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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ADVERSE POSSESSION

The European Court of Human Rights gave judgment in **J.A. Pye (Oxford) Ltd v UK** on 15th November 2005. J.A. Pye held the registered title to a piece of land which the Grahams had used for grazing. The Grahams claimed title to the land by way of adverse possession and succeeded at first instance but not on appeal. On 4th July 2002 the House of Lords allowed the Grahams' appeal, holding that they had acquired title. The ECHR held that the operation of the domestic law on adverse possession caused a disproportionate interference with the applicants' property rights under Article 1 Protocol 1. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1 Protocol 1. This principle is not confined to the taking of property for public purposes but is equally applicable to the compulsory transfer of property from one individual to another. The question of compensation was reserved, it being possible that agreement would be reached. [15th November 2005] Application number 44302/02; [2005] 47 EG 145 (CS); [23rd November 2005] TLR.

In a decision given a few months earlier in the Chancery Division of the High Court, Deputy Judge Strauss QC reached the same result by reinterpreting the relevant legislation in accordance with s.3 Human Rights Act 1998. **Beaulane Properties Ltd v Palmer** [2005] EWHC 871 (Ch); [2005] 4 All ER 461; [2005] 3 WLR 554.

The law has in any event been changed by the Land Registration Act 2002, which makes it much more difficult for title to be lost through the inadvertence of the registered owner. The relevant provisions, ss.96 to 98 of and Schedule 6 to the LRA 2002, were brought into effect on 13th October 2003.

HIGHWAYS

A right of way was originally shown on the definitive map as a road used as a public path. By the review process in paragraph 9(1) schedule 3 to the Countryside Act 1968 it was reclassified as a bridleway. In February 2003 the council made an order modifying the definitive map to show the way as a byway open to all traffic (pursuant to s.53(3)(c)(ii) Wildlife and Countryside Act 1981). The Secretary of State's inspector refused to confirm the modification order. On an application for judicial review it was held that there was no express statutory provision for the extinguishment of any existing public rights over the way. The relevant provisions could not be interpreted to provide that any vehicular rights which might have existed over the way at the time of its reclassification as a bridleway had been extinguished by the reclassification. The inspector's decision was quashed and a declaration granted to the claimant. ***Regina (Kind) v Secretary of State for the Environment, Food and Rural Affairs*** [2005] EWHC 1324 (Admin); [2005] 3 WLR 616.

HOUSING

The Court of Appeal considered anti-social behaviour injunctions which had been made without notice under ss.153A and 153C(2) Housing Act 1996 against the tenant and her non-resident partner. The ASBIs included exclusion provisions and had powers of arrest attached to them. A further order had been made without notice under s.153D ousting the tenant from the house. An order for possession was subsequently made. The Court of Appeal held that to make an order without notice was to depart from the normal rules as to due process and warranted the existence of exceptional circumstances. In the circumstances it was neither necessary nor proportionate to have made an ouster or exclusion order without notice. The power of arrest should only have been attached to that part of the order which protected people from violence. An appeal against the ASBIs was allowed and the order for possession was suspended. The court set out detailed guidance as to what is required before an ASBI should be granted. ***Moat Housing Group South Ltd v Harris & anor*** [2005] EWCA Civ 287; [2005] 3 WLR 691; [2005] 4 All ER 1051.

Where a British citizen had a child who was subject to immigration control, the effect of s.185(4) HA 1996 was that the child had to be disregarded when determining whether the British citizen had a priority need for accommodation. In having this effect s.185(4) HA 1996 was unjustifiably discriminatory on the grounds of nationality, and breached the right to family life guaranteed by the ECHR. It was declared incompatible with articles 8 and 14 of the Convention. Immigration control had no legitimate bearing on a British citizen. The court was not prepared to attribute to Parliament a policy objective of driving a British citizen out of the country because of the immigration status of her child. The local authority had alternative powers by which it could assist those who had been refused under s.185(4), and was obliged to interpret those alternative powers in a way which was compatible with the Convention. ***Regina (Morris) v Westminster City Council and Another; Regina (Badu) v Lambeth London Borough Council and Another*** [2005] EWCA Civ 1184; [19th October 2005] TLR CA.

LAND REGISTRATION

S.82(3) Land Registration Act 1925 provides that the register should not be rectified so as to affect the title of the proprietor in possession unless he has caused or substantially contributed to the error or omission by fraud or lack of care, or it would be unjust not to rectify the register against him. The claimant had been the registered proprietor of a leasehold flat. In 2001 the first defendant had forged a transfer from the claimant to himself so as to become the registered proprietor. When the claimant discovered the fraudulent transfer he took no action. In 2003 the first defendant executed a transfer to the second defendant, who purported to grant a charge to the third defendant bank by way of mortgage. The claimant then applied to rectify the land register under s.82 LRA 1925 and sought a declaration that the 2001 transfer was void. The claim was dismissed and the second and third defendant were granted declarations that they were entitled to be registered as proprietors of the property and the charge. Here the transfer to the second defendant had not been fraudulent. He was the proprietor in possession when the claimant made his claim and so was protected by s.82(3). After discovering the fraud the claimant had done nothing to prevent the first defendant from dealing with the property or disposing of it to an innocent third party. **Nouri v Marvi and others** [18th October 2005] Ch Div; [2005] 43 EG 188 (CS).

LANDLORD AND TENANT ACT 1987

The court considered the meaning of “building” in the Landlord and Tenant Act 1987 in the context of a landlord serving notice on tenants of its intention to dispose of its interest. Although judgment in this case was given in March of last year it has only just reached the All England Law Reports. **Long Acre Securities Ltd v Karet** [2004] EWHC 442 (Ch); [2005] 4 All ER 413.

LEASEHOLD ENFRANCHISEMENT

Tenants served a notice under s.13 Leasehold Reform, Housing and Urban Development Act 1993 in relation to buildings containing flats, and also additional land comprising communal gardens and a children’s playground. The landlord served a counternotice admitting the right to acquire the freehold interest in the buildings, but disputing the right to acquire some of the additional land. A question arose as to whether the LVT had jurisdiction to determine this dispute or whether it had to be referred to the county court. It was held by the LVT and, on appeal, by the Lands Tribunal, that the LVT did have jurisdiction. The division of functions between the county court and the LVT was quite clear. If the counternotice admits the right to enfranchise, it must state which if any of the proposals in the initial notice are accepted or rejected. A distinction is thus established between a dispute as to the right to enfranchise the premises at all, and a dispute about the proposals in the initial notice. If the right to enfranchise is disputed then the issue of entitlement is for the county court to determine (s.22(1)), but if the terms are in dispute (as here) it is a matter for the LVT (s.24(1)). **Stephenson and another v Leathbond Ltd and another** [22nd June 2005] Lands Tribunal; [2005] 40 EG 184.

RENT

The defendant lessee had a claim for damages for defective construction of a factory by the original lessor. It was held that he could not set off this claim against a claim for rent arrears by the lessor's successor in title, the claimant. The rent arrears had accrued since the assignment. A landlord's right to sue for previously accrued arrears of rent was a chose-in-action. It was, therefore, subject to the established principle that an assignee took subject to all rights of set-off and other defences that were available against the assignor. However the reversion itself, with the right to sue for future rent, was not affected by equitable set-off. The Landlord and Tenant (Covenants) Act 1995 did not have the purpose of changing the law by making successors in title to the landlord or the tenant liable for the defects of their predecessors. The combined effect of ss.3 and 23(1) LT(C)A 1995 was to make the benefit and burden of covenants pass with the estate for the future, but to leave past rights and obligations with the assignor. **Edlington Properties Ltd v JH Fenner & Co Ltd** [2005] EWHC 2158 (QB); [2005] 43 EG 189 (CS); [4th November 2005] TLR.

RESTRICTIVE COVENANTS

A covenant provided that the transferees were not to erect any building on the transferred land "...other than a greenhouse garden shed or domestic garage in accordance with plans which have been approved previously by the Transferors in writing." There was no issue that the transferees' successors in title had the benefit of the covenant. On appeal it was held that "Transferors" could be read to include the original transferors and their successors in title. The meaning of the term depended on its context and the intention of the parties. The transferees' successors in title (the appellants) needed only the consent of the transferors' successors in title (the respondents). It was also held that a term should be implied that consent was not to be unreasonably withheld. The concept of "approval" of plans implied at least a process of active consideration, so the covenantee was at least obliged to consider the plans in good faith with a view to their possible approval. It followed that it was implicit that some criteria were to be applied in the course of that process. It cannot have been intended to be a matter of pure whim. **Mahon and another v Sims and another** [8th June 2005] QBD; [2005] 39 EG 138.

OTHER DEVELOPMENTS

CONSULTATION PERIODS: ODPM

Consultation periods are currently running in relation to various property and landlord and tenant related matters, including the following:

- Tenancy Deposit Protection: Consultation on Secondary Legislation (consultation period 30th November 2005 to 1st February 2006).
- Contracting out of ASBO functions from local authorities to organisations managing their housing stock (consultation period 9th November 2005 to 1st February 2006).
- Security of Tenure for Residential Boats (consultation period 29th November 2005 to 21st February 2006).

Further details can be found on the website for the Office of the Deputy Prime Minister at www.odpm.gov.uk

HOUSING RENEWAL GRANTS

The Housing Renewal Grants (Amendment) (England) Regulations 2005 SI 3323 come into force on 31st December 2005. They amend the Housing Renewal Grants Regulations 1996 SI 2890, which set out the means test for determining the amount of grant which may be paid by local housing authorities under Chapter I of Part I of the Housing Grants, Construction and Regeneration Act 1996. The effect of the change is that the means test no longer applies where an application for a grant is made by the parent or guardian of a disabled child or young person. There are some other consequential amendments.

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