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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

COLLECTIVE ENFRANCHISEMENT

Henderson J upheld the “*admirable*” judgment of HHJ Madge that a self-contained part of a building within ss.3 and 4 Leasehold Reform Housing and Urban Development Act 1993 can itself consist of two or more such self-contained parts for the purposes of collective enfranchisement. The premises specified in the initial notice consisted of 20 flats, nos. 41 to 60. It was common ground that flats 41-50, and flats 51-60, could each qualify as a self-contained part of a building within the meaning of s.3, but could not be further sub-divided into smaller self-contained parts. Like the trial judge, Henderson J found that the language of s.3 was clear. Neither expressly nor by implication did it require that a self-contained part of a building should be indivisible into smaller self-contained parts to qualify for enfranchisement by a majority of tenants. ***Crafrule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd*** [2010] EWHC 1230 (Ch).

COMMONS

On a challenge to registration of land on the outskirts of Leeds as a town or village green (“TVG”), the court considered the central question of the meaning of “neighbourhood” within the meaning of s.22(1A) Commons Registration Act 1965 (now repealed by Commons Act 2006). The judge agreed with the Inspector, who had registered the land as a TVG. There were no grounds for amending the registration. It was the clear intention of Parliament in a neighbourhood case to relax the requirements necessary to register a TVG and to weaken the links with a common law village green. There was no reason to import the technical difficulties with the word “locality” which had arisen in relation to common law greens. One of the main purposes of the amendment was to allow inhabitants in a neighbourhood to qualify in a situation where the locality was too big. “Neighbourhood” was an ordinary English word. The Haws and Banksfield were two separate neighbourhoods and could not be regarded as one composite neighbourhood, but there was nothing in the wording of the Act limiting the neighbourhood to “one neighbourhood” and there was no

logical reason why there could not be two or more neighbourhoods. **Leeds Group Plc v Leeds City Council** [2010] EWHC 810 (Ch).

ESTATE AGENTS

Glentree Estates Ltd & ors v Favermead Ltd & Ecclestone [2010] EWHC 1120 (Ch) was an unsuccessful claim for commission brought by three well known firms of estate agents. The court considered whether it was a term of the agreement that the claimants had to be the effective cause of the sale. The material words of the agency agreement were an undertaking to pay a fee if one of the claimants “introduces an applicant who subsequently purchases the property from Corfiducia”. Article 57 of Bowstead & Reynolds on Agency, 18th edition, states that an agent is not entitled to commission on a contract unless his services were the effective cause of the transaction being brought about. Such a term is very readily implied in this context and was so implied in the present case. There was an obligation on the agents to demonstrate that they had been the effective cause of the purchase in question in order to qualify for commission, which they had failed to show on the facts.

HOUSING

The claimant was not a “former relevant child” for the purposes of leaving care support. He was approaching the age of 21. Had he been able to show that he was a former relevant child he would have been entitled to further support up to the age of 24. He had been provided with accommodation at the age of 16 but this was not through the children’s social services team. It is clear from s.22 Children Act 1989 and the decision in **R(M) v Hammersmith & Fulham LBC** [2008] 1 WLR 535 that a child only becomes a “looked after child” once accommodated by a local authority in the exercise of its social services functions, and that there is a limit to the cases in which it will be held to have so acted. A firm line has to be drawn in resolving when a local authority is exercising its social services functions. The line has to be drawn by saying that the duty is not triggered until the child comes to the attention of the division of the local authority responsible for those functions in the ordinary course. The peripheral attention of a duly qualified official of a different team will not do (here a social worker who was a member of the youth offending team). This is a rational and workable distinction because it is the children’s social services team that is properly equipped to make the initial judgment that the child is or is not in need within the meaning of s.17(10) CA 1989. **R (TG) v Lambeth LBC** [2010] EWHC 907 (QB).

HUMAN RIGHTS

The Court of Appeal considered the position of a person (i) who is unlawfully present in the UK (ii) is destitute (iii) has made an application for leave to remain which expressly or implicitly raises grounds under the Convention. In these circumstances they held that the local authority’s financial situation is irrelevant to the question whether assistance should be provided to that person. The Court of Appeal upheld the decision of Charles J that Birmingham CC had acted unlawfully in refusing to provide Ms Clue and her family with support and accommodation pursuant to s.17 Children Act 1989, pending a decision on her application for indefinite leave to remain. Ms Clue was a Jamaican national with four children, one born in Jamaica in 1994 and the others all born after she came to the UK in December

2000, initially on a six month visitor visa. After the expiry of her visa she applied for leave to remain as a student but this was refused and the subsequent appeal dismissed in March 2003. No steps were then taken to remove her and her children. She and her children were granted indefinite leave to remain in October 2009. Before this, Birmingham CC had decided not to provide support to the family under s.17 Children Act 1989 since they were able to return to Jamaica and enjoy family life there. Charles J held that Birmingham CC had erred in law in failing to take into account the reasons underlying DP 5/96 and the presumption to which it gave rise, namely that where a child of a family had been resident in the UK for 7 years, indefinite leave to remain would be granted in all but exceptional cases. When applying schedule 3 Nationality, Immigration and Asylum Act 2002 the local authority should not consider the merits of an outstanding application for leave to remain, unless the application is hopeless or abusive. The case includes a helpful review of some of the caselaw on Article 8. Some reassurances were given by the Secretary of State about decision making processes within the Case Resolution Directorate. **Birmingham City Council v Clue & ors** [2010] EWCA Civ 460.

LONG RESIDENTIAL TENANCIES

Mrs Hughes had been in occupation of her flat as assignee of an underlease of some 39 years from 25th March 1964. This lease expired on 21st June 2003. Her landlord, Borodex, then served notice on her under paragraph 4(1) Schedule 10 Local Government and Housing Act 1989 determining her long residential tenancy and proposing a new assured periodic tenancy commencing on 28th February 2004 at a rent of £2,600 pcm. Mrs Hughes served a counter-notice proposing a rent of £1,300 pcm and the matter was referred to a rent assessment committee to determine the rent. On this occasion the rent fell to be determined under paragraph 11 of schedule 10, and under those provisions the RAC disregarded improvements made to the premises by Mrs Hughes and fixed the rent at £1,668 pcm from 28th February 2004. There was no issue about this determination. The issue arose on a second determination following a second set of notices served in 2007. On this occasion the RAC determined that it could not disregard the improvements that Mrs Hughes had made to the flat when fixing the rent. Collins J dismissed Mrs Hughes' appeal, as did the Court of Appeal. It was not open to the court to interpret the legislation in the manner proposed by Mrs Hughes. Paragraphs 9 and 11 of Schedule 10 were limited to fixing the initial rent following the expiry of a long lease. Once the initial terms, including rent, are fixed, those paragraphs are spent and it is open to the landlord to serve a notice and start the procedure for fixing a new rent which does not require improvements made by the tenant under the old long lease to be disregarded. A second notice cannot be served until the expiry of one year after the fixing of the rent by the RAC on the first occasion. **Hughes v Borodex Ltd** [2010] EWCA Civ 425.

OVERRIDING INTERESTS

The Court of Appeal would not overturn the trial judge's decision that Ms Bustard was in actual occupation of her home for the purposes of an overriding interest under para 2 schedule 3 Land Registration Act 2002, even though she had been a psychiatric in-patient elsewhere for more than a year. Ms Bustard had transferred her interest in her home to a Mrs Hussain at a time when she was too unwell to have legal capacity to do so. Mrs Hussain then charged it to Link Lending plc, who sought possession when Mrs Hussain defaulted on

repayments. Mummery LJ noted that there were facts pointing both ways on the question of whether Ms Bustard was in actual occupation. She was not personally present in her home on the date of registration of the charge on 29th February 2008. She had been in a residential care home since January 2007. She was incapable of living safely in the property. Her visits there were brief and supervised. On the other hand, all of her furniture was still there, she genuinely wanted to return there, she continued to visit the property because she still considered it to be her home, those responsible for her finances paid the bills, she was applying to the Mental Health Review Tribunal to be allowed to return, and no-one had taken a final and irrevocable decision that she would not be permitted to return. Mummery LJ reviewed the caselaw and noted that the courts were reluctant to lay down or even suggest a single legal test for determining whether someone is in actual occupation. The degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it, the nature of the property and the personal circumstances of the person are among the relevant factors. The judge did not misconstrue the 2002 Act or the authorities and his decision would not be disturbed. **Link Lending Ltd v Bustard** [2010] EWCA Civ 424.

RENT

The landlords of a first floor flat in Brick Lane, E1, succeeded in varying the fair rent (on appeal) from £8.50 per week to £12 per week. They failed on a number of other grounds of appeal. The tenant was a protected tenant with a furnished weekly tenancy. He had lived in the flat since July 1974. The landlords were not able to contend that his rent should be exempt from the maximum fair rent provisions of the Rent Acts (Maximum Fair Rent) Order 1999 because of repairs or improvements increasing the rent by at least 15% (paragraph 2(7)). No repairs or improvements had actually been carried out, and the tenant had not been unreasonable in refusing to allow the landlords access to the flat to carry out such works. The landlords' attitude was, erroneously, that the tenant did not have any form of protected tenancy and would only be allowed back in on less secure terms. However the London Rent Assessment Committee had erred in its application of the rent capping formula. The judgment sets out in detail the correct application of the formula. **Ahmed & ors v Murphy** [2010] EWHC 453 (Admin).

RIGHT TO BUY

The appellant Mrs Nessa was not able to rely on a right to buy notice specifying a price of £159,000, rather than a later notice specifying a price of £209,000. Both notices were served by Tower Hamlets LBC pursuant to s.125 Housing Act 1985. The first notice was served on 9th May 2006. Tower Hamlets LBC then served a "revised" notice on 5th January 2007 giving the higher valuation. Mrs Nessa and her husband had freely accepted the terms of the revised notice and this had the effect of discharging by mutual agreement any rights or obligations of either party arising from the first notice. The question whether there is any limit on the power of a landlord to vary the price stated in the s.125 notice where a tenant has not abandoned a purchase or agreed to proceed on a subsequent notice was left open. **Nessa v Tower Hamlets LBC** [2010] EWCA Civ 559.

SERVICE CHARGES

On a preliminary issue, Lewison J held that an estate management deed fell within the statutory definition of “qualifying long term agreement” within the meaning of s.20 Landlord and Tenant Act 1985 and the Services Charges (Consultation etc) Regulations 2003. The case concerned three residential blocks comprising 467 flats in Paddington Basin, each of which had been sold on a long lease. Part of each service charge was payable to the block management company for services provided to the individual block. The remainder was payable to West End Quay Estate Management Ltd. WEQEM Ltd was party to an estate management deed under which it covenanted to permit Paddington Basin Management Ltd to enter the West Quay Land in order to provide services to the whole of the Paddington Basin estate, and to pay a fair proportion of the cost incurred by PBM Ltd in providing those services. PBM Ltd then claimed sums from WEQEM Ltd, who argued that the estate management deed was a qualifying long term agreement and so the sums claimed were not lawfully recoverable because consultation requirements had not been complied with. This argument was dependent on the existence of an implied term in the estate management deed that WEQEM Ltd was only liable to pay what is lawfully recoverable from the individual lessees. The existence of such an implied term was still to be determined. At the time of the preliminary hearing the arrears due under the estate management deed stood at £1.1 million. Counsel for PBD Ltd sought to argue that if the consultation requirements did apply to the estate management deed the result would be absurd and unworkable. Lewison J did not agree. It would have been possible to give notice to the tenants of the intention to enter into the estate management deed, the services to be provided under it, the parties to it and its duration. This judgment and any subsequent decision in this case, particularly on the question of any implied term, are likely to be important for advisers structuring estate management services in these types of developments. ***Paddington Basin Developments Ltd & ors v West End Quay Estate Management Ltd & anor*** [2010] EWHC 833 (Ch).

TRUSTS OF LAND

The first instance judgment in ***Kernott v Jones*** [2010] EWCA Civ 578, summarised in the September/October 2009 bulletin, has been overturned by the Court of Appeal. The judge found that the interests in a property purchased in joint names had shifted from 50/50 to 90/10 in favour of Ms Jones, who had remained in the property when Mr Kernott moved elsewhere. The Court of Appeal held by a majority that in fact the interests had remained at 50/50. The property was purchased in 1985. The couple separated in 1993. Thereafter Ms Jones assumed sole responsibility for the outgoings on the property. Mr Kernott sought payment of his half share in May 2006. The Court of Appeal considered ***Oxley v Hiscox*** and ***Stack v Dowden***. What made the case unusual was the long delay before Mr Kernott severed the joint tenancy (in March 2008) and sought his half share. In the preceding 12 years he made no contributions towards the property. There was a total lack of evidence about the parties’ intentions. The severance of the joint tenancy in March 2008 was clear evidence that at that stage Mr Kernott regarded the beneficial shares each had in the property as joint. It was not possible to infer an intention from their conduct that the parties intended that the 50/50 split would be varied. The passage of time was insufficient to displace the 50/50 split. If the parties had intended that Mr Kernott’s beneficial interest in the property should reduce, they should have so decided and acted accordingly by adjusting their beneficial interests in the property. There might be questions of equitable accounting on any future sale of the property.

OTHER DEVELOPMENTS

COMMONS

The Commons Councils (Standard Constitution) (England) Regulations 2010 SI 1204 came into force on 7th April 2010. The schedule to the Regulations sets out the standard terms as to the constitution and administration of commons councils. The schedule has effect by Regulation 2, which provides that the standard constitution applies to every commons council established by an order under s.26 of the Commons Act 2006 for any area of land in England.

ENERGY PERFORMANCE CERTIFICATES

The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2010 SI 1456 make some amendments to the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 SI 991 consequent on the suspension of HIPs (as to which see below). There is a new duty on sellers of residential property in England and Wales to secure the commissioning of an EPC before putting the property on the market. There is also a new duty for persons such as estate agents not to market a property unless satisfied that an EPC has been commissioned. The Regulations came into force on 21st May 2010, the same day as the suspension of HIPs.

HOME INFORMATION PACKS

As has been widely publicised far beyond the confines of this bulletin, the requirement for Home Information Packs was suspended by the Home Information Pack (Suspension) Order 2010 SI 1455. This came into force on 21st May 2010, and suspended all of the duties relating to the content and provision of HIPS set out in ss.155 to 159 Housing Act 2004.

HOUSING AND REGENERATION ACT 2008

The Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 SI 866 makes amendments to and repeals some provisions in primary legislation that make reference to registered social landlords in England and to the Housing Corporation. It also makes some amendments and repeals in consequence of the coming into force of certain provisions of the Housing and Regeneration Act 2008. Part 2 of the Act sets out the functions of the Regulator of Social Housing and also sets out a new regulatory regime for registered providers of social housing. The Order came into force on 1st April 2010.

MORTGAGE REPOSSESSIONS: PROTECTION OF TENANTS

The Mortgage Repossessions (Protection of Tenants etc) Act 2010 gives the court limited powers to defer the recovery of possession of mortgaged residential premises by the mortgagee where there is an unauthorised tenancy of all or part of the property. An unauthorised tenancy is an assured, protected or statutory tenancy (Housing Act 1988 or

Rent Act 1977) to which the mortgagee's interest is not subject. On an application by the tenant, the date for delivery of possession may be postponed for a period not exceeding two months. Alternatively the court may suspend execution of an order for possession for a period not exceeding two months. The power to postpone, stay or suspend may be exercised subject to the making of payments to the mortgagee in respect of the occupation of the property. Such payments will not create a tenancy. The Act comes into force on 1st October 2010, by the Mortgage Repossessions (Protection of Tenants etc) Act 2010 (Commencement) Order 2010 SI 1705. The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010 SI 1809 provide for the form of notice which must be given to the tenant when the mortgagee applies for a warrant for possession pursuant to an order for possession. These Regulations also come into force on 1st October 2010.

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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