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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

COMPULSORY PURCHASE

In *Transport for London (London Underground Ltd) v Spirerose Ltd (in administration)* [2009] UKHL 44 the House of Lords considered the assessment of compensation for compulsorily purchased land. Specifically, their Lordships considered the position where the Lands Tribunal finds on the balance of probability that but for the compulsory acquisition, planning permission would have been granted by the valuation date. Should the Tribunal then treat that hypothetical permission as a certainty, to be assessed at its full value, or award “hope value”, that is, a percentage of the full value, discounted for the chance that permission would not have been granted? Consideration was given to the **Pointe Gourde** principle: “*It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.*” The underlying principle of the law of compensation for compulsory acquisition is that fair compensation should be given to the owner claimant whose land has been compulsorily taken. The basis of compensation is the value to the owner, and not its value to the public authority. One plainly relevant element in the value to the owner is the prospect of exploiting the property. The land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future. Here, on the balance of probability, permission for a mixed-use development would have been granted as at the valuation date. It was plain on the basis of the statutory provisions and long established authority, which was entirely in accordance with commercial common sense, that (a) the value of the land is the open market value; (b) any depression in the price which the land might be expected to fetch which is caused by the scheme is to be disregarded; (c) the valuation must take into account the potential of the land, including its potential for development; and (d) the development potential must be valued in the normal way, by discounting for future uncertainties. Valuation on the “hope value” basis was the correct approach.

HOUSING

The House of Lords considered the situations of families in overcrowded accommodation who were owed the full housing duty under s.193(2) Housing Act 1996. They also considered whether a woman who had been asked to leave a women's refuge because of her misconduct was intentionally homeless. It was held that it is lawful for a local housing authority to decide that an applicant is homeless because it is not reasonable for him to remain in his present accommodation indefinitely, but nevertheless to leave him there for the short term. It is not, however, lawful for a local housing authority to leave such families where they are until a house becomes available under the council's allocation scheme. The present accommodation may become unsuitable long before then. The question whether someone has been left in unsuitable accommodation for too long is primarily one for the authority, and the court should be slow to intervene. It would be wrong to ignore practical pressures including severe budgetary and personnel constraints, and the very limited number of satisfactory properties for large families and disabled people. The allocation policy was unlawful to the extent that it gave preference to people in one type of temporary accommodation that was no less satisfactory than accommodation in which homeless families are left temporarily at home. Ms Moran (who had been asked to leave the refuge) was not intentionally homeless, because it would not be reasonable to expect her to occupy her place there indefinitely. The approach to the question of "accommodation" in **R v Ealing LBC ex p Sidhu** [1982] 80 LGR 534 could not survive **Puhlhofer** and **Awua**, and was now generally addressed by s.175(3) HA 1996. It was not necessary to determine whether a prison cell or a hospital bed could amount to accommodation. **Birmingham CC v Ali & ors; Moran v Manchester CC** [2009] UKHL 36.

The Court of Appeal's decision in **Freeman v Islington LBC** [2009] EWCA Civ 536 contains a useful summary of the caselaw on the meaning of "residing with" in s.87 Housing Act 1985. By s.87, a person is qualified to succeed the tenant under a secure tenancy if she occupies the dwelling house as her only or principal home at the time of the tenant's death and (subsection (b)) she is a member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death. On the facts, Ms Freeman had not "resided with" her father for the twelve months preceding his death, although she had stayed in the flat with him full-time during that year. The purpose of living at the premises is an important part of the test. Mere temporary residence is not enough. One is looking for something which can fairly be called home-making. The retention of another home, whilst not fatal, can be a significant factor in deciding that a person was not making their home in the premises in question. An intention to live with the tenant to nurse him or her does not preclude "residing with" but it is not conclusive either way. The nature of the occupation must have the necessary qualities of "residing with" for the whole of the twelve months prior to the death of the tenant. On the present facts there was nothing to show that the appellant was doing any more than fulfilling her natural duty to her father – she was there to tend and look after him, not to make his flat her home. The judge's reasoning could not be faulted.

HUMAN RIGHTS

In **Central Bedfordshire Council (formerly Bedfordshire County Council) v Taylor & ors (Secretary of State for Communities and Local Government intervening)** [2009] EWCA Civ 613, the appellants were unable to resist possession claims solely on Article 8

grounds. The decision of a public authority can be made the subject of judicial review, and in the context of possession claims in the county court, the correct forum for that review, if an arguable point is raised, is the county court itself. The question was whether the decision of the council to recover possession was an improper exercise of its powers at common law. In the circumstances of the case, this was a question to be considered by reference to the decision to press for a possession order at trial, not decisions taken at an earlier stage. The appellants had no arguable basis for saying that the council's decision to proceed for a possession order at trial was arbitrary, unreasonable or disproportionate, so that it was not a lawful decision as a matter of public law. The council could not have been expected to do more than allow the appellants some time to make alternative housing arrangements. Any contention that they should have been taken on as tenants was unarguable. Given the period that had elapsed by the time of trial since the original demand for possession (some two years) it was clear that the council's decision to press for a possession order at trial was a proper and valid public law decision. The council was not obliged to give the appellants as long as they might need. There was no point in remitting the case for further investigation of the facts.

In ***London & Quadrant Housing Trust v R (on the application of Weaver) (Equality & Human Rights Commission intervening)*** [2009] EWCA Civ 587, the Court of Appeal held that the Housing Trust was subject to human rights principles when terminating the tenancy of someone in social housing. The purpose of s.6 HRA 1998 is to identify those bodies which are carrying out functions which will engage the responsibility of the UK before the ECHR. A public body is one whose nature is, in a broad sense, governmental. In determining whether a body is a public authority, the court should adopt a "factor-based approach", weighing all relevant features or factors. A broad application of s.6(3)(b) should be adopted ("*public authority includes... (b) any person certain of whose functions are functions of a public nature*"). The factors include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service. Here, the act of terminating a social tenancy was within the purview of the Human Rights Act. There was a substantial public subsidy which enabled the Housing Trust to achieve its objectives. Although not directly taking the place of local government, the Trust in its allocation of social housing operated in very close harmony with it, assisting it to achieve the authority's statutory duties and objectives. The provision of subsidised housing was a function which could properly be described as governmental – almost by definition it was the antithesis of a private commercial activity. The act of termination of a tenancy was so bound up with the provision of social housing that once the latter was seen as the exercise of a public function, acts in the regulation of a function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. The act of terminating Mrs Weaver's tenancy was not a private act and was in principle subject to human rights considerations.

INSOLVENCY

The appellant lessee, Ms Shaw had assigned the lease of a retail unit to a corporate assignee with the licence of the then landlord. Pursuant to the terms of the licence to assign, Ms Shaw guaranteed the assignee's performance for a specific period. The assignee went into liquidation and the liquidator disclaimed the lease. Ms Shaw then sought to deny liability for arrears of rent under the guarantee. The Court of Appeal held that the effect of s.178(4)(b)

Insolvency Act 1986 is that, on disclaimer of a lease by the liquidator, the assignee's liability under the lease was determined subject to the qualification that the disclaimer did not affect the liability of any other person. Ms Shaw was such a person and her liability under the guarantee continued for the period of the guarantee. Following disclaimer, the assignee ceased to be bound as far as its own obligations were concerned, but was still treated as bound so far as third-party obligations were concerned. The lease was deemed to continue and the assignee's obligations under the tenant's covenants deemed to remain in place for the purposes of determining the rights and liabilities arising out of the relationship between the landlord and the guarantor. However, if the guarantee agreement had provided that the guarantee was to terminate on disclaimer, effect would have been given to that agreement. **Doleman v Shaw** [2009] EWCA Civ 279; [2009] 27 EG 92.

The Court of Appeal considered the meaning of "realises" in s.283A(3)(a) Insolvency Act 1986. Assuming a jointly owned home, s.283A only applies to that part of the bankrupt's estate comprising his or his spouse/civil partner's dwelling-house. It does not apply to other property. The trustee has three years to decide what to do where the estate has such an interest. If he does nothing (subject to subsection (6), dealing with special cases) the estate loses the property interest. If the interest is of low value within the meaning of the Act, the trustee, while technically owning the interest, will in practice have no enforcement mechanism available to him. If the interest is of significant value, the trustee can apply for an order for sale, apply for a charging order, or sell to the bankrupt. He can also sell the interest to the co-owner or to someone other than the bankrupt or the civil partner/spouse at the then value. The central feature of the scheme is that the trustee, if he can achieve anything worthwhile at all, gets the equivalent of the then value of the property. He is not allowed to hang on for ever as co-owner, waiting to see whether property values rise. The provisions also achieve a reasonable degree of certainty for the bankrupt and the co-owner in that by the end of the third year they will know whether or not the property has to be sold. A sale of the beneficial interest for a future price or a partially future price did not fit within this background. "Realises" in the subsection involved getting the full cash consideration for the deal. It did not include effecting a sale for future cash consideration. Where the cash to be obtained from the transaction was not all got in within 3 years, the transaction was not within the scope of the subsection. **Lewis & anor v Metropolitan Property Realisations Ltd** [2009] EWCA Civ 448.

NOTICE TO QUIT

At common law a weekly periodic tenancy, like any other periodic tenancy, will continue unless terminated by a notice equal in length at least to the period of the tenancy and expiring at the end of the last day of that period. The tenancy agreement may (as it did here) stipulate a longer period of notice. In the case of a periodic joint tenancy the tenancy will be terminated by an appropriate notice of the necessary length served by only one of the joint tenants. A joint tenancy cannot be terminated by the operation of a break clause or by a surrender of the term unless all of the joint tenants consent to and are parties to the termination. If a tenant gives short notice terminating a lease the landlord may accept it and so bring the tenancy to an end. But the agreement operates technically as a surrender and so would require the consent of all of the joint tenants. The notice to quit gave two alternative termination dates, a specific date and a catch-all provision. The catch-all provision operated first, and so the notice took effect at the end of Friday 23rd February, not on Sunday 25th February, the specific date given in the notice. The inclusion of two alternative dates did not

make the notice ambiguous and it was not to be construed as giving an invalid termination date. A letter from the landlord allowing one of the joint tenants to remain at the premises beyond the expiry of the notice to quit did not extend the tenancy or vary the notice. Nor did payment of rent for a period after the expiration of the notice to quit affect the validity of the notice. The payment of rent would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy. The joint tenancy terminated on 23rd February in accordance with the notice to quit as served. **Bradford Community Housing Ltd v Hussain & Kauser** [2009] EWCA Civ 763.

PARTY WALL ACT

Under the Party Wall etc. Act 1996, the agreed surveyor or the three surveyors (one each appointed by the parties and the third surveyor) or any two of them may settle by award any matter connected with any work done under the Act which is in dispute (s.10(10)). By s.10(12), an award may determine, among other things, the costs of making the award. By s.10(13), the reasonable costs incurred in making the award, reasonable inspections of work to which the award relates, and any other matter arising out of the dispute shall be paid by such of the parties as the surveyor/s making the award determine. In **Reeves v Blake** [2009] EWCA Civ 611; [2009] 26 EG 113 (CS), it was held that in view of the wording of s.10, there can be no doubt that there may be circumstances in which appointed surveyors have the power under s.10 to order payment by one adjoining owner of legal costs properly and reasonably incurred by another. **Onigbanjo v Pearson** [2005] BLR 507 (HHJ Birtles, Mayor's and City of London Court) approved on this point. The power to order payment of such costs under s.10 is restricted to costs connected with the statutory dispute resolution mechanism. Proceedings in court to enforce common law or equitable remedies such as damages or an injunction for trespass or nuisance, or the threat of them, fall wholly outside the 1996 Act. The purpose of the Act is to provide a mechanism for dispute resolution which avoids recourse to the courts. A power of the appointed surveyors to make provision for costs incurred for the purpose of actual or contemplated litigation in court would be inconsistent with that statutory objective. Such litigation, resulting from non-compliance with the dispute resolution mechanism, falls entirely outside the statutory dispute resolution framework.

RESTRICTIVE COVENANTS

Norwich City College succeeded in obtaining a declaration pursuant to s.84(2) Law of Property Act 1925 that land it wanted to develop was no longer affected by restrictive covenants and that they were no longer enforceable. The covenants were stated to be "*for the benefit of the Trafford estate...or parts thereof for the time being remaining unsold.*" Kitchin J held that the College's interpretation was correct. The covenants contained an express reference to the vendor and to his successors in title, so necessarily looked to the future. The benefit of the covenants was annexed only to the part or parts of the Trafford estate for the time being remaining unsold. Where development land was sold off in plots without a building scheme having been created, it was likely that the developer would seek to retain exclusive power to give or withhold consent to a relaxation of a restriction on building that had been imposed on each purchaser, without needing to obtain consent from every subsequent purchaser who had bought other plots on the development land. This interpretation was supported by the wording of positive covenants elsewhere in the

conveyance. Given the history of the disintegration of the Trafford estate, no-one was entitled to the benefit of the covenants. **Norwich City College of Further and Higher Education v McQuillin & anor** [2009] EWHC 1496 (Ch); [2009] 27 EG 90 (CS).

RIGHT TO BUY

Where a local housing authority delays in responding to a right to buy notice served by a tenant under s.122 Housing Act 1985, the tenant can serve a notice of delay under s.153A(1) HA 1985. Where the housing authority still fails to serve a counter-notice, the tenant can serve an operative notice of delay under s.153A(5). This has the effect of allowing the tenant to treat payments of rent made after the default date (being the last date for service of a counter-notice as specified in the notice of delay) not only as rent payments but also as payments towards the purchase price (s.153B). The House of Lords considered the meaning of “payments of rent” in **Hanoman v Southwark LBC** [2009] UKHL 29, specifically in the context of housing benefit. It was held that the tenant could take the benefit of a rent payment made by way of housing benefit as counting towards the purchase price under s.153B. This was so whether the rent payment was made by way of payment to the tenant which was then paid to the housing authority, or whether the housing benefit took the form of a rent rebate so that no money was actually transferred. The word “payment” can vary with the context. A construction which drew a distinction between monies paid over by way of rent as opposed to a rent rebate would produce anomalous differences between tenants entitled to housing benefit who received money payments and tenants whose housing benefit took the form of a rent rebate.

OTHER DEVELOPMENTS

COMMONS

The Commons Registration (England) (Amendment) Regulations 2009 SI 2018 were made on 19th July 2009 and come into force on 30th September 2009. The Commons Registration (England) Regulations 2008 came into force on 1st October 2008 and set out procedures for amending registers of common land and town or village greens within a pilot implementation of Part I of the Commons Act 2006 in seven local authority areas. These regulations amend the 2008 regulations by extending the transitional application period and transitional period by a year. This means that applications and proposals under Schedule 3 to the 2006 Act can be submitted until 30th September 2010. The purpose of such applications and proposals is to bring the commons register up-to-date to reflect events which took place between 1970 and 30th September 2008. Some other minor corrections and amendments are made to the 2008 Regulations.

ENERGY PERFORMANCE

The Home Energy Efficiency Scheme (England) (Amendment) Regulations 2009 SI 1816 come into force on 1st August 2009. They increase the levels of grants available under the existing Home Energy Efficiency Scheme Regulations 2005 SI 1530, and also increase the relevant income threshold which applies to applicants applying for a grant. Maximum grant levels are

increased from £2,700 and £4,000 to £3,500 and £6,000, the higher figures being applicable where oil or low carbon or renewable technologies are recommended.

The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2009 SI 1900 come into force on 10th August 2009. Their main purpose is to promote the adoption of measures to improve the energy performance of dwellings. They provide for the disclosure of energy performance certificates for dwellings in the lowest categories of performance to the Energy Savings Trust when dwellings are sold. This will allow the EST to provide owners and occupiers with information about measures to improve the energy performance of those dwellings and about financial assistance for taking such measures that may be available to them.

ESTATE AGENTS

The functions of the Estate Agents Appeal Panel are transferred to the First-tier Tribunal by the Transfer of Functions (Estate Agents Appeals and Additional Scheduled Tribunal) Order 2009 SI 1836, coming into force on 1st September 2009. Schedule 3 to the Order sets out transitional provisions. These include a provision that any proceedings before the Secretary of State to decide an appeal under s.7(1) Estate Agents Act 1979 which are pending immediately before 1st September 2009 shall continue on and after 1st September 2009 as proceedings before the First-tier Tribunal.

LANDS TRIBUNAL

The jurisdiction of the Lands Tribunal is transferred into the Lands Chamber of the Upper Tribunal by the Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 SI 1307, coming into force on 1st June 2009. The Order also abolishes the Lands Tribunal. The Upper Tribunal is primarily but not exclusively an appellate tribunal from the First-tier Tribunal.

LAND REGISTRATION

Minor changes are made to the Land Registration Rules 2003 by the Land Registration (Amendment) Rules 2009, SI 1996, coming into force on 1st October 2009. The amendments make provision concerning the registration of charges by overseas companies. The new rule 111A will require applicants registering a charge created by an overseas company to supply evidence that the charge has been registered under the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 or to state that the charge when created did not require to be so registered. The rules also provide an additional form of execution by limited liability partnerships. A note of the changes is available on the Land Registry website, and a consolidated version of the principal rules will be available on the website from 1st October 2009.

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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