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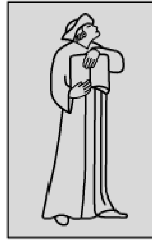

7 Lincoln's Inn Fields London WC2A 3BP
T 020 7404 7000 F 020 7831 4606
DX 90 Chancery Lane E clerks@thomasmore.co.uk
www.thomasmore.co.uk

PROPERTY LAW BULLETIN

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CASE LAW UPDATE

BREACH OF COVENANT

The Lands Tribunal considered the powers of the LVT under s.168 Commonhold and Leasehold Reform Act 2002 to determine whether a breach of covenant had occurred. A determination or admission of breach is now a necessary precursor to service of a s.146 notice in relation to a long lease of a dwelling. It was held that the LVT had jurisdiction to consider a waiver of the covenant by the landlord. The Lands Tribunal expressly gave no decision on the question whether the LVT had jurisdiction to consider whether a landlord had waived the right to forfeit a lease on the basis of a breach of covenant. The question with which the case was concerned was whether the landlord was estopped from asserting against the tenant that there had been a breach of covenant at all. In order for the LVT to decide the question posed by s.168(2)(a) as to whether a breach had occurred the LVT needed to decide (and so must have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case a breach will not have occurred), or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non-compliance with the terms of the covenant). There was no waiver or estoppel on the facts of the present case. ***Swanston Grange (Luton) Management Ltd v Langley-Essen*** [2007] EWLands LRX/12/2007.

BUSINESS TENANCIES

The tenant had a lease of a cafe on an industrial site. There was access from a major road to the south which had a board advertising the cafe at the entrance to the site. It was also possible to obtain access to the cafe from the other end of the site, but this was much less convenient. The landlord built a wall completely blocking access from the southern end of the site, and removed the sign advertising the cafe. This was held to be a breach of the covenant of quiet enjoyment and a derogation from grant. The lease contained a proviso allowing the landlord to make regulations for the direction of traffic. However the most that this could mean was that he was allowed to direct the way in which traffic would circulate along the roadway round the site. It did not allow him to block the road altogether. The Court of Appeal was critical of the failure to provide all of the plans and photographs which

had been before the trial judge. Arden LJ gave the following guidance: *"...it is absolutely essential in any case of this kind, where the court is going to have to grapple with plans, maps, diagrams or photographs, that there is at least one plan, photograph or map which leaves the court in no real doubt about the location of all of the relevant features. The skeleton arguments should also identify that photograph, map, plan or diagram at an early point, so this court is left in no doubt when it is prereading its papers for the hearing..."* ***Hunte v E. Bottomley & Sons Ltd*** [2007] EWCA Civ 1168.

COMPULSORY PURCHASE

A challenge pursuant to s.23(1) Acquisition of Land Act 1981 was brought to a compulsory purchase order relating to Priestman Point on the Crossways Estate in Tower Hamlets. The CPO was made pursuant to s.17 Housing Act 1985 and s.2 ALA 1981. The challenge was not related to the merits, but to the formal authority under which it was made. Underhill J held that words recommending that the council *"initiates and...manages...CPO processes"* were sufficient when adopted as a resolution to constitute adequate authorisation for the CPO, though he did comment that the language was *"somewhat jargonish."* ***R (Collis) v Secretary of State for Communities & Local Government & anor*** [2007] EWHC 2625 (Admin).

CONSTRUCTIVE TRUSTS

The parties had lived together as man and wife for some fifteen years at a property registered in Mr Thomas' sole name which had formerly been his parents' home. Miss James had made substantial contributions to Mr Thomas' business as an agricultural building and drainage contractor. Although the judge at first instance could be criticised for the way in which he expressed the law, he had not erred in holding that Miss James had not acquired any interest in the property by way of constructive trust or proprietary estoppel. The common intention necessary to found a constructive trust or estoppel may be formed at any time before, during or after the acquisition of the property. The common intention may be inferred from evidence of the parties' conduct during the whole course of their dealings in relation to the property. An estoppel or constructive trust may arise in circumstances where the legal owner has assured the claimant or led her to believe that she has or will obtain a beneficial interest in the property, even though the extent of that interest is not specified. There was nothing on the present facts which could found a constructive trust or an estoppel. Observations such as *"this will benefit us both"* or that Miss James would be provided for by will were not sufficient. As was observed in ***Stack v Dowden*** [2007] UKHL 17, it is not for the court to abandon the search for the result which reflects what the parties must, in the light of their conduct, be taken to have intended in favour of the result which the court itself considers fair. ***James v Thomas*** [2007] EWCA Civ 1212.

CONVEYANCING

Morgan J gave summary judgment in favour of the Bank of Scotland plc on a claim by the bank relating to a charge of £1.2 million over a residential property where the conveyancing process had gone awry. The total purchase price had been £1.5 million of which £1.2 million had been advanced by the Bank of Scotland, but the purchaser had not paid the remainder of the purchase price and the vendors had remained in possession. The principal issue was

whether the TR1 signed on 29th June 2004 and sent to the purchaser's solicitors was an unconditional transfer of the vendors' title, or was a transfer executed in escrow on condition of payment of the balance of the purchase price. The vendor never did pay the balance, and so if the transfer was executed in escrow it would never have become effective. It was held that there was an unconditional transfer. It was a natural inference in relation to a purchase transfer that a deed of conveyance is held in escrow if at the time of delivery the purchase money has not been paid. However, here the transfer was given to the purchaser's solicitors under cover of a letter which appeared to suggest that the transfer was effective. The vendors and their solicitors knew that the purchaser was borrowing from the bank to fund the purchase. The vendors were to be taken to have known that the bank would not release the mortgage advance until it had the benefit of a charge duly executed by the purchaser, and that such a charge would not be duly executed until the purchaser had an unconditional transfer of the property to him. The monies when received by the vendors' solicitor were not held to the order of the purchaser's solicitor but were regarded as irrevocably released to the vendors and were used by them to discharge earlier mortgages and for their own purposes. The parties had agreed to use the Law Society's Code for Completion by Post, and the circumstances were consistent only with the transaction being completed on 29th or 30th June 2004. The use by the vendors of monies remitted must be regarded as a waiver of any condition that the purchaser must execute the transfer before it took effect. The vendors were to be taken to have intended to subordinate their unpaid vendors' lien to the bank's mortgage, which they knew was being granted for the purpose of obtaining mortgage monies to pay over to them. ***Bank of Scotland Plc v King, Okoronkwo & anor*** [2007] EWHC 2747 (Ch).

ENFORCEMENT

The Court of Appeal dismissed an appeal against an order enforcing a sale of a property. The order for sale had been made twenty years previously. The property was held in equal shares by a husband and wife. The husband had occupied it and had allowed it to fall into disrepair. Repairs were carried out by the local council under its statutory powers, and there was a charge over the property for the cost of the repairs. There was an issue about whether this charge had become statute barred. However this need not prevent a sale. It was high time that the order for sale was carried out. It was perfectly possible for the husband to apply under s.50 Law of Property Act 1925 for matters relating to this encumbrance of this charge to be dealt with by the court. There was power under CPR PD 40 for the disputed monies to be paid into court following sale to await the event. ***Chambers v Chambers*** [2007] EWCA Civ 1165.

ESTATE AGENTS

The claimant estate agent brought a claim for some £30,000 of commission. The defendant had instructed the estate agent to market his property. A purchaser had been found but did not proceed with the purchase because the defendant had misrepresented the position about a noise nuisance dispute with a downstairs neighbour. The court found that the defendant was potentially liable in damages for having made fraudulent misrepresentations about the noise nuisance. In order to achieve business efficacy it was necessary to imply into the agreement with the claimant a term that the defendant would not make fraudulent representations such as would render any contract of sale of the property unenforceable

and so prevent a sale. A claim founded in debt, on the basis that exchange of unconditional contracts had occurred, meaning that commission became payable, was unsuccessful. The defendant's misrepresentation rendered the contract for sale of the property void ab initio and thus unenforceable by the defendant. There was no valid quantum meruit claim as the claimant's standard terms clearly provided for the circumstances in which remuneration was payable. ***John D Wood & Co (Residential and Agricultural Ltd) v Craze*** [2007] EWHC 2658 (QB).

HOUSING

An order for possession was made against a housing association tenant pursuant to ground 14 of Part II of Schedule 2 to the Housing Act 1988 (nuisance or annoyance). He had been convicted of making indecent photographs of children but argued that this was not covered under paragraph (b)(ii) of ground 14 because the offences were committed before the tenancy began. The Court of Appeal upheld the order for possession and agreed with the trial judge that paragraph (b)(ii) could cover convictions for offences committed before the tenancy began. There was no reason to think that Parliament intended to restrict the paragraph to offences committed during the currency of the tenancy. Why should a tenant who was the mystery burglar responsible for thefts from houses in the area before he obtained a tenancy not be at risk of eviction when his identity is discovered and conviction follows? The court did not decide whether it was necessary that the conviction should have occurred during the currency of the tenancy as this was not in issue on the facts. ***Raglan Housing Association v Fairclough*** [2007] EWCA Civ 1087; [2007] 45 EG 163 (CS).

The Court of Appeal considered a new and untested point of law relating to ground 16 of Schedule 2 to the Housing Act 1985. Mr Randall lived alone in a four-bedroomed council house. He had succeeded to the tenancy when his grandfather died. Wandsworth LBC served notice that it would seek possession on ground 16 (accommodation more extensive than required and suitable alternative accommodation available). At Mr Randall's request his mother and half-sister then moved into the property with him. It was held that the words *"the accommodation afforded by the dwelling-house is more extensive than is reasonably required by the tenant"* in ground 16 were to be judged at the date of the hearing, not at the date of succession to the tenancy. There was nothing unlawful about family members moving into a dwelling-house after the date of succession to the tenancy. There was some risk of abuse (i.e. family members moving in simply to defeat the claim) but it should not be too difficult to establish when family members moved in, why, how long they intended to remain and whether they had anywhere else to go. The claim would be remitted to the county court where Wandsworth LBC would be able to contend that it had a suitable three-bedroomed property available. ***Wandsworth LBC v Randall*** [2007] EWCA Civ 1126; [2007] 46 EG 176 (CS).

LEASEHOLD ENFRANCHISEMENT

Under s.1(4)(a) Leasehold Reform, Housing and Urban Development Act 1993 the freeholder is entitled to retain land which the tenant might otherwise be able to acquire under the Act, provided that appropriate rights over that land are granted to the tenant. The s.1(4)(a) test requires that the rights granted should ensure that the occupier thereafter had as nearly as may be the same rights as those enjoyed on the relevant date by the qualifying

tenant under the lease. Provided that this test is satisfied, the LVT is obliged to permit the freeholder to retain the land in question. Here the LVT had rightly refused to consider the rights offered to the tenants in isolation. In another part of the counter-notice the freeholder proposed that it should have the right to do things on the retained land such as building on it. This could interfere with the rights to be given to the tenants, such as rights of way or rights to light, in ways which were not open to the freeholder under the existing leases. The LVT had to construe the permanent rights offered to satisfy s.1(4)(a) in the context of the freeholder's proposals taken as a whole. A landlord cannot say that he has satisfied s.1(4)(a) if he proposes to grant rights with the one hand and take them back or modify them to an unacceptable extent with the other. The Lands Tribunal declined to interfere with the LVT's pre ***Sportelli*** decision on the deferment rate, which had been fixed at 7%. This was not a property in the prime central London area, and the appeal was by way of review not re-hearing. The Lands Tribunal was being asked to overturn the decision of the LVT on the evidence it heard, to reject that evidence, and (without the benefit of any evidence) to adopt as correct in this particular case the expressions of expert opinion accepted in another case. This goes beyond what the Lands Tribunal can do on an appeal by way of review. ***Ulterra Ltd v Glenbarr (RTE) Company Ltd*** [2007] EWLands LRA/149/2006.

LEASEHOLD MANAGEMENT

The Court of Appeal considered the powers of the Leasehold Valuation Tribunal to appoint a manager of a building in multiple occupation under Part II Landlord and Tenant Act 1987. The residential units were within the precincts of Cawsand Fort, a Grade II Listed Building and a Scheduled Ancient Monument. There was no dispute that the leaseholders were entitled to apply for the appointment of a manager. Nor was there any dispute that this was a case in which the LVT could properly exercise its discretion to appoint a manager. The third step, which was in dispute, was to identify the extent of the property over which the LVT had power to appoint a manager. It was held that the words of s.24(1) meant that an order appointing a manager to carry out functions "in relation to" the premises could extend to the amenity land and other land not within the buildings or their curtilages. The order did not have to limit the manager to carrying out functions only on the premises to which the Act applied. If the order went too far in conferring powers on the manager otherwise than "in relation to the premises", the proper course was not to appeal but to apply to the LVT under s.24(9) LTA 1987 for a variation of the order. ***Cawsand Fort Management Company Ltd v Stafford & ors*** [2007] EWCA Civ 1187.

REPAIRS

Allowing an appeal by a long leaseholder, the Court of Appeal held that the Chapel Cloisters on the Marley Estate in South Brent, Devon, were part of the buildings for which the landlord had responsibility under the landlord's repairing covenant. The cloisters had a floor, three walls, and a colonnade forming the fourth wall. The Chancellor stated, giving judgment, that if such a structure was not a building within the normal meaning of the word it was hard to know what it was. The landlord also had responsibility for decorating the exterior of the building, and it was held that this included the exterior of the windows. This was so even though the tenant was liable to repair the demised premises which were specifically defined to include the windows. The windows were Georgian style sash windows and were an

important part in the exterior of the building and its visual appearance. Such appearance was of concern to the lessees and occupants of all 17 dwellings so that it would be normal to find some standardised decorating obligation. The Court of Appeal exercised its jurisdiction under s.20C(3) Landlord and Tenant Act 1985 to order that the landlord's costs of the appeal were not to be regarded as relevant costs recoverable by the landlord under the provisions of the lease. ***Pattrick & anor v Marley Estates Management*** [2007] EWCA Civ 1176.

RESTRICTIVE COVENANTS

Two properties had been built on land adjacent to Mr and Mrs Winter's dwelling-house in breach of a restrictive covenant which limited the use of the land to a single dwelling-house. The Lands Tribunal modified the covenant to allow the development under s.84(1)(aa) Law of Property Act 1925 and awarded compensation of £10,000 to Mr and Mrs Winter, to be reduced to nil if certain works were carried out by the developer. The Court of Appeal declined to interfere with the assessment of compensation. When considering the basis of the assessment of compensation, Carnwath LJ, giving judgment, noted that compensation under s.84 LPA 1925 is based on the impact of the development on the objectors, not on the loss of opportunity to extract a share of the development value. There is no hard and fast rule as to how that loss is to be assessed, but the negotiated share of profit approach is a permissible tool for the tribunal. If a percentage of development value is to be used it is likely to be at or around the 5% taken in ***Wrotham Park Estate Co v Parkside Homes Ltd*** [1974] 1 WLR 798. The ability to protect amenity by influencing the form of development either through negotiation or by conditions imposed by the Lands Tribunal could be regarded as part of the practical benefits secured by the covenant. If further guidance on the basis of assessment of compensation was necessary it was for the Lands Tribunal, not for the Court of Appeal, to provide it. ***Winter & anor v Traditional & Contemporary Contracts Ltd*** [2007] EWCA Civ 1088; [2007] 46 EG 177 (CS).

RIGHTS OF WAY

The claimant landowners owned land crossed by certain rural rights of way, and were concerned by damage caused to them by motor vehicles. By s.67 Natural Environment and Rural Communities Act 2006, which came into force on 2nd May 2006, certain rights of way were extinguished. The landowners argued that the rights of way were extinguished on 2nd May 2006, on the basis that decisions made by Hampshire County Council on 22nd March 2006 upgrading them to byways open to all traffic were not valid. However the landowners' challenge by way of judicial review to Hampshire's refusal to reconsider their decisions was unsuccessful. Hampshire was entitled to treat each of the applications to upgrade the rights of way to BOATs as valid. The validity of an application has to be considered in the context of s.53 Wildlife and Countryside Act 1981 as a whole. An application does not have to relate to or provide evidence that the council have not yet discovered. To be valid, an application must identify the way to which it relates and the modification to the definitive map and statement that is sought. It must also refer to the new evidence on which the application is based. The council was entitled to waive the requirement to attach copies of documentary evidence of which it already had copies. The council was also entitled to waive the formal requirements to give notice to landowners in circumstances where each landowner and occupier had been made aware of the applications and had not been prejudiced by the failure

to comply with formal requirements. ***R (Warden & Fellows of Winchester College & Humphrey Feeds Ltd) v Hampshire County Council (Interested Party: Secretary of State for Environment Food and Rural Affairs)*** [2007] EWHC 2786 (Admin).

RIGHT TO BUY

Mr Dennett, a secure tenant, gave notice claiming to exercise the right to buy in June 2001. On 11th February 2004 he served an initial notice of delay in form RTB6 asserting that delays by Southwark LBC were holding up the sale. On 19th February 2004 Southwark LBC served a counter-notice in form RTB7 saying that they were being denied access to Mr Dennett's property and that there was no action for them to take. This was not correct as Southwark LBC did not in fact need access to the property. There was a further dispute about car parking rights, in which Southwark LBC were trying to deny Mr Dennett rights to which he was entitled. At trial, Southwark LBC was ordered to pay damages for misfeasance in public office and to complete the conveyance to Mr Dennett including appropriate car parking rights. Southwark's appeal against the finding of misfeasance in public office was allowed, as it was possible that the difficulties had been caused by overwork or incompetence rather than by subjective reckless indifference. Southwark's RTB7 notice had been ineffective and this finding was not dependent on Mr Dennett establishing bad faith (distinguishing ***Guinan v Enfield London Borough Council*** [1996] 29 HLR 456). However the invalidity of the RTB7 notice did not entitle Mr Dennett to the benefit of an RTB8 notice which he did not in fact serve (this would have enabled him to set-off rent payments against the purchase price). No amount of benevolent deeming could supply the absence of the RTB8 notice. ***Southwark LBC v Dennett*** [2007] EWCA Civ 1091.

OTHER DEVELOPMENTS

ENERGY PERFORMANCE OF BUILDINGS

The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No.2) Regulations 2007 SI 3302 come into force on 31st December 2007. They amend the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 in relation to various requirements related to energy performance certificates and recommendation reports. In particular, the implementation of the requirement for large buildings occupied by public authorities and institutions performing similar functions to display an energy certificate is deferred from 6th April 2008 to 1st October 2008. The implementation of the requirement for energy performance certificates for newly constructed dwellings is deferred from 1st January 2008 to 6th April 2008.

HOME INFORMATION PACKS

The Housing Act 2004 (Commencement No.10) (England and Wales) Order 2007 SI 3308 brings the requirement for HIPs in relation to properties with fewer than three bedrooms into force on 14th December 2007. The relevant provisions are set out in Part 5 of and

Schedule 8 to the Housing Act 2004. The requirement for HIPs already applies to properties with three or more bedrooms by virtue of commencement orders nos. 8 and 9. The provisions apply to a residential property unless it is excepted under Part 6 of the Home Information Pack (No.2) Regulations 2007.

The Home Information Pack (Amendment) Regulations 2007 SI 3301, coming into force on 14th December 2007, amend the Home Information Pack (No.2) Regulations 2007, which are the principal regulations. By ss.155 to 159 Housing Act 2004, a HIP must comply with the principal regulations. Regulation 2 of SI 3301 adds a new regulation 10A to the principal regulations, the effect of which is to treat required leasehold documents other than the lease as authorised documents for a temporary period until 1st June 2008. A further amendment by regulation 3(1) (to regulation 34 of the principal regulations) extends the period for first day marketing during a temporary period from January 2008 to 1st June 2008.

STAMP DUTY LAND TAX

The Stamp Duty Land Tax (Zero-Carbon Homes Relief) Regulations 2007 SI 3437 provide relief from stamp duty land tax on the first acquisition of a dwelling which is a zero-carbon home in accordance with ss.58B and 58C Finance Act 2003. The Regulations come into force on 7th December 2007 but have retrospective effect in relation to acquisitions made on or after 1st October 2007. They only have effect in relation to acquisitions before 1st October 2012, suggesting that the legislation will be reviewed prior to that date.

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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