



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7831 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

## PROPERTY LAW BULLETIN

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### CASE LAW UPDATE

#### CONSTRUCTIVE TRUSTS

HSBC's claim for possession of a mortgaged house was unsuccessful. Mr Colleldevall was entitled to a declaration that he was solely beneficially entitled to the house and that his interests overrode the interests of HSBC as mortgagee. Mr Colleldevall had lived at the house since 1976 and his wife had also lived there until her death in 1994. The registered proprietor, Mrs Dyche, the daughter of Mr Colleldevall, was the mortgagor. Mr Colleldevall had been made bankrupt in 1988. In 1994 the house was transferred into the names of Mrs Dyche and her husband for the sum of £25,000, with the concurrence of Mr Colleldevall's trustee in bankruptcy. This sum was used to discharge a mortgage and to increase the dividend in the bankruptcy. It bore no relation to the actual value of the house, which was much greater. The Dyches took out a mortgage of £17,000 for the Colleldevalls and it was agreed that the house would be transferred back to the Colleldevalls once the £17,000 plus interest was repaid. The result was that the house was held on a common intention constructive trust for the Colleldevalls. The common intention was also to be inferred from the simple fact that the Colleldevalls continued to have sole beneficial use of the house as their home. The house was held by the Dyches upon trust for the Colleldevalls as beneficial joint tenants, so that Mr Colleldevall became sole beneficial owner when his wife died. After Mrs Dyche's divorce, the property was transferred into Mrs Dyche's sole name in breach of trust. She obtained monies from HSBC by way of mortgages by representing that Mr Colleldevall was an assured shorthold tenant. Mrs Dyche was a trustee acting in dishonest breach of trust and so was not purchasing in good faith for the purposes of s.205(1)(xxi) LPA 1925. Mr Colleldevall's beneficial interest also overrode the registration of HSBC's mortgages, as he was in actual occupation throughout (paragraph 2 of schedule 3 Land Registration Act 2002, formerly s.70(1)(g) LRA 1925). **HSBC Bank Plc v Dyche & anor** [2009] EWHC 2954 (Ch).

#### CONVEYANCING

In **Thames Valley Housing Association Ltd & ors v Elegant Homes (Guernsey) Limited and others** [2009] EWHC 2647 (Ch) Mann J rejected attempts to stave off the enforcement

of the usual undertakings to discharge a mortgage given by the vendors' solicitors. On the facts, Mann J dismissed the argument that an enquiry as to the amount required to discharge the mortgage was necessary and should precede enforcement. However he said that even if the figure could be questioned he would have held that the mortgagee's figure ought to be paid to procure the discharge. These undertakings were central to the conveyancing process. It was right that the onus be placed firmly on the vendors' solicitors to conduct any necessary enquiries before giving such undertakings. Mann J left open the possibility of a modified approach in extreme cases – for example where the amount sought for discharge was greatly in excess of the market value of the property.

## DAMAGES

The Court of Appeal upheld the trial judge's finding that there would be some diminution in value to new build residential properties even after remedial work to damaged brickwork had been carried out. The trial judge had assessed damages at £5,000 per property, which was roughly 2.5% of their value. His reasoning was that the fear of further litigation would drive vendors into sufficient disclosure for the past history of defects and litigation to become known, and that that, together with the very small risk of further problems, was just sufficient to drive down the price for these properties, but only by a very modest amount. Both counsel had conceded that it could not be said that a figure between the positions adopted by the valuers was unjustified. One valuer had contended for a 10% diminution in value and the other for no diminution. The judge's reasoning was sufficient to support the conclusion he had reached. It did not matter that the claimants had no present or fixed future intention of selling their properties. It was also noted in relation to another part of the judgment at first instance that disputes as to the reasonable cost of remedial work will very often be avoided if the remedial works are actually carried out. **Strange & ors v Westbury Homes (Holdings) Ltd & anor** [2009] EWCA Civ 1247.

An assessment of damages for trespass was overturned by the Court of Appeal, despite the fact that the assessment exercise was analogous to the exercise of a discretion. The Deputy Master had awarded £170,325 by way of damages, plus interest. He had arrived at that conclusion by holding that the base rental value of the land at the agreed valuation date was £5.00 per square foot, to which figure he then applied various discounts. He had erred in that he had rejected some proposed comparables as worthless but then relied on them to decide that a proposed rental figure was too low. The Deputy Master should simply have relied on the other comparables, which were in respect of leases of pieces of land forming part of the depot and used for the same purposes as that for which the subject land was used during the assessment period. Rimer LJ wielded what he described as a "broad axe" in fixing the base rental value at £1.75 per square foot, but declined to make any adjustment, saying that "It cannot be usual to refine with a scalpel that which has been produced by the wielding of an axe." **Earlrose Golf & Leisure Ltd & anor v Fair Acre Investments Ltd** [2009] EWCA Civ 1295.

When assessing damages for disrepair and in particular capping by s.18 Landlord and Tenant Act 1927, the judge had erred in that he had valued the wrong thing. Under s.18(1) LTA 1927 the judge had to assess the amount by which the value of the reversion in the premises is diminished owing to the breach. The reversion means the property as it reverts to the landlord. Any reversionary lease, whether made before or after the term date and whether with the same or a different tenant, is left out of account. What is to be valued is the

freehold reversion at the moment when it vested in the landlord unencumbered by the old lease or any new lease. What the judge was required to do was to value the bundle of rights that the landlord actually had on the valuation date. On the valuation date the landlord did not have the benefit of an agreement for a lease with Ryman (the tenant) or even an offer capable of acceptance. The judge said that he had to decide whether Ryman would have repeated offers of a new lease (previously rejected by the landlord) to a purchaser. That was not a relevant question. The judge had embarked on determination of a hypothetical fact. The only hypotheses required or permitted by s.18(1) are (i) the hypothesis that there are two simultaneous sales of the reversion; and (ii) the hypothesis that in relation to one of those sales, the property was in the physical condition required by the repairing covenants. No other hypothetical facts are required or permitted. The judge valued the freehold with the benefit of an agreement for a lease with Ryman. This was not a right that the landlord had and was not therefore part of the reversion. The uplift of 7.4% on the out of repair value could not stand. ***Van Dal Footwear Ltd v Ryman Ltd*** [2009] EWCA Civ 1478.

## **DEFECTIVE PREMISES ACT 1972**

The Court of Appeal considered the meaning and application of s.1 Defective Premises Act 1972 on an appeal by structural engineers where the trial judge had awarded damages of £218,617 for breach of s.1. In a case where a defect is fundamental to the stability of the dwelling, and does not raise a merely cosmetic or stylistic issue, the fact that it is necessary to vacate for a long period, while remedial work is carried out, is likely to be highly material to the question whether the defect renders the dwelling unfit for habitation. The judge at first instance was not only entitled but also right to regard as material the fact that it would be necessary for the claimants to vacate for about 12 months during the remedial works. The obvious purpose of a dwelling is for it to be occupied and inhabited safely and without inconvenience. The judge was not obliged to approach the question of whether there had been a breach of s.1 DPA 1972 by considering each defect individually. He was entitled to ask himself whether the dwelling as a whole was unfit for habitation. The judge found that it suffered from a fundamental defect, namely inadequate foundations, causing ground heave and in turn widespread cracking. He was entitled and right to conclude that the dwelling was unfit for habitation, taking into account all of the defects and the fact that they were caused by a fundamental defect, namely the inadequacy of the foundations. The claimants were only entitled to foreseeable loss and damage flowing from the fact that the dwelling was unfit for habitation. However the judge was entitled to conclude that the cost of remedying all of the defects attributable to defective foundations was a foreseeable consequence of the breach of s.1 DPA 1972. The appeal was dismissed. ***Bole & anor v Huntsbuild Ltd & anor*** [2009] EWCA Civ 1146.

## **DISABILITY DISCRIMINATION**

The appellant, Mr Allen, suffered from Duchenne Muscular Dystrophy and used an electric wheelchair. He complained that the Royal Bank of Scotland had discriminated against him by failing to comply with the duty to make reasonable adjustments without justification (s.19(1)(b) Disability Discrimination Act 1995). The Court of Appeal dismissed the bank's appeal against the trial judge's finding of discrimination. The main branch of the bank, where Mr Allen had opened his account, was a 19<sup>th</sup> century listed building only accessible by flights of stone steps. The bank had refused to install a platform lift so as to allow Mr Allen to enter

the branch. The bank argued that Mr Allen could use telephone and internet banking, and that if he wanted to have a meeting with the bank (for example for financial advice) this could take place at his home. Alternatively he could use other banks. The trial judge had noted that the bank had previously failed to provide reasonable alternative methods of making facilities available. For example, on one occasion a member of staff had helped Mr Allen to complete an application for a savings account in the street. More fundamentally, the judge was entitled to conclude that the fact that face to face facilities are available at the main branch is of itself an important element of the service provided by the bank at that branch. There are many customers who prefer the traditional way of doing things. The bank recognises this, or it would not have some 2,300 branches throughout the country to which its customers have physical access. The judge was entitled to conclude that the provision of alternative methods of making those services available was not a reasonable alternative unless there was no reasonable way of affording Mr Allen physical access to the main branch. The bank did not want to install a lift because it would lose the use of one of eight busy interview rooms in doing so. However there was no direct evidence about use of the interview rooms. There had not been any costing of the effect of losing one of them, or any consideration of reducing their size or finding another room elsewhere in the building. The judge had addressed objectively the central questions about whether it was reasonable to require the bank to install a platform lift or whether the bank could reasonably rely on making alternative facilities available. The conclusion that he reached was open to him on the evidence. The lift would be installed. **Royal Bank of Scotland Group Plc v Allen** [2009] EWCA Civ 1213.

## HOUSING

Mr Ali was offered accommodation pursuant to s.193 Housing Act 1996. He rejected it orally as unsuitable when he saw it, and then again in a form requesting a review of suitability. On 1<sup>st</sup> May 2008 the local housing authority wrote to him to inform him that they regarded themselves as having discharged their duty to him. The requested review of suitability was carried out, and on 30<sup>th</sup> May 2008 a homeless review officer gave extended reasons for determining that the accommodation was suitable. That decision was not challenged by Mr Ali. However, it was said on appeal that he had not been fully informed within the terms of s.193(5) HA 1996 that the local housing authority regarded themselves as having discharged their duty under the section, because his understanding of English was very limited and the letter informing him was written in English. The Court of Appeal dismissed Mr Ali's appeal. There were references in the statutory Homelessness Code of Guidance for Local Authorities about the need to ensure that procedures and decisions were understood. These amounted to a requirement that the local housing authority should provide reasonable help and guidance to homeless applicants. They should sufficiently offer translation services or other help in understanding to those who needed and requested them. There is no requirement to provide translations which have not been requested in every case where understanding or language might conceivably be a problem. The oral refusal by Mr Ali did not in practice amount to a final refusal of the offer, which remained open for a short time. **Ali v Birmingham City Council** [2009] EWCA Civ 1279.

The Court of Appeal approved Islington LBC's refusal to allocate additional points to the appellant for housing purposes. She had five adult children living with her and three grandchildren. Islington LBC was entitled to conclude that it was not appropriate to allocate a larger property to the appellant because (a) her five children were all independent adults

who should have been able to make their own housing arrangements; and (b) because they were subject to immigration control so that providing accommodation to them would have amounted to having recourse to public funds in breach of their conditions of entry into the UK. Local housing authorities have a very broad discretion under s.159(7) HA 1996, which relates to allocation of housing accommodation. Lord Neuberger MR observed that “*While any document prepared for public consumption should be as clear, short and simple as possible, it is particularly true of housing allocation schemes required to be prepared under Section 167, and published under Section 168, of the Housing Act 1996. They are intended to be read by, and administered for, the benefit of people who require public housing and their families, and they are intended to be applied in multifarious different circumstances in which great difficulties can often arise. Islington’s scheme provided in 2007 seems to me to be a document which complies with these requirements. It is plainly right for the court to apply a common sense and a practical approach to the interpretation of the scheme...*” **R (on the application of Ariemuguvbe) v Islington LBC** [2009] EWCA Civ 1308.

Newham LBC had a property-related debt policy whereby tenants could bid for accommodation but offers would not be made to tenants who had property-related debts. It was held that it was unlawful for Newham LBC to apply this policy, when operating its choice-based housing allocation scheme, to debts created by the requirement to repay overpaid housing benefit which were irrecoverable by virtue of s.9 Limitation Act 1980. By applying the policy to debts which were no longer recoverable in law, Newham were acting irrationally and contrary to Mr Joseph’s legitimate expectation of how his applications under the choice based allocation scheme would be treated. **Joseph v Newham LBC** [2009] EWHC 2983 (Admin).

Unusually, a residential tenancy was neither a secure tenancy nor an assured tenancy and had been lawfully terminated by a contractual notice to quit (subject to the provisions of the Protection from Eviction Act 1977). The landlord was registered under the provisions of the Industrial and Provident Societies Act 1965. It was a fully mutual housing co-operative within the meaning of s.5(2) HA 1985 and s.1(2) Housing Associations Act 1985. Consequently it was not an assured tenancy because it fell within the exceptions set out in schedule 1 s.12(1)(h) HA 1988. It was not a secure tenancy because whilst the landlord was a housing association it was not a social housing association and so was not a landlord for the purpose of the creation of a secure tenancy. The question of rent arrears was irrelevant and the landlord was entitled to possession. **Mexfield Housing Co-operative Ltd v Berrisford** [2009] EWHC 2392 (Ch).

## HOUSING BENEFIT

A claim for housing benefit can be made for the purposes of the Housing Benefit (General) Regulations 1987 without using explicit wording to indicate that a claim for benefit is being made. Parliament has made a policy decision that claimants should not necessarily lose their benefits if they fail to make a claim in the right way. It is legally possible that an accompanying letter might be enough to make it clear that another document was making a claim. There is no requirement that every benefit being claimed must be expressly named. The reasonable official would not be in any doubt that, if the appellant was arguably entitled to housing benefit, she was making a claim for it. The appeal was allowed. **Novitskaya v Brent LBC & Secretary of State for Work & Pensions** [2009] EWCA Civ 1260.

## INSOLVENCY

**Goldacre (Offices) Ltd v Nortel Networks UK Ltd (in administration)** [2009] EWHC 3389 (Ch) is an important decision about the application of the Insolvency Rules, as amended by the Enterprise Act 2002, in relation to 'administration expenses'. Rent on a property held by a company, falling due during its administration, was held to be payable by the administrators as a priority 'necessary disbursement' within the meaning of rule 2.67(1)(f) of the Insolvency Rules 1986, as amended. Judge Purle QC applied the **Lundy Granite** principle as described in Lord Hoffmann's speech in **Re Toshoku Finance UK Plc** [2002] 1 WLR 671, HL, by which liquidators are liable to pay rent as a liquidation expense where they make use of or retain possession of leasehold premises for the benefit of the liquidation. The Judge came to the following conclusions: (i) the question whether rent is payable by the administrators must be decided exclusively by reference to the Insolvency Rules. Neither the Court nor the administrators have any discretion in the matter. David Richards J had reached the same conclusion in **Exeter City Council v Bairstow** [2007] 4 All ER 437. In **Toshoku** the House of Lords had overruled the contrary approach of Nicholls LJ/VC in **In re Atlantic Computers Systems Plc** [1992] Ch 505 and **In re Kentish Homes Ltd** [1993] BCLC 1375. (ii) The **Lundy Granite** principle applies to administrations as well as to liquidations. It would be surprising if it did not. Administrators can now make distributions to unsecured creditors and administrations may come to resemble liquidations. (iii) Even if there may be doubts about whether the rent was an expense of the administration within the meaning of rule 2.67(1)(a), on application of the **Lundy Granite** principle it was a necessary disbursement and fell within 2.67(1)(f). The Judge built on Briggs J's observation in **Lehman Brothers International (Europe)** [2009] EWHC holding that necessity extended to payments which ought to be made in fairness and justice and was not confined to situations where there was a specific threat of, for example, forfeiture proceedings from the landlord. (iv) Drawing on **Powdrill v Watson** [1995] 2 AC 394, he rejected the suggestion that rental payments could be tailored to the use the administrators make of the property. Any liability incurred is payable in full. The judge declined to follow the *obiter* suggestion to the contrary in **Sunberry Properties Ltd v Innovate Logistics Ltd** [2009] 1 BCLC 145, CA, which was based on a concession as opposed to full argument. The Court of Appeal had not considered **Toshoku**, **Lundy Granite** or **Powdrill**.

## LAND REGISTRATION

The deputy adjudicator had reached the right conclusion in deciding that a strip of disputed land adjacent to the roadway belonged to Bridge House and not to another house at Moles End. Moles End was further from the roadway than Bridge House and the disputed strip was in effect the entire road frontage of Bridge House. The deputy adjudicator found as a fact that the disputed land was within the curtilage of Bridge House at the time of a 1995 conveyance to the first registered proprietor, Crown Hall Estates. It was occupied together with and as part of Bridge House. Accordingly Rule 251 of the Land Registration Rules would have operated to vest the disputed strip in Crown Hall Estates as part of the registered title. The fact that the red edging on the filed plan did not include the disputed land did not matter because of the operation of the general boundaries rule. Part of the description of the parcels was false and the deputy adjudicator was right to reject it. **Frazer & anor v Martin & anor** [2009] EWHC 2692 (Ch).

## PROFESSIONAL NEGLIGENCE

The appellant had instructed surveyors, Mr Radford and Mr Boston, to act for her in relation to a lease extension. Any application to the LVT had to be made by 8<sup>th</sup> November 2000. No such application was made, and the appellant was unable to obtain an extended lease for £380,900 (a figure agreed by the experts). Instead she purchased an extended lease outside the scheme of LRHUDA 1993 for £485,000 on 31<sup>st</sup> October 2001. The trial judge had found that the surveyors were not liable to the appellant for the difference because their retainer had terminated on 5<sup>th</sup> June 2000. The Court of Appeal held that this was wrong, finding that the retainer continued until after 8<sup>th</sup> November 2000. In these circumstances it was not sufficient that the appellant had been told about the deadline for an application to the LVT in June or July. As a general principle, if a professional person gives clear advice on a particular point to his client as to the need to take a particular step by a particular time, there is no duty to keep repeating that advice. However on the present facts, the continuing retainer meant that as the 8<sup>th</sup> November deadline loomed, the surveyors should have repeated to the appellant the need for her, if she wished to keep her claim alive, to apply to the LVT by 8<sup>th</sup> November. Mr Radford's instinct that this is what he would have done in the ordinary course was a correct reflection of the legal obligation that he was under. The limited nature of Mr Radford's express duties at the material time did not absolve him from the obligation to remind. Judgment was entered on the appellant's damages claim. ***Littlewood v Radford & Boston, formerly t/a Boston Carrington Pritchard*** [2009] EWCA Civ 1024.

## PROPRIETARY ESTOPPEL

The trial judge set aside a will leaving the family farm to the RSPCA instead of to Dr Angela Gill, the daughter of Mr and Mrs Gill, on grounds of undue influence exercised by Mr Gill over his wife Mrs Gill. In the alternative (and in anticipation of a possible appeal) it was held that the transfer of the farm and the farming business would not have been disproportionate to the expectation of Dr Gill, created and encouraged by her parents, that she would inherit the farm. Nor was it disproportionate to the detriment suffered by her as a result of the reliance which she placed upon their assurances made to her. There had been a series of assurances, express, implied, direct and indirect, over many years. These were given in the context of the close and loving relationship between Dr Gill and each of her parents, the tradition of inheritance of farms in Yorkshire farming families, and the acknowledgement and approval of that tradition by Mr and Mrs Gill. Dr Gill's devotion to and loyalty to and care of her parents for over thirty years was to an extent greater than that which would normally be expected from and given by an only daughter to her parents. Dr Gill had undertaken hard physical labour at the farm for thirty years or more. She had adopted a career which was probably not the one she would have chosen had she not relied on the assurances made to her, and had suffered a loss of income as a result. She and her husband had purchased the adjoining farm in a derelict condition and invested significant sums renovating it. It was in an inconvenient location and they would not have purchased it save that it adjoined the family farm. ***Gill v Woodall & ors*** [2009] EWHC B34 (Ch).

A proprietary estoppel claim in relation to the estate of the claimants' father was unsuccessful. Payments of £100 per month each made by the claimants over many years were referable not to any expectation that they would inherit the estate, but rather to financial advances made to them around the time that the monthly payments commenced. In effect, the claimants' father (and his then wife) had purchased a fixed rate annuity from their

daughters for £40,000 in money or money's worth. The trial judge considered **Re Basham** [1986] 1 WLR 1498, where the promise related to the deceased's estate, and noted that it "probably marks the widest boundary of the application of the doctrine of proprietary estoppel thus far in this jurisdiction (and, so far as I have been able to ascertain, in any other common law jurisdiction)..." She considered that **Re Basham** was a decision which now had to be treated with the utmost caution. It certainly could not be regarded as laying down any general principle to the effect that assurances given about inheriting a residuary estate will always be sufficient to give rise to a proprietary estoppel. If and insofar as the decision indicates that the property in question does not need to be identified, it is inconsistent with **Thorne v Major** [2009] UKHL 18. **Macdonald & anor v Frost** [2009] EWHC 2276 (Ch).

## RIGHTS OF WAY

Pear Tree House and agricultural land to the rear had at one time both been in the ownership of Mrs Edith Thompson, grandmother of the respondent Mrs Bee, the current owner of Pear Tree House. When planning permission was granted for the building of three houses on the agricultural land, questions arose about the nature and extent of any right of way from the main road to the agricultural land over land belonging to Pear Tree House. The Court of Appeal agreed with the judge that Mrs Thompson's will could be construed together with the assents giving effect to separate gifts of the house and the land. The assents and not the will itself were the documents of title to the properties. However in order to ascertain the true legal position on the right of way it was legitimate to read and construe the assents together with the will, all being part and parcel of the same transaction. The judge had limited the right of way to agricultural purposes. The Court of Appeal held that this was an error. The will stated that the right of way was "at all times and for all purposes connected with the said garth" [the agricultural land]. The judge's construction did not give full force to the powerful generality of this expression. There was insufficient justification in the text of the will or in the context for diminishing "all purposes" to a restricted purpose, that is, agricultural. However the judge was entitled to find that the proposed user by and for three new dwelling houses would be excessive. The Court of Appeal was not prepared to consider whether a lesser user would be acceptable. A lesser or alternative development had not been proposed or argued at trial. The parties were encouraged to try to settle any further differences about the right of way without further recourse to litigation. **Thompson v Bee & anor** [2009] EWCA Civ 1212.

A right of way "for all reasonable and usual purposes" leading to garden land as at the date of the grant was not restricted to use as a right of way for all reasonable and usual purposes connected with garden land. There was nothing in the context and background to justify the inference that the original parties intended that the easement over the track could only ever be used in connection with use of the dominant plot as garden land. The conveyances did not state this. The fact that the parties may have contemplated that the plots would be used as garden land did not indicate an intention that the track would only be used to access them so long as they continued to be used as garden land. The cases show that the purpose for which the right may be used will not be limited by the original use of the dominant land. The judge's interpretation (that the purpose was limited to use of the land as garden land) was an unnatural one. The easements over the track could lawfully be used for the purposes of building dwelling houses and their occupation when built. **Davill v Pull & anor** [2009] EWCA Civ 1309.

## TRESPASSERS

The Supreme Court considered the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them. Travellers had established an unauthorised camp in Hethfelton Wood near Wool in Dorset. In the claim form, the Secretary of State sought possession not only of Hethfelton Wood but also of “*all that land described on the attached schedule all in the county of Dorset.*” That schedule set out more than fifty separate woods owned by the Secretary of State and managed by the Forestry Commission. The number of woods was later reduced to thirteen. The Secretary of State’s concern was that the travellers would leave Hethfelton Wood and camp in another local wood. Mr Recorder Norman granted a possession order in respect of Hethfelton Wood but refused to grant a wider order covering the other thirteen woods. On appeal by the Secretary of State, the Court of Appeal ordered that the Secretary of State “*do recover*” the other woods, and that each of the defendants be “*restrained from entering upon, trespassing upon, living on or occupying*” any of the other woods. There were two issues on appeal to the Supreme Court. The first was whether an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The Supreme Court held that it could not. It was simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in the present case. ***Secretary of State for the Environment v Drury*** [2004] 1 WLR 1906 disapproved. The correctness of ***University of Essex v Djemal*** [1980] 1 WLR 1301 was queried but not considered in detail. The essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. A possession order could be made in relation to Hethfelton Wood, but not in relation to other woods miles away which the travellers were not occupying. An injunction against intrusion would be a more natural remedy. The second issue was whether an injunction against travellers is generally appropriate, with consideration of the 2004 Guidance. The 2004 Guidance does not preclude the granting of an injunction to restrain travellers from trespassing on other land. It is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. It could conceivably be relevant to the question whether an injunction should be granted. It was suggested that the Civil Procedure Rules Committee should consider the position in relation to writs or warrants of restitution where an injunction has been breached. ***Secretary of State for Environment, Food & Rural Affairs v Meier & anor & ors*** [2009] UKSC 11.

## VIRTUAL ASSIGNMENTS

When considering the effect of a virtual assignment on covenants in a lease, Ward LJ observed that: “*I recognise that Virtual Assignments are strange new beasts in the forest...one must circle around them suspiciously and cautiously...*” A virtual assignment is an arrangement under which all the economic benefits and burdens of a lease, including any management responsibilities, are transferred to a third party, but without any actual assignment of the leasehold interest. The issue was whether by entering into a virtual assignment of leasehold premises, the tenant of those premises acts in breach of the standard-form alienation covenants contained in the lease. HHJ Hodge QC held that they did, by sharing possession or occupation, but the Court of Appeal disagreed. Possession must be given its normal,

albeit its technically legally correct, meaning. Natwest, the tenant, had sublet to Mercers and so had divested itself of possession. The virtual assignment did not alter this state of affairs. Not having been in possession of the premises, Natwest could not be said to have parted with possession to the virtual assignee, New Liberty, or to have shared possession by entering into the virtual assignment. It was accepted that for some purposes “possession” has a meaning which extends beyond its core meaning and includes receipt of rents and profits or the right to receive them. However, New Liberty did not receive or have the right to receive rent in that sense. Even an express assignment of the rent by itself would not amount to sharing or parting with possession of the demised premises. Natwest did not, by entering into the Virtual Assignment, share or part with possession of the demised premises or any part thereof. There had not been any assignment of the lease to New Liberty nor any underletting of the premises to them. Nor had any trust been created. The proper meaning and cornerstone of the arrangement was agency. ***Clarence House Ltd v National Westminster Bank Plc*** [2009] EWCA Civ 1311.

## OTHER DEVELOPMENTS

### COMMONS

The Commons Act 2006 (Commencement no.5) (England) Order 2010 SI 61 was made on 12<sup>th</sup> January 2010 and brings into force ss.26 to 37 Commons Act 2006 on 20<sup>th</sup> January 2010. Those sections comprise Part 2 of the Act, and allow for the management of registered common land, or of a registered town or village green that is subject to rights of common, by a commons council.

### RIGHT TO MANAGE

The RTM Companies (Model Articles) (England) Regulations 2009 SI 2767 came into force on 9<sup>th</sup> November 2009. The Regulations replace and revoke, subject to transitional provisions, the 2003 Regulations. This is because the Companies Act 2006 introduced changes to the constitutional documents of companies. The replacement statutory instrument is necessary to reflect those changes. The instrument is based on the Companies (Model Articles) Regulations 2008 SI 3229, made under s.19 Companies Act 2006. Specific right to manage provisions have been added where necessary. These relate to aspects of membership, insurance and inspection of documents focussing on the needs of RTM companies. During the transitional period the 2003 Regulations continue to have effect in relation to RTM companies incorporated before 9<sup>th</sup> November 2009. The transitional period began on 9<sup>th</sup> November 2009 and ends on 30<sup>th</sup> September 2010. The Model Articles appear as a schedule to the Regulations.

**Note:** Where the only case reference given is a universal reference, readers will find a full transcript of the decision available on [www.bailii.org](http://www.bailii.org). Statutory instruments can be found on [www.opsi.gov.uk](http://www.opsi.gov.uk).

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