



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

JULY & AUGUST 2008

CASE LAW UPDATE

DISABILITY DISCRIMINATION

By s.22(3)(c) Disability Discrimination Act 1995, "It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises...by evicting the disabled person, or subjecting him to any other detriment." S.24 defines discrimination as less favourable treatment which cannot be shown to be justified. Mr Malcolm was a disabled person, suffering from schizophrenia which, when not controlled by medication, substantially impaired his ability to carry out normal day to day activities. He had sublet his flat and moved elsewhere. The treatment alleged to constitute discrimination was Lewisham LBC's claim for possession of his flat. The House of Lords held that there was no discrimination. But for his mental illness, Mr Malcolm would probably not have behaved so irresponsibly as to sublet his flat and move elsewhere. However Lewisham LBC's reason for seeking possession was a pure housing management decision which had nothing to do with Mr Malcolm's disability. The correct comparator was a person without mental disability who had sublet their flat and gone to live elsewhere (**Clark v Novacold** [1999] ICR 951 disapproved). It was necessary for the alleged discriminator to have knowledge or at least imputed knowledge of the tenant's disability, otherwise it could not play any causative part in the decision-making process. There was no unlawful discrimination and so Mr Malcolm had no defence to the claim for possession. However unlawful discrimination could in principle be a defence even if there was no defence under housing legislation. Lewisham LBC's appeal was allowed and the order for possession reinstated. **Lewisham LBC v Malcolm** [2008] UKHL 43; [2008] 26 EG 117 (CS).

HOUSING

S.89 Housing Act 1980 restricts the power of the court to grant a stay to 14 days after the order for possession, save that if exceptional hardship is caused the date may be postponed to six weeks. Teare J has held that this provision does not apply to an appellate court. It would be very odd and apparently unjust if an appellate court which considered that there was merit in an appeal against a possession order should be so severely limited in its ability to preserve the position until an appeal was heard. It could not have been Parliament's

intention to restrict the discretion of the appellate court, with jurisdiction to hear and determine an appeal from the court making the order for possession, when ordering a stay of execution of the order for possession pending such appeal. **Admiral Taverns (Cygnets) Ltd v Daniel & Daly** [2008] EWHC 1688 (QB); [2008] 30 EG 82 (CS).

The Peabody Trust has been unsuccessful in a test case where it was seeking to vary its standard tenancy agreement unilaterally so as to charge for services. The inability to charge for services was resulting in a loss of around £1,000,000 per annum. Clause 5 of the tenancy agreement allowed variations either by agreement or by using the procedure under s.103 Housing Act 1985. In light of the contradictory and apparently irreconcilable terms of clause 5, which gave rise to doubt as to its meaning as a whole, the court was obliged by regulation 7(2) of the Unfair Terms in Consumer Contracts Regulations 1999 to adopt the interpretation that was most favourable to the consumer. That interpretation had to be that the tenancy agreement could not be varied without the written agreement of both parties. If that conclusion was wrong and the tenancy agreement did allow for unilateral variation, the suggested variation would not be binding on the tenant pursuant to regulation 8 of the 1999 Regulations, because it had not been individually negotiated and caused a significant imbalance in the parties' rights and obligations, to the detriment of the tenant as consumer. **Governors of the Peabody Trust v Reeve** [2008] EWHC (Ch) 1432; [2008] 23 EG 116 (CS).

The liability of a tolerated trespasser for mesne profits ends on the giving up of possession, not on the date when the landlord is notified that possession has been given up. Mr Jones had decided not to return to his flat after being shot there by two masked men on 23rd June 2005. By 3rd October 2005 he had relinquished his intention to reside in the flat and had formed the intention in the future to give up possession of it. A friend removed his personal possessions for him in November 2005. It was held that possession had been given up on the removal of the personal possessions, even though Mr Jones had retained keys after that date. The precise date on which the personal possessions had been removed was unclear but it was held that Mr Jones was only liable for mesne profits until 15th November 2005. **Jones v Merton LBC** [2008] EWCA Civ 660; [2008] 25 EG 173 (CS).

LAND REGISTRATION

In 2004, development land owned by the appellant was transferred to a Gibraltar company. Although a transfer showed a purchase price of £15,000,000, the appellant maintained that that sum had not in fact been paid to him. In 2005 the company executed a charge over the land in favour of Barclays Bank to secure indebtedness that later exceeded £100 million. The company went into liquidation and Barclays Bank proposed to sell the land as mortgagee. The appellant claimed that he was still the beneficial owner of the land and sought to have the property transferred into his own name free from the charge. He claimed that the charge was defective in circumstances where the title charged had been procured by fraud or forgery. Having lost at first instance the appellant was refused permission to appeal. He could arguably show that the registration of the original transfer was a mistake if it was the product of a forgery, since the registration of something that is not properly executed by the registered proprietor must be a mistake. However there was no such mistake in relation to the registration of the charge. The registration of a charge cannot be said to be erroneous or the result of a mistake unless the party asserting the mistake can show that the mortgagee had actual notice of the defect of title or that it had ignored matters that would

have shown that the title was defective. The appellant's complaints with regard to the lack of a proper title on the part of the company should have been dealt with by lodging a caution against the title. *Barclays Bank plc v Guy* [2008] EWCA Civ 452; [2008] 25 EG 174.

LEASEHOLD ENFRANCHISEMENT

Chapter II of Part I of the Leasehold Reform, Housing and Urban Development Act 1993 confers a right on a "qualifying tenant of a flat" to acquire a new long lease of the flat from his landlord. Overturning the decision of the Court of Appeal, the House of Lords has held that a head-lessee of premises including property other than the flats can be a qualifying tenant. As a matter of statutory language it appears clear that a lessee under a lease of property which includes a flat can be a "tenant" of that flat for the purposes of Chapter II of Part I, irrespective of the nature or extent of the other property included in the demise. There was no reason to exclude a lessee under a lease of a block of flats, or a lease which includes property other than flats, from being a "tenant of a flat" for the purposes of Chapter II. There was no good argument to the contrary based on the policy of the 1993 Act. Nor was there any good argument to the contrary based on the alleged practical difficulties, inconsistencies or oddities resulting from this conclusion. There was no breach of Article I of the First Protocol to the European Convention on Human Rights. *Earl Cadogan & ors v 26 Cadogan Square Ltd; Howard de Walden Estates Ltd v Aggio & ors* [2008] UKHL 44; [2008] 26 EG 116 (CS).

LONG RESIDENTIAL LEASES

S.168 Commonhold and Leasehold Reform Act 2002 provides that a landlord under a long lease of a dwelling may not serve a notice under s.146(1) Law of Property Act 1925 (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless the tenant has admitted the breach, or the LVT or a court or arbitral tribunal has finally determined that the breach has occurred. Here the LVT had wrongly refused an application for a determination under s.168(4) that a breach of covenant had occurred. The new leaseholder had failed to give notice of the assignment of the lease to the landlord, contrary to the provisions of the lease. On the landlord's appeal the Lands Tribunal held that a breach had occurred. The LVT had erred in refusing to find that a breach had occurred on the ground that the breach had been remedied, as these were two different questions. The LVT had jurisdiction to find that a covenant had been suspended by a waiver or estoppel so that a breach had not occurred, but the question whether a breach had been waived was a subsequent question for the court considering forfeiture. *Re Glass* [2008] EWLands LRX/153/2007.

Mawhood & Dobson v Sinclair Gardens Investments (Kensington) Ltd [2008] EWLands LRX/59/2007 demonstrates the ability of the LVT (and on appeal the Lands Tribunal) to vary the provisions of a long lease pursuant to ss.35 and 37 Landlord and Tenant Act 1987. Whilst not particularly notable on its facts, it may be useful as a worked example to anyone contemplating a similar application.

MORTGAGES

Receivers selling four properties initially marketed them individually, but then decided to sell them as a portfolio. It was held that there had been no breach of the duty to secure the best price reasonably obtainable for the properties. A receiver appointed by a mortgagee to sell mortgaged property owed a duty in equity to those interested in the equity of redemption to obtain a proper price for the property. However he was not a trustee of the power of sale for the mortgagor, and could choose the time of sale even if that turned out to be disadvantageous to a debtor in that more could have been recovered if the property had been sold at a later date. A degree of latitude was to be given to mortgagees and receivers not only as to the time but also as to the method of sale to be employed. The mortgagee could have regard to its own interests in deciding how to sell. Once a serious offer for all four properties had been accepted, it would not have been prudent to revert to the alternative of individual disposals unless there were serious offers for each of the four properties that in total exceeded the portfolio bid. The receivers were entitled to prefer the certainties of a portfolio sale over the uncertainties of a longer period of marketing against a background of changing market conditions. They were not bound as a matter of law to take the risk of waiting for an indefinite period in the hope of obtaining a higher return when they had a competitive bid for all the properties that exceeded any individual offers. **Bell v Long & ors** [2008] EWHC 1273 (Ch); [2008] 25 EG 172 (CS).

Although probably limited to its particular facts, **Royal Bank of Scotland Plc v Luwum** [2008] EWCA Civ 648 is of some interest in the current financial climate. Mr Luwum succeeded in having a possession order set aside on appeal. He had a Virgin One Account and had exceeded the limit. Possession proceedings were threatened and then brought. Prior to the issue of proceedings Mr Luwum had spoken with a Mr Le Page at the bank. The Court of Appeal held that the plain sense of the arrangement made with Mr Le Page was that Mr Luwum was to have a three month amnesty during which he would have the chance to bring the account within its permitted limit, and that if he did so the bank would review the position. In reliance on this arrangement Mr Luwum then arranged to borrow money from family and friends to reduce the debt. In these circumstances the bank had acted prematurely and was estopped from issuing proceedings before the expiry of the three months.

NOTICES

Despite the fact that a purchase notice under s.12 Landlord and Tenant Act 1987 was extremely badly and incorrectly drafted it was held on appeal to be valid. The question in every case is whether on a fair construction of a notice it is quite plain that the reasonable recipient could not be misled by it. Having considered the whole of the notice in its context, Teare J was of the view that the reasonable recipient of the notice would have been left in no doubt that the tenants were giving notice to the freeholder of their requirement to have the freehold interest in the premises transferred to them. Neither the incorrect date nor the naming of an incorrect Act (and section) could have caused the reasonable recipient to have been in any doubt as to what the tenants required. The notice did not expressly identify the person nominated by the tenants as the person to whom the landlord would dispose of his interest, but the reasonable recipient can have been in no doubt that the tenants required it to be disposed of to themselves. The notice did not specify the addresses

of the flats of which the tenants were qualifying tenants, but this was a directory not a mandatory requirement. **Green v Westleigh Properties Ltd** [2008] EWHC 1474 (QB).

RESTRICTIVE COVENANTS

An application to modify restrictive covenants under s.84(1) Law of Property Act 1925 was refused. The proposal was to replace a bungalow with two or three storey dwellings which would have overlooked neighbouring properties. The applicant's expert evidence had been largely directed to planning issues, not to s.84(1). Although planning considerations were not irrelevant to a consideration under paragraph (aa), the starting point should be an appraisal of the impact, upon those with the benefit of the restrictions, of allowing a development proposal to proceed, bearing in mind that it would otherwise be obstructed by the covenants. It would have been possible, within the covenant, to demolish the existing bungalow and construct a taller building, but it was not very likely that this would occur if the present application was refused. There would be a significant loss of privacy and loss of sunlight, and an overbearing effect on neighbouring properties if the application was allowed. **Re Fisher** [2008] EWLands LP/31/2006.

RIGHT TO BUY

If a tenant who has exercised his right to buy serves notice under s.153A(5) Housing Act 1985 (an operative notice of delay), he is entitled by virtue of ss.153B and 155(3A) to a reduction in the premium he is liable to pay at completion. In effect, payments of rent made after the service of the notice can be applied towards the purchase price. This applied not only to rent paid by the tenant himself but to rent paid by third parties, including rent paid by way of housing benefit. The provisions might have been inspired by a desire to compensate tenants who had had to go on paying rent out of their own resources when they could have been paying mortgage interest, but the court had to take the wording as enacted. There was no material difference in legal terms between the payment of rent by a third party and the credit by the housing authority of rent from its housing benefit account to the tenant's rent account. The effect of this decision was that Mr Hanoman was entitled to acquire the lease of his property for a nil premium. Although he had completed the purchase Mr Hanoman was able to rely on a collateral contract that he would be able to enforce any outstanding rights in the county court after completion. The collateral contract had not been rendered unenforceable by s.2 Law of Property (Miscellaneous Provisions) Act 1989. On its true interpretation it did not contain a term that formed part of the lease. The remedy available under the collateral contract did not involve rewriting the terms of the lease but gave a personal remedy against the landlord in consequence of what the lease erroneously contained. **Hanoman v Southwark LBC** [2008] EWCA Civ 624; [2008] 24 EG 140 (CS).

RIGHT TO MANAGE

An application for the right to manage under s.79 Commonhold and Leasehold Reform Act 2002 failed because of the absence of a register of members. The RTM company had failed to establish that on 4th January 2007, when the s.79 notice was given, the members of the company included "a number of qualifying tenants of flats contained in the premises which is not

less than one-half of the total number of flats so contained.” (s.79(5)). In order for a person other than a subscriber to be a member that person must (a) have agreed to become a member and (b) had their name entered in the register of members: see s.22(2) Companies Act 1985. In the absence of a register of members a person’s name could not be entered on the register and so the person could not be a member, whether or not that person had agreed to become a member. It followed that none of the twenty-four leaseholders who were said to have agreed to become members of the RTM were members at the date of its application to the LVT. The RTM company did not fulfil the requirements of s.79(5) and its claim notice was invalid. **Southall Court (Residents) Ltd & ors v Buy Your Freehold Ltd & ors** [2008] EWLands LRX/124/2007 and 137/2007.

SERVICE CHARGES

The decision of the Lands Tribunal in **Camden LBC v Leaseholders of 37 Flats at 30-40 Grafton Way** [2008] EWLands LRX/185/2006 is something of a cautionary tale for landlords embarking on major works. Camden LBC failed to overturn the decision of the LVT refusing to dispense with consultation requirements under the Service Charges (Consultation Requirements) (England) Regulations 2003. The practical result of this was that a bill of £504,200.71 for major works could not be recovered from 37 long leaseholders. Instead their liability was limited to £250 per flat, a total of £9,250. Camden had made a series of mistakes, the most serious of which was the failure to serve a statement on the leaseholders under paragraph 4(5)(b) of Part 2 of Schedule 4 to the Regulations, which would have set out the amount specified in at least two of the estimates and a summary of observations received. Other information had been sent which was wrong and could have been misleading. The principal consideration for the purpose of any decision on retrospective dispensation must be whether any significant prejudice has been suffered by a tenant. Camden LBC had made a gross error, and the information it had provided did not even begin to make good the omission. The appeal was dismissed.

The Lands Tribunal held in **Chand v Calmore Area Housing Association Ltd** [2008] EWLands LRX/170/2007 that the LVT was right to reject a claim in relation to service charges on the basis that it did not have jurisdiction. Part of the payment made under the assured tenancy agreement was described as the service charge. The landlord fixed the service charge each year by taking the actual cost from the previous period as the basis for calculating the costs of providing the services for the forthcoming year. Once set, the weekly service charge was a fixed charge for that financial year and did not vary according to the actual costs. If the landlord’s actual expenditure on the items for which a service charge was levied exceeded the amounts the tenants were contractually liable to pay, the landlord absorbed the difference. If the actual expenditure was less, the landlord retained the difference. There was no ‘year end’ accounting and no payment of a balancing charge. No service charge accounts were provided to the tenants. Following the decision in **Home Group Ltd v Lewis & ors** [2007] EWLands LRX/176/2006, the payment was not within s.18(1)(b) Landlord & Tenant Act 1985 (which defines “service charge”) because it did not vary according to the relevant costs. There was no direct relationship between the amount of costs as a cause and the amount of the service charge as a consequence.

TRUSTS OF LAND

The wife of a convicted drug dealer has been successful in retaining her 50% share of the matrimonial home, despite attempts by the Revenue and Customs Prosecution Office to argue that her share was tainted by her guilty knowledge that the money used to pay the mortgage was not legitimately earned. The property was held in joint names, so Mrs Gibson was not asking the court to exercise its discretion to make a transfer in her favour. Nor did she have to rely on illegality to establish her beneficial entitlement. There was no identifiable power in the court which would achieve what the prosecution sought to achieve. Declining to order the transfer to a complicit spouse of property which is not hers was one thing; confiscating property which she already owned was quite another. **Gibson v RCPO** [2008] EWCA Civ 645.

OTHER DEVELOPMENTS

HOUSING

From 8th September 2008 certain provisions of Parts 1 and 2 of the Housing and Regeneration Act 2008 are brought into force by the Housing and Regeneration Act 2008 (Commencement No.1 and Transitional Provision) Order 2008 SI 2358. The provisions coming into force in Part 1 are those relating to the establishment, constitution, objects and initial proceedings of the new Homes and Communities Agency. The provisions coming into force in Part 2 are those relating to the establishment of a new Office for Tenants and Social Landlords. Some other provisions of the Act are brought into force on 22nd September 2008 so as to coincide with other statutory regimes.

LAND REGISTRATION

The Adjudicator to Her Majesty's Land Registry (Practice and Procedure) (Amendment) Rules 2008 SI 1731 make a number of amendments to the existing rules (made under SI 2003/2171). The amendments came into force on 25th July 2008. In particular there are a number of changes to the rules on disclosure, service and costs. The new rules also permit an adjudicator to make an additional order before closing the proceedings where a question has been referred to the court and the court has made a substantive decision. The adjudicator's order must be consistent with the court order, necessary to put the court order into effect, and within the normal powers of the adjudicator.

The Land Registration (Network Access) Rules 2008 SI 1748 came into force on 3rd July 2008. They are made under the Land Registration Act 2002 and support the establishment of a land registry network for carrying out electronic conveyancing. A person who is not a member of the land registry may only have access to a land registry network under the authority of a network access agreement entered into with the Chief Land Registrar. The rules provide for three different types of network access agreements. Network agreements are to be in a standard form, and certain terms which must be included are set out in Schedule 2 to the rules. The rules also set out procedures under which the registrar may

terminate a network access agreement, for example where a subscriber becomes insolvent or is in serious breach of the agreement.

The Land Registration (Electronic Conveyancing) Rules 2008 SI 1750 came into force on 4th August 2008 and make provision for the creation of legal charges in electronic form. Schedule 1 to the rules sets out the mandatory contents of an electronic legal charge.

STAMP DUTY

By virtue of the Stamp Duty Land Tax (Exemption of Certain Acquisitions of Residential Property) Regulations 2008 SI 2339, most purchases of residential property under £175,000 are exempt from stamp duty until 2nd September 2009. This well-publicised change is effected in relation to transactions on or after 3rd September 2008.

Amendments to the Stamp Duty Land Tax (Zero-Carbon Home Relief) Regulations 2007 SI 3437 are made by the Stamp Duty Land Tax (Zero-Carbon Homes Relief) (Amendment) Regulations 2008 SI 1932, coming into force on 13th August 2008. The amendment provides that an accredited assessor may charge a reasonable fee for assessing a dwelling and producing a certificate for the purposes of the principal Regulations. This amendment has effect in relation to acquisitions on or after 1st October 2007 but before 1st October 2012.

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.

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.