

NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Farmland prices at record high

The price of farmland property reached an all-time high during the first half of 2011, according to the latest RICS *Rural Land Market Survey H1 2011*.

Surveyors estimate that the average price per acre increased to £6,115 during the first half of the year, reaching record levels for the second consecutive period.

Interest from potential buyers of commercial farmland continued to surge, with 50 % more respondents reporting increases rather than decreases in demand. Surveyors say this is driven largely by increasing demand from commercial farmers who are looking to expand production on the back of elevated commodity prices.

Alongside rising demand, land availability increased for the first time in three years: 27 % more respondents reported rises rather than falls in commercial farmland coming onto the market, while a net balance of seven noted an increase in residential farmland availability. Although positive, these increases were not enough to keep pace with the growing level of demand.

During the first six months of 2011, all areas of Britain experienced rising farmland prices, with the exception of the North West and Wales, where prices dipped. However, farmland in these areas was also the most expensive, with surveyors reporting prices of £6,938 and £6,500 per acre respectively.

Surveyors predict farmland prices will continue to rise in the next year, with strong growth expected in the commercial farmland market (net balance +42) but a flatter trend in the residential sector (net balance 0).

Review calls for abolition of stamp duty land tax

Stamp duty land tax (SDLT) is among “the most inefficient and damaging of all taxes” and should be abolished, a new independent report on taxation in the UK recommends.

The *Mirrlees Review*, carried out by the Institute for Fiscal Studies (IFS), calls for SDLT – which is charged on all land transactions in the UK – to be replaced with a reformed council tax system. This new housing services tax would be based on real property values, and would “effectively stand in place of a VAT on housing”.

The proposal is part of a package of reforms which could increase national income by as much as 1.4%, according to figures by the IFS.

The review slams SDLT as an “obviously stupid” tax which stops people from moving home because of the huge tax bill associated with buying a new property.

It adds: “Stamp duty ensures that properties are not held by the people who value them most. It creates a disincentive for people to move house, thereby leading to potential inflexibilities in the labour market and encouraging people to live (and businesses to operate) in properties of a size and in a location that they may well not otherwise have chosen.”

The report labelled the tax of housing in the UK “a mess”, claiming that renting is needlessly penalised by the tax system. Council tax was also criticised for still being based on 1991 valuations

and being unnecessarily regressive.

The report also called for a more reliable method of environmental taxation, including a consistent price on carbon emissions from different sources. This could include a tax on domestic gas consumption, it said.

Sir James Mirrlees, who led the review, says his findings show that the current tax system imposes “unnecessary costs” on the economy.

“There is no getting away from the political difficulty associated with some of the proposed changes. But there is also no getting away from the enduring costs of failure to reform,” he adds.

Corporate landlords must improve service charges arrangements

Corporate landlords must buck up their ideas when it comes to service charges and the environment, according to an annual survey of corporate occupiers.

The *Occupier Satisfaction Survey* – which measures the satisfaction of corporate occupiers in the UK based on the *Code for Leasing Business Premises in England and Wales* – found that occupiers were happier overall with their landlords than in 2010, but that low satisfaction with service charge arrangements remains.

Landlords scored well when it came to occupier satisfaction, with the leasing process, rent review terms and conditions achieved in lease negotiations and the process of relinquishing a property, notching up an

average score of 6.2 out of 10.

But landlord interaction on environmental issues averaged only 4.0 out of 10, while satisfaction with service charge arrangements scored just 4.3 out of 10. Almost a quarter of respondents said that either “a minority” or “none” of their landlords provided a service charge budget.

Matthew Baker, property lawyer with Pinsent Masons, says better communication between landlords and tenants is paramount. “Disputes occur when there has been a breakdown in communication and can be costly in terms of time, money and damaging landlord and tenant relationships. The commonsense approach of talking to each other has to be the way forward.”

Contents

What to do about squatters?	2
In practice	3
Legislation update	6
Case digests	7

Editor:

Lucy Trevelyan
lucy.trevelyan@lexisnexis.co.uk

Designer & Typesetter:

Heather Pearton
heather.pearton@lexisnexis.co.uk

Customer Services:

0845 370 1234
customerservices@lexisnexis.co.uk

Publishing Director:

Simon Collin
Published by LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission in writing of the publishers.

Printed by Headley Brothers Ltd.

ISSN: 2040-0128

 LexisNexis®

What to do about squatters?

Michael Walsh explores the various options being mooted for dealing with squatters

Background

There has been much in the news recently about the problems with trespassers, or squatters, going into possession of residential and commercial property across England & Wales. The *Evening Standard* recently ran a story about a couple expecting their first child who were deprived of possession of their newly purchased home because squatters had moved in. Those squatters eventually gave up possession after the couple obtained an interim possession order (IPO) at Central London County Court.

Options for change

The recent media coverage has prompted the government to consult on changing the law in the Ministry of Justice's paper, *Options for dealing with squatting*, with five suggested options:

1. create a new offence of squatting in buildings;
2. expand the existing offence in s 7 of the Criminal Law Act 1977 (CLA 1977);
3. repeal or amend s 6 of CLA 1977;
4. leave the criminal law unchanged but work with the enforcement authorities to improve enforcement of existing offences; and
5. do nothing: continue with existing sanctions and enforcement activity.

CLA 1977

Section 6 of CLA 1977 makes it an offence for any person to, without lawful authority, use or threaten violence to secure entry into any premises where there is a person present in the premises who is opposed to the entry and the person using or threatening the violence knows that is the case.

This essentially makes it an offence for the owner of land to enter onto it to evict squatters without an order of the court. Subsection 1A states that this does not

apply to a displaced residential occupier or a protected intending occupier (as defined by s 12A of CLA 1977), or any person acting on their behalf.

Section 7 of CLA 1977 makes it an offence for any person who remains on premises as a trespasser, having entered into them as such, if he is required to leave by or on behalf of a displaced residential occupier or an individual who is an intending occupier of the premises (see s 7(1)). There is a defence if the trespasser believed the person asking him to leave was not a displaced residential occupier or an individual who is an intending occupier, or a person acting on their behalf. Sections 6 and 7 only apply to residential property.

Court action

Where the owner of residential or commercial property cannot avail himself of the provisions of the CLA he must go to court to seek an order for possession and issue proceedings under CPR Pt 55 against the trespassers. Although in some courts the process can be quicker than ordinary possession proceedings against tenants, there is usually a frustrating delay. There is also the option of seeking an IPO under CPR 55.20, which can be sought where the claimant is only seeking possession and no other remedy; the claimant has an immediate right to possession and has had such a right throughout the period of unlawful occupation and the defendants entered the premises as trespassers.

It is a criminal offence for a trespasser to remain on the property more than 24 hours after served with an IPO under s 76 of the Criminal Justice and Public Order Act 1994. The difficulty with this type of possession order is that it requires the support of the police, who, in some circumstances, may have different priorities. If they are planned properly,

TANFIELD CHAMBERS
TC

IPOs can be very effective. A call should be made to the local police station as soon as an order is obtained and a senior officer informed of the existence of the order.

Criminal penalties

Much of the media's attention appears to be focused on the introduction of harsher criminal penalties for those who trespass and remain in occupation of land where they have no right to be there. Indeed, the consultation paper looks at strengthening or adding to the criminal law penalties as part of the solution to the perceived problem of squatters. However, one has to look at the depth of the problem before jumping to the conclusion that the criminal law is the only way to stop squatting. The government estimates that there may be 20,000 people squatting at any one time and states that the civil courts granted 216 IPOs under CPR 55.3 and 531 ordinary possession orders under CPR 55.1 against trespassers in 2010. The question begged by these statistics is whether they warrant the introduction of harsher or amended criminal sanctions where the civil courts are imposing possession orders on this scale?

There is no doubt that the current system allows for the removal of those trespassing on land without the licence or consent of the owner but the real issue appears to be the time it takes to remove these people. It does not follow that if stricter criminal sanctions are introduced, landowners will be able to remove trespassers more easily. Removal of these people will require the attendance of the police, who may be unable to attend because of other priorities. If the scope of law is expanded to include non-residential property we will find an explosion in the number of cases requiring police attendance. The cure, therefore, may not be in the criminal law.

Possession not punishment

All landowners are usually interested in is possession of their property, and

not the punishment of the trespasser, who may be someone unable to house themselves through their own means or through their local authority. The likely punishment is a fine; but is a fine a suitable punishment for someone with no money in the first place?

The creation of greater criminal powers is a double-edged sword: it allows the police to simply arrest trespassers on land but it puts more pressure on the over-stretched police force to remove the trespassers.

The criminal law currently provides protection to displaced residential occupiers and intending occupiers of the property but under option 2 of the consultation paper, the government suggests that this be extended to squatters who refuse to leave other types of property. Although, once again, this is dependent on the

availability of the police, this power would be welcome as an alternative to seeking a civil remedy and may prevent trespassers moving between commercial units.

In some county courts there is nothing wrong with the speed of civil proceedings in trespasser claims but the availability of bailiffs to enforce the possession order is often the problem. If landowners could enforce their order immediately after it had been made delays of weeks may be avoided and possession regained more quickly.

Rather than legislating to cure the problem the answer may lie in having more bailiffs available to enforce the current law more effectively.

Conclusions

In summary, the law provides adequate protection to displaced

residential occupiers and protected intending occupiers but there appears to be a lack of awareness of their rights to require squatters to leave. Extending the application of CLA 1977 to non-residential premises would be a welcome addition to the criminal law.

Whereas criminal sanctions exist for police to act to remove trespassers, they are often reluctant to do so where they cannot determine the owner's right to possession. One remedy to this would be new guidelines for the police requiring them to be more robust where there is *prima facie* evidence that the person in occupation is a squatter. Furthermore, greater clarity and a speedier eviction process would be a welcome addition to the current criminal powers.

Michael Walsh
Barrister
Tanfield Chambers

No zero-rating for care homes and hospices

Works to a residential care home and a hospice were extensions, rather than the construction of new buildings. The supplies of construction services did not qualify for zero-rating, but were standard-rated

The supply of construction services in the course of construction of a building designed as a dwelling, or number of dwellings, or intended for use solely for a relevant residential or charitable purpose, is zero-rated. Use for a relevant residential purpose includes a residential care home for the elderly and a hospice.

Construction of a building does not include:

- conversion, reconstruction or alteration of an existing building;
- enlargement of, or extension to, an existing building (except to the extent it creates an additional dwelling or dwellings);
- the construction of an annexe to an existing building (except where the use is solely for a relevant charitable

purpose and the annexe is capable of functioning independently and there are separate main accesses).

In *Cantrell (No 1)* [2000] All ER (D) 94, Lightman J confirmed that in considering the nature of a new building regard must be had to:

- appearance;
- layout;
- potential uses and function.

In *TL Smith Properties v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 528 (TC), the First-tier Tribunal (Tax) held that works to a residential care home/nursing home for the elderly did not qualify for zero-rating. The new structure was an extension or

enlargement of the existing building. It was built to accommodate residents who needed nursing care, but it was joined to the original building on both floors with internal access for staff throughout. Key services, kitchen and laundry were also shared. It was not self-contained and could not function independently.

In *Treetops Hospice Trust v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 503 (TC), the tribunal held that the construction works to create a new building, adjoining a hospice, did not qualify for zero-rating, despite the visual contrast between the two. It was an extension. Two lockable doors providing double access routes between the old and new buildings demonstrated clear integration. The old and new buildings were equipped to function as one integrated whole offering a comprehensive day care service.

Even if the new building was not an extension/enlargement, it was an annexe. It did not come within the statutory exception as while the old and new buildings had their own main access, they were not capable of functioning independently of each other. The new building could not offer the full range of services on its own.

Joanna Bhatia

Scheme launched to combat mortgage fraud

1 September 2011 saw the formal launch of the Mortgage Verification Scheme – a new weapon against mortgage application fraud

HM Revenue & Customs, the Council of Mortgage Lenders and the Building Societies Association worked together to develop the Mortgage Verification Scheme to combat mortgage fraud by applicants which range from applicants who are mildly creative with their accounting; those who expressly mislead a lender on salary figures; to organised criminal rings that defraud lenders with assistance from brokers, solicitors and valuers.

The Financial Services Authority (FSA) introduced the Information From Lenders (IFL) scheme in 2007 under which lenders and brokers can voluntarily report cases of proven or suspected mortgage fraud where there is strong suspicion of intermediary involvement. However, with the National Fraud Authority estimating that the cost of mortgage fraud in the last year alone is around £1 billion, further measures were required.

Where they reasonably suspect mortgage fraud, lenders can now send relevant details of mortgage applications to HMRC using a secure electronic platform. HMRC can check the declared income details shown on the applications against information already held by it from income tax and employment returns to see if they correspond.

HMRC has set up a specialised unit to deal with the requests. It is not anticipated that the scheme will have any significant impact on the time taken to reach a lending decision and its intended use is limited to cases where lenders reasonably suspect, following rigorous checks, that mortgage fraud may be taking place. However, any mortgage lender can use the scheme subject to payment of a fee of £14 plus VAT per case and so, at such a low cost (which will inevitably be passed on to the applicant) a concern has to be that lenders will choose to run the check anyway, inundating the specialised unit and causing delay.

In practice, mortgage approval is often the last thing a practitioner is waiting for before exchange of contracts and it is not yet clear at what stage lenders will be able to pay for and use the scheme. Lenders may have to complete their own processes before making an application to HMRC. This may lead to lenders changing their own decision shortly before drawdown causing wasted work for practitioners and heartache for those involved in a collapsed chain. It may be that lenders decide it is more expeditious to obtain authority from applicants for HMRC to provide certified figures from the outset rather than completing lender's forms only for

the lender to seek confirmation of figures directly from HMRC. Whatever happens, it is difficult to believe that the scheme will not lengthen the overall process.

Safety net or deterrent?

It is yet to be seen whether the scheme will be used as a safety net that encourages lending or whether it will deter mortgage applications – particularly for those with more complicated incomes such as the self-employed or those on bonus incentive/commission based salaries – for fear of having their figures scrutinised or due to the difficulty in proving income.

The scheme depends on HMRC having a tax return or employment documentation against which to verify an applicant's information and so will only work in certain situations. HMRC's information will also become quickly out of date as forms such as the P60 and P35 are only submitted once a year. Payslips will prove salary and bonus/commission details but this is the same information as has already been provided to the lender.

To combat mortgage fraud, it will remain crucial for mortgage lenders to continue to work on their own anti-fraud criteria by improving working practices for fast-track loans (which sometimes require less anti-fraud checks than other forms of lending). They must satisfy themselves as to the brokers' suitability on an ongoing basis and not just check they are on the FSA-approved list of brokers.

The scheme will, of course, assist HMRC to assess whether details given in relation to an applicant's tax affairs is correct and aid it in its own fight against tax evasion.

Elinor Clark

Light at the end of the tunnel?

The latest version of the Localism Bill contains amendments to the tenancy deposit scheme legislation, designed to redress the balance in favour of tenants following the recent run of cases weighted in favour of the landlord. It remains to be seen whether they will be enacted

Housing Act 2004, pt 6, ch 4 set up tenancy deposit schemes (insurance-based or custodial) to safeguard

tenancy deposits paid in connection with assured shorthold tenancies, provided for the imposition of

sanctions (for failure to comply with the scheme requirements) and set up structures for the resolution of disputes.

The legislation provides that if the landlord has failed to comply with the initial scheme requirements, or give the tenant information in relation to the applicable authorised scheme in prescribed form, the tenant can make an application to court.

The court must take action if it is satisfied that:

- the requirements have not been complied with or the prescribed notice has not been given; or

- the deposit is not being held in accordance with an authorised scheme.

It must order:

- the return of the deposit or its payment into an authorised scheme;
- the landlord to pay to the tenant three times the deposit.

Court decisions

Court decisions have undermined the tenant's protection. Landlords have until the hearing date to comply with the scheme requirements (*Tiensia v Vision Enterprises* [2011] 1 All ER 1059), and will still have complied even if they do so after the tenancy has ended (*Potts v Densley* [2011] All ER (D) 54 (May)), but, in fact, need not do so, as the court can only penalise them if the tenancy subsists (*Gladehurst Properties v Hashemi* [2011] All ER (D) 180 (May)).

In *Harvey v Bamworth* [2008] 3 EGLR 66, the county court judge drew a distinction between a landlord's failure to comply with the scheme in its entirety and the default of providing the prescribed information outside the limits set by the legislation. The judge held that where the landlord

had complied with the scheme, but had provided the required information outside the 14-day time limit, the punitive provisions that were appropriate to a complete failure to comply should not be applied. The landlord who gave the prescribed information outside the statutory time limit, did not have to pay the penalty sum equal to three times the deposit.

However, the substantive requirement to provide the prescribed information remains important. In *Suurpere v Nice* [2011] All ER (D) 36 (Aug), the High Court held that a landlord was in breach of the legislation as it had failed to provide the tenant with the prescribed information. It was liable to pay the tenant three times the deposit. The court acknowledged that the primary focus in recent cases on the scheme had been the deposit. However, it was clear that a landlord's obligations are twofold. This was a rare victory for tenants.

Proposed amendments

The Localism Bill contains amendments designed to redress the balance back in favour of tenants. They were introduced by the government at the House of Lords committee stage. The current amendments:

- place strict liability on the landlord to protect the deposit and provide the prescribed information within 30 days;
- clarify that if the landlord fails to comply with any of its obligations the tenant can make an application to court and can do so even where the tenancy has ended;
- provide that the court must make an order (for the return/payment of deposit into a designated account and payment of a penalty) if the landlord has not complied with any of its obligations;
- provide that if the tenancy has ended the court may simply order the return of the deposit (in other cases it can order its return or payment into a designated account as it sees fit).

However, it is not all bad news for landlords. Presumably to counteract the fact that the court must make an order whatever the breach, the amount of the penalty is not less than the amount of the deposit and not more than three times the deposit.

It remains to be seen whether the amendments will survive until royal assent.

Joanna Bhatia

Once is enough

A trespass victim cannot recover twice for the same wrong, the Court of Appeal has held

In *Ramzan v Brookwide* [2011] All ER (D) 90 (Aug), the Court of Appeal considered the assessment of damages for the misappropriation by Brookwide of a room owned by Ramzan. Ramzan had a flying freehold interest in the room on the first floor of a property (123), owned by Brookwide, which adjoined another building he owned (125). Brookwide's builders took down the wall separating the room from the rest of 123 and bricked up the entrance from 125.

The Court of Appeal held that:

- Ramzan had suffered a single wrong; misappropriation of the room. He could only recover once for the same wrong. If his claims for damages were inconsistent he had to make an

election between the two causes of action (trespass and breach of trust).

- Ramzan should not have been awarded damages for breach of trust as well as loss of profit for the trespass. They were not cumulative, but alternative and inconsistent remedies. To award both would award him damages measured both by Brookwide's gain and his own loss. He could not use the room at the same time as Brookwide obtained a profit from renting out the first floor of 123, using the room.
- the court had to treat Ramzan as having elected to receive the larger award; damages for loss of profits (for the trespass) alone and not the damages for breach of trust.
- Ramzan should not have been awarded mesne profits in addition to

damages for loss of profits. He had used the room as a store, but after the misappropriation, another room in 125 could have been used. There was no evidence that his business needed to hire or use other space to compensate for the loss of the room as storage. The loss caused by the misappropriation of the room was the inability to use the first-floor function room of 125 (due to lack of fire escape via the room). Ramzan could not establish any further actual loss.

- having "elected" for compensatory damages, Ramzan should not be awarded exemplary damages to give him the benefit of the alternative, inconsistent claim which he elected not to take. Had he elected to take an account of profits for breach of trust he could have stripped Brookwide of all remaining profit such that there would have been no scope for exemplary damages. However, the judge's finding in the court below that some award of exemplary damages was necessary to deter Brookwide from similar conduct elsewhere, was unchallenged.

■ In practice/ Legislation

■ the Court of Appeal found that Brookwide's conduct in misappropriating the room was a "totally unacceptable way of resolving the issues as to the ownership of property in a democratic society

subject to the rule of law". However, the award of exemplary damages need not be substantial to make the point. ■ The court also confirmed that as loss of profits must necessarily be based on a projection of what they would have

been, but for the trespass, such claims are not capable of precise calculation and the court must do the best it can to assess the amount of the loss.

Joanna Bhatia

Legislation update

<p>Legal Services Act 2007 (Designation as a Licensing Authority) Order 2011</p>	<p>Enactment Citation SI 2011/2038</p> <p>Commencement Date 12 September 2011</p> <p>Enabling Power Legal Services Act 2007, s 208(2)</p>	<p>Designates the Council for Licensed Conveyancers as a licensing authority in relation to reserved instrument activities, the administration of oaths and probate activities. The council is already an approved regulator in relation to these reserved legal activities by virtue of Pt 1 of Sch 4 to the Legal Services Act 2007.</p>
<p>Access to the Countryside (Appeals against Works Notices) (England) Regulations 2011</p>	<p>Enactment Citation SI 2011/20</p> <p>Commencement Date 1 October 2011</p> <p>Legislation Affected Access to the Countryside (Means of Access, Appeals) (England) Regulations 2004 revoked</p> <p>Enabling Power Marine and Coastal Access Act 2009, s 316(1), Sch 20, para 4(5); Countryside and Rights of Way Act 2000, ss 38(6), 44(2), 45(1)</p>	<p>Makes changes to the appeal procedure for advertising works notices. Provide for the period within which, and the manner in which, appeals under s 38(1) of the Countryside and Rights of Way Act 2000 and para 4 of Sch 20 to the Marine and Coastal Access Act 2009 are to be brought, and also make provision for the advertising of those appeals and for the appeal procedures. In particular:</p> <p>(a) Part 2 (regs 4-12) of these regulations relates to the initial stages of appeal and include provision as to how appeals are to be made and the period within which they are to be brought;</p> <p>(b) Part 3 (regs 13-37) of these regulations relates to the determination of these appeals and set out the procedures for—</p> <p>(i) appeals to be determined on the basis of written representations (Ch 1, regs 13-15);</p> <p>(ii) appeals to be determined by way of a hearing (Ch 2, regs 16-24);</p> <p>(iii) appeals to be determined by way of an inquiry (Ch 3, regs 25-37); and</p> <p>(c) Part 4 (regs 38-45) of these regulations contains general provisions, including provision for allowing further time for taking any step required by these regulations (reg 40) and provision for the inspection and copying of documents (reg 41).</p> <p>These regulations revoke the Access to the Countryside (Means of Access, Appeals) (England) Regulations 2004 (reg 45).</p>
<p>Access to the Countryside (Exclusions and Restrictions) (Amendment) (England) Regulations 2011</p>	<p>Enactment Citation SI 2011/2021</p> <p>Commencement Date 1 October 2011</p> <p>Legislation Affected SI 2003/2713 amended</p> <p>Enabling Power Countryside and Rights of Way Act 2000, ss 32, 44(2), 45(1), and 94</p>	<p>Part 1 of the Countryside and Rights of Way Act 2000 (the Act) confers a public right of access to certain types of land, subject to certain conditions. Chapter 2 of Pt 1 provides for the exclusion or restriction of this right in certain circumstances. Chapter 2 was modified by art 8 of, and Pt 3 of the Sch to, the Access to the Countryside (Coastal Margin) (England) Order 2010 (SI 2010/558) (the Coastal Margin Order) in relation to land which is coastal margin (as defined by s 1(2) of the Act). These regulations amend the Access to the Countryside (Exclusions and Restrictions) (England) Regulations 2003 (SI 2003/2713) (the 2003 regulations) which were themselves amended by the Access to the Countryside (Exclusions and Restrictions) (England) (Amendment) Regulations 2006 (SI 2006/990).</p> <p>The 2003 regulations contain provision relating to the exclusion or restriction of the right of access conferred by Pt 1 of the Act, and in particular set out the procedures on an application to a relevant authority (as defined by s 21(5) of the Act (a)) for a direction excluding or restricting access under Pt 1 of the Act. They also set out the procedure for an appeal under the Act where a relevant authority has decided not to act in accordance with an application for a direction. These regulations amend the 2003 regulations as they relate to land which is coastal margin, by:</p> <p>(a) specifying the information to be included in an application for a direction under s 24 or 25 (reg 4); and</p> <p>(b) making amendments consequential on the insertion by the Coastal Margin Order of s 25A (power to make directions to exclude or restrict access on salt marshes and flats) in Ch 2 (regs 5-10).</p> <p>These regulations also:</p> <p>(a) amend reg 9 of the 2003 regulations (consultation on proposals for long-term exclusions or restrictions) to streamline the requirements for the provision of information during a consultation (reg 6); and</p> <p>(b) remove the right of the appellant or the relevant authority to request site inspections in certain circumstances on an appeal (regs 13, 16 and 20).</p>

Case digests

Franks and another v Land Registrar
[2011] All ER (D) 59 (Jul); [2011] EWCA Civ 772
7 July 2011

Land Registration – Appeal – Procedure – Applicants applying for registration of land by adverse possession – Adjudicator cancelling application – Whether judge correct in ordering reinstatement of application with original priority date.

On 18 April 2005, the applicants applied to the Chief Land Registrar (the registrar) to be registered as proprietors of a strip of land on the basis that they had acquired title to it by adverse possession. Their neighbours, the third and fourth respondents, were the registered proprietors of the land. They objected to the application. The registrar referred the dispute to the Adjudicator to HM Land Registry (the adjudicator) who ordered that the registrar cancel the applicant's application. That order had not been based upon the merits of the application, but was by way of a sanction following a procedural default on the part of the applicants in their prosecution of the reference to the adjudicator. No stay of the adjudicator's order pending an appeal was ordered and the registrar cancelled the application. The applicants appealed to the High Court against the adjudicator's order. The appeal was allowed and the order set aside. The registrar was not notified of the successful appeal for 18 months. Consequently, nothing had been done to give effect to the court's order and two charges in favour of third parties had been created over land, including the disputed land. The applicants applied to the High Court to have their original application restored as if it had never been cancelled. The judge ordered the registrar to restore the original application with effect from 18 April 2005 (the restoration order). The registrar appealed.

He submitted that the judge had had no jurisdiction to make the restoration order. Consideration was given to CPR 52, the Land Registration Act 2002 and the Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003, SI 2003/2171.

The appeal would be dismissed (Arden LJ dissenting).

In a case where no third party had acquired or applied for an interest in the

land (a "no third party interest" case), the court had jurisdiction, following a successful appeal, to make a restoration order. However, it might be that the time for inquiry as to whether any such interest had, in the meantime, arisen was not only when the court made its order but also at the later stage when the registrar came to give effect to it. If the court had jurisdiction in a no third party interest case to make a restoration order, it also had jurisdiction to make a restoration order in a third party interest case. There was no logical basis for the proposition that, once a third party interest had intervened, the jurisdiction disappeared. The only question that circumstances such as those provoked was whether the jurisdiction should be exercised, and if yes, on what, if any, terms and conditions.

The judge had had jurisdiction to make the restoration order. Whether he should have exercised his jurisdiction in the way he had, had been a matter for his discretion.

Re Frontsouth Ltd (in administration)
[2011] All ER (D) 41 (Jul); [2011] EWHC 1668 (Ch)
30 June 2011

Company – Administration order – Discharge and extension of order – Whether order could be extended despite previous extension invalidly made – Whether appropriate for fresh application to extend to be made and backdated – Insolvency Act 1986, Sch B1, paras 22(2), 76(2)(B), 78(2) – Insolvency Rules 1986, r 7.55.

Two companies, BHWL and FWL, had entered into administration. FWL had acted as a holding company for BHWL, which it owned entirely. BHWL had sought to develop two properties, which would offer accommodation to the elderly. In December 2008, after that venture had failed, the directors were advised to put both companies into administration. Administrators were appointed in January 2009. Under para 22(2) of Sch B1 of the Insolvency Act 1986 (the Act), the appointments ceased to have effect after one year unless validly extended. In January 2010, the administrators sought a six-month extension by consent of their appointment, under para 76(2)(b) of Sch B1. Under para 78(2) of that schedule, consent was required for the extension to be valid: in the case of FWL, from the bank and employees, and in the case of BHWL, from two secured creditors (the creditors). In the event, valid consent was not obtained in the case of BHWL, although the administration

continued on the assumption that it had been validly obtained. In March 2010, to cover a period of negotiations regarding a new sale and marketing agreement, the administrators sought to extend the period of administration. In the case of a second administration period, an order had to be sought from the court. The administrators successfully applied for that order, seemingly without the previous extension being properly brought to the court's attention. In June 2011, the administrators sought further extensions for FWL and BHWL.

Two issues arose: (i) whether the defect in the previous extension could be waived under r 7.55 of the Insolvency Rules 1986 and the invalid extension of the administration could be declared valid under para 104 of Sch B1; and (ii) whether it was apt to allow a fresh, retrospective administration order to be made.

The court ruled:

- (1) It would be appropriate to extend the administration with regard to FWL for 12 months. Both of the prior extensions had been validly made, and this application had been made in good time before the expiry of the existing extension.
- (2) It would not be possible to use r 7.55 to cure the defect in the purported extension by consent of the administration of BHWL. The initial period of administration had expired in January 2010. Thereafter the court had no jurisdiction to extend it and the administrators had failed to act with authority. The extension of June 2010 had been made without jurisdiction and would be a nullity. The result of the failure to obtain a written consent in good time had been that the initial period of administration had expired in January 2010. Where the appointment was invalid to begin with, it would not be possible to rectify it by extension. The defect would be fundamental. It would be impossible to waive the defect in the administration of BHWL.
- (3) It would be appropriate for a fresh application to be made by the bank in its capacity as a creditor of the company, as opposed to the administrators. The appointment of administrators could be backdated so it would take place 364 days before the date of the order.

Eastern Power Networks Plc v BOH Ltd
[2011] All ER (D) 189 (Jan); [2011] EWCA Civ 19
26 January 2011

Easement – Right of way – Extinguishment – Merger – Claimant owning freehold

Case digests

and tenancy of plot of land – Freehold of larger land parcel held by claimant and defendants together – Claimant seeking to exercise rights of way over defendants' land as granted by tenancy – Whether merger of claimant's rights as freeholder and tenant.

In 1953, the claimant, a public utility supplier, took a 42-year tenancy of land in North London. The tenancy was in respect of three parcels of land (plot 2, plot 26 and plot 31) which adjoined one another. A fourth plot of land (plot 20) also formed part of the land but was not leased to the claimant. Plot 20 abutted the road. The claimant built an electricity substation on plot 2. The lease conferred upon the claimant rights of way over plot 20 and also the right to lay cables under the highway and under plot 20. The cables passed from plot 2, under plots 26 and 20 and from there under the highway. The freeholder owned plot 20 and the highway, so could grant those rights. The property comprised in the tenancy created by the lease was or included premises occupied by the claimant for the purposes of a business carried on by it. Consequently, Pt II of the Landlord and Tenant Act 1954 (the Act) applied. The tenancy was due to end in June 1994, but the effect of s 24(1) of the Act was that it would not then come to an end but would only do so if terminated in accordance with Pt II of the Act. In 1992, the claimant began negotiations with the freeholder for a consensual renewal of the tenancy. In 1993, the freeholder served notice on the claimant, purportedly under s 25 of the Act in an attempt to terminate the tenancy. The claimant served a counter-notice stating that it was not willing to give up possession of the premises upon the termination of the tenancy. Eventually, the claimant purchased the freehold estate in plot 2. Consequently, the claimant was the freehold owner of plot 2 and was

also the tenant under the lease. The lease expired in accordance with the tenancy agreement but the claimant had not applied to the court for the grant of a new tenancy. By 2005, the first defendant was the registered proprietor of plots 20 and 31 and the second defendant was registered proprietor of plot 26. The claimant wished to install more cables to the sub-station on plot 2 and so required access. The defendant denied the claimant had any rights of access through plots 20 and 26 or a right to maintain in position the cables that had previously been laid under that land. The claimant brought proceedings seeking to prove those rights. The claimant submitted that, despite its acquisition of the freehold of plot 2, its tenancy of plots 2 and 26 created by the lease was still continuing under s 24 of Pt II of the Act because it had never been terminated in accordance with that part, and, as a consequence, it continued to enjoy the like appurtenant rights in respect of plot 2. The defendants submitted that upon the claimant's acquisition of the freehold estate in plot 2, its tenancy in respect of that plot had to be regarded as having merged in the freehold estate and to have come to an end. If so, the claimant could not continue to enjoy the rights over plot 20 that were formerly appurtenant to its tenancy interest in plot 2, nor could it use its rights as a tenant in respect of plot 26 to gain access to plot 2. The judge held in favour of the claimant. He found that, under common law, a merger occurred automatically, reflecting the principle that one person could not be both landlord and tenant of the same premises, whereas in equity (which prevailed pursuant to s 185 of the Law of Property Act 1925) the position was different as it gave regard to the intention of the parties and that, on the facts, there had been no merger. Further to that finding, the tenancy created by the lease had

statutorily continued by Pt II of the Act after the termination date provided by the lease, which continuation applied equally to that part of the demised premises comprising plot 2. Consequently, the lease continued solely in respect of plots 2 and 26. The defendants appealed. They submitted that the judge had erred in finding that, on the facts, there had been no merger.

The appeal would be dismissed.

It was established law that the starting point was that whereas the ordinary rule at law was that the coalescence of a lease and its reversion in the same person in the same right would result in a merger and extinguishment of the lease, in equity it was open to that person to form an intention and declare that there should be no such merger and extinguishment. Equity developed the principle that where a person did not expressly evince such an intention, or where there was no other evidence of such an intention, there was a presumption against any intention for a merger if such would be against his interest. In a case in which there was no express declaration or other evidence as to the intention, the focus of equity's inquiry was therefore exclusively on his interests; and if a merger would be against his interests, he was presumed to have intended against any merger.

The judge had not erred in finding that there had not been a merger. Following settled principles, his first task had been to consider whether there was any evidence of any intention on the part of the claimant as to whether there should have been a merger. He found that there was none. Having so found, he next had to consider whether or not it was in the claimant's interests that there should be a merger. He found that it was not and that finding led him, correctly, to the conclusion that he should presume that no merger was intended.



**SUBSCRIBE TO BUTTERWORTHS
PROPERTY LAW NEWSLETTER
BY FILLING IN THIS FORM**

1 YES! I would like a 12-month subscription to
Butterworths Property Law Newsletter, please invoice me for £204.

*Title: _____

*Name: _____

*Surname: _____

*Job Title: _____

*Company: _____

*Address 1: _____

*Address 2: _____

*Town: _____

*Postcode: _____

Telephone: _____

Email: _____

Signature _____ Date // _____

✉ Marketing Department,
LexisNexis, Freepost RSJB-BCTH-ZGUB,
Quadrant House, The Quadrant, Sutton SM2 5AS

☎ Fax +44 (0)20 8212 1988

✉ Email newsales@lexisnexis.co.uk

Please quote response code
AD8346

Privacy Policy
We have a commitment to protect your privacy. We may use the information we collect from you to keep you informed of LexisNexis products and services. We do not sell, trade or rent your email address to others, but we may pass your postal details to trusted third parties. If you do NOT wish to be kept informed by mail phone fax email of other LexisNexis products and services, please tick the relevant box. If you do NOT wish your mailing details to be passed onto companies approved by LexisNexis, to keep you informed of their products and services, please tick the box .

Return Your Order
For further details of our privacy policy please visit our website at:
www.lexisnexis.co.uk/contact_us/privacypolicy.html

2 **My Delivery Details**
*Required Fields