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## PROPERTY LAW BULLETIN

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### CASE LAW UPDATE

#### CHARGING ORDERS

Mrs Mulhall argued unsuccessfully that the Yorkshire Bank was not entitled to enforce a charging order obtained consequent to a judgment debt. Following ***Ezekiel v Orakpo*** [1997] 1 WLR 340 (CA), there was no provision in the Limitation Act 1980 which affected the enforcement of the charging order by the bank. Mrs Mulhall was wrong to contend that the charging order could not be enforced because of the lapse of time. The enforcement of the charging order by normal means was not barred by s.20(1) LA 1980, and unlike the position under a legal mortgage, the creditor's rights are not barred after 12 years because the holder of a charging order does not have a right to possession such that time can run against it under s.15, and extinction of title cannot therefore occur under s.17. It was not illogical that time limits should apply differently where a creditor already has a judgment. The parties' rights had been established by court proceedings and the only outstanding question was one of enforcement. The chargor will only be permitted to redeem an equitable charge on terms of payment of all principal and interest outstanding under the charge, irrespective of any limitation period in s.20 LA 1980. There was no basis for discharging the charging order in this case since the bank continued to enjoy rights as a secured creditor. There is no limitation period for execution of a judgment other than under s.24 LA 1980, which does not apply to the making of a charging order. ***Yorkshire Bank Finance Ltd v Mulhall & anor*** [2008] EWCA Civ 1156; [2008] 43 EG 195 (CS).

#### CONSTRUCTIVE TRUSTS

Once a finding of an express arrangement or agreement has been made, all that the claimant to a beneficial share under a constructive trust needs to show is that he has "*acted to his detriment or significantly altered his position in reliance on the agreement...*" It is not necessary to show that the arrangement or agreement involved the making of something in the nature of a bargain between the parties, or that the claimant had performed his part of the bargain. This argument had been advanced unsuccessfully by counsel for the bank in ***Lloyds Bank Plc v Rosset & anor*** [1991] 1 AC 107, over 18 years ago. In any given case the claimed acts of reliance may be too trifling to enable the establishment of the claimed constructive trust.

Whether in any particular case the claimed acts of detriment are or are not sufficient is essentially a matter of judgment for the judge concerned to decide the matter. There was no doubt that Mr Parris had made a materially greater financial contribution to the flats than Mr Williams had. Mr Williams had done two days' painting work and had contributed around £2,000. This was materially less than Mr Parris, but it could not be said to be trivial. The Recorder had been right to find that Mr Williams was beneficially entitled to one of the two flats which had been purchased in Mr Parris' sole name. **Parris v Williams** [2008] EWCA Civ 1147; [2008] 43 EG 194 (CS).

## EASEMENTS

A transfer included the benefit of the right to “*enter...upon such part of the yard at the rear of [the adjoining property] as is necessary for the purpose of carrying out any maintenance repair rebuilding or renewal to the Property...*” The property had the benefit of planning permission for the demolition of the existing single storey warehouse/industrial structures and the building of a 5/6 storey block with commercial units on the ground floor and 24 flats on the upper floors. The new building would be 22,055 sq ft as compared with the existing buildings of 3,382 sq ft. Although “*rebuilding*” has a limited meaning in planning legislation and in a leasehold covenant, it did not follow that it had a similarly restricted meaning in a right of entry provision. The scope of the right was conditioned by its underlying object. When the original common owner first sold off the adjoining property a right of entry was thought necessary because it was envisaged that the situation of the existing land and buildings would not remain for ever. The relevant operations related to “*the Property*” which included not only the existing structures but also the land on which they stood. The exercise of the right was subject to important safeguards set for the protection of the adjoining owner. “*Rebuilding*” should not be given too literal a construction. It should permit entry onto the adjoining property in order to preserve existing buildings on the property, or to pull down the buildings on the property and (a) put up new buildings in their place, or (b) put up buildings similar to the demolished buildings, or (c) put up different buildings in place of the demolished buildings. “*Renewal*” had an even wider meaning and it was not possible to restrict the terms “*rebuilding and renewal*” so as to exclude the construction of a new and different building on the property. **Risegold Ltd v Escala Ltd** [2008] EWCA Civ 1180; [2008] 44 EG 115 (CS).

## EQUITABLE INTERESTS

The House of Lords considered with some care the doctrines of proprietary estoppel and constructive trust, and concluded, contrary to the conclusions of Etherton J and the Court of Appeal, that they were not applicable on the facts of the case. Lord Walker commented that “*Equitable estoppel is a flexible doctrine which the Court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined way...*” Mr Cobbe had agreed with Yeoman's Row that he would try to obtain planning permission for a residential development on land owned by Yeoman's Row. If planning permission was obtained, the parties would enter into a written agreement whereby Mr Cobbe would purchase the land for £12 million and develop it, and would pay Yeoman's Row 50% of any profits exceeding £24 million. When planning permission was

finally obtained, Yeoman's Row sought to renegotiate the oral agreement, contending for a purchase price of £20 million, and 40% of all sale proceeds over £40 million. There could be no claim for specific performance because of s.2 Law of Property (Miscellaneous Provisions) Act 1989 (contract for sale of land can only be made in writing). There was no proprietary estoppel. Unconscionability of conduct could well lead to a remedy, but only if the ingredients of proprietary estoppel were present, which was not the case here. Mr Cobbe's interest was in an oral agreement for the purchase of land that lacked statutory formalities and was also contractually incomplete. Mr Cobbe knew that the oral agreement was legally unenforceable. Yeoman's Row's conduct had been unconscionable but this did not justify a leap to a conclusion that there was a proprietary estoppel. Nor was there a constructive trust. The property was owned by Yeoman's Row long before there were any negotiations for a joint venture agreement. The interest that Mr Cobbe was expecting to acquire was an interest pursuant to a formal written agreement, some of the terms of which remained to be agreed, and which never came into existence. Mr Cobbe was, however, entitled to a common law remedy for unjust enrichment and/or a quantum meruit for his reasonable expenditure. The effect of this decision is that it is now likely to be more difficult to advance claims founded on proprietary estoppel and/or constructive trust, particularly in a commercial context. **Yeoman's Row Management Ltd & anor v Cobbe** [2008] UKHL 55, [2008] 35 EG 142 and 36 EG 142.

## ESTATE AGENTS

The OFT brought proceedings against Foxtons alleging that some of the terms in its standard form of contract with landlords for lettings were contrary to the Unfair Terms in Consumer Contracts Regulations 1999. Foxtons succeeded on an application to strike out the claim for an injunction and one of the claims for a declaration. Morgan J held that the injunction sought by the OFT was too wide to be granted in the present proceedings. A distinction had to be drawn between an individual challenge and a collective challenge. In an individual challenge, the court would be able to apply the 1999 Regulations to all of the circumstances of the particular case; it could not do so in a collective challenge. An injunction in the terms sought by the OFT would mean that the court would effectively be ruling on Foxtons' rights in every individual case without having regard to the specific circumstances of each individual case. A declaration that the relevant terms were not binding on consumers was problematic for the same reason. However a declaration that certain terms were not expressed in plain and intelligible language could be granted on a collective challenge, because the outcome of the issue depended upon the language used and not upon the circumstances of each case. **Office of Fair Trading v Foxtons Ltd** [2008] EWHC 1662 (Ch); [2008] 29 EG 91 (CS).

## HUMAN RIGHTS

Birmingham City Council sought to evict Mr Doherty from the gipsy and travellers' caravan site where he had lived for many years. His licence to occupy the site had come to an end and he had no enforceable right to remain there under English property law. Despite invitations from counsel to do so, the House of Lords declined to overrule its decision in **Kay v Lambeth LBC** [2006] UKHL 10, and instead elaborated on the reasoning in **Kay**. There are two possible situations, or "gateways" where it may be possible for the court to refrain from making an order for possession where the requirements of the law have been satisfied and the public authority landlord has an unqualified right to recover possession. The

two gateways are not mutually exclusive and may both be available. Gateway (a) is available where there is a seriously arguable point that if the court made the order for possession this would be incompatible with Article 8 ECHR. In this situation the court must either give effect to the law, as far as is possible under s.3, in a way that is compatible with Article 8, or must adjourn the proceedings for the compatibility issue to be dealt with in the High Court. Gateway (b) is available where the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable. Again the point must be seriously arguable, but the challenge can either be on conventional public law grounds, or by challenging factual allegations, and can be raised by way of defence in the possession proceedings. Separate judicial review proceedings are not necessary. It was noted that gateway (b) is not available in private law proceedings. In the present case it was not possible to interpret the legislation in a way that was compatible with Article 8. It might have been appropriate to make a declaration of incompatibility, but the legislation had already been amended to address the incompatibility, subject to a commencement date. However the judge could have considered gateway (b), and the case would be remitted to the High Court for this purpose. ***Doherty & ors v Birmingham City Council*** [2008] UKHL 57.

## **LANDLORD AND TENANT (COVENANTS) ACT 1995**

The House of Lords has given an important decision on the effect of s.17 LT(C)A 1995 in relation to rent reviews and the requirement to serve notice on the original tenant in the event of default in payment by the new tenant. At common law a tenant remains liable to pay rent during the term, whether or not he has assigned the leasehold estate to someone else. S.5(2) LT(C)A 1995 provides that a tenant is released from his covenants on assignment. However this only applies to new leases granted after 1<sup>st</sup> January 1996. The common law continues to apply to earlier tenancies, subject to the restrictions in ss.17 to 20 of the Act. The question under consideration was whether, for the purposes of s.17(2), an increase under a rent review was to be treated retrospectively as having become due from the commencement of the rent review period, thereby triggering the six month period during which the landlord must serve notice on the tenant or lose the right to claim under the covenant. The statutory construction of s.17 was not entirely satisfactory. There were potentially some “*remarkably silly consequences*”. In order to avoid a situation where a landlord had to serve s.17 notices every time there was an outstanding rent review, even if there was no rent default at the time, their Lordships held that the ‘fixed charge’ that became due on each payment date was the rent at the pre-rent review date level. The additional rent over the period from the rent review date until the determination of the revised rent was a new and separate fixed charge which only became due for the purposes of s.17(2) on the date of determination. This meant that s.17(4) had largely misfired, but this was better than requiring landlords to serve regular notices on former tenants saying that nothing is owing but there is a possibility that something may become owing in the future. In paying the amounts claimed, Scottish & Newcastle was discharging a legal obligation and so was entitled to an indemnity from Mr Raguz. ***Scottish & Newcastle Plc v Raguz*** [2008] UKHL 65; [2008] 44 EG 114 (CS).

## LEASEHOLD ENFRANCHISEMENT

The Lands Tribunal overturned a decision of the LVT in which a deferment rate of 6.5% had been adopted in relation to lease extensions of flats, rather than the **Sportelli** figure of 5%. The factors relied on by the LVT in adjusting the deferment rate were already reflected in the vacant possession value and it was not appropriate to make an adjustment to the deferment rate as well. The LVT had relied on the outer London location of the properties, but the mere fact of location does not self-evidently affect the deferment rate. Evidence of prices gave mere snapshots, and there was no evidence that growth rates were slower or prices more volatile than in the Prime Central London areas. The other factors relied on by the LVT were: a history of litigation between the landlord and tenants about service and charges; “very poor tenants” occupying about half of the flats; the poor external condition of the flats; the proximity to a major road and the Heathrow flight paths; and an adjacent road to an industrial estate. In the light of **Sportelli** the correct approach was to ask whether these matters were fully reflected in the vacant possession value. If, as here, they were so reflected, there was no basis for departing from the **Sportelli** deferment rate of 5%. **Cik v Chavda & ors** [2008] EWLands LRA/111/2007.

## MORTGAGES

Natwest had mistakenly executed a Deed of Release in relation to a mortgage over a property owned by FG Collier & Sons Ltd (now in administration). The administrator wanted to know whether Natwest should be treated as a secured or an unsecured creditor. FG Collier was indebted to the bank on its own account, and had also given a guarantee in respect of a connected company. The debt of the connected company was repaid, but FG Collier’s own indebtedness remained. The bank released the mortgage unaware of FG Collier’s continuing indebtedness, and would not have done so had it known of it. It is well settled that equity will set aside transactions for mistake in appropriate circumstances. Wherever there is a voluntary transaction by which one party intends to confer a bounty on another, it will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. This is so whether the mistake is one of law or fact, so long as the mistake was as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it. Here the bank was granted equitable relief because it executed the Deed of Release believing it was giving effect to the fact that the secured indebtedness had all been discharged. Relief was available where it could be shown that the party affected by the mistake would not have acted as it had done had it been aware of the true facts. Turning the bank from a secured into an unsecured creditor was an unintended effect, the underlying and mistaken belief being that the bank was not a creditor at all. **Fender (administrator of FG Collier & Sons Ltd) v National Westminster Bank Plc** [2008] EWHC 2242 (Ch); [2008] 40 EG 177 (CS).

## RENT REVIEW

The parties were in dispute about the meaning of a rent review clause which provided that the yearly rent was to be calculated as the greater of (i) the market rent of the premises with its existing buildings; or (ii) the market rent on the basis that the buildings consisted instead of a modern single storey warehouse. McDonalds had used the site for its first UK drive-thru hamburger restaurant. The landlord could instead have used the site to construct

and let a warehouse. The tenant, McDonalds, contended that warehouse meant both a physical structure and a use. The landlord contended that “warehouse” as used in the rent review clause simply described a physical entity and said nothing about the use to which that physical entity might be put. Lewison J held that although the building type to be valued was a second generation standard warehouse building, the prospect of obtaining planning permission for the use of that building for retail purposes should be taken into account in the valuation. **McDonalds Real Estate LLP v Arundel Corporation** [2008] EWHC 377 (Ch); [2008] 30 EG 84.

## RESTRICTIVE COVENANTS

The Lands Tribunal refused to modify a restrictive covenant protecting a residential estate of 34 detached houses. The proposed development would have allowed for the building of no more than two additional dwellings in parts of the existing rear gardens. The new dwellings would have faced onto another road. Planning permission had not yet been obtained. The main objections were that in the absence of detailed planning permission it was not possible to form a reliable opinion as to the effects of the development, and that if the restrictions were modified this would establish a precedent for further breaches of the restrictions. It was held that if the Tribunal is to assess the extent of the benefit to an objector of impeding a particular user of land, it is essential for the Tribunal to be provided with full details of that user. In the absence of detailed planning permission, there was insufficient information available to enable the Tribunal to form a clear conclusion as to the effects of the proposed development on those entitled to the benefit of the restriction. The power to prevent a precedent from being established was a practical benefit of substantial advantage. The applicants had also failed to prove that the proposed modification would not cause injury to any of the objectors. Neither ground (aa) nor ground (c) of s.84(1) Law of Property Act 1925 had been made out. **Re: Land at rear of 27 & 29 Highbury Crescent, Camberley, Surrey** [2008] EWLands LP/65/2006.

## SALE OF LAND

A contract for sale was expressed to be subject to the rights of first refusal held by qualifying tenants pursuant to Part I Landlord and Tenant Act 1987. The notices to the tenants specified 1<sup>st</sup> February 2007 as the date by which the offer of disposal had to be accepted. However the contract for sale stated that “...completion shall take place 10 days after the date upon which the said tenants’ rights to proceed under the Act have expired. Such date shall be 24<sup>th</sup> January 2007.” As a result of the confusion over the date for completion the vendor’s conveyancers served three different notices to complete, the last of which was served on 12<sup>th</sup> February 2007 (the first working day ten days after 1<sup>st</sup> February). The purchase monies were then sent by telegraphic transfer at 2.44pm on 26<sup>th</sup> February 2007 (the latest date for completion), but were returned by the vendor’s conveyancers. The purchaser brought proceedings for rectification of the contract (in relation to the date for completion) and specific performance. Blackburne J held that the claim for rectification was made out. There was a common intention that the date inserted into the contract should have coincided with the date for expiry of the LTA 1987 notices. That common intention continued when the contract was entered into. The wording of the contract did not accurately reflect the common intention. It did not matter that payment had been made after 1pm on 26<sup>th</sup> February, except that an additional day’s interest would be payable. However the

purchaser's failure to pay the sum of £599.50 specified by special condition 26 (legal costs plus VAT) meant that the vendor was entitled to rescind the contract. Accordingly the claim for specific performance failed. Blackburne J commented that this was a hard result but that by leaving payment so late, the claimant purchaser had left himself with no margin for error. **Chinnock v Hocaoglu & anor** [2007] EWHC 2933 (Ch); [2008] 29 EG 92.

The obligation to show good title is the central term of a contract for the sale of land. Where the contract is silent, the obligation is a matter of legal implication. In order to show good title one must either be the registered proprietor of the freehold estate with an absolute title, or where the land is unregistered be seized of the fee simple and in a position to convey it without the possibility of dispute or litigation. The obligation to show good title in every respect is rebutted by proving that the purchaser entered into a contract with knowledge of particular defects in the title. The court should not find that it was a term of the contract that the vendor only sells such interest as he has unless that term is made clear and unambiguous to the purchaser. Where good title cannot be shown because the vendor can deduce no title at all to part of the land, the court should be slow to find that the obligation to show good title does not arise. The court considered whether the purchaser would need actual knowledge of a defect in title, or whether constructive knowledge would suffice, but in the event it was found that the purchasers had actual knowledge of the limits of the vendors' title. The vendors were granted the remedy of specific performance in the light of the purchasers' knowledge of the limited extent of their title to the land. **Ezekiel & Ezekiel v Kohali & Kohali** [2008] EWHC 734 (Ch).

## SERVICE CHARGES

HHJ Huskinson, sitting both as a member of the Lands Tribunal and as a County Court judge, ruled on the question whether a landlord had complied with the consultation requirements in s.20 Landlord and Tenant Act 1985 (in the form unamended by CLRA 2002). He held that the landlord had failed to comply with the consultation requirements, and declined to dispense with them pursuant to s.20(9) on the basis that the landlord had not acted reasonably. Consequently the amount recoverable for the major works was limited to £1,000 for the whole block, rather than the £20,727 which had been incurred and allowed by the LVT. The landlord had failed to comply with the requirement in s.20(4)(b) to display the notice and a copy of the estimates "*in one or more places where it is likely to come to the notice of all those tenants.*" The only place where the estimates had been displayed (if at all) was in the offices of the managing agent, some eight to ten miles from the flats. None of the tenants had gone to inspect the documents. There were elderly and disabled people living at the flats and so it was not likely that they would go to inspect the documents. Having documents available for inspection at a place where a determined tenant if he makes the effort may see them, does not constitute a display within the meaning of s.20(4)(b). The landlord had acted unreasonably in a number of respects, in particular by pressing ahead with the works after receiving a letter from one of the tenants (by his solicitor) pointing out that there had been a failure to comply with the consultation requirements. **M & M Savant Ltd v Brown & ors** [2008] EWLands LRX/26/2006.

## TRESPASS

Warren J assessed damages for trespass where Elmbridge Borough Council had allowed its tenants to trespass on a strip of land belonging to Field Common Ltd when travelling to and from an industrial estate. There had been a bridleway over which Elmbridge had a right of way for all purposes, but Elmbridge had laid a tarmac road which was wider than the right of way and encroached on land belonging to FCL. In laying the tarmac road, Elmbridge had permitted and so was liable for the trespass by its tenants on the strip of land belonging to FCL. In the circumstances it was appropriate to assess damages on the basis of a hypothetical negotiation between the parties. The hypothetical negotiation was aimed at ascertaining the amount which Elmbridge would be prepared to pay for the right to tarmac FCL's land and permit its employees, servants, agents, licensees and tenants to use it as part of the access road to the industrial estate for the seven year period in question. It was to be assumed that the parties to the negotiation were willing to reach an agreement and would act reasonably in reaching a negotiated result. The negotiation ought to be treated as taking place at the start of the seven year period with the background circumstances as they would have been at the time. The proper approach was to start with an assessment of what in fact Elmbridge would perceive itself as likely to be able to extract from its tenants for the right to use FCL's land for access in the light of the actual facts relating to each tenant. **Field Common Ltd v Elmbridge Borough Council** [2008] EWHC 2079 (Ch).

## TRUSTS OF LAND

Where a property is acquired by one party to a joint venture and held on trust for the joint venture, and that party occupies the property, he is liable to pay an occupation rent. Similar principles apply as between partners or participants in a joint venture which falls short of a technical partnership. It did not matter that the occupation might have contributed to the security of the property. Occupation rent is based on the principle that requires a person who has derived a personal benefit from his enjoyment of joint property to account for the benefit he has received. This is not affected by the fact that the occupation may also be of incidental benefit to the partnership or joint venture. **Lediaev v Vallen** [2008] EWHC 1271 (Ch).

## OTHER DEVELOPMENTS

### LAND REGISTRATION

Various statutory instruments relating to land registration come into force on 10<sup>th</sup> November 2008. They are:

- The Land Registration (Amendment) Rules 2008 SI 1919
- The Commonhold (Land Registration) (Amendment) Rules 2008 SI 1920
- The Land Registration (Proper Office) (Amendment) Order 2008 SI 1921

The amendments made by SI 1919 are to the Land Registration Rules 2003 SI 1417, which are the principal rules. Among other things SI 1919 substitutes a new Schedule 1 of prescribed forms, and contains transitional provisions as to the use of the superseded forms. It also substitutes a new Schedule 4 (standard forms of restriction) and makes further provision in relation to restrictions. SI 1920 provides for evidence in support of certain applications relating to commonhold land to be given in the form of a statement of truth instead of a statutory declaration. SI 1921 substitutes a new definition of “conveyancer” in article 2(2) of the Land Registration (Proper Office) Order 2007 so as to include a barrister and a registered European lawyer.

**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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