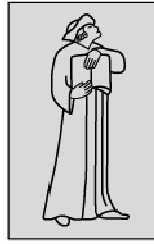


# THOMAS · MORE · CHAMBERS



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

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### CASE LAW UPDATE

#### ADVERSE POSSESSION

The Court of Appeal overturned a declaration that Mrs Benfield had acquired title to a residential property by way of adverse possession against Mr Rehman, the registered owner. S.29 Limitation Act 1980 provides that there is a fresh accrual of the right of action to recover land where the person in possession of the land acknowledges the title of the person with the right of action. The acknowledgement must be in writing and signed and must be delivered to the person with the right of action or addressed to them and in fact received by them. Mrs Benfield had moved into the property in March 1991. If there was no fresh accrual of the right of action after this date, she would have acquired title by adverse possession prior to the change in the law brought about by the Land Registration Act 2002 from 13<sup>th</sup> October 2003. However on 19<sup>th</sup> December 1991 Mrs Benfield had signed a document purporting to be a lease of the property which acknowledged that Mr Rehman was registered with absolute title to the property and that he had agreed to grant her a lease. Mr Benfield had arranged for someone to impersonate Mr Rehman in order to obtain the lease, and the signed counterpart lease was delivered, with Mrs Benfield's authority, to the solicitors who thought they were acting for Mr Rehman. In April 1992 the counterpart was sent to the solicitors who were in fact acting for Mr Rehman and then sent on to him. Although the document did not operate to create a lease it was an acknowledgement for the purposes of s.29 LA 1980 and so time began to run less than 12 years before 13<sup>th</sup> October 2003. *Rehman v Benfield* [2006] EWCA Civ 1392.

#### BOUNDARY DISPUTES

There is a general rule in contract law that extrinsic evidence is not admissible for the construction of a written contract. There is a well-established exception to this in relation to the construction of conveyances of land. The precise extent of a conveyance of a parcel of land is often indefinite or contradictory. The court is entitled, when construing a conveyance which is unclear or ambiguous, to have regard to the measurements shown in other related conveyances and to evidence relating to physical features on the land at that time. The court is also entitled to have regard to evidence of subsequent conduct. Any

evidence considered must be of probative value in considering what the parties intended. Evidence of physical features in existence after the conveyance are of no relevance unless there is some reason to think that they were in existence at the time of the conveyance or that they are replacements of or related to physical features which were in existence at the time of the conveyance. **Ali v Lane & anor** [2006] EWCA Civ 1532.

## FORFEITURE

As a matter of principle, once the right to forfeit in respect of a failure to pay rent had arisen, any subsequent unequivocal affirmation of the continuation of the lease with effect from a subsequent date operated to waive the right to forfeit. The tenant had made it clear that it was appropriating monies paid to particular rental payments due. Once the landlord had accepted the monies he was fixed with the consequences of the tenant's appropriation of funds to rent for specified periods in relation to any action for forfeiture. The tenant had made it very clear that it was appropriating the payments made for the rent due for December and January and the landlord could not treat those payments as satisfying some other period. If the landlord had not intended to accept the tenant's appropriation of the funds, he should have either not accepted the payments or returned them within a reasonable time. The right to forfeit had been waived. Rent falling due after a company voluntary arrangement (CVA) came into place should be no means necessarily be expected to be caught by the terms of the CVA, even if it was capable of being so caught. **Thomas v Ken Thomas Ltd** [2006] EWCA Civ 1504; [2006] 42 EG 244 (CS).

## HOUSING

Where a legally defective decision letter is given under s.184 Housing Act 1996, there is power for this to be rectified upon review under s.202 HA 1996. Regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI 71 provides an extra procedural safeguard. The s.202 review, followed by an appeal under s.204, is capable of remedying a defect in the s.184 decision letter, including any legal defect. The procedure under the HA 1996 provided a suitable statutory alternative for challenging the defendant's decision. There were no exceptional circumstances to invoke the alternative discretionary remedy of judicial review, although this is still a residual remedy available in Housing Act cases. An allocation scheme must set out all aspects of the allocation process, but it was not necessary to do more than the defendant had done, namely to explain what criteria apply to each group and to indicate that an officer will allocate in accordance with those criteria. The criteria may be general. The points system sets out all the circumstances which qualify for points, but the exact numbers to be allocated on medical and welfare grounds must be a matter for the discretion of the authority. The allocation of points to Mrs Lynch was not irrational. Relief was refused. **R (on the application of Michelle Lynch) v Lambeth LBC** [2006] EWHC 2737 (Admin).

The Court of Appeal considered the meaning of the word "violence" in s.198 Housing Act 1996, and held that it meant physical violence, rather than threats of violence or acts or gestures which lead someone to fear physical violence. That was the natural meaning of the word, and if a broader meaning was given this would render s.198(3)(b) redundant. (S.198(3)(b) includes in the definition threats of violence which are likely to be carried out.) **Royal Borough of Kensington and Chelsea v Danesh** [2006] EWCA Civ 1404.

## LANDS TRIBUNAL: COSTS

The applicant applied to the Lands Tribunal for the modification of a restrictive covenant. Modification would allow infill residential development to be carried out. Objections were received from the owners of 20 neighbouring properties. In due course, the applicant informed the objectors of his intention to withdraw the application and wrote to advise the Tribunal of the position. The objectors would only consent to the proposed withdrawal on the basis that the applicant paid their costs. They sought costs on an indemnity basis on the grounds that the application had been frivolous. They had previously advised the applicant of the costs implications of proceeding. The applicant had been provided with title deeds relating to a number of the objectors' properties, showing that they were all subject to, and had the benefit of, the same covenants. The applicant had insisted on being provided with copies of all of the objectors' title deeds. The Lands Tribunal awarded the objectors their costs on the standard basis. A successful objector to an application to discharge or modify a restrictive covenant will normally receive all his costs unless he has been unreasonable (Lands Tribunal Practice Directions 11 May 2006, paragraph 22.4). However the conduct of the applicant could not properly be described as frivolous so as to justify the award of indemnity costs. **Haghighi** [2006] EWLands LP/13/2005.

## LEASEHOLD MANAGERS

The LVT has power to appoint a manager in respect of residential premises under s.24 Landlord and Tenant Act 1987. This power extends to allow the LVT to include within the management order land in the ownership of the freehold owner which does not consist of residential buildings nor the curtilages of such buildings. "Premises" within s.24 can include incorporeal rights such as rights of access and the right to enter on and use land for recreational purposes. A management order in relation to premises that include easements may appoint a manager to carry out functions that include works to the servient tenement. These would undeniably be functions in connection with the management of the premises. The property in respect of which the manager is appointed to exercise functions may properly include appropriate parts of the servient tenement. **Cawsand Fort Management Co Ltd v Stafford & ors** [2006] EWLands LRX/145/2005.

## MISDESCRIPTION

The defendant had purchased a site with planning permission for 18 flats and 16 parking spaces. The claimants agreed prior to construction to purchase the flats on long leases. The sales brochures stated that the flats would have balconies, allocated parking spaces and limestone flooring. However when the flats were completed, three balconies were missing, three parking spaces had had to be moved and there was no limestone flooring. It was held that the claimants were entitled to rescind their contracts on the ground of substantial misdescription. Alternatively, if the claimants were only entitled to an abatement of the purchase price, they were not obliged to comply with a notice to complete until the abatement price had been determined. When considering whether a misdescription was substantial, the question was whether it might reasonably be supposed that but for the misdescription the purchaser would not have entered into the contract. The missing items

here had been major selling points and so there was substantial misdescription. **Donnelly & ors v Weybridge Construction Ltd & ors** [2006] EWHC 2678 (TCC); [2006] 46 EG 208 (CS).

## OPTION TO PURCHASE

The claimant leaseholder was entitled, under the lease, to acquire the freehold reversion upon giving “*not less than three months notice...expiring not later than the 6<sup>th</sup> day of February 2004*”. The claimant gave a notice in late August 2003, but that notice was expressed to expire on 7<sup>th</sup> November, thereby giving less than three months notice. This error was repeated in correspondence but by a further letter, the claimant’s solicitor identified the mistake, stating that it was typographical error and that the notice should have stated that it would expire on 7<sup>th</sup> December 2003. The validity of the notice was considered as a preliminary issue in proceedings. The claimant submitted that the notice was not required to stipulate a date for termination but merely to give not less than three months’ notice and further that the reasonable recipient would be left in no doubt that the claimant intended both to exercise the option and to give three months’ notice of its desire to do so. The defendants’ position was that the notice was an invalid exercise of the option since it left the reasonable recipient in reasonable doubt as to how and when it was intended to operate. There was a range of dates when the notice could have expired and no necessary reason why any one of those dates must have been intended. It was held that the notice was not sufficiently clear and unambiguous as to have left a reasonable recipient, with the requisite knowledge, in no doubt as to its terms. The notice period was not referable to a particular date or occurrence, and the expiry date was not clearly defined or made clear by the context. The notice was not valid to exercise the option. **Peaceform Ltd v Cussens & ors** [2006] EWHC 2657.

## ORDER FOR SALE

Pursuant to s.363(2) Insolvency Act 1986, an undischarged bankrupt or a discharged bankrupt whose estate is still being administered under Chapter IV shall do all things as he may be directed to do by the court for the purposes of the bankruptcy or administration. This meant that Mr Holtham could be ordered to deliver up possession of leasehold property to the Trustee for the purposes of a sale for the benefit of the creditors even though he had been discharged from his bankruptcy. S.335A Insolvency Act 1986 was not engaged because it was not necessary for the Trustee to apply for relief under s.14 Trusts of Land and Appointment of Trustees Act 1996. Article 6 of schedule 1 to the Human Rights Act 1998 did not confer any defence on Mr Holtham. The administration of a bankrupt’s estate is not a process which results in the determination of the civil rights and obligations of the bankrupt, but is a process whereby his assets are gathered in, liquidated and applied for the benefit of the creditors, with any surplus being returned to the bankrupt. Mr Holtham had no right to occupy the property enforceable against the Trustee at any time after the commencement of the bankruptcy. There had not been any delay in the prosecution of the Trustee’s claim for possession which engaged Article 6(1). **Holtham v Kelmanson** [2006] EWHC 2588 (Ch).

## REPAIRING COVENANTS

The court does not need expert evidence on damages in order for a landlord to prove a case for damages under s.18 Landlord and Tenant Act 1927 in relation to repairing covenants. The court has to find the difference between the value of the premises in disrepair on the open market and what the value would have been absent any breach of the covenant to repair. In such cases it will be obvious that the disrepair must have caused some damage to the value of the reversion and that the cost of doing the repairs is a reliable guide to the amount of that damage. Landlords should not necessarily be deprived of a remedy in damages simply because they performed repairs to a higher standard than was required of the outgoing tenants. However, damages should be subject to a percentage reduction to account for repairs which the landlord would have been required to do, regardless of the disrepair caused by the outgoing tenant, in order to satisfy the incoming tenant. In calculating an appropriate starting figure it was for the judge to infer diminution in value to the reversion from the estimated costs of any repairs required to be done by the outgoing tenant which the landlord could actually show it had done. It is open to the court simply to find that the difference was at least as great as the amount claimed against the tenant, without carrying out exact calculations. **Latimer v Carney** [2006] EWCA Civ 1417; [2006] 45 EG 191 (CS).

## RIGHT TO LIGHT

If an applicant establishes proper legal grounds for an injunction to be granted, it should be granted. Only in an exceptional case would the injunction not be granted and the applicant be compensated with costs instead. Ability to compensate the applicant in damages was a factor in deciding whether to grant an injunction but the main focus of the decision should be whether the applicant had established the necessary legal grounds to obtain the injunction. In deciding whether or not to grant an injunction, the principles in **Shelfer v City of London Electric** [1895] 1 Ch 287 applied. The court should consider whether (1) the injury to the claimant's legal rights was small; (2) the injury could be adequately estimated and compensated by a small money payment; (3) it would be oppressive to grant an injunction, (4) the claimant had shown that he or she wanted only money; (5) the claimant's conduct rendered it unjust to grant more than pecuniary relief; and (6) other circumstances justified the refusal of an injunction. The test for infringement of the right to light was whether the obstruction complained of was a nuisance in that there was a substantial loss of light rendering the house less fit for occupation and generally uncomfortable. Here, the respondents had taken a calculated risk in deciding to proceed with the development *after* the appellant had started his claim for infringement of his right to light, and it was not oppressive to the respondents, or unreasonable, to grant an injunction to protect the appellant's right to light in relation to his property. **Regan v Paul Properties DPF No 1 Ltd & ors** [2006] EWCA Civ 1319; [2006] 44 EG 197 (CS); [2006] 46 EG 210.

## SERVICE CHARGES

Upholding the decisions of the LVT and the Lands Tribunal, the Court of Appeal held that a subtenant occupying a flat in a residential block was entitled to challenge the maintenance charge levied by the freeholder via the head-lessee as a service charge within the meaning of the Landlord and Tenant Act 1985. The definition of "tenant of a dwelling" in s.18(1) and s.38

LTA 1985 does not require that the tenant himself should be in occupation of the dwelling and so can include a tenant who has sublet. A tenant is not excluded from the definition merely because whilst he is the tenant of a dwelling which extends only to part of a building, he is also the tenant of other parts of the building. This meant that the head-lessee, Publicshield, could rely on the protection of the service charge provisions in the LTA 1985. The words of s.27A LTA 1985 also allowed a challenge to be brought by a subtenant against the freeholder where, as here, the head-lessee did not wish to undertake a challenge against the freeholder. **Oakfern Properties Limited v Ruddy** [2006] EWCA Civ 1389.

Under clause 4(A)(i) and (ii) of her lease the respondent leaseholder was liable to pay a reasonable part of “*the expenditure incurred by the Council*” during the appellant landlord’s financial year “*in fulfilling the obligations and functions set out in Clause 6 hereto*”. Clause 6 detailed the landlord’s covenants including, amongst others, the provision of services, insurance, and painting the outside and common parts of the building. The yearly service charges sought from the leaseholder in each year included an item described as management fee. The LVT held that, on a proper construction of the lease, there was no power to include an amount in respect of management fees in the service charge because the lease contained no provision allowing such a charge. On appeal, it was held that expenditure was recoverable if it was incurred by Brent LBC in fulfilling the obligations and functions set out in clause 6. Whether it was so incurred was a question of fact. Work done in fulfilment of obligations under clause 6 (for example arranging for work to be done) may be classified as management and would not fall outside the scope of clause 4(A)(i) and (ii). No question of implying a term in the lease arose. The appeal was allowed. **Brent LBC v Hamilton** [2006] EWLands LRX/51/2005.

## OTHER DEVELOPMENTS

### AGRICULTURAL TENANCIES

The Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 SI 2805 came into force on 19<sup>th</sup> October 2006. It makes important amendments to the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995. The amendments include changes to the conditions of eligibility for succession to a 1986 Act tenancy, and alterations to rent review and end of tenancy compensation provisions in the 1995 Act.

### HOUSING BENEFIT

Two statutory instruments relating to housing benefit claims come into force on 20<sup>th</sup> December 2006, the Housing Benefit and Council Tax Benefit (Amendment) (No. 2) Regulations 2006 SI 2967, and the Housing Benefit and Council Tax Benefit (Electronic Communications) Order 2006 SI 2968. They provides that in relation to housing benefit and council tax benefit, claims, amendments of claims and change of circumstance notifications should be made in writing (handwritten or electronic) or by telephone; and that change of circumstance notifications can be made in person to a relevant local authority. If telephone calls are accepted, authorities may require that claimants subsequently approve a written statement of their claim. If claims, amendments and change of circumstance notifications are to be accepted electronically the authority’s Chief Executive must give a direction to this effect and may impose restrictions.

## **REAL ESTATE INVESTMENT TRUSTS**

A series of statutory instruments relating to Real Estate Investment Trusts (SIs 2864, 2865, 2866 and 2867 of 2006) come into force on 1<sup>st</sup> January 2007. They set out further details of the rules relating to the taxation of REITs and their investors in four areas. These are (i) the consequences of breaching various conditions and tests set out in Part 4 Finance Act 2006; (ii) the information to be provided in the financial statements that the principal company of a group that is a REIT must supply to HMRC; (iii) how the rules in Part 4 FA 2006 apply to joint ventures in which a REIT is involved; and (iv) the administrative provisions for deducting and accounting for tax when tax-exempt profits are paid out as distributions to shareholders.

## **TENANCY DEPOSIT PROTECTION SCHEME**

Statutory tenancy deposit schemes will apply to all assured shorthold tenancies, where a deposit is taken after 6<sup>th</sup> April 2007, in England and Wales. The Government announced on 22<sup>nd</sup> November 2006 (Communities and Local Government News Release 2006/0147) that it has awarded contracts to three companies to run tenancy deposit schemes from 6<sup>th</sup> April 2007. A single custodial scheme, where deposits will be paid into and held in a separate account managed by the scheme, will be run by Computershare Investor Services, and will be free to use for tenants and landlords. Two insurance based schemes run by The Dispute Service Ltd and the National Landlords Association will be funded through a fee paid by landlords or agents, though the service will be free to tenants. All three schemes will offer free alternative dispute resolution services to landlords and tenants. The private sector currently holds around £1.2 billion in assured shorthold tenancy deposits in England and Wales.

**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](http://www.bailii.org). Statutory instruments can be found on [www.opsi.gov.uk](http://www.opsi.gov.uk).

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