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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

EASEMENTS

Abandonment of a right of way is not to be lightly inferred. The dominant owner must manifest an intention to abandon the right and, in order to do so, must make it clear that its intention is that neither it nor its successors in title should thereafter make any use of the right. Owners of property do not normally wish to divest themselves of property unless to do so is to their advantage, even if they have no present use for the property in question. The question of abandonment has to be tested at the time of the acts relied upon as showing abandonment without reference to later events. Here an express right of way to garages was granted in 1964. Some time later the garages were demolished and other buildings constructed, and alternative use was made of the way for many years. In 2002 the respondent redeveloped the property and rebuilt garages on the land. The appellant argued that the right of way to the garages had been lost by abandonment, but was unsuccessful at first instance and on appeal. The construction and reconstruction works were substantial but did not justify an inference that the then owner intended to abandon the right of way to the garages for ever. **CDC2020 plc v Ferreira** [2005] EWCA Civ 611; [2005] 35 EG 112.

HOUSING

Where on the face of it the court is obliged to make an order for possession against an assured tenant because eight weeks' rent is owing (ground 8 and s.7(3) HA 1988), the court cannot grant an adjournment simply because the arrears are attributable to maladministration by the housing benefit department. The court's discretion to grant an adjournment under s.9(1) HA 1988 should be exercised justly and not for the purpose of defeating the policy of the 1988 Act or the rights which it conferred on landlords. The existence of arrears due to maladministration by the housing benefit department was not an exceptional circumstance justifying an adjournment. **North British Housing Association v Matthews; Same v Snaith; Same v Masood; London and Quadrant Housing Trust v Morgan** [2004] EWCA Civ 1736; [2005] 1 WLR 3133.

An establishment can be a care home even where a lessor/lessee relationship exists. The existence of such a relationship is not determinative. A registered care home provider had granted assured tenancies to two people who needed accommodation and care by reason of their severe learning difficulties. The care home provider had then applied to have the care homes deregistered on the basis that the accommodation was provided by way of an assured tenancy so the homes were not care homes within the meaning of s.3(1) Care Standards Act 2000. The Commission for Social Care Inspection had refused to cancel the registration. The High Court and then the Court of Appeal agreed. There was no reason why an establishment could not provide accommodation within the meaning of that word in section 3 of the Act whether or not the accommodation provided was by lease or licence. **Regina (Moore and others) v Care Standards Tribunal and another** [2005] EWCA Civ 627; [2005] 1 WLR 2979.

The London Borough of Enfield's decision to use out-of-district accommodation for a relatively small proportion of those seeking accommodation was not unreasonable. The court should only interfere if the decision was unlawful on a Wednesbury basis. The consideration was not simply what was reasonable but what was reasonably practicable, which was a higher test. The shortage of suitable accommodation in Enfield coupled with the savings that could be secured for the budget overall justified the adoption of the policy. **Regina (Calgin) v Enfield London Borough Council** QBD [27th September 2005] TLR.

A tolerated trespasser does not become a secure tenant simply because they are allowed to remain in occupation, even if the landlord changes the terms of that occupation. In three of the cases under appeal the county court had suspended orders for possession which had been breached, and the landlord had subsequently increased the rent. It was argued that this created a new tenancy. The Court of Appeal disagreed. It was not enough that the facts were consistent with the existence of a new tenancy: the facts of the situation had to force that conclusion. **Lambeth London Borough Council v O'Kane; Helena Housing Limited v Pinder and others** CA [22nd September 2005] TLR.

A person who was a protected tenant under the Rent Act 1977 continued to be a protected tenant following the coming into force of the Housing Act 1988 (by s.34(1)(b)). However that status did not pass on to persons who held jointly with the protected tenant once the 1988 Act was in force. A Rent Act tenant had entered into assured shorthold tenancy agreements together with others who later tried to claim Rent Act status. The protected status did not pass to joint tenants simply through the existence of a joint tenancy with a Rent Act tenant after the coming into force of the 1988 Act. **Secretarial Nominee Company Limited v Thomas** CA [20th September 2005] TLR.

LEASES

A covenant against underletting set out the agreement of the parties as to what alienations were not absolutely prohibited and could be made with consent and accordingly restricted the circumstances in which a tenant could properly apply for consent to an underletting. The covenant was valid. It was designed to ensure that Tesco, as the landlord's tenant, had the like rights and protection under the underlease against the underlessee as the landlord had against Tesco under the lease. As there was no like repairing covenant in the underlease, there was no obligation on the landlords to consider whether to grant consent, as the necessary conditions precedent had not been fulfilled. The grant of the underlease by Tesco

to Magspeed without consent was a breach of covenant by Tesco. S.I LTA 1988 did not apply although Lightman J went on to consider its potential application to the facts and stated that he would have found that the landlord had reasonably withheld consent to underlet until the matter of outstanding repairs had been resolved. Magspeed had committed the tort of wrongful interference with contract against the landlord by agreeing to accept, and accepting, the grant of the underlease. Consequently the landlord was entitled to relief against both Tesco and Magspeed in the form of an order for surrender of the lease. The landlord was also entitled to damages in such sum as the landlord might reasonably have demanded as at the date of the breach of contract or tort for relaxing the covenant against underletting, and an inquiry into damages was ordered. **Crestfort Ltd & others v Tesco Stores Ltd & another** [2005] EWHC 805 (Ch); [2005] 37 EG 148.

A covenant in a lease prevented the carrying on of the business of a “victualler” or “coffee house keeper”. The tenant wanted to sublet the premises to Pret a Manger and the issue between the landlord and the tenant was whether this would breach the user covenant. The Court of Appeal took the view, contrary to that of the trial judge, that the word “victualler” bore the wider meaning of a person who supplies food and drink and was not restricted to a licensed victualler. Although the word could be traced back to a standard lease from the 1790s, the starting point must be the ordinary meaning of the word in 1950, the year in which the lease was entered into. The only evidence of this before the trial judge was dictionary definitions, which provided no basis for his conclusion that the ordinary or common understanding of persons in 1950 was that “victualler” was confined to “licensed victualler”. The wording of the covenant was a hotchpotch of different and sometimes overlapping trades and businesses in no particularly logical order, so arguments based on the layout of the clause were not likely to provide any sure guidance. Similarly although “coffee house keeper” had an earlier historical meaning relating to a type of coffee house which had long ceased to exist, by 1950 the expression had a contemporary meaning as a place for the sale and consumption of food and drink. The subletting would be a breach of covenant. **Mount Cook Land Limited v Joint London Holdings Limited and Market Place Investments Limited** [2005] EWCA Civ 1171, transcript available on www.bailii.org

LEASEHOLD ENFRANCHISEMENT

An important decision about valuations and in particular deferment rates was given by the Lands Tribunal in **Arbib v Earl Cadogan** (and other linked cases) [2005] EWLands LRA/23-/2004 [15th September 2005]. A full transcript can be found on www.bailii.org The Tribunal expressed concern at the number of applications for permission to appeal on the issue of deferment rate and expressed the hope that the decision would reduce the number of appeals in the future. A summary of the Tribunal’s conclusions appears at paragraph 180 of the decision. Amongst other things it is held that there is unlikely to be any dependable market evidence in any particular case. There has never been a binding convention that a fixed and constant deferment rate of 6% should be universally used. It is unlikely that the deferment rate could remain constant over a period of several years. In the absence of reliable land market evidence it is permissible to consider the money market. A norm of 4½ % is suggested (compared to index linked gilts at 2%). The Tribunal also stated that decisions of LVTs and the Lands Tribunal on questions of fact and opinion should not be treated as evidence of value in later cases, although a decision of the Lands Tribunal setting out general guidance on valuation principles or procedure may be applied in subsequent cases.

The Lands Tribunal considered the floor area of a building where (for the purposes of the right to manage) the landlord argued that more than 25% of the internal floor area was non-residential and consequently that the right to manage was excluded by s.72(6) and Schedule 6 paragraph 1(1) Commonhold and Leasehold Reform Act 2002. Part of the building was sublet as a restaurant with subsidiary dwelling accommodation in the basement. The Tribunal held that although the accommodation in the basement was included in a commercial lease to the restaurant, it was still occupied for residential purposes. It was not appropriate to read into the provision the qualification that it was the underlying purpose of the person providing the residential accommodation that must be treated as the determinant of whether the part is occupied for residential purposes. The question to be asked was simply whether the basement was occupied or was intended to be occupied for residential purposes. The non-residential area of the building did not exceed 25%. ***Gaingold Ltd and Devonbrae Ltd v WHRA RTM Company Ltd*** [2005] EWLands LRX/19/2005 [22nd September 2005], transcript available on www.bailii.org

RENT

VAT was included in the calculation of gross turnover for the purposes of calculating rent. Tax would have been included in the turnover originally, albeit as purchase tax rather than as VAT. Considering the lease in its commercial context, there was no reason why the parties would have regarded a substitute for purchase tax which also affected ultimate prices as being excluded from the gross turnover. Debenhams department store in Swindon had to pay a fixed rent and an additional rent based on turnover. For many years it had paid the additional rent on the basis that turnover included VAT. In 2003 it sought a declaration that the calculation should be based on turnover not including VAT. It succeeded at first instance but this decision was overturned on appeal. ***Debenhams Retail plc and another v Sun Alliance & London Assurance Co Ltd*** [2005] EWCA Civ 868; [2005] 38 EG 142; [29th September 2005] TLR.

OTHER DEVELOPMENTS

PUBLIC RIGHTS OF WAY

The Countryside and Rights of Way Act 2000 (Commencement No. 9) Order 2005 SI 2459 and The Public Rights of Way (Register of Applications under section 53(3) of the Wildlife and Countryside Act 1981) (England) Regulations 2005 SI 2461 bring into force, on 27th September 2005, various provisions relating to the obligation on a surveying authority to keep a register of applications for a public rights of way modification order. The register is to be kept in electronic and paper form and is to be made available for inspection by the public on a website and at the principal office of the surveying authority.

RIGHT TO BUY

The Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) (No. 3) Regulations 2005 SI 2876 amend the Housing (Right to Buy) (Prescribed Forms) Regulations 1986 by prescribing a new form of notice to be used by a tenant claiming to exercise the right to buy his or her dwelling house in accordance with section 122 Housing Act 1985. The new form

RTBI is set out in the Schedule to the Regulations. By regulation 2 of the 1986 Regulations, a form substantially to the same effect as the updated form may also be used. The form can be found online at www.opsi.gov.uk/si/si2005/20052876.htm

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