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## PROPERTY LAW BULLETIN

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### INTRODUCTION

The period since the last bulletin has produced three useful cases on the 1954 Act. Two deal with procedure, covering situations where a party needs to be added after limitation has expired (*Parsons v George*), and where new evidence needs to be adduced on appeal (*Mayor & City of London v Davy's of London (Wine Merchants) Ltd*). The third, *Hawkesbrook Leisure Ltd v The Reece-Jones Partnership*, will be of interest to anyone who deals with clients who are not operating on a purely commercial basis, as it held that a non-profit making company could occupy premises within the meaning of the Act.

An important decision in the House of Lords, *Ghaidan v Mendoza*, provides that a same sex partner can succeed to a Rent Act tenancy as a spouse. Also relevant to those with a housing practice are two cases involving Manchester City Council (*Romano* and *Samari*) where the Court of Appeal gave a very interesting decision on the need to consider the Disability Discrimination Act 1995 when contemplating possession proceedings based on nuisance.

For any practitioners dealing with service charges, *Bluestorm Ltd v Portvale Holdings Ltd* is something of a cautionary tale, notable for the scandalous yet ingenious behaviour of the landlord turned tenant.

So far as statutory developments are concerned, the remainder of Part I of the Commonhold and Leasehold Reform Act 2002 comes into force on 27<sup>th</sup> September 2004 (with the exception of s.21(4) and (5)). Regulations and Land Registration Rules relating to commonhold come into force on the same date and are summarised in the Other Developments section below.

You will find a list of our sources at the end of the bulletin. If you know anyone who would like to receive a copy of this or future bulletins, please contact [clerks@thomasmore.co.uk](mailto:clerks@thomasmore.co.uk) to have them added to our mailing list. Mailings can be by email, DX or post. Earlier editions of the bulletin appear on the chambers website at [www.thomasmore.co.uk](http://www.thomasmore.co.uk)

## CASE LAW UPDATE

### BUILDING CONTRACTS

#### **Restriction in building lease on nature of development should not go beyond legitimate concern**

*Sargeant & anor v Macepark (Whittlebury) Ltd* [2004] EWHC 1333 (Ch); [2004] 25 EG 171 (CS); [6<sup>th</sup> July 2004] TLR

The claimants owned a leisure complex and granted a building lease of part of the site to the defendant with a view to developing a hotel. The lease prohibited the defendant from altering the hotel after construction without the claimants' consent, which was not to be unreasonably withheld or delayed. The defendants sought consent to the building of an extension and the claimants agreed. However their agreement was subject to an additional condition to be incorporated into the lease in the event that the court determined that the condition was reasonable. The condition was that the defendant would not use the meeting or conference facilities in the extension otherwise than for functions and activities directly related to management training conferences held at the hotel. The claimant was concerned that the defendant was trying to attract business similar to the claimant's extensive weddings and functions business.

Lewison J held that the claimants had a legitimate concern but that the clause went beyond what was reasonable to protect their legitimate concern and so would not be incorporated into the lease.

#### **Notice referring dispute to adjudicator was valid: statutory time limit was not rigid**

*William Verry Ltd v North West London Communal Mikvah* [2004] EWHC 1300 (TCC); [2004] 26 EG 192 (CS)

The claimant carried out building works for the defendant under a JCT contract. A dispute over payment was referred to an adjudicator, who ordered the defendant to pay some £67,000. In proceedings for summary judgment brought by the claimant, the defendant argued that the adjudicator's appointment was invalid. The adjudication notice had been issued on 3<sup>rd</sup> December 2003 and the adjudicator had required that the claimant provide him with a referral notice on or before 11<sup>th</sup> December. The referral notice had been served on 11<sup>th</sup> December. The defendant said that this was a day too late as s.108(2)(b) Housing Grants, Regeneration and Construction Act 1996 states that a contract must provide a timetable with the object of securing the appointment of an adjudicator and referral of a dispute to him within seven days of an adjudication notice.

Judge Thornton QC held that the requirement imposed by s.108(2)(b) was not mandatory and its language was not rigid. Its language required contractual machinery that enabled the referring party to refer the dispute within seven days of the notice but it did not prohibit the

inclusion in the contract of a mechanism allowing a referral outside that timescale. The contract provided, by clause 41A, for referral within seven days of a notice but also provided that failure to comply with any requirement of clause 41A would not invalidate the adjudication. As the claimant had complied with the adjudicator's direction the notice had been served in time and the adjudication was valid.

### **Party may not withhold payment unless s.111 notice has been given but can litigate disputed items after payment**

*Rupert Morgan Building Services (LLC) Ltd v Jervis* [2003] EWCA Civ 1563; [2004] 1 WLR 1867

Mr and Mrs Jervis had building works done on their cottage by the claimant builders. There was a standard form written contract and Mr and Mrs Jervis employed an architect. The builders were paid on an interim basis under the contract. The architect had issued a seventh interim certificate for around £44,000. Mr and Mrs Jervis disputed £27,000 of that amount and the builders sought summary judgment.

S.111(1) Housing Grants, Construction and Regeneration Act 1996 provides that a party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. S.111(2) provides that to be effective such a notice must specify the amount proposed to be withheld and the grounds for withholding it, and must be given not later than the prescribed period before the final date for payment. The builders argued that Mr and Mrs Jervis had not given a notice of intention to withhold payment.

The Court of Appeal agreed that in the absence of a notice under s.111, once the architect had issued a certificate the builders were entitled to payment. Such an approach provided a fair solution of preserving the builders' cash flow whilst not preventing Mr and Mrs Jervis from subsequently raising the disputed items. S.111 is a provision about cash flow. It is not a provision which seeks to make any certificate conclusive whether it is interim or final. Mr and Mrs Jervis were still able to raise the disputed items in adjudication or even in legal proceedings.

## **BUSINESS TENANCIES**

### **Parties can be added or substituted in 1954 Act proceedings after the expiry of a limitation period by CPR 19.5(1)(c)**

*Parsons v George* [2004] EWCA Civ 912; [2004] 3 All ER 633; [2004] 31 EG 93 (CS); [2004] 40 EG 150

The claimant tenants held a lease subject to Part II Landlord and Tenant Act 1954. Following the expiry of the lease the defendants, Mr George and Mr Loochin, who were executors of the landlady's will, served a s.25 notice dated 26<sup>th</sup> March 2003 terminating the tenancy on 4<sup>th</sup> October 2003. The notice stated that they would not oppose the grant of a new tenancy. On 2<sup>nd</sup> April 2003 the claimants served a counternotice stating that they were not willing to give up possession. On 23<sup>rd</sup> April the freehold of the property was transferred to Mrs

Purcell. The defendant's solicitors Birkett Long acted for the defendants and for Mrs Purcell in relation to the tenancy of the property.

On 25<sup>th</sup> June 2003 the claimants issued a claim for a new tenancy under s.29 against Mr George and Mr Loochin as executors of the landlady's will. Birkett Long filed an acknowledgement of service stating that the defendants were not the competent landlords within s.44(1). The claimants applied on 15<sup>th</sup> September 2003 for an order that Mrs Purcell be substituted for the defendants. The deputy district judge held that on his interpretation of CPR 19.5 he had no power to substitute Mrs Purcell as defendant. The claimant tenants appealed. It was common ground that the defendants were the landlord under s.44 until 23<sup>rd</sup> April and that Mrs Purcell became the s.44 landlady thereafter.

Dyson LJ, giving the judgment of the Court of Appeal, held that the natural interpretation of CPR 19.2 and 19.5 when they are read together is that CPR 19.5 was intended to be the code which governs the position in relation to a change of parties after the end of any relevant limitation period; and that CPR 19.2 was intended to be the code which governs the position in relation to a change of parties in any other case. There were important differences between the two codes, which was hardly surprising since the effect of an amendment under CPR 19.5 is to deprive the defendant of a limitation defence. The correct interpretation of CPR 19.5(1)(c) was that it applied not only to enactments which expressly allowed a change of parties after the expiry of the relevant limitation period, but also to those which did not prohibit such a change. Plainly, something was allowed if it was expressly allowed. However there were many occasions where it was a legitimate use of language to say that something was allowed merely because it was not prohibited. Applications to change the parties in an application for a new tenancy after the expiry of the s.29(3) limitation period were permitted by the 1954 Act because the 1954 Act did not prohibit them.

Because the limitation period had expired, the relevant provision was CPR 19.5. Here the claimants always intended to sue the persons who answered the description of competent landlord, and named the defendants because they mistakenly believed that they answered that description. At all material times Birkett Long were acting as solicitors for the defendants and for Mrs Purcell. They must have understood that the claimants were intending to apply for a new tenancy from the competent landlord and that they had named the defendants by mistake. The requirement under CPR 19.5(3)(a) that the substitution of a party is necessary only if the court is satisfied that the new party is to be substituted for a party who was named in the claim form in mistake for the new party was satisfied. It would be manifestly unjust to the claimants not to allow the amendment. Mrs Purcell was not misled in any way and the amendment would cause her no prejudice. The appeal was allowed.

### **New evidence can be admitted on appeal when fairness requires it**

*Mayor & City of London v Davy's of London (Wine Merchants) Ltd* [2004] 29 EG 117 (CS)

The respondents applied for a new tenancy of business premises under part II Landlord and Tenant Act 1954. The county court ordered a new tenancy for 14 years with a redevelopment break clause. Both parties appealed. The county court had heard evidence that the landlords had negotiated a sale of the building to a property development company which proposed to redevelop the building. At the time of the hearing contracts for sale had

not been exchanged. The landlords sought to adduce further evidence under CPR 52.11 in connection with the sale of the site. Sir Andrew Morritt V-C allowed the application for new evidence. The court on appeal had a discretion to admit evidence of events which had taken place after the initial judgment when fairness or the interests of justice so required. Such a discretion should be exercised sparingly and taking into account all the circumstances before, during and after the trial. In the present case the fresh evidence had to be admitted as the appeal court would not be able to deal with the case conscientiously on any other basis.

### **Non-profit making company could occupy premises for the purposes of s.23 Landlord and Tenant Act 1954**

Hawkesbrook Leisure Ltd v The Reece-Jones Partnership [2003] EWHC 3333 (Ch); [2004] 25 EG 172

*S.23 provides that the LTA 1954 applies to any tenancy “(1)...where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him...(2)...the expression ‘business’ includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporated.” This was a preliminary issue whether a non-profit making company could occupy premises for the purposes of s.23 Landlord and Tenant Act 1954. Etherton J held that it could. At the heart of the defendant’s case was the sole and simple contention that Hawkesbrook could not satisfy the requirements of s.23 because it could not distribute a profit, but could only apply the profit for maintaining, improving and enlarging its sporting facilities. Etherton J held that there was nothing in the 1954 Act or in the reported cases that would warrant such a narrow and artificial approach. Hawkesbrook was carrying on a commercial enterprise with a view to making a surplus. It was irrelevant that this could not be distributed to its members or to shareholders.*

### **COMPULSORY PURCHASE**

#### **Market value does not include enhanced value attributable to compulsory purchase scheme**

*Waters v Welsh Development Agency* [2004] UKHL 19; [2004] 2 All ER 915

The claimants owned 225 acres of land which was acquired by the defendant’s predecessor under compulsory powers. The land was to be used to create a wetlands nature reserve to replace habitat lost by the construction of a barrage in Cardiff Bay. The claimants had put forward three valuations (all figures per acre): agricultural value £4,500, value as a nature reserve £13,000, and value with reference to the land’s indispensable status as part of the barrage project at £28,000 (the ‘key value’). Their Lordships considered the application of the ‘*Pointe Gourde* principle’, also known as the ‘no-scheme’ rule, and set down general principles as to the method to be used to assess compensation. They held that market value does not include enhanced value attributable solely to the particular use proposed to be made of the land under a scheme of which compulsory acquisition of the subject land is an integral part. The potential of the land as a result of the barrage scheme, including any key value it might have, was to be disregarded.

**Compulsory purchase order of house must consider whether house as a whole is required for housing, not whether each individual part is so required**

*Ainsdale Investments Ltd v First Secretary of State & anor* [2004] EWHC 1010 (QB); [2004] 22 EG 141 (CS); [2<sup>nd</sup> June 2004] TLR

The defendant council sought to acquire from the claimant a property in Soho which was partly used for commercial purposes and partly for prostitution. A compulsory purchase order was made under s.17 Housing Act 1985 (that is, for housing purposes) in relation to the whole property. The order was confirmed by the Secretary of State. The claimant challenged the decision. Owen J held, dismissing the application, that the inclusion of the commercial part of the property was authorised by s.17 because it was incidental to the acquisition of the residential parts. The property as a whole was a house within the meaning of s.17. The test under s.17(1)(b) was whether the house as whole was required for housing purposes, not whether each individual part was so required. There had been no violation of the claimant's rights under Article 1 of the First Protocol to the ECHR or the Article 8 rights of the two women who occupied the upper parts of the premises. The Secretary of State had struck a fair balance between the claimant's interests and the interests of the wider public.

**Land Tribunal was correct to assess value based on sale of land as a single unit**

*Ryde International plc v London Regional Transport* [2004] EWCA Civ 232; [2004] 30 EG 108

The defendant had acquired land from the claimant property company for use in the Croydon tramlink scheme. The claimant had constructed a development of 37 flats and five bungalows on the land. But for the acquisition the claimant would have sold the units by March 1993. The claimant put forward a valuation of £2.4 million based on the revenue expected from selling the units individually, including the profit. The defendant put forward a valuation of £1.96 million based on sale of the whole development as a unit. The Lands Tribunal awarded £2.06 million based on the valuation for sale as a single unit. It held that no claim could be made for loss of profit by r(6) s.5 Land Compensation Act 1961. The Court of Appeal held that the approach of the Land Tribunal was correct. Although the claimant was deprived of the profit it would have made on individual sales it was relieved of the corresponding risks. Any additional value that could have been achieved by marketing the units separately would have been directly based on the value of land and so was excluded from r(6) in any event.

**HIGHWAYS**

**Secretary of State must be satisfied of existence of right of way on balance of probabilities, not on a lower standard of proof**

*Todd & anor v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin); [2004] 1 WLR 2471; [6<sup>th</sup> July 2004] TLR

The claimants sought to quash an order made by Hampshire County Council on 15<sup>th</sup> September 2003 confirming that Sandy Lane was a BOAT. They did not object to Sandy Lane's inclusion on the definitive map as a footpath or bridleway. By s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 the council was permitted to make such an order if a right of way which was not shown in the map subsisted or was reasonably alleged to subsist. Following an inquiry the Secretary of State's inspector found that a BOAT could be reasonably alleged to subsist and confirmed the council's order under para 7(3) sch 15 WCA 1981.

Evans-Combe J held, allowing the claim, that in order to confirm a proposed order under para 7(3) the Secretary of State had to be satisfied of the subsistence of a right of way on the balance of probabilities, not on the lower standard that it could be reasonably alleged to subsist. The inspector had applied the lower standard and so the order would be quashed. There was also a finding of procedural unfairness in that the inspector had based his conclusions on independent research but had not given the claimants notice of this and of any fresh material resulting from his investigations so that they could deal with it.

## HOUSING

### Same sex partner can succeed as spouse under para 2 sch 1 Rent Act 1977

*Ghaidan v Mendoza* [2004] UKHL 30; [2004] 3 All ER 411

On the death of a protected tenant of a dwelling house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. Marriage is not essential: a person who was living with the original tenant '*as his or her wife or husband*' is treated as the spouse of the original tenant by para 2(2) sch 1 Rent Act 1977. In *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 the House of Lords decided that this did not include persons in a same-sex relationship. The question on appeal was whether this decision could survive the coming into force of the Human Rights Act 1998.

Here the original tenant, Mr Wallwyn-James, had died on 5<sup>th</sup> January 2001, after the HRA came into force. Mr Wallwyn-James had been living in a stable and monogamous homosexual relationship with Mr Mendoza, who was still living at the property. The landlord brought possession proceedings and at first instance the judge held that Mr Mendoza did not succeed as surviving spouse, but that he was entitled to an assured tenancy as a member of the original tenant's '*family*' under para 3 of sch 1 RA 1977. On appeal the Court of Appeal held that Mr Mendoza was entitled to a statutory tenancy as surviving spouse under para 2. For various reasons a statutory tenancy is more advantageous to the tenant than an assured tenancy. The landlord appealed.

Mr Mendoza argued that para 2 sch 1 RA 1977 should be read in conjunction with Article 8 (right to respect for private and family life and home) and Article 14 (prohibition on discrimination on grounds of sex etc). Their Lordships agreed. Security of tenure for the survivor of a couple was an important and legitimate social aim, but the reason underlying the social policy was as applicable to the survivor of a homosexual couple in the same way as

it was to the survivor of a heterosexual couple. There was no legitimate, rational or fair ground for distinguishing the one couple from the other in this context.

s.3 HRA 1998 provides that all legislation, existing and future, shall be read and given effect to in a way which is compatible with convention rights 'so far as it is possible to do so.' No difficulty arose in applying s.3 HRA to para 2 sch 1 RA 1977 so that para 2 could be read and given effect to as though the survivor of a homosexual couple were the surviving spouse of the original tenant. In relation to the use of s.3 HRA Lord Steyn also stated that a broad approach was required and that caselaw revealed that there had sometimes been a tendency to approach the interpretative task in too literal and technical a way. Interpretation under s.3(1) is the prime remedial remedy and a declaration of incompatibility under s.4 HRA must always be an exceptional course.

### **Housing authority must consider disability discrimination in possession proceedings including tenant's health and effect on health and safety of neighbours**

*Manchester City Council v Romano; Manchester City Council v Samari* [2004] EWCA Civ 834; [2004] 4 All ER 21; [27<sup>th</sup> July 2004] TLR

Manchester City Council sought orders for possession against the defendants Ms Romano and Ms Samari, who were secure tenants. The council relied amongst other things on ground 2 of schedule 2 to the Housing Act 1985, namely that the tenant or a person residing in or visiting the dwelling house had been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality. The court could only make an order on ground 2 if it was reasonable so to do. There was medical evidence that Ms Romano suffered from depression and that Ms Samari was suffering from a borderline personality disorder. There was also evidence that their behaviour had caused neighbours significant stress and depression. Orders for possession had been made.

On appeal both defendants argued that they were suffering from a disability under the Disability Discrimination Act 1995. They relied on s.22(3)(c) of the Act which made it unlawful for a person managing premises to discriminate against a disabled person occupying those premises by (amongst other things) evicting him. S.24(2) provided that such treatment was justified only if in the opinion of the discriminator one or more of the conditions in s.24(3) was satisfied and it was reasonable for the discriminator to hold that opinion. The condition at s.24(3)(a) provided that the treatment was necessary in order not to endanger the health or safety of any person.

The Court of Appeal held that it had to interpret s.24(3)(a) in a way that was compatible with the rights of the tenants and their neighbours under the Human Rights Act 1998. They held that this meant that the court had to ask whether the landlord held an objectively justified opinion that it was necessary to serve a notice seeking possession and/or to bring possession proceedings in order that the health of an identified person would not be put at risk. Health in this context meant a state of complete physical, mental and social well-being,

not merely the absence of disease or infirmity. Trivial risks to a person's health should be disregarded. Here the requirements of s.24(2) and s.24(3)(a) were satisfied and the defendants' appeals would be dismissed. They added per curiam that sending a warning letter to a tenant about his conduct does not subject him to detriment under the DDA 1995 but that it would be wise for a local housing authority to consider at that stage whether it would be able to hold an opinion within s.24(3) and to start gathering evidence as to the tenant's mental state and any effect on the health and safety of complainants. In the first instance a statement by a complainant supported by a short letter from their GP or medical adviser is likely to be sufficient.

### **Threshold for safety grant under HGCRA 1996 is relative not absolute**

*Regina (B) v Calderdale Metropolitan Borough Council* [2004] EWCA Civ 134; [2004] 1 WLR 2017

S.23 and 24 Housing Grants, Construction and Regeneration Act 1996 allow for councils to give grants in order to make a dwelling safe for a disabled occupant and those residing with him. The claimant was the father of four children, the eldest of whom, D, had a form of autism which manifested in uncontrollably aggressive behaviour towards his siblings. He was particularly aggressive towards the youngest sibling, who shared a bedroom with him. The council had refused a grant to control the loft into a separate bedroom for D. It was held that the threshold of safety in s.23(1)(b) was relative not absolute and that the proposal that D should have his own bedroom would minimise the risk of harm to D and his siblings as far as was possible. Once D satisfied the s.23(1)(b) test the council had to consider whether the works were necessary and appropriate under s.24(3), which they were.

## **HUMAN RIGHTS**

### **Gypsies' rights under Article 8 were violated by summary eviction scheme**

*Connors v UK (Application no. 66746/01)* ECHR [10<sup>th</sup> June 2004] TLR

The applicant and his family were Gypsies who led a traditional travelling lifestyle. They claimed that they suffered so much from harassment and were moved on so frequently that they were compelled to settle permanently at a site at Cottingley Springs in Leeds. They lived there for about 13 years, left complaining of harassment in February 1997 and returned in 1998. The applicant and his wife were licensed to occupy a plot provided that they, their family and their guests did not cause a nuisance to those living on the site or in the vicinity. In March 1999 their adult daughter was granted a licence to occupy an adjoining plot. Their adult sons were frequent visitors. In January 2000 notice to quit was served based on allegations of nuisance. These were denied. In March 2000 summary proceedings for possession were issued. In the early hours of the morning of 1<sup>st</sup> August 2000 the council evicted the family in an operation lasting five hours. Following the eviction the family suffered significant disruption and one of the children who had been attending school did not return. The applicant complained in particular that he was not given the opportunity to challenge in court the allegations made against him which were the basis for the eviction.

The court considered Article 8. In spheres such as housing, which played a central role in the welfare and economic policies of modern societies, the court would respect the judgment of the legislature as to what was in the general interest unless it was manifestly without reasonable foundation. The procedural safeguards available to the individual were particularly important in determining whether the state had remained within the margin of appreciation allowed to it in fixing the regulatory framework. The court stated that the vulnerable position of gypsies as a minority meant that special consideration had to be given to their needs and lifestyles in setting the regulatory framework and in reaching decisions in particular cases. There had been a serious interference with the applicant's article 8 rights and such an interference required weighty public justification. The mere fact that anti-social behaviour occurred on local authority gypsy sites could not of itself justify a summary power of eviction since such problems occurred in other types of housing where the authorities could only evict subject to independent court review. The security of tenure provisions covered privately run gypsy sites. There was no particular feature about local authority gypsy sites which would make their management unworkable if they had to establish reasons for evicting longstanding occupants. Local authority gypsy sites did not benefit from low licence fees and so no advantage of low cost would be lost. Nor did the gypsy population gain any specific benefit from the existing regime. There were no special allowances in the planning criteria. Judicial review could not assist where the local authority terminated licences in accordance with the applicable law.

The court was not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family had been sufficiently demonstrated by the UK Government. The power to evict without the burden of giving reasons liable to be examined on their merits by an independent tribunal did not respond to any specific goal or provide any specific benefit to the gypsy community. The situation in England placed considerable obstacles in the way of those pursuing an actively nomadic lifestyle, whilst excluding from procedural safeguards those who decided to adopt a more settled way of life. The eviction was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with rights, and consequently could not be regarded as justified by a pressing social need or proportionate to the legitimate aim being pursued. There had been a violation of Article 8. No separate violation arose under article 14, there was no separate consideration of article 1 protocol 1 and article 6, and article 13 did not guarantee a remedy. The applicant was awarded 14,000 Euros for non-pecuniary damage and 21,643 Euros for costs and expenses.

## **LEASEHOLD ENFRANCHISEMENT**

### **Company can obtain enfranchisement following CLRA 2002**

*Cadogan & anor v Search Guarantees plc* [2004] EWCA Civ 969; [2004] 33 EG 71 (CS)

The appellant held a 65-year lease of premises consisting of six flats, and the respondents owned the freehold reversion. Five of the flats were sublet on short-term tenancies. The appellant made an application to acquire the freehold from the respondents pursuant to s.1 Leasehold Reform Act 1967. The respondents relied on s.1(1ZB), which applied to “a tenant of the house” where “a flat forming part of a house is let to a person who is a qualifying tenant of the flat.” The respondents argued that as the appellant was a qualifying tenant of each of the flats and was also the tenant of the house, it had no right to enfranchise as, being a company, it could not satisfy the residence requirement.

The appeal was allowed. One of the purposes of the Commonhold and Leasehold Reform Act 2002 was to modify the law so as to allow companies to obtain enfranchisement. For this reason the residence requirement had been removed from most of the enfranchisement provisions. It had been retained in relation to s.1(1ZB), which applied to “a tenant of the house” where “a flat forming part of a house is let to a person who is a qualifying tenant of the flat.” The section required that the tenant of the flat was someone other than the tenant of the house. On this construction it did not apply to the appellant and so did not prevent it from obtaining enfranchisement.

## **LEASES**

### **Break clause expressed as personal but with limited right to assign to third parties touches and concerns the land allowing benefit to pass under s.63 LPA 1925**

*Harbour Estates v HSBC* [2004] EWHC 1714 (Ch); [2004] 3 All ER 1057; [2004] 32 EG 62 (CS)

On 13<sup>th</sup> January 1994 Midland Bank plc (as a trustee) granted an underlease of premises to its 100% subsidiary Stafford Properties Ltd for a term from 24<sup>th</sup> June 1993 to 24<sup>th</sup> December 2013. At some later date the reversion passed to Harbour Estates. The lease contained a break clause at clause 6 which gave the right to the tenant to determine the lease on 23<sup>rd</sup> June 2004. Clause 6.5 provided that clause 6 was personal to Stafford Properties and was not capable of assignment to or exercise by any other person. This was subject to a proviso that allowed assignment of the benefit of clause 6 to a permitted assignee of the lease where the assignee was a group company (including a holding company). Stafford Properties assigned the lease to HSBC plc which was a group company within clause 6.5. However the assignment of the lease did not include an express assignment of the benefit of clause 6. HSBC then served notice on the landlord purporting to terminate the lease on 23<sup>rd</sup> June 2004 under clause 6. The landlord challenged the validity of the notice.

In subsequent proceedings it was argued that the benefit of clause 6 had not passed to HSBC in the absence of express assignment or implied transfer because the clause did not touch and concern the land. Lindsay J held that a right to, in or on the property conveyed did not pass automatically with the conveyance under s.63 Law of Property Act 1925 unless it touched and concerned the land. In this case, however, the benefit of clause 6 did touch and concern the land. The break clause was unusual but was plainly not wholly personal and was to be regarded as touching and concerning, or having reference to, the subject matter of the lease. Accordingly the benefit of the break clause passed with the term on assignment, even though it was not mentioned, and HSBC was entitled to exercise it.

## **MORTGAGES**

**Where mortgage is voidable for undue influence, replacement mortgage will also be voidable if it is taken out as condition of discharging earlier mortgage**

*Yorkshire Bank plc v Tinsley* [2004] EWCA Civ 816; [2004] 3 All ER 463; [2004] 1 WLR 2380; [2004] 28 EG 176 (CS)

The Tinsleys purchased a property called Hillcrest by way of a joint mortgage in 1988. Second 'all moneys' mortgages were created by them over Hillcrest in favour of Yorkshire Bank in 1988 and 1991. In 1994 Mrs Tinsley, the defendant in the present case, began divorce proceedings. Mr Tinsley persuaded her to deal with the financial aspects of the divorce by exchanging Hillcrest for a second, smaller property at London Road in Stockton Heath. He offered to pay her a cash sum which he said would pay the mortgage on Hillcrest and allow her to own the second property free of any mortgage. However the mortgages over Hillcrest exceeded its value and the Yorkshire bank insisted that Mrs Tinsley should execute a new all moneys charge over the London Road property in place of the 1988 and 1991 mortgages on Hillcrest and securing Mr Tinsley's current and future liabilities. She did so. In 1997 Yorkshire Bank required the indebtedness to be discharged and in 2001 it started possession proceedings. The judge found that the 1988 and 1991 mortgages had been procured by Mr Tinsley's undue influence over Mrs Tinsley and that the Yorkshire bank had constructive notice of this. The 1988 and 1991 mortgages were voidable. However he held that this did not affect the validity of the 1994 mortgage. Mrs Tinsley appealed.

The Court of Appeal held that where a mortgage or guarantee is voidable for undue influence as between a husband and wife and as against a bank, a replacement mortgage is itself voidable, at any rate if the replacement mortgage was taken out as a condition of discharging the earlier voidable mortgage. This is so even if undue influence was not operative at the time of the replacement mortgage and even if there is a new contract rather than a variation of an old contract. If a bank was deemed to have notice of the voidability of a charge, that notice was deemed to arise when the charge was given. Where a replacement or substitute mortgage was made with the same lender there was no reason why the constructive notice should invariably be deemed to have disappeared when the earlier mortgage was discharged. In this case the bank had required the 1994 charge on the London Road property as a condition of the release of the charge on Hillcrest. Mrs Tinsley accordingly succeeded in her appeal

**Whether existence of subcharge removes principal mortgagee's right to possession is question of construction of contractual documents**

*Credit & Mercantile plc v Marks* [2004] EWCA Civ 568; [2004] 3 WLR 489; [27<sup>th</sup> May 2004] TLR

Mrs Marks had acquired a property called Home Farm House, where she lived with her husband and three children, with the assistance of a loan of £1,305,000 from the claimant mortgagee. She fell into arrears and an order for possession was eventually made. She appealed on various issues but her appeal to the Court of Appeal was limited to a single issue. At the same time as the loan to Mrs Marks the claimant had subcharged Home Farm House to the Bank of Scotland as security for its own debts. Mrs Marks' argument on appeal was that in subcharging the property the claimant had divested itself of its right to possession in favour of the subchargee.

The Court of Appeal took the view that there was no general proposition that wherever there is a submortgage, the principal mortgagee's rights against the mortgagor are transferred to the sub-mortgagee and so lost by the principal or in some way suspended. A mortgagee had a right, as soon as the mortgage was executed, to go into possession unless the mortgage contract expressly or impliedly provided otherwise. There is no reason in principle why both a mortgagee and a sub-mortgagee should not have rights of possession. It is possible for a subcharge to divest a principal chargee of the right to possession, but the subcharge in the present case did not have that effect. In the absence of a transfer by statute, all was dependent upon the true construction of the submortgage in any particular case. On a proper construction of the charge and the subcharge in the present case the claimant's right to possession had not been transferred contractually or by statute and so the claimant was entitled to possession.

## **RENT REVIEW**

### **There are no special rules of construction for rent review clauses**

*Chancebutton Ltd & anor v Compass Services UK & Ireland Ltd* [2004] EWHC 1293 (Ch); [2004] 31 EG 94

Premises were held on a lease for 25 years less one day from 24<sup>th</sup> June 1982, although the lease had only taken effect as a grant on 23<sup>rd</sup> June 1989. There was a five yearly rent review based on the current market rent for a hypothetical letting “for a term equal to the term originally granted under this lease.” For the 2002 rent review the claimant landlords argued that this meant a hypothetical term of 25 years less one day commencing on 24<sup>th</sup> June 1982; the tenants that the hypothetical term would start on the date of the rent review. Lawrence Collins J found in favour of the landlords’ construction. The question was one of construction of the language in the light of its context and purpose. There are no special rules for the construction of a rent review clause. It is appropriate to bear in mind the commercial purpose of the clause, namely that the landlord should be able to obtain the market rent. It made no difference that the lease did not take effect as a grant until 1989. The landlord’s construction accorded with the natural meaning of the clause. Had the parties intended the assumption at each review to be a term of 25 years from and including the review it would have been easy for them to have said so. The tenant’s construction required a departure from reality not justified by the language of the clause in that a tenant who had only five years remaining would be required to pay a rent calculated on the assumption that it had 25 years remaining.

## **RIGHT TO BUY**

### **Council had obligation to determine right to buy application within four weeks and could not unilaterally impose time limits on applicant**

*Hanoman v Southwark London Borough Council* [2004] 27 EG 129 (CS)

The appellant made an application to buy his home under the right to buy provisions in Part V Housing Act 1985. S.124 HA 1985 provides that the council are under a duty to give a decision on the application within four weeks. The council failed to give a decision and required various documents from the appellant. These were not provided and the council treated the application as withdrawn. Two years later the appellant sought relief against this decision.

Peter Smith J allowed the appeal. The council had no power under HA 1985 to treat the application as withdrawn simply because the appellant had failed to comply with a time limit that they had imposed. The council had breached their duty under s.124 to reach a decision within four weeks. They had no power to extend time unilaterally although it might be possible for the parties to agree an extension of time. An application could be withdrawn by notice in writing under s.122(3) HA 1985 but also by other means. Mere inactivity was not sufficient for the council to treat an application as withdrawn. The principles of estoppel applied. The council were under a continuing duty to determine the application.

## **SERVICE CHARGES**

### **Tenant could lose right to claim set-off for disrepair where it had refused to pay service charges**

*Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289; [2004] 22 EG 142

PVL as freeholder tried to forfeit leases in a block of flats for non-payment of service charges. PVL was a subsidiary of PHL, and both were effectively emanations of one Mr Marcel. The leaseholders obtained a substantial judgment on their counterclaim for specific performance and damages in relation to PVL's breach of repairing obligations. PVL promptly went into liquidation. The leaseholders arranged for the transfer of the freehold to a company called Bluestorm Ltd. PHL and its associates at this time owned various flats in the building and purchased more. When Bluestorm Ltd attempted to collect service charges, PHL refused to pay, and when sued, counterclaimed for breach of repairing covenants. The judge dismissed the counterclaim in its entirety. He was extremely critical of PHL's behaviour, stating "*Dress it up how you will, this Court is not prepared to entertain a claim for damages in respect of breaches which the Claimants have themselves substantially helped to ensure could not be remedied.*" PHL appealed.

The Court of Appeal dismissed the appeal. PHL was liable to Bluestorm on the judgment for the sums due as service charges and its failure to pay was a breach of contract. Other tenants had not paid because of PHL's refusal to pay. PHL's contribution would have been 31% of the total. Bluestorm was not able to go ahead with any major repairing scheme because of PHL's refusal to pay. Loss accruing to Bluestorm because of that inability could be recovered by it from PHL, and that claim by Bluestorm cancelled out its liability to PHL. The set-off relied on by PHL was equitable in nature and the judge had been entitled to take the view that PHL should be denied equitable relief. Obiter it was said by Buxton LJ that the question whether payment was a condition precedent to performance of repair and maintenance obligations must be considered with regard to the context of the particular lease and the intentions of the parties in entering into it. It may be that a provision deprives the non-payer of the right to complain of the landlord's breach when there is a direct connection between the non-payment and the breach. Sir Martin Nourse noted that this was a case where the tenant had evinced a fixed intention not to be bound by its obligation to pay and had thereby disentitled itself from claiming the benefit of the lessor's obligation.

## **UNDUE INFLUENCE**

### **Where there is a relationship of trust and confidence and transfer is shown to be to transferor's manifest disadvantage, transferee must show that it was not brought about by undue influence**

*Vale v Armstrong & anor* [2004] EWHC 1160(Ch); [2004] 24 EG 148 (CS)

The claimant, a 78 year old man, agreed to transfer his house to his nephew, the first defendant, in consideration of the nephew taking over the mortgage and allowing the claimant to live there rent-free for life. The claimant granted an enduring power of attorney to the second defendant, the father of the first defendant, to make the arrangements for the

sale. The property was sold at an undervalue and so the claimant took legal advice. After the transfer the defendants asked the claimant to vacate. The court set aside the transfer on the basis that it had been procured by the undue influence of the second defendant. On the facts the claimant had trust and confidence in the second defendant. The transfer was to the claimant's manifest disadvantage. The burden of proof shifted to the defendants to show that the transaction had not been brought about by their undue influence (see *RBS v Etridge* [2001] UKHL 44). The fact that the claimant had suggested the transaction did not rebut a presumption of undue influence. Nor did the fact that the claimant had had legal advice. The legal advice had been flawed. The transfer of the property was voidable and the second defendant was in breach of his fiduciary duty.

### **Transferor shows prima facie case of undue influence where transferee has ascendancy over him and transaction is not readily explicable**

*Macklin & ors v Dowsett* [2004] EWCA Civ 904; [2004] 34 EG 68

The appellant lived in a caravan on land where he had planning permission to build a bungalow. The land was subject to mortgage debts. He could not afford to build the bungalow and so sold the land to the respondents at an undervalue in 1996 in return for a rent-free, non-assignable life tenancy. He used the money to pay off the mortgages. In January 1999 the respondents arranged for foundations to be laid to prevent the planning permission from lapsing. They then persuaded the appellant to agree that if he did not complete the bungalow within three years he would have to surrender the life tenancy for £5,000. At the end of the three year period the appellant resisted proceedings to enforce this agreement on the basis that it had been brought about by undue influence. The Court of Appeal held that the contractual relationship of landlord and tenant does not exclude the possibility of a claim of undue influence. The respondents knew that the appellant did not have the means to build the bungalow and had driven a hard bargain on the basis of the financial disparity between the parties' bargaining positions. The appellant was clearly disadvantaged by the agreement as if he wished to continue to enjoy the life tenancy he was required to construct the bungalow, when previously this had been optional. It was likely that he would lose the life tenancy. The appellant had successfully raised a prima facie case of undue influence by showing that the respondent had acquired ascendancy over him and that the transaction was not readily explicable by the relationship of the parties.

## **IN BRIEF**

### **Commons**

*Regina (Whitney) v Commons Commissioners* [10<sup>th</sup> August 2004] TLR CA

The Commons Commissioners had no jurisdiction to amend the register where an application to amend the register under s.13 of the Commons Registration Act 1965 was disputed. There were three ways in which disputes as to whether land should be registered as a village green under s.13 might be determined. There could be an application to the court for a declaration; the registration authority could determine the matter; or following a registration a dissatisfied party could apply to the court for rectification of the register.

## Council tax

*R (on the application of Bennett v Copeland Borough Council* [2004] 22 EG 140 (CS); [28<sup>th</sup> May 2004] TLR CA

The Court of Appeal held that the appellant could not be a resident of a property in which he had never lived, and so was not liable to pay council tax as the property was not his “sole or main residence”. The appellant lived a nomadic lifestyle and so had no sole or main residence. It did not follow that this property became his residence.

## Covenants

*Iqbal & ors v Thakrar & anor* [2004] EWCA Civ 592; [2004] 36 EG 122

Premises were let on a lease which included a covenant against making alterations without the landlords’ approval, which was not to be unreasonably withheld. The tenants applied to the landlords to convert the premises into a restaurant and the landlords refused. It was held that the refusal had been unreasonable. The landlords’ appeal to the Court of Appeal was allowed. The court must first discover what was in the landlord’s mind and then make an objective enquiry as to whether the landlord’s decision was reasonable or not. The landlords in the present case were entitled to withhold consent on the basis that the tenants’ proposals would or could give rise to structural problems. Where the tenant is proposing to remove structural elements the landlord is entitled to know the tenant’s suggested solution to any structural problem.

*Martin v David Wilson Homes Ltd* [2004] EWCA Civ 1027; [2004] 39 EG 134

Two plots of land were subject to a restrictive covenant “...*not to use or permit or suffer any buildings to be erected thereon or on any part thereof to be used for any purpose than as a private dwelling house...*” A dwelling house had been built on each plot. The appellant developer acquired parts of the plots that did not include the existing dwelling houses and began construction of 24 dwelling houses. The respondent claimed the benefit of the covenants. At first instance the respondent succeeded in arguing that “*a private dwelling house*” in the covenant meant that no more than one building on each plot could be used as a dwelling house. The Court of Appeal allowed the developer’s appeal. The indefinite article “*a*” restricted the manner of use, not the number of buildings. The schedule to the conveyances containing the covenant referred to “*any buildings*” and so envisaged the presence of multiple buildings.

*Jarvis Homes Ltd v Marshall & anor* [2004] EWCA Civ 839; [2004] 29 EG 116 (CS)

The owners of adjoining properties both had the benefit and the burden of a restrictive covenant which prohibited the use of the land “*for the erection of more than one two storey dwelling house...*” The covenant further provided that the purchaser should not “*use or permit or suffer to be used **the land hereby conveyed or any part thereof** or any building or erection now or at any time erected thereon for any trade business or manufacture but will use **the same** as a private residence only.*” The respondents intended to demolish the house on the site and

construct a roadway leading to a development of ten houses on adjoining land. At first instance it was held that the covenant allowed this use. On appeal it was held that the words “the same” related back to the words “the land hereby conveyed” etc. and were not limited to “any building”. The use of the roadway would be a breach of covenant.

## **Easements**

*Sweet & anor v Sommer & anor* [25<sup>th</sup> August 2004] TLR Ch Div

A transfer of land reserved no vehicular rights of way over the land transferred. The transferred land could only be reached from the road by crossing the transferred land or by demolishing a large workshop. The continued existence of the workshop had obviously been within the contemplation of the parties. Accordingly it was consistent with the doctrine of implied reservation of an easement of necessity to say that a way over the property granted was impliedly reserved as a matter of necessity.

## **Highways**

*Ocean Leisure Ltd v Westminster City Council* [2<sup>nd</sup> September 2004] TLR CA

Statutory works by Westminster County Council caused damage to shops owned by Ocean Leisure. Ocean Leisure applied for compensation under s.10 Compulsory Purchase Act 1965. The Court of Appeal held that a statutory power given to a local authority to carry out work on the highway did not relieve it from the duty not to harm occupiers of property adjoining the highway. The current state of statutory law governing compensation for such damage was unsatisfactory.

## **Housing**

*Shine v English Churches Housing Group* [2<sup>nd</sup> June 2004] TLR CA

The Court of Appeal held that an award of damages for a failure to repair contrary to s.11 Landlord and Tenant Act 1985 was for a breach of contract by the landlord, rather than for a tort. Accordingly the calculation of damages for stress and inconvenience should relate to the fact that the tenant was not getting proper value for the rent. The award of £8,000 for seven years (reduced from £19,000 awarded in the county court) was modest because the tenant in a secure weekly tenancy had the benefit of occupying premises at a rent which was well below the letting value of the premises on the open market.

*Stevens v Blanenau Gwent County Borough Council* [29<sup>th</sup> June 2004] TLR CA

A local authority which had a general ban on window locks for fire safety reasons was not liable for injury to a child who fell from an unlocked window. This was so even though the child’s mother had asked for a lock to be fitted. In refusing the mother’s requests the council were entitled to assume appropriate vigilance and ordinary good sense on the part of the mother by moving furniture a safe distance from the windowsill.

*Codona v Mid-Bedfordshire District Council* [21<sup>st</sup> July 2004] TLR CA

A local housing authority had discharged its duty to secure suitable accommodation for a homeless gypsy when it offered her temporary bed and breakfast accommodation although she had an aversion to living in conventional houses of bricks and mortar. The council had not been able to find an alternative caravan site and could not provide long-term conventional housing at short notice. It was driven to offer bed and breakfast as a last resort. There was evidence that the claimant would find it unbearable and claustrophobic to live in a house, although not that it would cause her or her family psychiatric harm. The accommodation could become unsuitable in domestic law or there could be a violation of Article 8 if the situation went on for too long before suitable long-term housing could be found.

*Kay & ors v Lambeth London Borough Council & anor* [26<sup>th</sup> July 2004] TLR CA

Homeless people who were granted a sub-licence to occupy accommodation which had been temporarily passed to a housing trust by a local authority did not become secure tenants of the local authority. The occupants were let into possession in the 1970s by the housing trust. In 2000 Lambeth LBC terminated the housing trust's licence. The housing trust was not acting as agent for Lambeth but on its own account. There was no basis for saying that when the tenancy of an intermediate landlord from whom an occupier held a secure tenancy was terminated, there remained a secure tenancy which could prevent the superior landlord from recovering possession.

### **Leasehold enfranchisement**

*Slamon & anor v Planchon* [28<sup>th</sup> July 2004] TLR CA

The Leasehold Reform, Housing and Urban Development Act 1993 only exempted a resident freeholder from collective enfranchisement if the freeholder was able to establish one continuous interest from the date the property was converted into flats to the date of the application for enfranchisement. The interest might be outright ownership of the freehold or an interest under a trust, but a freehold interest over part of the period could not be mixed together with an interest under a trust over another part of the period so as to give a continuous whole.

### **Leases**

*Courtney Lodge Management Ltd v Blake & ors* [15<sup>th</sup> July 2004] TLR

A notice of forfeiture served by a landlord on a tenant was not valid when it failed to allow enough time for the tenant to remedy the breach complained of, namely nuisance caused by sub-tenants to neighbouring occupiers. Notice was served on 3<sup>rd</sup> September 2002 and on 8<sup>th</sup> September 2002 the head lessees wrote to the sublessees (who had themselves sublet to the occupiers) asking for action and a time scale. Proceedings were issued on 2<sup>nd</sup> October 2002. The breach could not be remedied within a month.

## **OTHER DEVELOPMENTS**

### **COMMONHOLD REGULATIONS 2004**

The Commonhold Regulations SI 1829 of 2004 are made under Part I of the Commonhold and Leasehold Reform Act 2002. They came into force on 27<sup>th</sup> September 2004 and make provision for land in England and Wales to be registered as a freehold estate in commonhold land. The Regulations are divided into six parts. Part I deals with citation, commencement and interpretation. Part II sets out the consent requirements for creation of a commonhold and the circumstances in which the court may dispense with a requirement for consent. Part III gives a definition of a commonhold unit and sets out restrictions on the leasing of residential commonhold units. Part IV gives detailed requirements for the establishment of commonhold associations including name, memorandum of association (which must be in the form in schedule 1 or substantially to the same effect), articles of association (schedule 2), commonhold community statement (schedule 3), and forms (schedule 4). Part V deals with the operation of a commonhold, setting out the jurisdiction of the court and restrictions on rights conferred on developers. Part VI covers matters relating to termination.

### **THE COMMONHOLD (LAND REGISTRATION) RULES 2004**

As with the Commonhold Regulations 2004 described above, the Commonhold (Land Registration) Rules 2004 SI 1830 are made under the Commonhold and Leasehold Reform Act 2002. By reason of the Commonhold and Leasehold Reform Act (Commencement No.4) Order SI 1832 of 2004 the Rules come into force on 27<sup>th</sup> September 2004. The fourth commencement order brings Part I of CLRA 2002 into force so far as it is not already in force (with the exception of s.21(4) and (5)).

The Rules provide for applications to the Registrar under the Act. Rule 4 provides that a number of documents required with an application can be lodged as certified copies rather than originals. Rule 5 provides that an application to register a freehold estate in land as commonhold must be made in Form CMI and must be accompanied by a statutory declaration. Rule 6 sets out the necessary content of the statutory declaration. Rule 8 provides that the Registrar may reject or cancel an application if the plans submitted with it are insufficiently clear or accurate. Rules 10 and 11 deal with service of notices where leasehold titles are extinguished. Rules 13 to 26 set out the requirements and prescribed forms for particular types of application to the Registrar. Rules 27 to 32 set out various circumstances in which the register will be amended. The forms prescribed by the rules are set out in Schedule 1, and Schedule 2 prescribes the wording of restrictions prescribed by the rules.

### **Sources**

The following sources have been used in the compilation of this bulletin: The Law Reports (AC, QBD, Ch Div) parts 6 to 8 covering June to August 2004; 2004 2 All ER parts 10 to 12, 2004 3 All ER parts 1 to 12, and 2004 4 All ER parts 1 to 3 covering 2<sup>nd</sup> June 2004 to 13<sup>th</sup> October 2004; 2004 WLR parts 21 to 35 covering 29<sup>th</sup> May 2004 to 1<sup>st</sup> October 2004; Times Law Reports 27<sup>th</sup> May 2004 to 28<sup>th</sup> September 2004; Estates Gazette editions 22 to 40 covering 23<sup>rd</sup> May 2004 to 2<sup>nd</sup> October 2004; recent legislation and draft legislation.

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