

## PROPERTY LAW BULLETIN

MAY 2003

This bulletin summarises case law and other developments since the last bulletin in February 2003. After various decisions on the point in the lower courts, Runa Begum's case on housing appeals and article 6 has finally reached the House of Lords. Their Lordships held that the reviewing officer did not constitute an independent and impartial tribunal for the purposes of article 6. There was no reason to doubt the impartiality of the particular officer involved but as an employee of the authority it was obvious that she was not independent of it. However the right of appeal to the county court under s.204 HA 1996 was sufficient to satisfy article 6 even though it only allowed for appeals on points of law.

Following *Central Midlands Estates Ltd v Leicester Dyers Ltd* (summarised in the February bulletin), another case on parking easements concludes that there cannot be an easement where the extent of it would deprive the servient owner of any reasonable use of his land. In *Batchelor v Marlow*, it was held that a right to park from Monday to Friday 8.30am to 6pm would so deprive the servient owner and so could not constitute an easement.

The case of *Smith v Hughes & anor* (joined with *Cranfield & anor v Bridgegrove Ltd*, and summarised below in the **In brief** section) deals with a situation which often causes anxiety for claimant landlords. Where there is no solicitor acting and no address for service, there is nothing to prevent a claimant serving a claim form at the defendant's last known address even where the claimant knows or believes that the defendant is no longer living there. This is obviously relevant to the situation where a tenant has vacated without leaving a forwarding address.

The contents of the draft Housing Bill published on 31st March 2003 will no doubt be of interest to many. The consultation period ends shortly, on 9th June 2003.

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## CASE LAW UPDATE

### EASEMENTS

*Massey & anor v Boulden & anor* (2002) EWCA Civ 1634; (2003) 2 All ER 87

The appellants owned a village green which was crossed by a track leading from the public highway to the garden of a house owned by the respondents. From 1956 at the latest until 1997 the track had been used continuously by successive owners of the

house as a means of vehicular access. In 1977 the house was enlarged but this did not result in any significant increase in the use of the track.

The Court of Appeal held that notwithstanding the length of user, no easement had been acquired. s.34(1)(a) Road Traffic Act 1988 provides that a person commits an offence if, without lawful authority, he drives a motor vehicle onto or upon "*any common land, moorland or land of any other description not being land forming part of a road.*" Prescriptive rights to vehicular access could never be acquired save over land "*forming part of a road.*" The use of the track had at all times contravened s.34(1)(a) RTA 1988 and so had been unlawful. However by the time the appeal was heard, the Vehicular Access Across Common and Other Land (England) Regulations 2002, made under s.68 Countryside and Rights of Way Act 2000 had come into force. These allowed the respondents to purchase from the appellants, for 0.25% of the current market value of the dominant tenement, the easement claimed.

So far as the enlargement of the house was concerned, there was no absolute rule that a right of way established for the benefit of Whiteacre could not be used for the benefit of both it and Blackacre. The critical question was whether the use made of Blackacre was more than merely ancillary to that made of Whiteacre. In the present case, insofar as the use of the way served the enlarged part of the house, that use could only be described as ancillary to its use for the purposes of the original dominant tenement.

*Batchelor v Marlow & anor* (2001) EWCA Civ 1051; (2003) 1 WLR 764

The defendants ran a garage and used a strip of land to park cars that were being serviced and repaired. The claimant acquired the strip of land and the defendants entered a caution against first registration claiming that they had regularly parked cars there every day for over 20 years. The judge at first instance found that the defendants had acquired an exclusive prescriptive right to park up to six cars on the strip from Monday to Friday, 8.30am to 6pm.

The claimant's appeal was allowed. A right to park cars which would deprive the servient owner of any reasonable use of his land was not capable of subsisting as an easement. The right found by the judge was such a right and so was not capable of being an easement and could not have been acquired by prescription. Whether a right to park deprived the servient owner of any reasonable use of his land was a matter of degree and depended on the facts of each case.

## HIGHWAYS

*Roe v Sheffield City Council & ors* (2003) EWCA Civ 1; (2003) 2 WLR 848

The claimant had a serious road accident when the wheels of his car came into contact with wet tram rails which were proud of the road surface by between 4 and 10mm. The works by the tramway company had been completed two months earlier. On appeal by both the claimant and the tramway company it was held that the duty on the highway authority to maintain the highway at public expense under s.41 Highways Act 1980 was not displaced by the statutory provisions relating to the construction of tramways. Those provisions did not expressly remove the highway authority's statutory duty. The judge had erred in holding that the highway authority could not be liable to the claimant.

## HOUSING

*Runa Begum v Tower Hamlets LBC* (2003) UKHL 5; (2003) 1 All ER 731; (2003) 2 WLR 388

Runa Begum presented herself to Tower Hamlets LBC as threatened with homelessness. They accepted a duty to provide accommodation under s.193 Housing Act 1996 and offered her a secure tenancy. She turned it down, claiming that the property offered was unsuitable. She then requested an internal review under s.202 HA 1996. The reviewing officer rejected her reasons for refusing the property as unreasonable. Mrs Begum disputed the reviewing officer's findings of fact and appealed to the county court under s.204(1) HA 1996. This allows appeal only on a point of law. The county court held that there had been a breach of Mrs Begum's rights under article 6(1) to schedule 1 to the Human Rights Act 1998 (right to have civil rights determined by an independent and impartial tribunal). The Court of Appeal allowed an appeal by Tower Hamlets LBC.

The House of Lords held that the reviewing officer did not constitute an independent and impartial tribunal for the purposes of article 6. There was no reason to doubt her impartiality but as an employee of the authority it was obvious that she was not independent of it. However the right of appeal to the county court under s.204 HA 1996 was sufficient to satisfy article 6 even though it only allowed for appeals on points of law. In any event the county court does have some power over fact finding in that it can quash a decision if there is no evidence to support factual findings made or they are plainly untenable or if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact. The jurisprudence of the European Court of Human Rights provides compelling support for the conclusion that for reasons of good administration, where there is an appeal from an administrative decision making body, the absence of a full fact-finding jurisdiction in the appeal tribunal does not disqualify it under article 6.

Although this is stated to be a decision based on ECHR jurisprudence, pragmatic considerations clearly played a part. As Lord Bingham says at paragraph 5, if the term "civil right" is given a broad interpretation then similarly there must be a flexible approach to the requirement of "independent and impartial review" if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided. Lord Hoffman adds (at paragraph 44) that Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes. As to the question of contracting out fact-finding to an independent tribunal the view was expressed that this was inappropriate as it would add to cost and delay.

*Al-Ameri v Kensington & Chelsea Royal LBC; Osmani v Harrow LBC (Glasgow City Council intervening)* (2003) EWCA Civ 235; (2003) 2 All ER 1

Both appellants were asylum seekers allocated by the National Asylum Support Service (NASS) to accommodation in Glasgow. Thereafter Mr Al-Ameri was granted exceptional leave to remain and Mrs Osmani was granted indefinite leave to remain as a refugee. As a result their entitlement to accommodation under the NASS scheme came to an end. They both moved to London and were accepted as homeless and entitled to accommodation under s.193 Housing Act 1996. However in both cases the local authority took the view that the appellants had a local connection with Glasgow under s.199(1)(a) HA 1996 and so referred the case to Glasgow City Council. The appellants contended that accommodation provided pursuant to the NASS scheme could not give rise to a local connection under s.199(1)(a). The Court of Appeal agreed. S.199(1)(a) provides that a person has a local connection with the district of a local housing authority if he is or was normally resident there and that residence was of his own choice. Here the residence was not of the appellants' choice. Under the NASS scheme asylum seekers had no choice whatever as to the location of their accommodation. If they refused what was offered they would be destitute. It would be a contradiction in terms to hold that a person whose preferences are to be left wholly out of account when he is accommodated under the Immigration and Asylum Act 1999 is to be regarded under the Housing Act 1996 as becoming resident "of his own choice" in a particular area.

*Medina Housing Association Ltd v Case* (2002) EWCA Civ 2001; (2003) 1 All ER 1084

The claimant housing association brought possession proceedings against the defendant tenant based on breach of a clause in the tenancy agreement prohibiting anti-social behaviour towards other tenants in the locality. They were granted an order for possession and also obtained an injunction for a term of five years against further anti-social behaviour.

On appeal it was held that the injunction should not have been granted. The purpose of an injunction is to prevent future breaches of contract. The order for possession brought the contract (being the tenancy agreement) to an end and thereafter there was no contract upon which an injunction could be founded. The court had no jurisdiction to grant an injunction. It was not suggested that a claim in tort could properly be made by the housing association, although such a claim could probably have been made by the other tenants. S.152 Housing Act 1996 provides a statutory basis for the grant of an injunction against anti-social behaviour, but this is only available to local authorities.

## LANDLORD AND TENANT ACT 1954

*Pennycook v Shaws (EAL) Ltd* (2003) EWHC 2769 (Ch); (2003) 2 WLR 1265

The landlord gave notice under s.25 of the 1954 Act terminating a tenancy of business premises. S.24(1) allows the tenant to apply to the court for a renewal of the tenancy following a s.25 notice. However the tenant must give notice within two months of the s.25 notice that he is not willing to give up possession (s.29(2)). Here the tenant mistakenly gave notice that he was willing to give up possession and then gave notice that he was not. Both notices were given within the two month time limit. The judge struck out the tenant's application for a renewal of the tenancy on the basis that the first notice was binding on him. On appeal Pumfrey J held that the second notice fulfilled the notification requirement under s.29(2) even though there had been an earlier notice saying that the tenant was willing to give up possession. The court must determine whether in all the circumstances the tenant was entitled to resile from the first notice and substitute a new statement of his intention. Each case must be dealt with on its own merits.

## LEASES

*Go West Ltd v Spigarolo & anor* (2003) EWCA Civ 17; (2003) 2 All ER 141; (2003) 2 WLR 986

The claimant tenant held premises on two leases from the defendant landlords, each lease containing a covenant against assignment save where the landlords' consent had been given. Consent was not to be unreasonably withheld or delayed. The covenants were subject to s.1(3) Landlord & Tenant Act 1988, which requires that where a tenant serves a written application for consent the landlord must reply within a reasonable time either giving consent or stating the reasons for withholding it. The tenant sought licence to assign on 13th March 2001. On 30th May the landlords replied refusing consent, although correspondence continued thereafter. The Court of Appeal held that the landlords' response on 30th May 2001 brought the "reasonable time" in s.1(3) to an end. It was not open to the landlords to reconsider the tenant's application during the remainder of what might have been a reasonable period had they not replied when they did. The landlords were in breach of statutory duty on 30th May 2001 because they had unreasonably failed to give consent and had also failed to give consent within a reasonable time. Nothing that had happened after that date expunged the breach or absolved the landlords from the consequences.

## OCCUPIERS' LIABILITY

*Tomlinson v Congleton Borough Council & anor* (2002) EWCA Civ 309; (2003) 2 WLR 1120

The claimant dived into a lake which had formed in a disused quarry owned and occupied by the first defendant and managed by the second. There were prominent warning notices and rangers were employed to give oral warnings against swimming and to hand out safety leaflets. The defendant was aware that the warnings had little effect in preventing swimmers and that there had been several accidents. It intended to plant vegetation to prevent access to the lake but had not done so because of a shortage of money. The claimant ignored the warning signs and on diving in struck his head on the shallow bottom of the lake and suffered severe spinal injuries. The claim was dismissed on the basis that the risk was obvious and had been willingly accepted by the claimant, and that the warnings were sufficient. It was allowed in part on appeal. The Occupiers' Liability Act 1984 was considered with some care. For the purposes of determining what care is reasonable in all the circumstances under s.1(4) the focus is on the duty owed to the individual claimant. In view of the gravity of the risk of injury, the frequency of exposure to the risk, the failure of the warning signs to curtail it, and the attractiveness of the beach and the lake, some duty was owed. The duty owed was found to include the landscaping and planting necessary to deter swimming in the lake. In failing to carry out this work the defendant was in breach of the duty it owed to the claimant. The trial judge's assessment of two-thirds contributory negligence was upheld.

*Donoghue v Folkestone Properties Ltd & anor* (2003) EWCA Civ 231; (2003) 2 WLR 1138

The claimant, a professional diver, dived into a tidal harbour from a slipway and broke his neck. The accident happened after midnight in mid-winter. The harbour was owned and occupied by the defendants. There were warning notices at the head of steps leading down into the water but not on the slipway. The notices forbade jumping and swimming in the harbour. At first instance the defendant was found 25% liable because it knew of a substantial number of trespassers swimming and diving in the harbour and had failed to place a warning notice on the slipway. The defendant's appeal was allowed. The existence of a duty had to be determined by the likelihood of the individual claimant's presence in that vicinity at the actual time and place. It did not follow that because a duty was owed to trespassers swimming in summer of whom the defendant was aware, a similar duty was owed to such trespassers in the winter. The defendant had no reason to believe that the claimant or anyone else would be swimming in the harbour in mid-winter in the middle of the night and so no duty was owed.

## TRESPASSERS

*Regina (Fuller & ors) v Chief Constable of the Dorset Police* (2001) EWHC Admin 1057; (2003) QB 480

A group of travellers set up an encampment on a rubbish tip site owned by the borough council. After a while the borough council, the county council and the police made a joint decision to give the travellers 48 hours' notice to vacate the site. On the morning of 29th August a representative from the borough council visited the site with a police inspector, informed the travellers that they were trespassers, and required them to leave by 10am on 31st August. At the same time the police inspector gave a direction under s.61(1) Criminal Justice and Public Order Act 1994 directing the travellers to leave the land by 31st August. On a judicial review it was held that the police's direction to leave was unlawful. It was implicit in s.61 that the trespassers must have failed to comply with the steps taken by the occupiers to ask them to leave before the police could lawfully give a direction. A direction under s.61(1) was an order to leave immediately rather than at a future time. Since the travellers had not been given a

chance to comply with the borough council's direction to leave and since the police direction was a direction to leave in two days' time, the police direction was unlawful and would be quashed. S.61 was compatible with sch 1 to the Human Rights Act 1998. Particular consideration was given as to whether it was compatible with articles 3, 6, and 8, and article 1 of protocol 1. Per curiam the court observed that the concept of "home" within article 8 involves a degree of continuity. The nature of a person's private and family life must be considered where a breach of article 8 is alleged. The degree of interference with the family life of those with a transient lifestyle will be significantly attenuated as compared with persons who have a stationary lifestyle.

## In brief

### Covenants

*Dano Ltd v Earl Cadogan & ors* (14th March 2003) TLR Ch Div

The term "working classes" is capable of being given a current meaning so that a restrictive covenant that limited burdened land to the housing of the working classes was not so uncertain that it was no longer capable of being enforced. This was so even though the intention of the parties to the conveyance had been that the term should be defined in the light of the social and economic conditions then prevailing.

### Housing

*Forbes v Lambeth LBC, Regina (Forbes) v Lambeth LBC* (10th March 2003)  
TLR QBD

Where a local authority applied for possession against an introductory tenant, s.128(3) Housing Act 1996 required the court to have regard to the local authority's decision to bring possession proceedings. If there was a series of decisions the court might have to consider which decision was relevant.

*Kensington & Chelsea LBC v O'Sullivan & anor* (27th March 2003) TLR CA

Where a local authority landlord was misled by the husband, the sole tenant, into believing that he was living alone and granted him a new tenancy, there was no breach of his wife's rights under Article 8 to sch 1 Human Rights Act 1998 (respect for private and family life). She remained there as a trespasser and an order for possession could be granted against her. The policy of treating the remaining resident as a trespasser could not be said to be discriminatory contrary to Article 14.

*Hackney LBC v Sareen* (9th April 2003) TLR CA

An applicant for housing assistance under ss.183 and 184 Housing Act 1996 had no right to require a local authority under s.202 of that Act to review its decision not to refer his application to another authority under s.198. The statutory scheme was not intended to give an applicant a right of review or appeal if it gave him what he asked for, namely housing by the authority to which he had applied. If he wanted to be housed in another local authority area he should have applied there.

*Knowsley Housing Trust v Revell; Helena Housing Ltd v Curtis* (17th April 2003) TLR CA

The local authority had commenced possession proceedings and had then transferred the title of those properties to a registered social landlord, converting the tenancies into assured tenancies under Housing Act 1988. If the registered social landlord wished to

continue the proceedings it could ask the court to dispense with service of a s.8 notice under s.8(1)(b). The court's discretion under that section was wide enough to allow this where the reality was that the landlord relied on the same breach of the same term in the same tenancy and the relief sought was no different. However the court should consider the tenant's views.

*Alamo Housing Co-operative Ltd v Meredith & ors* (21st April 2003) TLR CA

A housing association had rented property from a council and sublet it. The interest of the housing association was determined on the expiry of a notice to quit by the council. However it retained a sufficient interest in the property to entitle it to evict the subtenants by reason of an exception contained in the termination clause of the lease.

## Landlord and Tenant Act 1954

*Zarvos v Pradhan & anor* (4th April 2003) TLR CA

A landlord who failed to adduce evidence of the financial viability of his plans to carry on his own business following the termination of a tenancy of business premises had not established grounds for opposing the grant of a new tenancy.

## Procedure

*Regina (Lester) v London Rent Assessment Committee* (25th March 2003)  
TLR CA

A statutory periodic tenant who sought to object to a rent increase imposed by the landlord had to ensure that the notice of objection was received by the rent assessment committee within the statutory period. The use of the word "*refer*" in Housing Act 1988 meant that the tenant had to deliver the notice to the committee in time. "*Refer*" means "*deliver to*". This is its ordinary and natural meaning. An application has not been referred to a person until he has received it.

*Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* (15th May 2003) TLR Ch  
Div

Where a notice served under s.25 Landlord and Tenant Act 1954 is sent through the post by recorded delivery to the addressee at his place of abode, the effect of s.23 Landlord and Tenant Act 1927 is that there is an irrebuttable presumption of service. Service was deemed to be the date that the notice was put in the post and not the date of receipt.

*Cranfield & anor v Bridgegrove Ltd & other cases* (16th May 2003) TLR CA

This case clarified a number of unresolved difficulties concerning the courts' powers under rule 6.9 and rule 7.6 of the Civil Procedure rules, which, respectively, allow the court to dispense with service of a document and to order an extension of time for service of the claim form. The case of *Smith v Hughes & anor* (one of the joined cases) raised issues as to the meaning and effect of rule 6.5(6), which provides for service to be effected on an individual at his last known residence. If the conditions precedent to the operation of the rule were satisfied (no solicitor acting and no address given for service) then no basis existed for holding that if the claimant knew or believed that the defendant was no longer living at his last known address, service could not be effected by sending the claim form to it.

## Rent

*Day v Coltrane* (14th April 2003) TLR CA

An uncleared cheque delivered to the landlord or his agent at or before the hearing and which was accepted by him or which he was bound by earlier agreement to accept, was to be treated as payment at the date of delivery provided that the cheque was subsequently paid on first presentation. At the hearing the judge could adjourn for a short time to allow the cheque to clear although he was not bound to do so if he had reason to conclude that the cheque would not be paid. Presentation of a cheque could thus be a defence to possession proceedings.

## **OTHER DEVELOPMENTS**

### **HOUSING BILL**

On 31st March 2003 the Office of the Deputy Prime Minister published a draft Housing Bill (Cm Paper 5793). The Bill contains proposals for home information packs for each house conveyancing transaction (formerly the "seller's pack"), a system for selective licensing of private landlords; a licensing scheme for houses in multiple occupation; a replacement of the current fitness standard with a new hazards rating system; further curtailment of the right to buy; and a Social Housing Ombudsman for Wales. The consultation document is on the internet at [www.housing.odpm.gov.uk](http://www.housing.odpm.gov.uk) and the consultation period ends on 9th June 2003.

### **LAND REGISTRATION ACT 2002**

This Act is due to come into force on 13th October 2003. Rules under the Act are expected to be published shortly. So far there have been two commencement orders. The Land Registration Act 2002 (Commencement (No.1) Order 2003 SI 935 brought into force section 128, which contains supplementary provisions relating to the making of secondary legislation under the Act; section 129, which provides that the Act binds the Crown; section 130, which relates to the Act's application to internal waters; sections 131 and 132, which relate to the interpretation of the Act; section 134(1), which confers power to make transitional provisions; and section 136, which contains the Act's short title, commencement and extent provisions. This order took effect on 4th April 2003.

The Land Registration Act 2002 (Commencement No.2) Order 2003 SI 1028 brought into force section 107, which contains provisions relating to the appointment and qualification of the Adjudicator to Her Majesty's Land Registry and gives effect to Schedule 9; Schedule 9, which makes further provision about the Adjudicator; and Schedule 11, paragraph 28, which adds the Adjudicator to Her Majesty's Land Registry to the list of office holders in Schedule 5 to the Judicial Pensions and Retirement Act 1993 subject to compulsory retirement at 70 with the possibility of annual extension up to 75. This order took effect on 28th April 2003.

### **STAMP DUTY: LAND TAX**

The new Stamp Duty Land Tax is due to take effect on 1 December 2003. This will replace stamp duty and will be a tax on land transactions, whether or not a document effects the transaction.

### **STAMP DUTY: EXEMPTIONS FOR DISADVANTAGED AREAS**

The Stamp Duty (Disadvantaged Areas) (Application of Exemptions) Regulations 2003 SI 1056 are made under section 92A of the Finance Act 2001. This confers upon the Treasury power to provide that the stamp duty exemptions relating to land in

disadvantaged areas (contained in section 92 of, and Schedule 30 to, that Act) shall not apply in cases specified by reference to certain matters. Regulation 3 specifies cases in which the exemptions are not to apply. The cases are where all the land in question is residential property (within the meaning given by section 92B of the Finance Act 2001) and the amount or value of certain consideration is more than £150,000. This restriction of the exemptions applies only in relation to the stamp duty chargeable in respect of that consideration. Regulation 4 provides additionally that, where the instrument in question is a lease of land, the exemptions are not to apply where the rate or average rate of rent is more than £15,000.

## **MODEL CLAUSES FOR COMMERCIAL LEASES**

The British Property Federation and the British Council of Offices have published a set of model clauses for commercial leases. These are designed to encourage standardisation of commercial leases and can be found on the internet at [www.bpf.org.uk](http://www.bpf.org.uk) (in the publications section).

## **COUNTY COURT FEES INCREASE**

Court fees for county court possession proceedings increased on 1st April 2003 under the County Court Fees (Amendment) Order 2003 SI 648. It now costs £130 (instead of £120) to issue a claim for possession, and £90 (rather than £80) for a request for a warrant.

## **Sources**

The following sources have been used in the compilation of this bulletin: The Law Reports 2003 (QBD, Ch Div and HL parts 2, 3 and 4 covering February, March and April); 2003 1 All ER parts 8 to 12 and 2003 2 All ER parts 1 to 8 covering 20.2.03 to 21.5.03; 2003 WLR parts 8 to 19 covering 28.2.03 to 23.5.03; TLR from 22.2.03 to 30.5.03; recent legislation.

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