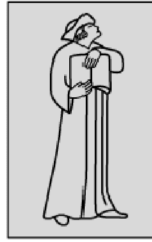

7 Lincoln's Inn Fields London WC2A 3BP
T 020 7404 7000 F 020 7831 4606
DX 90 Chancery Lane E clerks@thomasmore.co.uk
www.thomasmore.co.uk

PROPERTY LAW BULLETIN

MARCH/APRIL 2010

CASE LAW UPDATE

ABUSE OF PROCESS

The Court of Appeal allowed the claimant's appeal against a ruling in the County Court that a disrepair claim was an abuse of process and that the defendant could not have a fair trial. The claimant tenant and defendant landlady had agreed a consent order in January 2007 in relation to a dispute over possession. In November 2008 the claimant brought proceedings alleging that the defendant was in breach of statutory obligation to repair. The central issue was whether the claimant *should*, not could, have raised the disrepair claim during the negotiations pursuant to which the possession claim was settled. The Master of Rolls concluded that (i) the two claims involved different issues; and (ii) had the possession claim proceeded to trial it would have been impossible to establish that the disrepair claim was an abuse. As such the disrepair claim could not now be said to be an abuse. Further, the defendant had been aware for a number of years of the possible existence of disrepair in the property. The claimant had obtained up to date reports about the state of the property, and the defendant did have access to sources of information to this effect obtained before 2007. The court observed that where an inequality between parties is very substantial and very prejudicial, especially if it is attributable to the actual wrongdoing of the advantaged party, the court might conclude a fair trial cannot be achieved. That was not so in this case. ***Henley v Bloom*** [2010] EWCA Civ 202.

ADVERSE POSSESSION

In ***R (Wayne Smith) v The Land Registry & Cambridge CC*** [2010] EWCA Civ 200 the Court of Appeal rejected the novel proposition that a person could acquire the right to land forming part of the highway by means of adverse possession. S.263 Highways Act 1980 vests the surface of the land over which a public highway passes in the highway authority. It followed that no-one else could obtain title until the public highway had ceased to exist. The court recognised that highways could cease to be such, by operation of statute and in some other circumstances. However, the Limitation Act 1980 makes no provision for extinguishing public rights over land as opposed to the title of a person to land. Further,

there was no common law authority to support the extinction of public rights of way as a result of the expiry of the limitation period or by adverse possession. Accordingly there is, at present, no way in which a squatter can obtain title to land on which a highway runs by adverse possession, because adverse possession does not extinguish the highway. It was for Parliament to create any additional means of ending public rights of way.

In ***Baxter v Mannion*** [2010] EWHC 573 (Ch), important guidance was given about the meaning of a mistake in the register, in relation to the registrar's power to amend to correct a mistake. A squatter who has been in adverse possession for the requisite ten year period may apply to be registered as the proprietor of the land. The application is then followed by the procedure of notice and counter-notice. If the proprietor fails to exercise his right to require the application to be dealt with under paragraph 5 Schedule 6 Land Registration Act 2002, the applicant is entitled to be registered as proprietor under paragraph 4. Where an application under paragraph 1 is rejected, paragraphs 6 and 7 operate so as to give the proprietor two years from the date of rejection of the application to obtain possession or to bring possession proceedings. By paragraph 5(a) of Schedule 4, the registrar may alter the register for the purpose of correcting a mistake. There is no good reason to confine this jurisdiction to the correction of mistakes of a procedural nature. There is a mistake in the register, which the registrar has power to correct, if any statutory condition which is a prerequisite for registration is shown not to have been satisfied. The procedure set out in paragraphs 2 to 5 of Schedule 6 is not necessarily conclusive of the applicant's entitlement to be registered. The applicant will automatically be registered under paragraph 4 if no counter-notice is served requiring the application to be dealt with under paragraph 5, but it will still be open to the former proprietor to argue that registration was a mistake, on the ground that the applicant did not satisfy the test of ten years' adverse possession. The general policy of the 2002 Act was severely to limit the circumstances in which a squatter could acquire title to registered land. In light of this policy it would be very strange if a registered proprietor could be at risk of irrevocably losing his land to a squatter who had never in fact been in adverse possession. It would also be a wholly disproportionate penalty for failing to serve a counter-notice. It would potentially reward a dishonest applicant who had told lies about the nature and extent of his use of the land. If registration of a squatter who did not satisfy the adverse possession test did not involve a mistake which could be rectified, the former proprietor would not be able to claim an indemnity pursuant to s.103 of and Schedule 8 to the 2002 Act. This would be unfair. On the present facts, Mr Baxter should never have been registered as proprietor of the field and Mr Mannion should be able to regain title to it.

Port of London Authority v Ashmore [2010] EWCA Civ 30 concerned a claim to adverse possession by a barge owner near Battersea Bridge. The Court of Appeal's consideration of a preliminary point brought to light a rarely ventilated proposition on which the parties were agreed. It is possible for the owner of a vessel moored on a tidal river to acquire title by adverse possession to part of the river bed or foreshore, despite only intermittent contact with the river bed and notwithstanding the public right of navigation in and around the mooring area. The Court of Appeal declined to give a preliminary ruling expanding on the circumstances in which the owner of such a vessel might acquire title in this way, remitting the matter for decision by the trial judge.

BUSINESS TENANCIES

The defendant solicitors admitted liability for damages in contract and negligence for failing to renew the claimant's business lease. Damages were assessed at £43,000 plus interest. The claimants had contended for damages of £1.8 million. The premise of this claim was that a retail jewellers turning over around £50,000 per annum would have become a highly successful and lucrative internet based business. The judge considered the authorities and noted that if negligence in renewing the lease causes losses to the business in addition to the loss of the value of the lease itself, those losses are in principle recoverable subject to normal considerations of remoteness. The caselaw showed the flexibility available to the court in assessing damages in cases of this type. If the claimant has lost a capital asset such as a lease, compensation will be assessed based on the value of the asset lost at the date the damage is suffered. If the asset has not been lost but profitability has been impaired (e.g. where the business is maintained but has to move to new premises) reduction in profitability and costs incurred may be recoverable. The court may accept that part of the value of a business which has been lost is its potential to earn increased profits in the future, though this had been assessed in one case as the value of the goodwill thereby generated, not the lost future profits. The claimant was not entitled to recover projected future profits as this was the wrong basis in principle for assessing the loss. Nor was she entitled to recover the costs of seeking to re-establish the retail business that she had lost, as she had not in fact sought to re-establish the business. The defendant solicitors were not aware of the existence of the internet business nor its dependence on the retail premises. Accordingly all losses claimed in relation to the internet business were not foreseeable and were too remote to be recoverable in law. ***Nahome & ors v Last Cawthra Feather Solicitors*** [2010] EWHC 76 (Ch).

COLLECTIVE ENFRANCHISEMENT

McHale v Earl Cadogan [2010] EWCA Civ 14 concerned the collective enfranchisement of a leasehold property. The issue was whether the caretaker's flat in the property subject to enfranchisement should be valued on the basis that it was dedicated to housing a caretaker rent free and thus of little value; or on the basis that the tenants (underlessees) of the premises collectively had to pay a service charge which was designed to provide compensation for that loss of rent. The court emphasised that service charge provisions have been construed restrictively. However, in the present case the relevant clause of the headlease expressly included *"the cost to the Lessor of the outgoings for such accommodation (including loss of rack rent thereon)."* It was impossible in such circumstances to say the loss of rack rent was not included in such outgoings because the flat was to be licensed to the caretaker rent free; it was precisely for that reason that the value of the flat in terms of rack rent has been lost. As such the headlease had to be interpreted on the basis the appellant as intermediate landlord was entitled to be compensated in the service charge for the loss of rack rent on the caretaker's flat.

In ***Earl Cadogan & anor v Nicholas & ors*** [2010] EWHC 422 (Ch), on appeal from HHJ Marshall QC, the court considered issues arising under s.19 Leasehold Reform, Housing and Urban Development Act 1993. S.19 restricts the freeholder's power to deal with his interest following registration of an initial notice served by the tenants pursuant to s.13 of the Act. The freeholder had granted a lease of the caretaker's flat in the basement of the property. The lease was held to be void. It did not fall within s.19(1)(a)(i), as it was not a disposal

splitting the freehold reversion, nor was it a lease which could be enlarged into a freehold under s.153 Law of Property Act 1925. However it was void under s.19(1)(a)(ii), as prior to the grant of the lease it was part of the common parts of the premises and was reasonably required for the proper management or maintenance of the common parts, as accommodation for the caretaker. If the lease had not been void, ss.19(2) and (3) would not have applied to the grant. S.19(2)(a) refers to a transfer of the freehold interest, not the grant of a lease out of that interest. The freeholder's appeal was dismissed.

COMMONS

R (Lewis) v Redcar and Cleveland BC & anor [2010] UKSC 11 is an important case in which the Supreme Court clarified the test for establishing user 'as of right' for the purposes of an application to register land as a town green pursuant to s.15 Commons Act 2006. It concerned the familiar situation where a proposal to develop open land was countered by a registration application. First, the court held that applicants did not acquire unrestricted rights of recreation over all the land following registration. The applicants' usage would be confined to recreation approximate to their historical user. They could not interfere with the owner's continuing entitlement to use the land as he has been doing and vice versa. Secondly, it followed that the test whether the applicants' user was 'as of right' or sufficient, did not require any additional consideration of 'deference' in the way it had been exercised. The Supreme Court disapproved the judge-made 'deference' rule created by Sullivan J in ***R (Laing Homes Ltd) v Buckinghamshire CC*** [2003] EWHC 1578 (Admin), [2004] 1 P&CR 573. The land in question in the present case had historically been used as a golf-course and the respondents said that the residents/applicants had deferred to the golfers. However the court held that the inspector and the courts below erred in holding that the natural and courteous civility of non-golfers enjoying the amenities of the course was 'deference' and that this prevented their user from being 'as of right'. As a veteran walker and golfer Lord Brown agreed.

CONSTRUCTIVE TRUSTS

In ***Clarke v Corless*** [2010] EWCA Civ 338 the question was whether the defendants' purchase of an access road from a housing developer had been made subject to a constructive trust by previous oral discussions with the claimants. The alleged agreement was that the land should be acquired for the mutual benefit of the residents of the development. The Court of Appeal held that the ***Banner Homes*** guidelines (***Banner Homes Group plc v Luff Developments Ltd*** [2000] Ch 372) applied where, as in this case, the arrangements said to give rise to the constructive trust were never intended or expected to be incorporated into a contract. To found the constructive trust it was sufficient if the agreement was to the effect that the land was to be purchased for the residents as a whole. It was not necessary for it to go further and specify by what method the land was to be held.

CREATION OF TENANCY

A judge had erred in taking into account the subjective intention of the landlord when assessing whether an assured shorthold tenancy had been created: ***Lynch v Kirby*** [2010]

EWHC 297 (QB). On 20th February 1997 the tenant entered into exclusive possession of a room. The landlord tried to argue that he had only granted a bare licence of the room pending determination of the tenant's entitlement to housing benefit, and that no agreement was entered into until after 27th February 1997 (which would make the tenant an assured shorthold tenant rather than an assured tenant). Davies J allowed the tenant's appeal against the order for possession on the basis there had been an intention on the part of both parties to create legal relations on 20th February 1997. This was evidenced by the signed pre-tenancy determination form and the exclusive possession granted to the tenant. The landlord was doing no more than taking a commercial risk in allowing the tenant to enter into possession before his housing benefit application had been processed. An assured tenancy rather than an assured shorthold tenancy had been created.

DISABILITY DISCRIMINATION

Even though the companionship that a disabled bipolar tenant derived from her dog promoted her mental health and well-being to a marked degree, the Housing Association were not in breach of their duty under ss.24A & D Disability Discrimination Act 1995 in maintaining the 'no dogs' provision in her tenancy agreement. The appellant failed to show that the provision made it impossible or unreasonably difficult for her to enjoy the premises within the meaning of s.24D. The right to enjoy the premises was dictated by the terms of the lease itself and could not exceed what the letting permitted. The dog helped her state of mind, rather than her usage of the premises. Third party consent would have been required from the head lessor to change the lease and was withheld under threat of forfeiture. There was no reasonable step that the Housing Association should have taken to permit the tenant to keep her dog. ***Thomas-Ashley v Drum Housing Association Ltd*** [2010] EWCA Civ 265.

FORFEITURE

Repair works were the subject of bitter dispute but were ultimately carried out by consent on the claimant's property by the defendant tenants pursuant to their lease agreement. Work carried out by claimant's solicitors and the surveyors did not constitute steps in contemplation of, or in relation to, proceedings under s.146 Law of Property Act 1925. This was so even where the works were completed in part by the implied threat of proceedings under s.146. As such, the claimant had no claim in damages for those costs incurred after service of a counter-notice by the defendants under s.1(3) Leasehold Property (Repairs) Act 1938. Where a defendant admitted breaching a repairing covenant and a s.146 notice was served this did not operate as a *"special circumstance"* to allow the claimant to bring proceedings under s.1(5) of the 1938 Act. ***Agricullo Ltd v Yorkshire Housing Ltd*** [2010] EWCA Civ 229.

HOUSING

In ***Salford CC v Mullen*** [2010] EWCA Civ 336 the Court of Appeal drew attention to the important pending review by the Supreme Court of the scope of the defence to claims for possession of non-secure residential tenancies. The court also attempted to clarify the current state of authority on the subject. The case involved gateway (b) defences in introductory tenancy and homelessness cases under Parts 5 and 7 of the Housing Act 1996

respectively. The Court followed the majority in ***Doherty v Birmingham CC*** [2008] UKHL 57, [2009] 1 AC 367, holding that gateway (b) did not allow a free-standing Article 8 proportionality defence, although the factors considered in applying the domestic reasonableness test might be wider than a traditional domestic review would have encompassed. However it pointed to the nine justice Supreme Court due to hear the appeal in ***Pinnock v Manchester Corporation*** [2009] EWCA Civ 852, [2010] 1 WLR 713 between 5 and 8 July 2010, suggesting that the Supreme Court was likely to reconsider ***Doherty*** and the line of majority decisions of the House of Lords such as ***Kay v Lambeth LBC*** [2006] UKHL 10 [2006] 2 AC 465 which lay behind it and which for the present bound the Court of Appeal. The Secretary of State as intervener specifically reserved the right to argue that ***Kay*** and ***Doherty*** should not be followed in ***Pinnock*** or any subsequent appeal in ***Salford CC v Mullen*** before the Supreme Court. In ***Doherty*** the Secretary of State had unsuccessfully argued that a full free-standing Article 8 defence should now be recognised, to achieve consistency with the jurisprudence of the European Court of Human Rights. The Court of Appeal produced the judgment in ***Salford CC v Mullen*** both in order to lay before the Supreme Court a decision on introductory and homelessness tenancies (***Pinnock*** involved demoted tenants) and to provide guidance for the lower courts on the current state of the law in the meantime. It is an essential starting point when advising a tenant as to whether their position may or may not be affected by ***Pinnock***. However we will watch for the judgments in ***Pinnock*** with considerable interest.

In ***Barber v Croydon LBC*** [2010] EWCA Civ 51, the Court of Appeal gave guidance on the correct approach to a public law challenge to the decision of a local authority to seek possession against a non-secure tenant (in this case under Part 7 Housing Act 1996). First, when assessing whether the decision was one which no reasonable person would consider justifiable under 'gateway (b)', it must be considered in stages. The local authority is bound to keep the process under review. So although a decision, for example to serve a notice to quit, cannot be retrospectively impeached on the basis of subsequent information received by the local authority, a later decision to seek possession following service of the notice would have to take account of the new material. Second, where a claim is dismissed because the local authority have not complied with their public law obligations, a subsequent claim for possession following a procedure which did comply will not be subject to issue estoppel.

In ***Tomlinson v Birmingham CC*** [2010] UKSC 8, the Supreme Court held that a decision taken by the local housing authority under s.193(5) Housing Act 1996 that they had discharged their duty to the applicant did not qualify as a determination of the applicant's 'civil rights' within the meaning of Article 6(1). Lord Hope formulated a wider proposition that where an award of services or benefits in kind is not an individual right held by the applicant, but is dependent on a series of value judgments by the provider, Article 6(1) will not be engaged. Lord Collins reached the same conclusion but preferred to base it on the absence of an individual economic right in the applicant. The court also said *obiter* that even if Article 6(1) had been engaged, the absence of a full fact finding review of such a decision did not breach the procedural requirements of Article 6(1). The court stressed that it was not in the public interest for funds to be diverted to administration and legal disputes. It was time to redress the over-judicialisation of dispute procedures in the administration of social and welfare benefits.

The respondent was a fully mutual housing association under s. 1(2) Housing Associations Act 1985 and a registered co-operative housing association under the Industrial Provident Societies Act 1965. The appellant, a tenant and member of the co-operative, breached his

tenancy agreement by keeping a dog. He was given 14 days to remove the dog. Seven weeks passed without the dog being removed. As a result, the respondent served a notice to quit and obtained an order for possession. On the tenant's appeal, it was accepted that tenancies granted by fully mutual housing associations were not secure tenancies and consequently did not enjoy the statutory protection imposed by ss. 82 to 85 Housing Act 1985. However, the appellant argued that the right of possession of housing associations must be subject to a procedure which enables the tenant to address any breaches within a reasonable time before becoming liable to have his tenancy terminated by the service of a notice. In dismissing the appeal, the Court of Appeal accepted that the tenant must be given a reasonable time to remedy any breach. However, the appellant had had seven weeks to remedy the breach. This was ample time and could not be said to be inadequate or unreasonable. ***Joseph v Nettleton Road Housing Co-operative Ltd*** [2010] EWCA Civ 228.

In ***Bury MBC v Gibbons*** [2010] EWCA Civ 327 the Court of Appeal (Sedley LJ) held that when considering an application from a tenant in the context of the obligations under the Housing Act 1996 it was the substance not the form that mattered. Thus although the application in this case looked like a Part 6 application, in substance it was a Part 7 application. The tenant spelt out that he and his daughter were about to become homeless and sought the council's assistance. This triggered the council's Part 7 obligations.

In ***Eastland Homes Partnership Ltd v Whyte*** [2010] EWHC 695 (QB) the appellant had challenged the decision of the respondent to seek possession as procedurally unfair, unreasonable and unlawful. The question before the court related to the applicability of public law judicial review type defences to possession claims. Quoting Dyson LJ in the case of ***Smith v Buckland*** [2008] 1 WLR 661, HHJ Holman found that the defence was based on conventional public law grounds, that is to say that the decision to recover possession was so unreasonable that no reasonable authority could have made it or that it was unlawful for some other public law reason. In the present case the decision to seek possession was found to be a decision no reasonable authority could have reached. The key elements in reaching that decision were the failure to supply written evidence to the appellant in advance, the broadening of the matters considered by the appeal panel beyond the information contained in the case summary, and most importantly the failure to consider the respondent's clearly stated policy for dealing with rent arrears. As the decision to issue proceedings was unlawful, it was incapable of retrospective validation.

LANDLORD AND TENANT (COVENANTS) ACT 1995

S.24 of the 1995 Act was meant to ensure that any obligations undertaken by a person as guarantor for a tenant should come to an end on the assignment of the lease. If the guarantor is required to enter into a further guarantee when the lease is assigned, the guarantee would frustrate the operation of the Act, in that it would, if valid, impose on the guarantor obligations equivalent to those from which s.24 was meant to secure his release. Parliament intended a tenant to be able to give no guarantee other than an AGA, as provided for in s.16. S.16 is an exception to a general prohibition. If the Act precludes tenants from giving guarantees for assignees other than as AGAs, it is difficult to see why guarantors should not likewise be barred from giving such guarantees. Had Parliament intended a tenant's guarantor to be able to guarantee obligations of an assignee, it could have been expected to say so explicitly. There is no provision equivalent to s.16 dealing with

guarantors. There is no indication in s.16 that an AGA can include a guarantee from anyone other than the tenant. If a tenant's guarantor could guarantee the tenant's assignee, there would be nothing to bring the guarantor's obligations to an end, unlike s.16(4), which provides that a tenant's AGA ends when the assignee assigns. This would drive a coach and horses through the legislation. The guarantee agreement in question was invalidated by s.25 of the Act insofar as it purported to impose liability on Centaur, the original guarantor, for the default of the assignee. ***Good Harvest Partnership LLP v Centaur Services Ltd*** [2010] EWHC 330 (Ch).

NORTHERN CYPRUS

Apostolides v Orams & Orams [2010] EWCA Civ 9, previously considered in the September 2006 bulletin, upheld a ruling that judgments made by the Nicosia District Court in the Republic of Cyprus be declared enforceable by the Queen's Bench Division of the High Court of Justice. The ruling was pursuant to Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The orders made in the Republic of Cyprus related to land in the village of Lapithos in the Kyrenia district, ordering the immediate destruction of a villa, pool and fencing on the property and delivery to the appellant of vacant possession. The respondents were British citizens who claimed to have purchased the land in 2002 in good faith from a third party who had acquired it from the Turkish Cypriot authorities. They failed to have the order set aside in the Cypriot court. It was subsequently set aside by Jack J on the respondents' appeal. However, leave was granted for a further appeal and the matter was referred to the European Court of Justice. The case returned to the Court of Appeal in light of the ECJ's answers to the questions referred to it. Two issues were raised that were both determined in the appellant's favour: (i) that recognition of the Cyprus ruling was not contrary to public policy in the UK and (ii) the ruling of the ECJ was not affected by bias (the President in the ECJ ruling originated from Greece).

NOTICES

In ***Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd*** [2010] EWCA Civ 314, the long leasehold tenants of the majority of flats in a property sought to exercise their statutory right to acquire the freehold of the property. Three of the tenants were individuals whilst the fourth was a company. The four tenants served a notice served under s.13 Leasehold Reform, Housing and Urban Development Act 1993. The notice was signed by each of the tenants. In respect of the fourth tenant, the signature was effected by way of a signature from the director of the company. A dispute arose as to whether the director's signature amounted to signature of the notice by the company. On appeal, it was held that the director's signature was not sufficient. In accordance with s.36A Companies Act 1985, a company signing a notice must do so either by affixing its common seal or by using the signatures of two directors or a director and company secretary.

PROCEEDS OF CRIME

In ***Olden v SOCA*** [2010] EWCA Civ 143 the Court of Appeal jealously preserved the protection CPR Part 55 affords those in possession of land, especially dwelling houses, in

overturning the possession order the judge had made in civil asset recovery proceedings under the Proceeds of Crime Act 2002 (PoCA). The court held that PoCA neither expressly nor impliedly conferred jurisdiction to make a possession order and it would have been wrong to use any inherent jurisdiction of the court to sidestep the protection of Part 55. In any event the civil recovery order vested the trustee for civil recovery with the property. It was for him, if so advised, to seek a possession order in Part 55 proceedings. The order should never have been made in favour of SOCA. The case also contains a useful review of the relationship between civil PoCA proceedings and previous criminal proceedings. The court's reasoning might allow for distinction in the case of non-residential property.

The appellant appealed against a decision to appoint a management receiver under s. 77(8) Criminal Justice Act 1988 to manage a property registered in appellant's name on the basis that it was the realisable property of another individual who had been convicted of criminal offences. In dismissing the appeal, the Court of Appeal held that the court had jurisdiction to appoint a management receiver where the property constituted realisable property for the purposes of a confiscation order even though there was an ongoing dispute as to the identity of the true beneficial owner. ***Lamb v Revenue & Customs Prosecutions Office & ors*** [2010] EWCA Civ 285.

RESTRICTIVE COVENANTS

The Lands Tribunal would not modify a restrictive covenant so as to permit alterations to an existing dwelling-house, "Priddeons". The proposed alterations would have increased the height of Priddeons and added two dormer windows at second floor level. The covenant prevented alterations without the prior written approval of the owners of the adjoining property. The objection from the adjoining owners was reasonable. Their home was a high value property with a large secluded garden in a conservation area. The proposed increase in the height and bulk of the existing roof of Priddeons would be intrusive. The new second floor windows would be clearly visible from substantial areas of the objectors' garden, which was at present extremely private. The restrictive covenant, in preventing a perceived loss of privacy and increase in bulk of the adjoining building, secured to the objectors a practical benefit of substantial advantage. Ground (aa) had not been made out and as the proposed modification would cause injury to the objectors, the application also failed on ground (c). ***Walker, Re Priddeons*** [2010] UKUT 16 (LC).

RIGHTS OF WAY

A planning inspector had decided on the balance of probabilities that a public footpath not shown on the Definitive Map and Statement subsisted. The decision was flawed on grounds of Wednesbury unreasonableness because the inspector had failed to have regard to a previous public objection to the right of way's existence. Where a right of way cannot be established under the Rights of Way Act 1932, reliance must be placed on the common law. The 1932 Act and its successor the Highways Act 1980 supplemented the common law rather than replaced it. The court considered a number of authorities that explored the principle of an intention to dedicate land to the use of the public. The first thing to be proved is intention to dedicate. Secondly, while public user may be evidence tending to instruct dedication, it would be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right within the knowledge and with the

acquiescence of the owner of the fee (***Folkestone Corporation v Brockman*** [1914] AC 338 considered). The critical question was whether the owners had acquiesced in the use of the present footpath as a public way and that as a consequence dedication on their part could be inferred. The previous objection was therefore of the greatest importance to this decision. The inspector had failed to consider how that objection might be relevant to the nature and use of the footpath thereafter. ***Wild v Secretary of State for Environment, Food and Rural Affairs & anor*** [2010] EWCA Civ 1406.

The owner of land between points A and B on a map which had became incorporated in a Modification Order submitted an application under s.53(5) Wildlife and Countryside Act 1981. The application, which was largely in the form prescribed by the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, sought to upgrade a public path to a byway open to all traffic (points B to C on the map). The application was unsigned and undated, and was not accompanied by a map showing points B to C. The respondent replied by letter (together with a summary and plan) in order to confirm that the landowner's application would be accurately reflected by reclassifying the entire route from points A to C on the map. The landowner replied that he did not foresee a problem with this. In due course, the respondent approved the reclassification. The appellant succeeded on appeal in quashing the respondent's decision. The application to modify was defective for two main reasons. First, subject to the de minimis principle, applications made under the 1981 Act had to comply strictly with the requirements in paragraph 1 Schedule 14 of the Act. This did not mean that a valid application had to be contained in a single document, namely the prescribed form. Minor departures from the requirements of paragraph 1 did not invalidate an application. There were circumstances in which a valid application might be contained in an application form when read with another document. In the instant case, the departures from the requirements of paragraph 1 were substantial and could not be saved by the de minimis principle. The lack of a date and signature were important omissions. Secondly, the landowner's letter did not make it clear that he was applying for the entire route from points A to C to be reclassified. Rather, he was simply indicating that he was indifferent as to whether it should be so extended. ***Maroudas v Secretary of State for Environment, Food and Rural Affairs*** [2010] EWCA Civ 280.

In ***Lester & Hardy v Woodgate & Woodgate*** [2010] EWCA Civ 199, the claimants appealed unsuccessfully against a ruling in the County Court that they were estopped as against the defendants from enforcing a right of way to the full extent of a 1980 grant. The claimants' predecessor in title, Sherwell, ought to have known that demolition between 1999 and 2000 of a ramp and path by the then owner, Mr Mees, which had previously supported the right of way, constituted an actionable interference. As no steps had been taken to prevent those works, nor the subsequent use of a car parking space, the claimants were estopped as against the defendants (Mees' successors in title) from enforcing the full extent of the right of way. Patten LJ observed that although proprietary estoppel is largely concerned with cases in which the defendant acquires some right over the claimant's property as a result of the latter's conduct towards him, there is no reason why the principles involved are not capable of equal application to a case where a defendant is alleged to have committed an act of nuisance by interfering with an easement over his own land. On the facts of the present case the court was fully justified in ruling that it was unconscionable for Sherwell and the claimant successors in title to seek to enforce and reinstate the 1980 right of way.

SALE OF LAND

On appeal the court considered the question whether a forfeited deposit had to be set off against damages if there had been no resale. The purchaser, Ashley King, had failed to complete, eventually leading to the termination of the next transaction in the conveyancing chain. Mr and Mrs Ng (the vendors) were obliged to give credit to Ashley King for the amount of the deposit paid by Ashley King in reduction of the damages that would otherwise be recoverable. The overriding principle in the assessment of damages for breach of contract is to compensate the injured party, not punish the contract breaker. Subject to rules prohibiting penalties, the parties to a contract may exclude particular rights and remedies but must do so using clear words. The Standard Conditions do not purport to exclude any right of set off. Where there has been a resale, credit must be given for the deposit (***Ockenden v Henley*** [1858] EB&E 485). There can be no distinction in principle between a case where there has been a resale and a case where there has not. In the latter case, the starting point will be the difference between the contract price and the market value. The consensus of opinion among textbook writers is that the seller is bound to give credit for the deposit, and this must be the ordinary understanding of parties to contracts for the sale of land which require the payment of a deposit. Mr and Mrs Ng had no entitlement to contractual interest on the deposit, but they were entitled to statutory interest under s.35A Supreme Courts Act 1981, which the judge had awarded at the rate of 3% per annum. ***Ng v Ashley King Developments Ltd*** [2010] EWHC 456 (Ch).

S.423 Insolvency Act 1986 relates to transactions entered into at an undervalue. If such a transaction is entered into for the purposes of putting assets beyond the reach of a person (the victim) making a claim against that person or otherwise to prejudice the interests of the victim in relation to the claim, the court may make such order as it thinks fit restoring the position to what it would have been had the transaction not been entered into. Mrs Chiu and Mr Ding had sold their home to Mr Delaney at a price substantially lower than the unencumbered freehold value because of the grant back to them of a tenancy of just over 21 years. The unencumbered freehold value of the property was £275,000. The purchase price paid by Mr Delaney was £210,000. The District Judge held that this was a transaction at an undervalue with the requisite purpose, and ordered that the transfer was void as against the victims Mrs Chen and Mr Du, who were judgment creditors of Mrs Chiu and Mr Ding. The buyer's appeal succeeded. £210,000 was a fair price for the freehold subject to the tenancy, so there was no transaction at an undervalue. The sale at £210,000 was equivalent to a sale at £275,000 with a lease back at a premium of £65,000. The burden was on the victims to show that the transaction was at an undervalue. They had failed to do this. ***Delaney v Chen & anor*** [2010] EWHC 6 (Ch).

In ***UK Housing Alliance (North West) Ltd v Francis*** [2010] EWCA Civ 117 the Court of Appeal rejected a challenge to a scheme by which a property had been sold and then leased back to the vendor/tenant. 30% of the sale price was retained by the purchaser as a 'final payment' which could be forfeited by the purchaser/landlord if they terminated the tenancy agreement pursuant to any right to do so under the agreement. The court held, first, that a retained portion of the sale price was not a deposit within the meaning of Chapter 4 Part 6 Housing Act 2004. Secondly, the loss of the contingent right to part payment of the sale price was not a proprietary right, so its loss did not give rise to a claim for relief against forfeiture. Thirdly, the vendor's solicitors had had a chance to consider the offending term, but this did not mean that it was 'individually negotiated' so as to fall outside the protection of the Unfair Terms in Consumer Contract Regulations 1999, but in any event the term did

not fall foul of the Regulations. The retention of the final payment did not create an imbalance between the parties since the vendor/tenant had the protection of the Housing Act 1988. Nor was it contrary to the concept of good faith. The vendor/tenant had instructed solicitors and had not been taken advantage of. The court recognised that there might have been an imbalance if the contract price had been below the market price against a buoyant rental or sales market.

In ***North Eastern Properties v Coleman & Quinn*** [2010] EWCA Civ 277 the Court of Appeal reconciled conflicting dicta in respect of the operation of s.2 Law of Property (Miscellaneous Provisions) Act 1989. It was argued that because a finders fee clause had not been included in contracts for the sale of land they were void pursuant to s.2. The starting point was that Parliament had never intended that s.2 would make it easier for those who have genuinely contracted to escape their obligations. S.2 does not prevent parties to a composite transaction which includes a land contract from separating the land contract from the rest by ensuring that it is not conditional upon the performance of some other expressly agreed part of the bargain. However, the contract will be void if the parties have expressly agreed terms on which the land sale is conditional, such as the sale of chattels or provision of services, in a separate document. Separate contracts to such a composite transaction should expressly state whether one is conditional upon the performance of the other. An appropriately worded 'entire agreement clause' in the land contract could be used to specify that separate contracts are not to operate as conditions to the land contract. In this case the entire agreement clause had that effect. The expressly agreed finders fee did not trigger s.2 because the performance of land contracts was not conditional upon it.

A contract of sale was not void for uncertainty simply because there were no plans attached to the draft intended lease and the service charge percentage had been left blank. The property was due to be sold at auction but was in fact purchased after the sale. Where parties have entered into what they believe to be a binding agreement the court is most reluctant to hold that their agreement is void for uncertainty, and will only do so as a last resort. The wording in the lease was not sufficiently clear without more to identify the premises demised. However in the circumstances parol evidence could be admitted. There was a clear mistake in the omission of the plans and it was clear what correction needed to be made – the plans needed to be attached. A reasonable person, having all the background knowledge which would have been available to the parties, would have understood the contract to have been referring to the plans contained within the auction pack. This made the definition of the premises sufficiently certain. It was also possible for the court to fill in the blank service charge. A reasonable person with the parties' knowledge would have thought that the parties intended to include a service charge of 36% as the landlord's share. This would accord with the parties' knowledge from the documents and with normal commercial arrangements. Specific performance of the contract of sale was ordered. ***Westvilla Properties Ltd v Dow Properties Ltd*** [2010] EWHC 30 (Ch).

SERVICE CHARGES

Paragraph 16A(3) of Schedule 6 to the Housing Act 1985 provides that where a landlord does not insure against obligations imposed by paragraph 14(3), the lease may require the tenant to pay a reasonable sum in place of the contribution he could be required to make if there were no insurance. During the years in question the council had not insured against some risks but had instead included an amount in the service charge in respect of their costs

of bearing the risk themselves. As the lease had not provided for this, the sums were not recoverable. Had the council included a suitable provision in the lease pursuant to paragraph 16A(3) the costs could have been recoverable. Other procedural errors led to the case being remitted to the LVT. ***Mihovilovic & anor v Leicester CC*** [2010] UKUT 22 (LC).

TENANCY DEPOSITS

Draycott & Draycott v Hannells Letting Ltd [2010] EWHC 217 (QB), is an important case about the residential tenancy deposit scheme. Landlords are required to deal with deposits in accordance with an authorised scheme and to provide the tenant with statutory information about the scheme. Substantial penalties can be imposed on landlords for non-compliance. In the present case, the landlord's letting agents had paid the deposit into the scheme and provided the statutory information after a delay of almost three months. On appeal by the letting agents, Tugendhat J upheld the judge's finding that it was the defendant as letting agent who was potentially liable to the sanction. S.212(9) Housing Act 2004 provides that *"references to a landlord...include references to a person acting on his...behalf in relation to the tenancy..."*. The words of s.212(9) plainly included the defendant as letting agent, and the tenant could claim directly against the person responsible. The penalty should be imposed on the person who is responsible for the failure to comply with s.213. However the appeal was allowed, in that the initial requirement of the scheme, with which the landlord must comply, was payment into the scheme, not payment into the scheme within 14 days. If the landlord or agent protects the deposit within a scheme outside the 14 day period from receipt, but before a claim is issued by a tenant, the tenant is no longer entitled to an order under s.214(4) for the landlord or agent to pay him three times the amount of the deposit. This does not mean that there is no penalty for non-compliance by the landlord or agent, as so long as the landlord has not lodged the deposit with a scheme he cannot recover possession by serving notice under s.21 Housing Act 1988.

TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

The court considered the application of s.14 TLATA 1996, which allows any person who is a trustee of land or has an interest in a property subject to a trust of land to apply to the court for an order relating to the exercise by the trustees of any of their functions. The bank sought and obtained an order for possession and sale against Mr Edwards. His wife had executed a charge over their home and had forged his signature on it without his consent. She owed around £681,000 to the bank, and the bank had an equitable charge over her half share in Langley Court, where Mr Edwards lived. The bank therefore had locus standi to make an application under s.14. The court considered the factors set out in s.15, noting that a beneficiary of an equitable charge such as the bank is as much a beneficiary of a s.15 trust as the innocent co-owner. Langley Court had originally been acquired as Mr and Mrs Edwards' matrimonial home, but Mrs Edwards no longer lived there (s.15(1)(a)). The property was held as a house for Mr and Mrs Edwards, but as security for a loan by the bank (s.15(1)(b)). There were no minors living at Langley Court (s.15(1)(c)). Mr Edwards wished to continue to live in the property (s.15(3)). He was aged 77 but not in ill health. He would receive in excess of £600,000 from the realisation of Langley Court and another property, so would be able to purchase alternative accommodation. There was no evidence that Mrs Edwards had other assets from which the debts could be recovered. The proceedings had been protracted, partly by the conduct of Mr Edwards, which had led to an extended civil

restraint order being made against him. The order for possession would take effect in four months, which would give Mr Edwards an appropriate opportunity to sell Langley Court and purchase a new property. ***Edwards v Edwards & Bank of Scotland PLC*** [2010] EWHC 652 (Ch).

Arnold J heard full argument in ***National Westminster Bank PLC v Rushmer & Rushmer***, [2010] EWHC 554 (Ch) but nevertheless declined to grant the Rushmers permission to appeal against an order for possession and sale. As with ***Edwards*** above, the case is a useful illustration of the application of the s.15 TLATA 1996 criteria. In ***Rushmer*** there were two children living in the family home, but this was not sufficient to prevent the sale. The court's discretion under s.15 has to be exercised compatibly with Convention rights, but the Master had not erred by not referring expressly to Article 8.

UNDUE INFLUENCE

In ***Hewett v First Plus Financial Group PLC*** [2010] EWCA Civ 312, the Court of Appeal held that a husband's failure to disclose to his wife that he was having an affair when seeking to persuade her to join with him in a charge over the matrimonial home as security for his personal debts amounted to a breach of his duty of fairness and candour to her and therefore amounted to undue influence. The existence of the affair was a material fact which should have been disclosed. It was not strictly necessary to ask whether the non-disclosure was innocent and inadvertent, or a deliberate concealment. However it was plain on the evidence before the judge that Mr Hewett was guilty of deliberate concealment of his affair.

Mr and Mrs Chandra had given two guarantees of borrowings made by a company jointly owned by them. RBS sought to enforce the guarantees and to obtain an order for possession of the matrimonial home. The first guarantee was upheld as there was no misrepresentation or undue influence by Mr Chandra. The second guarantee was set aside on the grounds of actual undue influence exercised over Mrs Chandra by Mr Chandra. The main area of disagreement on the law was whether a failure by a husband to disclose all material information to the wife, where not motivated by a desire to conceal material information, amounts to undue influence where the wife places her trust and confidence in her husband in relation to the transaction in question. Mis-stating the position or misleading the wife is different from an inadvertent failure to disclose, a distinction familiar in the law of misrepresentation. A deliberate suppression of information because the husband knows that, if disclosed, it will deter the wife from giving the guarantee, involves an abuse by him of her confidence. This would be unconscionable. Deliberate concealment can lead to a finding of undue influence. It does not follow that inadvertent non-disclosure should do so. They are quite different in nature. Non-disclosure, as opposed to the deliberate concealment or suppression, of material facts is insufficient by itself to amount to undue influence. ***RBS PLC v Chandra & Chandra*** [2010] EWHC 105 (Ch).

OTHER DEVELOPMENTS

ASSURED TENANCIES

The Assured Tenancies (Amendment) (England) Order 2010 SI 908 comes into force on 1st October 2010. It amends the amount of annual rent above which a tenancy cannot be an assured tenancy under paragraph 2 of Schedule 1 to the Housing Act 1988. The amount is increased from £25,000 to £100,000.

COMMONS

The Commons Councils (Standard Constitution) (England) Regulations 2010 SI 1204 come into force on 7th April 2010. They prescribe, as required by s.29(1) Commons Act 2006, a standard constitution for commons councils established by orders under s.26(1) CA 2006. The standard constitution is set out in the Schedule to the Regulations. It contains terms governing a council's membership and proceedings, its procedure in respect of requiring the payment of fees, its use of income and property, the requirement to keep accounts, and the manner in which the council may execute documents.

COUNTRYSIDE AND RIGHTS OF WAY

The Access to the Countryside (Coastal Margin) (England) Order 2010 SI 558, coming into force on 6th April 2010, is made under s.3A of the Countryside and Rights of Way Act 2000. It applies only to land in England, and relates to coastal routes. Coastal margin is defined by article 3 of the Order. Some coastal routes are to be determined in accordance with a report prepared by Natural England. Some amendments are made to the CROW 2000 in relation to (i) land which is excepted from the right of access, (ii) restrictions to be observed by persons exercising a right of access, and (iii) exclusion and restriction of access in some circumstances.

HOUSING AND REGENERATION ACT 2008

Several SIs have been made under or in relation to this Act:

- The Housing and Regeneration Act 2008 (Commencement No.7 and Transitional and Saving Provisions) Order 2010 SI 862. This brings into force a number of provisions of Parts 1 and 2 HRA 2008 on 1st April 2010. The provisions commenced are principally those relating to social housing assistance and the new regulatory regime for private registered providers of social housing. The regulator is the Office of Tenants and Social Landlords, established under Part 2 of the Act and known as the Tenant Services Authority. The TSA has a website at www.tenantservicesauthority.org

- The Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010 SI 660, coming into force on 1st April 2010. By s.144 HRA 2008, taking a prescribed step only has effect if the person taking it has given notice to the

Regulator of Social Housing. Under s.145 HRA 2008, a moratorium begins when a prescribed step is taken which prevents a registered provider of social housing from making any disposals of land without the consent of the Regulator. This order provides that a prescribed step is any step to enforce a security over land held by a registered provider of social housing.

- The Housing and Regeneration Act 2008 (Penalty and Compensation Notices) Regulations 2010 SI 662, coming into force on 1st April 2010. By s.228 HRA 2008, the Regulator may penalise failures on the part of a registered provider of social housing. In order to do so, the Regulator must send the provider a penalty notice. Amongst other things that notice must specify the period within which the penalty must be paid. These Regulations provide that the period specified in such a notice shall be at least 28 days. The same period of at least 28 days is specified by these Regulations as the period within which compensation must be paid under a compensation notice to a victim of a failure on the part of a registered provider of social housing.

- The Housing Management Agreements (Break Clause) (England) Regulations 2010 SI 663, coming into force immediately after s.111 HRA 2008 comes into force. S.27 Housing Act 1985 enables a local housing authority to delegate management of its housing to a manager through a management agreement. The Regulator's enforcement powers include the power to impose a requirement to put the management of social housing out to tender or to require transfer of management functions to a specified provider. These Regulations require that any management agreement entered into on or after the date on which Part 2 HRA 2008 is commenced must include a break clause allowing the agreement to be determined and the management functions transferred in circumstances where a management requirement is imposed by the Regulator.

- The Housing and Regeneration Act 2008 (Consequential Provisions) (No.2) Order 2010 SI 671, coming into force on the day s.111 HRA 2008 (register) comes into force. This Order contains amendments to provisions in secondary legislation that make reference to registered social landlords, the Housing Corporation and the existing regulatory regime. These are in addition to those in the HRA 2008 itself, and are consequential on the coming into force of the remainder of Parts 1 and 2 of the Act, which make provision in relation to social housing finance and the regulation of registered providers of social housing. The Order also revokes various earlier orders.

- The Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 SI 844, largely coming into force on 1st April 2010, with some provisions having come into force on 18th March 2010. This Order makes provision for the registration of English local housing authorities and county councils by the Regulator of Social Housing under Part 2 HRA 2008. It is compulsory for local authorities that provide or intend to provide social housing to be registered. Private registered providers remain subject to regulation only if they register voluntarily.

RIGHT TO MANAGE

The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 SI 825 come into force on 19th April 2010. The Regulations supplement Chapter 1 Part 2 Commonhold and Leasehold Reform Act 2002, which makes provision for the acquisition and exercise of rights in relation to the management of premises by a right to manage ("RTM") company. The 2003 Regulations have been revoked and replaced (SI 2003/1988) as it was thought that amending them would be more confusing for lay people trying to make sense of the requirements. The new Regulations set out prescribed forms to be used for the notice of invitation to participate, the claim notice and counter-notice. They also prescribe requirements to be included in contract and contractor notices.

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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