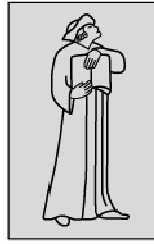


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## PROPERTY LAW BULLETIN

JUNE 2007

### CASE LAW UPDATE

#### AGRICULTURAL TENANCIES

Mr Foster had given a retirement notice pursuant to s.49(1) Agricultural Holdings Act 1986 nominating his daughter Mrs Crabtree to succeed him as tenant. The issue was whether Mrs Crabtree fulfilled the livelihood condition under s.50(2)(a) of the 1986 Act. Beatson J held that the Agricultural Land Tribunal had not erred in concluding that the livelihood condition must be satisfied in respect of the period ending with the retirement notice, and that once established the qualification could not be lost. The subsection should be construed in a purposive manner and the words "*in the last seven years*" should be given their ordinary and natural meaning. The ordinary and natural meaning of those words was the period of seven years expiring at the date of the retirement notice. A nominated successor does not have to satisfy the livelihood conditions in s.50(2)(a) by reference to the seven years ending with the date of the Tribunal hearing as well as by reference to the seven years ending with the date of the giving of the retirement notice. ***Shirley & ors v Crabtree*** [2007] EWHC 1532 (Admin).

#### BOUNDARY DISPUTES

In a boundary dispute between Derbyshire County Council and Mr and Mrs Fallon, the Fallons had said in May 2002 that they would build a garage on the disputed strip unless the Council applied to the Land Registry to rectify the title. The garage was completed in early summer 2003, and in August 2003 the Council applied to the Land Registry. Although the Adjudicator held in favour of the Council on the location of the boundary, he declined to amend the register. The alteration would have achieved nothing of any value and it was inappropriate for the Council to proceed with the application to amend the register when the real issues between the parties could only be resolved by the Court. For example it would be necessary for the Court to decide whether there should be an order that the garage should be pulled down, or damages in lieu. Although the boundary as shown on the register did not reflect where the paper title lay, changing it would be wholly unhelpful and would add to the confusion. This decision was not altered on appeal to the Chancery Division. The Adjudicator had not erred in exercising his discretion. He was perfectly

entitled to take the view that if the circumstances were exceptional he could properly refuse the application. The question whether or not the Council could in practice recover the disputed strip was irrelevant to the paper title but was very relevant to the question of the de facto right to enjoy the land, and hence to the question whether any useful purpose was served by amending the register by substituting one general boundary for another. It was also noted that where the Court is asked to determine where a boundary lies, it should do its best even if limited material is available, and should be very reluctant to say that it cannot be determined. **Derbyshire County Council v Fallon & Fallon** [2007] EWHC 1326 (Ch); [2007] 25 EG 182 (CS).

## **COLLATERAL CONTRACTS**

In a dispute about dilapidations, the Court of Appeal upheld an appeal to the effect that there was no collateral contract or estoppel so as to prevent the lessor from bringing a claim for £416,632. The case is useful for its discussion of collateral contracts in the context of sales or leases of land. Although the law relating to collateral contracts is well established it needs to be treated with some caution in this context. The correspondence about the terms of the lease did not show, objectively, that the parties intended to make any contract other than that resulting from the grant of a new lease. It was significant that the representation relied on related to future events in unforeseeable circumstances. As a contractual commitment it would be wholly uncommercial. **Business Environment Bow Lane Ltd v Deanwater Estates Ltd** [2007] EWCA Civ 622.

## **COMPULSORY PURCHASE**

A clear case is required, both under domestic law and the ECHR, to justify depriving a private owner of his land in the public interest. The issue was whether the Secretary of State had adequately considered the achievement of the objectives of the CPO by less intrusive means, not involving deprivation of land. It was held that the protection of the appellant's scrap-metal business was not a realistic option. The Secretary of State had decided that its retention was not compatible with the planning objectives for the area. This was a matter of planning judgment which was not open to legal challenge. **Hall & anor v First Secretary of State & Hillingdon LBC** [2007] EWCA Civ 612.

## **CONSENTS**

The claimant's office building was subject to restrictive covenants for the benefit of the defendant's adjoining land. These were contained in a 1962 transfer from the Port of London Authority to the claimant's predecessor in title. The PLA had previously owned both sites. The covenants provided that alterations were not to be made to the building unless prior written approval to plans had been given by the "Estate Officer for the time being of the Transferor". It was held that this meant the PLA's Estate Officer, and did not include successors in title. There was express reference to successors in title elsewhere in the document, so there was no room for an implication under s.78 LPA 1925 that "the Transferor" included successors in title. There could be a commercial purpose in the vendor of land retaining for itself the right to give consent to alterations or changes of use and not

giving that right to successors in title. *City Inn (Jersey) Ltd v Ten Trinity Square Ltd* [2007] 26 EG 162 (CS).

## HIGHWAYS

S.31(1) Highways Act 1980 provides that where a way has been actually enjoyed by the public as of right and without interruption for 20 years, it is deemed to be dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. On the true construction of s.31(1), “intention” means what the relevant audience, namely users of the way, would reasonably have understood the landowner’s intention to be. The test is objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending to disabuse him of the notion that the way was a public highway. Contrary to what the Court of Appeal had said, this was not reading words into the statute or placing a gloss on it. Outside the criminal law and parts of the law of torts it was common to use the word intention in an objective sense. S.31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. It requires “sufficient evidence” that there was no such intention. The evidence must be inconsistent with an intention to dedicate. This contemplates evidence of objective acts, existing and perceptible outside the landowner’s consciousness, rather than simply proof of a state of mind. The objective acts must be perceptible by the relevant audience. The intention not to dedicate must be contemporaneous with the 20 year period of user claimed, but does not have to be continuously manifested throughout the 20 years. *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs & other action* [2007] UKHL 28; [2007] 26 EG 163 (CS).

Questions arose about the extent of the powers of the Secretary of State for Defence under ss.16 and 17 Defence Act 1842, which allows the stopping up of footpaths in relation to the defence of the realm. The stopping up power was a general power to stop up or divert any public or private footpaths or bridle-roads for the purposes of the defence of the realm, not just those on land being acquired under s.16. If a path was stopped up, the Secretary of State was entitled to have regard to the existing highway network and to utilise parts of that network. If it was possible to create a more convenient path between the two terminus points by constructing a length of path shorter than the length of path stopped up, there was no sensible reason why this would not be within the scope of s.17. A highway upon which there is a right of passage by vehicles as well as on foot could form part of the path which is provided in lieu of the path which has been stopped up. However the Secretary of State had acted unlawfully in failing to provide and make another path in lieu of the stopped up path. Simply telling the public that they could use the existing highway network instead was not providing and making another path within the meaning of s.17. The Secretary of State was granted permission to appeal on the issue of whether it was necessary to provide a new path in lieu of a stopped up path. *R (The Ramblers Association) v Secretary of State for Defence* [2007] EWHC 1398 (Admin).

## HOUSING

Mr Omar had been sent a letter making him a final offer of accommodation under Part VI Housing Act 1996. He sought to argue that the letter did not fulfil the duty owed to him under s.193 HA 1996 (the main housing duty) because it did not repeat the words of s.193(7A). This subsection provides that “*An offer of accommodation under Part VI is a final offer for the purposes of subsection (7) if it is made in writing and states that it is a final offer for the purposes of subsection (7).*” Although the letter stated that the offer was final it did not include the words “*for the purposes of subsection (7).*” The Court of Appeal held that the offer did fulfil the duty, or that the duty had been discharged. Literal slavish repetition of the exact words of the subsection was not an immutable statutory requirement when every single matter of substance which the statute requires was expressly contained in the letter. The addition of the words omitted would have told the homeless applicant nothing useful. Even if this was wrong, the refusal of the offer was a refusal within s.193(5) so that the duty had ceased. ***Omar v Birmingham City Council*** [2007] EWCA Civ 610.

Mrs Shala’s appeal against a review decision that she was not in priority need was allowed. The decision was flawed in that it excluded recent medical reports from consideration on the basis that they added nothing new. This was wrong, as the reports described Mrs Shala’s medical condition in terms different from, and graver than, those which had led Dr Keen, Birmingham City Council’s medical adviser, to his opinion previously. The tone and reasoning of the letter also displayed a want of fair-mindedness, for example by referring to Dr Keen’s view as impartial as if to suggest that the views of Mrs Shala’s doctors were not; and by introducing further reasons based on the decision maker’s own psychiatric input. Care should be taken by local authorities not to appear to be using professional medical advisers simply to provide or shore up reasons for a refusal. Medical opinion or advice does not have to be couched in terms of the eventual decision by the local authority. However it may be helpful for medical advisers to address in exact terms those matters within their professional competence about which the local authority has to make a decision. When weighing the view of Dr Keen against that of a psychiatrist the local authority must not fall into the trap of thinking that it is comparing like with like. The local authority should also take into account the fact that Dr Keen had not examined Mrs Shala. It might be appropriate for a local authority’s medical adviser to speak to an applicant’s doctors informally in order to clarify issues between them. ***Shala & anor v Birmingham City Council*** [2007] EWCA Civ 624.

It is lawful for the same housing officer who has made a decision refusing an application for housing under Part VII Housing Act 1996 also to decide an application for temporary accommodation pending a review of the first decision. The scheme of the Act is that one particular decision, the review decision under s.202, must be decided by an officer more senior than the one who made the original s.184 decision. The reviewing officer must not have been involved in the original decision. Given the nature of a review decision it is understandable that Parliament regarded both seniority and a degree of independence as particularly important. There is no express restriction on who may make a decision relating to interim accommodation under s.188(3). A challenge on grounds of apparent bias also failed. ***Abdi v Lambeth LBC*** [2007] EWHC 1565 (Admin).

The Court of Appeal considered causation in relation to intentional homelessness under the Housing Act 1996. The claimant called herself a traveller but was not a gypsy, nor was she ethnically of any other nomadic origin. She had given up a tenancy in April 2000 and

subsequently lived in a caravan as a trespasser on various sites. The issue was what acts would break the chain of causation with previous intentional homelessness. The Court of Appeal agreed with the court below that the question whether accommodation could properly be classed as having been settled was one of fact and degree for the housing authority. **Chapman v UK** [2001] 33 EHRR 18 was considered, which had established that the state owes a positive duty to gypsies and travellers to facilitate their way of life but is under no positive obligation to provide an adequate number of suitably equipped sites. However the claimant was not a gypsy and had chosen to adopt a lifestyle approximating to that of a gypsy. Accordingly she was not protected by the ruling in **Chapman**. The judge's decision that unlawful occupation of disused sites was far removed from occupation of settled accommodation, so that the link to intentional homelessness remained, could not be faulted. **Steward v Royal Borough of Kingston-Upon-Thames** [2007] EWCA Civ 565.

In a case raising similar issues to those considered in **Steward**, Mr and Mrs Gilby had become intentionally homeless by leaving privately rented accommodation. The question was whether Mrs Gilby's status of intentional homelessness was brought to an end when she moved into her sister's flat. It was held that it was not. The accommodation in her sister's flat did not constitute settled accommodation. There was no reasonable expectation that the accommodation would continue for the foreseeable future or for a significant period of time. It did not matter whether Mrs Gilby's occupancy of her sister's flat was as an unlawful subtenant or as a bare licensee. As the legal label did not matter, there was no deficiency or irregularity in the original decision and regulation 8.2 of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 was not triggered. **Gilby v City of Westminster** [2007] EWCA Civ 604.

## HOUSING BENEFIT

The appeal of the Rent Service was allowed and previous redeterminations of housing benefit restored by the Court of Appeal in **The Rent Service v R (Daniel Heffernan)** [2007] EWCA Civ 544. The issue was the meaning of "locality" in Part I of Schedule 1 to the Rent Officers (Housing Benefit Functions) Order 1997 as amended. It was held that Sheffield could be a locality. The use of the word "locality" did contemplate a broader geographical area, especially now that there was a hierarchy of "vicinity" "neighbourhood" and "locality" in the 1997 Order. The definition in two 2001 circulars broadly reflected the statutory intention. No maximum area was expressed but, having regard to an obvious parliamentary intention to create a workable and manageable scheme for assessing local reference rent, an area (such as Greater Manchester) may be too large to constitute a locality within the meaning of the Order. Constraining localities to areas in which services and facilities are of similar quality would have the effect of segregating the more deprived from the more prosperous areas for the purposes of assessing housing benefit. This was not within the purposes of the statute, as it would put a premium on tenants going to more prosperous areas where higher housing benefit would be paid. From a procedural point of view, material should be available to establish how the decision as to boundaries had first been made.

## HUMAN RIGHTS

Another challenge to the compulsory purchase of land for the Olympic Games has failed. The case of **Smith & ors v Secretary of State for Trade & Industry (Interested Party: London Development Agency)** [2007] EWHC 1013 (Admin), was summarised in the May 2007 bulletin. In **Sole v Secretary of State for Trade and Industry & ors** [2007] EWHC 1527 (Admin), a similar challenge was brought, also partly on Article 8 grounds. It was held that whilst the interference with the claimant's Article 8 rights was substantial, the importance of the Olympics and Legacy project, its benefits and the urgency of its timing, made the case for compulsory purchase overwhelming. The decision of the Secretary of State to accept the Inspector's recommendation to confirm the compulsory purchase order relating to the Clays Lane Estate land was justified and was not disproportionate.

## LEASEHOLD ENFRANCHISEMENT

As a matter of law, hope value cannot be included as an element in the valuation of the landlord's interest on a leasehold enfranchisement valuation. It had not been shown that there was a valuation practice of including hope value. In prescribing a 50-50 split of marriage value it was more likely than not that s.9(1D) Leasehold Reform Act 1967 was to be taken as referring to a marriage value derived from a valuation of the freehold and leasehold interests that left out of account entirely the possibility of their coalescence. The decision in **Sportelli** in relation to 13 South Terrace that hope valuation was properly included in the valuation of the landlord's interest was reached in the absence of any contention that such inclusion was wrong in law, and should be regarded as per incuriam. There was no inconsistency between the present decision and the decision in **Sportelli** about hope value in valuations under the Leasehold Reform, Housing and Urban Development Act 1993. **Pitts & Wang v Earl Cadogan; Earl Cadogan v Atlantic Telecasters Ltd** [2007] EWLands LRA/79/2006 & LRA/4/2007.

The Lands Tribunal declined to include a proposed clause in a new lease which would have required the landlord to enforce against other lessees covenants in those other lessees' leases. The starting point of s.57(1) Leasehold Reform, Housing and Urban Development Act 1993 is that the new lease is to be granted on the same terms as those of the existing lease, subject to modifications. What the appellant sought was in substance the introduction of a new term, not the modification of an existing term. Accordingly neither the LVT nor the Lands Tribunal had power to order that the proposed clause should be included in the new lease. If there was such a power, the LVT was correct on the merits not to include the proposed clause. Inclusion of the proposed clause was not established on the evidence as standard conveyancing practice, nor was its exclusion shown to reduce the market value of properties that lacked it. Landlords might reasonably take the view that the proposed clause was undesirable and could give rise to estate management problems. Even if there was power to modify, it could not be said that the absence of the proposed clause was a defect within the meaning of s.57(6)(a) of the 1993 Act or that there had been a change in conveyancing practice within the meaning of s.57(6)(b). The clause would not be included. **Gordon v Church Commrs** [2007] EWLands LRA/110/2006.

An issue arose about whether notice under s.42 Leasehold Reform, Housing and Urban Development Act 1993 claiming a new lease had been validly served on the landlord. It had been sent to two addresses by recorded delivery. One copy had been returned undelivered

but the tenant had a signed receipt for the other delivery. S.99(3) LRA 1993 provides that if the tenant has been given an address for service of notices under s.48 Landlord and Tenant Act 1987, the tenant may serve at that address. If not, the tenant may serve at the last address supplied under s.47 LTA 1987 (landlord's address to be contained in demands for rent). Dismissing an appeal from the County Court, the Court of Appeal held that a letter from the landlord's agent to the tenant's solicitor about dilapidations did not constitute notice under s.48. Given the context, the reasonable recipient would not have understood that a letter about dilapidations was also notice of an address under s.48. Accordingly the correct address was the s.47 address where the notice had been received. In any event the tenant's solicitor did not, on the facts, have authority to receive a s.48 notice. **Glen International Ltd v Triplerose Ltd** [2007] EWCA Civ 388; [2007] 26 EG 164.

## REPAIRS

The Lands Tribunal, allowing an appeal from a decision of the LVT, held that works to windows were part of the costs of repair, rather than improvements. The windows had to be taken out as a necessary part of urgent repair work to replace cladding and window subframes, and they or their replacements had to be put back. However the matter was remitted to the LVT for it to consider whether it was reasonable to replace the Crittall windows with PVC double glazed units rather than making good the damage the Crittall windows had suffered in removal and securing them in place again. The issue was said to be of wide practical importance for the landlord and other social landlords and their leaseholders. **Sutton LBC v Drake & ors** [2007] EWLands LRX/69/2004.

## SALE OF LAND

It is not possible for parties to a contract for the sale of land to exclude the application of s.49(2) Law of Property Act 1925 by agreement. That section confers a power on the court, in an action for the return of the deposit, to make an order for the return of any deposit. S.49(2) does not confer a right on any party, but rather a jurisdiction on the court in the exercise of its discretion to order the return of a deposit paid by a purchaser. The contractual term purported to oust the court's jurisdiction and was accordingly void and of no effect on grounds of public policy. It was not open to a purchaser to waive the jurisdiction conferred by s.49(2), which was equivalent to the jurisdiction to grant relief from forfeiture. **Aribisala v St James Homes (Grosvenor Dock) Ltd** [2007] 25 EG 183 (CS).

## TRUSTS OF LAND

The Court of Appeal considered the question of occupation rent under the Trusts of Land and Appointment of Trustees Act 1996. Following **Stack v Dowden** [2007] UKHL 17, it is clear that the court's power to order payment to a co-owner of an occupation rent is no longer governed by the doctrine of equitable accounting but by ss.12 to 15 of the 1996 Act. Although there had been no free-standing claim for payment of an occupation rent, it was proper and sensible to use a credit for occupation rent as a form of set-off. An occupation rent may be payable even if there is no proof of ouster of one party from the property. The party who was still in occupation of the property had claimed credit for payments of interest, rent and premiums under an endowment mortgage policy. The payments of interest

and rent were set off against the occupation rent, thus cancelling them completely. **Murphy v Gooch** [2007] EWCA Civ 603.

## **OTHER DEVELOPMENTS**

### **HOME INFORMATION PACKS**

Home Information Packs are finally being brought into force on a phased basis from 1<sup>st</sup> August 2007 onwards by the Housing Act 2004 (Commencement No. 8) (England and Wales) Order 2007 SI 1668. They will initially apply only to residential properties with four or more bedrooms, other than properties to which regulation 17C of the Building Regulations 2000 applies. (Regulation 17C imposes minimum energy performance requirements.) Two other related statutory instruments are the Home Information Pack (No.2) Regulations 2007 SI 1667 and the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2007 SI 1669, both coming into force on 2<sup>nd</sup> July 2007. On a temporary basis, properties can be marketed as soon as a HIP has been commissioned rather than when it is received; and energy performance certificates can be up to twelve months old when the property is first put up for sale, rather than three months old. More information is available at [www.communities.gov.uk](http://www.communities.gov.uk)

### **HOME LOSS PAYMENTS**

The Home Loss Payments (Prescribed Amounts) (England) Regulations 2007 SI 1750 increase the amount of home loss payments payable under s.30 Land Compensation Act 1973. A person is entitled to a home loss payment when he is displaced from a dwelling by compulsory purchase or in other circumstances specified in s.29 of the Act. The maximum amount of the home loss payment is increased to £44,000 and the minimum to £4,400 when the date of displacement is on or after 1<sup>st</sup> September 2007.

### **HOUSES IN MULTIPLE OCCUPATION**

Provisions relating to s.257 HMOs are brought into force from 1<sup>st</sup> October 2007 by the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 SI 1903 and the Houses in Multiple Occupation (Certain Converted Blocks of Flats) (Modifications to the Housing Act 2004 and Transitional Provisions for section 257 HMOs) (England) Regulations 2007 SI 1904. S.257 Housing Act 2004 applies to a building or part of a building which has been converted into self-contained flats if the building work undertaken in connection with the conversion did not and does not comply with appropriate building standards, and fewer than two-thirds of the flats are owner-occupied. The Regulations impose duties on the person managing a s.257 HMO in relation to providing information to occupiers, safety measures, and maintenance of facilities, services and living accommodation. They also modify the definition of a person having control of a s.257 HMO, the licence conditions, and the circumstances when a notice under s.21 Housing Act 1988 may be served.

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

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