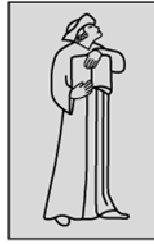


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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ESTATE AGENTS

Mann J held that the provision for renewal commission within the terms and conditions used by Foxtons as letting agents was unfair. Foxtons had introduced new terms and conditions shortly before the hearing, and so both the old and the new terms and conditions were considered. There was a long history of correspondence between the Office of Fair Trading and Foxtons leading up to the proceedings. Foxtons' renewal commission was not hinted at in its publicity, much less referred to. The obligation to pay renewal commission was not part of the core bargain. As far as the landlord is concerned, the core bargain is getting the tenant in, in exchange for the commission payable on the first period's rent. It might be possible to bring about a state of affairs in which the renewal commission became part of the core bargain, but this would have to involve a real degree of clear disclosure, if not active flagging, of the point. The renewal commission provisions under both the old and the new Foxtons terms were not exempt from a consideration of fairness under Regulation 6 of the Unfair Terms in Consumer Contracts Regulations 1999. The terms relating to renewal commission were not drafted in plain and intelligible language in either the old or the new terms, and were found to be unfair in both the old and the new terms. Foxtons' apparent recognition of the need for transparency (in its dealings with the OFT) was simply not reflected in the new terms, where there was no reference to renewal at all. The third party renewal commission and the sales commission (both only in the old terms) were also found to be unfair. Mann J did not rule on whether renewal commission was always unfair to consumer landlords. ***The Office of Fair Trading v Foxtons Ltd*** [2009] EWHC 1681 (Ch).

HOUSING

It is lawful for a local housing authority to contract out the function of reviewing homelessness decisions under s.202 Part VI Housing Act 1996. In these cases the function had been contracted out to a company called Housing Reviews Limited, whose director Mr Perdios carried out the reviews. The legislative provisions were clear. The functions expressly excepted by the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 from the contracting-out power do not include the

review function, and it follows that the review function could be contracted out. S.203 HA 1996 and The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI 71 provide some safeguards that the review will be fairly conducted: for example, the reviewer must be senior to the original decision-maker. Any differences between Housing Reviews Ltd and Mr Perdios, and an employee or officer of the local authority, were not such as materially to affect overall fairness of the review process. There was no apparent bias. The appeal was dismissed, and without regret. Brent Council evidently considered that Mr Perdios provided an efficient service that dealt with reviews expeditiously and at a reasonable cost. If his decisions were accepted by Brent Council and upheld by the county court, it was because his decision letters addressed the issues raised by applicants and the information put before him, on which he reached sensible conclusions. Agreeing with Stanley Burnton LJ's leading judgment, Sedley LJ noted, perhaps disconsolately, "*...Starting from such a low base, delegation of the review function to a competent outsider on the kind of terms we have seen in this case, whatever its weaknesses, probably offers more in the way of independence and impartiality than the in-house system.*" **De-Winter Heald & ors v Brent LBC** [2009] EWCA Civ 930.

Mr Redpath was an alcoholic and was evicted from his local authority property in Warnborough for harassing his neighbours, who had reported him to the police for driving when under the influence of alcohol. He continued to visit the village and to harass residents: damaging cars, shouting and swearing in the street, sleeping in the bus shelter and throwing a brick through the window of a resident's house. It was held that "housing-related conduct" should be broadly defined for the purposes of s.153A(1) Housing Act 1996, which deals with the local authority's power to obtain an anti-social behaviour injunction ("ASBI") against a person in order to prevent housing-related anti-social behaviour. Mr Redpath was no longer a tenant of the local authority, but this did not prevent the granting of the ASBI. There is no requirement in the statute that the respondent should be a tenant of the local authority and it is not necessary that they should live in the area. Mr Redpath's conduct was not to be viewed piecemeal but as a whole. It was possible to take past conduct into account, even where this was used as the basis for an earlier injunction. On the facts, the conduct of the past was all of a piece with the conduct of the present. Mr Redpath's persistent and offensive conduct made the area less desirable and attractive to live in. The legislature is very concerned about anti-social behaviour. Whilst legislation addressing anti-social behaviour should not be interpreted in an artificially wide or impractical way, nor should it be interpreted in a way which is artificially restrictive or which discourages or disempowers responsible and considerate landlords from taking proportionate steps in appropriate cases to protect their tenants. **Swindon Borough Council v Redpath** [2009] EWCA Civ 943.

A secure tenancy granted by a local housing authority under s.79 Part IV Housing Act 1985 is not void simply because it has been granted to someone who has not been selected in accordance with the authority's housing allocation scheme pursuant to Part VI Housing Act 1996. Mr Rasool, an officer in the housing department, had bypassed the voids procedure when properties became vacant, and had let them to tenants of his choice. Since then the tenants had remained in the properties as their homes, paying rent and observing the terms of the tenancies. Misconduct by Mr Rasool was shown, but the tenants were not implicated in his wrong-doing. There was a distinction between allocation under Part VI HA 1996 and disposal or grant under Part II HA 1985. What happened in each of the present cases (involving seven tenancies) was a breach of the statutorily prescribed procedure for selecting an applicant to be a secure tenant of available accommodation, not a purported disposal by way of the grant of a secure tenancy other than in accordance with statutory requirements.

Allocation is a public law obligation and remains effective unless and until it is set aside by the court. The subsequent grant of the tenancy, although effected pursuant to the defective allocation, was not ultra vires. It is notable that ground 5 of Schedule 2 HA 1985 provides that a secure tenancy granted pursuant to a misrepresentation by the tenant is determinable only if the court thinks it reasonable. If the tenant was not responsible for any misrepresentation, the fact that the tenancy survives is not particularly surprising. **Birmingham City Council v Qasim & ors** [2009] EWCA Civ 1080.

The respondent housing association brought proceedings against the appellant after his neighbours complained of excessive noise emanating from his flat. The appellant gave an undertaking “not to, whether by himself or by instructing or encouraging any other person” cause a nuisance or annoyance to his neighbours. Notwithstanding this, the antisocial behaviour continued. The respondent applied to commit the appellant to prison for breach of his undertaking. The application was heard by HHJ Mitchell who found the appellant to be in breach of his undertaking. He sentenced the appellant to eight weeks’ imprisonment for each breach, to run concurrently. The Court of Appeal allowed the appellant’s appeal for three reasons. First, it held that the phrase “instructing or encouraging” did not include “allowing or permitting” another (in this case the appellant’s children) to cause a nuisance. Secondly, there was no evidence to suggest that the appellant was personally responsible for any nuisance. Thirdly, the evidence showed that the antisocial behaviour had come to an end. That being so, the appropriate sentence would have been a suspended sentence of four weeks’ imprisonment. **Kathirkmanathan v Circle 33 Housing Trust Ltd** [2009] EWCA Civ 921.

HUMAN RIGHTS

Article 8 can be engaged in a planning application even if the person is not living on the land when the application is made. The appellants, who were gypsies, owned land and sought a change of use to a residential gypsy caravan site for two Romany gypsies. They had not yet moved onto the land. It would be highly unsatisfactory if someone who had moved onto the land unlawfully could claim that Article 8(1) was engaged, whereas someone who had applied for planning permission before moving onto the land could not. The appellants’ home is their caravans and it is from there that they carry on their private lives. This was the right that was being infringed and this was so whether or not their caravans were already on the land in respect of which they sought a change of planning use. However, the inspector would have reached the same conclusion even if he had applied Article 8(1). He had weighed all the factors as planning considerations that would have been weighed under Article 8(2), and had concluded that the harm from the proposed development was sufficiently serious not to be outweighed by the need for this gypsy site for these applicants. The appeal was dismissed. **Rafferty & Jones v Secretary of State for Communities and Local Government & anor** [2009] EWCA Civ 809.

LAND REGISTRATION

Briggs J considered Croatia’s application to enter restrictions against the title to a long leasehold interest of 4 Zetland House, Marloes Road, London W8, registered in 1974 in the name of the Socialist Federal Republic of Yugoslavia (Ministry of Defence) (“the SFRY”). The SFRY had ceased to exist and six states became its successors: Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro. A UN Security Council resolution

provided for the division of diplomatic and consular properties owned around the world by the former SFRY and for a final settlement of mutual rights and obligations of the successor states. 4 Zetland House was not listed as a diplomatic or consular property in the UNSC resolution. It was occupied by someone serving at the Serbian embassy. Croatia applied to register restrictions against the title to prevent disposition by a sole proprietor of the registered estate and to require notice to be given to Croatia of any disposition prior to registration. Overturning the Adjudicator's order that the applications be cancelled, Briggs J held that as Croatia had a claim to a beneficial share in 4 Zetland House and also a claim to full beneficial ownership, it had a sufficient interest to enter a restriction against the title under ss.40 to 47 Land Registration Act 2002. ***The Republic of Croatia v The Republic of Serbia*** [2009] EWHC 1559 (Ch).

POSSESSION PROCEEDINGS

A valuable residential lease with 94 years left to run was forfeited for non-payment of a small sum of £893.25 representing arrears of ground rent and charges. The landlord then obtained an order for possession, which the lessee applied to set aside. The first question was whether the order was to be set aside under CPR 39.3 or CPR 3.1(2)(m). This depended on whether or not the possession hearing had been a trial. The court considered the procedure under CPR 55.8(1), whereby the judge may decide a possession claim or give case management directions. Where in a busy possession list with five or ten minutes allocated for each case, the judge considers the evidence briefly without cross-examination and orders possession, this is not a trial. It follows that the rule relevant to the application to set aside the order was not CPR 39.3(5)(a) (application to set aside order made at trial in the absence of a party), but CPR 3.1(2), the power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. However the discretion to be exercised under either rule was in practice quite similar. The checklist under CPR 3.9(1) was also useful by way of analogy. The application for relief had not been made promptly and there was no good explanation for the failure. However the lessee stood to lose a valuable asset for want of payment of a modest sum. If relief was granted, the landlord would lose what could fairly be described as a windfall. The decision to grant relief from forfeiture was upheld. ***Forcelux Ltd v Binnie*** [2009] EWCA Civ 854.

RESTRICTIVE COVENANTS

The appellant sought to build an extension to his house on Heron Island, on the River Thames near Reading. The extension would have interfered with the river views of his neighbours. Restrictive covenants applied so as to prevent the appellant from doing anything which may be or become a nuisance or annoyance to the owners or occupiers of the residential estate or the neighbourhood. The covenant relating to nuisance or annoyance was in a familiar form and the court had no hesitation in holding that it was wide enough to extend to activities of all natures, including building an extension to an existing house, which when built would be an annoyance to other owners and occupiers. Another covenant provided that buildings could not be erected without the approval of the management company, but it was held that this provision did not cut down the scope of the nuisance covenant. The giving of approval by the management company would not impliedly prevent other owners from arguing that the building would amount to a nuisance. ***Davies v Dennis & ors*** [2009] EWCA Civ 1081.

RIGHT TO BUY

Miss Scinto had initiated the right to buy process under the Housing Act 1985 in September 1999 by serving notice on Newham LBC. The property needed significant structural repairs and it was agreed in October 2000 that the right to buy application would remain open pending the outcome of investigations by Newham's technical manager. Remedial works had not been carried out by 26th February 2003 when Newham served a first notice to complete under s.140 Housing Act 1985. Miss Scinto did not respond and on 30th April 2003 a second notice was served requiring her to complete within 56 days. She did not do so, but in December 2004 issued proceedings for disrepair which were compromised after Newham had carried out some repair works. The Court of Appeal then upheld Miss Scinto's successful claim for a declaration that she was entitled to exercise the right to buy in accordance with the terms of the offer of 17th December 1999. Newham could not rely on their notices to complete, because the relevant matters previously stated by Miss Scinto to be outstanding had not been determined. The existence of contended for repair does not by itself entitle the tenant to defer purchase, but here the parties had agreed that the right to buy process would be held in abeyance until investigations and necessary repair works had been carried out. The facts also gave rise to a promissory estoppel. It was far too late for Newham now to say that the whole process was invalid. Miss Scinto was entitled to proceed with her claim to buy the premises. **Scinto v Newham LBC** [2009] EWCA Civ 837.

TRUSTS OF LAND

The following principles could be derived from the landmark cases of **Stack v Dowden** [2007] 2 AC 432 and **Oxley v Hiscock** [2005] Fam 211: (1) Where property is conveyed into the sole name of one partner, the presumption is that he or she is intended to be the sole beneficial owner. This can be displaced by evidence of a common intention that both should have beneficial interests. Financial contribution to the purchase price by the other party will usually be sufficient. (2) Where the property is put into joint names, but nothing more is said, it is presumed that the parties intend that each should have a legal and a beneficial interest, and that these interests should be equal. This presumption will only be displaced in very unusual cases. (3) Where the presumption is displaced, if there is no express agreement as to the respective amounts of the partners' interests, the court will quantify them by reference to the "*whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended*". The court must assess what in the light of their conduct the parties must be taken to have intended, and not impose what the court itself would consider to be fair. (4) The court must decide what the common intention of the parties was, and reallocate their property interests on that basis, on evidence which would fall short of establishing a common intention in a contract case. In many cases there will be no evidence at all of the actual intention of either party, and the court will be attributing a common intention to them. (5) Whatever the beneficial interests may be at the time of acquisition, a trust may be "ambulatory": the intentions of the parties as regards their interests in the property may change, or be taken as having changed, over time. There is little guidance in **Stack**, or in any earlier authority, as to the circumstances in which the presumption of equality will be displaced or how, if it is, the altered amounts are to be assessed. Although the court must not override the parties' intentions and substitute what it considers to be fair, where there is evidence that the parties intended to alter their shares but no evidence as to how, the only available criterion by which to assess the extent of the alteration is what is objectively fair. On the present

facts, the parties had no discernible intentions as to the amount of the adjustment, so must be taken to have intended that it should be whatever was fair and reasonable. If this is a fiction, it can be justified as the only option available to the court on quantification, once it had been determined that the parties intended their respective beneficial interests to change. The 90/10 split was well within the range of what was fair. **Jones v Kernott** [2009] EWHC 1713 (Ch).

OTHER DEVELOPMENTS

COMMONHOLD

The Commonhold (Amendment) Regulations 2009 SI 2363, coming into force on 1st October 2009, amend the Commonhold Regulations 2004 SI 1829 in consequence of the coming into force on 1st October 2009 of provisions of the Companies Act 2006. Of particular relevance to commonhold associations, which are private companies limited by guarantee, are the changed roles of the memorandum of association and the articles of association.

COMMONS

The Commons Registration (England) Regulations 2008 SI 1961 are amended by the Commons Registration (England) (Amendment) Regulations 2009 SI 2018, coming into force on 30th September 2009. The amendment regulations extend, in each case by one year, (i) the length of the transitional application period, which is now to last until 30th September 2010, and (ii) the transitional period, which is now to last until 30th September 2011. The transitional period is the period during which registration authorities can, for the purposes of Schedule 3 Commons Act 2006, amend their registers of common land and town or village greens in consequence of certain qualifying events which were not registered under the Commons Registration Act 1965.

ENFRANCHISEMENT

The Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009 SI 2097 come into force on 7th September 2009. They apply to the granting of a long tenancy for a house in England at any time after the coming into force of the Regulations, except where the grant arises from a written agreement for that grant made before the coming into force of the Regulations. Schedule 4A LRA 1967 makes provision for certain shared ownership leases to be excluded from the provisions of Part I LRA 1967. Schedule 4A provides that a lease is excluded from Part I if it meets certain conditions and does not fall within any prescribed exemptions. These Regulations are concerned with defining the conditions and exemptions.

The Housing and Regeneration Act 2008 (Commencement No. 6 and Transitional and Savings Provisions) Order 2009 SI 2096 brings into force, from 7th September 2009, various

provisions of the Housing and Regeneration Act 2008 relating to leasehold enfranchisement (ss.300 to 302 HRA 2008, amending the Leasehold Reform Act 1967).

The Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 SI 2098 comes into force on 7th September 2009 and designates protected areas within which shared ownership leases will be excluded from the operation of Part I LRA 1967.

HOUSING

The Housing and Regeneration Act 2008 (Commencement No. 6 and Transitional and Savings Provisions) Order 2009 SI 2096 (considered above) also brings into force the remainder of s.114 HRA 2008, giving the Secretary of State powers to make an order in relation to the registration of local authorities as providers of social housing.

Note: Where the only case reference given is a universal reference, readers will find a full transcript of the decision available on www.bailii.org. Statutory instruments can be found on www.opsi.gov.uk.

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