PROPERTY UPDATE – AUTUMN 2006

1. *UNILATERAL NOTICES UNDER THE LAND REGISTRATION ACT 2002 AND "PENDING LAND ACTION[S]"*

Godfrey v. Torpey **[2006] EWHC 1423 (Ch) – 5 May 2006**

A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge and has the effect that the priority of the interest is protected for the purposes of the 2002 Act (section 32 refers). A party who claims to be entitled to the benefit of an interest affecting a registered estate may apply for an entry of a notice in the register (section 34) and "an interest affecting an estate or charge" includes a pending land action within the meaning of the Land Charges Act 1972 (see section 87(1)). Section 17 of the 1972 Act states that "pending land action" means any action or proceedings pending in court relating to land or any interest in or charge on land.

D5 was registered as proprietor of a property on 1 June 1999. C registered a unilateral notice against that property on 30 December 2004. D5 applied to vacate that notice.

The action in question involved a claim against D4 for unsecured debts of £1m. C claimed that the property registered in D5's name was either beneficially owned by D4 or that the transfer to D5 was challengeable as being a transfer with intent to defeat creditors.

D5 argued that C's notice should be vacated because "pending land action" should be read as involving the claimant asserting that it has an interest in land. Here C did not (nor could it) assert a direct interest in the property.

The court approached the question as follows:

(i) The starting proposition is that the purpose of a pending land action is to put on notice to a prospective purchaser that there is a dispute that might affect the title to the land because if there was no such registration a purchaser would not know that there was actually a dispute.

(ii) In a case where a creditor is asserting that the debtor has an (unregistered) interest in a registered property, what is being disputed is the claim of the registered owner (D5) to be the legal or beneficial owner of the property.

(iii) Accordingly, the creditor (C) has a legitimate interest in asserting, in effect on behalf of the debtor (D4), something which one would normally expect D4 to assert i.e. "I own this very valuable property, not D5". That is a claim relating to land and so can be protected by a notice.

It followed that the fact that C was not asserting an interest in the property per se did not preclude the possibility of protection by a notice.

2. *BOUNDARY DISPUTES INVOLVING CONFLICTS BETWEEN DIMENSIONS IN FIGURES ON A PLAN AND DIMENSIONS ARRIVED AT BY SCALING OFF THE PLAN*

Cook v. JD Wetherspoon Plc. **[2006] EWCA Civ 330 – 31 March 2006, CA**

Cook transferred part of a parcel of registered land. The property transferred was expressed to be "defined on the attached plan and shown edged red". The strip of land retained by Cook was measured on the plan as having a width of 40 feet and that measurement was incorporated into the plan. In fact, the actual scaled width between the red edging and the extremity of the transferor's land was only 30 feet.

The defendant transferee argued that as the property transferred was the property "shown edged red" there was no ambiguity. The plan should be scaled off accordingly and that left the retained strip of only 30 feet. It was argued that the absence of reference to the measurement in the parcels clause meant that it should be disregarded.

Conversely, the claimant transferor argued that if a plan uses a dimension then, prima facie, the dimension is to govern. It followed that the retained strip was 40 feet.

The CA rejected both propositions.

Applying *Jackson v. Bishop* ((1984) 48 P&CR 57), the court held that there was no rule of law one way or the other but stated that the applicable principle from the authorities is that:

"…where there is a conflict between (1) dimensions in figures on a plan by which the property conveyed or 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."

Essentially, the court has a free hand to determine the boundary by reference to the most likely intended boundary.

3. *BUSINESS TENANCIES OF INCORPOREAL HEREDITAMENTS*

Pointon York Group Plc v. Poulton **[2006] EWCA Civ 1001 – 13 July 2006 CA**

Section 23 of the Landlord & Tenant Act 1954 expressly provides that the Act *"applies to any tenancy where the property comprised in the tenancy is or includes premises*

which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes".

This case raised two issues on the application of section 23.

The defendant landlord appealed against a decision that the respondent tenant was in occupation of property for the purposes of the L&TA 1954 s. 23 so that the tenancy was continuing by virtue of Part II of the 1954 Act and so that a tenant's notice was valid. That appeal raised two issues.

The defendant landlord let to the claimant tenant a suite of offices and three other units of accommodation. The schedule(s) to the lease conferred the right to use seven parking spaces during normal business hours. The claimant tenant had also sub-let the premises. The under-lease determined 3 days before the end of the claimant's own tenancy and the claimant informed the defendant of its intention to re-occupy the premises. The sub-tenant then laid carpets and the claimant's employee checked on the carpet laying.

Issue 1. - Were the parking spaces which the respondent had the right to use under the lease "premises" which could be "occupied" by the tenant for the purposes of section 23?

The CA applied *Whitley v. Stumbles* ([1930] AC 544) and held that:

(i) an incorporeal hereditament (such as a right to use a parking space) can be "premises" and can be "occupied";

(ii) the incorporeal hereditament in this case was capable of occupation although that will not always be the case (see *Land Reclamation Co. v. Basildon DC* [1979] 1 WLR 767 involving a right of way which could not be said to be "occupied");

(iii) whether there is "occupation" of any property is a matter of fact and degree.

Importantly, the case opens the door to the possible conclusion that a tenancy may qualify under section 23 even though only the incorporeal hereditament is occupied for business purposes. As was noted at paragraph 25:

"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 used for business purposes. It is difficult to see why this business use should not be protected even though the house is not used as part of the business. Section 23 expressly applies where only part of the premises is occupied for business use."

Issue 2. – What constitutes "occupation" for the purpose of section 23?

Here the court 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 for other purposes under the Act, 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.
On the above facts, there was ample occupation for section 23 to bite.

4. *DETERMINING ASSURED SHORTHOLD TENANCIES AND SECTION 5 OF THE HOUSING ACT 1988*

Church Commissioners for England v. Meya **[2006] EWCA Civ 821 – 21 June 2006, CA**

The tenant had been granted a tenancy for a term of a year (less a day) at "a clear yearly rent of £17,680 per annum". The tenant also covenanted to pay the rent "by equal quarterly payments in advance on the usual quarter days".

The landlord served a section 21 notice using the saving formula of words (i.e. possession was required at the end of a period of the tenancy being not less than two months after service of the notice). It was therefore common ground that the landlord had given a quarter's notice.

The tenant contended that reference to a yearly rent meant that this was an annual tenancy and that proceedings were therefore premature. At common law that is supported by *Adler v. Blackman* (1953) 1 QB 146. It also appeared to be the position under the 1988 Act following *Laine v. Cadwallader* (2001) 33 HLR 36).

The statutory periodic tenancy under section 5 of the 1988 Act is one "under which the periods of the tenancy are the same as those for which rent was last payable under the fixed term tenancy" (per section 5(3)(d)).

The CA held that the formula of words used in section 5(3)(d) required the court to ascertain what was the last payment of rent the tenant was obliged to make, and then to ascertain the period covered by that last payment. On that basis the amount of rent actually payable under the terms of the tenancy was payable in advance for the last quarterly period. It followed that the period of the tenancy was a quarterly period.

As proceedings had been commenced after a quarter's notice had been given proceedings were not premature and an order for possession was made.

5. *FORFEITURE OF BUSINESS PREMISES AND THE PROTECTION FROM EVICTION ACT 1977*

Pirabkaran v. Patel **[2006] EWCA Civ 685 – 26 May 2006, CA**

The Facts: The tenant had a lease of mixed business and residential premises. The tenant conducted a retail business on the ground floor and resided on the first floor. The tenant fell into arrears and the landlord forfeited the lease. The tenant argued that section 2 of the Protection from Eviction Act 1977 applied and that the forfeiture was therefore unlawful.

The Statute: 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 the court while any person is lawfully residing in the premises or part of them"

The Issue: Are premises let partly for residential purposes and partly for business purposes "let as a dwelling" within the meaning of s.2 of the Act of 1977?

The Decision: The Court of appeal held that section 2 of the 1977 Act did apply to mixed business and residential tenancies (even if the 1954 Act applied). "[L]et as a dwelling" in s. 2 means "let wholly or partly as a dwelling" and so applies to mixed use premises. The forfeiture was accordingly unlawful.

The CA reached this conclusion, inter alia, because:

(i) the authorities under predecessor statute to the 1977 Act supported that conclusion;

(ii) the express need to exclude 1954 Act tenancies in section 3 of the 1977 Act supported the conclusion that such tenancies could be caught by section 2;

(iii) the policy of the 1977 Act supported its application to mixed use premises;

(iv) the answer arrived at was most compatible with the tenant's Article 8 rights to respect for his private life and home.

6. *LANDLORD & TENANT REPAIR COVENANTS*

Marlborough Park Services Ltd. v. Rowe **[2006] EWCA Civ 436 – 7 March 2006, CA**

The lease in question was a long lease involving a fairly standard parcels clause defining the demised premises as "including the ceilings and floors…the joists and beams on which the floors are laid together with all the floors…". The tenant covenanted to keep the demised premises and all walls thereto belonging (other than the parts caught by the landlord's repair covenant) in good and tenantable repair. The landlord's repair covenant included the equally standard covenant "To maintain, renew and decorate…the roofs and main structures of the Property".

There were defective wooden joists on the intermediate floor of a two storey maisonette and the question on appeal was whether the joists fell within the expression "the main structures of the property".

On the facts the CA held that the joists were so caught. The case is useful in general terms in reiterating the appropriate approach to construction. Namely:

(i) The meaning of an expression such as "main structure" must be determined by reference to its context in the lease under consideration and in light of all the other facts and circumstances of the case.

(ii) Reading across from one lease to another (and from an interpretation in one case to another) is a risky business and may not always be useful.

(iii) That stated, in considering what is meant by words such as "structure" or "main structures" a good working definition to bear in mind is that provided in *Irvine v. Moran* [1991] 1 EGLR 261.

(iv) The decision in *Toff v. MacDowell* [1993] 69 P&CR 535 should not be regarded as authority for a restrictive meaning of the phrase "in particular" in leases (e.g. "the main structure and in particular the roof chimney stack gutters…" - *Toff v. MacDowell* had previously hinted that such a clause restricted the meaning of "main structure" to the particularised elements following "in particular").

7. *BREAK CLAUSES AND "MATERIAL COMPLIANCE" WITH TENANT'S OBLIGATIONS UNDER THE LEASE*

***Fitzroy House Epworth Street v. Financial Times Ltd.* [2006] EWCA Civ 329 – 31 March 2006, CA**

A tenant's break clause usually requires that the tenant should have complied with the tenant's covenants and obligations as a condition precedent to the effective exercise of the right to exercise the break clause.

Finch v. Underwood [1976] 2 Ch. 310 is authority that such provisions have to be strictly complied with because equity has no power to relieve a party in breach.

In the instant case, the condition precedent to the exercise of a break clause was qualified by the requirement that the tenant had "materially complied" with all its obligations. The leading case on the test of what constituted "material compliance" or a "material breach" was previously *Commercial Union Life Assurance Co. Ltd. v. Label Ink Ltd.* [2001] L&TR 29.

On the facts there was a dispute as to whether the tenant's repairs were apt to materially comply with its repair covenants as at the date of the break.

The CA approached the matter as follows:

(i) The previous test or guidance in *Label Ink* was wrong and rejected.

(ii) The test of material compliance is an objective one.

(iii) Materiality must be assessed by reference to the ability of the landlord to re-let or sell the property without delay or additional expenditure.

(iv) Where the provision is absolute then any subsisting breach will preclude an exercise of the break clause.

(v) Conversely, insertion of the word "material" was not intended to permit only breaches which were trivial or trifling.

(vi) "[T]he question is quite simply whether…the Tenant had [on the date for the break] materially complied with its obligations…[T]hat is a question of fact".

8. *DAMAGES IN LIEU OF AN INJUNCTION AND THE BASIS OF ASSESSMENT*

Lun Poly Ltd. v. Liverpool & Lancashire Properties Ltd. **[2006] EWCA Civ 430 – 15 March 2006, CA**

In breach of the covenant for quiet enjoyment, the landlord blocked up a fire door in the tenant's demised premises. By the date of the breach the parties had been negotiating for 8 months on the basis that the tenant would be paid a sum as a quid pro quo for allowing the fire door to be blocked up. The judge accordingly refused to grant an injunction in favour of the tenant but was prepared to award damages in lieu. At the date of the landlord's breach the tenant was at risk of a forfeiture action (for unrelated matters) in which it would probably secure relief from the same. The tenant subsequently secured that relief in the landlord's forfeiture proceedings.

The judge indicated that he would assess damages on a "negotiating basis" but without reference to the fact that the tenant had been at risk of losing its tenancy in forfeiture proceedings.

The CA held that:

(i) In awarding damages in lieu three bases may generally be adopted.

(a) compensatory damages (i.e. damages for the loss caused by the breach as opposed to damages for the loss of the covenant); or

(b) negotiating damages (a sum based on what reasonable parties would have negotiated for release of the right); or

(c) an account (damages based on the profit made by the defendant as a result of his breach).

(ii) Negotiating damages are compensatory in character.

(iii) Damages (at least under (a) and (b)) should normally be assessed at the date of breach and so post-valuation events (like securing relief from forfeiture) are normally irrelevant.

(iv) Damages in lieu of an injunction are, however, quasi-equitable in nature and so the judge may, where there are good reasons, direct a departure from the norm by selecting a different valuation date or by directing that a specific post-valuation event be taken into account.

On the facts, as the risk of forfeiture was small, that risk had been addressed at trial and as it would add absurd artificiality to the hypothetical negotiations, the judge's approach was not to be faulted.

9. *CONSTRUCTIVE TRUSTS & PROPRIETARY ESTOPPEL*

Oates v. Stimon **[2006] EWCA Civ 548 – 3 April 2006, CA**

O and S jointly purchased a property which was registered in both of their names. They paid the sums due under the mortgage in equal shares and had matters proceeded on that footing they would plainly have both owned a beneficial half-share of their property. In 1997, however, an oral agreement was reached whereby S was to pay O £2,500 for the latter's share of the house. It was also agreed that that payment could be deferred until S could afford to meet his side of the bargain.

S failed to pay the £2,500 until he offered that sum three years later. O denied that any oral agreement had been reached but his case was rejected by the recorder.

Applying and *Yaxley v. Gotts* ((2000) Ch. 162), the CA held that the oral agreement was enforceable notwithstanding the requirement that a disposition of land should be in writing (and not merely oral) under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 on the basis that section 2(5) of that Act exempts oral agreements which create implied or constructive trusts.

By taking on an endowment mortgage and improving the house in the years following the agreement S had acted to his detriment to a sufficient degree to provide a foundation for an estoppel.

In considering the appropriate terms of relief, it is noteworthy that the £2,500 agreed in 1997 would have been £18,000 in real terms by the time of trial. The court observed, however, that if there must be a search for the minimum equity to do justice, there is also an obligation to take into account all relevant

circumstances including the parties' conduct. O was held to his agreement and was awarded only the £2,500.

10. *RIGHTS OF WAY AND REPAIR COVENANTS*

Carter v. Cole **[2006] EWCA Civ 398 – 11 April 2006, CA**

In a useful summary of the law on parties' rights to construct and maintain rights of way, the common law position was summarised by the CA in the following terms:

(i) a grantor of a right of way (the servient owner) is under no obligation to construct the way;

(ii) the grantee may enter the grantor's land for the purpose of making the grant of the way effective viz to construct a way which is suitable for the right granted to him;

(iii) once the way exists, the grantor/servient owner is under no obligation to maintain or repair it;

(iv) similarly, the dominant owner has no obligation to maintain or repair the way;

(v) the servient owner can maintain and repair the way if he chooses;

(vi) similarly, the dominant owner can maintain and repair the way if he chooses but he must bear the cost of such work himself.

The dispute on the facts was curious because, rather than neither party wanting to do the repairs (as is usually the dispute), both parties wanted to carry out the work. The dispute essentially turned on whether the common law position was altered by the terms of the retained right which was:

"A Right of way for all purposes…the cost [of] maintenance and upkeep of the Right of way being shared as to 80% by the Transferror and 20% by the Transferee…the right of the Transferror to use the Right of way being conditional…upon their contributing the said percentage to the Transferee within 28 days of being requested to do so."

One could be forgiven for thinking that that clause contemplated only the Transferee having a right to do the works (notwithstanding that the Transferee would pay only a fifth of the cost).

The CA held, however, that the clause was not adequate to deprive either party of its common law right to do the work. Indeed, the CA went further and suggested that Transferor could do the work and then call upon the Transferee to pay a 20% contribution.

The second important point to emerge from the case was the determination that on the words of the clause, the Transferee could not simply call upon the Transferor to pay 80% of whatever estimate they decided to accept. According to the clause, what was to be shared between the parties was "the cost of maintenance and upkeep of the Right of way". That sharing could not be implemented until the cost of repair had been incurred (or at least the payment fell due).

A FEW OTHER RECENT CASES…

11. ***Earle v. Charalambous*** **[2006] EWCA Civ 1090 – 28 July 2006, CA**

In assessing the appropriate award of damages for a breach of a repairing covenant contained in a lease for a residential property, distress and inconvenience caused by disrepair were not free-standing heads of claim, but were symptomatic of interference with the lessee's enjoyment of that asset. If the lessor's breach of covenant had the effect of depriving the lessee of that enjoyment for a significant period, a notional judgment of the resulting reduction in rental value was likely to be the most appropriate starting point for assessment of damages.

12. **Oxfordshire County Council v. Oxford City Council & Robinson [2006] UKHL 25 – 24 May 2006, HL**

In order to satisfy the definition of a "town or village green" for the purposes of the Commons Registration Act 1965 s.22(1A), the inhabitants of the locality must "continue" to use the land for sports and pastimes for a period of 20 years until the date of the application for registration under the 1965 Act (rather than the date of registration itself).

13. ***Munt v. Beasley*** **[2006] EWCA Civ 370 – 4 April 2006, CA**

An order for rectification was found to be clearly established where the tenant of a top floor flat had converted the overhead loft space to living accommodation although it was not included in the demised land. Even if that decision was wrong, the landlord was estopped from denying that the loft area was subject to the lease, given the long delay between the building of the conversion and the landlord's complaint.

14. ***Northstar Land Ltd. v. Brooks*** **[2006] EWCA Civ 756 – 14 June 2006**

Where on the day fixed for the completion of the sale of a property the purchaser's solicitor asked the vendors' solicitor whether time for completion could be extended and the vendors' solicitor said he would take his clients' instructions and revert back, the vendors were not estopped by their solicitor's conduct in not responding from denying that the time for completion had been extended, since the solicitor's failure to revert back could not reasonably be understood to convey a promise or assurance that completion had been postponed.

Tim Walsh
Guildhall Chambers, Bristol
26 September 2006