RECENT CASES IN PROPERTY LAW

(2007)

BY

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REAL PROPERTY AND LAND LAW

A. Cohabitation and Beneficial Interests

1. *Stack v. Dowden* [2007] UKHL 857 (HL) – 25 April 2007

The facts: In 1983 Mr. Stack and Miss Dowden began cohabiting in a property purchased in Miss Dowden's sole name. Miss Dowden paid the entirety of the mortgage although Mr. Stack made other contributions to the family economy. In 1993 they moved to a second property which was conveyed into their joint names. Mr. Stack did thereafter contribute directly to the acquisition costs by meeting mortgage instalment repayments. Miss Dowden had provided the lion's share of the purchase price. Although the property was held in joint names, the Court of Appeal had awarded Miss Dowden 65% of the net proceeds of sale. Importantly, there had been no express declaration of trust in the TR1.

The decision: The starting point where there is sole legal ownership is sole beneficial ownership. Equally, the starting point where there is joint legal ownership is joint beneficial ownership. A transfer into joint names effectively establishes a common intention of shared beneficial ownership. The court must ask whether the parties intended their beneficial ownership to be different from their legal interests (joint ownership is not simply part of the "whole course of dealing" in relation to the property). Each case turns on its own facts but Baroness Hale, in the leading opinion, expressly stated that "*cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.*"

Additionally, Baroness Hale expressly stated that the old doctrine of equitable accounting under which a beneficiary who remained in occupation might be ordered to pay an occupation rent to a beneficiary who was excluded from the property had been supplanted by the statutory regime of the Trusts of Land and Appointment of Trustees Act 1996. It will be a "rare case", however, in which the result will differ.

Analysis: There remains plenty of scope to argue that any particular case falls into the "very unusual" category. *Stack* was itself a case in which the Lords upheld a 65/35 split rather than 50/50. NB: Lord Hope and Lord Neuberger – it is not possible to ignore unequal contributions and *"The relative extent of those contributions provides the best guide as to where their beneficial interest lay"*.

The Lords expressly approved *Goodman v. Gallant* ([1986] Fam 106). An express declaration of trust is conclusive of the question of beneficial ownership unless varied by subsequent agreement or affected by proprietary estoppel. Given changes to the TR1 form, cases like *Stack* should become increasingly rare.

In terms of more general guidance, in *Oxley v. Hiscock* Chadwick LJ had stated that beneficial ownership should be apportioned (absent express agreement) by reference to *"what is fair having regard to the whole course of dealing between [the parties] in relation to the property"*. The Lords preferred the approach advocated by the Law Commission concluding that *"…the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended…it does not enable the court to abandon that search in favour of the result which the court considers fair"*. It may be doubtful how often this change of emphasis will alter the result.

Lloyds Bank v. Rosset ([1991] 1 AC 107). There is a distinction between express bargain constructive trusts and implied bargain common intention constructive trusts. In the case of the latter, Lord Bridge had stated that it was doubtful whether anything less than direct contributions to the purchase (either initially or by mortgage instalments) would suffice to establish a claim. Arguably that statement was inconsistent with earlier authority but has held sway ever since. In *Stack* Lord Walker stated that *"the law has moved on"* and Baroness Hale conceded that there was an argument that Lord Bridge had set the hurdle *"rather too high"*. What will now suffice as a qualifying contribution is not addressed and the law is more uncertain than ever.

B. Equitable Accounting & TLATA 1996

2. *Wilcox v. Tait* ([2006] EWCA Civ 1867) (CA) – 13 December 2006

The facts: Miss Wilcox and Mr. Tait had cohabited in a jointly owned property held on trust for themselves as beneficial tenants in common. The property had been purchased in 1990 with the aid of a mortgage and the relationship eventually broke down in 1999. Mr. Tait argued that equitable accounting meant that Miss Wilcox should give credit for half of the mortgage payments made by him from the inception of the mortgage until the day of trial. At first instance, the Judge accepted that argument and expressly did not follow the decision in *Clarke v. Harlowe* which, it had been argued, had been decided *per incuriam*. He also dealt with the question of the equitable account before ordering a sale of the property.

The decision:

(I) Procedure:

As the primary relief sought was a declaration as to a beneficial interest coupled with an order for sale, the judge ought to have granted a declaration and ordered a sale by public auction with liberty for Mr. Tait to bid. The Judge should not have simply relied upon a dated valuation. Further, the equitable accounting exercise should not have been undertaken until the property had been sold and there was a fund in place for distribution.

(II) Equitable accounting:

It is in the nature of equitable accounting that there can be no hard and fast rule or principle that in a cohabitation case equitable accountability commences at any particular date. What is the appropriate date for the commencement of equitable accounting, assuming it is appropriate at all, must depend upon the facts of each case. Nonetheless, *Clarke v. Harlowe* was not decided *per incuriam* and accordingly:

"[66]…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. Whether the court draws that inference in the given case will of course depend on the facts of that case."

NB: This decision pre-dated *Stack v. Dowden*.

3. *Young v. Lauretani* ([2007] EWHC 1244 (Ch)) - 25 May 2007

Following *Wilcox v. Tait*, Lindsay J. had to consider the application of that authority to a dispute between cohabitees in which both harboured hopes of buying the other's interest in the property. This would be difficult or impossible to achieve if the property had to be sold before the equitable accounting exercise.

"[59] The principles in Wilcox v. Tait which has a comprehensive review of authorities in the area, suggest that in many cases it is prudent to await the sale of the property in dispute before equitable accounting is further dealt with. However, in the case at hand, both parties wish to be able to buy the property in question and so there must be some prospect that the delays and expenses of a sale to a third party might be avoided. Moreover, without equitable accounting being investigated at least in outline, neither side will be able to be sure how much they can afford to offer to acquire the property. Accordingly it seems to me that there is a good argument for not awaiting the sale before indicating, at least in outline, how the proceeds of sale ought to be divided between Mr. Young and Miss Laurentani."

As a straightforward application of *Clarke v. Harlowe* and *Wilcox v. Tait* the Judge then declined to undertake any account in respect of the period before the couple ceased to cohabit because when they were living together *"All can be taken to have been thrown into one indivisible pot not to be sought to be divided and such as not to be subjected to the sort of analysis that might have been appropriate between commercial parties"*.

After they had ceased to live together, however, Miss Lauretani was held liable to account for one half of the mortgage payments and for half of an occupation rent.

4. *Murphy v. Gooch* ([2007] EWCA Civ 603) CA – 27 June 2007

The facts: Ms. Murphy and Mr. Gooch purchased their property jointly in 1991. Their relationship broke down irrevocably in 1993 and Ms. Murphy moved out. Mr. Gooch thereafter remained in sole occupation and between 1994 and 1999 he paid the endowment policy premiums, the interest only mortgage and the rent (the property being a shared ownership scheme property jointly owned with a housing association). The issue between the parties was whether Mr. Gooch's entitlement to credit in respect of his payments of interest, rent and endowment premiums was to be offset by an obligation on his part to give credit in an equivalent sum in the nature of an occupation rent in respect of his occupation of the Property since 1993.

TLATA 1996: Section 12 of TLATA 1996 ("The right to occupy") gives a beneficiary who is beneficially entitled to an interest in the property the right to occupy the land (if that was the purpose of the trust). Section 13 ("Exclusion and restriction of right to occupy)" gives the trustees the power to exclude or restrict a right of occupation or to impose conditions on occupation including the payment of outgoings, expenses or obligations. Under subsection 13(6) another beneficiary who remains in occupation may be required to compensate the excluded beneficiary. Under section 14(2) the beneficiaries can apply to the court for an order relating to the exercise of the trustees functions/powers. Under section 15 the court must have regard to (a) the intentions of those who created the trust; (b) the purposes for which the property subject to the trust is held; (c) the welfare of minors; (d) the interests of creditors; the wishes of the beneficiaries.

The decision: Applying *Stack v. Dowden* the Court of Appeal revisited the trial judge's approach which had been based exclusively on the doctrine of equitable accounting. As Lightman J. observed:

"[14] Under the previous equitable doctrine the court was concerned only with considerations relevant to achieving a just result between the parties. The statutory innovation is section 15, which requires the court in determining applications for an order under section 14 to include [the matters listed in the statute]…The wider ambit of relevant considerations means the task of the court must now be, not merely to do

justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and in particular (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified."

On the much vexed question of whether it is necessary to prove ouster in order to claim an occupation rent the court added:

"[18]…In my judgment, it was open to the Judge and is open to this court to order credit for an occupation rent if it was or is just to do so, whether or not there was proof of ouster. What (if any) credit could or should be given is a separate matter to be determined in accordance with the statutory principles…"

Under section 15 of TLATA the court had to have regard to the intentions of Mr. Gooch and Ms. Murphy when they created the trust (i.e. when they bought the property) and the purpose of the trust (i.e. to be their joint home). The court approached matters thus:

"[22] If Ms. Murphy had made or been able to make an application to the court before Mr. Gooch's occupation commenced, the court would practically as a matter of course have imposed as a condition of Mr. Gooch's continued occupation a requirement of his continued payment of the full Interest and Rent as proper and necessary in accordance with statutory principles. Such statutory principles likewise require on an application made after the period of occupation that Ms. Murphy should be entitled to offset a credit for occupation rent against the full payments of Interest and Rent made by Mr. Gooch.

[23] I should add that there must be available such a right of offset in respect of the full period of Mr. Gooch's sole occupation and accordingly it is irrelevant whether the period during which Mr. Gooch should obtain credit for payment of Interest and Rent exceeded that for which the judge allowed, for all relevant payments were made during the period of his sole occupation."

C. Adverse possession

i) European News

5. **Pye v. UK*

Judgment of Grand Chamber of European Court of Human Rights 30/8/07

(on appeal from decision of Chamber 15/11/05)

(go to www.echr.coe.int to see judgment)

APPEAL ALLOWED (10:7)

The state of English law on adverse possession and registered land prior to the implementation of the LRA 2002 (as applied by the LRA 1925 and Limitation Act 1980) did not amount to a violation by the UK Government of Article 1 Protocol 1 of the ECHR:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

- Art. 1 Protocol 1 *was engaged* by legislation affecting rights of private individuals inter se (contrary to Govt argument that this law and legislation should be seen as *purely* about limitation and access to the courts under the Article 6 right)

BUT:

- This law was not in the "deprivation of possessions" category, since not e.g. legislative provision permitting State to transfer ownership for some reason of policy, but was rather a "control of use": part of general land law, regulating ownership and rights between private individuals.

- A statutory limitation period applied to recovery of land pursues a legitimate aim in general interest (citing *Stubbings* case on PI limitation periods, rationale = certainty, stale claims etc.)
- As for extinguishment and transfer of title over and above mere limitation, states have wide margin of appreciation in pursuing public interest, regulating balance between private individuals.
- Many countries have such rules, albeit all different. A policy of extinguishing title as well as limitation-barring claim not "manifestly unreasonable".
- "Fair balance" between policy and rights in this "control of use" of property? Proportionality?
- Yes- again, wide margin of appreciation given to states in matters of property and housing, and here:
- Barring title as well as remedy: HL in *Pye v. Graham* said former is "logical and pragmatic" consequence of latter
- Law was in force for a long time before Pye acquired land, and it couldn't say it wasn't aware of law
- Very little action would have stopped time running (asking for rent, which would have been paid; or commencing possession proceedings)
- Absence of compensation – this is not a state "deprivation of possessions" case, and compensation for loss of rights would sit uneasily with limitation period principle. And even in LRA 2002, no compensation....
- And no "absence of procedural protection/access to courts" here.
- Mere fact that law was subsequently changed to make adverse possession v. registered land more difficult does not mean previous law was in breach of Convention. Legislative change takes time...
- No sympathy with fact that Pye lost land of great value: "limitation periods, if they are to fulfil their purpose…must apply regardless of the size of the claim. The value of the land cannot therefore be of any consequence to the outcome of the present case."
- Strong minority dissenting judgment, but they were outnumbered….

So :-

- There will be no flood of compensation claims against government by previous limitation-barred proprietors

Very likely that *Beaulane Properties v. Palmer* [2006] Ch. 69 will now be successfully appealed out of time, or else overruled in a subsequent case.

ii) Boundary walls

6. *Palfrey v. Wilson* ([2007] EWCA Civ 94) CA – 15 February 2007

The facts: The parties fell into dispute about the ownership of an inconsequential boundary wall of no great practical value to either of them (by the time it reached the Court of Appeal costs exceeded £260,000 plus VAT). The primary issue was whether the defendant's predecessor had acquired title to the boundary wall by adverse possession. Findings of fact included that he had done all that needed to be done to maintain the wall; he had rebuilt part of the wall after it collapsed; he inserted a damp-proof course into the wall to protect a store fixed to the wall; he extended the height of the wall after first applying for planning permission; he attached the roof of a car port to the wall (the list went on). At first instance the judge had found the claim to adverse possession made out.

The decision: Appeal dismissed. Applying *Prudential Assurance Limited v. Waterloo Real Estate Inc.* there were five conditions: (1) having possession (2) which must be exclusive (3) and dispossessed the papers owner (4) with the intention to possess (5) adversely in the statutory sense. The court stressed the need to look at matters in the round. The repair, the extension of the wall and the insertion of the damp proof course were *"all of a piece and can be seen as unequivocal acts of possession dispossessing the paper owner"*. There was longstanding authority in *Waddington v. Naylor* ((1889) 60 LT 480) that raising someone else's wall simply meant that the person who did that work made a gift of what he had done. Tuckey LJ added:

"[19]…That may be so, but I do not think it follows that one must ignore such an act for the purpose of considering whether it is an act of possession over not just part but the whole of the wall. It self-evidently is if it is not done with the permission of the true owner. It will not of itself confer ownership upon the builder, but it may be capable of supporting a claim that he has asserted rights of possession over the wall."

iii) Acknowledgement of title

7. *Rehman v. Benfield* [2006] EWCA Civ 1392 (CA) - 26 October 2006

The facts: Mr. Rehman was the registered owner of 19 Merton Hall Road, Wimbledon, a property he purchased in 1986. In around 1988 Mr. Rehman, a Pakistani national, returned to Pakistan. In March 1991 Mr. and Mrs. Benfield moved into the property as squatters and Mrs. Benfield had remained there ever since. On 18 October 2004 Mr. Rehman commenced possession proceedings. Mrs. Benfield succeeded initially in arguing that she had been in adverse possession of the property for 12 years before the Land Registration Act 2002 came into force on 13 October 2003. Mr. Rehman appealed on the basis that there had been an acknowledgement of his title.

The alleged acknowledgement was in the form of a sham lease created in December 1991. Mr. Benfield had arranged for a lease to be drawn up ostensibly between Mr. Rehman (as owner) and Mrs. Benfield (as tenant). Mrs. Benfield executed the sham lease. Mr. Rehman knew nothing of this. Further, Mr. Benfield then arranged for a friend to disguise himself as a Pakistani and to impersonate Mr. Rehman to a firm of solicitors which purported to act for Mr. Rehman and to execute the lease. Mr. Rehman had not in fact instructed anyone. He came into possession of the sham lease in 1992 when a firm he had instructed obtained it from the duped solicitors who had thought they acted for Mr. Rehman in the execution of the lease.

The decision: On appeal the question was whether the sham lease was apt to amount to an effective acknowledgement of title within the 12 year period of possession relied upon. Insofar as it is material the Limitation Act 1980 provides as follows:

29 *(1) Subsections (2) and (3) below apply where any right of action…to recover land…has accrued.*
(2) If the person in possession of the land…in question acknowledges the title of the person to whom the right accrued has accrued –
(a) the right shall be treated as having accrued on and not before the date of acknowledgement…

30 *(1) To be effective for the purposes of section 29 of this Act, an acknowledgement must be in writing and signed by the person making it.*
(2) For the purposes of section 29, any acknowledgement…
(a) may be made by the agent of the person to whom it is required to be made under that section; and
(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged…"

The sham lease had plainly been created in order to give the impression of legitimate occupation of the property so that Mrs. Benfield would have an apparently official document to provide to anyone challenging her right to occupy the property. It was not intended to acknowledge Mr. Rehman's title to the property and, in reality, he was probably the last person they wanted to see the sham lease. Nonetheless, the recitals to the sham lease provided (1) that Mr. Rehman was the registered owner and (2) that he had agreed with Mrs. Benfield to grant her a lease. On those facts, section 29 was made out. The critical question of the communication of the acknowledgement under section 30(2) was resolved by the fact that the duped solicitors had believed they were acting for Mr. Rehman, they had the lease with Mrs. Benfield's authority and she could not have objected to them passing the lease to the solicitors actually later instructed by Mr. Rehman (para. 32).

8. *Allen v. Matthews* ([2007] EWCA Civ 216) CA - 13 March 2007

The facts: A case with a background of violence and crime, murder, police bias and witness intimidation culminating in a group of 20 men entering Central London County Court and assaulting one party's associates. The more prosaic point of law related to the question of the effect of a solicitor's letter written on behalf of a company that had already been dissolved. The solicitors wrote to the legal owner "We should be obliged if you would advise us as to what your

intentions are with regard to the property. Has a buyer been found for the same, and if so is there any likelihood that our client will receive any monies".

The decision: The letter was a clear acknowledgement that the paper owner had a better title to the property:

"For a document to constitute an acknowledgement of title all that is required is that, as between himself and the owner of the paper title, the person in possession acknowledges that the paper title owner has better title to the land. Whether or not such a particular writing amounts to an acknowledgement depends on the construction of the document in all the surrounding circumstances…"

The real question was whether the letter, written on behalf of the then dissolved company had any effect:

"[79] In my judgment for there to be an acknowledgement there has be a statement by or on behalf of the person in possession which is reasonably understood by the owner as an acknowledgement from that person. The owner does not have to know who is in possession, and the person acknowledging does not have to know who is the owner, but the acknowledgement must be by or on behalf of the person in possession."

On the facts, the solicitors had intended to write on behalf of the (dissolved) company (rather than the individual standing behind the company). The letter was not to be construed as written on behalf of whomever happened to be in possession of the property in dispute. It followed that there had been no operative acknowledgement by the person in possession.

d) Part 36 and settlements involving a disposition of land

***9. Orton v. Collins* ([2007] EWHC] 803 (Ch) – 23 April 2007**

The parties had fallen into dispute but an offer made pursuant to CPR Part 36 had been made and accepted. A dispute subsequently arose as to the terms of the settlement and an application was made to the court. The terms of the settlement had involved the disposition of an interest in land and it was argued that the commonly used method of accepting a Part 36 offer will not work in

such cases because the offer and acceptance will not comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Allowing the appeal and dismissing those arguments, the court concluded that section 2 did not preclude a binding compromise being reached through the machinery of Part 36:

"[61] In my judgment, if parties who are before the court choose to employ machinery prescribed by the court's rules in order to settle their dispute, they must be taken to submit to the consequences. Namely, that if the offer is accepted the court may enforce it. A party who makes a valid Part 36 offer, or one who accepts it, must be taken to be binding himself to submit to those consequences."

Having reached a settlement under Part 36, it followed that the court had power to order the parties to sign a single document incorporating the terms of the settlement which was section 2 compliant.

LANDLORD AND TENANT

1954 Act

10. Lay and ors. (Trustees of Portman Estate) v. Drexler and ors.
[2007] EWCA Civ. 464

Application for new business tenancy initiated by *landlord* under post-2004 regime. In acknowledgement of service, tenant did not oppose renewal but contested its terms. Interim rent sought and agreed.

Eventually tenant decided did not want new tenancy, gave notice to court, so proceedings dismissed under s29(5).

Judge made no order for costs, said it was a "compromise".

CA – wrong – T should pay L's costs. T's initial acknowledgment of service was equivalent of bringing its own proceedings for a new tenancy. Its later change of mind was equivalent of discontinuing. L's proceedings not premature – this was exactly what the new s24 was designed to allow (i.e. allowing Ls to force the issue).

Repairs

11. Lyndendown Ltd v Vitamol Ltd [2007] EWCA Civ.826

- Expiry of head lease, with 1954 Act sub-tenant in occupation.
- Dilapidations claim by landlord against former head tenant.
- Held, following *Family Management v. Gray* [1980] 1 EGLR 46, that *no* damage to L's reversion for purposes of s18(1) LTA 1927, since sub-tenant entitled to new tenancy against landlord, and directly liable on same repairing covenants (and sub-tenants cannot rely on disrepair, for which they now responsible, to seek lower rent in new tenancy).
- Unaffected by side letter from head-T to sub-T, in which it agreed to limit sub-T's repairing obligation under sub-tenancy to keeping premises wind and watertight, and to carry out repairs beyond that at its own expense. Letter would not have worried prospective purchasers of reversion, who might if anything have seen it as a benefit (as a sort of guarantee or indemnity).

12. Business Environment Bow Lane Ltd v Deanwater Estates Ltd
[2007] EWCA Civ 622

- No valid collateral agreement that landlord would not pursue dilapidations claim against tenant at end of lease then being negotiated, despite repeated references to such an assurance in pre-lease correspondence. Parties, represented by solicitors, taken to have reduced their agreement to the final lease signed, which included a full repairing covenant.
- Still fairly remarkable facts, which had led Briggs J. at first instance to decide the other way.

- At one point in correspondence, when issue had been raised several times and confirmation sought, L's sols. wrote "My client has already indicated to your client that a terminal schedule of dilapidations will not be served and this should be satisfactory comfort to your client".
- But CA held that this was overtaken by subsequent drafts and final lease, which contained a full repairing covenant and a (rather worthless and muddled?) revised clause only limiting the right to serve a dilaps schedule on exercising the right of entry for *inspection*.
- In a normal commercial conveyancing transaction with solicitors on both sides, will usually be assumed that what's in final version is what was agreed. Heavy burden to show collateral contract intended to have effect separately from that, if not to be invalid under s2 LPMPA 1989.

13. Alker v Collingwood Housing Association [2007] EWCA Civ 313

- A landlord owes no duty to a tenant under the DPA 1972 to put premises into a safe condition at outset of tenancy. A "relevant defect" for the purposes of s4 of the Act extends only to matters falling under the landlord's obligations to *maintain or repair*.
- Premises had ordinary annealed glass (not safety glass) panel in front door, a known safety hazard since at least 1963, but glass not broken or in disrepair. T seriously injured when arm went through panel while opening door.
- However, this was not a matter within L's repairing covenant, even though covenant was to keep home "in good condition".
- It was for Parliament to legislate if L liability to T to be broadened in such a way (that is, private liability to T: such matters would ordinarily be picked up on local authority H&S rating of property under HA 2004 and followed by enforcement action).

Lease or licence? Assured or assured shorthold tenancy?

14. Vesely v Levy [2007] EWCA Civ 367

- V, friend of mentally ill trust beneficiary went in occupation of trust flat in 1996. Trustees considered possession proceedings, but then beneficiary moved in too, and V remained, with exclusive occupation of two rooms, helping to care for her. Trustees agreed with V in December 1996 that she should pay £65 p.w. to joint household expenses. Later (September 1997) formalised as rent, then later (1998 and 2001) tenancies granted of new flat and rooms in original flat.
- Was V an assured tenant of part of original flat before 28th February 1997 (when HA 1996 came into force)? If so, then her current tenancy would be assured too.
- Held - No - December 1996 arrangement was not tenancy, despite exclusive occupation of rooms. Contribution not intended to be rent, and not intended to create L-T relationship - so within the exceptions to *Street v. Mountford* [1985] AC 809.

15. Andrews and another v Cunningham [2007] EWCA Civ 762

- Post-HA 1996, to make a residential letting an assured rather than assured shorthold tenancy, has to be notice from L under HA 1988 Sch. 2A para. 1 or 2 "that the assured tenancy to which it [an agreement] relates is not to be an assured shorthold tenancy".
- Oral tenancy of flat from owner, with provision of rent book saying "Assured Tenancy" on its cover.
- But held : this was not sufficient notice under the Act to make it an assured tenancy. ASTs are themselves one form of "assured tenancy", so that expression could not exclude an AST. Plus: Schedule 2A contemplates notice being "served", meaning written notice: rent book provided merely to record rent and was not service of a notice.

Prevention of acquisition of easement over L's adjoining land by "right to build" clause

16. RHJ Ltd. v. FT Patten Holdings [2007] EWHC 1655 (Ch. D, Lewison J.)

Lease reserved to L:

"the full and free right to erect build rebuild and/or alter as they may think fit at any time and from time to time any buildings or bays or projections to buildings on any land adjoining the demised property..."

- Successor of T claimed right to light over some adjoining car park land, under s3 Prescription Act 1832, on basis of 20 years' enjoyment without interruption while L owned both.
- Issue was whether above clause could mean that this enjoyment was "...by some consent or agreement expressly made or given for that purpose by deed or writing" so as to prevent prescription under s3; and whether to do so such a clause had to mention "light" or rights to light to have this effect.
- Lewison J. held that clause was effective to prevent right being acquired, that enjoyment was permissive, not absolute and indefeasible, and that a "full and free" right to build could not be fettered by the subsequent acquisition of a prescriptive right.

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