

## PROPERTY LAW BULLETIN

JUNE 2004

### INTRODUCTION

Readers dealing with business tenancies should note that regulations providing for new prescribed forms came into force on 1st June 2004 under the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations SI 2004/1005 (see the Other Developments section below).

Those readers with a housing practice may well already be aware of the new provisions in Part 2 of the Anti-Social Behaviour Act 2003 for injunctions against anti-social behaviour in the housing context, and new powers to demote secure and assured tenancies. These are summarised in the Other Developments section, where there is also a note about the new Part 56 to the Civil Procedure Rules, which sets out the procedures governing applications under Part 2 of ASBA.

Since the February 2004 there has been another flurry of cases on notices: defects in notices, notices contradicting earlier notices, how many notices need to be served per building, doubts as to the identity of the person serving the notice, and so on. As in cases reported in the February 2004 bulletin, some leeway has been allowed in relation to defects. However the Court of Appeal recently took a firm line in *Pennycook v Shaws*, where a tenant served two counter-notices and was not allowed to rely on the second, which contradicted the first.

Tenants attempting to rely on article 8 ECHR continue to get short shrift from the courts, and in recent months the courts have also considered the application of article 6, article 9, and article 1 of protocol 1, in a variety of property law contexts.

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### CASE LAW UPDATE

#### BUSINESS TENANCIES

##### **Business tenant is bound by first counter-notice**

*Pennycook v Shaws (EAL) Ltd* (2004) EWCA Civ 100; (2004) 2 All ER 665; (20th February 2004) TLR

The Court of Appeal reversed a decision of the High Court ((2003) 3 All ER 1316), and allowed the landlord's appeal, following the case of *Bridgers and Hamptons Residential v Stanford* (1991) 63 P & CR 18. In this case the

landlord had served a notice under s.25 LTA 1954 to which the tenant had served an incorrect first counter-notice stating that the tenant was willing to give up possession of the property. Within the two month period for serving notices the tenant had served second counter-notice indicating that it was not willing to give up possession of the property. The Court of Appeal, in a very interesting analysis of property rights, decided that despite Article 1 of Protocol 1 to the ECHR (the right to property) having been engaged by reason of the fact that the tenant had a right to a further tenancy, it had not in the circumstances been violated by the procedural requirements of s25(5) LTA 1954. Furthermore, there had been no violation of Article 6 ECHR in the way that the litigation had been handled.

Readers should note that in any event s25(5) LTA 1954 has been repealed with effect from 1st June 2004 by the Regulatory Reform (Business Tenancies) England and Wales Order 2003, thereby meaning that a tenant no longer has to serve a counter-notice. This change is not retrospective in effect and forms part of a package for change on the law in this area, including a power for a landlord to fix an interim rent after service of the s25 notice. A new s29(2) has been substituted which provides *inter alia* that the court must grant a new tenancy save where the tenant does not want one. Furthermore, there are new regulations setting out the new prescribed forms for various notices under the Act: the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004 SI 2004/1005 (see below in Other Developments for more details).

**Order excluding 1954 Act can cover lease substantially to same effect as that attached to the order**

***Brighton & Hove City Council v Collinson & anor (2004) 21 EG 150 (CS)***

The council wanted to grant a lease of premises in a leisure centre to a company of which the respondent brothers were directors. An application was made under s.38(4)(a) to exclude the protection of ss.24 to 28 Landlord and Tenant Act 1954. The application form named the council as applicants and the company and brothers as respondents. The draft lease named the council as landlords, the company as tenants and the brothers as guarantors. An order was made authorising the exclusion of the 1954 Act provisions from a lease to the respondents. For tax reasons the lease was in fact granted to the brothers personally not to the company.

When the lease expired the brothers sought to argue that they were protected by the 1954 Act. On appeal it was held that the lease was excluded from the 1954 Act. S.38(4)(a) should not be read in an over-technical way. The important thing was that the prospective tenant should understand that he was forgoing the protection of the 1954 Act. A tenancy that was substantially similar to that authorised by the court would be covered by the order. The court order was the governing document and it might well have been drafted to cover a lease granted to the company or to the brothers.

## **DEEDS**

**s.74(1) Law of Property Act 1925 does not remove the need for delivery of a deed**

***Bolton Metropolitan Borough Council v Torkington (2003) EWCA Civ 1634; (2004) 2 WLR 426***

In 1985 the council entered into negotiations with Mr Torkington in relation to the granting of leases over two plots of land. Mr Torkington moved onto the land. The negotiations continued. On 25th September 1990 an officer of the council sent an

engrossed counterpart lease to Mr Torkington with a letter stating that the lease would be sealed on behalf of the council on 1st October 1990 in readiness for completion. On 1st October 1990 the lease was sealed. Mr Torkington failed to return the counterpart with his signature by that date. He later tried to do so but the council decided not to grant the lease. The council issued possession proceedings in 1992, Mr Torkington having remained in occupation of the plots throughout. The hearing resumed in 2003 and the council succeeded.

On Mr Torkington's appeal, the Court of Appeal rejected his submission that the sealing of the lease by the council and his later attempts to return the counterpart lease were sufficient to effect completion. The formalities required for a deed were that it be in writing, that it should clearly intend to be a deed, that it be validly executed as a deed and that it be delivered. S.74(1) Law of Property Act 1925 provides that a deed which has been sealed by a corporation aggregate shall be deemed to have been executed. However this does not dispense with the need for delivery of the deed. Where negotiations for the grant of a lease are expressed to be subject to contract, the signing and sealing of the lease in accordance with normal conveyancing practice do not disclose an intention to deliver the deed in escrow. Until completion had taken place by delivery of the documents, neither party would be bound by the lease. The council was entitled to recover possession.

## **EASEMENTS**

**An easement can be acquired in reliance on illegal or unlawful use if it is not in contravention of public policy**

*Bakewell Management Ltd v Brandwood & ors* (2004) UKHL 14; (2004) 2 All ER 305; (2nd April 2004) TLR

The House of Lords held that an easement can be acquired even where the use relied on in the acquisition was illegal either in the sense of being criminal or in the sense of being tortious provided it did not contravene public policy, overruling the case of *Hanning v Top Deck Travel Group Limited* (1993) P&CR 14.

Owners of houses abutting a common had for a number of years used tracks across the common to reach their houses. Section 193(4) of the Law of Property Act 1925 provides that it is a criminal offence to drive a vehicle on common land without lawful authority. The owner of the common and the previous owners had never given any authority for the common to be driven over. Given that the right to use the land without committing an offence is entirely within the grant of the owner of the common and is not fettered by statutes in any way, as a matter of public policy, the commission of such an offence does not prevent the acquisition of prescriptive rights.

Note that s.68 of the Countryside and Rights of Way Act 2000 sets out a statutory scheme for owners of property deprived of a prescriptive right of way over a common by the unlawful conduct principle underlying the *Hanning* decision. Under the scheme the person deprived can now require the owner of the common to grant the right to him in return for payment of an appropriate sum of money.

**Modification or discharge of covenant under s.84(1) LPA 1925 can alter permitted use of right of way**

*Hotchkin v McDonald & ors* (2004) 18 EG 100 (CS) CA

The appellants' land included a driveway which was the sole means of access to the respondents' adjoining property. A right of way had been granted for all purposes in connection with the use of the respondents' property as authorised by clause (d) in the schedule. Clause (d) limited use of the property to offices and ancillary purposes. The respondents applied to the Lands Tribunal under s.84(1) Law of Property Act 1925 for a discharge or modification of the user covenant in clause (d).

The appellant brought proceedings claiming that if the covenant were to be modified or discharged the drive could no longer be used for access. The Court of Appeal held that where use of a right of way had been restricted by reference to the use of a property to which it provided access, any alteration to the use of the property would result in a corresponding alteration to the scope of the right of way. If the Lands Tribunal decided to modify or discharge clause (d), the permitted use of the right of way should also be altered.

## **HUMAN RIGHTS**

### **Article 8 can only be used to challenge decision to seek possession in exceptional cases**

*Hounslow London Borough Council v Adjei* (2004) EWHC 207 (Ch); (2004) 2 All ER 636

Pumfrey J dismissed an appeal by a tenant who had held a secure tenancy with his wife. The tenancy had been determined by the wife serving a notice to quit upon the local authority. The tenant's dependent child remained living with him and therefore the tenant would have a priority need for accommodation. The tenant appealed on the basis that as he was likely to be provided with similar accommodation by the local authority, their policy of seeking a possession order where one of two joint secured tenants had served a notice to quit was in contravention of Article 8.

The court held that considerations of the policy of the local authority in seeking possession orders and the treatment of the tenant could not in this case form a defence to a possession action in the county court. The only realistic public law remedy would be for the tenant to challenge the local authority's decision after service of the notice to quit by means of judicial review: see *Wandsworth London BC v Michalak* (2002) EWCA Civ 271. The Court did note the *dicta* of Lord Hope in the case of *Harrow London BC v Qazi* (2003) UKHL 43; (2003) 4 All ER 461 that "*in the rare situation where something wholly exceptional happened after service of the notice to quit which fundamentally altered the rights and wrongs of the proposed eviction the judge in the county court who was hearing the claim for possession might be obliged to address it in deciding whether the making of a possession order could be justified ...I wish to reserve my opinion as to whether it would be open to the tenant, in a wholly exceptional case, to raise these issues in the county court where proceedings for possession were being taken... "*

### **Article 8 not available as defence to possession proceedings**

*Newham London Borough Council v Kibata* (2003) EWCA Civ 1785; (2004) 15 EG 106

Mr Kibata was married to the tenant of a flat who left, complaining that Mr Kibata had been violent. The tenant gave notice to quit the flat in order to be considered

for rehousing under the council's policy, and the tenancy terminated in accordance with the notice. In possession proceedings the county court judge refused to give an order for possession against Mr Kibata, holding that he was protected by Article 8 ECHR. On appeal, the principle that Article 8 was unavailable as a defence in possession proceedings was restated (cf *Qazi v Harrow London Borough Council* (2003) UKHL 43; (2003) 4 All ER 461). The council had not acted unlawfully in formulating or implementing their policy on domestic violence. Article 8 had not been infringed. Mr Kibata's right to remain in the flat had been determined by his wife's notice to quit, not by the council, and so the council had not determined his rights within the meaning of Article 6.

**No breach of right to freedom of religion where religious beliefs taken into account to determine factual issue**

*Campbell & ors v South Northamptonshire District Council & anor*  
(23rd April 2004) TLR CA

The claimants were members of the Jesus Fellowship Church and had agreed to live communally, pooling their income. They occupied properties owned by the church under tenancy agreements which created legal liabilities for rent. They appealed from a decision of the Social Security Appeal Tribunal that they were not entitled to housing benefit because their tenancies were not on a commercial basis.

The Court of Appeal held that it was not an infringement of the right to freedom of religion under articles 9 and 14 ECHR to take into account the claimants' manifestations of their religious beliefs when determining whether the tenancies were on a commercial basis. The issue of whether or not there was a commercial basis was one of fact. The ECHR could not and did not purport to change facts or make evidence relevant to a factual inquiry inadmissible. Religious or any other reasons could not turn that which was non-commercial into that which was.

## **HOUSING**

**Council not obliged to allow homeless persons to view accommodation offered**

*Regina (Khatun & ors) v Newham London Borough Council* (27th February 2004) TLR CA

A council offering accommodation to homeless persons is not required by law to take into account their views on the suitability of the accommodation, although it can take their views into account should it wish to do so. Nor does the council have to give them an opportunity to view the accommodation in advance. The council's procedures were compatible with the lawful aim of moving families out of bed and breakfast accommodation as quickly as possible. The procedures were not oppressive even though they departed from guidance issued by the secretary of state which in general terms recommended that councils should give applicants a reasonable period to consider offers of accommodation. Council lettings under Part VII Housing Act 1996 were subject to the Unfair Terms in Consumer Contracts Regulations SI 1999/2083 and to Council Directive 93/13/EEC (OJ 1993 L95) on unfair terms in consumer contracts.

## **IMPROVEMENTS**

*s.3(1) LTA 1987 does not give landlord right to carry out unwanted works*

*Norfolk Capital Group Ltd v Cadogan Estates Ltd* (2004) EWHC 384 (Ch); (2004) 1 WLR 1458; (12th March 2004) TLR

A tenant of business premises served notice under s.3 Landlord and Tenant Act 1927 that it intended to make improvements to the premises. The proviso to s.3(1) states that the court should not certify the tenant's improvements as proper if the landlord has offered to execute the improvement himself, unless it is subsequently shown that the landlord has failed to execute the improvement. The landlord made an offer to carry out the works but the parties could not agree on the corresponding rent increase and the tenant withdrew its notice. The court held that the fact that the landlord had made an offer did not mean that the landlord was then entitled to carry out the works. The proviso did not say so and there was no policy reason for compelling the tenant to accept an improvement by the landlord where the tenant no longer wanted it.

## LEASES

**Exemplary or punitive damages can be awarded for calculated failure to comply with statutory duty to serve notice**

*Design Progression Ltd v Thurloe Properties Ltd* (2004) EWHC 324 (Ch); (2004) 10 EG 184 (CS); (2nd March 2004) TLR

A tenant had applied in writing to a landlord to assign a lease of premises let well below the market rent. The landlord had failed to comply with its statutory duty under s.1 Landlord and Tenant Act 1987 either to give consent or serve a notice of decision whether or not to give consent within a reasonable time. It was found that the landlord had embarked on a strategy of recovering the premises with a view to granting a new lease at a higher rent. It had pursued a deliberately obstructive policy in order to prevent the assignment.

In the circumstances the tenant was entitled to seek punitive or exemplary damages against the landlord. The basis of such an award is to punish a wrongdoer for his conduct. Such damages would be available where the defendant's behaviour displayed features which merited punishment and where the defendant had acted in a way calculated to make a profit which might exceed the compensation payable to the claimant. Damages could be awarded to mark the disapproval of the court and to cause the landlord to consider its future conduct. The tenant was awarded exemplary damages of £25,000.

## NOTICES

**"Building" can encompass more than one structure for purpose of service of notice under s.5(3) Landlord and Tenant Act 1987**

*Long Acre Securities Ltd v Karet* (2004) EWHC 442 (Ch); (2004) EG 138 (CS); (24th March 2004) TLR

A landlord intending to dispose of his leasehold interest in premises was required to serve notice under s.5 Landlord and Tenant Act 1987. Where his interest extended to more than one building he was required by s.5(3) to deal with each building separately. However this did not mean that he was required to serve a separate notice for each independent structure that formed part of an estate. In construing "building" in s.5(3) it was necessary to have regard to the purpose of the legislation. S.5(3) was not intended to require integrated developments to be split into inappropriate and unwieldy sections. Parliament must have intended that in limited circumstances the word "building" could cover more than one structure. Provided that the tenants of each structure shared the use of the same

appurtenant premises with tenants of the other structures (in this case access ways, amenity areas, car-parking, yards, paths and roadways), service of a single notice covering all of the structures was sufficient.

## REPAIRS

**No liability for repairs under s.11 Landlord and Tenant Act 1985 where landlord has no estate or interest in part of building where installation is located**

*Niazi Services Ltd v van der Loo* (2004) EWCA Civ 53; (2004) 1 WLR 1254; (2004) 08 EG 134 (CS)

Niazi had a lease of a top floor flat in a four storey block. Mr van der Loo was the subtenant of the flat. There was an inadequate water supply to the flat because the restaurant on a lower floor had installed a larger take-off pipe and so was taking a larger supply. Mr Niazi sued for damages, relying on s.11 Landlord and Tenant Act 1985. S.11 implies repairing covenants on the lessor which include an obligation to keep in repair and proper working order the installations in a dwelling house for the supply of water and electricity (s.11(1)(b)). S.11(1A) provides that if the lease is of a dwelling house which forms only part of a building, then an installation which directly or indirectly serves the dwelling house and which "*either (i) forms part of any part of a building in which the lessor has an estate or interest or (ii) is owned by the lessor or under his control*" is covered by the covenant. Niazi did not own or control the installation under subsection (ii). In relation to subsection (i), Niazi only had a lease of the flat, not of the whole building. Niazi would only be liable under the s.11 covenant if it had an estate or interest in a part of the building containing the defective section of the installation. This conclusion meant that there might be some mismatch between the obligations owed to Niazi by the freeholder or head-lessee, and those owed by Niazi to its subtenant. Nonetheless Niazi were not liable for defects in the water supply where the installation was in a part of the building in which they had no estate or interest. There had been other breaches of the sublease and the judge was entitled to use the principle of a notional reduction in rent to assess damages (see *Wallace v Manchester City Council* (1998) 3 EGLR 38).

## TRUSTS

**Court must have regard to entire course of dealings in relation to property when establishing shares under common intention constructive trust**

*Oxley v Hiscock*(2004) EWCA Civ 53; (2004) EWCA Civ 546; (2004) 20 EG 166 (CS)

Where there is an express common intention between the parties that each should have a beneficial share in a property, the court can go on to infer the extent of the parties' interests from their subsequent conduct. Where, as here, there the parties had not considered the proportions, the court was imputing a common intention as to the respective shares on the basis of what was shown to be fair in all the circumstances.

In deciding what was fair the court was to have regard to the entire course of dealings between the parties in relation to the property including the payment of outgoings. An analysis on the basis of a proprietary estoppel would lead to the same result. Here the division was 60/40 in favour of the appellant where he had contributed substantially more to the purchase price but payment of outgoings including the mortgage had been approximately equal.

## **In brief**

### **Covenants**

*Crest Nicholson Residential (South) Ltd v McAllister* (2004) EWCA Civ 410; (2004) 15 EG 105 (CS); (6th May 2004) TLR

It is desirable that a purchaser of land burdened with a restrictive covenant should be able to ascertain from inspecting the register not only that the land is burdened but also for what land the benefit was taken. If the benefited land was not identified in the covenant the purchaser would be unable to identify who could enforce the covenant and inquiries would be an oppressive burden on him. It should be kept in mind that the time when the enforceability of the covenant became an issue might be long after the date of the relevant instruments.

*British Glass Manufacturers' Confederation & anor v University of Sheffield* (2003) EWHC 3108 (Ch); (2004) 09 EG 146

In 1958 the claimant was granted a lease of land belonging to the defendant for a term of 1,000 years at a rent of £1 per annum. The lease required the tenant to erect and then to keep in repair office buildings and a laboratory to be yielded up at the end of the term. It was held that on the proper construction of the lease the parties had not intended that the tenant should be obliged to keep in repair for 1,000 years the buildings that were erected at the beginning of the lease. The repairing covenants contemplated that other buildings might be erected. The overall commercial context required an interpretation that did not prohibit demolition.

### **Formalities**

*Joyce v Rigolli* (10th March 2004) TLR CA

Sales or dispositions of interests in land must be in writing pursuant to s.2(1) Law of Property (Miscellaneous Provisions) Act 1989. However this does not apply to trivial dispositions of land consciously made under an informal boundary agreement where the purpose of the agreement was to demarcate the boundary.

*Nweze & anor v Nwoko* (6th May 2004) TLR CA

Sales or dispositions of interests in land must be in writing pursuant to s.2(1) Law of Property (Miscellaneous Provisions) Act 1989. Here a property had been sold to Mr Nwoko by the Nwezes. There had been a dispute between the parties resolved by an agreement that certain monies would be returned to Mr Nwoko and he would put the property on the market. If a buyer were found, he was then obliged to enter into a contract to sell the property and then to account for the proceeds of sale to the Nwezes after payment of sums borrowed from the building society. Although this was an oral compromise it was enforceable because it was not a contract for the sale or disposition of an interest in land.

### **Highways**

*Gorringe v Calderdale Metropolitan Borough Council* (2004) UKHL 15; (2004) 2 All ER 326

The House of Lords held that the duties imposed upon a highway authority were not capable of covering any alleged failure to provide warning signs on an approach to a dangerous section of road. Thus in relation to a road traffic

accident, where the car skidded at a dangerous point in the road, any failure to provide a warning sign was not a breach of the duty to repair under s.41 Highways Act 1980. Furthermore, the broad duty upon a highway authority to promote road safety did not generate a common law duty of care and thus a private law right of action. A common law duty would not be imposed based solely upon the existence of a broad public duty.

## **Human rights**

*Regina (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs & anor* (19th February 2004) TLR QBD

A canal was designated as a site of special scientific interest under the Wildlife and Countryside Act 1981. Mr Justice Ouseley held that this was compatible with the landowners' rights to peaceful enjoyment of property as guaranteed by article 1 of protocol 1 ECHR. The WCA 1981 provided that consent could be sought for operations, and for an appeal system if consent was refused. It also provided for compensation to be paid in certain circumstances. Parliament and the executive had a wide discretion and the legislative scheme as a whole struck a fair balance between the interests of those affected.

*Shirayama Shokusan Co Ltd & ors v Danovo Ltd* (22nd March 2004) TLR Ch Div

The parties were lessees of parts of the former London County Council Hall. The claimant sought damages and an injunction to restrain alleged trespasses by the defendant relating amongst other things to the display of artwork. The defendant asked the court to stay the proceedings and order the parties to pursue alternative dispute resolution. Mr Justice Blackburne held that the court had jurisdiction to order mediation and to render it effective by ordering that the parties were adequately represented. However the court could not order that a particular person attend, especially where that person was not a party to proceedings. The court would not order a stay of proceedings pending the attendance at mediation of a named non-party, since such an order might infringe the parties' right to a fair hearing pursuant to article 6 of the ECHR.

## **Leases**

*BP Oil UK Ltd & ors v Lloyds TSB Bank plc* (8th March 2004) 12 EG 171 (CS)

The defendant assigned a lease of office premises to three claimant companies. The contract contained an option, expressed to be "personal and non-assignable", under which the claimants could require the defendant to take the property back on specified dates. The lease was reassigned to two of the claimant companies and they tried to exercise the option. It was held that the option could be exercised by all three of the companies but not by two. Provided the lease was re-assigned back to the three companies the option could still be exercised.

*John Laing Construction Ltd v Amber Pass Ltd* (2004) 17 EG 128 (CS)

The claimant exercised a break clause in a lease and the defendant sought to argue that this was ineffective because the claimant had left security guards and protective barriers at the premises. It was held that the lease had been validly terminated. Unless any special form or process was prescribed, the court's task

was to look objectively at what had occurred. It had to decide whether there had been a clear manifestation of an intention to effect a termination and whether the landlord could occupy the premises without difficulty or objection. The claimant had clearly and obviously manifested a desire to terminate the lease. It had served a valid notice and had made it clear to the defendant that it asserted no right to the premises and the defendant could deal with them as it wished without hindrance.

*PW & Co v Milton Gate Investments Ltd (BT Property Ltd & anor, part 20 defendants)* (2003) EWHC 1994 (Ch); (2004) 2 WLR 443

As a general principle, the determination of a head tenancy in accordance with its terms will lead to the destruction of any subtenancy created out of it. The subtenancy will only survive where the head lease is determined by some consensual arrangement between the landlord and head tenant which is not provided for in the head tenancy. Accordingly the underleases here determined when the head tenant's break notice took effect, subject to any right to remain in occupation pursuant to Part II Landlord and Tenant Act 1954. Determination by notice does not constitute surrender, which as a matter of law involves some subsequent consensual act such as execution of a deed of surrender or handing over a key. Where a convention which in due course might give rise to an estoppel was established between a landlord and tenant it would normally bind successors in title and subtenants.

## **Mortgages**

*Michael & ors v Miller & anor* (30th March 2004) TLR CA

In a forced sale of mortgaged property it is for the lender to decide how to discharge his duty to take reasonable care to obtain the best price reasonably available at the time. In assessing whether the lender had fulfilled that duty the judge was entitled to assess the sale price actually obtained by reference to a bracket of acceptable valuations. The use of a bracket, or a margin of error, had to be available to the court as a means of assessing whether the lender had failed to exercise the judgment reasonably.

*Kinane v Mackie-Conteh & anor* (2004) 19 EG 164 (CS)

The claimant lent money to the defendant's business. As security for the loan the defendant and his wife signed an agreement giving the claimant an equitable charge over a property that they owned. The agreement did not comply with s.2 LP(MP)A 1989 but it did comply with s.53(1) Law of Property Act 1925. It was held that the document created an equitable charge because it complied with s.53(1). It was not necessary to have a pre-existing equitable interest in order for there to be a disposal protected by s.53(1) LPA 1925.

## **Notices**

*Earl Cadogan & anor v Strauss* (2004) EWCA Civ 211; (2004) 19 EG 166; (11th March 2004) TLR

The holder of a long lease at a low rent wished to acquire the freehold of the property and served the relevant notice under the Leasehold Reform Act 1967. However he failed to include a list of previous linked leases in the notice. Such notices had to be construed against the factual background. The omission was not fundamental and so the notice could be saved by para 6(3) schedule 3 LRA 1967.

*Lay & ors v Ackerman & anor* (24th March 2004) TLR CA

The tenants served a notice of claim under s.42 Leasehold Reform, Housing and Urban Development Act 1993 in respect of two properties. The identity of the legal owner of the properties was somewhat unclear but it would have been clear to the tenants that they were part of the Portman estate. A landlord's counter-notice was subsequently served which was stated to be from the trustees of the Portman collateral settlements. It was common ground that no such body existed. However it was held that a counter-notice would not be invalid simply because it left the tenant in doubt as to the identity of his landlord. A reasonable person in the position of the tenant could be in no doubt that the counter-notice was served by or on behalf of the landlord. If the tenant began proceedings or served documents on the person identified in the counter-notice as the landlord it would not be open to the actual landlord to contend that proceedings or documents were invalid because they named the wrong person. The counter-notice was valid.

### **Party walls**

*Roadrunner Properties Ltd v Dean & anor* (2003) EWCA Civ 1816;  
(2004) 11 EG 140

Where an owner had carried out works to a party wall without serving the necessary statutory notice he should not be allowed to gain a forensic advantage from his failure so to do. If a Party Wall Act notice had been served, a pre-works survey could have been carried out. The coincidence between the works to the party wall and damage to the neighbouring property's floor tiles was a proper factor to take into account when drawing inferences as to causation. Material existed from which a causal link could be established between the works and some of the damage.

### **Possession proceedings**

*Loveridge & anor v Healey* (27th February 2004) TLR CA

Landowners sought to terminate an agreement permitting an occupier to site a mobile home on their land. The preconditions set out in para 4 of part 1 of schedule 1 to the Mobile Homes Act 1983 were not satisfied in that the landowners had never served a notice under s.4(a). However the occupier had admitted in his pleaded defence that the landowners had given him a notice. It was for the landowners to prove their case in accordance with the rules of evidence and civil procedure. The judge did not have to disregard the admission made by the occupier solely because it could be demonstrated that the facts admitted were not true. He was wrong to hold that as a matter of law he had to find that the notice required by schedule 1 had not been served. He should have heard argument on whether the occupier should be given permission to amend his pleading and then ruled on whether such permission should be granted.

*Salford City Council v Garner* (10th March 2004) TLR CA

Proceedings were issued for the purposes of CPR 7.2 and s.130 Housing Act 1996 when the court issued a claim form. Here the tenant had been on a twelve month introductory tenancy but the twelve months had expired before possession proceedings were issued and so he had acquired a secure tenancy. As the council had not made out grounds for possession under the secure regime they were not entitled to possession.

## Registration

*Rother District Investments Ltd v Corke & ors* (2004) EWHC 14 (Ch); (2004) 13 EG 128

The claimant took an assignment of a headlease and then forfeited the lease of the defendant sub-tenants before it had registered its own title to the headlease. The claimant then sued the defendants for arrears of rent and other sums for the period prior to the purported forfeiture. It was held that the sublease had been forfeited. The claimant could not rely on its own wrongdoing in failing to register its title in order to argue that it had no title to forfeit. The defendants had elected to treat the sublease as forfeited and the claimant was estopped from denying the forfeiture. Upon the claimant's registration of title the forfeiture was retrospectively validated.

## Rent review

*Monella & anor v PizzaExpress (Restaurants) Ltd* (2003) EWHC 2966 (Ch); (2004) 12 EG 172

A lease for a term of 25 years was granted subject to upwards-only five-year rent reviews. The landlords proposed a new rent and the tenants replied with a lower figure. Under the rent review provisions the landlords then had one month to apply to the RICS for the appointment of an arbitrator. The landlords did not so apply until over a month later. They also applied to the court to extend time for the appointment. It was held that they were out of time and that time would not be extended. S.12(3) Arbitration Act 1996 applied. It could not be said that the overlooking of a time limit was outside the reasonable contemplation of the parties.

## Right to buy

*Kensington and Chelsea Royal London Borough Hospital v Hislop* (2004) EWHC 2944 (Ch); (2004) 1 All ER 1036

The High Court set out the relevant factors to be taken into account where a secure tenant sought to exercise their right to buy but the landlord wished to repossess. Section 84(2)(c) of the Housing Act 1985 provides that the Court shall not make a possession order unless it is reasonable to do so and there is alternative accommodation for the tenant. The balance cannot depend upon which of the tenant and the landlord should win the race as to who could most delay the other and thus be first to get the order which he sought. This decision set out some of the factors to be taken into account when deciding whether the tenant's or the landlord's interest will be successful.

## Trespass

*Secretary of State for the Environment, Food and Rural Affairs v Drury* (15th March 2004) TLR CA

In April 2003 the defendant and other travellers wrongfully occupied Fermyn Woods. The claimant was granted possession pursuant to CPR 55.1(b) in respect of Fermyn Woods and thirty other areas of woodland within a twenty mile radius. On appeal it was held that a possession order can extend beyond the particular area of the actual trespass. However there has to be a real danger that actual trespass might occur in the near future on the other areas. The court should carry

out a common sense assessment of the whole situation taking into account the past and likely future conduct of the trespassers. There was no convincing evidence of a real danger that actual trespass would be committed on other areas of the claimant's land and so there was no justification for the inclusion of the thirty additional areas.

## **OTHER DEVELOPMENTS**

### **ANTI SOCIAL BEHAVIOUR ACT 2003**

This Act deals with a variety of types of anti-social behaviour. Part 2 of the Act (ss.12-17) relates to anti-social behaviour in the context of housing. Social landlords will be given new powers in dealing with anti-social behaviour by tenants, including the power to apply to the court for a "demotion order" which temporarily removes the tenant's security of tenure.

s.12 of the Act inserts a new s.218A into part 8 of the Housing Act 1996. It provides that local housing authorities, housing action trusts and registered social landlords must prepare a policy in relation to anti-social behaviour, and procedures for dealing with occurrences of anti-social behaviour. These policies and procedures must be published within 6 months of the commencement of s.12 and must be kept under review. They must be available for inspection and copies must be provided on request on payment of a reasonable fee. Summaries of the policies and procedures must also be prepared and must be provided free of charge to anyone who requests them.

s.13 ASBA inserts new sections 153A to 153E into the Housing Act 1996 in place of the existing ss.152 and 153. The new sections confer powers to grant injunctions against anti-social behaviour, against unlawful use of premises, and against breaches or anticipated breaches of tenancy agreements (ss.153A, B and D). Anti-social behaviour is defined as conduct which is capable of causing nuisance or annoyance to any person, and which directly or indirectly relates to or affects the housing management functions of a relevant landlord. In certain circumstances the court has powers under s.153C to make an exclusion order as part of an injunction and/or to attach a power of arrest. Under s.153E(2)(b) an injunction may have the effect of excluding a person from his normal place of residence.

s.14 ASBA amends s.82 Housing Act 1985 to add s.82A, which allows a secure tenancy to be brought to an end by a demotion order because of the anti-social behaviour of a tenant. There is a similar amendment to the Housing Act 1988 inserting a new s.6A to cover demotion of assured tenancies. The court must not make a demotion order unless it is satisfied that the tenant or a person residing in or visiting the dwelling-house has engaged or has threatened to engage in conduct to which section 153A or 153B of the Housing Act 1996 applies (anti-social behaviour or unlawful use). The court must also find that it is reasonable to make the order. If the tenant remains in occupation after the demotion order is made, a new demoted tenancy will begin on the same date. If the landlord is a local authority or housing action trust, the demoted tenancy will be equivalent to a 12-month introductory tenancy, governed by section 143A of the Housing Act 1996. If the landlord is a registered social landlord, the demoted tenancy will be an assured shorthold tenancy, whether or not it was previously secure or assured.

s.15 ASBA introduces a new s.20B into the Housing Act 1988. This section sets out the legal basis for demoted tenancies. A demoted assured shorthold tenancy can be ended at any time during the demotion period, even within the first six months. There is provision for the demoted assured shorthold tenancy to turn

automatically into an assured tenancy after one year unless a notice of proceedings for possession has been issued within that year. There is also provision for promotion of other demoted tenancies back to their secure status if a notice seeking possession has not been served within twelve months.

s.16 ASBA introduces new provisions relating to the court's exercise of discretion in possession proceedings. When a court is considering whether it is reasonable to grant a possession order against a secure or assured tenant under one of the nuisance grounds for possession, it must give particular consideration to the actual or likely effect which the anti-social behaviour has had or could have on others. s.17 relates to amendments to Welsh legislation.

So far there are two commencement orders for the Act. The Anti-Social Behaviour Act 2003 (Commencement No.1) Order SI 2003/3300 brought various provisions into force on 20th January, 27th February and 30th April 2004. The Anti-Social Behaviour Act 2003 (Commencement No.2) Order 2004 SI 690 brings other provisions into force on 31st March 2004. However as at 3rd June 2004 Part 2 (ss.12 to 17 above) had not been brought into force.

A new part 65 is being added to the Civil Procedure Rules which will govern procedures for applications under Part 2 of ASBA (see below).

## **CIVIL PROCEDURE (AMENDMENT) RULES 2004**

The Civil Procedure (Amendment) Rules 2004 SI 1306 were made on 11th May 2004, and rules 1-3, 5-9, 15, 16 and 20(1) come into force on 1st June 2004. The rest of the rules come into force on 30th June 2004. The rules add a new Part 65 to the Civil Procedure Rules which will govern procedures under various enactments relating to anti-social behaviour and harassment. These include the new procedures relating to injunctions and demotion orders under the Anti-Social Behaviour Act 2003 which are summarised above. Part 65 will also govern the procedures relating to anti-social behaviour orders under the Crime and Disorder Act 1998, as amended by ASBA 2003, and proceedings under s.3 of the Protection from Harassment Act 1997.

Various amendments are made to Part 55 (possession claims) in consequence of the new Part 65. The amendments provide for the Part 55 procedure to apply where a demotion order is claimed in the alternative to a possession order, and where a possession claim is made in respect of a demoted tenancy.

Amendments are also made to Part 56 (landlord and tenant claims and miscellaneous provisions about land). Rule 56.2 is amended and rule 56.3 is substituted by a new rule following amendments made to the Landlord and Tenant Act 1954 by the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003. The substituted rule 56.3 contains provisions governing claims brought by a landlord or tenant for a new tenancy under section 24 of the 1954 Act, or claims by a landlord to terminate a tenancy under section 29 of the 1954 Act, as amended by the 2003 Order.

## **NEW NOTICES UNDER LANDLORD AND TENANT ACT 1954**

The Landlord and Tenant Act 1954 Part 2 (Notices) Regulations SI 2004/1005 were made on 30th March 2004 and come into force on 1st June 2004. They are made under s.66 Landlord and Tenant 1954 (including its effect under s.22(5) Leasehold Reform Act 1967). They provide new prescribed forms under the 1954 Act. Forms which are substantially to the same effect as the prescribed forms may also be used (reg 2(2)). There are seventeen prescribed forms and the purpose for which each is to be used is set out in schedule 1 to the Regulations. The forms themselves appear at Schedule 2. The Regulations (including the

forms in schedule 2) can be found in full at [www.hmso.gov.uk](http://www.hmso.gov.uk)

In relation to these changes see also *Pennycook v Shaws (EAL) Ltd*, summarised above in the Case Law Update.

### **Sources**

The following sources have been used in the compilation of this bulletin: The Law Reports (AC, QBD, Ch Div) parts 2 to 5 covering February to May 2004; 2004 1 All ER parts 8 to 12 and 2004 2 All ER parts 1 to 9 covering 19th February 2004 to 26th May 2004; 2004 WLR parts 8 to 20 covering 21st February 2004 to 28th May 2004; Times Law Reports 14th February 2004 to 26th May 2004; Estates Gazette editions 8 to 21 covering 21st February 2004 to 22nd May 2004; recent legislation and draft legislation.

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