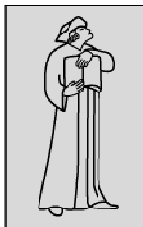


THOMAS · MORE · CHAMBERS



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

MAY 2007

CASE LAW UPDATE

BUSINESS TENANCIES

The Court of Appeal has recently given a ruling on costs which may assist landlords applying for the grant of a new tenancy under the 1954 Act in circumstances where the tenant ultimately does not wish to take a new tenancy. The tenants had indicated that they wanted a new lease but had then delayed in responding to the landlord's proposals. The landlord issued proceedings on 20th April 2005. On 6th April 2006, after the date for the final hearing on 9th March 2006 had been adjourned, the defendant tenants wrote to the court to say that they no longer wanted a new lease. When the matter returned to court in June 2006, the question of interim rent had been resolved and the only question was costs. The Court of Appeal held that the judge was wrong to make no order as to costs. The normal rule, as found in CPR 38.6(1), is that where proceedings terminate because the defendant concedes the relief sought, the defendant must pay the costs unless he can show special circumstances justifying a different order. Service on the court by the defendants of notice under s.29(5) LTA 1954 was the equivalent of a notice to discontinue proceedings in which they had been seeking an order from the court awarding them a new tenancy upon terms settled by the court. The defendants were ordered to pay the whole of the landlord's costs of the county court proceedings. The order might have been different if the landlord's application had been premature. *Lay & ors as Trustees of the Portman Estate v Drexler & ors trading as Littlestone Martin Glenton* [2007] EWCA Civ 464.

COMMONS

A claim seeking a declaration that a plot of land was not registrable as a new green for the purposes of s.13 Commons Registration Act 1965 was struck out. The question whether a given piece of land is or is not a town or village green depends upon registration, not upon proving the constituent elements on an application for registration. A piece of land cannot become a green unless it is registered as such. Registration can only occur following an application in accordance with the applicable regulations and it is not open to the court to decide the question. There were sound practical reasons supporting this approach. Any decision reached by the court would not be binding on the registration authority or on any

local inhabitants other than the defendant. The process which has developed for contested applications for registration (usually a non-statutory public inquiry) is local and relatively cheap, as each party meets its own costs. If a person is dissatisfied with the decision of the registration authority it can be challenged in the courts by way of judicial review or an application under s.14(b) of the 1965 Act. **McLaren v Kubiak** [2007] EWHC 1065 (Ch).

CONSENTS

The head-lessee of a residential block of flats in Mayfair sought to assign its interest (a 99 year lease expiring in 2063) to the claimant, a dormant company which was in existence simply to become the new head-lessee. HHJ Cowell held that the freeholders were reasonable in withholding consent to the assignment, despite the offer of a guarantee from the claimant's sole director for a period of three years. At the date of trial, subleases generated sufficient income to pay the rent under the head lease, though the rent was due to increase following a rent review. It could be accepted as a general rule that the better the security the less need there is to be concerned about the strength of the covenant to pay the rent. However the freeholders were reasonably entitled to take the view that they wanted the liability for the rent to be secured by a suitable guarantee and that they did not wish to rely on alternative security such as forfeiture, which would inevitably involve them in the management of the subleases. If the guarantor was so sure that the claimant would have no problem in receiving sums sufficient to pay the head rent, he should have no problem in giving a guarantee for the period of the claimant's ownership. The freeholders reasonably feared a diminution in the value of the head lease, which could result if flats currently occupied by regulated tenants fell vacant and were sold on long subleases with low ground rents. It was perfectly reasonable for a landlord who saw a clear risk to seek to avoid it, and to cast the risk of the claimant's insolvency onto the very man who protested that the claimant would have no difficulty in paying. HHJ Cowell re-emphasised that each case turns on its own facts. **Landlord Protect Ltd v Dolman & ors** [13th October 2006] Central London County Court; [2007] 18 EG 154.

CONSTRUCTIVE TRUSTS

Mrs Deprince submitted that a classic case of a common intention constructive trust or proprietary estoppel in her favour precluded Revenue & Customs from recouping the full realisable assets of her husband in the form of a property bought in the name of her husband's company. Mrs Deprince had made contributions to the mortgage and claimed that she had a 20 to 30% beneficial interest in the property. The judge found that the evidence of the Deprinces was unreliable as to an express agreement, as they had each given evidence of entirely different express arrangements. This undermined the notion of any common intention such as to support the implicit grant of a beneficial interest. The evidence of payments of the mortgage was also inconsistent and a mortgage statement had not been provided. The evidence was also not sufficient to establish a case for proprietary estoppel, particularly as no monies had been paid at all until after the purchase of the property. **Revenue & Customs Prosecution Office v Deprince & ors** [2007] EWCA Civ 512.

EASEMENTS

The owners of a leasehold interest in no.231 Leigh Road, West Houghton, Bolton, had an express right of way over South Road, which ran along the south side of the neighbouring property, no.233. The lease was granted in 1910 for a term of 999 years. In 1986 the then owners of the leasehold interest in no.231 acquired the freehold interest in no.231 as well. The leasehold title merged into the freehold when it was conveyed to the appellant, Mr Wall, in 1999. Contrary to what was held at first instance, this did not destroy the easement. In addition, the effect of s.62(2) Law of Property Act 1925 was such that when the freehold interest in no.231 was sold by the common owner of the freehold interests in nos.231 and 233, the right of way over South Road passed with the transfer of the freehold. It was a “right or advantage” enjoyed with the house at no.231 and so was capable of being the subject of an easement. **Kent v Kavanagh** [2006] EWCA Civ 162 was followed and Carnwath LJ noted that it showed a broad approach to the construction of s.62 so as to overcome technicalities and ensure that the legal title reflects the reality. There had been difficulties between the neighbours at nos.231 and 233 and it was noted that Mr Wall had a more convenient means of access over Back Street, which was a public highway. Although he had succeeded in establishing his right of way over South Street, this did not enable him to use it for purposes for which he had equally or more convenient access by another route. **Wall v Collins & anor** [2007] EWCA Civ 444.

HOUSING

The House of Lords dismissed an appeal of Birmingham City Council, thereby upholding the finding of the Court of Appeal that Mr Walker had become the secure tenant of a dwelling house by succession, following the death of his mother Mrs Walker in February 2004. Mrs Walker had herself originally been a joint tenant together with her husband, who died in 1969. The Housing Act 1980 only allows for one succession, and if the succession provisions had retrospective effect, Mrs Walker would herself have been a successor pursuant to s.88(1)(b) of the Act (joint tenant becoming sole tenant). Their Lordships agreed with the Court of Appeal that the provisions should not have retrospective effect. S.88(1) refers to events in relation to tenancies which have become secure tenancies, and not to events which happened earlier. There is a general presumption against retrospectivity; the word “successor” most naturally meant “successor to a secure tenancy”; and there was no rational purpose in giving the definitions a retrospective effect. **Birmingham City Council v Walker** [2007] UKHL 22; [2007] 21 EG 131 (CS).

A local authority is entitled to vary the terms of a secure tenancy pursuant to ss.102 and 103 Housing Act 1985. By s.102, they may be varied in three ways: by agreement; pursuant to existing contractual arrangements (in relation to payments of rent, council tax etc); and by service of a notice of variation under s.103; but not otherwise. It was not possible for the local authority to give up its power of unilateral variation by including in all of its tenancy agreements a clause stating that it could only change the terms of a tenancy if a majority of the tenants’ representatives agreed. Ss.102 and 103 are a complete code governing the variation of the terms of a secure tenancy. A system which circumscribed that power by giving the tenants’ representatives an absolute veto was a fetter on the rights of the local authority and was incompatible with the statute. **R (on the application of Kilby) v Basildon District Council** [2007] EWCA Civ 479.

An assured tenancy can terminate in the same way as a secure tenancy if a suspended order is breached. The tenant will become a tolerated trespasser in the same way as a secure tenant does in these circumstances. This is so notwithstanding that there is no equivalent to s.82(2) Housing Act 1985 in Housing Act 1988. S.82(2) provides that where a landlord obtains an order for the possession, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order. The answer to when any particular assured tenancy ends will be found in the construction of the order made by the county court. Where the order is not suspended or postponed, either on its making or at a time before execution, **Artesian Residential Developments Ltd v Beck** [2000] QB 541 appears to be authority for the proposition that the order for immediate possession terminates the tenancy. Where a date for possession is given in the order, the tenancy will terminate on that date. If the court wishes to avoid terminating the tenancy in this way it can order the delivery of possession but postpone the date for delivery until a date to be fixed, as suggested in **Bristol City Council v Hassan** [2006] EWCA Civ 656. **White v Knowsley Housing Trust (Intervener: Secretary of State for Communities and Local Government)** [2007] EWCA Civ 404; [2007] 20 EG 294 (CS).

The lawful occupation of trust property by beneficiaries on typical repairing and insuring terms is within the protection conferred by the Protection from Eviction Act 1977. Although the obligations to repair and insure were not in terms a fee for occupation they were necessarily the quid pro quo for occupation, so the licence was granted for money's worth and was not excluded under s.3A(7)(b) PEA 1977. Possession of the property could only be recovered by proceedings in the appropriate county court. **Polarpark Enterprises v Allason** [2007] EWHC 1088 (Ch).

A rent-free arrangement for the exclusive use and occupation of premises does not create a tenancy if the correct inference from the purpose of the arrangement and the surrounding circumstances is that there is no intention to create a landlord and tenant relationship between the parties. The judge found that the arrangement was for the continued sharing of the expenses of a joint household by two friends. One occupant was a beneficiary under the trusts under which the entire flat was held and therefore was not a tenant. This made it very difficult to infer that there was an intention to grant a tenancy to the other occupant. The purpose of the arrangement and its terms were entirely consistent with the conclusion that the trustees did not expressly or by implication grant a tenancy of the flat to the appellant, notwithstanding the fact that there was exclusive possession and the payment of money towards expenses. **Vesely v Levy & ors** [2007] EWCA Civ 367.

The Court of Appeal allowed the appeal of Haringey LBC in a homelessness matter, finding that the reviewing officer had given the respondent's application proper and fair consideration. The reviewing officer was entitled to consider the contents of a previous housing file on the respondent from Enfield LBC when considering her credibility and whether or not she was intentionally homeless. The reviewing officer had not slavishly followed the findings of the previous housing file in respect of his own decision, and had not relied solely upon the enquiries made previously. The fact that the respondent had not mentioned domestic violence at any time prior to a witness statement made to Haringey LBC was a relevant factor in the decision that the housing officer had made that it was not reasonable of her to give up her accommodation. **Eren v Haringey LBC** [2007] EWCA Civ 409.

HUMAN RIGHTS

In a decision relating to the compulsory purchase of land required for the Olympic Games, Wyn Williams J held that the Secretary of State for Trade and Industry acted lawfully in confirming a purchase order even though suitable relocation sites had not been found for gypsies and travellers living on caravan sites on the land. There was an interference with the Article 8 rights of those gypsies and travellers but it was justified and proportionate. It was not necessary for the Secretary of State to demonstrate that the measure taken was the least intrusive available in order for the decision to be proportionate. In any event the measure taken was the least intrusive available. **Smith & ors v Secretary of State for Trade and Industry (Interested Party: London Development Agency)** [2007] EWHC 1013 (Admin).

INDEMNITIES

The claimant freeholder of commercial premises served a schedule of terminal dilapidations in the sum of £335,000 in respect of alleged breaches of the tenant's repairing covenants. The tenant's parent company advised that the tenant had sold its interest to the defendant, which had undertaken to indemnify the tenant and the parent company. The tenant and parent company assigned their rights under the indemnity to the claimant freeholder. The defendant's argument that the claimant was not able to enforce the indemnity failed on a trial of preliminary issues. On expiry of the lease, the tenant was liable in respect of breaches of covenant and was entitled to be indemnified by the defendant in respect of those liabilities. The assignment was not of a debt, but of a cause of action, namely the right to be indemnified. The assignment did not affect the enforceability of the entitlement and nor did it release the defendant. Following **Technotrade Ltd v Larkstore Ltd** [2006] EWCA Civ 1079, it was clear that although the defendant could not be placed in a worse position by the assignment, the assignment did not diminish the defendant's liability. The court should strive to ensure that a wrongdoer does not escape liability merely because the cause of action lies in the hands of someone other than the person who suffered the loss. The court should endeavour to give effect to the aims and commercial object of the deed of assignment, which was to transfer to the claimant those rights and remedies that the tenant and parent had against the defendant, including the right to be indemnified. The reassignment provisions did not operate so as to release the defendant but merely to suspend the rights of the tenant and parent to pursue their claims against the defendant. The deed of assignment did not amount to a compromise of any claims the claimant might have against the tenant, but simply operated as a stay. **Bizspace (NE) Ltd v Baird Corporatewear Ltd** [9th January 2007] Ch Div; [2007] 17 EG 174.

INSOLVENCY

After PRG Powerhouse entered into a CVA, Etherton J considered whether the CVA was effective to release Powerhouse's parent company, PRG Group Ltd, from liability in respect of guarantees provided by it to landlords of premises let to Powerhouse. It was held that on a true construction of the CVA and the guarantees, the claimant creditors were obliged to treat the guarantees as having been released. There was nothing to prevent Powerhouse from enforcing that obligation. It was legally possible for a CVA to provide that a creditor could not take steps to enforce an obligation of a third party to the creditor that would give

rise to a right of recourse by the third party against the debtor company. However the CVA was unfairly prejudicial to the claimants as guaranteed landlords, within the meaning of s.6(1)(a) Insolvency Act 1986. The CVA left the claimants in a worse position than without the CVA, having regard to both past and future possibilities. But for the CVA the claimants would have had the benefit of the guarantees, which were of value and would have been enforceable both now and in the future. **Prudential Assurance Company Ltd & ors v PRG Powerhouse Ltd & ors** [2007] EWHC 1002 (Ch); [2007] 19 EG 164 (CS).

LEASEHOLD ENFRANCHISEMENT

The Court of Appeal has held that head-lessees do not have the right of individual lease extension conferred by Chapter II of Part I of the Leasehold Reform, Housing and Urban Development Act 1993. A lease under Chapter II can include property other than a flat. It does not follow that the right of individual lease extension is conferred on the head lessee of a long lease of a building which includes multiple flats and common parts. If Parliament had intended this it would surely have made provision in the Act. It is not usual to have a complex legislative scheme dealing with real property where essential elements in a transaction have to be left to negotiation. The failure in the otherwise very detailed legislation to address the difficulties of individual lease extension by a head-lessee was so remarkable that the proper inference was that the 1993 Act did not apply in that situation. **Maurice v Hollow-Ware Products Ltd** [2005] 2 EG 71 was wrongly decided and was overruled. The county court was bound by decisions of the High Court even when it was exercising the same first instance jurisdiction. On a separate issue, it was ruled that a lessee can be required to pay a deposit under paragraphs 2 and 3 of schedule 3 to the Leasehold (Collective Enfranchisement and Lease Renewal) Regulations 1993 even where the landlord disputes the entitlement to a new lease. **Howard de Walden Estates Ltd v Les Aggio & ors; Earl Cadogan and Cadogan Estates Ltd v 26 Cadogan Square Ltd** [2007] EWCA Civ 499.

The Lands Tribunal considered the question of the price payable on enfranchisement under the Leasehold Reform Act 1967 where there was a special purchaser. The actual words of the statute suggest that the price payable is a factual matter, to be considered, in the no-Act world, on the basis of two assumptions only: the market being unrestricted and the seller being willing. No other assumption is implied. If the evidence shows that, selling in the open market, the seller would not have been aware of the existence of a special purchaser or his special interest, then as a matter of fact he would not have achieved a price that included a special purchaser's premium. There was no justification for imputing to the seller knowledge that he would not have had. In case they were wrong in taking the view that knowledge of the special purchaser did not have to be imputed to the seller, the Lands Tribunal went on to calculate the amount of the premium that would have been agreed with the special purchaser. **Trustees of the Will of the Second Duke of Westminster (deceased) & anor v Regis Group (Barclays) Ltd** [2007] EWLands LRA/82/2006.

MORTGAGES

In an interesting case about brokers' commissions, the Court of Appeal rejected arguments based on consumer credit legislation but ordered the lender to pay to the defendant borrowers a sum equivalent to the commission paid to the broker who had arranged the

loan, plus interest. The borrowers had been in arrears with their mortgage and arranged a further loan which was secured by way of a second charge on their home. The agreement for the loan was held to be enforceable both at first instance and on appeal, and the appellate judgment is useful for its clear consideration of the applicable consumer credit legislation. More importantly, it was held that the broker had breached his fiduciary duty to the borrowers by failing to give full disclosure of the commission which was to be paid to him by the lender. The burden of proving full disclosure is on the agent. There had been partial disclosure such that the commission was not secret. However the borrowers' informed consent to the commission had not been obtained. As this was a half-way house case, the court had discretion whether or not to grant rescission of the loan agreement. The fair result was to order the lender to pay equitable compensation for procuring the broker's breach of duty, hence the order for payment of £240 plus interest. Given current levels of consumer debt and recent interest rate rises it seems likely that there will be more of these types of cases. **Wilson & anor v Hurstanger Ltd** [2007] EWCA Civ 299.

PROFESSIONAL NEGLIGENCE

A surveyor was found to have been negligent when acting on behalf of the Earl of Malmesbury in negotiating the grant of leases to Bournemouth International Airport Ltd for car parking. The standard of professional skill and care was that to be expected of a major national firm, holding itself out as having the competence to act in connection with the development of land adjacent to an airport. The individual surveyor concerned was in a position equivalent to that of specialist Queen's Counsel. In particular it was negligent not to press for a turnover rent. If the surveyor had stood out for a turnover rent at a modest level in 2001, both parties would have been in a position where they could not allow the negotiation to fail. The most likely outcome was that the parties would have agreed on a figure of 10% (not the 80% claimed by the Earl). The loss was to be assessed on the valuation basis as at the date of the transactions. There were no special circumstances such that the valuation basis should not be applied, and there was no justification for assessing the value at dates later than the transaction dates. The Earl's solicitor had not been negligent as he had not been retained to check the advice given by the surveyor, and was entitled to assume that the surveyor had done his job. In a short subsequent judgment, Jack J has held that damages will be assessed on both the valuation basis and also on the basis which he has found to be incorrect, namely the likely lost income. This will enable the claimant to see whether there is a substantial difference meriting appeal, and will also save court time and costs in the event that there is a successful appeal against the ruling on the appropriate measure of damages. **Earl of Malmesbury & ors v Strutt & Parker & ors** [2007] EWHC 999 (QB); [2007] EWHC 1132 (QB); [2007] 21 EG 130 (CS).

RECTIFICATION

The Court of Appeal considered the effect of a break-clause in a reversionary sub-underlease. It was obvious from a reading of the 1985 lease on its own that something had gone wrong. Comparison with the 1974 draft left no doubt as to the parameters of the error, but did not yield a definitive answer. Either too much had been left out, or not enough. However the existence of two plausible alternatives did not undermine the case for correction or force the court to adopt an implausible solution. **KPMG LLP v Network Rail Infrastructure Ltd** [2007] EWCA Civ 363.

RENT REVIEW

The rent under the current lease and the rent of an adjoining property were relevant valuation evidence when determining the market rent of a lock-up shop in Walm Lane, NW2, pursuant to s.34(1) Landlord and Tenant Act 1954. In order for those rents to be relevant it was not necessary for the party relying on them to produce positive evidence of the circumstances in which they were determined. It is for the party who challenges the relevance of the passing rent and/or the rent of the adjoining property to adduce evidence of circumstances relied on to show that the rents are not relevant factors in the valuation exercise of determining the open market rent. ***Trans-World Investments Ltd v Dadarwalla*** [2007] EWCA Civ 480.

REPAIRING COVENANTS

A covenant “to keep in good and substantial repair” does not require the tenant to put the property into perfect repair or pristine condition. The standard of repair is an objective one, that of an intending occupier “who judges repair reasonably by reference to his intended use of the premises.” If there is more than one possible method of repair, each of which would comply with the required standard, the choice is for the tenant to make. Where there is a dispute between replacement and repair, replacement will only be required if repair is not reasonably or sensibly possible. A tenant cannot rely on his own breaches of covenant to lower the standard of repair. Here there was a strong case for concluding that patch repairs to the roof were more appropriate than re-covering with overcladding. Patch repairs were not futile or impracticable. The fact that the landlord had chosen the more expensive option of overcladding did not bring the case within the second limb of s.18 Landlord and Tenant Act 1927, as the overcladding was a work of repair rather than a structural alteration. ***Carmel Southend Ltd v Strachan & Henshaw Ltd*** [2007] EWHC 1289 (TCC).

RIGHT TO BUY

A secure tenant made a right to buy application pursuant to the Housing Act 1985. A suspended order for possession was made and breached, so that the tenant became a tolerated trespasser. It was held that the subsequent retrospective revival of the tenancy, following the tenant’s application to set aside the order for possession, did not revive the right to buy application. The right to buy can only be exercised through a particular application and if the right to buy falls, so does that application. The key to the interpretation of s.121 HA 1985 was that the right to buy was only exercisable through an application or claim under the statutory scheme. If the right to buy cannot be exercised or ceases to be exercisable, then the application or claim which established that right to buy must also cease to be exercisable. ***London Borough of Islington v Honeygan-Green*** [2007] EWHC 1270 (QB).

OTHER DEVELOPMENTS

COMMONS

The Commons Registration (General) (Amendment) (England) (Revocation) Regulations 2007 SI 1553 revoke the Commons Registration (General) (Amendment) (England) Regulations 2007 before they come into effect on 1st June 2007. The effect of these Regulations is to ensure that the existing provisions in the 1966 Regulations are not revoked and remain in force. The reason for the change is related to the decision to defer the introduction of Home Information Packs (as to which see below). The Law Society decided to defer the introduction of new non-statutory search forms because HIPs were not coming into force on 1st June 2007. An additional question relating to the commons registers would have been included in the new form. As introduction of the new form CON29 was delayed it is necessary to preserve the existing statutory provisions for searching the commons registers for the time being.

COUNTRYSIDE AND RIGHTS OF WAY ACT 2000: COMMENCEMENT

The Countryside and Rights of Way Act 2000 (Commencement No.12) Order 2007 SI 1493 brings into force s.57 of and Schedule 6 to that Act, to the extent that those provisions insert ss.119D and E into the Highways Act 1980. These sections provide for the diversion of certain highways for the protection of the special features of sites of special scientific interest. The provisions come into effect on 21st May 2007.

HOME INFORMATION PACKS

Readers will be aware that Home Information Packs did not in fact come into effect on 1st June 2007. Regulations due to bring them into effect were revoked by the Home Information Pack (Revocation) Regulations 2007 SI 1525, and the Home Information Pack (Redress Scheme) (Revocation) Order 2007 SI 1536, both coming into force on 31st May 2007. The 2007 Regulations were intended to revoke and replace the 2006 Regulations, hence the latest set of Regulations revokes both the 2006 and 2007 Regulations. It seems that the introduction of HIPs will be delayed at least until 1st August 2007. Even at that stage they may only apply to properties with four or more bedrooms, with a view to application to other properties at a later date. Estate agents will probably not be required to join an approved redress scheme until April 2008.

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.

Disclaimer

The information and any commentary on the law contained in this bulletin are provided free of charge for information purposes only. No responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by any member of Thomas More Chambers. The information and commentary does not, and is not intended to, amount to legal advice and the writers do not intend that it should be relied upon. You are strongly advised to obtain specific personal advice from a lawyer about any legal proceedings or matters and not to rely on the information or comments in this bulletin.