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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

BUSINESS TENANCIES

The Court of Appeal has given an important decision on exclusion agreements under Part II Landlord and Tenant Act 1954, in *The Chiltern Railway Company Ltd & anor v Patel* [2008] EWCA Civ 178. Mrs Patel had two leases of shops on Marylebone Railway Station. She tried to argue, unsuccessfully, that the exclusion agreements were not binding. The Court considered the scheme set out in s.38A(3) LTA 1954, and Schedules 1 and 2 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. There are two forms of declaration that the tenant can make to create an exclusion agreement. One is set out in paragraph 7 of Schedule 2, and the other in paragraph 8. The form in paragraph 8 is essentially a more solemn version of the form in paragraph 7. Paragraph 8 also requires that the declaration be made before a commissioner for oaths. Mrs Patel had made the more solemn form of declaration as required in paragraph 8, even though she could have used the paragraph 7 declaration. This did not invalidate the exclusion agreement. The paragraph 8 declaration was substantially in the form of the paragraph 7 declaration, as required by paragraph 3. The parties may not always know when the lease will be entered into, and so it could be an unfair trap if they could not use the paragraph 8 form as an alternative to the paragraph 7 form. However the converse would not apply, in that a paragraph 7 declaration, being a lesser version, would not satisfy the requirements of paragraph 8. It did not matter that the declaration actually made referred to the notice having been served, rather than having been served “*not less than fourteen days before*” the date of the lease. Whether or not a notice is served before the fourteen days is not an essential factor in itself.

By s.29 Land Registration Act 2002, a registered owner is not bound by any interest whose priority is not protected at the time of registration. The priority of an interest can be protected on grounds set out in Schedule 3 to the Act, which include certain leasehold interests. Where a leasehold interest is created by parole and not put in writing and signed by the persons creating it, it will only take effect as an interest at will and will not suffice as a periodic tenancy for the purposes of the 1954 Act unless it falls within s.54(2) Law of Property Act 1925 as being a parole lease for a term not exceeding three years at the best rent which can be reasonably obtained (i.e. the market rent). Here the rent that had been agreed for the business unit was well under the market rent, so there was no valid parole

tenancy and no continuing periodic tenancy under the 1954 Act which could override the proprietor's registered interest. Although the trial judge had conducted the trial in a manner which was unfair to the appellant (who had claimed to be the tenant), the registered proprietor was entitled to possession. **Fitzkriston LLP v Panayi & ors** [2008] EWCA Civ 283.

HOUSING

A licence granted to Mr Langridge as a short term expedient by Mansfield District Council was held to be a secure tenancy under s.79 Housing Act 1985. Possession proceedings for nuisance were brought against Mr Langridge and pending the hearing he was in hospital and was then excluded from his home at 7 Mappleton Drive by the council, who feared problems with the neighbours pending the trial of the possession proceedings. The council granted him a licence of an alternative property at 30 Willoughby Court. The licence was only supposed to last until after the trial. The trial resulted in an immediate order for possession of 7 Mappleton Drive. When the council then tried to terminate Mr Langridge's licence of 30 Willoughby Court, he argued that he was a secure tenant of that property. The Court of Appeal agreed. The parties could not contract out of the relevant provisions of the Housing Act 1985. The legislation made provision for a number of situations in which accommodation made available as a temporary expedient does not create a secure tenancy. There was no such provision relevant to the present case. Mr Langridge was a secure tenant of 30 Willoughby Court. **Mansfield District Council v Langridge** [2008] EWCA Civ 264.

The Court of Appeal considered whether a housing officer carrying out a review under s.202 Housing Act 1996 should consider the facts as at the date of the original decision, or the facts as at the date of the review. Mr Omar had rejected a housing offer because it was some way from Chelsea & Westminster Hospital where his premature baby son was being treated. The child was born on 7th December 2006, the housing offer was refused on 20th February 2007 and the review was carried out in May 2007. The question of what facts may be taken into account on the review will depend on what is being reviewed. Unless there is some compelling legislative provision to the contrary, they should be dictated by what fairness requires. Common sense may often dictate the taking into account of facts as at the date of the review. However if accommodation has been offered and rejected, and the council has taken the decision that it has fulfilled its duty and so no longer makes available that property or any property, it does not seem fair on either the homeless person or the council to look at the matter at the date of review. The question in such cases ought to be whether the council was correct in taking the view that it had offered suitable property, and that can only be fairly tested by reference to the circumstances as they existed at the date of that decision. Mr Omar's appeal was allowed and the matter was remitted for a further review, which was to focus on the position as it had been at 23rd February 2007. **Omar v City of Westminster** [2008] EWCA Civ 421.

HUMAN RIGHTS

Collins J has quashed a decision by Basildon District Council to use s.178 Town and Country Planning Act 1990 to remove forty families of Irish Travellers and Gypsies from unauthorised sites within the district. S.178 empowers the local planning authority, where any steps required by an enforcement notice have not been taken within the period given for

compliance, to enter the land and take steps. An eviction inevitably constitutes an interference with an individual's Article 8 rights, and so the court, itself a public body, must consider on a judicial review application whether the enforcement action is proportionate. The decision to enforce under s.178 was likely to be unassailable in respect of most and perhaps all of the claimants in due course. However the application for judicial review succeeded on three grounds. First, the council's approach to need had been too restrictive and further consideration should be given to whether any sites could be found in the district. Secondly, the possible effects of the homelessness duty had not been sufficiently considered. Thirdly, the council's approach had been flawed in that a view had simply been taken that the site should be cleared. Instead there should have been consideration of whether there were any individual families whose circumstances were such that, whether because of serious ill-health or the needs of their children, eviction would be disproportionate in their individual cases. **McCarthy v Basildon District Council (Equality and Human Rights Commission intervening)** [2008] EWHC 987 (Admin).

LAND REGISTRATION

An application to alter a registration of title to land is a matter of private law rights. Mr Wells had registered possessory title by way of adverse possession to part of the foreshore at Pilling and Presill Sands in Morecombe Bay. Pilling Parish Council applied seeking rectification or closure of part of the title on the basis that Mr Wells had not established the title which he claimed. The council's application was cancelled on appeal, as it had no standing to challenge Mr Wells' title in private law proceedings, having no claim to any title of its own to the land. The law of land registration in Scotland was sufficiently similar to that in England and Wales for the case of **Wilson & Ors v Keeper of the Registers of Scotland** [1999] SCLR 872 to be of good persuasive authority. **Wells v Pilling Parish Council** [2008] EWHC 556 (Ch).

LEASEHOLD VALUATION TRIBUNAL: PROCEDURE

Where the LVT grants permission to appeal out of time it necessarily and by implication extends time. It is not necessary for it to state explicitly that it is doing so. The LVT has power to extend the time for applying for permission to appeal to a party who has requested permission to appeal out of time, though that party has no right to have such an application determined. **Grosvenor Estate Belgravia v Adams** [2008] EWLands LRA/131/2007.

RESTITUTION

The claimant J. S. Bloor Ltd mistakenly built a road as part of a property development at a cost of just over £93,000. In fact under the terms of the contract between them, the defendant, Pavillion Developments Ltd, should have built the road. Bloor's claim to recover the cost of building the road was unsuccessful. There was no evidence that Pavillion knew or ought to have known that Bloor intended to build or were building the road. There was no evidence that Pavillion had acquiesced in its construction. Once the road had been constructed, Pavillion had no real alternative but to accept it. Bloor did not suggest that Pavillion should have taken it up, and had not offered to pay the cost of digging it up. It was

clear from Goff & Jones: The Law of Restitution that improvements to land fell into a different category from other restitutionary claims. There was no doubt that the road was an improvement. Equity will offer relief to the mistaken improver only where the landowner has acted unconscionably. As in **Blue Haven Enterprises Ltd v Tully** [2006] UKPC 17, the landowner had done nothing positive in relation to the improvements; he had not stood by and allowed work to be carried out; there was no acquiescence or unconscionable behaviour. Nor could it be said that the building of the road was an incontrovertible benefit to Pavillion. Bloor's claim failed. **J.S. Bloor Ltd v Pavillion Developments Ltd** [2008] EWHC 724 (TCC).

RESTRICTIVE COVENANTS

A restriction preventing the use of land other than as a coach depot with an associated bungalow for residential use was not obsolete under s.84(1)(a) Law of Property Act 1925. It had only recently been imposed (in July 2000) and there had been no changes in the character of the application land or its neighbourhood which made it obsolete. However the restriction was discharged under s.84(1)(aa). The proposed residential development would be a reasonable user of the land. The practical benefit secured to the objector, Easington District Council, was the ability to control the development and use of the land, which was a benefit secured for planning purposes. There was no evidence that this benefit was of substantial value or advantage to the objector and indeed the modification or discharge of the covenant was likely to increase the value of at least some of the benefited land retained by the council. The application also succeeded under s.84(1)(c) (no injury caused by discharge or modification). Compensation was assessed at £23,500. The negotiated share approach was not appropriate and compensation was assessed in relation to the value of the application land with and without the restriction as at the date the restriction was imposed. The purchase price of the land was £39,000. An uplift of 60% was appropriate to reflect the impact of the restriction on the value of the application land as a whole and the limited hope value that may have existed for its complete residential development as at July 2000. Without the restriction the value of the application land would have been £62,500, so the compensation payable should be £23,500. **Re Graham** [2008] EWLands LP/83/2005.

SERVICE CHARGES

The LVT has no jurisdiction to determine whether a service charge is payable under s.27A(1) Landlord and Tenant Act 1985 in relation to a property whose use is restricted to providing holiday accommodation. "Service charge" is defined in s.18(1) as an amount payable by a tenant of a dwelling as part of or in addition to the rent. "Dwelling" is defined in s.38 as "...a building or part of a building occupied or intended to be occupied as a separate dwelling..." There was no dispute that the bungalows possessed all the amenities necessary for residential accommodation. However it was clear from **Uratemp Ventures Ltd v Collins** [2002] 1 AC 301 that "dwelling", where it appears in legislation conferring protection on tenants, will convey its ordinary meaning of the occupier's home unless there is something that suggests it should not be so limited. There was nothing in ss.18 to 30 LTA 1985 to suggest that the protection conferred should be extended to premises that are not a person's home. Ss.18 to 30 did not apply to the holiday bungalows because their use was restricted to providing holiday accommodation. **King & ors v Udlaw Ltd** [2008] EWLands LRX/186/2006.

The LVT's decision in a service charge dispute could not stand. It was plain that the various separate disputes between the parties raised numerous disputed questions of fact. The LVT made no findings of fact and gave very brief and general reasons, stating only that various disallowed items were not recoverable "...due to the previous freeholders' neglect, failure to undertake essential works, and lack of evidence..." The LVT was required to give clear and sufficient reasons for its decision on the various aspects in dispute. The nature of the dispute was not one which could properly be decided without finding of fact being made. The LVT should not have decided the items in dispute simply on the basis of the contents of the Scott Schedules and without hearing evidence. The matter was remitted for a fresh hearing before a differently constituted LVT. **Witnesham Ventures Ltd v Markwick & anor** [2008] EWLands LRX/19/2007.

TECHNOLOGY AND CONSTRUCTION COURT: PROCEDURE

In **Collins & ors v Drumgold & ors** [2008] EWHC 584 (TCC), Coulson J has given guidance as to the correct procedure on an application to transfer a matter to the TCC, and the relevant guidelines that will govern whether or not such an application is successful. The High Court has power to transfer to itself proceedings commenced in the county court pursuant to s.41(1) County Courts Act 1984. Generally an application to transfer from a county court to the High Court will be made under CPR 30.3. An application to a specialist list such as the TCC will be made under CPR 30.5. In each case the application to transfer is made to the receiving court with notice to the relevant county court. It does not have to be made first to the county court. The matters which the court hearing the application to transfer must consider are set out in CPR 30.3(2). The first five considerations will be of particular relevance to any application to transfer to the TCC: the financial value of the claim and the amount in dispute; whether it would be more convenient or fair for hearings to be held in some other court; the availability of a specialist judge; whether the facts, legal issues, remedies and procedures involved are simple or complex; and the importance of the claim to the public in general. The TCC will consider in particular (a) whether the dispute arises out of or in connection with one of the types of claim set out in paragraph 2.1 of the practice direction to CPR 60 as suitable for the TCC; (b) whether the financial value of the claim and/or its complexity mean that it should be transferred to the TCC; (c) convenience of the parties including geographical location and legal costs.

TRUSTS OF LAND

Stack v Dowden [2007] UKHL 17 is not necessarily to be followed in a joint names case where the parties are not a cohabiting couple. Here the parties were a mother and daughter who had purchased the property as a rental investment. It would not be right to apply **Stack** in a case such as this where the parties primarily purchased the property as an investment for rental income and capital appreciation, although their relationship was a familial one. Even if **Stack** did apply, the presumption of equality would have been rebutted on the facts. The parties kept their financial affairs separate, and the property was not purchased as a home. The mother had several other children and there was no reason to think that she intended the daughter to receive what would have amounted to a significant gift not shared with the other children. The right to buy discount belonged to the mother and so the contributions to the purchase price had been significantly different. The daughter was

brought in as a co-purchaser primarily because the mother could not afford the purchase on her own. The presumption of advancement was not applicable on the facts. There was no reason not to fall back on a resulting trust analysis. The mortgage was in joint names and had been met by rental payments from the property, so there was a strong case for apportioning the mortgage equally between the parties when assessing contributions to the purchase price. The judge's finding that the daughter only had a 4.28% interest in the property was substituted for a finding that she had a 33% interest. **Laskar v Laskar** [2008] EWCA Civ 347.

In the absence of any express agreement or discussion, the court will be slow to infer from conduct alone that the parties intended to vary existing beneficial interests established at the time of acquisition. The first instance judge had erred in finding that the wife had obtained a beneficial interest by way of a constructive trust or proprietary estoppel in her mother-in-law's farm. There had been no express agreement or discussion and there was no conduct sufficient to demonstrate any common intention. It was one thing to say that the claimant believed herself to be an integral part of a business conducted on the land. It was quite another to say that she had acquired an interest in the land itself. The claimant's riding business was quite distinct from the farming business. Her activities in support of the farming business were not of such an exceptional nature as to lead to any inference that she was acting in the belief that she was acquiring an interest in the farm. It is not for the court to impose its own view of what is fair. The outcome must be based on the parties' intentions. There was no material on which the judge could properly have based a finding that there was a common intention constructive trust. The proprietary estoppel claim failed on a similar basis. **Morris v Morris** [2008] EWCA Civ 257.

OTHER DEVELOPMENTS

HOUSING BENEFIT

The Housing Benefit and Council Tax Benefit (Extended Payments) Amendment Regulations 2008 SI 959 make changes to the Extended Payment schemes, which are work incentive schemes designed to provide an additional four weeks of assistance for benefit claimants moving into work. They come into force from 6th October 2008.

HOME INFORMATION PACKS

Further provisions relating to HIPs are brought into force from 6th April 2008 by the Housing Act 2004 (Commencement No.11) (England and Wales) Order 2008 SI 898. Earlier commencement orders brought Part 5 Housing Act 2004 into force on a phased basis in relation to residential properties of various types. This order brings Part 5 into force in relation to all remaining residential properties. The provisions will now apply to all residential properties unless they are excepted under Part 6 of the Home Information Pack (No.2) Regulations 2007. Minor amendments to the HIP Regulations are made by the Home Information Pack (Amendment) (No.2) Regulations 2008 SI 1266, coming into force on 1st June 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.

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