



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

OCTOBER 2007

CASE LAW UPDATE

ADVERSE POSSESSION

The Grand Chamber of the ECHR has given a ruling in *JA Pye (Oxford) Ltd & anor v UK* [30th August 2007] 41 EG 200 (CS) in relation to the pre-Land Registration Act 2002 law of adverse possession. The applicants had complained to the ECHR, arguing that UK law on adverse possession, by which they had lost their land to a neighbour, violated their rights under Article 1 of the First Protocol (right to peaceful enjoyment of possessions). The Fourth Chamber upheld that complaint. The government's appeal to the Grand Chamber was allowed. The provisions of the Land Registration Act 1925 and Limitation Act 1980 were part of the general land law to regulate limitation periods in the context of use and ownership of land as between individuals. There was a general interest in both the limitation period and the extinguishment of title at the end of that period. The arrangements fell within the state's margin of appreciation. Limitation periods had to apply regardless of the size of the claim, and so the value of the land could not affect the outcome. The fair balance required by Article 1 of Protocol had not been violated.

In allowing an appeal from the Deputy Adjudicator to HM Land Registry, Mr Peter Leaver QC (sitting as a deputy) reviewed the pre-Land Registration Act 2002 law of adverse possession and in particular what acts amount to possession. The occupier had to prove that he was in possession of the disputed land for twelve years prior to 13th October 2003, when LRA 2002 came into force. The judge noted that it is the element of exclusivity which distinguishes possession from mere occupation. Normally, the erection of fences will be considered to be an unequivocal act of possession, as will the placing and locking of gates which control the entrance and access to the land. However the erection of fences must be for the purpose of keeping people out of the land and not merely for the purpose of keeping animals in. The mere maintenance of existing boundary features such as a fence, ditch or hedge is not an act which unequivocally asserts exclusive control over land. The cultivation of land for the purpose of growing crops or trees, or as a garden, will usually be treated as unequivocal evidence of possession. The cutting of trees or turf is not without more to be treated as evidence of possession. On the facts the necessary factual possession and intention to possess were not made out. The Deputy Adjudicator's decision had been

against the weight of the evidence. **Long & Satow (LPA Receivers appointed by SS Global Ltd) & ors v Sava** [2007] EWHC 2087 (Ch).

HOUSING

The applicant tenant lived in a property with her husband and five children. The property was statutorily overcrowded by half a person. This meant that the tenant was committing a criminal offence by allowing the situation to continue. The Court of Appeal nevertheless upheld the first instance decision that the Housing Review Officer had acted lawfully in concluding that it was reasonable for her to continue to occupy the property. The tenant was not homeless. The Code of Guidance states that statutory overcrowding may not by itself be sufficient to determine reasonableness, but it can be a contributory factor if there are other factors which suggest unreasonableness. The Housing Review Officer noted that there were many families living in overcrowded accommodation and that there were 21 households on the register in greater need than this tenant for five bedroomed accommodation. The statutory question under s.177(2) Housing Act 1996 is: “*Having regard to the general circumstances prevailing in relation to housing in my district, including overcrowding in the district, is it reasonable for the appellant to occupy her accommodation?*” The HRO’s decision that it was reasonable was correct. Overcrowding gives a person preferential treatment in the allocation of housing under s.167(2) HA 1996. If someone in overcrowded housing was automatically homeless this provision would not be necessary. **Harouki v Royal Borough of Kensington & Chelsea** [2007] EWCA Civ 1000.

The Court of Appeal considered the housing difficulties posed where joint residence orders are made under s.8 Children Act 1989. The family court should consider how capable each parent is of meeting the child’s needs (s.1(3)(f) CA 1989). This must include accommodation. The family court is obliged to consider the likelihood of suitable accommodation becoming available, and so is bound to enquire of the relevant local housing authority as to what accommodation is currently available and what is likely to become available. Where the local housing authority has already had the opportunity to comment to the family court on local conditions in a contested hearing, it is difficult to see why it should do other than follow the decision of the family court, unless there is a change of circumstances. However where a joint residence order is made by consent the local housing authority is entitled to consider afresh the reasonableness of the applicant’s expectation that a dependent child will reside with him or her. If it decides that it is not reasonable, the parent should return to the family court so that the court can reconsider the order previously made by consent. **Holmes-Moorhouse v Richmond-Upon-Thames LBC** [2007] EWCA Civ 970.

The London Borough of Newham has been ordered to reconsider parts of its housing allocation policy which have been found to be unlawful. It was noted that all judges considering this problem have stressed that it is for the local authority to provide an allocation scheme according to its Part VI duty. The merits as to who, how and when priority should be afforded is a matter for the local authority subject to its special duties. Judges should be slow to enter the politically sensitive area of allocations policy. However the scheme must address the greatest need by way of a preference scheme that enables a judgment on cumulative need to be taken. It is part of the authority’s statutory duty to make a cumulative assessment of need. To this extent the existing policy was deficient. The reasoning in **R (Cali & ors) v Waltham Forest LBC** [2006] EWHC 302 Admin was

expressly approved and followed. Other challenges to the scheme were rejected. **R (Ahmad) v Newham LBC** [2007] EWHC 2332 (Admin).

An Article 6 challenge to the Demoted Tenancies (Review of Decisions) (England) Regulations 2004 has been rejected. In **McLellan v Bracknell Forest Borough Council** [2001] EWCA Civ 1510 the Court of Appeal held that Article 6 was engaged by a review decision under the statutory scheme relating to introductory tenancies. However, the availability of judicial review meant that the statutory scheme as a whole satisfied the requirements of Article 6. There was no material distinction between the legislation relating to introductory tenancies and that relating to demoted tenancies. Although strictly **McLellan** was not binding, there was no reason to take a different approach in relation to demoted tenancies. There was no breach of Article 6 in the proceedings conducted or in the review carried out by the officer of the local authority. **R (Gilboy) v Liverpool City Council & anor** [2007] EWHC 2335 (Admin).

LEASEHOLD ENFRANCHISEMENT

In an important decision, the Court of Appeal has upheld the decision of the Lands Tribunal that hope value is not a permissible element in valuations carried out under schedules 6 and 13 Leasehold Reform, Housing and Urban Development Act 1993. Although there was no appeal before the Court in respect of hope value under s.9(1A) Leasehold Reform Act 1967, a clear view was also reached that hope value should not be included when single houses were enfranchised. There was no reason for the landlord to be paid both for the hope and its fulfilment in the same transaction. The appeal against the setting of a guideline deferment rate of 4.75% for houses and 5% for flats in the prime central London area was also dismissed. The approach of the Tribunal was in line with the majority of experts, and did not disclose any error of law. An important part of the role of the Lands Tribunal is to promote consistent practice in land valuation matters. It was entirely appropriate for the Tribunal to offer guidance as they had done in the present case, and unless and until the legislature intervenes, to expect LVTs to follow generally that lead. **Cadogan & anor v Sportelli & anor & or appeals** [2007] EWCA Civ 1042.

PRE-ACTION PROTOCOLS

An action in the Technology and Construction Court has been stayed to facilitate compliance with the pre-action protocol for Construction and Engineering Disputes. The litigation related to two preliminary construction projects at Whipps Cross Hospital in Leytonstone, London E11. It was noted that a meeting is not required under the Protocol until after there has been a proper exchange of information between the parties. If a meeting is held prematurely it is unlikely to serve any useful purpose. There was a real possibility of settlement if the parties went through the Protocol process, and accordingly a stay would be granted until 1st December 2007. **Cundall Johnson & Partners LLP v Whipps Cross University Hospital NHS Trust** [2007] EWHC 2178 (TCC).

PROFESSIONAL NEGLIGENCE

Jack J has declined to re-open his judgment in the Bournemouth Airport case so as to reconsider the figure of 10% turnover rent as the figure on which the parties were most likely to have agreed. He took the view that it accorded with the authorities that a judge should only exercise his jurisdiction to reconsider a judgment where it was clear to him without prolonged enquiry that he had reached the wrong conclusion. He was not satisfied that this was so. Permission to appeal had already been refused, and any fresh application for permission would have to be made to the Court of Appeal. ***Seventh Earl of Malmesbury & ors v Strutt & Parker (a partnership)*** [2007] EWHC 2199 (QB); [2007] 42 EG 294 (CS).

PROPRIETARY ESTOPPEL

Where an estoppel is raised so as to restrict testamentary freedom of action, there is no absolute requirement that there should be an express promise in terms. However where the assurances relied on fall significantly short of express promises made in terms as such, it will be all the more important for the claimant to be able to support his case with clear and substantial detrimental reliance, and perhaps with evidence from others corroborating the meaning and intention which the claimant imputes to the deceased's words or actions. Here the estoppel was made out. The decision is useful as a careful analysis of an estoppel arising over a long period of time through indirect statements and actions, rather than by one or more clear and express promises. The deceased was a Somerset farmer not given to direct expression. There was a substantial body of corroborative evidence and evidence of very considerable detrimental reliance. ***Thorner v Curtis & ors*** [2007] EWHC 2422 (Ch).

RESTRICTIVE COVENANTS

S.610 Housing Act 1985 allows for an application to the county court to vary a lease or restrictive covenant preventing conversion of a single dwelling house into two or more dwelling houses. S.610(a) allows this where owing to changes in the character of the neighbourhood the premises cannot readily be let as a single dwelling house but could be let if converted into two or more. S.610(b) allows this, as an alternative to (a), where planning permission has been granted for the conversion. This provision is much less well known and much less well used than s.84 Law of Property Act 1925 (application to Lands Tribunal to modify or vary restrictive covenant). Until now there has been very little judicial guidance on its operation. In ***Lawntown Ltd v Camenzuli*** [2007] EWCA Civ 949; [2007] 42 EG 295 (CS); the Court of Appeal held that the s.610 HA 1985 regime was plainly intended to be separate from s.84 LPA 1925. The court must have regard to the interests to be protected by the restrictive covenant, and also to the interests of the person seeking to vary the covenant and the advantages which will accrue from variation, the latter of which can include public as well as private interests. The court must not leave matters out of consideration merely because they have already been considered by the local planning authority. The overwhelming factor in allowing the application was the urgent demand for more housing in London. The court's power to impose conditions on a variation included the power to order compensation, but no payment was appropriate in the present case, given in particular the absence of any evidence of diminution in value of neighbouring properties.

RIGHTS OF WAY

The respondents sought to argue that a right of way also included a right to park vehicles on the servient tenement. It was not physically possible to bring vehicles onto the respondents' land because it was accessible only by boat or on foot. The House of Lords held that there was no fundamental objection in principle to the right that the respondents sought to establish. The essence of a servitude was that it existed for the reasonable and comfortable enjoyment of the dominant tenement. It might carry with it other rights which would not qualify as servitudes on their own. The right to turn and to load and unload vehicles fell within that principle. A right of vehicular access without a right to park would be completely impractical on the particular facts. Parking would not place an unacceptable burden on the servient tenement, nor would it deprive its owners of any reasonable use of the land in question. It was unlikely that a large number of vehicles would be parked, given that the right was in favour only of the owners of the dominant tenement and their guests and visitors. ***Moncrieff & anor v Jamieson & ors*** [2007] UKHL 42; [2007] 43 EG 200 (CS).

RIGHT TO MANAGE

The Lands Tribunal allowed the landlord's appeal against an order giving the right to manage to an RTM company. The appeal succeeded on a single ground, namely that the building was not a self-contained building or part of a building because it was not divided vertically. Approximately 2% of the floor area, comprising two parking spaces in the basement and the roller shutter security door, were outside the vertical division. The requirement that there must be a vertical division (s.72(3) Commonhold and Leasehold Reform Act 2002) is unqualified. Deviations from the vertical that are de minimis could no doubt be ignored. However the part of the building including the disputed area could not be said to be a vertical division. The LVT had erred in importing a test of materiality by reference to the test in the Leasehold Reform Act 1967. ***Re Housing and Management (Solitaire) Ltd*** [2007] EWLands LRX/138/2006.

SERVICE CHARGES

S.19 Landlord and Tenant Act 1985 provides that costs are to be taken into account only to the extent that they are reasonably incurred. If reasonably incurred, they fall to be apportioned in accordance with the terms of the lease, unless excluded by a failure to consult, etc. The LVT should not have refused jurisdiction to interpret the residential leases so as to apportion the service charges between the residential and commercial units. It is wrong for the LVT to decline jurisdiction to construe a lease if its true construction is determinative of a matter that the LVT has to decide. It may as a matter of discretion decline to determine a point of construction because it is better determined by other means. If, however, no provision has been made or accepted by the parties for such other determination, the LVT not only has jurisdiction but has a duty to construe the lease insofar as is necessary either to decide the application under s.19 or to determine how it should exercise such jurisdiction as it decides that it has. ***Re Rowner Estates Ltd*** [2007] EWLands LRX/3/2006.

OTHER DEVELOPMENTS

AGRICULTURAL LAND TRIBUNALS

New rules for the operation of Agricultural Land Tribunals come into force on 15th January 2008, by the Agricultural Land Tribunals (Rules) Order 2007 SI 3105. It is thought that the two existing Rules Orders are outdated and that they hamper the ability of Tribunals to carry out their duties effectively. The new rules reflect the modern civil procedure rules and the new “Guide to Drafting Tribunal Rules” published by the Council on Tribunals in 2003. The Agricultural Land Tribunals are due to move to the Tribunal Service in 2009 and it will facilitate integration if their rules of procedure are more closely aligned to those of other tribunals.

ESTATE AGENTS

The Consumers, Estate Agents and Redress Act 2007 (Commencement No.1) Order 2007 SI 2934 brings into force provisions of the Consumers, Estate Agents and Redress Act 2007 which amend the Estate Agents Act 1979 to provide for redress schemes dealing with complaints about estate agents. The provisions come into force on 12th October 2007.

HOUSING STATISTICS

Housing in England 2005-6 was published by the Department for Communities and Local Government on 2nd October 2007. The annual survey provides key housing data on owner occupation and on the social and private rented sectors. In 2005-6 there were 14.6 million (70%) owner-occupying households, 3.7 million (18%) social renters and 2.5 million (12%) private renters. The proportion of people aged 25-29 who are owner-occupiers has fallen from 60% to 47% between 1993 and 2005, and private renting has become more common among this age group. 56% of home-owners are buying their homes with a mortgage. 44% owned their home outright. Couples with no dependent children form the most common type of household (36%). Single person households are the second most common type of household, forming 28% of the total. It is estimated that there are around 489,000 households with second homes either in the UK or abroad.

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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