cautionary tale for those involved in serving s.21 Housing Act 1988 notices in the case of *Fernandez & anor v McDonald & anor*. S.21(4)(a) is, according to the Court of Appeal, clear and precise. They also suggest that compliance by landlords is not difficult. However the subsection does seem to cause landlords perennial problems which will not be lessened by the decision in this case. *M25 Group Ltd v Tudor & ors* may prove useful in situations where less serious errors have been made in the content of a notice.

Marcic v Thames Water Utilities Ltd eventually arrived in the House of Lords, where unfortunately for Mr Marcic, Thames Water succeeded in their appeal. Their Lordships held that common law and Human Rights Act claims could not be used to circumvent the statutory enforcement scheme. Notwithstanding this decision there was a more positive practical outcome: remedial work to alleviate the problem of repeated sewer flooding onto Mr Marcic's property was concluded in June 2003.

You will find a list of our sources at the end of the bulletin. If you know anyone who would like to receive a copy, please contact clerks@thomasmore.co.uk to have them added to our mailing list. Mailings will be by email but hard copies can be provided on request. Earlier editions of the bulletin appear on the chambers website at www.thomasmore.co.uk

CASE LAW UPDATE

BUSINESS TENANCIES

Whether extensive refurbishment involving removal and replacement of internal partitions is within s.30(1)(f) Landlord & Tenant Act 1954 is question of fact and degree

Ivorygrove Ltd v Global Grange Ltd (2003) EWHC 1409 (Ch); 2003 1 WLR 2090

The defendant landlord resisted an application for a new business tenancy under s.30(1)(f) Landlord & Tenant Act 1954 (landlord's intention to demolish or reconstruct a substantial part of the premises or to carry out a substantial work of construction on the holding or part of it). The proposed works involved an extensive refurbishment of the premises including the demolition of internal partitions, the majority of which were not load-bearing. The judge at first instance held that the tenancy could be opposed on s.30(1)(f). Lawrence Collins J agreed, dismissing the tenant's appeal against this decision. S.30(1)(f) did not refer to the structure of the building. It would be wrong to import into the section a requirement of demolition or construction of structural or load-bearing

features. Whether relevant parts of the premises were load-bearing was simply one of the factors to be taken into account in determining whether there was demolition, construction or reconstruction within the meaning of s.30(1)(f). Whether the replacement and reconfiguration of partitioning could amount to demolition and reconstruction within the section was a question of fact and degree, and accordingly the judge was entitled to find that the defendant's proposed works fell within the section.

COMMONS

Use of land can be by implied permission which can defeat claim that use was as of right

R (on the application of Beresford) v Sunderland City Council (2003) UKHL 60; (2004) 1 All ER 160; (2003) 3 WLR 1306

Sunderland City Council owned an area of grassland which members of the public used for recreation. The council's predecessors in title had constructed wooden seats along most of the perimeter in 1977 and a hard surface cricket patch had been laid out in 1979. The council mowed the grass regularly. In 1999 the claimant and other local residents submitted an application to the council for the land to be registered as a town or village green. This was on the basis that the local residents had indulged in 'lawful sports and pastimes as of right' for not less than 20 years under s.22(1) Commons Registration Act 1965. The council refused the application, saying that the use was pursuant to an implied licence.

The claimant failed on an application for judicial review and before the Court of Appeal. However the House of Lords allowed her appeal. The only issue on the appeal was whether the admitted use of the land was 'as of right.' It was not suggested that the council had expressly licensed the use of the land. Rather the question was whether it was possible to imply a licence. Lord Bingham could see no objection in principle to the implication of a licence. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission (for example by asserting his right to exclude them). However a licence to use land cannot be implied from mere inaction of a landowner with knowledge of the use to which the land was put. The council had relied on its conduct in mowing the grass and providing benches. It argued that in doing this it was encouraging the public to use the land, from which its licence to do so could be implied. However this conduct was equivocal. If the land were registered as a village green one would expect the council to mow the grass and provide some facilities. It was hard to see how the same conduct could be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence. There was no sign that the permission was intended to be temporary or revocable. The fact that the land was in public ownership was highly relevant when considering what conclusion a reasonable person would draw from the circumstances of user.

EASEMENTS

Parking easement can exist if it does not deprive servient owner of reasonable use of the land

Batchelor v Marlow & anor (2001) EWCA Civ 1051; (2003) 4 All ER 78; (2003) 1 WLR 764

The defendants ran a garage and parked cars on a strip of land verging on the public highway. The strip belonged to the claimant. No more than six cars could be parked on the strip. The defendants claimed that they had acquired an exclusive prescriptive right to park six cars on the land between 8.30am and 6pm Monday to Friday in connection with their business. They succeeded at first instance and the claimant appealed. It was common ground between the parties that the right to park can exist as an easement.

The essential question is one of degree. If the right granted is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it cannot be an easement, though it might be some larger or different grant. The answer to the question depends on the facts of each case. On appeal, counsel for the defendants made a variety of suggestions as to how the claimants could make use of their land during the time it was not being used subject to the easement. Tuckey LJ, giving judgment for the court, was not impressed by these suggestions. The right claimed was too extensive to amount to an easement.

Easement for use of land as a communal garden can arise by prescription

Mulvaney v Gough & ors (2002) EWCA Civ 1078; (2003) 4 All ER 83

The respondent claimed an easement over land behind her cottage which was owned by the appellant. For many years she and other residents had enjoyed communal use of the adjacent land as a garden. In 1996 the respondent returned home to find that the appellants had used a JCB to remove flowerbeds and that gravel had been deposited for the purpose of gravelling the surface for vehicular access. The respondent issued proceedings. At first instance the district judge concluded that the use claimed was long established and capable of being an easement. He granted a declaration that the respondent was entitled to reinstate and maintain the flowerbed. This decision was affirmed by the circuit judge. In the Court of Appeal the appellants accepted that an express grant of the right to the enjoyment of a communal garden could constitute an easement. However they argued that the use relied on by the respondent as establishing a prescriptive right was too extensive to amount to an easement as it effectively excluded the appellants from any beneficial use of the land. The Court of Appeal did not accept this. However they did agree that the respondent was not necessarily entitled to reinstate the particular flowerbed. They amended the declaration to state that "*The respondent is entitled to a right to use the blue land as a communal garden for recreational and amenity purposes.*" If the appellants wanted to do works on the land they would have to maintain its character as a communal garden and in practice should consult and if possible agree with the respondent before carrying out works. The court upheld the award of £200 in damages for the destruction of the flowerbed.

Right of way cannot be used to provide substantial benefit to non-dominant land

Macepark (Whittlebury) Ltd v Sargeant & anor (2003) EWHC 427 (Ch); (2003) 1 WLR 2284

The defendants had leased land with a hotel on it to the claimants. The Silverstone motor racing circuit was nearby. The lease conferred a right of way "*at all times and for all purposes*" for the claimant, its invitees and servants, over a path which crossed the defendants' adjoining land. The right of way was granted "*for the purpose of gaining access to and egress from the site and the county highway.*" A copse owned by a third party was situated between the leased land and the motor racing circuit. The claimants had an agreement with the third party to construct a "fast track" vehicular access through the copse so as to link the hotel directly with the circuit. The parties asked an arbitrator to determine whether it would be a lawful use of the right of way to enable hotel guests, including racing drivers, to enter the leased land and then drive through the copse to the circuit. The arbitrator held that such use would be outside that granted by the lease.

On the claimant's appeal, Gabriel Moss QC sitting as a deputy High Court judge, agreed with the arbitrator. The right of way over the defendant's land was for the benefit of the leased land (the dominant tenement). It could not be used substantially for the benefit of non-dominant land (the copse and the circuit), whether or not that land was in the same ownership as the dominant tenement. The right of way permitted ancillary use to access non-dominant land provided that it did not substantially benefit the non-dominant land. The use proposed would allow the owners of the copse to charge for access to the

circuit and the circuit itself would benefit. This would mean that the copse and the circuit would become in substance dominant land and the proposed use of the path would not be merely ancillary to the right of access to the leased land. The proposed use would also exceed the right of access which on a true construction had been granted by the lease. Accordingly the proposed use would be unlawful.

HOUSING

s.21(4)(a) Housing Act 1988 notice must expire on the last day of a period of the tenancy

Fernandez & anor v McDonald & anor (2003) EWCA Civ 1219; (2003) 4 All ER CA 1033

In this case the Court of Appeal considered the validity of a notice served under s.21(4)(a) Housing Act 1988 requiring possession of premises let under an assured shorthold tenancy. The tenants had lost at first instance and appealed. The statutory periodic tenancy ran from month to month, from the fourth day of each month to the third of the next. The s.21(4)(a) notice was given in October 2002 and stated that the landlord required possession on 4th January 2003, i.e. the day after the last day of a period of the tenancy. S.21(4)(a) requires the court to make an order for possession if it was satisfied that the landlord has given a notice in writing “*stating that, after a date specified in the notice, being the last day of a period of the tenancy*” possession was required by virtue of s.21. The Court of Appeal allowed the tenants’ appeal and held that the notice was invalid. A notice that failed to specify a date which was the last day of a period of the tenancy was not a valid notice for the purposes of s.21(4)(a). The statute did not require the landlord to state the date on which he required possession. S.21(4)(a) was clear and precise and compliance by landlords was not difficult. Further, the consequences of failure to comply are not particularly serious for landlords. Even if the defect is not noticed until the point is taken in court, a valid notice can then be given. Although the notice was only one day out, it could not be said that the notice was sufficiently clear to comply with its statutory purpose. This would leave room for all sorts of arguments, uncertainty and inconsistency up and down the country on a matter about which there should be no doubt at all.

Note: The Court of Appeal in this case considered the decision in *Burman v Mount Cook Land Ltd* (2002) 1 All ER 144. Readers may wish to compare the more recent case of *M25 Group* (summarised below), which also looked at defects in notices in the light of the *Burman* case but took a more lenient view where the statutory requirement was not central to the purpose of the notice.

Allocation of accommodation under NASS scheme does not involve choice for purposes of local connection under s.199(1)(a) Housing Act 1996

Al-Ameri v Kensington & Chelsea Royal LBC; Osmani v Harrow LBC (Glasgow City Council intervening) (2004) UKHL 4; (2004) 2 WLR 354; (6th February 2004) TLR

Mr Al-Ameri and Mrs Osmani were asylum seekers allocated by the National Asylum Support Service (NASS) to accommodation in Glasgow. Thereafter Mr Al-Ameri was granted exceptional leave to remain and Mrs Osmani was granted indefinite leave to remain as a refugee. As a result their entitlement to accommodation under the NASS scheme came to an end. They both moved to London and were accepted as homeless and entitled to accommodation under s.193 Housing Act 1996. However in both cases the local authority took the view that the appellants had a local connection with Glasgow under s.199(1)(a) HA 1996 and so referred the case to Glasgow City Council. The appellants contended that accommodation provided pursuant to the NASS scheme

could not give rise to a local connection under s.199(1)(a). The Court of Appeal agreed and the House of Lords affirmed their decision on an appeal by the housing authorities.

S.199(1)(a) provides that a person has a local connection with the district of a local housing authority if he is or was normally resident there and that residence was of his own choice. Here the residence was not by choice. Under the NASS scheme asylum seekers had no choice whatever as to the location of their accommodation. Since the applicants had been directed to Glasgow as the only place where they were to be offered accommodation and subsistence, their residence there was not of their own choice and founded no local connection within s.199(1)(a) HA 1996.

Note: the Court of Appeal decision in this case is noted in the May 2003 bulletin.

LEASES

Eighteen month rule under s.20B Landlord & Tenant Act 1985 does not apply to final account provided some time after payments on account

Gilje & ors v Charlegrove Securities Ltd & anor (2003) EWHC 1284 (Ch); (2004) 1 All ER 91

The claimants were tenants of flats under leases which required them to pay a service charge by way of quarterly payments in advance. The defendants were the landlord and the landlord's agent. In respect of the years ending March 1999 and March 2000 the defendants gave notice requiring payments on account based on anticipated expenditure in those years. Projected budgets were supplied. Accounts for the years ending 1999 and 2000 were not supplied until the beginning of October 2001. The accounts showed that the amounts expended and claimed by way of service charge were less than the interim quarterly service charge demands for those years. The claimants argued that by virtue of s.20B Landlord & Tenant Act 1985, the defendants were not entitled to recover by way of service charge any expenditure in those accounts as the expenditure had been incurred more than 18 months previously. Etherton J did not agree. He accepted the submissions of the defendants' counsel that s.20B LTA 1985 had no application where (a) payments on account are made to the lessor in respect of service charges; (b) the actual expenditure of the lessor does not exceed the payments on account; and (c) no request by the lessor for any further payment by the tenant needs to be or is in fact made. Submission of the final accounts for the two years in October 2001 was not a demand for payment.

LEASEHOLD ENFRANCHISEMENT

Failure to include information required by statute in a notice may not invalidate the notice if the information omitted is likely to be common ground or readily ascertainable

M25 Group Ltd v Tudor & ors (2003) EWCA Civ 1760; 2003 All ER (D) 73 (Dec)

The tenants had served a notice under s.11A Landlord and Tenant Act 1987 which the landlords claimed was defective because it failed to state the addresses of the flats of which they were qualifying tenants (although they gave their names). S.54 LTA 1987 requires that a s.11A notice (and other notices under the Act) shall specify the names of all the persons by whom it is served and the addresses of the flats of which they are qualifying tenants. The sole issue was thus whether the failure to state the addresses was fatal to the validity of the notice. No excuse was put forward for the omission which was an unfortunate oversight by the solicitors. The notice had been found to be valid by HHJ Cooke at first instance, and the landlord had appealed.

Judgment was given by Carnwath LJ, and Potter LJ concurred in it. Two lines of authority were examined, one where it had been held that the issue was simply whether the

notice complied with the requirements of the statute; the other whether the requirement was “mandatory”, or “directory” or “permissive.” Carnwath LJ held that the starting point must be the purpose for which the statute requires a notice containing the information. The ‘irreducible minimum’ of matters that must be regarded as mandatory are matters which but for the notice the landlords could never know, here for example who is giving the notice, what their proposals are, whether they accept the other party’s proposals, and what property they seek to acquire. Further statements which the statute requires but which once given the mandatory facts are common ground or readily and indisputably ascertainable are likely to be regarded as directory only. It will be helpful to have them but the purpose of the notice is achieved without them. These sort of statutory provisions are aimed at providing a commercially fair result so that recipients of notices are told what they have to be told. However the object of the exercise is the giving of information and the defining of issues, not prescription of steps in a ritual dance or a complex game, one false step in which is intended to produce disaster.

MORTGAGES

Purchaser acting improperly is protected by s.104(2) Law of Property Act 1925 if impropriety does not relate to the statutory power of sale

Corbett & anor v Halifax plc & Deakin & Deakin (2002) EWCA Civ 1849; (2003) 4 All ER 180

The Corbetts owned two adjoining properties which were subject to various loans, including a mortgage on one of them, Yew Tree Farm, in favour of Halifax plc. The loan proposal was signed by one Mr Deakin, who worked for Halifax plc. The Corbetts got into difficulties with repayments, and Yew Tree Farm was repossessed by the Halifax. It was then sold to Mr Marples, Mr Deakin’s uncle, who then immediately sold it on to Mr Deakin by prior arrangement. The Halifax’s internal rules prohibited a sale to an employee or to his family. The Corbetts sought to have the sale of Yew Tree Farm set aside on the basis that the sale had been fraudulent and/or at an undervalue. The judge found that the sale had been at an undervalue and that the Deakins could not claim to be purchasers in good faith and so were outside the protection of s.104(2) Law of Property Act 1925. The sale was to be set aside. The judge found as a fact that Mr Deakin did not have actual or constructive knowledge that the sale to him was at an undervalue.

On appeal by the Deakins it was held that the sale was not liable to be set aside just because it had been at an undervalue. There had to be impropriety and the purchaser would not be protected if they knew of the impropriety. However Pumfrey J took the view that he had to consider to whom the lack of good faith related. Mr Deakin’s lack of good faith had nothing to do with the Corbetts, but only to do with the Halifax, because he had dishonestly broken their internal rules. The Deakins were unaware that the sale was at an undervalue. The Halifax’s internal rules and whether they were properly applied were nothing to do with the Corbetts. In any event if the judge had had a discretion to set aside the sale, he had exercised it wrongly in failing to take into account prejudice caused by the delay, the age of the Deakins’ children, work done on the property, and the recent rise in property values. There were compelling reasons why the sale should stand and the Corbetts be left to their remedy in damages.

Measure of damages on sale by mortgagee at undervalue includes sums owed to but unclaimed by second incumbrancer

Adamson v Halifax plc (2002) EWCA Civ 1134; (2003) 4 All ER 423

Ms Adamson had purchased a flat in 1991 with the aid of a mortgage from Halifax plc. She fell into arrears and the flat was repossessed in 1995 without a court order. Prior to this the Royal Bank of Scotland had obtained a judgment for an unrelated and unsecured

debt of £5,000 and had obtained a charging order against the flat. The flat was sold for £17,000. The judge found that at the time its true value was £23,000. There was no dispute that the Halifax was in breach of its duty to take reasonable care to obtain the best price reasonably obtainable. However he only awarded damages of £1,000, stating that Ms Adamson should not obtain a windfall of £5,000 just because RBS had taken no steps to recover its money. Judgment was given five months before the end of the limitation period applicable to RBS. By the time Ms Adamson's appeal was heard, limitation had expired and RBS had still taken no steps to recover its money. The appeal was allowed. The Court of Appeal held that the assessment of damages was to be made at the time of trial with the benefit of the knowledge of what had happened up to that point. The possibility of RBS suing Ms Adamson was probably so small that the judge could have discounted it, or ordered the £5,000 to be paid into court and paid out at the end of the limitation period. By the time of the appeal there was no longer any risk of Ms Adamson being sued by RBS and she was entitled to recover all the loss caused by the Halifax's breach of duty.

NUISANCE

Repeated flooding from sewers was not nuisance or breach of human rights and claim should have been pursued under existing statutory scheme

Marcic v Thames Water Utilities Ltd (2003) UKHL 66; (2004) 1 All ER 135

From June 1992, Mr Marcic had endured serious and repeated external sewer flooding onto his property caused by overloaded sewers operated by Thames Water. The sewerage system was run under statutory powers and subject to statutory duties. Mr Marcic started court proceedings in May 1998. He alleged nuisance, and breach of his rights under article 8 (respect for family life and home) and article 1 of protocol 1 (protection of property), of schedule 1 to the Human Rights Act 1998. At first instance on a trial of preliminary issues, the human rights claim was upheld but the nuisance claim was dismissed. The Court of Appeal upheld both claims. Thames Water appealed.

The House of Lords allowed the appeal, reversing the decision of the Court of Appeal. The statutory duty was to provide effectual drainage, but what constitutes effectual drainage is a question of degree. The duty is enforceable through a statutory scheme allowing enforcement orders to be made by the Director General of Water Services or the Secretary of State. If there is non-compliance with an enforcement order, proceedings can be brought. In the absence of an enforcement order an individual can bring judicial review proceedings against the Director or the Secretary of State. Mr Marcic had sought to sidestep the statutory enforcement code by bringing proceedings based on common law nuisance and under the Human Rights Act.

Work had in fact been done by Thames Water to resolve the problem. It began in April 2003 and was completed in late June 2003. It alleviated sewer flooding to ten properties including Mr Marcic's, at a cost of £731,000. The remaining question was whether Mr Marcic was entitled to recover damages. It was held that he was not. Thames Water is not an ordinary occupier of land. It is subject to an elaborate statutory scheme. The common law of nuisance should not impose obligations on Thames Water which are inconsistent with the statutory scheme and which would effectively supplant it. This would run counter to the intentions of Parliament. The statutory scheme struck a fair balance between the interests of the individual and of the community as a whole and so was compliant with the Human Rights Act 1998. Things went awry in Mr Marcic's case but this did not render the whole scheme unfair. Mr Marcic should have pursued his claim under the statutory scheme. There is a modest statutory compensation scheme for internal flooding and there should be one for external flooding. It was suggested that the Director and others should consider this in the light of the facts of this case.

Earlier decisions in this case were noted in the February 2002 and the September 2001 bulletins which can be found on the chambers website (address above).

The rule in *Rylands v Fletcher* should remain, and was not to be treated as having been absorbed by the principles of ordinary negligence

Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council (2003) UKHL 61; (2004) 1 All ER 589

The defendant local authority supplied water to a block of flats for the domestic use of the residents. The pipe was normal for such use. Without negligence by the defendant the pipe failed and a considerable quantity of water escaped, causing the collapse of an embankment which was supporting a high pressure gas main. The claimants repaired the damage and sued the defendant under the rule in *Rylands v Fletcher*. The House of Lords took the opportunity to reconsider and restate the rule. They considered that it should not be absorbed into the ordinary principles of negligence. Lord Bingham felt that there was a category of case in which it seemed just to impose liability even in the absence of fault. Common law rules do not exist in a vacuum; there are statutory regulations imposing strict liability which could be affected if the courts acted to falsify the assumption on which Parliament had legislated. In the *Cambridge Water* case (1994) 2 AC 264, the House declined to depart from *Rylands v Fletcher* in its entirety and instead looked forward to a more principled and better controlled application of the existing rule. Whilst replacement of a strict *Rylands v Fletcher* liability by a fault based rule would tend to assimilate the law of England and Wales with that of Scotland, it would tend to increase the disparity between it and the laws of France and Germany. The rule should not be generously applied: as a general rule, it is more appropriate for strict liability in operations of high risk to be imposed by Parliament. Lord Hoffman noted the limited scope of the rule. Counsel could not find a reported case since the 1939-45 war in which anyone had succeeded in a claim under it. He observed: "It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse." However he felt that abolition of the rule would be too radical a step.

The rule in *Rylands v Fletcher* is a subspecies of nuisance, a remedy for damage to land or interests in land. It does not apply to works or enterprises authorised by statute. It excludes liability where the escape is by reason of unusual natural events or vandalism (act of God or act of a stranger). There must be an escape from one tenement to another. The claim cannot include a claim for death or personal injury as such a claim does not relate to any right in or enjoyment of land. The thing which the defendant has brought onto his land must be something dangerous to others; something which will naturally do mischief if it escapes. It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be. The defendant's use of the land must be extraordinary and unusual. A test of reasonable user is unhelpful. A useful test is whether the damage is something against which the occupier could reasonably be expected to have insured himself.

In the present case the supply of water was a natural and ordinary user and its escape was not likely to cause danger or mischief. Accordingly the defendant was not liable under the rule in *Rylands v Fletcher*.

In brief

Commons

Oxfordshire County Council v Oxford City Council & anor (30th January 2004) TLR Ch Div

In an application to register land as a class C green under the Commons Registration Act 1965, any 20 year period of use by local residents for sports and pastimes as of right was sufficient. The applicant was not required to establish that there had been 20 years of use immediately before the date of the application.

Counterclaims

Laib v Aravindan & anor (13th November 2003) TLR QBD

The usual rule that once judgment had been obtained and fully satisfied there was then no action in which a counterclaim could be made did not apply in an action for possession of land.

Housing

Ealing Family Housing Association Ltd v McKenzie (30th October 2003) TLR CA

An oral agreement to surrender an existing tenancy to take up a new tenancy of other premises is not an express surrender. An express surrender must be in writing under s.2 Law of Property (Miscellaneous Provisions) Act 1989. Nor was a mere verbal agreement a surrender by operation of law in the absence of actions inconsistent with the continuance of the existing lease. However a transfer by the landlord of the tenant's rent book of the old premises in favour of the new premises imposing an obligation to pay rent for the new premises could give rise to an inference that the old tenancy had come to an end.

Leases

Bolton Metropolitan Borough Council v Torkington (13th November 2003) TLR CA

Where a local authority sealed a lease on the condition that the other party to the lease should sign the counterpart by a particular date, the sealing by the local authority did not exclude the need for the lease to be delivered to the other party in order to complete it. The other party to the lease had failed to execute the counterpart on the requested date. They were not entitled to claim that the sealing by the local authority should be deemed to have constituted a delivery of the lease by the authority within the meaning of s.74 Law of Property Act 1925. That section only dealt with the formality of sealing the deed.

Leasehold enfranchisement

Malekshad v Howard de Walden Estates Ltd (No 2) (14th January 2004) TLR Ch Div

Where a tenant gave notice of his desire to acquire the freehold of a house and premises, the notice was invalidated if it extended to property not properly included. However in the absence of dishonesty the court would normally grant leave to amend the notice without conditions unless the landlord could establish any relevant prejudice as a result of the amendment. A tenant could serve a notice where the contractual term of the lease had expired and it was continuing only by virtue of para 3(1) sch 3 Leasehold Reform Act 1967.

Mortgages

Silven Properties Ltd & anor v Royal Bank of Scotland plc & ors (27th October 2003) TLR CA

Receivers appointed by a bank to sell properties owned by defaulting borrowers are not under a duty to take steps to increase the market price by obtaining planning permission or seeking tenants for the properties which are to be sold.

Occupiers' liability

Bottomley v Secretary & Members of Todmorden Cricket Club & ors (13th November 2003) TLR CA

An occupier of land who engaged an independent contractor to perform a pyrotechnic display on his land owed a duty to ensure that the contractor had adequate public liability insurance cover. A cricket club which had allowed uninsured contractors to perform such a display were liable for the injuries caused to the claimant who had been engaged by the contractors to help with the display. It made no difference that the contractors charged no fee.

Stamp duty

Keston & anor v Inland Revenue Commissioners (12th February 2004) TLR Ch Div

An attempt to reduce liability for stamp duty on the purchase of a residential property by interposing a shell company together with arrangements for a subsale and instalments payments failed. The effect of sections 56(2) and 58(4) and (7) Stamp Duty Act 1891 was to impose the liability for the duty on both the amounts of the consideration payable by the purchaser to the vendor and by the subpurchaser to the purchaser.

OTHER DEVELOPMENTS

HOUSING BILL

The Queen's speech on 26th November 2003 announced that legislation was to be introduced on housing to help to create a fairer housing market and protect the most vulnerable. A Housing Bill was introduced on 8th December 2003 and can be found at www.publications.parliament.uk

Part 1 of the Bill replaces the existing housing fitness standard contained in the Housing Act 1985 with the Housing Health and Safety Rating System (HHSRS). It also adapts and extends the powers currently available to local housing authorities to tackle poor housing conditions by means of enforcement. The changes are intended to help local housing authorities to prioritise their intervention based on the severity of the health and safety hazards in the home.

Part 2 of the Bill introduces mandatory licensing of larger, higher-risk houses in multiple occupation. It will also allow discretionary licensing if local housing authorities wish to extend the licensing regime to other houses in multiple occupation in certain circumstances. Part 11 of the Housing Act 1985 will be repealed. The provisions in the Bill will be free-standing and will include a new definition of "house in multiple occupation" for housing law purposes.

Part 3 of the Bill introduces a power for local housing authorities to introduce selective licensing to deal with particular problems in an area. Selective licensing will be primarily

focused on areas of low housing demand; areas that are likely to fall into that category; and other areas suffering from a particular problem, such as anti-social behaviour. The bill provides a discretionary power, subject to consultation and to the approval of the appropriate national authority, for local housing authorities to license all private landlords in a designated areas so as to ensure that a minimum standard of management is met. Selective licensing would be part of a wider strategy to deal with anti-social behaviour and the regeneration of an area.

Part 4 contains provisions for enforcement action in respect of properties licensable under Parts 2 and 3.

Part 5 of the Bill introduces a new legal duty on people marketing residential properties in England and Wales. Before marketing a property, the seller or, more usually, their agent must have a home information pack of standard documents available for prospective buyers. These proposals were contained in the seller's pack provisions of the Homes Bill introduced in Parliament in 2000. That Bill fell when Parliament was dissolved for the general election in 2001. The provisions in this Bill are similar to those in the Homes Bill, except that the description "home information pack" has replaced "seller's pack" and enforcement of the pack duties is proposed to be by civil rather than criminal remedies.

Part 6 of the Bill allows a local housing authority to increase the duration of an introductory tenancy by six months and establishes a procedure by which the decision to do so may be reviewed. The new provisions only apply to new introductory tenancies granted after this Bill comes into force. Part 6 will also introduce changes to the Right to Buy scheme. Provisions in Part 6 will equalise the position between unmarried different sex couples and same sex couples in relation to succession to Rent Act, assured, secure and introductory tenancies. The powers of the Housing Corporation and the National Assembly for Wales under the Housing Act 1996 will be extended to allow them to give grants to bodies other than registered social landlords for specified purposes. Part 6 also sets up the office of Social Housing Ombudsman for Wales (SHOW) to investigate complaints against social landlords in Wales, and will extend eligibility for disabled facilities grants to include all those occupying caravans as their only or main residence.

Part 7 requires local housing authorities to keep registers of licences and management orders. It also provides for the approval of statutory codes of management practice, and for the making of management regulations relating to houses in multiple occupation. For the purposes of Parts 1-4 of the Bill it provides for documents and other information to be produced. It provides for powers of entry to property and to prescribe for the production of forms, licences and other documents. Its other supplementary provisions provide for the way in which orders and regulations are to be made and for offences. It allows that local inquiries may be held in relation to local housing authority functions under the Act. Part 7 also provides, in conjunction with Schedule 9, a definition of 'house in multiple occupation'.

COMMONHOLD & LEASEHOLD REFORM ACT 2002: COMMENCEMENT

The Commonhold and Leasehold Reform Act 2002 (Commencement No. 3) Order 2003 SI 2377 was made on 8th September 2003 and brings into force the following sections from 29th September 2003: ss. 42 (ombudsman); 62 (advice); 64 (orders and regulations); 65 (registration procedure); 66 (jurisdiction); 67 (the register); and 69 (interpretation) and 70 (index of defined expressions) so far as they relate to those sections.

By section 42 of the Act the Lord Chancellor may approve an ombudsman scheme and by section 62 the Lord Chancellor may give financial assistance to a person in relation to that person providing general advice about an aspect of the law of commonhold land, so far as it relates to residential matters. Sections 64 to 67 allow the Lord Chancellor to

make regulations on commonhold and for those regulations to confer functions on the Registrar, to make rules on the registration of freehold estates in commonhold land and to make rules of court or rules of procedure in relation to commonhold land. Section 69 defines a number of terms in the Act and section 70 lists where other expressions are defined. The explanatory note contains information about provisions brought into force by earlier commencement orders.

HOMELESSNESS: SUITABILITY OF ACCOMMODATION

The Homelessness (Suitability of Accommodation) (England) Order 2003 SI 3326 was made on 19th December 2003 and comes into force on 1st April 2004. When discharging a housing function to secure that accommodation is available for an applicant who is homeless or threatened with homelessness (under Part 7 of the Housing Act 1996), a local housing authority must ensure that the accommodation is suitable (section 206(1)). This order specifies some circumstances in which accommodation will not be regarded as suitable.

The order applies to applicants who are pregnant or with whom a pregnant woman or dependent children reside or might reasonably be expected to reside. The accommodation not to be regarded as suitable is defined as B&B accommodation (article 3). B&B accommodation is accommodation which, whether or not breakfast is provided, is not self contained or which involves sharing certain amenities with another household. There are exceptions contained in Article 4. This provides that if there is no accommodation other than B&B accommodation available, the local housing authority may house such an applicant in B&B accommodation, but only for a period or total of periods not exceeding six weeks.

In calculating the total period of time during which an applicant with family commitments has been housed in B&B accommodation, a local housing authority is to disregard any period spent in such accommodation before 1st April 2004. It is also to disregard any period spent in B&B accommodation where such an applicant was being housed by another local housing authority prior to the conditions for a referral being met in accordance with sections 198 to 200 of the Housing Act 1996. Those sections provide that, where a local housing authority is of the opinion that the conditions for a referral are met and that an applicant has a local connection with the district of another local authority, it may refer the applicant to that authority. If the conditions for referral are met, the second authority is subject to the duty under section 193 of that Act (the main housing duty) in respect of the applicant.

Sources

The following sources have been used in the compilation of this bulletin: The Law Reports (AC, QBD, Ch Div parts 9 to 12 (October to December) of 2003 and part 1 (January) of 2004; 2003 4 All ER parts 1 to 12 and 2004 1 All ER parts 1 to 7 covering 1st October 2003 to 18th February 2004; 2003 WLR parts 34 to 46 and 2004 WLR parts 1 to 7 covering 27th September 2003 to 20th February 2004; Times Law Reports 16th September 2003 to 13th February 2004; recent legislation and draft legislation.

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.