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Property Bulletin
A Review of Case Law Spring 2008

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Introduction

The purpose of this bulletin is to highlight some of the real property and landlord and tenant cases of note that were decided in the past eighteen months or so. The autumn of 2006 saw the publication of my first review of property law update, which was well received by practitioners. This bulletin therefore covers the period since 1st August 2006, to 1st March 2008. It is not intended to contain a comprehensive list of all cases decided at appellate level during this period but only a selection. There are undoubtedly many others worthy of reference and consideration. By 'cases of note', I mean those cases that may be of particular interest to the practitioner, perhaps because they state important new points of law, contain helpful and refreshing statements of old principles or narrate diverting anecdotes. Some may be familiar already; others will not.

1. Trusts of Land

A. Joint Ownership and Equitable Accounting

Many of you will already be well-versed in *Stack v Dowden* [2007] AC 432. But I make no apologies for starting here. Not all readers will know this case as well as they should and even those of use who think we know it well can always benefit from a short summary of its salient features:

- (1) The decision relates to property which is held in joint names, usually by cohabiting couples, whether married or unmarried, but where there is no express declaration of trust.

- (2) The declaration on the Land Registry transfer form that 'the survivor can give a valid receipt for capital money arising on a disposition of the land' does not amount to an express declaration of trust.
- (3) There is a presumption that the beneficial interests reflect the legal interests in the property: where there is joint legal ownership, there will be joint beneficial ownership.
- (4) The burden is on the person seeking to show that the beneficial ownership is different from the legal ownership (just as in sole ownership cases the burden is on the non-owner to show that he has an interest).
- (5) But only in 'very unusual' cases will the result be different: a mere difference in the owners' contributions to the purchase price is unlikely to be sufficient alone.
- (6) In a 'very unusual' case, the search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.
- (7) The factors which may be relevant to divining the parties' true intentions include:
 - a. Their financial contributions;
 - b. Any advice or discussions at the time of the transfer, which cast light upon their intentions then;
 - c. The reason why the property was acquired in their joint names;

- d. The reason why (if it be the case) the survivor was authorised to give a receipt for capital moneys;
 - e. The purpose for which the property was acquired;
 - f. The nature of the parties' relationship;
 - g. Whether they had children for whom they both had responsibility to provide a home;
 - h. How the purchase was financed both initially and subsequently;
 - i. How the parties arranged their finances, whether separately or together or a bit of both;
 - j. How they discharged the outgoings on the property and the other household expenses.
- (8) An arithmetical calculation may be less important: it may be that they intended that each should contribute as much to the household as each could afford and that they would share the eventual benefit or burden equally.
 - (9) The statutory powers under sections 12-15 of the Trusts of Land and Appointment of Trustees Act 1996 replace the old doctrine of equitable accounting. The statutory criteria should be applied in lieu of the cases under the old law.

In relation to point (1) above, it has already been held in the county court by His

Honour Judge Behrens QC that the principles in *Stack* are applicable to a cohabiting mother and son: there is no need for a platonic or sexual relationship (*Adekunle v Ritchie* [2007] BPIR 1177: this point was affirmed in *Laskar*). But generally the presumption is applicable in 'the domestic consumer context' (per Lady Hale in *Stack*) and the Court of Appeal followed this approach in *Laskar v Laskar* ([2008] All ER (D) 104 and Lawtel, 7th February 2008).

In *Laskar* a mother exercised her statutory right to buy the council house in which she was living. Her daughter jointed in the transaction in order to help the mother raise the necessary finance. The property was purchased primarily as an investment and not to provide a house of the mother or daughter: neither lived there after the purchase, apart from briefly.

The Court of Appeal held that the reasoning in *Stack* does not apply in a case such as this because the context was essentially commercial, even though the relationship was familial. It went on to comment that even if *Stack* did apply, the presumption of equality would have been rebutted because the parties (as in *Stack*) kept their financial affairs separate. The court therefore fell back on a resulting trust analysis so that the parties beneficial shares should relate to the size of their contributions. In carrying out this analysis the daughter's liability on the mortgage was a factor taken into account and the Court of Appeal awarded her 33% as opposed to the 50% claimed and the 4.38% awarded by the first instance judge (being the proportion of her contribution to the purchase price).

Point (9) above was recognised in the case of *Murphy v Gooch* ([2007] 3 FCR 96, [2007] BPIR 1123). This case concerned the basis on which an account was

to be taken following the sale of a property under the Trusts of Land and Appointment of Trustees Act 1996 ("the 1996 Act"). G and M jointly owned a property. In 1993 their relationship broke down and M left. G remained in occupation and made all payments arising in respect of it.

The court held that, following *Stack* the doctrine of equitable accounting was no longer applicable and it applied sections 12-15 of the 1996 Act instead, whilst noting that very often, if not always, the result would be the same whichever approach was taken: the task of the court was to do justice between the parties. M was entitled to offset a credit in her favour in respect of G's continued occupation against the credits to which he would be entitled because of the payments he has made, notwithstanding her disavowal of a free-standing claim to payment of or credit for an occupation rent and that a credit for occupation rent could be ordered without the need for M to prove ouster from occupation.

Another case dealing with the principles of equitable accounting is *Wilcox v Tait* ([2007] 2 FLR 871, [2007] 3 FLR 611, [2007] BPIR 262). W brought her claim for an order for sale under section 14 of the 1996 Act. At first instance, the circuit judge attempted to deal with the question of equitable accounting at the same time as making the declaration and the order for sale in order to achieve finality in the proceedings early. In the words of Jonathan Parker LJ, this approach 'caused this case to go off the rails.'

The Court of Appeal made it clear that the question of equitable accounting is more appropriately addressed once a property has been sold and there is a fund in place for division: "To attempt an equitable accounting exercise in advance of

any sale is, as it seems to me, in general an inherently risky and uncertain process.” The requirement to account is a reflection of and derives from the parties’ beneficial interests and so ought only to arise once those interests have been determined.

The period to which equitable accounting should relate will depend upon the intentions of the parties as to how the relevant expenditure should be borne as between them. But, in agreement with the case of *Clarke v Harlowe* ([2007] 3 FCR 726, [2006] BPIR 636) (which was referred to in the last bulletin), in the ordinary cohabitation case it is open to the court to infer from the fact of cohabitation that during the period of cohabitation it was the common intention of the parties that neither should thereafter have to account to the other in respect of expenditure incurred by the other on the property during that period for their joint benefit. But the drawing of such an inference will depend on the facts in each case.

B. Constructive Trusts and Proprietary Estoppel

And now a trio of cases in which the claimants’ arguments that they were entitled to a beneficial interest arising under a constructive trust or by reason of proprietary estoppel all largely failed:

***Hunt v Soady* [2007] EWCA Civ 366**

H & S jointly owned a property. The parties separated and H moved out. Some years later, H offered to transfer her interest in the property to S if he paid the mortgage arrears then outstanding. S agreed but did not comply with the terms

of that offer for some years. Later still, H brought a claim for an order for sale and S sought to rely on the agreement with H, on which he said he relied to his detriment, thereby giving rise to an estoppel or constructive trust in his favour.

The court disagreed. S had failed to act on the terms of the agreement. Even though he subsequently cleared the mortgage arrears, this could not properly be regarded as detriment giving rise to an estoppel or making it unconscionable for H to resile from the representation or promise because S was contractually bound to the bank to pay the mortgage arrears and, if he did not, the bank would enforce its possession order.

***Powell v Benney* [2007] EWCA Civ 1283, 151 Sol Jo 1598**

P claimed two properties that were vested in B on the basis of a constructive trust or proprietary estoppel. B was the personal representative of her cousin, H, who had died intestate. P relied on promises made to them by H that he would leave the properties to them on his death and that they could use them during his lifetime. They also relied on acts of detriment, namely works of refurbishment and some repair work following a flood. At first instance, the judge rejected their claim to the properties and awarded them the sum of £20,000, having taken the view that P’s expectation of receiving the properties was out of all proportion to the detriment P had suffered.

His decision was upheld on appeal. The court considered that there was an insufficient causal link between H’s promises and P’s detriment. The Court of Appeal referred to the distinction between bargain category cases (where the relief should vindicate the claimant’s expectation) and non-bargain category

cases where the relief is arrived at by the exercise of a wider discretion, which may be influenced by a number of factors including proportionality with the detriment. P asserted that their case fell within the bargain category but the court disagreed. The acts of detriment had not been defined with clarity between P and H as part of a consensual arrangement. H had not required P to do the acts relied on. P decided to avail themselves of H's offer to use the properties and incurred some expense as a result. H may have known about the detrimental acts but doing them was a matter for P.

James v Thomas [2007] 3 FCR 696

J claimed a beneficial interest in a property of which T was the sole registered proprietor and in which they had both lived together for 15 of years. T had owned the property and lived there alone for a number of years before their relationship began. During their relationship, J helped T with his business and they carried out extensive works of renovation to the property. The judge held that there was insufficient evidence to support J's claim to a beneficial interest either under a constructive trust or by way of proprietary estoppel.

His decision was upheld in the Court of Appeal. The only source of funds to pay the mortgage and the other household and personal expenses was the business in which J was a partner. It was not surprising therefore that J did all she could to ensure the business prospered (the particulars of claim pleaded J's 'near Herculean labours'). But that did not give rise to an inference that the parties had agreed or reached a common understanding that she should have a share in the property because what she did was wholly explicable on other grounds.

The assurances relied on by J (that the improvements J and T carried out to the property would benefit them both) were at least as likely to mean that the improvements would have the effect that the property would be more comfortable and more convenient for them at that time, as to indicate the promise of some future property interest. Similarly a representation by T that J would be well provided for upon his death could not amount to a representation that she would have a present proprietary interest in the property or at any time during T's lifetime. Further, such a representation must have been made on the common assumption that the parties would still be living together after T's death.

3. Adverse Possession

Pye v United Kingdom [2007] 23 BHRC 405

This is likely to be the final case in the *Pye* saga, which culminated in the House of Lords re-examination of the law of adverse possession in the decision of *Pye v Graham* [2003] 1 AC 419. The Lords held that P had lost its land under the law of adverse possession. It had been conceded that the Human Rights Act 1998 was of no application because the adverse possession pre-dated that Act coming into force and that Act did not have retrospective effect. P therefore applied to the European Court of Human Rights alleging that English law on adverse possession operated in violation of article 1 of protocol no. 1 to the Convention.

Although the Court initially ruled in P's favour ([2005] 3 EGLR 1), the UK government requested a referral to the Grand Chamber (the ultimate stage of a

determination by the Strasbourg Court). The Grand Chamber overruled the earlier decision and found in the government's favour: the UK law on adverse possession does not operate in violation of article 1.

Although the decision is confined to registered land under the Land Registration Act 1925, it must a fortiori apply to unregistered land and to registered land under the Land Registration Act 2002. The effect of the decision is to render the judgment in *Beaulane Properties Ltd v Palmer* [2006] Ch 79 as bad law and an application has been made in that case for permission to appeal out of time.

The Grand Chamber recognised that the state enjoys a wide margin of appreciation with regard to choosing the means of enforcement of laws and ascertaining whether the consequences of enforcement are justified. The Court noted that P had lost its land as a result of generally applicable rules on limitation periods and that the statutory provisions were not intended to deprive paper owners of their ownership but to regulate questions of title. It was not a question of 'deprivation of possessions' in article 1 but of 'control of use'. The court noted similar systems amongst other states. The court found that the existence of a 12-year limitation period for actions for recovery of land pursues a legitimate aim in the general interest. It also noted that the limitation period was relatively long and that very little action on the part of P would have stopped time running.

Subsequently, in *Ofulue v Bossert* [2008] EWCA Civ 7 the Court of Appeal held that *Pye v United Kingdom* applies to all cases of adverse possession and it was not open to a court not to follow it because a case was distinguishable on the facts.

Ashe v National Westminster Bank plc [2008] EWCA Civ 55

This case saw the application of the principles in *Pye v Graham* [2003] 1 AC 419 to a failure by a mortgagee bank to enforce its right to possession of a property occupied by mortgagors who failed to make mortgage payments over a period in excess of 12 years. The bank had an all monies charge, which gave it an immediate right to possession of the property upon execution. (This should be contrasted with many mortgages and charges which limit the right to possession, usually making it dependent on default in repayment.) During the 12 year period, the mortgagors neither made payments to the bank nor acknowledged its title. The bank conceded that its contractual right of action to sue the mortgagors for payment of the debt was statute-barred but contended that its right to possession was not, on the basis that there had not been adverse possession and that the mortgagors had been in possession with the consent of the bank throughout. The bank emphasised that the mortgagors were in possession lawfully and with the bank's permission: they were not trespassers.

The Court of Appeal disagreed and emphasised the fact that the mortgagors' right to possession was derived from their own registered title. There was no express permission for them to be there, nor was there any implied permission. It also stated that the question of 'permission' was irrelevant. What was relevant was the fact that the bank had an immediate right of action to possession of the property as soon as the legal charge was executed. This right was not dependent on the termination of a permission granted by the bank to the mortgagors. It was from the accrual of this right to possession that time started running. It should be noted that despite the many cases cited by leading counsel and the first instance

judge, the Court of Appeal considered that 'cases from the 18th, 19th and 20th centuries will not help to make the present legal position any plainer than it was made by the House of Lords in *Pye*'.

Rehman v Benfield [2006] EWCA Civ 1392

B and her husband entered the property as squatters and lived there from 1991. R claimed possession of the property over 12 years after B had first entered the property. He defended B's claim of adverse possession on the basis that B did not acquire title by adverse possession because she had acknowledged his title in writing, thereby causing time to run afresh and ensuring his possession claim was not statute barred.

The acknowledgement point was based on a sham lease which B's husband arranged to have drawn up between B and a friend of his who impersonated R, a Pakistani national. B signed the counterpart lease. The purpose of the sham lease was so that B would have "an apparently official document to provide to anyone challenging her or her family's right" to occupy the property. The Court of Appeal held that the sham lease was sufficient to amount to a signed written acknowledgement by B of R's title to the property.

Allen v Matthews [2007] BPIR 281

This case involved two members of chambers ([Jane Giret QC](#) and [Tim Cowen](#)). As Lawrence Collins LJ said in his judgment in the Court of Appeal "The background to this case is one of violence and crime." That background quickly came to the fore when, on the second day of trial in the Central London County Court, a gang of 15-20 men attacked the 'associates' of the claimant in the

building. The trial was adjourned to a secure location and eventually concluded at Kingston Crown Court. One of the principal witnesses was threatened with violence unless he made a statement retracting what he had said in a previous statement. Further, before trial, the Metropolitan Police wrote to the court to say that over £500,000 worth of stolen and counterfeit goods had been recovered from the property and the defendant's son was in custody awaiting trial as a result.

The claim was for possession of land owned by C, to which D claimed to be entitled by adverse possession. At trial, C succeeded, notwithstanding the finding that there had been adverse possession for 12 years, because the judge found that D's solicitors had written to C in 1994 and acknowledged title for the purposes of the Limitation Act 1980, thereby restarting the 12 year period required for adverse possession.

The Court of Appeal disagreed and held that there was no acknowledgement of title and that D was entitled to the land by adverse possession. Although it considered that the letter in question was sufficient to amount to an acknowledgement of title, it held that the letter was not an acknowledgment by the person in possession because the letter was written by a company which had been dissolved and did not exist. An acknowledgment must be by or on behalf of the person in possession and must be reasonably understood by the owner as an acknowledgment from that person. The question is what the author of the acknowledgment intends and who the recipient understands to be the person making the acknowledgment. In this case, the letter could not be construed as being written on behalf of whoever happens to be in possession of the property.

4. Leasehold Enfranchisement

A. Leasehold Reform Act 1967 (“the 1967 Act”)

Boss Holdings Limited v Grosvenor West End Properties [2008] *UKHL 5, 152 Sol Jo 31*

This case concerned the meaning of the phrase “designed or adapted for living in” in section 2(1) of the 1967 Act. The claimant was a lessee of an eighteenth century terraced house which was built as a single private residence comprising six floors. Since 1946 it had been used partly for residential purposes and partly for business purposes. At the time the notice under section 1(1) of the 1967 Act was served, the property was vacant and not being used for either purpose. Both the judge at first instance and the Court of Appeal refused the claim for a declaration that the lessee was entitled to acquire the freehold of the property because at the time the notice was served the property was not a house within the meaning of section 2(1) because it was not ‘designed or adapted for living in’.

The House of Lords disagreed. The fact that the property had not been occupied for a number of years and was dilapidated did not detract from the fact that it had been designed for living in when it was first built. The word ‘designed’ was concerned with the past not the present, and it was necessary for the court in construing the phrase in question to consider the property as initially built and the purpose for which it was originally designed. This conclusion was fortified by the fact that the 1967 Act as originally enacted required the tenant to have occupied the house as his only or main residence, in which case a further

requirement that the property be in such a physical state that it can be lived in ‘seems somewhat arid and valueless’ (per Lord Neuberger).

B. Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”)

Sinclair Gardens Investments (Kensington) Limited v Poets Chase Freehold Co Ltd [2008] 2 All ER 187

In this case, Morgan J held that there was no statutory prohibition on tenants serving a second notice for collective enfranchisement under s.13 of the 1993 Act where they had accepted the landlord’s s.21 counter-notice that their first notice was invalid. The first notice had not complied with the mandatory requirements of s.13(3) of the Act and the landlord asserted this in its counter-notice. The tenants accepted that their first notice was invalid and sought to serve a second notice.

The judge started from the general proposition that where a mandatory contractual or statutory provision requires a party to give a notice in a particular form and the particular form is not used, then the notice has no legal effect. In particular cases, statutory provisions may seek to deal with inaccuracies and misdescriptions (e.g. paragraph 15 of Schedule 3 to the 1993 Act) but they were not of any assistance in this case.

Therefore, the normal result would be to conclude that the first notice was not a notice under section 13 and it did not have effect for the purposes of that section. As a result, the prohibition on a subsequent notice in s.13(8) cannot apply

because the first notice was not in force and did not have to be withdrawn. There was nothing to stop the tenants agreeing with the landlord's assertion and serving a second notice.

Majorstake Limited v Curtis [2008] UKHL 10

This case concerned the phrase 'any premises in which the flat is contained' in section 47(2)(b) of the 1993 Act. T claimed to exercise his right to acquire a new lease under the 1993 Act. L responded by serving a counter-notice stating that T's right should not be exercisable because L intended to redevelop 'the whole or a substantial part of the premises' in which T's flat was contained. Section 47 of the 1993 Act provides that the court may declare that the right to acquire a new lease shall not be exercisable by the tenant by reason of the landlord's intention to redevelop 'any premises in which the tenant's flat is contained'. At first, L had wanted to combine T's flat with the one next door to create one large flat. Later, L proposed to incorporate T's flat with a flat below to create a single flat over two floors. At first instance, the judge held that C's flat and the flat below did not constitute 'premises in which the flat is contained'. The House of Lords upheld this decision and reversed the Court of Appeal's decision to the contrary.

The House of Lords recognised that if L's arguments were acceded to then a landlord could easily defeat the rights granted by the 1993 Act by proposing to do some comparatively minor works to the building involved. The phrase 'any premises in which the flat is contained' had to be an objectively recognisable physical space. A visitor would describe the premises in which T's flat was contained as the block and not as any smaller area of space, although much would depend on the physical facts on the ground. For L to argue that premises

could be limited to T's flat and the flat below would strain the language of the section so far as to cause a literate non-lawyer to doubt L's familiarity with the English language (per Lord Scott of Foscote)!

5. Landlord and Tenant

A. Forfeiture: Refusal of Relief

Greenwood Reversions Ltd v World Environment Foundation Ltd [2008] EWCA Civ 47

This is one of those unusual cases in which the court refused to grant relief from forfeiture of residential premises. The court also concluded that there had been no unequivocal demand to pay rent which would amount to a waiver of the forfeiture in the same way as receipt of rent.

In relation to the refusal of relief, the Court of Appeal was satisfied that the judge had taken into account all the circumstances, including the history of the tenancy, the breach (unlawful assignment), the conduct of the tenant and its financial effects. The judge was exercising a broad discretion and there was no basis for interfering with it. The tenant's conduct over a number of years was woeful. He had acted in repeated breach of the tenancy, without regard to the landlord's rights, disobeyed court orders and had sought to put himself beyond the orders of the court and any enforcement processes. Further, this was not a case where the landlord was likely to obtain a windfall, owing to the high costs of the litigation.

B. Forfeiture: Waiver of Covenant

Swanston Grange (Luton) Management Limited v Langley-Essen Lands Tribunal, 12th November 2007

L applied to the leasehold valuation tribunal (LVT) for a determination that there had been breaches of covenant by T under section 168 of the Commonhold and Leasehold Reform Act 2002. L and T agreed that there had been certain breaches of the lease by T. T submitted that L had waived compliance with these covenants and that, accordingly, there was no breach of covenant. The question for the Lands Tribunal was whether the LVT had jurisdiction to consider this question and, if so, whether L had waived the right to rely on the covenants.

His Honour Judge Huskinson concluded that the LVT did have jurisdiction to consider the question of waiver of the covenant. He distinguished that from the separate question of waiver of the right to forfeit, which affects what remedies are available to a landlord to deal with a breach of covenant. He thought that the question of waiver went hand in hand with the question of breach. If the LVT has to decide whether a breach of covenant has occurred, then it must also consider whether the covenant was suspended by waiver or estoppel (e.g. promissory estoppel). Section 168 requires a determination that an actionable breach of covenant has occurred not that facts have occurred which, on the strict interpretation of the lease, amount to a breach of covenant but with it being left over for future consideration whether that breach is actionable or whether there is an estoppel or waiver. However, contrary to the LVT, the judge determined that there had been no waiver by L and that there had been actionable breaches of covenant by T.

C. Unpaid Rent

Reichman v Beveridge [2006] EWCA Civ 1659

The Court of Appeal upheld a decision that L was under no duty to mitigate his loss when seeking to recover arrears of rent. T had failed to pay the rent and had then abandoned the premises. L sued and T's defence contended that L had failed to mitigate his loss (even though the lease had not been terminated) by failing to instruct agents to market the premises and failing to accept an offer from a prospective tenant. T's argument was based on a limited category of cases in which the court has refused to allow an innocent party to a contract not to accept a repudiatory breach of contract because such an election would, in the circumstances, be wholly unreasonable and the innocent party had an adequate remedy in damages. T argued that the court should focus on the contractual nature of a lease. The Court of Appeal did not accept this argument and noted that it is not the law of England that a landlord may accept a tenant's repudiation and sue for loss of future rent, this principle being derived from Canadian and Australian authorities. In fact, there is no case in English law that shows that a landlord can recover damages from a former tenant in respect of loss of future rent after termination and there is at least one case which decides that he cannot.

D. Damages for disrepair

In *Latimer v Carney* [2006] 3 EGLR 13 L carried out works of repair himself and sought to recover the cost of doing so as damages from T. L's claim was rejected at first instance on the basis that L had failed to prove the actual costs of the

repairs and had failed to produce evidence of the diminution in value of the reversion for the purposes of section 18(1) of the Landlord and Tenant Act 1927.

The Court of Appeal reversed this decision, pointing out that expert evidence of the diminution in value of the reversion was not necessary, that valuation evidence was not the only means of proving diminution value and that the court could infer diminution in value from the evidence of the estimated cost of the repairs. The judge could have drawn the inference that the cap in section 18(1) was not exceeded from the fact that L had to repair the roof before a new tenant would take a lease. It was not necessary to know the actual cost of repairs if the estimated costs were reasonable.

Further, giving a purposive interpretation to section 18(1), it was held that the court should treat a failure to repair the decorative state of the premises as a breach of the covenant to repair for the purposes of the first limb of section 18(1) even if that failure also constitutes a breach of a covenant for periodic decoration in the same lease.

E. Business Tenancies

Broadway Investments Hackney v Grant [2006] EWCA Civ 1709

A tenant took a lease of premises that were part commercial and part residential, which obliged him to keep the premises open as a shop at certain times. T argued that his lease was an assured tenancy on the basis that at first he lived there and only subsequently did he use the ground floor for business purposes.

The Court of Appeal disagreed. Taking the terms of the lease into account, the lease plainly fell within the second illustrative example of Lord Denning in *Cheryl Investments v Saldanha* [1978] 1 WLR 1329. A professional man who takes a tenancy of a house, using one room for professional purposes (such as a doctor who has a consulting room) and living in the rest of it will have a business tenancy. He is clearly occupying part of the house for the purposes of his profession and thus falls within section 23(1) of the Landlord and Tenant Act 1954. But if the point was so obvious, why did the case end up in the Court of Appeal? Unfortunately, the judge had taken an interventionist approach during trial and made various ill-considered pronouncements, concluding with “I do not care what the law says,” a comment which is undoubtedly “unfortunate on the part of a judge” (per Lloyd LJ).

Less clear cut was *Tan v Sitkowski* [2007] EWCA Civ 30, in which a tenancy had been granted for mixed business and residential purposes. In 1989 T subsequently permanently ceased his business use of the premises. L obtained a possession order but T appealed and contended that his tenancy was protected by the Rent Act 1977. The Court of Appeal disagreed. Mixed commercial and residential premises were not ‘let as a dwelling’ for the purposes of the 1977 Act. It would be unfair on a landlord if a mixed use tenancy could be unilaterally brought within the 1977 Act simply by the tenant ceasing business use, especially where L did not know of the change of use and had done nothing to indicate his consent to the change apart from accepting rent.

F. Assured Tenancies

Knowsley Housing Trust v White [2007] 4 All ER 800

The Court of Appeal held that an assured tenancy came to an end on the last day for giving up possession under a possession order. The question of when the assured tenancy came to an end was relevant in this case because the tenant sought to exercise her right to buy under the Housing Act 1985 after the date for delivery up of possession had passed under a possession order requiring the tenant to give up possession on or before 6th July 2004 but providing that the order would not be enforced so long as the tenant paid the current rent together with weekly payments towards the arrears.

The case is similar to the decision in *Bristol CC v Hassan* [2006] 1 WLR 2582 (referred to in the last bulletin) in which the court recommended that suspended possession orders made against secure tenants under the Housing Act 1985 should require the giving up of possession but postpone the date on which possession is to be given up to a date to be fixed, thereby allowing the secure tenant to keep her status (because the secure tenancy would otherwise end on the date by which possession was to be given up). The court recommended that the relevant CPR practice direction and the form of order should be changed to cover assured tenants too. The effect of this decision is that many assured tenants against whom suspended possession orders have been made have the status now of 'tolerated trespassers'

6. Real Property

A. Boundary Disputes

Two salutary cases concerning boundary disputes: first *Ali v Lane* [2007] 1 P&CR 438, in which the Court of Appeal warned:

"It was disturbing that neither of the experienced leading counsel before us was able to give a clear indication of the practical significance of the strip to their respective clients, nor to inform the court what if any attempts have been made at mediation. It is sadly a commonplace that boundary disputes can be fought with a passion which seems out of all proportion to the importance of what is involved in practical terms. In such cases, professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures."

The issue in this case was whether extrinsic evidence could be relied on when construing a conveyance relating to disputed land, where the information contained in the conveyance was unclear or ambiguous. The starting point is the law of contract generally: extrinsic evidence is not admissible for the construction of a written contract (*L Schuler AG v Wickman Machine Tools Sales Limited* [1974] AC 235). This general rule is subject to exceptions, of which one concerns the construction of conveyances of land (*Neilson v Poole* (1969) 20 P&CR 909).

The question here was whether evidence of subsequent conduct can be used to assist in the construction of a conveyance. The conclusion reached by the Court

of Appeal was that *Watcham v AG of the East Africa Protectorate* [1919] AC 533 (in which the Privy Council held that evidence of user may be given to show the sense in which parties to an ambiguous instruments used the language employed) remains good law within the narrow limits of what it decided, i.e. in the context of a conveyance of land, provided the evidence of subsequent conduct has probative value in determining what the original parties intended. In this particular case, none of the evidence was probative of the relevant issue and therefore the appeal failed.

Secondly, there is an appeal to the High Court from a decision of an adjudicator to the Land Registry: *Derbyshire CC v Fallon* [2007] EWHC 1326 (Ch). The respondents had built an extension over the true boundary line, thereby encroaching on unregistered land owned by the applicant local authority but they had been registered as the legal owners of this land at the land registry. The adjudicator found that the local authority had established its paper title to the land and that the respondents had not acquired title to it, whether under the general boundaries rule or by adverse possession. But he refused to accede to the application to alter the land register.

Ordinarily, if a boundary has been determined to be in the wrong place, the plan filed at the Land Registry will be altered to show the boundary more accurately. Paragraph 6(3) of Schedule 4 to the Land Registration Act 2002 provides that where the registrar has power to make an alteration (e.g. to correct a mistake), any application for alteration must be approved. However, this is subject to the proviso “unless there are exceptional circumstances which justify not making the alteration.” The adjudicator concluded that it was more than arguable that the

local authority would not in practice be able to recover the land in question (owing to the fact that the respondents had built an extension to their house upon it) and that this amounted to exceptional circumstances which justified not altering the boundary shown on the Land Registry plan. The local authority was also ordered to pay half the respondents’ costs. This decision was upheld on appeal to the High Court.

B. Restrictive Covenants

Lawntown Limited v Camenzuli [2007] EWCA Civ 949

This case serves as a reminder of the potentially useful function served by section 610 of the Housing Act 1985. This section enables a person interested in any premises to apply to the county court to vary a covenant which prevents the conversion of a dwelling-house into two or more dwelling-houses, provided either planning permission for the conversion has been granted or there have been changes in the character of the neighbourhood in which the premises are situated which mean that they cannot be readily let as a single dwelling-house but could be readily let if converted. This section is often overlooked as the busy practitioner’s mind will usually turn in the first place to the provisions of section 84 of the Law of Property Act 1925 when considering the question of varying covenants.

L obtained planning permission to convert a semi-detached house into two self-contained flats and then applied to the county court. On the face of section 610, there is no guidance as to how the court might exercise its discretion and there are very few reported cases. Accordingly, the Court of Appeal gave some

guidance for the future, recognising that an application under section 610 may more easily succeed than one under section 84.

The discretion is not (as the judge thought) 'unfettered' for it must be exercised judicially, that is with due regard to the purpose for which the power was conferred. But there is no presumption in favour of variation and the court must carry out a balancing exercise, taking into account all relevant factors.

The court must have regard to the interests sought to be protected by the restrictive covenant and the extent to which those interests will be harmed by the proposed variation, as well as to the interests of the person seeking to vary the covenants and the advantages that will accrue from the variation. The court must make its own assessment of the relevant factors and the weight to be accorded to them. It must not leave matters out of account or give them no weight, even if they have been considered by the local planning authority.

In this case, the Court of Appeal considered that the trial judge had erred by failing to take into account matters which were considered in the decision to grant planning permission. The Court of Appeal therefore exercised a fresh discretion of its own and took into account the external appearance and visual amenity of the property, the likely increase in density that would occur as a result of the conversion, the wish to preserve the character of the neighbourhood (being one of the purposes for which the restrictive covenant was imposed in the first place), the effect granting the variation will have as an adverse precedent, possible diminution in value as a result of the conversion, the desire of the freehold owner to carry out the conversion, the fact that planning permission had been granted

and the present urgent demand for more housing in London. Taking all those factors into account, the Court of Appeal found that the balance comes down decisively in favour of the variation sought.

C. Rights of Way

Adealon International Pty Ltd v Merton LBC [2007] 1 WLR 1898

This case was reported in the last [Property Bulletin](#) as a first instance decision. That decision has now been upheld in the Court of Appeal. C owned a plot of land bounded to the south by a road, which it could only access with planning permission and planning permission had not been granted. To the north was land owned by D, and another road. C argued that it was entitled to a right of way by necessity over D's land so it could access the road to the north. The claim was refused and C was practically left with no access to its land.

This case is a useful reminder that an easement of necessity is not necessarily available in every case where a plot of land cannot be accessed. An easement of necessity is not a free-standing rule of public policy but one of implication from the circumstances of a grant of land. The court reasoned that C could and should have reserved to itself a right of way over D's land when it first granted that land to D but, at that time, C was instead focussed on obtaining a right of access from the highway to the south. Whereas it is usual to imply an easement of necessity in favour of a grantee on the basis of non-derogation from grant, the converse is that no such easement will be implied in favour of a grantor who could and should have expressly reserved any such right to himself. There is a presumption

in favour of a grantee that access to his land will be available over land of the grantor (if not otherwise available) as an incident to the grant. But there is a presumption against a grantor that any rights he requires over the land transferred will have been expressly reserved in the grant and the burden is on him to establish an exception.

Jones v Cleanthi [2007] 3 All ER 841

Section 352 of the Housing Act 1985 empowers a local authority to serve a notice requiring a person in control of a house of multiple occupation to do certain works in order to ensure that there are adequate fire precautions and fire escapes at the property. Pursuant to such a notice, L erected a wall which obstructed access to certain common parts of a building in which T had a lease of a flat. T had a right of way over the parts now blocked by the wall.

T claimed a declaration that her rights were subsisting and an injunction preventing L from interfering with them. The Court of Appeal held that L's performance of a statutory obligation did not have the effect of extinguishing T's rights. It was conceivable that at some date in the future the statutory obligation might be altered so that the wall could be removed. It was also a well-known principle of the common law that an Act should not be construed so as to injure or interfere with a person's rights without compensation unless it is expressed to do so in unequivocal terms. T's rights were therefore continuing.

But L's actions in complying with his statutory obligation did not amount to an actionable wrong whether in nuisance or in breach of a covenant in the lease. It

is well-established that an act in discharge of a statutory obligation is a complete defence to any claim in nuisance.

D. Rights of Light

Regan v Paul Properties Ltd [2007] Ch 135

This is the classic story of the little man taking on the big developers. Mr Regan lives in Brighton and claimed his maisonette would suffer interference with its right to light unless the developer building a block of flats across the road modified its plans. Mr Regan was successful at first instance in the High Court but only insofar as he obtained damages: his claim for an injunction was refused. Now that decision has been successfully appealed and the Court of Appeal has held that Mr Regan should be entitled to a mandatory injunction. The Court held that the judge's error lay in putting the burden of proof on the claimant to persuade the court why he should not be left with a remedy in damages.

The Court held that the well-known case of *Shelfer v City of London Electric Lighting Co.* (1895) 1 Ch 287, which deals with the circumstances in which the court will generally award damages in lieu of an injunction, establishes that a claimant is prima facie entitled to an injunction and that the discretion to award damages should only be exercised in very exceptional circumstances. Mr Regan's circumstances were not exceptional: the amount by which light in his living room would be reduced could not be regarded as a small injury and, although the injury could be estimated in money, it was not capable of being adequately compensated by a small money payment.

E. Possession Orders

Boyland & Son Ltd v Persons Unknown [2006] EWCA Civ 1860

A possession order against trespassers was not subject to section 89 of the Housing Act 1980 because the purpose of that section was to curtail the period for which a court could postpone possession, provided the court had power to postpone possession in the first place. The section did not grant rights which had not previously existed. The court has never had power to postpone a possession order against trespassers (*McPhail v Swordheath* [1973] Ch 447) and therefore section 89 was not applicable.

F. Sale of Land: deposits

Aribisala v St James Homes Ltd [2007] EWHC 1694 (Ch)

Section 49(2) of the Law of Property Act 1925 gives the court jurisdiction to order the repayment of any deposit paid under a contract for the sale of land. A provision in such a contract which purports to exclude that section was one which purported to oust the jurisdiction of the court and was accordingly void and of no effect on the ground of public policy.

7. Practice and Procedure

A. Plans

Hunte v E Bottomley & Sons Ltd [2007] EWCA Civ 1168

This case concerned a claim for damages for breach of covenant for quiet

enjoyment and interference with a right of way. The case is important because of the comments of Arden LJ in the Court of Appeal on the importance of the court having at least one document (whether it be a plan, map, diagram or photo as the case may be), which left the court in no real doubt about the location of all the relevant features. This document should be identified early on in a skeleton argument. The court noted that even when it has the appropriate document, often the colouring or the scale or the compass points have been omitted or parts of it do not survive copying. This should be avoided in the future.

B. Precedent

Howard de Walden Estates Ltd v 26 Cadogan Square Ltd [2008] Ch 26

The substance of this case concerned the right to a lease extension under the 1993 Act. But the case is of particular interest because of the note concerning precedent at the end of the judgment. The Court of Appeal reaffirmed that decisions of the High Court, whether made on appeal or at first instance, are binding on the county court because the former is a superior court and the latter is an inferior court. This principle applies even when the High Court is exercising a first instance jurisdiction that has been conferred by statute both on that court and on the county court.

David Nicholls

David Nicholls specialises in property and land law. He is interested in the law of real property, including easements, rights of way, restrictive covenants and markets and fairs. He also acts regularly in landlord and tenant matters, including possession claims and 1954 Act matters, as well as advising on leasehold valuation and enfranchisement cases. He acts for individuals, property companies and the banks. He is experienced in commercial and insolvency work, particularly in a property context.



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Property @ 11 Stone Buildings

Edward Cohen - in the course of his general commercial and Chancery practice, he deals with commercial landlord and tenant cases including, in particular, questions of interpretation of commercial leases, rights and remedies of landlords and obligations of tenants arising out of such leases and their assignment and applications for new business tenancies and the terms of such tenancies. He also advises on other property and land issues whether involving contractual issues or more technical aspects and handles such cases when they become contentious. Cases handled involve, in particular, contracts/options for the sale of land, restrictive covenants and mortgages. In view of his wide-ranging practice, he is able to deal with property and land disputes that also involve other areas of law, including insolvency, and his commercial experience enables him to bring a commercial perspective to bear upon such disputes both in relation to the substantive disputes and to the settlement of such disputes.



Nigel Meares deals with problems and disputes that involve the Law of Real Property, sale of land, land registration, restrictive covenants, rights of way and other easements, adverse possession, mortgages - have been a central part of his practice since 1977. He has wide experience in litigation involving commercial and residential property, for example disputes between landlord and tenant, vendor and purchaser,



and neighbouring owners. Areas of specialist advice and drafting include freehold and leasehold conveyancing schemes and Housing Association work.

Nigel was involved in the case *West Bromwich Building Society v Wilkinson & Wilkinson* which went to the House of Lords. The decision is likely to affect thousands of negative equity borrowers who lost their homes in the recession of the domestic housing market in the early 1990s.

Jonathan Arkush has a wide experience in most types of disputes and litigation involving property. These include such matters as vendor & purchaser, conveyancing, title, landlord & tenant, misdescription and misrepresentation in contracts for the sale of land, auction contracts, rights of way and other easements, boundary disputes, squatters and trespassers, adverse possession and licences. He has dealt with markets and fairs, both statutory and under charter, and rights to prevent rival markets. He is frequently instructed in relation to mortgage disputes both by lenders and borrowers and has considerable experience of advising and litigation in *Barclays Bank v O'Brien* cases.



Charles Holbech's experience covers the whole field of property and land law, including commercial and residential landlord and tenant disputes, manorial rights, leasehold enfranchisement, possession proceedings, mortgages, easements, restrictive covenants, options, conveyancing,



boundary disputes, dilapidation claims, licences, adverse possession, land registration, rights of co-owners, applications for sale of land, planning, trusts of land, land taxation, overage agreements, proprietary estoppel, property related negligence and insolvency, and equitable claims as they affect land.

Sally Barber is experienced in a wide range of chancery and commercial litigation with particular emphasis on company and insolvency law. From early in her career she gained much experience in Chancery matters with a property bias, which has proved invaluable on many occasions since when dealing with property disputes arising in an insolvency context.



Marilyn Kennedy-McGregor lectured on business computing at The City University Business School and ran her own computer consultancy company before coming to the Bar. Known as a forceful advocate she specialises in commercial and real estate litigation, professional negligence, family provision, contested wills and inheritance claims. She also has in recent years been building an increasingly busy planning and environmental law practice acting for major house builders and property developers.



Adam Deacock deals with all aspects of real property including contracts for sale of land, landlord and tenant (including rent review and leasehold enfranchisement), mortgages, restrictive covenants, easements, boundary disputes. He is particularly skilled where property disputes arise in an insolvency context.



Amanda Eilledge is a property and commercial litigator. Her property work includes commercial and residential landlord & tenant, mortgages, boundary disputes, easements, adverse possession claims, restrictive covenants, options, co-ownership and leasehold enfranchisement. Amanda's commercial practice involves litigation and arbitration in areas such as contract, fraud, partnerships, financial services and sports related disputes. She also enjoys employment law especially relating to restrictive covenants and confidential information, discrimination and claims for dismissal. In addition she deals with professional negligence claims arising out of these areas.



Tim Cowen practises in property litigation. He has particular expertise in landlord and tenant, including commercial leases, residential tenancies and leasehold enfranchisement. Other specialties include mortgage disputes, all aspects of real property, questions of title,



conveyancing problems, property-related insolvency and professional negligence cases. He has also represented a number of local authorities in property matters and related judicial review. Tim regularly contributes to our property bulletin and lectures on commercial property topics. He was appointed Deputy Adjudicator to HM Land Registry.

Gary Lidington worked as a management consultant in the public sector before coming to the Bar. He specialises in all aspects of commercial and property litigation. Other aspects of his practice include professional negligence and construction and technology disputes. He is experienced in all forms of Alternative Dispute Resolution. He was a judicial assistant to the Lord Chief Justice, Lord Woolf, for a legal term in 2002. His loyal client base are testament to his practical, commercially minded, tactically astute and client-centred approach to his work.



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