



PROPERTY LAW BULLETIN

2009



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FOREWORD

Welcome to this Spring 2009 issue of the Property Law Bulletin, produced by the Property Law team at 3 Hare Court.

The team in Chambers is expanding, with a number of members at both senior and junior level increasingly involved in matters which raise issues of property law, both in an advisory capacity and in the resolution of disputes. The extent of experience in Chambers fully justifies this Bulletin on a variety of aspects of law in this field. The articles herein almost exclusively feature cases in which our property team have been involved.

We undertake a broad range of commercial and residential landlord and tenant work: lease renewals, rent reviews, dilapidations and disrepair, service charge disputes, right to manage problems, and all varieties of actions for possession.

We have considerable experience of freehold enfranchisement and lease extension claims under the 1967 and 1993 Acts, as the case may be. We also deal with land law issues, such as adverse possession, boundary disputes, and restrictive and positive covenants.

Members of the group have associated experience of claims involving mortgages, including mortgage shortfall and mortgage possession orders: the current economic climate has led to a sharp rise in these (see article on the implications of the *Horsham Properties* case in this Bulletin) and in the litigation of property construction claims, including those involving major house builders and property developers.

Individual members of Chambers specialise in building and construction dispute resolution, particularly in the Technology and Construction Court (TCC) and in international arbitrations. We have extensive involvement in high value adjudication (one of our members is a TecSA/TecBar qualified adjudicator) and mediation (including TCC judge-led evaluation). The claims we handle include loss and expense claims, building defect claims, and professional negligence claims for and against architects, surveyors, engineers and other specialist advisers.

We also have experience of planning law and associated court action.

As in other areas of practice for Chambers, our expertise is not limited to the United Kingdom, and we handle many cases with an international element: we have recently advised in cases from St Lucia, Mauritius, Trinidad and Tobago, Gibraltar and elsewhere.

Senior members of Chambers are regularly instructed in cases before the Privy Council concerning issues in relation to property law.

Areas covered in this issue are:

- The implications of the *Horsham Properties* case
- The Service Charge regime in the Landlord and Tenant Act 1985
- Receivers – protection from costs
- The ‘Torrens’ system of registration of title
- Statutory update- pre-action protocol for mortgage possession claims; replacement of remedy of distress
- Front Loading Development Planning
- Enfranchisement update

Please see the back page of this bulletin for members of the Property law team, and for other contacts at 3 Hare Court. We hope that you will also visit our website at www.3harecourt.com for further details of members of Chambers, news, and all the services we provide.

For further copies of this bulletin, to have a copy e-mailed to you as a pdf attachment, or to register to receive future issues, please contact our Marketing Director at lizheathfield@3harecourt.com

We hope that you find this first issue interesting. As ever, we would welcome your feedback.

Paul Letman, Editor

MORTGAGE REPOSSESSION – THE IMPACT OF HORSHAM

The number of properties repossessed by mortgagees in the UK has risen by 48% in the past year. According to statistics issued by the Ministry of Justice, there were 28,658 mortgage possession orders made in the second quarter of 2008, 24% higher than in the second quarter of 2007. The number of mortgagors behind with their payments has also risen by 29% from 120,800 in the first half of 2007, to 155,600 in the first half of 2008.

These sharp rises help explain why a High Court judgment delivered in October this year, which at the time went largely unnoticed, has now made the headlines; being hailed as a devastating blow to homeowners, prompting criticism from the Prime Minister and an investigation by the Secretary of State for Justice.

The case in question is Horsham Properties Group Ltd v Clark & Others [2008] EWHC 2327 (Ch). This article examines the potentially wide-ranging implications of the case and seeks to explain why the outcome should have come as no surprise to lawyers.

The facts of the case are straightforward. Paul Clark and Carol Beech (“the defendants”) owned a house in Chatham, Kent (“the property”). In 2004, they entered into a mortgage with GMAC (“the mortgage”). The defendants fell into arrears with their mortgage payments and in April 2006 GMAC appointed receivers over the property pursuant to a power contained in both s.101(1)(iii) of the Law of Property Act 1925 (“the LPA”) and clause 12 of the mortgage conditions to which the mortgage was subject. In September 2006, the receivers sold the property at auction. The purchaser was Coastal Estates Ltd and the purchase price was sufficient to pay off the whole of the debt secured by the mortgage. The property was transferred by the receivers as agents for GMAC and on the same day Coastal transferred the property to Horsham Properties Group Ltd (“Horsham”) who then brought a claim for possession of the property claiming that the defendants were trespassers.

The possession claim was defended on the basis that s.101 of the LPA, construed as it and its predecessors have been since 1860, infringed the Convention rights of mortgagors (and residential mortgagors in particular) by permitting mortgagees to overreach the mortgagor’s rights in relation to mortgaged property by selling it out of court, without first obtaining a court order for possession, or an order for sale.

Prior to the coming into force of the Human Rights Act 1998, the defendants would have had no defence to Horsham’s claim for possession, as the pre-Human Rights Act understanding of the relationship between s.101 of the LPA and s.36 of the Administration of Justice Act 1970 (“the AJA”) was clearly explained by the Court of Appeal in Ropaigealach v Barclays Bank [2000] 1 QB 263. In short, s.101 of the LPA enables a mortgagee to sell without seeking a court order permitting him to do so and a purchaser from the mortgagee can obtain possession without thereby triggering the court’s powers to adjourn the proceedings or stay or suspend execution of a judgment for possession or to postpone the date for the delivery of possession in circumstances where it appears that the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or remedy any other default or breach of obligation.

The essence of the defence advanced against Horsham was that the traditional understanding, as set out in Ropaigealach, could only be compatible with the Convention rights of residential mortgagors if s.101 of the LPA was construed as requiring a mortgagee first to obtain a court order for possession or to make an application for an order permitting sale, or if s.36 of the AJA was construed so as to confer upon the court the discretionary powers to adjourn or suspend the making of a possession order. Alternatively, the defendants sought a declaration of incompatibility in relation to s.101, which led to the intervention of the Secretary of State for Justice.

Mr Justice Briggs had no difficulty in concluding that the defendants share in the equity of redemption in relation to the property was a “possession” within the meaning of Article 1 of the First Protocol to the Convention (“A1FP”). However, it was held that the defendants’ equity of redemption was lost by virtue of the exercise of powers conferred purely by contract. In other words, by the time the receivers transferred the property to Coastal, the defendants had already lost their equity of redemption without any State intervention at all.

Recognising that a different result might have ensued had GMAC sold the property purely in exercise of its statutory powers under s.101 of the LPA, Mr Justice Briggs went further and held that even in such a case there would have been no deprivation of possessions within the meaning of A1FP. The reason being that s.101 serves to implement rather than override the private bargain between mortgagor and mortgagee. It is a form of conveyancing shorthand, and its effect is not only apparent on the face of s.101, but (in the present case) spelt out in terms in the mortgage itself.

In the circumstances, the defendant's case fell at the first hurdle, with the Court finding that the exercise of a statutory power of sale under s.101 after a relevant default by the mortgagee is not a deprivation of possessions within the meaning of A1FP. Even if this hurdle had been overcome, the Court went on to hold that any deprivation would have been justified in the public interest, as it reflects the bargain habitually drawn between mortgagees and mortgagors for nearly 200 years, in which the ability of a mortgagee to sell the property offered as security without having to go to court has been identified as a central and essential aspect of the security necessarily to be provided if substantial property based secured lending is to be available at affordable rates of interest. As observed by Mr Justice Briggs, "That it is in the public interest that property buyers and owners should be able to obtain lending for that purpose can hardly be open to doubt, even if the loan-to-value ratios at which it has recently become possible have now become a matter of controversy".

The decision in Horsham will be seen by many as unfortunate timing, coming weeks before the new Pre-Action Protocol for Mortgage Possession Cases takes effect on 19 November 2008. However, the ruling simply reaffirms the power of mortgagees to sell property when mortgage money becomes due within the meaning of s.101 of the LPA without first seeking a court order. This has been the position for the last 200 years. The power is hardly ever used by mainstream mortgage lenders, as generally it makes very little business sense. The concern is that rogue lenders will threaten the use of the power, which is why the Ministry of Justice is investigating whether further action needs to be taken to protect homeowners.

Whether s.101 of the LPA is amended in light of Horsham waits to be seen. Until such time practitioners advising both mortgagees and mortgagors need to be aware that the pre-Human Rights Act understanding of the relationship between s.101 of the LPA and s.36 of the AJA remains unchanged.

SCOPE OF THE SERVICE CHARGES REGIME UNDER THE 1985 ACT – STILL AN OPEN QUESTION

In a decision handed down in July 2008, *Glendorgal Tenants Association v Blue Chip Hotels Ltd* (CH1/15UG/LRA/2008/0002), the Southern Rent Assessment Committee considered the important issue of the scope of the service charge regime contained in sections 18 to 30 Landlord

and Tenant Act 1985, specifically whether it applies to leasehold property where use is restricted to holiday accommodation only. In particular it had to consider whether it should follow a very recent, reported Lands Tribunal decision on the issue, namely *King v Udlaw* (LRX/186/2006).

The properties in question were 17 houses and duplex apartments in a residential development in Newquay, let on materially identical 999-year leases from June 2004 onwards. Both the leases and the planning consents restricted their use to holiday accommodation only. 16 of the 17 leaseholders (who complained that the landlord had made unreasonable service charge demands) joined the Glendorgal Tenants Association which applied for recognition as a tenants' association pursuant to section 29 of the 1985 Act.

The application was resisted by the landlord on the basis that tenants of property let as holiday accommodation were not tenants of a "dwelling" within the meaning of section 18 of the 1985 Act since that term required the tenant to be in occupation of the property as his home (which the tenants were not). The landlord relied in particular on *Udlaw*, a Lands Tribunal decision to that effect which was on materially identical facts and was handed down only in March 2008. In that case the Lands Tribunal had upheld the LVT's determination that it had no jurisdiction to deal with an application by such tenants under section 27A of the 1985 Act.

The Committee, however, determined that the Glendorgal Tenants Association would be recognised pursuant to section 29 of the 1985 Act. The Committee derived no assistance from the definition of "dwelling" in section 38 of the 1985 Act which it described as circular. Furthermore, it declined to follow the Lands Tribunal decision in *Udlaw*, taking the view that it was "not binding on them, nor was it persuasive or of guidance". The Lands Tribunal was not a superior court of record so far as the Committee was concerned and there was no right of appeal from the Committee's decision to the Lands Tribunal. Nor was there any other binding authority on the point before it.

Furthermore the Committee took the view that *Udlaw* had been wrongly decided. First, the decision in *Udlaw* was made without any reference to *Heron Maple Ltd v Central Estates Ltd* [2002] 13 EG 102, a closely-reasoned decision of the Central London County Court which the Committee regarded as highly persuasive. In that case the Court held that the service charges regime under the 1985 Act applied to landlords whose property was in turn sub-let by tenants who were not in occupation. The Court took the view that there was nothing in the legislation which

required the tenant to be in actual occupation of the dwelling and suggested during the course of its analysis that holiday lets would be subject to the regime.

Secondly and more fundamentally, the Committee rejected the essential reasoning adopted in *Udlaw*. This was based on the Court of Appeal decision in *Ruddy v Oakfern Properties Ltd* [2007] Ch 335 in which the Court held that a sub-tenant did have standing under the 1985 Act to make an application in respect of a service charge that the mesne landlord was obliged to pay to the landlord. The Court of Appeal took the view that the definition of “dwelling” for these purposes did not require that the tenant be in actual occupation. Further, it drew a distinction between the policy behind the 1985 Act and the Housing Act 1988 and Rent Acts. The former provides a tenant with a way of challenging unreasonable service charges sought to be levied by the landlord (suggesting a wider definition of “dwelling”) whereas the latter is designed to protect the tenant in his home (compelling a narrower definition). The Lands Tribunal in *Udlaw*, having set this out, then (perhaps surprisingly) reached the conclusion that, while the emphasis of the 1985 was not to protect a tenant in his home, that nevertheless was an aspect of the policy of that Act. Nor did it derive any assistance from the fact that a mesne landlord was subject to the 1985 Act regime. For its part, the Committee simply rejected the logic of that conclusion as failing to follow from the preceding analysis. Rather, the preceding analysis suggested the opposite result.

Accordingly it remains unclear, in the absence of authoritative determination of the issue, whether tenants of holiday accommodation will be able to persuade LVTs that they have jurisdiction to hear service charge challenges by them. Following *Udlaw* it might have been thought that such tenants would struggle to establish jurisdiction. *Glendorgal* illustrates that the position is not clear cut. The position suggested by the decision in *Glendorgal* is, it is suggested, preferable. From a policy perspective there is little to commend the arbitrary exclusion of tenants of holiday accommodation from being able to apply to the LVT under sections 18 to 30 of the 1985 Act and nothing in the wording or history of the 1985 Act to suggest that that was what was intended. Nor does such an exclusion sit happily with the analysis adopted in *Heron Estates* and *Ruddy*.

RECEIVERS RECEIVE PROTECTION FROM COSTS

A costs order made following an unsuccessful claim brought by a liquidator is payable out of the net assets held by the liquidator

in priority to all other claims (*Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1). But what is the position of a defendant to an unsuccessful claim brought by a receiver? Until now a receiver appointed under a bank charge who causes an insolvent company to sue has not known definitively whether he would be personally liable for the costs of any unsuccessful litigation. The decision in *Mills v Birchall and another* [2008] EWCA Civ 385 gives clarity and comfort to that receiver.

The background to the decision in *Mills* was a property transaction. In 2001 Orb Estates plc agreed to sell to Mr Mills a long lease of a flat at Dolphin Quays, Poole, Dorset, then in the course of development, for £650,000. It had also been agreed between them that the purchase price should be set-off against a debt of £1.85m due by Orb Estates plc to Mr Mills but this was not recorded in the written agreement. In August 2002 Orb Estates plc sold its interest in Dolphin Quays, together with the benefit of the agreement with Mr Mills, to the claimant company, and on the same day the company charged all the property so acquired to the Bank as security for all liabilities of any kind and in any currency due by the Company to the Bank.

In June 2003 the Bank appointed the receivers as Law of Property Act 1925 receivers of the property subject the charge as well as joint administrative receivers under a debenture given by the Company to the Bank. Mr Mills was the sole director of the company construction, had executed the charge and the debenture on its behalf and sworn the affidavit verifying the statement of affairs as at the date of the appointment of the administrative receivers.

In November 2004 the Company, by the receivers, instituted proceedings against Mr Mills for specific performance of the contract for the sale of the long lease of Flat 78. Mr Peter Leaver QC, sitting as a deputy High Court judge of the Chancery Division rejected the claim. He concluded that despite the apparently self-contained terms of the sale agreement the set-off agreement had been an integral part of the contract for the sale of the lease and, not having been included in that document, the contract was unenforceable under the Law of Property (Miscellaneous Provisions) Act 1989, section 2.

The parties agreed a form of order whereby Mr Mills obtained costs against the Company, but the question then arose as to whether a costs order could or should be made against the receivers. Mr Mills had not previously asked for security for costs. The receivers, on the advice of Counsel, took the view that Mr Mills ranked as an unsecured creditor of the Company for its costs only and the receivers had no personal liability. Mr Mills took the

view that an order against a non-party to the litigation should be made under section 51(3) of the Supreme Court Act 1981 (relying in particular upon *Knight v FP Special Assets Limited* (1992) 174 CLR 178). At first instance the Chancellor agreed with the receivers. In doing so he thought that there was inconsistency between the Court of Appeal decision in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 and the Privy Council decision in *Dymocks Franchise Systems (NSW) Pty v Todd (No 2)* [2004] UKPC 39, and considered himself bound by *Metalloy* which he took as requiring some impropriety or unreasonable conduct before a section 51 order could be made.

The Court of Appeal discussed the relationship of a company and its receivers. It noted that a receiver is deemed to be an agent of the company, both under section 37(1) of the Insolvency Act 1986 and under the terms of the debenture. This is a “real” agency “even though it has some peculiar incidents. An order for costs against the receivers was therefore only possible if Mr Mills could bring s51(3) into play.

The Court of Appeal in a number of cases has set about laying down the principles governing the exercise of the s51(3) discretion since Lord Goff of Chieveley in *Aiden Shipping Company Ltd v Interbulk Ltd* [1986] AC 965 made it clear they were to do so in accordance with “reason and justice”. In *Mills* the Court of Appeal undertook an extensive review of the authorities in which s51(3) orders had been considered against receivers in both this and other commonwealth jurisdictions.

In *Anderson v Hyde* [1996] 2 BCLC 144 the Northern Ireland Court of Appeal noted the unfairness which follows from a receiver who is able to conduct the defence of the action on behalf of the debenture holder in the knowledge that the debenture holder would never have to pay any costs as contrasted with the exposed position of the claimant. If the situation in *Anderson* is unfair, you may well consider that the unfairness created by the situation in *Mills*, in which it was the receivers who voluntarily started the litigation, is that much starker. The Court of Appeal in *Mills* was certainly alert to the *Anderson* point but ultimately it did not sway them.

The key point for the Court of Appeal was that “any injustice which has occurred is due largely to the failure of his advisers to take advantage of his right to apply for security for costs”. Indeed CPR rule 25.13(2)(c) expressly provides for the situation in which a claimant company is unable to pay the defendant’s costs. The Court of Appeal acknowledged that although the amount which the court orders as security is discretionary (and commonly set at 2/3 of the estimated costs) in cases such as these the court should

be “robust in its assessment of the amount of security” and “in appropriate cases” should order the full amount.

The Court of Appeal did not rule out the exercise of the s51(3) discretion against receivers. In adopting and commenting on the factors considered by the Chancellor, the Court of Appeal has clearly stated why the costs application in *Mills* failed. It is up to future litigants to use this reasoning to distinguish themselves and bring themselves within the scope of s51(3).

Firstly, it was stated that this was not an ‘exceptional’ case (as required by Lord Goff in *Aiden Shipping*). It was in fact an entirely normal case of receivers seeking to enforce a contractual right.

Secondly, there was no impropriety or unreasonableness on the part of the receivers. Although *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 properly interpreted did not make this a prerequisite, it is a relevant factor.

Thirdly, it cannot be said that a receiver is the ‘real party’ so as to bring the applicant within the principles laid out in *Dymocks Franchise Systems (NSW) Pty v Todd* [2004] 1 WLR 2807. It was insufficient that they benefitted in terms of the fees obtained for running a litigation or the prospect of further work from the bank if successful. The key was that a receiver neither funded the claim nor had any interest in the monies from which the claim was funded nor did it have an interest in the outcome of the claim.

Fourthly, the receivers were not principals acting for the benefit of the bank but were agents of the company analogous to the position of directors and liquidators where a personal costs order would not necessarily be made. An additional element was necessary.

Finally, it was a relevant factor that Mr Mills had failed to apply for security of costs when such an order had been available. The evidence was that an application for security for costs by Mr Mills might well have had an effect on their conduct of the proceedings by the receivers and in particular might have increased the prospects of settlement. A s51(3) order would be more likely where an application for security for costs had not been available.

Thus the Court decided that *Aiden Shipping* did not justify the judicial creation of a substantive rule that receivers whether bringing or defending a claim should be personally responsible for the costs of a successful party. If an order were made in such a case as the instant that would mean that it would be made in

virtually all such cases. Rather the normal expectation is that someone in Mr Mills' position should seek security for costs.

The clear message for future litigants and their legal advisers in a claim brought by receivers, therefore, is to apply for security for costs. Section 51 as an alternative is very much an uphill task.

TITLE REGISTRATION: THE TORRENS SYSTEM – SIMPLE, TRANSPARENT, EFFICIENT

Since it was introduced in South Australia 150 years ago, the "Torrens" system of title registration has been widely adopted across the Commonwealth. Its key characteristic is summed up in this description by Barwick CJ in the Australian case of *Breskvar v Wall* (1971) 126 CLR 376, 385:

"The Torrens system of registered title ... is not a system of registration of title but a system of title by registration."

Registration is conclusive as to title: the certificate of title describes the title which registration itself has vested in the proprietor. Registered title is indefeasible except in limited circumstances, in particular where registration was the result of fraud or mistake.

The system has the advantages of simplicity, transparency and efficiency. A prospective purchaser of land need only check the register to be assured of its legal title. The system is also seen as having wider benefits in developing countries in that it can encourage a more dynamic land market and more efficient use of land. As a result the Caribbean commonwealth countries have all to a greater or lesser extent pursued a policy of adoption of the "Torrens" system.

There are common obstacles to adoption: the larger Caribbean countries have a high percentage of unmapped parcels of land and large tracts of unused state land; undocumented or informally documented tenure is widespread; there are large numbers of squatters; the cost of survey and registration is high relative to the value of land.

The result has been that only the smaller countries have so far been able to take a systematic approach to registration, which involves surveying and mapping each parcel of land, determining the ownership of each parcel by adjudication, and compiling an exhaustive register of land. Small countries such as Antigua, the BVI and St Lucia have achieved full mapping and registration of land. Others, where plans for a unified system are

in the pipeline, are still operating 2 or 3 different systems of registration.

For example, Trinidad and Tobago adopted a "Torrens" system of title registration by its Real Property Ordinance of 1892. But today only about 15% of private land is registered under that system. More than half is still held under the earlier system of registration of deeds. Although legislative policy has long aimed for a unified and simplified system, a lack of resources and the problems identified above – informality of tenure, unmapped and undocumented land – have delayed its introduction.

Presently the government is said to be moving towards the implementation of Acts passed in 2000. Under the Registration of Titles to Land Act, the Land Adjudication Act and the Land Tribunals Act, a complete regime of identification, title adjudication and registration of land was introduced. There are now signs of a plan to systematically introduce this regime.

Two recent Caribbean cases provide illustrations of the kind of disputes which can arise on a switch to the system of title by registration. Both are the subject of appeals to the Privy Council to be heard in the coming months.

In 1984 St Lucia introduced the Land Registration Act (LRA) and the Land Adjudication Act (LAA). The LAA provided for land to be split up into regions, and for a process of identifying and describing each parcel of land. The ownership of each parcel would be adjudicated and the result placed on an adjudication record. Where title was not disputed, the result would be recorded by a recording officer. Where there was a dispute, it would be referred to an adjudication officer. There was provision for two layers of appeal for anyone not satisfied with an adjudication officer's decision.

Where an adjudication record was finalised, the LRA required the interests in the land to be registered according to the particulars in the record. In common with all "Torrens" type systems of title, the LRA provides that registered title is indefeasible legal title, except in cases of fraud and mistake. Section 98 of the LRA gives the High Court power to rectify the register where it is satisfied that registration was obtained by fraud or mistake; but this may not be done in the case of a proprietor in possession, unless that person had knowledge of the fraud or mistake or caused or contributed to it.

The case of *Louisien v Jacob* Civil Appeal No.17 of 2004 (St Lucia) concerned rectification of the register. During the adjudication process Mr Jacob had made a claim for a parcel of land, but was informed that he had supplied incorrect

boundaries. He did not respond to this information and the parcel of land was subsequently recorded as belonging to relatives of his. He did not take the appeal routes available to him but much later sought rectification of the register under LRA s.98.

He argued that there had been a mistake in the adjudication process: the recording officer had no power to record title but ought to have referred a dispute to the adjudication officer. The High Court and a majority of the Court of Appeal agreed with him, and following the authority of *Webster v Fleming* Civil Appeal No.6 of 1993 (Anguilla) held that the mistake in the adjudication process amounted to a mistake in the registration process.

Ms Louisien, and the dissenting judgment of Barrow JA in the Court of Appeal, distinguished *Webster v Fleming* and argued that there had been no mistake in the registration process. The registration accurately recorded the adjudication record, as was required by the LRA. If there had been a mistake in the adjudication process, it should have been challenged using the appeal procedure provided by the LAA. The Privy Council will shortly hear Ms Louisien's appeal.

The case of *Santiago Castillo Ltd v William and Jimmy Quinto* Civil Appeal No.7 of 2007 (Belize) tests the extent of the potential for fraud and mistake to defeat title, and illustrates problems which can arise where governments do not devote resources to systematic registration. The Quintos sought rectification of the register in respect of land which they said they had owned for more than 30 years. Their title had been documented under the previous system of registration.

The Quintos' parcel of land was in an area declared a compulsory registration area in 1981. Their parcel became known as parcel 869. Under the scheme of the Registered Land Act (RLA), the declaration ought to have led to the registrar entering all previously registered interests in the new title register. This did not happen. It was left up to individuals to apply to register title.

In 2004, one Ann Williams applied for first registration as proprietor of parcel 869. As later became clear, she had no documentary claim to the land. The documents submitted with her application did not relate to parcel 869 but were the same documents she had previously used when registering title to another parcel, 818. But her application was successful and title was registered on 28 December 2004.

Within a day or two, she approached Santiago Castillo, owner of the land neighbouring parcel 869, and offered it for sale.

Castillo's lawyer checked that the title was registered to Williams, and the sale went ahead. The transfer was registered on 6 January 2005. In the meantime, the Quintos had applied for registration as proprietors too; when this was brought to the Registrar's attention, the Registrar joined the Quintos in applying for rectification.

Section 143 of the RLA provides that any registration can be rectified where the court is satisfied that any registration has been obtained by fraud or mistake. This cannot be done in the case of a proprietor in possession unless that person had knowledge of the fraud or mistake or caused or contributed to it.

The Quintos argued that the registration had been obtained by fraud or mistake, and that Castillo knew of it or contributed to it. Castillo had long known of their claim to ownership of the land and had even sought to buy it from them.

Conteh CJ in the High Court had no difficulty in finding that Williams registration had been obtained by fraud or mistake. He went on to hold that the subsequent registration of Castillo's title was infected by the same mistake and that Castillo knew of it. He rectified the register.

However, the Court of Appeal allowed Castillo's appeal. They held that the second registration, of Castillo as proprietor, was not obtained by fraud or mistake. Castillo had purchased the land from Williams. At the time of sale, Williams was registered as the owner. Accordingly the registration of transfer from Williams to Castillo in accordance with the sale was not a mistake.

The Court held that the power to amend "any" registration where "any" registration has been obtained by fraud or mistake must be interpreted narrowly, to limit the mistake or fraud to the actual entry which it is sought to impugn. Otherwise, said the Court, the section conferred on the court a wide-ranging power to correct a mistake whenever made. In this respect it is argued that the Court's reasoning can be criticised for failing to consider the limiting effect of the requirement that the proprietor in possession have knowledge of the fraud or mistake. The Quintos' appeal is to be heard by the Privy Council in early 2009.

MORTGAGE POSSESSION CLAIMS: PRE-ACTION PROTOCOL

A new Pre-Action Protocol for possession claims based on mortgage arrears or home purchase plan arrears in respect of

residential property came into force on 19 November 2008. Perhaps appropriately given the current economic circumstances and the concern apparent in certain stories in the media that lenders will rush to repossess properties if a borrower falls into arrears, the Protocol gives as its aims to ensure that the lender and borrower act fairly and reasonably with each other, and to encourage more pre-action contact between the parties in an effort to seek agreement and avoid court proceedings.

The Protocol does not, of course, alter any party's rights or obligations; the various provisions are stated in terms that the parties 'should' carry out certain acts. However the Protocol does state that 'the court takes the view that starting a possession claim is usually a last resort' and that '[p]arties should be able, if requested by the court, to explain the actions that they have taken to comply with this protocol'.

The Protocol provides for 'initial contact' and the provision by the lender of information. The initial contact requirement is one which is also given importance in the case of possession claims based on rent arrears, which are covered in a separate Pre-Action Protocol. For mortgage cases, the lender is required to give to the borrower any required regulatory information sheet or National Homelessness Advice Service booklet on mortgage arrears, and is required to state various particulars: broadly, the amount of the arrears, the total amount outstanding and details of any interest or charges. The Protocol also states that parties should take 'all reasonable steps' to discuss with each other the cause of the arrears, the borrower's financial circumstances and proposals for the repayment of the arrears.

There is also a requirement under the Protocol for the lender to advise the borrower to speak to the housing department of the relevant local authority, or to seek other independent debt advice. The lender should also consider any proposal for payment, and must give reasons if such proposal is refused. There is, further, a recommendation that consideration be given by the lender to postponing a possession claim in certain circumstances where the borrower is claiming from an insurer under a mortgage protection policy, and where the property is being marketed. Again, there is a requirement according to the Protocol that the lender gives reasons in these cases if it does not agree to postpone the possession claim. A further instance in which the lender should consider postponing a possession claim is where a genuine complaint has been made to the Financial Ombudsman Service; again, the requirement is only for consideration to be given, but reasons must be stated if the lender does not agree to postpone the claim.

The new Protocol therefore clearly puts an onus on lenders to engage in discussions with borrowers and consider any payment proposals, keeping the claim for possession as a last resort. The requirement to give reasons for refusing any request, and the warning in the final paragraph of the Protocol that parties should be prepared to explain to the Court the actions which they have taken, may be seen as illustrative of the desire to avoid a possession action being an automatic response to a person falling into arrears.

Replacement of remedy of distress for commercial landlords

The Tribunals, Courts and Enforcement Act 2007 introduces a statutory procedure for the recovery by commercial landlords of arrears of rent and abolishes the common law remedy of distress in such cases in respect of commercial premises. The relevant part of the Act is still to be brought into force.

The new procedure will be known as Commercial Rent Arrears Recovery (CRAR). Like the remedy of distress, the commercial landlord will be able to take control of the tenant's goods and sell them to recoup the arrears. CRAR, however, includes certain requirements which need to be fulfilled in order for the right to be exercised. In addition, the statutory definition of 'rent' is fairly restrictive; it expressly does not, for example, include any sum in respect of service charges, repairs or insurance, whether or not such sums are called 'rent' in the lease.

CRAR also requires there to be a lease which is evidenced in writing. The procedure to be followed in carrying out the CRAR process is contained in detail in Schedule 12 of the Act. One notable provision is that notice has to be given to the tenant before an 'enforcement agent' may take control of goods. Regulations are to detail the period and form of such notice.

The new procedure, when it is brought into force, therefore seems to place some additional restrictions as far as landlords are concerned in respect of what has up to now been a relatively quick and effective method of recovering arrears. There had been some concern that the old law of distress may not be entirely compatible with Human Rights legislation. Under CRAR, the requirement to give notice in particular seems to be an important safeguard (or hurdle, depending on one's point of view). Having received such a notice, a tenant is able to make an application to the court to set aside the notice or to order that no further step be taken under CRAR without further order. Of course, it may mean that having received a notice of enforcement a tenant in arrears removes property from the premises to avoid it being seized.

FRONT LOADING DEVELOPMENT PLANNING

Proactive Involvement of planning authorities

The Planning and Compulsory Purchase Act 2004, **PCPA**, introduced an obligation on regional planning bodies, "**RPB**", and local planning authorities, "**LPA**", to manage land use so as to deliver sustainable development through the planning system; i.e., to "play a pivotal role as place-shapers within their community." – (Draft PPS 4).

The development plan and Development Plan Documents "DPD"

The adopted or approved DPDs for an area, together with, in London the spatial development strategy for London, in other areas the regional spatial strategy covering that area, form the **development plan** for that area. Any core strategy, area action plan, or document which includes a site allocation policy, must be a DPD. A DPD can, therefore, be detailed and site specific. The Government intention is that planning applications should stand or fall according to whether they comply with the "place shaping" development plan, thus simplifying, and rendering less costly, planning procedure.

For the Government, the slow rate of preparation of DPDs for submission for examination, and the high rate of findings of unsoundness on examination, (8 submitted core strategy documents had been found unsound as at July 31 2008, <http://www.parliament.uk/deposits/depositedpapers/2008/DE P2008-2300.doc>), is impeding the effectiveness of the legislation.

The failure of LPAs to adopt a proactive approach

The Communities and Local Government department, "CLG", as at August of this year, has identified a shortfall, (over 50%), as against expectation, in submission of DPD's for public examination. It puts this down to a lack of understanding of the new system by LPAs, a lack of "buy-in" to the new system, a lack of resources and a lack of clear messages about what is required. CLG makes clear that the recession must not be allowed to delay the preparation and progress of Core Strategy DPDs and other DPDs.

The June 2007 Planning Inspectorate document "Local Development Frameworks: Lessons learnt examining Development Plan Documents" states

"Some LPAs seem to be finding it difficult to move from an approach which seeks to produce a document that will allow development control decisions to be taken (the negative

regulatory approach) rather than starting with the concept of providing a picture of how the area will develop spatially over the plan period and providing a policy framework that will deliver it (the positive delivery approach). The aim of the Core Strategy should be to articulate what the area should be like in the future and how this is to be achieved."

"The Inspectorate is taking a firm line to ensure that an appropriate benchmark is set for quality having regard to the evolving nature of the new LDF system. There is little benefit to anyone in allowing documents that are plainly unsound to pass as sound. This will not assist the development of a robust plan led system."

Community, interested parties and members of the public involvement

Pursuant to EU Directives to give effect by 2005 to the rights established by the Aarhus Convention Agreement, in 2004 PCPA, and the regulations, (amended 2008), passed pursuant to PCPA, made detailed provision for information on planning strategy to be given to the public and for the public participation in the formation of local planning strategy, and, in particular, set detailed requirements in relation to the preparation of DPDs. Before it can be adopted or approved, every DPD must be submitted to the Secretary of State for independent examination to determine (i) whether it complies with those detailed statutory and regulatory requirements as to preparation of DPDs and (ii) whether it is sound.

Access to justice – not Judicial Review

PCPA S. 113 provides that "A person aggrieved by a relevant document may make an application to the High Court on the ground that a procedural requirement has not been complied with". If the High Court is satisfied that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement the High Court may quash the document in whole or in part. The application is as of right, in accordance with the terms of the Aarhus Convention Agreement, and failure to comply with the procedure is substantive.

Development

To any developer the DPDs are crucial. Any body, professional or layman, with an actual or potential interest in land, even of small area, which has development potential, should now concentrate on making representations at the pre preparation stage of DPDs, for favourable inclusion within the relevant DPD. If that is not possible, when appropriate, representations should be made after advertisement of the availability of the submission

documents for inspection and at the examination as to non-compliance with the legal requirements and/or the unsoundness of the document.

In relation to large developments it may be wiser to challenge the validity of the DPD, than to make doomed application for permission to develop contrary to the provisions of the DPD. However reluctantly, the Court will quash a document if the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement; *Ensign Group Ltd v Secretary of State* [2006] EWHC 255 (Admin).

ENFRANCHISEMENT UPDATE

So now we know, there is hope value in respect of non-participators under Schedule 6 of the 1993 Act but not otherwise. Hope value may perhaps most simply be understood as the additional value to purchasers of selling at an enhanced price to a special purchaser, normally of course the tenant. The House of Lords are agreed that there is no hope value to be valued under the 1967 Act whether in its original form or as amended, because marriage value on the sale to the tenant is already taken into account, logically leaving no scope for any additional value for a later potential sale to the tenant. Equally that there is no scope for hope value when valuing the price of a lease extension under Schedule 13. However, by a majority led by Lord Neuberger of Abbotsbury, and adopting what the dissenting voice of Lord Hoffman described as heroic methods of construction, their Lordships have decided to allow hope value to be added in the case of a freehold acquisition under Chapter I.

Those heroic construction arguments are to be found principally at paragraphs 105 to 108 of the opinion of Lord Neuberger. The first argument is that if the words in para 3(1) excluding from the market the nominee purchaser and any participating tenant are given a broad meaning, as was common ground, then the inclusion of the assumption at 3(1)(b) that Chapters I and II confer no right to acquire any interest has no point, and therefore may be taken to suggest that one should not disregard the possibility of the market taking into account at least some of the flat tenants seeking to negotiate new leases of their respective flats. The second, rather more convincing argument, is that the bracketed words of paragraph 3(1)(b), which permit taking into account a notice under section 42, open the way to hope value. Firstly, because they naturally permit some hope value given the tenant's right to pull out of his claim to a lease extension. Secondly, because the section entitles the landlord to rely upon the notice as

evidence of the interest of non-participators and thus hope value, given that the words in brackets require account to be taken of the notice itself rather than the rights which accrue pursuant to it. Lord Hoffman's comprehensive demolition of such reasoning and the points made by Lord Walker, however, makes cogent reading. He was not prepared to accept that there was the unfairness to freehold reversioners, by including marriage value for participators but excluding hope value for all tenants, which apparently drove the majority of their lordships to the conclusion by which we are all presently bound.

A major question that remains, however, is how hope value is best to be valued. This might be done by some downward adjustment to the deferment rate or by a percentage of marriage value. Neither approach appears to be endorsed in the opinions of their Lordships (see Lord Neuberger's comments at paragraphs 86 to 88 with reference to *Shulem B* [2001] 1 EGLR 105). Further, it remains to be seen what evidential basis will be required to establish hope value. The extent for example that tribunals will expect to hear evidence of interest from non-participators. The old cases will no doubt be revisited for guidance; such as *Becker Garden Properties Lt v. Garden Court NW8 Property co Ltd* [1998] EGLR 121 (where no award for hope value was made because it was held to be too remote a possibility given the 80 years unexpired terms), *Maryland Estates v. Compana Court Ltd* (a similar nil award though with only 69 years unexpired) and *Blendcrown Limited v. The Church Commissioners for England* [2004] 1 EGLR 143 (awarding hope value at 5% of marriage value with 63 years unexpired, in the case of non-participating flats only).

Further, essential advice for tenants and reversioners alike emerges clearly from the decision of the Court of Appeal in *Goldeagle Properties Limited v. Thornbury Court Limited* which revisited some of the issues arising in *Penman v. Upavon* and *Sinclair Gardens Investments (Kensington) Ltd v. Eardley Crescent*. The appellant Thornbury Court was the freehold owner of the eponymously named a block of flats. The respondent Goldeagle was the nominee purchaser (comprising not less than one-half of the qualifying tenants of the block).

The key facts were that the tenants served their initial notice on 07 February 2005 identifying the interests to be acquired, essentially the prices for each of the flats. The reversioner served a s.21 counter-notice on 15 April 2005. This admitted the right to collective enfranchisement and the proposed prices of some of the interests to be acquired. It disputed the prices of the remainder of these interests. It made counterproposals in respect of these. Importantly, it also enclosed draft transfers containing provisions

'in accordance with s.34 and Sched.7 of the Act' which it said it considered should be in the ultimate conveyance. The terms of the drafts were neither explicitly accepted nor challenged by Goldeagle's solicitors at the time.

The reversioner also took the initiative by issuing an application to the LVT on 11 July 2005. In its application form it said the purpose of the application was 'to determine the amount payable as the purchase price' of the identified interests, i.e. those whose price had been disputed in the counter-notice.

In its Statement of Case the reversioner went in to more detail, noting under the general heading Issues in Dispute that it had not received any response to the counter-notice and the annexed terms of the conveyance and reserved the right to provide further submissions should the same be necessary. Under the heading Section 33 costs it referred also to the fact that the conveyance had yet to be agreed so that determination of such costs would be premature.

In reply the nominee purchaser when dealing with Issues in Dispute, under the heading Conveyance stated that it would amend and return the Contract and simply concurred in the point made by the reversioner regarding the section 33 costs. The LVT made a decision and two subsequent correcting decisions, the later of which was dated 22 August 2006. The LVT fixed the disputed prices but said nothing about the terms of the conveyance or s.33 costs. It was common ground that the decision of the LVT became final on 14 September 2006. Correspondence between the parties ensued but it was not until 13 November 2006 that Goldeagle's then solicitors stated in a letter of that date that their clients had signed the contract (incorporating the terms of the transfer originally sent with the counter-notice).

Thus on the one hand there had never been any actual dispute about the terms of the conveyance whilst on the other hand agreement was not stated until the November letter. In these circumstances the central issue was whether an application for a vesting order made on 09 February 2007 was out of time. The argument turned on the provisions of s.24 which require an application within 2 months of the end of the appropriate period, and define the appropriate period where 'all or any' of the terms of acquisition have been determined by the LVT as the period of 2 months beginning with the date when the decision of the tribunal becomes final. The Appellant's first argument was that the basic scheme of the 1993 Act was that there should be only one application and that therefore when the decision of the LVT became final time began to run. Jacob LJ however accepted the

point made in *Penman* by Arden LJ that section 24(3) was the 'controlling provision' so that an application for a vesting order could only be made when all and not just some of the terms of acquisition had been agreed between the parties or determined by the LVT. The Court also rejected an argument that the terms of the transfer must be taken to be agreed because the nature of such terms is implicit in the fixing of the prices. In dismissing the appeal the Court of Appeal also thereby affirmed the decision of HHJ Huskinson who had rejected similar arguments, based on the LVT being limited to issues expressly put to it for decision and the dangers of a party otherwise inventing disputes to avoid a deemed withdrawal.

What must be done, therefore, to avoid 'the rabbits out of the hats.' In short parties (reversioners on a falling market, tenants on a rising market) must be astute to ensure that all possible points that have not been positively agreed are expressly raised before the LVT and the tribunal asked to determine them. With regard to the terms of the transfer, the kind of directions that LVT's commonly now make regarding the preparation of a travelling draft should be followed and ultimately the LVT asked to recite its approval of the draft in the form it has reached at the date of its decision. Provided the potential areas of dispute can be exhausted in this way, the 4 months from the date the LVT's decision becomes final should coincide with the period for applying for a vesting order and some certainty will be achieved.

Lastly, to another notable decision on *Sportelli v Cadogan*, namely the decision of the Southern LVT in *Poets Chase* (Case No. CAM/00KF/OCE/2008/0019), which gives a clear indication of the likely approach of LVT's to deferment rates even in non prime central London areas. The LVT accepted the landlord's proposition that *Sportelli* does provide a generic deferment rate, and that it should be followed even in the case of non PCL properties unless there is clear evidence to justify a departure. They were reinforced in this view by the decision of the Lands Tribunal in *Hildron Finance Limited v. Greenhill Hampsted Limited* [2008] 1 EGLR 179, that any departure from *Sportelli* has to be justified on the evidence with regard to the components of the rate as defined in *Sportelli*. Whether the 'credit crunch' presents an opportunity for a renewed attack by tenants remains to be tested.

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(In relation to property cases in the Privy Council)

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