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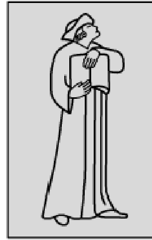

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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ADVERSE POSSESSION

There is no possible legal basis for denying to the Crown the ability to plead a limitation defence that any of its subjects can plead, or for treating the Crown's ordinary possession of another's land as other than that of a person in whose favour time can run under the Limitation Act 1980. Quite apart from the express provision putting the Crown on the same footing as its subjects in matters of limitation, the general purpose and policy of setting time limits on actions for the recovery of land by the paper title owner apply to land in the possession of the Crown as much as to land in the possession of a subject. If there ever was a constitutional principle or rule limiting the right of the Crown to acquire title to land by adverse possession it has ceased to exist. The same law that applies between subjects applies as between the Crown and its subjects. In relation to intention, it is obvious that it is possible for a person who mistakenly believes himself to be the true owner to have the requisite intention to exclude others and to acquire title by way of adverse possession. Adverse possession is not confined only to those who think or know that they are trespassing on someone else's land. It applies equally to those who mistakenly believe that they are the true owner of land. ***Roberts v Crown Estate Commissioners*** [2008] EWCA Civ 98; [2008] 08 EG 157 (CS).

CHARGING ORDERS: JURISDICTION

County Courts have a broad and often exclusive jurisdiction to make charging orders. However they have a very limited jurisdiction to enforce them. Their original jurisdiction to enforce charging orders is restricted to cases where the relevant debt does not exceed £30,000, unless the parties agree otherwise pursuant to s.24 County Courts Act 1984. However the High Court has power to transfer cases to the County Court by s.40(2) CCA 1984. This power is not limited to cases which would otherwise be within the county court's original jurisdiction. It is not expressly stated that where proceedings are transferred to a county court, it should have jurisdiction to hear and determine the proceedings. This is, however, implicit. If the transfer is to be effective the county court must thereby be given the requisite jurisdiction. ***National Westminster Bank Plc v King*** [2008] EWHC 280 (Ch).

CONSTRUCTIVE TRUSTS

There is a presumption that the legal and beneficial interests in a domestic property conveyed into joint names are, in the absence of an agreement to the contrary, joint and equal. However, the presumption is restricted to a family home occupied by cohabitants: ***Stack v Dowden*** [2007] UKHL 17 considered. The presumption does not apply to commercial properties or to properties purchased as an investment, even where the purchasers belong to the same family. The burden of proof is on the party that seeks to establish that the beneficial interests are not equal. It was not clear that ***Stack*** applied where the parties were a mother and daughter living separate lives. The aim of the purchase was not to provide them with a home. It was primarily an investment purchase. In the absence of agreement the shares were held according to the contribution that each party had made to the purchase price. The appellant's contribution was assessed at 33% of the value of the property, taking into account the fact that when the property had been purchased under the right to buy scheme, the discount had been based on her length of occupation as a secure tenant. ***Laskar v Laskar*** [2008] PLSCS 35.

HOUSING

M, who had attained the age of 18 in early 2006, sought to argue that she was entitled to assistance as a "former relevant child" under s.23C of the Children Act 1989, because she should have been looked after by a local authority under s.20 Children Act 1989 before she attained the age of 18. The House of Lords held that she was not so entitled. The housing department had not in fact referred M to the children's services department, although they should have done. M had been accommodated by the housing department under s.188 Housing Act 1996. She had not been looked after by the children's services department. The claim was for the extra help and support available to former relevant children, and M had never been in care and had never been accommodated under s.20 Children Act 1989. It would probably not be open to the children's services department to put a different label on something that they had actually done, but here they had not done anything. M had not been drawn to their attention at the relevant time. ***R (on the application of M) v Hammersmith & Fulham LBC*** [2008] UKHL 14.

Police constables occupying police accommodation did not become secure tenants by reason of the fact that from 1st September 1994 there had been no obligation to provide either tenancies or housing allowances to new police officers. The 1994 Regulations did not have the effect of depriving extant police tenancies of their basis in the earlier regulations. In the absence of any intervening variation or re-grant, at the date of the hearing the claimants' homes were still provided for them, as they always had been, in pursuance of the 1987 Regulations, notwithstanding that the power contained in those regulations to accommodate police officers was now spent. The test in s.2(2) of Schedule 1 to the Housing Act 1985 (not a secure tenancy if provided free of rent and rates in pursuance of regulations made under the Police Act 1964) was met. The fact that the claimants had to pay water charges did not make them secure tenants: water rates had been abolished and water charges were not the same thing. It was not clear that "rates" in s.2(2) included water rates in any event. The police authority was not estopped from evicting the claimants: it had given assurances that they could stay in their homes until retirement, and these had been relied on, but not to the claimants' detriment. The claimants would have continued as rent-free tenants for as long as

possible whether or not the assurance had been given. ***Holmes & anor v South Yorkshire Police Authority*** [2008] EWCA Civ 51.

The late Alan Austin had died in 2005. His brother Barry Austin sought to succeed to his secure tenancy. He was not able to do this because Alan Austin had been a tolerated trespasser for almost 20 years, following a suspended order for possession made on 4th February 1987 which he had subsequently breached. During his lifetime Alan Austin could have applied for a Lazarus order postponing possession and so reviving the tenancy under s.85(2) Housing Act 1985 and following ***Burroughs v Brent LBC*** [1986] 1 WLR 1448 HL. However no such application had been made. The Court of Appeal had decided in ***Brent LBC v Knightly*** [1997] 29 HLR 857 that the right to apply for a postponement of an order for possession under s.85(2) HA 1985 is not an interest in land capable of being inherited. This meant that once Alan Austin died, any right he had had before his death to apply for a Lazarus order ceased. This was not a breach of Article 1 Protocol 1 EHCR. The claim did not survive the death of Alan Austin. There was nothing capable of being passed on to his estate, and so there was nothing in respect of which an order could be made under CPR 19.8, which allows a claim to be pursued by the estate of a deceased person. Article 1 was intended to protect a citizen's possession from arbitrary interference or deprivation by a public authority. It does not confer substantive rights to property which do not otherwise exist. ***Austin v Southwark LBC*** [2007] EWHC 355 (QB).

It is not a lawful discharge of a council's duty under s.193(2) Housing Act 1996 (the full duty of securing that accommodation is available for occupation by the applicant) to leave a homeless family in the accommodation they were occupying in circumstances where they were found to be homeless because it would not be reasonable for them to continue to occupy those premises. It is not lawful to leave the homeless at home for a temporary period while the council hunts for permanent accommodation. There was no justification for the distinction in the allocations policy between the homeless at home and the street homeless. The same duty was owed to each and their treatment should have been the same. Ward LJ noted that this judgment might be received with alarm by local authorities. Having to find temporary accommodation for every homeless family, even the homeless at home, would doubtless add to their burdens. If the fulfilment of that duty was proving impossible, it was for the legislature to consider whether their position could be ameliorated. ***Birmingham City Council v Aweys & ors*** [2008] EWCA Civ 48.

LEASE EXTENSION

The landlord had tried to argue that the tenant was not entitled to a lease extension because the landlord intended to redevelop the tenant's flat together with the flat below it. The flats were in a block of fifty flats on nine floors. If the lease has less than five years to run, which it did here, the landlord can serve a notice resisting the claim and stating that he intends to apply to the court for an order under s.47(1) Leasehold Reform, Housing and Urban Development Act 1993, *"on the grounds that he intends to redevelop any premises in which the flat is contained."* Overturning the Court of Appeal, the House of Lords ruled that *"any premises in which the flat is contained"* in s.47(2)(b)(ii) LRHUDA 1993 does not mean the tenant's flat and any other part of the building capable of being identified by a continuous line on a 3-D plan. The phrase must refer to an objectively recognisable physical space, something which the landlord, the tenant, a visitor or a prospective purchaser would

recognise as “premises”. It cannot be a notional space which is defined by the landlord in whatever way it chooses. To allow the landlord to cherry-pick among separate flats, assembling what may be regarded as artificial uses so as to resist the claim for a lease extension and obtain possession in order to carry out small scale conversions, would be contrary to the apparent intention behind the legislation. ***Majorstake Ltd v Curtis*** [2008] UKHL 10; [2008] 06 EG 131 (CS).

LEASEHOLD ENFRANCHISEMENT

Tenants served a notice pursuant to s.13 Leasehold Reform, Housing and Urban Development Act 1993 on the then registered freehold owners, Mr and Mrs Gurden on 19th September 2006. The last date for service of a counter-notice was 26th November 2006. The Defendant completed the purchase of the freehold on 8th November 2006, though it did not become the registered owner until 12th January 2007. The Defendant served a counter-notice on 20th November 2006. The tenants then sought to acquire the premises on the terms set out in their s.13 notice on the basis that the counter-notice could only be validly served by Mr and Mrs Gurden, and that the Defendant could not serve a valid counter-notice until it was the registered proprietor. HHJ Collins CBE agreed that no valid counter-notice had been served, so that the tenants were potentially entitled to acquire the premises on the terms set out in the s.13 notice. The tenant has to know who it is to serve notices on and it has to know who is serving notices on it. The argument that it has to be the registered owner was irresistible. The reversioner, for the purpose both of giving and receiving notices, must mean the registered proprietor. S.19 LRHUDA 1993 could not be used to validate retrospectively acts done by the Defendant prior to 12th January 2007. There was an outstanding issue about whether the offer was made in good faith, given the level of the purchase price. This was to be determined without the need for expert valuation evidence. ***Renshaw & ors v Magnet Properties South East LLP*** [27th September 2007] Central London County Court HHJ Collins CBE; [2008] 04 EG 170.

MORTGAGES

Mr Cutler’s home had been repossessed by Bradford & Bingley because he had fallen behind on his mortgage repayments. Some of the interest payments had been made by the Benefits Agency under the Social Security (Mortgage Interest Payments) Act 1992, including most importantly a payment of £79.63 in December 1993. Although this was strictly speaking an overpayment of interest, B&B were entitled to apply it to the overall outstanding indebtedness. The property had been sold at a shortfall, and on 20th November 2005 B&B issued proceedings to recover the shortfall. They succeeded, and Mr Cutler’s appeal on agency and limitation points failed. The payment of £79.63 in December 1993 was a payment under s.29(5) Limitation Act 1980 so that the right of action was treated as having accrued on that date. The judge had been right to hold that the Benefits Agency had acted as Mr Cutler’s agent when making that payment, so as to bring it within s.30(2)(a) LA 1980. The claim was brought in time. ***Bradford & Bingley Plc v Cutler*** [2008] EWCA Civ 74.

NUISANCE

The reasonableness and propriety of contractors' operations operates by way of a defence to a claim in the tort of nuisance, rather than the absence of it being a necessary ingredient of the adjoining landowners' cause of action. A cause of action is constituted by causing undue inconvenience or discomfort to one's neighbour. Once that has been demonstrated, the evidential burden of proof shifts to the alleged tortfeasor to show that all reasonable and proper steps were taken to ensure that such nuisance would not occur. This is consistent with principle, since the existence or otherwise of reasonable and proper steps is essentially a matter peculiarly within the knowledge of the person conducting the construction or the demolition operations in question. Cost is a relevant consideration. Interim injunctive relief relating to vibration, access and water ingress was granted to the claimants, who were occupying premises adjoining a building site at Bishopsgate in London. As the trial of the claim would not take place until after the demolition of the building, it was not sufficient simply to consider whether there was a serious question to be tried, but was instead necessary to examine the relative strengths and weaknesses of each party's case. ***Hiscox Syndicates Ltd & anor v The Pinnacle Ltd & ors*** [2008] EWHC 145 (Ch); [2008] 05 EG 166 (CS).

PRE-ACTION PROTOCOLS

Akenhead J considered the operation of the Pre-Action Protocol for Construction and Engineering Disputes. He noted that the overriding objective was concerned with saving expense, and proportionality, expedition and fairness. The court's resources were a factor. The overriding objective justifies a pragmatic approach by the court to achieve the objective. The court has very wide powers within CPR Part 3 and elsewhere so as to achieve or further the overriding objective. The court should avoid the slavish application of individual rules, practice directions or protocols if such application undermines the overriding objective. Anecdotal evidence about the effectiveness of the Pre-Action Protocol process in the TCC is mixed. It is recognised as being effective both in settling disputes before they even arrive at court, and narrowing issues, but also as being very costly on occasion and enabling parties to delay matters without taking matters very much further forward. Whilst the norm must be that parties to litigation do comply with the Protocol requirements, the court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of costs orders. On the particular facts, a stay would not be ordered so as to enable the parties to comply with the Protocol. There was a related claim in which extensive disclosure had already been made. It was not likely that bilateral discussions between the parties in this claim would narrow issues significantly. Orange was penalised to some extent in costs for failing to comply with the Protocol, even though Hoare Lea's application for a stay had been unsuccessful. ***Orange Personal Communications Services Ltd v Hoare Lea (a firm)*** [2008] EWHC 223 (TCC).

PROPRIETARY ESTOPPEL

Considering and applying ***Jennings v Rice*** [2003] 1 P&CR 8, Briggs J held that there was no injustice where the recipient of assurances is given a proportionate remedy but the giver is enriched. The injustice, if any, arose between the giver of assurances and the party who had provided the remedy to the recipient. There is no reason in principle why one of two co-

owners of property should not seek a contribution from the other if he or she has satisfied, at no cost to the other, a proprietary estoppel arising from assurances given by both of them. The extent of any contribution ordered would depend, among other things, upon the relative responsibility of each of the two co-owners for the making of the assurances in the first place. ***Hopper v Hopper & ors*** [2008] EWHC 228 (Ch).

RIGHTS OF WAY

Sullivan J refused to quash a decision by an inspector not to confirm an order which would have closed right of ways for the purposes of crime prevention. The relevant powers were contained in s.118B Highways Act 1980, introduced into that Act by the Countryside and Rights of Way Act 2000. The rights of way were footpaths within Rusholme and Victoria Park in Manchester. Manchester City Council took the view that the existence of the footpaths was facilitating the persistent commission of criminal offences, including burglaries, robberies, and drug dealing. The inspector accepted this evidence and noted that it was not disputed by the objectors. However he decided that the footpaths had a real purpose for significant numbers of local people who used them regularly. Sullivan J held that the inspector had not erred in deciding that the benefits of closing the footpaths did not outweigh the benefits of retaining the public right of passage. There was nothing to suggest that he had attached undue weight to a petition from objectors. He had been entitled to attach some weight to the historical significance of the path. He had properly considered the personal safety of users. The weight to be given to the various factors in issue was entirely a matter for the inspector's expert judgment. It was possible that another inspector might have reached a different conclusion on the balancing exercise, but this did not mean that the inspector's decision was unreasonable. ***R (on the application of Manchester City Council) v Secretary of State for the Environment, Food and Rural Affairs*** [2007] EWHC 3167 (Admin).

SERVICE CHARGES

The Lands Tribunal has overturned the LVT's decision under s.20ZA Landlord and Tenant Act 1985 to dispense with certain consultation requirements in respect of agreements which Camden LBC proposed to enter into. The Lands Tribunal held that s.20ZA(1) LTA 1985 did give the LVT jurisdiction to make a determination dispensing with the consultation requirements in respect of qualifying works which had not yet been carried out or a qualifying long term agreement which had not yet been entered into. Whether it was reasonable so to dispense would be significantly affected by the degree of certainty with which the proposed QWs or QLTAs had been identified by the landlord. Here the LVT had plainly been wrong to make the dispensation that it did. The order made would have allowed Camden LBC something approaching *carte blanche* regarding the Partnering Agreements it would have sought to enter into. The order imposed no limit on the number of Partnering Agreements, nor when they were to be entered into, nor with whom they were to be entered into, nor what the terms were to be. Such a vague and open-ended dispensation for future agreements could not properly be granted under s.20ZA LTA 1985, or if it could, the clearest of reasons would be required explaining why. The LVT misdirected itself in concluding that the granting of the dispensation would not cause any significant diminution in the protection afforded to tenants against being asked to pay more than a reasonable

amount in respect of the cost of any works carried out under a Partnering Agreement. ***Auger & anor v Camden LBC*** [2007] EWLands LRX/81/2007.

OTHER DEVELOPMENTS

HOME INFORMATION PACKS

The Housing Act 2004 (Commencement No.11) (England and Wales) Order 2008 SI 898 brings Part 5 of and Schedule 8 to the Housing Act 2004 into force on 6th April 2008, insofar as they are not already in force. These are provisions relating to Home Information Packs. Earlier commencement orders brought Part 5 into force on a phased basis as applied to residential properties of different types. Once in force, the provisions will apply to a residential property unless it is excepted under Part 6 of the Home Information Pack (No.2) Regulations 2007 ("the principal regulations").

The principal regulations are amended by the Home Information Pack (Amendment) Regulations 2008 SI 572, coming into force on 31st March 2008. The effect of the amendments is to require information about the sustainability of the property in HIPs for new homes in England. "Sustainability" relates to the extent to which the materials, design and components of the property further the "sustainable design principles" which are set out in paragraph 1 of Schedule 2A (which is added by these amending regulations). Sustainability certificates must be produced by a person trained and certified as a Code Assessor.

LAND REGISTRATION

The Land Registration (Proper Office) Order 2007 SI 3517, coming into force on 1st April 2008, designates particular offices of the land registry as the proper office for the receipt of specified descriptions of applications under the Land Registration Act 2002. It replaces the Land Registration (Proper Office) Order 2003 and an amending order in 2005. As a consequence of the order, or and after 1st April 2008, the Land Registry's Durham (Boldon), Harrow and York offices will cease to be proper offices. A table set out in the explanatory notes to the Order shows the effect of the changes.

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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