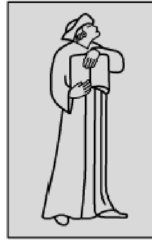

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PROPERTY LAW BULLETIN

JUNE 2008

CASE LAW UPDATE

BOUNDARY DISPUTES

In overturning the decision of the county court judge, the Court of Appeal held that in determining the line of the boundary he had been wrong to ignore the most relevant topographical feature, namely a recently erected fence. In many cases the parcels clause of the conveyance will provide the required help in identifying the boundary. Where a plan is *"for the purposes of identification only"* it is not intended to identify precise boundaries. If a plan is described as *"more particularly delineating"* land which is described in words, the plan will ordinarily prevail over the words in the event of any uncertainty. Here the plan was for the purposes of identification only. The boundary line on the plan did not obviously follow any hedge or fence and in particular did not follow the line of the newly erected fence. The parcels clause was inadequate to identify the boundary. The judge was wrong to use the plan to identify the boundary. He had failed to construe the parcels clause in the context of the conveyance as a whole. Clause 4 referred to the *"boundary fence"* and imposed a repairing obligation on the Penroses, the Appellant's predecessors in title. If the judge was right about the line of the boundary, the Penroses would have had no lawful access to the fence so as to fulfil their repairing obligation. There is clear Court of Appeal authority that evidence on the ground can be used (see ***Webb v Nightingale*** [8th March 1957], followed in ***Willson & anor v Greene & anor*** [1970] 1 WLR 635). The boundary was marked by the fence. ***Strachey v Ramage*** [2008] EWCA Civ 384.

ESTATE AGENTS

In ***Foxtons Ltd v Pelkey Bicknell & Anor*** [2008] EWCA Civ 419; [2008] 17 EG 163 (CS), a decision of some importance for all estate agents, the Court of Appeal considered the meaning of the phrase *'a purchaser introduced by us'* in the sole agency terms of Foxtons' residential sale terms of business. Foxtons had initially been instructed on the relevant sale under a sole agency agreement and had introduced the eventual buyer. However the purchase was not concluded until some time later, by which time both Hamptons and Foxtons were instructed on a multiple agency basis, and the same buyer was re-involved by Hamptons. The judge at first instance had found that Foxtons were entitled to their

commission because (1) there was no implied term that they must be the effective cause of the sale but (2) in any event they were the effective cause. Lord Neuberger, allowing the vendor's appeal, held that the guiding principle should be whether the agent had introduced the buyer to the purchase, not whether he had introduced the buyer to the property. Lord Neuberger disapproved of suggestions to the contrary in Murdoch on the Law of Estate Agency and Auctions (4th edition) at pp 129-130, apparently approved in Bowstead and Reynolds on Agency (18th edition at para.7-037. The judge had therefore applied the wrong test and on the facts Foxtons had not introduced the buyer to the purchase.

HOUSING

In ***Wandsworth LBC v Allison*** [2008] EWCA Civ 354 the Court of Appeal considered the jurisdiction of the county court, pursuant to s.204 Housing Act 1996, to review decisions about priority need accommodation under s.189(1)(c). Wall LJ surveyed the test to be applied by the county court and pointed out that the county court should confine itself to points of law, questions of vires and procedural irregularity or *Wednesbury* unreasonableness. The local authority will be best placed to make these carefully balanced decisions. Since the decision in the instant appeal turned on questions of fact and was not *Wednesbury* unreasonable the Recorder had erred in overturning Wandsworth's decision that Mr Allison was not in priority need of housing within s.189(1)(c).

Two women who had deliberately acted so as to cause themselves to be evicted from women's refuges were intentionally homeless and consequently were no longer owed the main housing duty under s.193 Housing Act 1996. A women's refuge was capable in principle of being accommodation for the purposes of the Act, and the decision to the contrary in ***R v Ealing LBC ex p Sidhu*** [1982] 2 HLR 48 was wrong. The Secretary of State had chosen not to exercise her powers under s.177(3) HA 1996 to specify that it was or was not reasonable to occupy a refuge as accommodation. The temporary nature of the accommodation did not without more determine whether it was reasonable for a person to continue to occupy it. When deciding whether or not it is reasonable for a woman to continue to occupy a refuge as opposed to other accommodation, relevant factors (set out at paras 49 and 50 of the judgment) should be considered. These include the size, type and quality of the accommodation including any need to share facilities, the length of time for which the woman has occupied it, and whether her occupation has prevented or may prevent the refuge from offering emergency accommodation to another victim of domestic violence. ***Manchester City Council v Moran; Richards v Ipswich Borough Council (Secretary of State for Communities and Local Government intervening)*** [2008] EWCA Civ 378.

HUMAN RIGHTS

The applicant and his wife had been secure tenants of a local authority property. The wife and children were subsequently rehoused by the local authority in accordance with its domestic violence policy. The applicant then moved back into the property and applied for an exchange of accommodation on the basis that he required a suitable home in the area so that he could visit the children. A housing officer asked the wife to sign a notice to quit. She did so without realising that it would extinguish the applicant's right to remain in the house or obtain other accommodation. She later tried to withdraw the notice but was unsuccessful. In possession proceedings the applicant succeeded on Article 8 in the county

court but failed in the Court of Appeal. The ECHR held that Article 8 had been violated by a lack of adequate procedural safeguards in the UK system for allocating public housing. The effect of the notice to quit and the possession proceedings interfered with the applicant's right to respect for his home. The interference had the legitimate aim of protecting the council's right to regain possession of the property as against an individual who had no contractual or other right to be there, but was disproportionate to the aim pursued. The loss of one's home was a most extreme form of interference with the right to respect for the home. Any person at risk should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of Article 8 principles, even though his right of occupation under domestic law had come to an end. Had the council used the statutory scheme under the Housing Act 1985 the applicant could have asked the court to consider whether his wife had actually left because of domestic violence and whether in the circumstances it was reasonable to make an order. The council had chosen to bypass the statutory scheme by asking the applicant's wife to sign a notice to quit, and did not appear to have considered his Article 8 rights. ***McCann v UK*** [2008] ECHR 385; [2008] 20 EG 136 (CS).

The applicants were unmarried sisters who had lived together for 31 years in a house built on land inherited from their parents. They owned the property in joint names, and had other properties, shares and investments. They argued that, contrary to Article 1 of Protocol 1 (peaceful enjoyment of possessions) and Article 14 (prohibition of discrimination) that when one of them died the survivor would face a significant liability to inheritance tax that the survivor of a marriage or civil partnership would not have to pay. The application was dismissed. The sisters could not be compared, for the purposes of Article 14, to a married or civil partnership couple. One of the defining characteristics of a marriage or civil partnership was that it was forbidden to close family members. The fact that the applicants had chosen to live together all their adult lives did not alter that essential difference between the two types of relationship. Marriage conferred a special status on those who entered into it and was protected by Article 12. The absence of a legally binding agreement between the applicants rendered their relationship of cohabitation fundamentally different to that of a marriage or civil partnership. ***Burden & anor v UK*** [2008] ECHR 357; [2008] 18 EG 126 (CS).

LEASEHOLD ENFRANCHISEMENT

The LVT had reached an incorrect decision when assessing the price to be paid for the collective enfranchisement of 6 Palmeira Square in Hove, because it had proceeded on a factually incorrect basis when deciding on the value to be attributed to the top floor flat, which constituted the most substantial element in the valuation. Both valuers had wrongly assumed that the top flat was let on an assured shorthold tenancy. In fact it was subject to a five year lease. The Lands Tribunal held that the Appellants were not bound (by contract or by estoppel) by the fact that their valuer had signed a document stating that there was an assured shorthold tenancy over the top flat. CPR 35.12(5) and Lands Tribunal Practice Directions paragraph 16.2 are in similar terms, and the latter provides that: *"Where experts reach agreement on an issue during their discussions, the agreement will not bind the parties unless the parties expressly agree to be bound by the agreement."* It was clearly not the intention of the Appellants to bind themselves to a particular basis of valuation if it transpired that their valuer had been misinformed of the facts relating to the top flat by the Respondent and his

advisers. The valuation was adjusted downwards to take into account the existence of the five year lease. ***Cawthorne & ors v Hamdan*** [2008] EWLands LRA/22/2003.

An appeal to the Lands Tribunal from the LVT is a statutory right of appeal under s.175 Commonhold and Leasehold Reform Act 2002. The normal nature of an appeal to the Lands Tribunal is by way of rehearing, unless restricted by the imposition of conditions. It was not necessary for the applications for permission to appeal to request a rehearing. It was open to the Lands Tribunal, in accordance with the overriding objective, to enlarge the ambit of an appeal so as to proceed by way of rehearing rather than review. The proper approach of the LT is not to disturb the LVT on a relevant point (here the deferment rate) unless it is convinced that the conclusion is clearly wrong. ***Sportelli*** does not automatically and without more mean that a decision on deferment rate higher than 5% must be wrong and must be disturbed: see ***Ulterra v Glenbarr (RTE) Company Ltd*** [2007] 04 EG 174. However having regard to the valuation evidence the deferment rate of 7.5% was clearly wrong and must be disturbed in favour of a deferment rate of 5%. There were no particular features in the appeal that would justify departure from the deferment rate for flats laid down in ***Sportelli*** and the deferment rate would be fixed at 5%. ***Daejan Investments Ltd v The Holt (Freehold) Ltd*** [2008] EWLands LRA/133/2006.

RESTRICTIVE COVENANTS

The Lands Tribunal refused an application to discharge or modify a restrictive covenant under s.84(1)(aa) LPA 1925 so as to permit the construction of six detached residential properties on pasture land. The covenant had been imposed under a deed of gift which provided that none of the donees should *"...erect any building...on the said property nor...allow it to be used for residential or business purposes or any other purpose other than pastoral purposes so that the land shall remain for ever hereafter open ground."* Outline planning permission had been granted. Evidence was given that the land had historically been known as *"Sara's sledging field"* where local people sledged and skiied in the winter months. There was no dispute that the proposed user was reasonable and that the restriction impeded it. However the restriction unquestionably secured practical advantages to the objectors' properties which were of substantial value or advantage. The present outlook over an attractive, undulating swathe of open pasture would be seriously impeded if it were to be replaced by a residential development. The objectors' concerns were even more clear cut than they were in many cases cited by counsel for the objectors where applications also failed. The loss of amenity and general air of openness that the residents currently enjoyed would be adversely affected to a considerable degree. Ground (aa) was not made out. ***Re Case*** [2008] EWLands LP/55/2006.

RIGHTS OF WAY

The Court of Appeal has overturned a decision made by George Bartlett QC (sitting as a deputy high court judge) in relation to the use of Chilcomb Bridleway and Twyford Road by mechanically propelled vehicles. S.67(1) Natural Environment and Rural Communities Act 2006 came into force on 2nd May 2006 and provided that existing public rights of way for mechanically propelled vehicles were extinguished if they were not already shown in a definitive map and statement or were shown only as footpaths, bridleways or restricted byways. By s.67(3) such rights could be saved from extinguishment if prior to

commencement an application had been made under s.53(5) Wildlife and Countryside Act 1981 for an order making modifications to the existing map and statement. The primary question at first instance and on appeal was whether applications had been made under s.53(5). The Court of Appeal held that they had not. It was provided by s.53(5) and paragraph 1 of Schedule 14 WCA 1981 that an application should be made in the prescribed form and accompanied by a map and copies of any documentary evidence which the applicant wished to adduce in support of the application. Neither of the applications was accompanied by any documents at all, and so neither application had been made in accordance with paragraph 1 of Schedule 14. It was irrelevant that some of the documents might have been available to the authority already. It was conceded that an applicant was not obliged to attach documents which were impossible for him to obtain. The rights of way for mechanically propelled vehicles had been extinguished. ***R (Warden & Fellows of Winchester College & Humphrey Feeds Ltd) and Hampshire CC v Secretary of State for Environment, Food & Rural Affairs*** [2008] EWCA Civ 431; [2008] 18 EG 127 (CS).

The parties owned adjoining terraced houses purchased under the right to buy. The sale to the appellants included a right of way along the side and across the rear of the respondent's end of terrace property *"at all times"* for access to and egress from the rear of the appellants' property *"for all proper purposes connected with the reasonable enjoyment of the property."* The respondents sought to argue that the appellants' use of the right of way was excessive. It was being used for access by the appellants and their visitors, and for wheeling bicycles, walking the dog etc. The respondents argued that it should be restricted to purposes that could not reasonably be accommodated by the front door, such as putting out the bins. They relied on a letter from the local authority written five months after the sale to the respondents, indicating what the local authority considered to be reasonable use of the way. The Court of Appeal held that the judge had erred in taking into account the letter from the local authority. The court's role was to interpret the right of way that had been granted by ascertaining the parties' intentions from the words used, in their context. Direct evidence of what the parties had intended was not admissible unless rectification was being sought. The letter from the local authority was admissible neither as evidence of their intention regarding the grant nor their opinion as to what it meant. There were no grounds for restricting use of the right of way to occasions where use of the front door was not reasonably practicable. ***Brooks & anor v Young & anor*** [2008] 21 EG 139 (CS).

RIGHT TO BUY

In ***Honeygan-Green v Islington LBC*** [2008] ECA Civ 363; [2008] 17 EG 162 (CS), the Court of Appeal concluded that steps taken under the tenant's right to buy under Part V of the Housing Act 1985 were not wiped out by an order for possession, so that the process did not have to be restarted if the possession order was discharged pursuant to s.85(4). Although whilst a possession order was in existence no further steps in the process could be taken, ss.121 and 85 were to be interpreted so that accrued steps in the 'right to buy' process revived together with the tenancy. Keene LJ suggested that the Court might, in appropriate circumstances use s.85(3)(b) to make it a condition of the revival of the tenancy that the tenant restart their claim to a right to buy. However Pill LJ doubted whether this would be right.

RIGHTS TO LIGHT

In ***Forsyth-Grant v Allen & anor*** [2008] EWCA Civ 505, a claim involving a breach of the claimant's rights to light, the Court of Appeal rejected the suggestion that damages for nuisance should be calculated based on the profits the defendants derived from their breach, as opposed to on ordinary principles by reference to the resulting diminution of the value of the claimant's property. Patten J, with whom Mummery LJ agreed, considered profit-based damages awarded in trespass or wrongful detention of goods cases, as referred to by Lord Nicholls in ***Attorney General v Blake*** [2001] 1 AC 268 at p.279, HL; and damages in lieu of an injunction calculated by reference to what the defendant would have had to pay to the claimant to avoid an injunction (so called Wrotham Park damages) in breach of contract cases. Patten J distinguished the trespass and conversion line of authorities and held that an account of profits was not available in nuisance cases. Alternatively if an account of profits was available this would only be in exceptional cases. Toulson LJ was not prepared to rule out this remedy in every nuisance case, given the developing state of the law. Patten J held that only the second form of remedy, Wrotham Park damages, might have been available to the Claimant. However, as he pointed out, she had not claimed that remedy; and as Toulson LJ pointed out she would have been unlikely to obtain a remedy based on what she might have bargained for as she had, on the facts, refused to bargain.

TRUSTS OF LAND

Fowler v Barron [2008] EWCA Civ 377 is another useful examination of apportionment of the beneficial entitlement to a home acquired in joint names by cohabitees following ***Stack v Dowden*** [2006] 1 FLR 254 HL. The Court of Appeal re-emphasised that the appropriate test was to search for the common intention of the parties according to the common intention constructive trust, not for the result which the Court thought was fair in all the circumstances. The Court of Appeal also emphasised that where a property is in joint names the presumption is of joint beneficial ownership, and that this presumption will be difficult to rebut. In rejecting the Appellant's claim to an interest the judge had wrongly applied the resulting trust test and had been overly swayed by evidence of financial contributions. Arden LJ took the opportunity to highlight Baroness Hale's warning about the unreliability of evidence from an estranged couple about their past dealings. The judge failed to have sufficient regard to the following factors; the parties' mutual wills which strongly suggested they each thought they each had a beneficial interest; the overall pooling of resources in contrast to the unusually rigid separation of assets in ***Stack***; and the Appellant's expenditure on the children which was an important element of the expenses of the family group in a situation where the parties plainly did not care about the size of each other's contributions. The judge had also been wrong to rely on evidence of a secret intention on the part of the Respondent as that could never be evidence of a common intention. Accordingly the presumption of an equally shared beneficial interest had not been rebutted.

Thomas Barrett was not able to enforce an interest under a proprietary estoppel/constructive trust because the trust was for an illegal purpose. Thomas had been made bankrupt in 1993 and his home at 137 Bilton Road in Perivale, Middlesex, had vested in his trustee in bankruptcy. His brother John had purchased the property for a price which left the trustee with £15,000. Non-preferential creditors received a dividend of 38.32 pence in the pound. Thomas contended that he had an interest under an estoppel or trust because he and John had agreed that the purpose of the transactions was to enable Thomas to regain

ownership of the property and to avoid its being repossessed by the trustee in bankruptcy. By enabling him to conceal his interest, the effect and purpose of the agreement was to deprive the trustee of the opportunity of acquiring Thomas' interest in the property. The illegal purpose of avoiding the rules of bankruptcy shaped the whole of the transaction. A claimant can enforce an equitable proprietary interest that has arisen under an agreement made for an illegal purpose provided that he does not have to plead or rely upon the illegality. However Thomas had to rely on the illegal purpose to prove the agreement, and this made his interest unenforceable. ***Barrett v Barrett*** [2008] EWHC 1061 (Ch); [2008] 21 EG 138 (CS).

OTHER DEVELOPMENTS

ESTATE AGENTS

The Estate Agents (Redress Scheme) Order 2008 SI 1712 provides that every person who engages in relevant estate agency work shall be required to be a member of an approved redress scheme. The Order comes into force on 1st October 2008. The Estate Agents (Redress Scheme) (Penalty Charge) Regulations 2008 SI 1713 provides that the penalty charge that may be imposed on a person who has engaged (or is engaging) in estate agency work in the UK in relation to residential property in breach of the requirement to belong to an approved redress scheme shall be £1,000. *"Estate agency work"* is defined in s.1 Estate Agents Act 1979 and *"residential property"* is defined in s.23C of that Act. Details of every approved redress scheme are available on the Office of Fair Trading website (www.oft.gov.uk).

Two further commencement orders bring additional provisions of the Consumers, Estate Agents and Redress Act 2007 into force from 1st April 2008, 7th May 2008 and 1st October 2008: see The Consumers, Estate Agents and Redress Act 2007 (Commencement No.3 and Supplementary Provision) Order 2007 SI 1262 and the Consumers, Estate Agents and Redress Act 2007 (Commencement No.4) Order 2008 SI 905. The first brings into force s.5 of the Act, which requires the National Consumer Council to produce a forward work programme before each financial year. The second brings into force provisions relating to the keeping of accounts by the National Consumer Council. It also expands the grounds for the issue by the Office of Fair Trading of prohibition and warning orders and increases the investigatory powers of enforcement officers.

HOME LOSS PAYMENTS

The Home Loss Payments (Prescribed Amounts) (England) Regulations 2008 SI 1598 increase the amount of home loss payments payable in England under s.30 Land Compensation Act 1973. A person is entitled to a home loss payment when they are displaced from a dwelling by compulsory purchase or in the other circumstances specified in s.29 LCA 1973. S.30(1) LCA 1973 provides that in cases where a person occupying a dwelling on the date of displacement has an owner's interest, the amount of home loss payment is calculated as a percentage of the market value of the interest, subject to a

maximum and minimum amount. Regulation 2(2)(a) of the Regulations increases the maximum amount payable under section 30(1) of the Act from £44,000 to £47,000 and regulation 2(2)(b) increases the minimum amount from £4,400 to £4,700. The revised amounts apply where the displacement occurs on or after the 1st September 2008.

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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