

## RECENT CASES IN PROPERTY LAW 2005

### I. ADVERSE POSSESSION (YET AGAIN...)

- Constant source of litigation
- Expect a lot more cases on unregistered land, and pre 13/10/03 registered land claims, for foreseeable future....
- What have human rights got to do with it?
- See previously *Family Housing Association v. Donnellan* [2002] 1 P&CR 449, and CA in *Pye v. Graham* [2001] Ch. 804 (this point n/a on appeal to HL).
- \**Beaulane Properties v. Palmer*, 23/3/05, Ch. D, N. Strauss QC, Times, 13/4/05.
- 12+ years' factual possession of registered land near Heathrow found on facts (by grazing, locked gates etc.), but with 'concealment' of possession in 1991 which reset clock then: so time bar fell between 2<sup>nd</sup> October 2000 (when HRA 1998 came into force) and 13<sup>th</sup> October 2003 (when LRA 2002 came into force).
- Owner successfully argued that s75 LRA 1925, imposing automatic statutory trust of registered title following 12 years' adverse possession as now understood, infringed Art. 1 1<sup>st</sup> protocol human right to "peaceful enjoyment of possessions". Not just a procedural time bar regulating access to the courts.
- And not justified by any legitimate policy aim, because Parliament in 1925 could not have thought that *Pye v Graham* adverse possession could bar registered titles; and not obvious why any statutory barring of title at all, given that earlier LR Acts did not allow it. Plus, Law Commission and Parliament now recognised that adverse possession of registered land was generally unjustifiable.

- So, gave effect to it, not by “declaration of incompatibility”, but by ‘creative’ re-interpretation of s75, in accordance with s3 HRA, as reflecting law on adverse possession as understood in 1925! (*Leigh v. Jack* (1879) Ex. D. 264 et al), and doctrine that possession not adverse if not inconsistent with true owner’s future plans for land; as rejected in *Powell v. McFarlane* then by Limitation Act 1980...).
- Watch this space....

### **The return of the implied licence**

- *Colin Dawson Windows Ltd. v. Kings Lynn & West Norfolk BC & Howard* [2005] EWCA Civ. 09
- C claimed adverse possession of car park land on which houses demolished in 1950s. Mrs. H was paper owner of one of former houses on site. Held that despite uncertainty over where her plot had been, negotiations to purchase her interest, which had continued until 1991 (just <12 years before claim brought) gave rise to an implied licence for C to be there => claim failed.
- *Batsford Estates (1983) Co. Ltd. v. Taylor* [2005] EWCA Civ. 489
- Implied licence inferred again, this time elderly brothers who were former tenants of farm and land. CA held that although owner B served notice to quit in 1985, “drawing battle lines” when brothers asserted tenancy for life, its failure to follow it through, and its acceptance of status quo, nevertheless suggested brothers’ occupation was by permission (a “reasonable person” would have thought so....?). No rent paid for >12 years....
- *Clowes Developments v. Walters & Dowsett* [2005] EWHC (Ch.) 669 (Hart J.)
- Daughter and son in law of widow given licence by developer to live in property, terminable on notice. D and s-in-law remained there for >12 years after widow herself left, and freehold transferred to another linked company. Held – D & s-in-law’s intentions throughout had been to live there via the permission given to the

widow, and for as long as owner permitted: distinct from intention of squatter who knows he has no permission but would go if owner sought to evict him = > no adverse possession.

## Possession

- *Wretham v Ross* [2005] EWHC (Ch.) 1259
- Factual possession, from which intent to possess inferred, is all that's required: no 'separate' test of what paper owner might have thought had he made a site visit?
- *Generay Ltd. v. Containerised Storage Co. Ltd.* [2005] EWCA Civ. 478
- Possession of 8 x 500 ft. strip on land on Wembley Industrial Estate: interruption of squatter's possession by his own erecting of a temporary 'tape fence', to demonstrate in proceedings brought by previous owners that he did not occupy that part of land: defeated claim for adverse possession of that part (but successful on remainder of land possessed for > 12 years).

## Encroachments by tenant for benefit of landlord

- *Tower Hamlets LBC v. Barrett* [2005] EWCA Civ. 923
- Possession of Council-enclosed land adjacent to tenants' pub: Held – sufficient possession by putting gate in Council's fences and storing items there, for c. 12 years (1978-90), Council not in possession via props it had erected against pub wall. Plus – applying *Smirk v. Lyndale* [1975] Ch. 317 et al, possession accrued for benefit of Bs' landlords, the brewery; however – written acknowledgment of title during possession period by the brewery did not come within s29 LA 1980, as the brewery were not themselves in possession. And, to round it off, when Bs acquired freehold of pub in 1993, they also acquired brewery's possessory title to adjoining land!

- (+ Human Rights Act 1998 n/a on facts here, pre-2000: but Neuberger LJ describes *Beaulane* in passing as an “impressive judgment” and “powerfully reasoned”...a hint?).

## II. EASEMENTS, COVENANTS, BOUNDARIES

### Easements

- *CDC 2020 plc v. Ferreira* [2005] EWCA Civ. 611

C claimed a right of way over D's land. D accepted that by a conveyance, dated 24<sup>th</sup> February 1964, a right of way was validly and effectively granted, but contended that the right no longer existed because it had been abandoned. Held that the test for abandonment was that given by Buckley LJ in *Gotobed v Pridmore* 115 Sol Jo 78 and that in this case the C had not manifested an intention to abandon the right of way forever.

- *Shrewsbury v. Adam* [2005] EWCA Civ. 1006

D owned Tan-y-Fford and Bryn Coed. D obtained planning permission to construct three houses, three garages and a road on Bryn Coed. D constructed three quarters of the road. By conveyance dated 22<sup>nd</sup> July 1979 C acquired Tan-y-Fford from the D. C contended that she also purchased a right of way over the D's land and that she still had the benefit of that right of way. Held: the parties anticipated that D would complete the development on Bryn Coed and that in those circumstances the C would be entitled to a right of way over the road. The D did not complete the development and the C was not entitled to a right of way.

### Covenants

- *Sims v. Mahon*, Ch. D., Hart J., Times 16/06/05

Action to enforce the terms of a restrictive covenant. Questions before Hart J were (i) In the phrase "plans approved previously by the Transferors" who does the term "the Transferors" refer to? (ii) Should a term be implied that the approval of plans should not be unreasonably withheld? Held: (i) The Transferors referred to the Houghtons and their successors in title. (ii) The term should be implied.

## Boundary disputes

- *Scammell v. Dicker* [2005] EWCA Civ. 405

The case concerned whether a consent order made in February 1994, compromising original proceedings between the parties commenced in 1989, was void for uncertainty. Held: the consent order was not void for uncertainty.

### III. LANDLORD AND TENANT AND SOLICITORS' NEGLIGENCE

#### 1954 Act

- *Dogan v. Semali Investments* [2005] EWCA Civ. 1036
- s 30(1)(f) intention to redevelop as ground of opposition.
- Reminder that a) it's L's intention, and its "reasonable prospects", on day of trial that matter (so L was allowed to arrive with a revised development proposal and a new expert witness on day of trial!) b) "reasonable prospect" of planning permission is a *lower* test that balance of probabilities (merely a real as opposed to a 'fanciful' chance) c) CA can look at post-trial events to assess correctness of trial decision i.e subsequent grant of planning permission.
- *Wessex Reserve Forces and Cadets v. White* [2005] EWHC 987
- Premises included large MoD 'Spooner' huts attached to ground, held to be fixtures. Lease contained covenant by T to remove all buildings and tenants' fixtures at end of lease. L opposed new tenancy on ground (f) (intent to demolish). Purported during hearing to release T from obligation to remove fixtures. Held – L failed to establish ground (f). Couldn't unilaterally release clause for benefit of both parties. And couldn't therefore demolish what would not be there at end of lease (on assumption no new lease and T removed huts)...
- Well done Malcolm Warner!

#### Watch your drafting....

- *Littman v. Aspen Oil* [2005] EWHC (Ch.) 1319 (Hart J.)
- Mutual break clause, on its face, made *landlord's* right to break conditional on payment of rent and performance of covenants by *tenant*; with no corresponding condition to tenant's right. Held – obvious mistake and absurdity, made no

commercial sense, landlord needed such a condition like a “fish needs a bicycle”...So court could correct it as a matter of construction by substituting “tenant” for “landlord” in relevant clause (as per *Holdings & Barnes plc v. Hill House Hammond* [2001] EWCA Civ. 1334). And rectification for unilateral mistake would have succeeded in the alternative.

- *Hemingway Realty v. Clothworkers Co.* [2005] EWHC 299 (Patten J.)
  
- ‘Open’ (i.e. not upward only) rent review clause in lease, stated to be exercisable by L only (“L shall have the right to review the yearly rent”) at 7 year intervals. L very happy with 1989 review level of £375K p.a, did not wish to initiate 2003 review which would have reduced rent. T demanded a review and sought to initiate one. Held – no presumption that open review clauses are operable by both L and T or that review mandatory, clear words must be given effect to, even if effect is to make rent review upward only...

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## **ADDITIONAL RECENT CASES**

### **CDC 2020 plc v Ferreira (2005) EWCA Civ 611:**

- On the 24<sup>th</sup> February 1964 a conveyance of the Claimant's land included the following grant for the benefit of the purchaser:

"together with full right and liberty in common with others entitled to the like right, to pass and repass with or without motor cars or other vehicles over the land coloured blue on the said plan, for all purposes connected with the use and enjoyment of the three garages erected on the land coloured pink ("the nib") on the said plan, subject to the obligation to contribute to the costs of repairing the said right of way..."

### **Shrewsbury v Adam [2005] EWCA Civ 1006:**

- By conveyance dated 22<sup>nd</sup> July 1979 Mr M T conveyed Tan-y-Fford to the Claimant. Clause 2 of the conveyance stated:

"The Purchaser [C] hereby covenants with the Vendor [Mr M T] that within a reasonable time after the Vendor has at his own expense excavated the garage space hatched blue on the plan hereto annexed to the level indicated on the site plan she will erect a stock proof fence along...the boundaries...separating the property hereby conveyed ...from the adjoining land of the Vendors...and the Purchaser further covenants that she and her successors in title will thereafter be responsible for maintaining and repairing the said fence."

**Sims v Mahon Ch. D. Hart J Times 16/06/05**

- The covenant:

“ The Transferees hereby jointly and severally covenant with the Transferors to the intent so as to bind the land hereby transferred and each and every part thereof into whosoever hands the same may come and to benefit and protect the Transferors property known as number 1 Wharf House...and lands held therewith not to use the property hereby transferred for any purpose except that of a private garden and not to erect thereon any building other than a greenhouse garden shed or domestic garage in accordance with plans which have been approved previously by the Transferors in writing.

It is hereby agreed and declared that the Transferees shall not be or become entitled to any right of light or air or other right or easement which would or might in any way restrict or interfere with the free use of the adjoining premises of the Transferors known as number 1 Wharf House...and lands held therewith for building or any other purpose.”

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