GUILDHALL
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Property News

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New team pupil

Daisy Brown is currently undertaking pupillage in Guildhall Chambers, under the supervision of Matthew Wales and Ewan Paton. She graduated in History from Churchill College, Cambridge and joins us following her completion of the Graduate Diploma in Law and Bar Vocational Course. She intends to practise in property law, and will be 'on her feet' and able to accept instructions from April during the second six months of her pupillage. In particular, she will be available to appear in possession hearings, small claims and fast track cases in property and other matters at very reasonable rates. For details and rates, please contact Charlie Ellis.

Welcome to another edition of the Guildhall Chambers Property Newsletter. In this issue, we provide a review of a number of cases across the whole range of real property and landlord and tenant law. Amongst the topics covered in this issue are landlords' and tenants' disrepair claims, a business tenancy of a parking space, acknowledgment of title by a fake lease, and the importance of both possession and plans in expensive boundary disputes.

The recent decision of the House of Lords in Stack v Dowden, on cohabitees' beneficial interests, has been so eagerly awaited that we have decided to publish a separate newsletter digesting and commenting upon it. You should receive that very shortly! In the near future, we also expect the long awaited decision in Pye v UK from the Grand Chamber in Strasbourg. As summarised in this issue, the law of forfeiture may soon be on the way out if the Law Commission's draft bill is given a fair wind.

We hope to cover topics in these areas, and more, in our regular rounds of Property Law seminars. Check our website for details of future seminars.

As ever, if you have any queries relating to any aspect of property law, come to us and for expert advice and assistance from our team of experienced and specialist barristers.

Best wishes to all our clients and readers for 2007!

Ewan Paton, editor

Recent seminars

The Property Team recently completed a well-attended series of seminars in the South West and Wales. The seminars, given by John Virgo, Malcolm Warner and George Newsom, were on the topics of regulated mortgage contracts, partnerships, and restrictive covenants. If you missed the seminars but would be interested in the notes from them, go to our website or contact Louisa Hope at these chambers. If you would be interested in members of the team providing in-house seminars on these or any other topics, contact our team clerk Charlie Ellis.

Recent cases

Real property

Adverse possession – yet again...

At the time of writing, we still wait patiently for the decision of the Grand Chamber of the ECHR in *Pye v UK*, and to hear whether thousands of proprietors whose registered titles were limitation-barred by adverse possessors prior to 2003 will be able to sue the government for their losses. The Court only heard final argument in early November, after all, and composing terse, pan-European judgments thin on detailed reasoning must take time... In the meantime, the English show no reduction in their enthusiasm for suing each other. Adverse possession continues to be one of the most heavily litigated and reported areas of English property law. Two cases in particular caught my attention recently.

i) Acknowledgment of title: how to shoot yourself in the foot

Rehman v Benfield [2006] EWCA Civ 1392

In March 1991, a married couple of squatters entered a house left vacant following the registered proprietor's return to Pakistan. They changed the locks, carried out repairs and made it their home for the next 13 years; intending to acquire title by adverse possession. The proprietor did not bring possession proceedings until October 2004. Surely he was too late? Title was registered, but the squatters had accumulated 12 years or more of possession prior to the coming into force of the Land Registration Act 2002 on 13th October 2003. It appears that the *Beaulane Properties v Palmer* [2006] Ch. 69/*Pye v UK* human rights argument was made unsuccessfully in the court below, and not pursued on appeal: presumably because taking over a house and changing its locks would have been regarded as possession "inconsistent with the owner's future intentions for the property" even on the pre-1925 case law re-introduced in this context by *Beaulane Properties*.

Sadly for the squatters, a bizarre plan of their own devising proved to be their undoing. In December 1991, they decided that it would be a good idea to produce "an apparently official document to provide to anyone challenging [their] right to occupy the property". They therefore decided to create a fake lease, purportedly from the owner. They even roped in a friend "to disguise himself as a Pakistani" and impersonate the owner to an unsuspecting firm of solicitors. A 7 year lease at a premium, containing a recital of the owner's title, was drawn up. To complete the authentic picture, the female squatter was described as the tenant, went to her own solicitors, and signed the lease. It was delivered to the duped firm of solicitors who believed they were acting for the owner.

Independently, and in 1992, the firm of solicitors who did act for the true owner learned of the existence of a lease, and asked the above firm for a copy so that they could pass it on to their client in Pakistan. It is not clear from the report of the case whether they had smelt a rat, or whether this was simply a routine enquiry. In any event, a copy was provided. For whatever reason, possession proceedings were not brought until 2004 against the surviving female squatter. The full factual picture seems not to have emerged until the trial and appeal.

Did you spot the ultimately fatal flaw in the squatters' plan? The Court of Appeal, reversing the trial judge, held that the "lease" was a signed written acknowledgment of the owner's title for the purposes of section 30 Limitation Act 1980. Further, and crucially, it was sufficiently communicated to the true owner's agent for the purposes of section 30(2) either by its delivery to the 'duped' firm who thought they were acting for the owner, or by their later provision of a copy to his actual solicitors. Either way, the communicated acknowledgment meant that time began to run afresh less than 12 years before the LRA 2002 came into force on 13/10/03, from which latter date the owner's registered title could not of course be automatically limitation-barred. Had the fake lease been drawn up just three months earlier, the squatter would have been successful (at least in the civil courts).

ii) The case of the £260,000 (excluding VAT) wall

Palfrey v Wilson [2007] EWCA Civ. 94

Neighbours (P and W) in Beverley, East Yorkshire were in dispute over a 9 inch thick wall which divided their properties. It was found that W's predecessor had, over the

years, once partially rebuilt the wall after it was damaged; inserted a damp proof course into it to protect a building which he was connecting to it; and later raised its height (with planning permission) so as to connect it to his new car port. P had once before sought permission from W's predecessor to key in parts of his buildings to the wall, which was refused. P later, without his neighbour's knowledge, repointed his side of the wall, attached some wire mesh to it and inserted some infill between the wall and his own building.

P brought proceedings claiming paper title to the wall, on the basis that it had been conveyed as part of the former public house of which his property formed part. The trial judge dismissed that claim, but found in any event that W and his predecessor had adversely possessed the wall for more than 12 years prior to the proceedings, following *Prudential Assurance v Waterloo Real Estate* [1999] 2 EGLR 75.

The Court of Appeal agreed. Taken in isolation, a mere act of repairing a damaged wall might be equivocal as an act of possession or ownership. The same might be said of simply raising a section of it. However, all of the actions here taken together over time, coupled with clear evidence that they were done by W's predecessor in the belief that the wall was his, did amount to unequivocal possession with intent to possess. P's "trivial" acts, unknown to his neighbour, did not detract from that. The case is a useful illustration of how adverse possession principles may resolve potentially complex questions of title affecting dividing walls.

Why £260,000 (excluding VAT)? Those were the estimated total costs of a dispute which Tuckey LJ described as being "of no great practical value to either party". P was ordered to pay W's costs, and on an indemnity basis after February 2004 following his rejection of an offer to agree the wall as a party wall. The Court of Appeal further rejected an invitation to hear the appeal on the paper title issue, P's hope being that if he succeeded on that (but lost on adverse possession) he might then have a chance of a partial, issue-based costs order. The Court reminded P, and other appellants, that "... if an appellant has to succeed on two grounds in order to upset the order under appeal, he takes the risk that this court will uphold the decision on one of those grounds and decline to consider the other."

Ewan Paton

Case summaries

Unilateral notices under the Land Registration Act 2002 and "pending land action[s]"

Godfrey v Torpey [2006] EWHC 1423 (Ch.)

The claimant creditor was owed unsecured debts of £1m. The creditor claimed that the defendant debtor had transferred her interest in a property to a third party and that that was a transaction challengeable as a transfer with intent to defeat creditors and/or that the property was beneficially owned by the defendant. The creditor registered a unilateral notice against the property and the third party applied to vacate the notice. A pending land action is an interest that can be protected by entry of a notice in the register but the third party argued that the litigation did not involve a pending land action because the claimant was not asserting a direct interest in the property. The court held that in a case where a creditor is asserting that the debtor has an (unregistered) interest in registered property, what is being disputed is the claim of the registered owner (i.e. the third party) to be the legal or beneficial owner of the property. It followed that proceedings could properly be characterised as a pending land action and the notice was not vacated.

Boundary Disputes: conflicts between figures on plan and results of "scaling off"

Cook v JD Wetherspoon Plc. [2006] EWCA Civ 330

The Court of Appeal has re-stated the law on boundary disputes involving conflicts between dimensions. Where there is a conflict between (1) dimensions in figures on a plan by which the property transferred is described and (2) dimensions arrived at by scaling off the plan, the conflict is to be resolved by reference to such inferences as may be drawn from topographical features which existed when the conveyance or transfer was executed. In short, the court has a free hand to determine the boundary by reference to the most likely intended position even if that conflicts with dimensions expressly incorporated in the plan.

Landlord and tenant

Dilapidations and disrepair

i) Landlord's claim: cost of repairs and diminution in value of reversion

Latimer v Carney & anor. [2006] EWCA Civ. 1417

The Court of Appeal has restated the principles governing damages for terminal dilapidations, and in particular the application of the 'cap' under section 18(1) Landlord and Tenant Act 1927.

In this case, the landlord obtained a terminal dilapidations survey at the end of a lease, which included estimates of the cost of the necessary repairs identified. The landlord was also keen to relet as quickly as possible, to a tenant who wished to change the use of the premises to a fast food outlet. The landlord then carried out refurbishment works to the premises to that end, including works over and above the repairs identified in the schedule.

At trial, the landlord was unable without difficulty to prove what the actual cost of repairs had been, precisely what works had been carried out under that schedule, and to what standard. The judge held that since the burden was on the landlord to show a diminution in the value of its reversion, and it had failed to adduce evidence of that, its claim should fail.

The Court of Appeal reversed this finding. It had to be recognised that, whatever deficiencies there were in the landlord's presentation of its evidence, "courts regularly have to do their best on less than ideal material". On the authorities, from *Jones v Herxheimer* [1950] 2 QB 106 to the present day, it was not always necessary to present expert evidence of diminution in value. The cost of repairs would often be the best (and only) guide to this diminution. In the present case, the judge could and should have inferred some diminution, and therefore awarded damages, on the basis of just the *estimated* cost of repairs, at least in relation to those works which the landlord could prove had been done. In the case of repairs which may have been carried out to a higher standard, or might have been subsumed by the refurbishment works, the court was entitled to take their estimated cost as the diminution, but apply a discount (of 60%) to it to reflect the evidential uncertainty.

The landlord therefore recovered some, but not great damages. The Court reiterated, by quoting *Dowding and Reynolds on Dilapidations*, that while a failure to adduce valuation evidence may not be fatal, "..a well-advised party will usually ensure that such evidence is before the court."

Tenant's claim: appropriate measure of damages

Earle v Charalambous [2006] EWCA Civ. 1090

The Court of Appeal has confirmed that in a tenant's disrepair claim, for damages representing his distress, discomfort and inconvenience, notional reduction in rack rental value over the relevant period will be an appropriate measure even in the case of a long lease under which only ground rent was payable. There was no 'cap' or tariff in this regard based on the level of awards to secure or other periodic tenants.

The lessee under a 99 year lease of a top floor flat in Islington sued the landlord for breach of repairing covenant, in relation to a roof which first leaked for nearly three years "in 20 different places" then finally caused the kitchen ceiling to collapse, forcing the tenant to move out and live with his parents for nearly two years.

The Court of Appeal substituted an award of £13,500 for the judge's award of £20,000 in respect of the first period, while also reducing the period of liability to allow for the reasonable time it would have taken the landlord to carry out the repair once notified. For the second period, it upheld an award of £10,000. In respect of both, however, the Court held that notional reduction in rental value over these periods was an appropriate basis for assessment. It was clear from *Wallace v Manchester CC* [1998] 3 EGLR 38 that this was a legitimate approach, either in the first instance or as a cross-check against an award first arrived at by a global quantification of the tenant's discomfort and inconvenience. The Court then doubted a dictum of Stephenson LJ in *Calabar Properties v Stricher* [1984] 1 WLR 287 to the extent that it suggested that this approach was inappropriate in a case where the property was occupied as a home under a long lease at a ground rent and not as an investment.

Rack or market rents were a good indication of the value of fully enjoyed occupation to tenants. If breach deprived the tenant of that enjoyment for a significant period, reduction in rental value was likely to be the most appropriate starting point. No direct analogy could be drawn with the level of awards for tenants occupying under secure or other protected periodic tenancies (in which regard the landlord's counsel had suggested that there was an upper limit of c. £3300 p.a. in cases of this type). For both periods, the Court's awards reflected an approximate 50% of the market rental value of the property. This was appropriate for the second period even though the tenant had in fact mitigated the potential cost of alternative accommodation by living with his parents, and had only suffered the additional direct inconvenience in that time of a longer journey to work.

Business tenancies

Business tenancies of incorporeal hereditaments

Pointon York Group Plc v Poulton [2006] EWCA Civ 1001

An incorporeal hereditament (such as a right to use a parking space) can be "premises" and can be "occupied" for the purposes of section 23 of the *Landlord & Tenant Act 1954* so that the protection of that Act may bite in unusual situations (although much will turn on the character of the incorporeal hereditament at play). In particular, it is possible to have a business use of the incorporeal hereditament alone, such as where a house is let with right to use garages or stables which are occupied and used for business purposes. Moreover, that business use is protected even though the house is not used as part of the business because section 23 expressly applies where only part of the premises is occupied for business use. That would also mean that the Housing Act 1988 would not apply to the occupation of the house.

With regard to what will constitute "occupation" for the purpose of section 23 of the 1954 Act, the court also extended the application of *Bacchiocchi v The Academic Agency Ltd.* [1998] 1 WLR 1313 wherein it had been held that in order to "occupy" premises, a tenant need not be physically present in the premises if he is using them in some other way as an incident in the ordinary course or conduct of business life, provided that the premises are occupied by no other business occupier and are not used for any non-business purpose.

Forfeiture of business premises and the Protection from Eviction Act 1977

Pirabkaran v Patel [2006] EWCA Civ 685

Section 2 of the 1977 Act provides that where any premises are "let as a dwelling" on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in court while any person is lawfully residing in the premises or part of them. The question on appeal was whether premises let partly for residential purposes and partly for business purposes were "let as a dwelling" for the purposes of the section 2 prohibition. It was held that they do and that section 2 should now be read to include the words "let wholly or partly as a dwelling".

Break Clauses and "material compliance" with tenant's obligations under the lease

Fitzroy House Epworth Street v Financial Times Ltd. [2006] EWCA Civ 329

Where a tenant's break clause requires that the tenant has complied with the tenant's covenants and obligations as a condition precedent to the effective exercise of the break clause then, if that is absolute, any subsisting breach will preclude an exercise of the break clause. Many clauses are, however, cast in terms that require "material compliance" with the tenant's covenants. The leading case on the test of what constitutes "material compliance" was *Commercial Union Life Assurance Co. Ltd. v Label Ink Ltd.* [2001] L&TR 29. That is no longer good law. The test is simply one of fact although the Court of Appeal indicated that the insertion of the word "material" was not intended to permit only trivial breaches. Essentially, materiality must be assessed by reference to the ability of the landlord to re-let or sell the property without delay or additional expenditure.

Ewan Paton & Tim Walsh

Law reform and statutory news

The end of forfeiture?

After first publishing a paper on the subject as long ago as 1985, the Law Commission has followed up its 2004 consultation paper with a final report and draft bill on the abolition of forfeiture of leases (Law Comm. No. 303: *Termination of Tenancies for Tenant Default:* Report and Draft Bill, October 2006). In its place it proposes a new statutory scheme of termination of tenancies for "tenant default". This will require in most cases a "termination claim" preceded by a "tenant default notice", which the landlord will have a period of six months to serve after becoming aware of the facts giving rise to the breach. This will replace the current law on waiver, and the landlord's need immediately to elect between ending or affirming the lease.

Neither the notice nor the subsequent claim will end the tenancy, or preclude the acceptance of rent in the interim. Only the court will be able to end the tenancy by making an order, and it will have discretion, at the conclusion of a termination claim, to make orders ranging from termination and possession, a remedial order on the tenant, or even orders for transfer or sale of the tenancy.

Provision is also made for a summary termination procedure by notice, intended for cases where there is no realistic prospect of resisting termination or e.g. where the premises have been abandoned. Such a notice will terminate the tenancy after the expiry of one month unless the tenant applies to discharge the notice by showing realistic grounds for resisting it.

The proposals follow a generally positive response to the consultation paper, and acceptance of the Commission's general concern that the law on forfeiture is "complex, lacks coherence and can lead to injustice". Amongst consultees, only the Property Bar Association opposed wholesale reform by a new statutory code. Aspects particularly welcomed were the abolition of the "limbo" period between issue of forfeiture proceedings and a final court order, the abolition of the doctrine of waiver by acceptance of rent or otherwise, and the general removal of the common law's doctrinal starting point of a landlord's right of re-entry subject to a tenant's right to relief. It is also hoped that the termination notice period will generally foster negotiation and settlement rather than the confrontation frequently instigated by a forfeiture claim.

Whilst no legislative timetable has yet been set, it seems likely that the draft Bill (which was also welcomed by the Government) will receive Parliamentary time in the near future. Watch this space for details of our seminars on the subject when that time comes!

Ewan Paton

Agricultural tenancy reform: Restructuring and diversifying

Recent reforms of agricultural tenancies legislation are designed to make it easier for tenant farmers to develop their businesses by restructuring and diversifying. The Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 (SI 2006 No. 2805) ["the RRO"] came into force on 19 October 2006 and amends the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995.

As readers will know, the 1995 Act disapplied the 1986 Act to tenancies beginning on or after 1 September 1995 and imposed virtually no security of tenure within a regime designed to reverse the decline in let land and meet the needs of tenants to increase income by diversification. The RRO promotes those objectives by providing greater freedom of contract in connection with four areas in particular: restructuring holdings and tenancies without effecting a surrender and regrant; contracting out of the statutory rent review formula; clarification of agreed succession to a tenancy; and providing for agreed limits for compensation for tenant's improvements. For those tenancies to which the 1986 Act applies, the RRO also reforms the rent review provisions, expands the 'livelihood' condition for succession, and modernises the arbitration process.

These changes made by the RRO should, certainly with the co-operation of their landlords, *"help tenant farmers to maximise the potential of their farming businesses, putting them in a better position to compete in the changing agricultural world"*, as the Minister predicted when announcing the reforms.

William Batstone

For fuller details of the provisions and their implications, see the recent article by William Batstone in the Solicitors Journal at (2006) 150 Sol. Jo. 1489.

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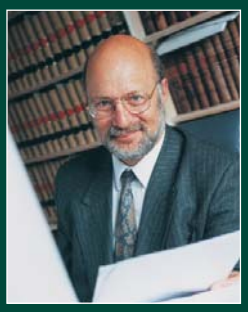

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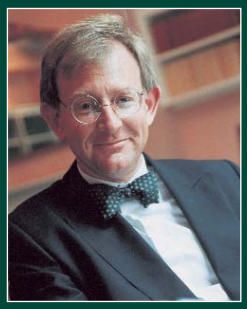

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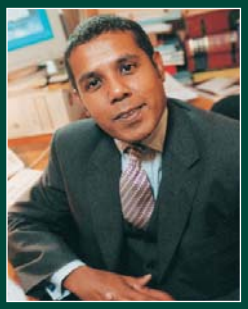

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