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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ADVERSE POSSESSION

Lindsay J has delivered a lengthy and complex decision on preliminary issues in ***Roberts (suing as Tudor, Lord Marcher of Trelleck) v Swangrove Estates Ltd & ors*** [2007] EWHC 513 (Ch). The claim relates to land forming parts of the foreshore and bed of the tidal estuary of the River Severn on its Welsh side. The decision is useful in part for the adoption by the judge of unified written submissions on the law provided by all defence counsel. There is also a careful consideration on both the law and the facts as to what constitutes factual possession (and what amounts to an intention to possess) land of this kind. Some of the claims of adverse possession succeeded but there will be a main trial of the action, which is likely to raise issues about precedence of competing historic titles which have existed for centuries.

A claim for possession of a yard and two warehouses was resisted on the basis of adverse possession from 1987 to 1999. This defence failed at first instance but succeeded on appeal. The claimed period of adverse possession predated and so was unaffected by the coming into force of the Human Rights Act 1998 and the Land Registration Act 2002. The Court of Appeal agreed with the trial judge that a letter of 7th June 1994 was a clear acknowledgement of title for the purposes of ss.29 and 30 Limitation Act 1980. However, it was not made by the person in possession. For there to be an acknowledgement there must be a statement by or on behalf of the person in possession which is reasonably to be understood by the owner as an acknowledgement from that person. The owner does not have to know who is in possession, and the person acknowledging does not have to know who the owner is, but the acknowledgement must be by or on behalf of the person in possession. Here the letter purported to be written on behalf of a non-existent company and so could not be taken as an acknowledgement from the person in possession. Limited permission had initially been given for use of the premises but by the summer of 1987 the use substantially exceeded the permission given, and was different in nature as well as degree. This was sufficient to make out a claim for adverse possession. ***Allen v Matthews*** [2007] EWCA Civ 216.

BOUNDARY DISPUTES

The fact that a boundary is shown on a particular place on an Ordnance Survey map is in itself no evidence of what the true boundary is. Insofar as a deed plan purports to show a boundary, the fact that the plan is a copy of the Ordnance Survey map does not detract from that function: **Fisher v Winch** [1939] 1 KB 666. Ordnance Survey maps do not purport to fix or record the legal boundary between adjoining plots of land. They will mark features, such as hedges or fences, which may well in fact reflect a legal boundary, but the map will simply indicate a line down the middle of such a feature whether the boundary is in the middle or not. They are drawn to a scale of 1:2500 so the line may be out of true by +/- 2.3 metres. The OS maps offered an uncertain guide as to the precise boundary line. **Willsher v Scott & ors** [2007] EWCA Civ 195.

CHARGES

A charging order was imposed over the appellant's home, 44 Glenbervie Drive, to secure costs which she had been ordered to pay in litigation brought by her against her former neighbour, the respondent. The respondent sought to obtain possession and sell the property so as to enforce the order. There was a lengthy procedural history demonstrating the appellant's resistance to this course of action. The appellant was an elderly lady and her home had equity of around £250,000, with a small mortgage of around £1,000. The Court of Appeal refused permission (on a renewed application) to appeal against the order for possession. Several grounds of appeal related to the original costs order, and permission to appeal from that order had been refused almost four years ago. In relation to article 6, there is no general principle that the State is obliged to make available legal assistance and legal representation in civil matters. The appellant could raise money against the equity in her house to instruct lawyers if she wished to do so. It would be possible for her to raise funds to satisfy the charging order without a sale. If she refused to co-operate it did not lie in her mouth to complain when the court proceeded to enforce the charging order by possession and sale. The original amount of around £10,000 secured by the charging order had risen to around £30,000 as a result of various applications made by the appellant. Chadwick LJ considered whether to make a civil restraint order against the appellant but took the view that it was unnecessary at this stage. **Goodfellow v Markos** [2007] EWCA Civ 254.

The claimant, a trustee in bankruptcy, sought a declaration that the defendant's charge over a property had been extinguished. The claim was allowed, the mortgage having been extinguished by the operation of ss.15 and 17 Limitation Act 1980 (s.15: twelve year time limit for actions to recover land; s.17: extinction of title after expiry of time limit). S.29(2) LA 1980 provides that a right of action is taken to accrue from the date of an acknowledgement of title by a person in possession. Richard Arnold QC (sitting as a Deputy) held that time starts to run for the purposes of s.15(1) on the date when the mortgagee becomes entitled to possession. It is not necessary for the mortgagor to be in possession without the consent of the mortgagee for time to run. There was no subsequent acknowledgement of title. The test under s.29(2) LA 1980 was the same as that under s.29(5): viewed as a whole the statement in question must be an admission of the title of the person having the right of action. The two letters relied on by the Defendant did not amount to an acknowledgment within s.29(2). The mortgage had been extinguished. **Ashe v National Westminster Bank Plc** [2007] EWHC 494 (Ch).

COMMONS

S.14 Commons Registration Act 1965 (to be superseded by s.19 Commons Act 2006, which is not yet in force) gives the High Court jurisdiction to amend a register of town and village greens maintained under the Act. Lightman J held that on the face of the statute the court is free to adopt the procedure best calculated to enable a just and fully informed decision to be reached on whether “no amendment or a different amendment ought to have been made”; whether it is just to rectify the register; what should stand as evidence; and what evidence should be admitted. S.14 imposes no fetter on the evidence or arguments which may be relied on. The court is not limited to the evidence adduced before the registration authority or panel, though it will have regard to the process adopted when the amendment of the register was made under s.13. In deciding on the admissibility of evidence the court will bear in mind that no amendment shall be rectified unless it is just to do so and that it may be unjust to order rectification on the basis of new evidence. This approach accords with what Parliament must have had in mind when conferring the jurisdiction to rectify, and with caselaw. Lightman J further held that the relevant definition of town or village green was that in force when the application was made, the application having been made in 1997 and the definition amended on 30th January 2001. The House of Lords have previously held (in **Oxfordshire County Council v Oxford City Council** [2006] 2 AC 674) that the amended definition applies to all applications for registration made after s.98 of the Countryside and Rights of Way Act 2000 came into effect on 30th January 2001. **Betterment Properties (Weymouth) Ltd v Dorset County Council** [2007] EWHC 365 (Ch).

DISABILITY DISCRIMINATION

On appeal, the appellant landlord succeeded in overturning a decision that it had discriminated against the respondent tenant in refusing to give her permission to install a stairlift. The tenant was 81 and had mobility problems. She would have paid for the installation. The Court of Appeal noted that in other fields, such as employment, education and public transport, the Disability Discrimination Act 1995 imposed a positive duty to make reasonable adjustments. There was no equivalent duty on persons disposing of or managing premises (ss.22 to 24 DDA 1995). The Court of Appeal considered the relevant Code of Practice, which stated that there was no positive obligation to make adjustments to premises for disabled people. It was also noted that amendments which would have achieved this in the Housing Act 2004 and the Disability Discrimination Act 2005 had been considered but had ultimately not been enacted. The landlord would not have given anyone permission to install a stairlift, whether or not they were disabled. A two stage exercise was necessary: (i) to ask why a disabled person was treated in a certain way; (ii) to look at comparators to see if they had been treated differently. Here the tenant had not been treated less favourably. The underlying complaint was that the landlord had failed to put her in a better position than that to which she was entitled under her underlease. This was in effect a complaint that the landlord had failed to take positive action, which it was not required to do under the relevant provisions of the DDA 1995. **Williams v Richmond Court (Swansea) Ltd** [2006] EWCA Civ 1719; [2007] 09 EG 204.

HOUSING

Possession was sought against Mrs Maddocks, a secure tenant, on grounds 1 and 2 of schedule 2 to the Housing Act 1985. The heart of the allegations was that Mrs Maddocks and/or her son had been causing nuisances, principally to the Ameur family who lived in a

downstairs flat. There were sixty pleaded allegations of nuisance, including amongst others racist abuse, noise nuisance and difficult behaviour concerning the communal gardens. In a long and careful judgment, the Recorder found that the majority of the allegations were not established. He rejected the allegation of racism and concluded that it was much more likely that Mrs Ameur complained about normal and acceptable behaviour because she disliked Mrs Maddocks. He found that Mrs Ameur had exaggerated her evidence. Two specific allegations of noise were proved, but the Recorder rejected the submission that they were racially motivated, and concluded that it was not reasonable to make an order for possession. The landlord sought permission to appeal on the basis that admissions made by the tenant's son and evidence of loud music being played should have carried the day, even if the other allegations were not made out. Permission was rejected. The Recorder had to evaluate what was reasonable on the evidence and had done so. The judgment was not amenable to appeal. **Places for People Homes Ltd v Maddocks** [2007] EWCA Civ 252.

Mr Doughan was a secure tenant of the appellant local authority, Brent LBC. Brent was granted an interim ASBO against Mr Doughan on an application under s. 153A Housing Act 1996. A power of arrest was attached. Brent then sought to commit Mr Doughan to prison for breach of the injunction, alleging that he had been in breach on two occasions. An order was made committing Mr Doughan to prison for four months, but the order was suspended. In subsequent proceedings seeking committal for a further breach together with a claim for possession on ground 2 schedule 2 Housing Act 1985 (nuisance and annoyance), the judge was satisfied on the balance of probabilities that Mr Doughan had been noisy on two occasions and had caused annoyance. There were, however, only two occasions. The judge rejected the application to commit because she was not satisfied to the criminal standard. She also found that it was not reasonable to make an order for possession. The Court of Appeal held that though such a finding was unusual, the judge was entirely rational to find nuisance proved to the civil standard but not to the criminal standard. Her decision not to make an order for possession, where it was probable but not certain that Mr Doughan had been noisy at the premises on two occasions in 18 months, was not amenable to appeal. The noise was not greatly beyond that which might be expected between neighbours in a property of this type. Brent's appeal was dismissed. **Brent LBC v Doughan** [2007] EWCA Civ 135.

LANDLORD AND TENANT ACT 1987

The Court of Appeal held that a contract to surrender a headlease by Campden to the freeholder was not a disposal within the meaning of s.12B Landlord & Tenant Act 1987, but was rather covered by s.12C. S.16 LTA 1987 had no application to the new lease granted by the freeholder to Campden, because it was not the estate or interest that was the subject matter of the original disposal (i.e. the agreement to surrender), that lease having been extinguished by the surrender. As Kensington (the tenants) had served a notice under s.12B, not s.12C, the judge did not have the power to order Campden to transfer either the new term granted them in 2000 or an equivalent term to that which was surrendered to the freeholder. This conclusion was consistent with the purpose of LTA 1987, which was designed to protect tenants against the disposal of the landlord's interest. Here Campden remained the headlessee before and after the transaction in 2000. **Kensington Heights Commercial Company Ltd v Campden Hill Developments Ltd** [2007] EWCA Civ 245.

LANDLORD AND TENANT (COVENANTS) ACT 1995

The Court of Appeal considered what, if anything, the landlord needs to do to preserve his ability to claim reviewed rent retrospectively as against the original tenant. It was held, upholding the decision below, that if a landlord wishes to preserve the possibility of claiming against an original tenant when the rent is subject to review, he must serve s.17(2) notices within 6 months after each rent day in turn, specifying in the Schedule that the sum intended to be recovered is then nil, but subject to paragraph 4 of the notice and the possibility of the rent being determined to be a greater sum. This will be a burden on landlords and could seem pointless and inconvenient for original tenants but is the result of the legislative language chosen. Further, the judge was right to hold that there had not been compliance with s.17 as regards the early instalments of rent, including arrears arising on the rent reviews. However he was also right to hold that this gave no defence to the claim under the indemnity covenant implied by s.24 Land Registration Act 1925 (now repealed), because the payments were, in the circumstances, fairly and reasonably incurred by Scottish & Newcastle plc. **Scottish & Newcastle plc v Raguz** [2007] EWCA Civ 150; [2007] 11 EG 161 (CS).

LEASEHOLD ENFRANCHISEMENT

In a leaseholders' appeal against a valuation by the Leasehold Valuation Tribunal, the President held (on preliminary issues) that the landlord was not precluded from arguing on appeal that there should be an addition for hope value, just because permission to appeal had only been given on the deferment rate. It was fallacious to assume that the LVT in giving permission meant a deferment rate excluding any allowance for hope value. There were authoritative examples of the deferment rate being treated as encompassing hope value. However the landlord was precluded from arguing for a higher value than it had contended for at first instance, because although the Lands Tribunal on appeal has all the powers of the LVT, the LVT does not have the power, pursuant to s.21 of the Leasehold Reform Act 1967, to determine a price higher than that contended for by the landlord. **Pitts & Wang v Earl Cadogan** [2007] EWLands LRA/79/2006.

RENT REVIEW

In interpreting the phrase '*market ground rental*' in a rent review clause the Lands Tribunal applied **Jarrett v Burford Estates & Property Co Ltd** [1999] 1 EGLR 181 and the well established principles of contractual interpretation in concluding that the phrase meant a nominal ground rent without any reflection of the value of the site or the potential use of the land. They had regard in particular to the fact that there was a real market in nominal ground rents, whereas the standing house or site value approach to such valuation was artificial. In addition the Tribunal made it clear that the opinions of counsel, however eminent, who do not appear before the Tribunal should carry no weight before it. The citing of such opinions was to be discouraged. **Elmbirch Properties PLC v Schaefer-Tsoropatzadis & Abbott** [2007] EWLands LRA/22/2006.

RIGHTS OF WAY

The Court of Appeal considered an appeal on remedy in a rights of way dispute, referring to the **Shelfer** principles as a long hallowed and reliable working rule: “Where the injury to the plaintiff’s legal right is (1) small, (2) capable of being estimated in money, (3) can be adequately compensated by a small money payment and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction, then damages may be given in substitution”. It was held that it was necessary for a defendant to satisfy the first three requirements, but that it was by no means sufficient for it to do so. The four elements were cumulative and there had to be some additional factor such as oppression, to justify withholding the injunctive remedy, which was the claimant’s prima facie right as ancillary to his property rights. The injunction granted below, which prevented obstruction of the right of way, would remain. **Jacklin & anor v The Chief Constable of West Yorkshire** [2007] EWCA Civ 181.

SERVICE CHARGES

Sums were not properly recoverable from the tenants as service charges where a lease contained no term which entitled the managers to reclaim those sums from the tenants. Sums which had been wrongly claimed included costs of negotiating with the landlord over his proposals, instructing a valuer, and other costs relating to the acquisition of the freehold. Nor did the lease permit sums within the maintenance reserve to be used as a fee for conducting negotiations. These costs, and legal costs spent in attempting to recover such sums when they were misappropriated by a dishonest agent, were not properly recoverable from the tenants as service charges. **Redcliffe Close (Old Brompton Road) Management Ltd v Lancaster** [2007] EWLands LRX/73/2006.

The Lands Tribunal considered whether the LVT could allow the amounts claimed for building works even if the year in which they were certified was different to the year in which they were claimed. The lease referred to “actual cost.” It was held that once a certificate had been issued and the 14 day period had expired, the liability existed and was to be regarded as a cost. The term “actual cost” could not include works which were the subject of certificates issued outside the year in question. **Henry Boot Construction Ltd v Alstom Combined Cycles Ltd** [2005] EWCA Civ 1814 approved in relation to the principle that a cost was only incurred when either the landlord paid the cost in question, or first became liable to pay it. This did not mean that it was wrong to make assumptions when attributing costs. It was reasonable to look at the overall percentage of costs over the whole contract and to apply it *pari passu* to the amount of works certified by the year end. **Barrington v Sloane Properties Ltd** [2007] EWLands LRX/31/2006.

Though the Court of Appeal was careful to emphasise that it was construing the provisions of the particular lease before it, **Brown’s Operating System Services Ltd v Southwark Roman Catholic Diocesan Corporation** raises an issue of general interest: whether unspent monies collected on account of service charges belong to the landlord or to the tenant as at the date of termination. The lease was of commercial, not residential, premises. On the construction of this particular lease, the monies belonged to the tenant at the date of termination. The landlord’s right to make future provision extended only to such expenditure as was likely to be incurred during the currency of the lease. The landlord was obliged to return any unspent money held at the date of termination, whether termination was by effluxion of time or the operation of a break clause. [2007] EWCA Civ 164.

OTHER DEVELOPMENTS

COMMONS

The Commons Registration (General) (Amendment) (England) Regulations 2007 SI 1032, coming into force on 1st June 2007, revoke various provisions of the Commons Registration (General) Regulations 1966 relating to official searches of the commons registers and certificates of search. From 1st June 2007 it will be possible to search the commons registers using the Supplementary Enquiries of Local Authority Form CON29 Part II.

HOUSING: TENANCY DEPOSIT SCHEMES

The new and long-awaited (by tenants, at least) tenancy deposit schemes come into force on 6th April 2007. The Housing (Commencement No.7) (England) (Order) 2007 SI 1068 brings into force ss.212 to 215 of, and Schedule 10 to, the Housing Act 2004, which are the provisions relating to tenancy deposit schemes. More details of the schemes are set out in a series of statutory instruments, namely The Housing (Tenancy Deposit Schemes) Order 2007 SI 796, The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI 797, and The Housing (Tenancy Deposits) (Specified Interest Rate) Order 2007 SI 798. There are two types of schemes: custodial and insurance. The purpose of the schemes is to safeguard tenancy deposits, and to facilitate the resolution of disputes arising in connection with deposits. From the coming into force of the provisions, all landlords and their agents will be required to ensure that any deposit required in relation to an assured shorthold tenancy is safeguarded by a tenancy deposit scheme. It will not be possible to avoid the legislation by agreement. The legislation only applies to deposits paid for ASTs entered into on or after 6th April 2007. Three companies have been awarded contracts to run tenancy deposit schemes. They are the Deposit Protection Service, the only custodial scheme (www.depositprotection.com); and two insurance schemes, Tenancy Deposit Solutions Ltd (www.mydeposits.co.uk) and The Tenancy Deposit Service (www.thedisputeservice.co.uk). If the landlord fails to comply with a scheme, the tenant can apply to the court for an order for repayment/payment into a scheme, and if such an order is made the landlord will also be ordered to pay an amount to the tenant which is three times the amount of the deposit. Perhaps more importantly in practical terms, the landlord may not serve a notice under s.21 Housing Act 1988 at any time when a deposit is not being safeguarded in accordance with an authorised scheme, where the initial requirements of the scheme have not been met, or the prescribed information regarding the safeguarding the deposit has not been given.

RIGHT TO BUY

The Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2007 SI 784 come into force on 3rd April 2007, and substitute the form of notice to be used by a tenant claiming to exercise the right to buy a dwelling-house in accordance with s.122 Housing Act 1985. The new form RTBI is set out in the schedule to the Regulations and replaces the form annexed to the Housing (Right to Buy) (Prescribed Forms) Regulations 1986. By regulation 2 of the 1986 Regulations, a form substantially to the same effect as the new RTBI may be used, but it may be safer to use the prescribed form.

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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