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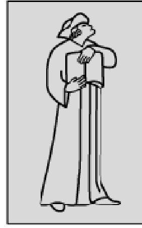

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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

BOUNDARY DISPUTES

The first step in any boundary dispute is to look at the available plans. The plans on the registered title will often be of little use, as the boundaries are often imprecise and the plans of too small a scale to be helpful. In these circumstances it may be necessary to look elsewhere for assistance. A plan known as plan J had been drawn up by the developer to show the boundaries at a date before the houses had been built and the driveways laid out. The parties agreed that this was the relevant plan. The Court of Appeal held that the judge had not erred in using plan J as a starting point but in taking additional evidence into account to assist in its interpretation. In circumstances where the boundary was not clear in the conveyances, it was permissible to have regard to matters occurring since the legal boundary was fixed, including what the parties had done, and features placed on the ground. ***Haycocks & anor v Neville & anor*** [2007] 04 EG 186 (CS).

CHARGES

The court had imposed a legal charge over a residential property as security for the payment of a lump sum equivalent to 17% of the gross proceeds of sale. The charge was not exercisable save on the occurrence of various trigger events (e.g. children leaving home). The Court of Appeal noted that ordinarily, a court would give directions for the sale of the property, but not before a reasonable time had been given to allow the chargor to discharge the debt and buy out the chargee's interest. On the facts, it was reasonable to allow six months for this purpose and then to grant a short extension of four weeks. However the court did not have jurisdiction to grant liberty to apply for a further suspension of enforcement if the chargor was able to raise monies to repay only <u>some</u> of the debt. There was no reason for concluding that an order which declares the extent of a person's interest in trust property by providing among other things that her interest in it be enforceable upon the occurrence of a specified trigger event is in any way variable. Nor was it likely that the limited power under s.36 Administration of Justice Act 1970 to relieve a defaulting mortgagor from the obligation to deliver up possession of a dwelling-house would be

exercised as the chargor had already had a reasonable time to pay what was owed. ***Swindale v Forder & Forder*** [2007] EWCA Civ 29.

CIVIL PROCEDURE RULES: PART 55

There is a close analogy between the procedure under CPR Part 55 (possession proceedings) and a summary judgment hearing. A hearing under CPR 55 (typically the first listing) may be in form a hearing of the claim, but in substance it is a hearing designed to enable the court to decide whether to give judgment without a full trial, or directions for a trial. The whole purpose of the hearing before the Master in the present case had been to establish whether or not the defendant had put forward a case which necessitated an answer. It is only where there is a case to answer that any occasion for the drawing of inferences from the failure to call witnesses arises. ***Polarpark Enterprises Inc v Allason*** [2007] EWHC 22 (Ch).

COHABITEES

Where the court is asked to make a declaration as to the parties' respective beneficial interests in a property, the issue as to the precise division of the net proceeds of sale in accordance with those interests is more appropriately addressed after the property has been sold. To attempt an equitable accounting exercise in advance of any sale is in general an inherently risky and uncertain process. It is also risky to attempt to formulate general principles to be applied in carrying out an equitable accounting exercise in any given case. Equitable accounting is fact sensitive. An exercise of equitable accounting is not to be confused with an enquiry as to the extent of the parties' respective beneficial interests. Questions of equitable accounting only arise once the extent of the parties' beneficial interests has been determined, since the requirement to account (where it exists) is a reflection of and derives from those beneficial interests. In an ordinary cohabitation case equitable accounting is only likely to come into play in respect of the period following the termination of the relationship between the co-owners. However there is no absolute rule to this effect, and the appropriate date for the commencement of equitable accounting will depend on the facts of each case. ***Wilcox v Tait*** [2006] EWCA Civ 1867.

HOUSING

On an application for judicial review it was found that Birmingham City Council was in breach of its duties to the claimants under Part VII Housing Act 1996. All of the claimants were homeless in that it was not reasonable for them to continue to occupy their present accommodation (s.175(3) HA 1996). Families may sometimes prefer to remain in unsuitable accommodation for a short time rather than move to temporary accommodation. However it is a breach of duty to require them to do so. There must be discussion leading to agreement, and no compulsion. Any period longer than six weeks will need clear justification. The council's use within its Allocation Policy of Band A (homeless households in temporary accommodation) and Band B (homeless households not in temporary accommodation) was unlawful. There was a real concern that the council's approach was driven by the financial advantages that flowed to it from being able to show that it was making less use of temporary accommodation. There were Article 8 claims and it was

possible that the claimants might be able to satisfy the test of exceptional circumstances required by ***Morris v Newham LBC*** [2002] EWHC 1262 (Admin), depending on the judge's assessment of the evidence when tested. ***R (Aweys & Ors) v Birmingham City Council*** [2007] EWHC 52 (Admin).

LEASEHOLD ENFRANCHISEMENT

The LVT is a tribunal with specialist members. It is not bound to accept the evidence of witnesses, including expert witnesses, who appear before it. However this does not mean that it is entitled to substitute its own view without giving the parties a chance to comment. If conclusions are reached by a specialist tribunal which do not arise from the evidence before it, or which represent a conclusion or judgment which has not been put forward by the parties (including matters which arise from a site inspection) then the tribunal must invite the parties to make representations on them before it reaches a settled conclusion. A failure to do so is a breach of natural justice. The tribunal must reach its decision on the basis of evidence which is before it. It must not reach a conclusion on the basis of evidence which has not been exposed to the parties for comment. ***Re Elmbirch Properties Plc*** [2007] EWLands LRA/28/2006.

The Lands Tribunal followed ***Cadogan v Sportelli*** [LRA/50/2005] in applying a deferment rate of 5% in relation to the price to be paid for a new lease of a flat. It went on to consider the factors relevant to the determination of the capitalisation rate when calculating the value of a new lease, and held that they are manifestly different from those relevant to the deferment rate. There can be no valuation rationale to justify adopting a rate for capitalisation simply because that rate is being taken for deferment. The application of the factors affecting the capitalisation rate, unlike the application of the factors affecting the deferment rate, is likely to vary in every case. However, if the ground rent is small and the unexpired term is not long there will be no significant difference in adopting one particular rate rather than another, and it would be disproportionate for valuers to dispute capitalisation rates in these circumstances. ***Re Flat 1, Cropthorne Court*** [2007] EWLands LRA/29/2006.

The Court of Appeal considered the provisions relating to leaseback notices in relation to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993. It held that if the reversioner wants a leaseback of a flat in respect of which, at the time of the counternotice, there is not a qualifying tenant, he must say so in his counternotice. If he does so, then he will be entitled to the leaseback, so long as there is still no qualifying tenant immediately before acquisition by the nominee purchaser. The reference to *"the appropriate time"* does not extend to that moment the opportunity for the reversioner to serve a leaseback notice if he has not made proposals to that effect in the counternotice. Rather it imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counternotice, such that he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does have a qualifying tenant. The sanction for failing to comply with the mandatory requirement to specify leaseback proposals in the counternotice, at least if the landlord could have done so, is that the landlord cannot seek a leaseback thereafter. ***Hamdan v Cawthorne & ors*** [2007] EWCA Civ 6.

POSSESSORY TITLE

The parties had compromised court proceedings relating to ownership of land by an agreement whereby each undertook to transfer certain parcels of land to the other. The land the respondents were to transfer included a parcel to which they claimed possessory title only. They relied on a statutory declaration to prove title. The appellant later claimed that he already owned that parcel of land on the basis that his predecessor in title had acquired it by adverse possession. He sought to rescind the compromise. The respondents obtained summary judgment against him on a claim for specific performance of the compromise agreement. On a second appeal, it was held that the claim to specific performance arose out of a compromise reached on the basis that the appellant admitted the respondents' ownership of the now disputed parcel. He had set up no adverse title at the time of the compromise though he had at that time been aware of the facts he now relied on. He had chosen not to raise those facts at the time and it was not open to him to raise them now. Insofar as the land was not registered, a conveyance accompanied by a statutory declaration of long possession sufficient to allow the appellant to register the land would fulfil the respondents' obligations under the compromise. ***Trustees in the Charity of Sir John Morden v Mayrick*** [2007] EWCA Civ 4; [2007] 03 EG 125 (CS).

RESTRICTIVE COVENANTS

The Lands Tribunal declined to modify a restrictive covenant of freehold land pursuant to s.84(1) Law of Property Act 1925. The covenant provided that no house standing on the land was to be used for any trade or business or other than as a private dwelling house. Any stable, coach house, garage or other erection on the land was to be used for private purposes in connection with the house only. The proposal was for the erection of a Jain temple, a single storey building which would be a place of worship and religious instruction. Planning permission had been obtained. The Tribunal held (on ground (a)) that the restriction was not obsolete. None of the changes in the neighbourhood, including the demolition of the original mansion, had changed the character of the estate so as to remove its residential character. That character was still preserved. In relation to ground (aa) it was accepted that the proposed use of the application site was reasonable, but there was no need for the temple to be located on the subject land. The proposed use involved the real possibility that very substantial numbers of people might attend the site from time to time. The restriction, in providing the ability to prevent such gatherings, still provided a practical benefit of substantial advantage to the residents of the estate. Ground (c) (no injury) failed for similar reasons. The Tribunal took into account evidence of very large numbers of people attending a consecration ceremony at the site. The successful objectors were represented by Mr Philip Noble of Thomas More Chambers. ***Re Mahavir Foundation Limited*** [2006] EWLands LP/69/2004.

RIGHT TO BUY

The scheme of the right to buy provisions under the Housing Act 1985 is for a single s.125 notice to be served by the landlord, with a further notice under s.128(4) in the event that the tenant requires the price to be determined by the district valuer. However, it is open to the parties to a right to buy lease to agree to any terms in the leases that are not contrary to the statutory provisions. These can include terms which differ from the original s.125

notice, such as a different reference period for contributions to improvement works. In the case of the first appellant Mr Hyams, at the date of the lease the parties had not been in agreement that the original s.125 notice should be treated as having been replaced by a specific later notice. The reference to the s.125 notice in the lease should therefore be construed as referring to the original notice. In the second appellant's, Ms Anderson's case, the notice to which the lease referred was the replacement notice, as she had indicated her acceptance of it. The respondent had not sought to claim that the appropriate reference period was that contained in the original lease until after the lease had been executed. Accordingly Mr Hyams' liability for the improvement works was £3,492.32 and Ms Anderson's was £586.89. ***Hyams & anor v Wilfred East Housing Co-operative Ltd*** [2006] EWLands LRX/102/2005.

UNDUE INFLUENCE

Two transfers of land were set aside on the basis of undue influence. The appellant had given a field to his great-nephew Mr Bradbury (the first respondent) as a wedding gift. Mr Bradbury had sold the field on for £1,800 to a Mr Hillier (the second respondent). Because of its development potential, the field could be worth as much as £100,000. This development potential also devalued the appellant's own property by around £45,000. The gift to Mr Bradbury was a transaction which no-one with proper regard for his own interests would enter into without careful and informed thought as to its wider effect. There was insufficient evidence of such thought on the part of the appellant. It was no answer that the appellant had said in a draft witness statement that he did not think that Mr Bradbury had put him under any pressure to give him the land. (The appellant had been too frail to attend court.) The fact that the donee did not ask for the gift is not a complete answer to a claim of undue influence. The court does not interfere on the ground that any wrongful act has been committed, but on the ground of public policy. The second transfer, to Mr Hillier, was also set aside because he had notice of the fact that the first transfer was liable to be set aside for undue influence. ***Goodchild v Bradbury & ors*** [2006] EWCA Civ 1868.

OTHER DEVELOPMENTS

HOME INFORMATION PACKS

There is an update on Home Information Packs online at www.communities.gov.uk which can be found in the "What's New" section. HIPs come into effect on 1st June 2007. The update looks at the current state of the housing market, sets out the role of HIPs in cutting carbon emissions and the wider reform of the buying and selling process, and explains how smooth introduction of HIPs is planned. Views on the proposals in the update are welcome and can be sent to homeinfopacks@communities.gov.uk before 21st February 2007 for consideration in advance of the final HIP Regulations.

HOUSE CONDITION SURVEY

A Headline Report for the English House Condition Survey 2005 is available online at www.communities.gov.uk (in the "What's New" section). The full annual report will be published in the spring. The results are based on a sample of 16,670 dwellings and 16,059 households. There are still 6 million non-decent homes (27%) though this has fallen from 45% in 1996. Privately rented homes are in the worst condition, with 41% being non-decent. RSL homes are in better condition than local authority homes, and the social sector is improving faster than the private sector. The most common reason for failing the standard for decent homes is failure to provide adequate thermal comfort. 73% of non-decent homes fail this criterion, and 59% fail on this alone. The other criteria are fitness, repair, and modernisations. 16% of households live in poor quality environments. Problems with upkeep, management, and misuse of surrounding public and private buildings or space are the most common types of liveability problems. Around 1.2 million households living in poor quality environments also live in non-decent homes.

HOUSING BENEFIT

The Housing Benefit (Daily Liability Entitlement) Amendment Regulations 2007 SI 294 come into force on 1st April 2007. They amend the Housing Benefit Regulations 2006 and the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006. They amend the rules determining when housing benefit starts and ends. The intention of the changes is that housing benefit for accommodation with a daily rent liability, which is provided by the local authority under its duties to the homeless or to people temporarily unable to live in their own homes, matches the period the person is living in the accommodation.

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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