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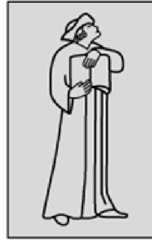

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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

BUSINESS TENANCIES

The case of ***Pointon York Group plc v Poulton*** [2006] EWCA Civ 1001, relating to parking rights, appeared in the July 2006 bulletin and has now been reported at [2006] 38 EG 192.

HOUSING BENEFIT

The court considered the meaning of "locality" in the context of the setting of a Local Reference Rent, which involves taking a median figure between low and high rents within a locality in order to assess housing benefit. The provisions under consideration were contained within Schedule One of the Rent Officers (Housing Benefit Functions) Order 1997 SI 1984 as amended by the Rent Officers (Housing Benefit Functions) (Amendment) Order 2001 SI 3561. It was held that the Rent Service was wrong to assume that the amended Order made no difference to the approach it had taken in the past. The Rent Service had no proper appreciation of the meaning of the word "locality" in the Order, and the decision that Sheffield was a locality within the meaning of the Order had not been properly reached. The Local Reference Rent had been fixed unlawfully as the Rent Service had failed to determine the extent of the locality in the manner required by the Order. It was not permissible to import additional non-statutory criteria in order to modify clear and unambiguous statutory criteria. The housing benefit determinations under consideration were quashed. ***R (Heffernan) v The Rent Service*** [2006] EWHC 2478 (Admin).

LEASEHOLD VALUATION TRIBUNAL: COSTS

The landlord had been obliged to obtain declarations from the LVT under s.27A Landlord and Tenant Act 1985 in respect of major works to two blocks of flats. The landlord's costs of these proceedings amounted to some £18,000 plus VAT. However the LVT limited the costs recoverable to £3,850 plus VAT. On appeal the Lands Tribunal held that the LVT had

been wrong in law to limit the landlord's costs. There was no question that the costs had been reasonably incurred and the LVT had been wrong to limit them for the reasons given. The landlord was justified in making the application, due to the recalcitrance of the tenants, and there was no question of it having been made frivolously or without merit. ***Shinereach Ltd*** [2006] EWLands LRX/94&97/2005.

NUISANCE

The court considered s.198(6)(b) of the Town and Country Planning Act 1990, which allows the cutting down, uprooting, topping or lopping of any tree so far as may be necessary for the prevention or abatement of a nuisance, even if the tree is protected by a preservation order. It was held that "nuisance" means actionable nuisance. There must be actual or imminent damage, not just the pure encroachment of roots or branches into or over the adjoining land. The word "necessary" provides a simple link between the cutting down etc. of the tree and the prevention or abatement of the nuisance. It governs the extent of the work to the tree, and nothing more. In order to decide whether work to the tree is necessary it is not appropriate for a person to have to consider all other alternative schemes or such matters as the financial position of the individuals involved or whether they have insurance. In particular, the fact that alternative engineering solutions may be available to abate or prevent the nuisance is not relevant to the operation of s.198(6)(b). ***Perrin & anor v Northampton Borough Council & ors*** [2006] EWHC 2331 (TCC); [2006] 41 EG 224 (CS).

RIGHTS OF WAY

In ***R (Godmanchester Town Council & anor) v Secretary of State for the Environment, Food and Rural Affairs*** and ***R (Drain) v Same*** [2005] EWCA Civ 1597, the Court of Appeal held in relation to the proviso to s.31(1) Highways Act 1980 that it is not necessary for the owner to show that he did not have the intention to dedicate a right of way continuously throughout a 20 year period. It is sufficient if at some time during the 20 year period he had an intention not to dedicate. This decision was considered in ***Berry v Secretary of State for the Environment, Food and Rural Affairs*** [2006] EWHC 2498 (Admin), where it was held that the Inspector was wrong to hold that the period for which the landowner had had an intention not to dedicate was de minimis, or legally insignificant. The overwhelming evidence was that a sign had been erected on the land in July or August 1999. The landowner had lodged a Landowner Evidence form with the council in December 1998 and made a statutory declaration of his intention not to dedicate in January 1999. This period of six or seven months could not be regarded as legally insignificant. The period under consideration was 1979 to 1999. A period of nineteen and a half years is not the same as a full period of twenty years. The order confirming the existence of the public right of way was quashed.

Where the Land Authority for Wales exercised its statutory powers to override rights, it was held that the effect of a transfer under the provisions of the Land Registration Act 1925 was to transfer the beneficial interest. The reality was that once the legal estate had been transferred, the local authority became the owner in equity and would have become the owner in law upon registration. The local authority could therefore have been said to "wash" the title through its brief ownership in order to exercise its statutory powers under

sch 20 of the Local Government, Planning and Land Act 1980, provided that it considered the exercise properly. Under sch 20 LGPLA 1980, as under s.237 of the Town and Country Planning Act 1990, the effect of the erection of buildings or work on the land by a person deriving title under an authority that had acquired the land was to override rights of way even where the works were carried out years later. The statutory power to facilitate redevelopment under sch 20 LGPLA 1980 overrides any third-party right to compensation. In circumstances where, following discovery of documents, the claimant sought to amend the claim, the delay in bringing proceedings was relevant. The claimant could have sought judicial review at the time of the development in 1995. The prejudice to the defendants was significant in terms of access to documents and in the context of future development. After 10 years they would have been entitled to assume that no further action would be brought. On the other hand the Claimant would be no worse off with a diverted right of way. ***Ford Camber Ltd v Deanminster Ltd & anor*** [2006] EWHC 1961 (Ch); [2006] 40 EG 248.

RIGHT TO LIGHT

An actionable nuisance had taken place by the obstruction of the rights to light to two basement windows by the defendant's redevelopment. The obstruction presented by the defendant's building to the claimant's light in respect of the basement windows amounted to a real injury, ignoring the possibility of artificial lighting, and went beyond a partial inconvenience. The claimant had sought a mandatory injunction requiring removal of part of the defendant's building. Damages were awarded but imposing a mandatory injunction was deemed oppressive on the basis that the claimant had suffered a relatively trivial injury to its building in circumstances where the claimant's building could use artificial light in any event. A mandatory injunction requiring demolition of a substantial part of the defendant's structure would be disproportionate to the injury caused to the claimant. The fact that the defendant had acted honestly throughout, genuinely believing that the new construction did not infringe the claimant's right to light, was relevant, as was the fact that the claimant did not apply for an interlocutory injunction prior to the defendant's redevelopment when it could have stopped the infringement altogether. ***Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*** [2006] 41 EG 226.

SERVICE CHARGES

The Court of Appeal dismissed an application for permission to appeal a decision of the Lands Tribunal in ***The Earl Cadogan & anor v 27/29 Sloane Gardens Limited*** [2006] EWCA Civ 1331. The decision of the Lands Tribunal [2006] EWLands LRA/9/2005 appeared in the April 2006 bulletin. The principles of construction set out by HHJ Rich QC in the Lands Tribunal decision were not in dispute. There was no serious prospect of success for the freeholders in persuading the Court of Appeal that the headlessee was not entitled to recover by way of service charge contributions to the notional market rent of the caretaker's flat. The decision was of wider significance because the leases were in standard form and so similar issues might well arise in relation to other properties within the Cadogan Estate.

VAT

Although Riverside Housing Association Ltd was a charity, the cost of construction of its new Midlands divisional head office was not zero-rated for VAT. The whole of its activity is concerned with letting properties on assured tenancies to residential occupiers, selling properties to tenants in accordance with right to buy provisions, and selling properties which are surplus to requirements. Although Riverside does not set out to maximise its profits, receives public money by way of housing benefits and grants, and is subject to extensive regulation, this did not displace the finding that its activities were in the course of a business for the purposes of the Value Added Tax Act 1994. ***Riverside Housing Association Ltd v Commissioners for HM Revenue and Customs*** [2006] EWHC 2383 (Ch); [2006] 41 EG 225 (CS).

OTHER DEVELOPMENTS

HOUSES IN MULTIPLE OCCUPATION

The Houses in Multiple Occupation (Specified Educational Establishments) (England) (No. 2) Regulations 2006 SI 2280 came into force on 1st October 2006. Buildings which could otherwise be HMOs are excluded by schedule 14 to the Housing Act 2004. These include buildings occupied by persons in full-time further education where the person managing or controlling the building is one of the establishments (universities and colleges) listed in the schedule to the Regulations.

HOUSING ALLOCATION

The amendments made in the Allocation of Housing and Homelessness (Miscellaneous Provisions) (England) Regulations 2006 SI 2527 create a new class of eligible persons who have humanitarian protection. Humanitarian protection is a form of leave granted to persons who do not qualify for refugee status but who would face a real risk of suffering serious harm if returned to their state of origin. The Regulations apply to applications for an allocation or for housing assistance made on or after 9th October 2006.

HOUSING STATISTICS

Statistics recently published by the Department for Communities and Local Government show that in 2004-5 there were 14.6 million (70%) owner occupying households, 3.7 million social renters (18%) and 2.4 million private renters (12%). Owner occupying in London is much lower, at 58%, with social renting at 25% and private renting at 17%. Private renting has grown in popularity between 1993 and 2005: the proportion of those aged 25 to 29 in private rented accommodation has risen from 19% to 34%. Tenure varies with age: 79% of household reference persons aged 45 to 64 were owner occupiers; but only 67% of those aged over 65. The remainder of those aged over 65 were social renters. Couples with no dependent children were the most common type of household, forming 36%, and one person households were the second most common type, at 28%. Average rents were £62

per week for social renters and £117 per week for private renters. See www.communities.gov.uk for more information.

MOBILE HOMES

The Mobile Homes (Written Statement) (England) Regulations 2006 SI 2275 came into force on 1st October 2006. They replace the Mobile Homes (Written Statement) Regulations 1983 in relation to England. S.1(2) of the Mobile Homes Act 1983 provides that before a s.1 agreement is entered into, the owner of the site must give a written statement to the proposed occupier of the mobile home. By Regulation 3 of the 2006 Regulations, the written statement must contain prescribed information as set out in the schedule to the Regulations. This includes a formal notice at the start of the written agreement advising the occupier that the document sets out their legal rights. Part 1 of the prescribed information includes the names of the parties; the particulars of the pitch, including a plan; the extent of the site owner's interest in and planning permission for the land; the pitch fee; review of the pitch fee; and any additional charges. Part 2 of the prescribed information sets out information about the occupier's rights, Part 3 sets out implied terms, Part 4 various supplementary provisions, and Part 5 is blank so that any express terms can be set out.

PRE-ACTION PROTOCOL FOR RESIDENTIAL RENT ARREARS

This new protocol under the Civil Procedure Rules is in effect from 2nd October 2006 and can be found online at www.dca.gov.uk/civil/procrules_fin/index.htm The protocol applies to residential possession claims by social landlords such as local authorities, registered social landlords and housing action trusts. It does not apply to claims in respect of long leases or claims for possession where there is no security of tenure. The protocol reflects the guidance on good practice given to social landlords in the collection of rent arrears. The court will take into account whether the protocol has been followed when deciding what action to take. The protocol provides that the landlord should contact the tenant as soon as reasonably possible if the tenant falls into arrears in order to discuss the cause of arrears, the tenant's finances, entitlement to benefits, and repayment of arrears. The landlord and the tenant should try to agree affordable sums for the tenant to pay towards the arrears. Rent statements should be provided quarterly. The landlord should offer to assist the tenant in any claim the tenant may have for housing benefit and the landlord and tenant should work together to resolve any housing benefit problems. The parties should consider ADR. Readers are referred to the full text of the protocol for further details.

Note: Where cases are given a universal reference but no other reported reference is given a transcript can be found in full at www.bailii.org

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