

Butterworths Property Law Newsletter

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NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Tesco housing

Tesco is planning to move into the housing market with a series of developments across south east England. The news follows the successful approval in March of the retailers plans to build 200 homes, a bus depot and an ice rink in Streatham, south London. The planned developments are in Dartford, Woolwich, and near the site of the 2012 Olympics in Bromley-by-Bow. Andrew Simms, policy director of independent think-tank the New Economics Foundation, said that the position of Tesco as the UK's biggest retailer "leaves little room for real competition to challenge them". He continued, "Their inexhaustible drive for market domination in almost every aspect of our day-to-day economic lives erodes communities, creates clone towns and undermines real choice. Tesco have planned a grave new world where we live in their houses, shop in their stores, use their bank accounts and mobile phones, buy their insurance and go on their holidays." Simms also called on the regulators to ensure that the market stays open. A failure to do so, he said, could result in the UK becoming a "supermarket subsidiary".

Commercial

Dealing with pre-action conduct in claims for damages at the end of commercial leases, the Property Litigation Association's Dilapidations Protocol has been recommended for formal adoption under the Civil Procedure Rules. Despite its endorsement by the Royal Institution of Chartered Surveyors, the protocol has been widely criticised as having "no teeth" owing to its lack of formal standing under the court rules.

Mortgage lending figures show slight improvement

The Council of Mortgage Lenders (CML) has said that gross mortgage lending in March increased by 24% on the previous month. The CML figures state that total lending for March reached an estimated £11.5 billion, an increase of £2.2 billion on February's total. The lending figure also represented a 3% increase on March 2009, with gross lending for 2010 so far reaching and estimated £29.5 billion. The CML said that this was a 24% decline from the fourth quarter of 2009 and a 9% decline from

the £32.4 billion in the first three months of 2009.

Paul Samter, CML economist said that while mortgage and housing activity remains subdued, it is comfortably higher than that experienced during the height of the recession. However, "Despite the increase in activity late last year and a subsequent fall early this year – due to the end of the stamp duty holiday – the underlying position looks to have barely changed," he said.

Samter continued though, "With the gradually improving

economic backdrop and interest rates still low, the CML continues to expect a gentle improvement in market conditions later in the year." Samter was also cautious about the overall prospects of the economy. He highlighted the forthcoming end to the £300 billion official support schemes towards the end of the year, and the need to find alternative funding sources, as potential cause for concern.

Low-carbon plans launched

The government has introduced two carbon reduction schemes designed to help homes and businesses contribute to cutting UK emissions by up to 34%. The Carbon Reduction Commitment Energy Efficiency Scheme (CRC EES) for organisations and Feed in Tariffs (FITs) have been brought in to help save money on bills, cut carbon emissions and generate low-carbon electricity.

The aim of the CRC EES is to help change behaviour and will require large public and private sector commitment to change energy habits and improve efficiency.

The performance of participants will be published in the form of league tables and will involve the sale of

emissions allowances. All revenue raised in such sales will be given back to participants with those that have increased their efficiency the most receiving greater sums. Organisations have until September to register.

In addition, individuals, organisations and businesses in England, Wales and Scotland who install low-carbon electricity generation can also benefit financially by registering for FITs.

The Department of Energy and Climate Change said that users will be paid for every unit of extra electricity that they generate and will receive three pence per kWh for every unit they don't use and that is exported to the grid.

Nationwide cuts 300 firms

The Law Society has said that it has entered into a dialogue with the Nationwide Group following reports that the group had entered into a "risk-based review" of its conveyancing panel. The Law Society said that the Nationwide had

terminated the membership of 300 firms from their panel. The group covers mortgages provided by, among others, Nationwide, Portman and UCB Home Loans. The Law Society said that they hope to provide an update on the situation as soon as possible.

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■ ■ Legislation

Legislation update

<p>Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010</p>	<p>Enactment Citation SI 2010/1176 Commencement date 1 January 2010 Legislation Affected SI 1994/1771 amended Enabling Power Planning (Listed Buildings and Conservation Areas) Act 1990, ss 60(5), (6), 75(7) (8), 93(6), (7) SI 2010/1176: Exemption from requiring local authority consent as a listed building removed from certain ecclesiastical buildings</p>	<p>Revokes the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771, in respect of England. Provides further exemptions for certain ecclesiastical buildings and imposes restrictions in respect of other ecclesiastical buildings. Reduces the administrative burdens upon exempt denominations of caring for historic churches and their associated structures. Removes the ecclesiastical exemption from some of the special cases which benefited from the exemption under SI 1994/1771:</p> <ul style="list-style-type: none"> ■ the churches in England of two Scottish denominations, which have agreed the changes as they currently have no such buildings; ■ the churches subject to Sharing Agreements pursuant to the Sharing of Church Buildings Act 1969. Churches Together in England have agreed to the change on behalf of such local partnerships; ■ “Royal Peculiars” (apart from Westminster Abbey and St George’s Chapel, Windsor, which retain the Exemption by virtue of having Fabric Advisory Committees); ■ the listed chapels of institutions such as schools, colleges, universities, hospitals and prisons; and ■ the places of worship of religious communities. <p>These exemptions were intended to be temporary but no timetable was ever made. SI 1994/1771 limited the impact of the Planning (Listed Buildings and Conservation Areas) Act 1990 which required all “listed” buildings to require building consent from the local authority by granting ecclesiastical exemptions.</p>
<p>Housing and Regeneration Act 2008 (Commencement No 7 and Transitional and Saving Provisions) Order 2010</p>	<p>Enactment Citation SI 2010/862 Enabling Power Housing and Regeneration Act 2008, ss 320, 322, 325 SI 2010/862: Provisions on social housing assistance and the new regulatory regime for private registered providers of social housing come into force on 1 April 2010</p>	<p>Brings into force certain provisions the Housing and Regeneration Act 2008, Pts 1, 2 on 1 April 2010. As regards Pts 1 and 2 of the Act, the provisions commenced are principally those relating to social housing assistance and the new regulatory regime for private registered providers of social housing (this term is inserted into the Act by the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010). The regulator is the Office of Tenants and Social Landlords, established under Pt 2 of the Act, and known as the Tenant Services Authority (TSA). The Order also makes transitional and saving provisions.</p>
<p>Non-Domestic Rating (Definition of Domestic Property) (Wales) Order 2010</p>	<p>Enactment Citation SI 2010/682 Commencement Date 1 April 2010 Legislation Affected Local Government Finance Act 1988 amended Enabling Power Local Government Finance Act 1988, ss 66(9), 143(1), (2) SI 2010/682: Meaning of “domestic property” for non-domestic rating defined</p>	<p>Amends Local Government Finance Act 1988, s 66 with effect from 1 April 2010. Provides a building or self-contained part of a building is not domestic property if:</p> <ul style="list-style-type: none"> ■ for a period of at least 12 months following assessment it will be available for letting commercially as self-catering accommodation for 140 days or more; and ■ in the 12 months prior to assessment it has been available for letting commercially as self-catering accommodation for 140 days or more and it has been so let for periods of 70 days or more.

Legislation ■

<p>Ordnance Survey Trading Fund (Maximum Borrowing) Order 2010 Enactment Citation</p>	<p>Enactment Citation SI 2010/1096 Commencement Date 1 April 2010 Legislation Affected SI 1999/965 amended Enabling Power Government Trading Funds Act 1973, ss 1, 2C SI 2010/1096: Maximum borrowing limit increased from £40,000,000 to £80,000,000</p>	<p>Increases the maximum that the Ordnance Survey Trading Fund may borrow, as it needs to have the ability to borrow above the current limit of £40,000,000, set under Ordnance Survey Trading Fund (Maximum Borrowing) Order 2006, SI 2006/2835.</p>
<p>Assured Tenancies (Amendment) (England) Order 2010</p>	<p>Enactment Citation SI 2010/908 Commencement Date 1 October 2010 Legislation Affected Housing Act 1988 amended Enabling Power Housing Act 1988, s 1(2A) SI 2010/908: Annual rental threshold for assured tenancies raised to £100,000</p>	<p>Raises the annual rental threshold for assured tenancies to £100,000, bringing all tenancies, except those with the very highest rents, under the protection of the Housing Act 1988. Restores the position intended in the original legislation, to exclude only the tenancies at the very top end of the market. It also means that the threshold will not need to be reviewed again for several years.</p>
<p>Marine and Coastal Access Act 2009 (Commencement No 3) Order 2010</p>	<p>Enactment Citation SI 2010/907 Enabling Power Marine and Coastal Access Act 2009, s 324 (3) SI 2010/907: Powers transferred from Secretary of State to the Marine Management Organisation</p>	<p>Brings into force ss 4 to 8 of the Marine and Coastal Access Act 2009, ss 4 to 8, which transfer the following of the secretary of state's functions to the Marine Management Organisation:</p> <ul style="list-style-type: none"> ■ granting licences under the Sea Fish (Conservation) Act 1967, ss 4, 4A; and ■ those remaining under the Sea Fish (Conservation) Act 1967, 9(1) to (4).
<p>Town and Country Planning (Compensation) (No 2) (England) Regulations 2010</p>	<p>Enactment Citation SI 2010/1220 Commencement Date 3 May 2010 Legislation Affected SI 2010/655 revoked Enabling Power Town and Country Planning Act 1990, s 108(2A), (3C), (3D), (5), (6) SI 2010/1220: Notice procedure and compensation availability prescribed for where a development order is withdrawn</p>	<p>Revoke and replace the Town and Country Planning (Compensation) (England) Regulations 2010, SI 2010/655, to prescribe:</p> <ul style="list-style-type: none"> ■ the types of development for the purposes of Town and Country Planning Act 1990, s 108(2A), (3C); ■ the manner in which planning permission is to be withdrawn; and ■ the manner and maximum period in which notice of withdrawal, revocation, amendment or directions is to be given. <p>Section 108 provides for the payment of compensation in certain cases where planning permission for development granted by either a development order or a local development order is withdrawn, and where on an application for planning permission for that development, the application is refused.</p>

■ In Practice

Contracts for the sale of land

Section 2 – where are we now?

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 has been in force for 20 years. Its intention may well have been to clear up uncertainty surrounding the enforceability of contracts for the sale of land.

However, in the words of Briggs J in *North Eastern Properties v Coleman* [2010] All ER (D) 208 (Mar), “It is not uncommon to find a statutory provision which, in seeking to remedy one mischief, unexpectedly creates another.”

He observed that the intention of s 2 was not to make it easier for someone who has genuinely contracted to escape his obligations. Nonetheless, this can be the result. The rigorous requirements of s 2 mean that a purposive construction may not assist, even where there is a clear intention to create a binding contract.

The section provides that a contract for the sale of land, or of any interest in land, is void unless it:

- is in writing;
- contains or incorporates all of the terms expressly agreed by the parties; and
- is signed by or on behalf of the parties.

Contains all the terms

In some cases it may be possible to save a contract from being void under s 2 where terms agreed by the parties but omitted from the contract can be construed as a separate, “collateral” contract.

A letter attached to a contract, agreeing that contracts were exchanged conditionally on the production of office copy entries confirming the seller’s title, was held to be a collateral contract [*Record v Bell* [1991] 4 All ER 471].

To find that omitted terms amount to a collateral contract the court must be able to conclude that they are not part

of the land contract [*Tootal Clothing v Guinea Properties Management* [1992] 2 EGLR 80]. If on the true construction of the agreement, the land contract is conditional on performance of the other terms, it will fall foul of s 2 [*Grossman v Hooper* [2001] 2 EGLR 82].

The stringent requirements of s 2 may mean that a party can prevent a contract being enforced by pointing to expressly agreed terms which are not in the contract, even where it was a deliberate choice to exclude them. Best practice is, therefore, to include an “entire agreement” clause to ensure that the land contract will not accidentally be construed as conditional on the collateral contract. As Longmore LJ commented in *North Eastern Properties*, “If the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said”.

Meaning of incorporated

The terms must either be set out in full in the contract, or incorporated by reference to some other document in which they are set out. The Court of Appeal held that a plan of property signed by the buyer, enclosed with a letter signed by the seller, referring to the plan, did not comply with s 2. The plan was incorporated by reference into the letter, but the letter was not signed by the buyer [*Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355].

Signed by the parties

An agreement for a developer to transfer affordable housing units to a housing association to be nominated by the local authority was held not to comply with s 2. When the contract was exchanged, no housing authority had been identified and so it could not be said that the contract had been signed by anyone who would be the “buyer”. The result would have been different had the local authority structured the

agreement so that the developer could be required to transfer the units to the local authority or as they directed. In those circumstances, the local authority could have signed the agreement as “buyer” [*Jelson v Derby* [1999] 3 EGLR 91].

The Court of Appeal has subsequently doubted the decision, but it has not been formally overruled.

Meaning of signed

The test is one of function, not form. The courts have approved “signature” by stamping, printing, typewriting and other marks applied with an “authenticating intention”.

This could extend to scanned manual signatures, typing a name, clicking on a website icon, and encrypted digital signatures.

The court held in 1995 that the old rules relating to typewritten “signatures” were inapplicable to the 1989 Act and that a handwritten signature was required. More recently, though, a judge observed that he had “no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document”.

Consequently, any e-mail containing the terms of a proposed agreement should state that they are “subject to contract” to avoid inadvertently and prematurely creating a binding agreement [*Firstpost Homes v Johnson* [1995] 4 All ER 355; *J Pereira Fernandes v Mehta* [2006] 2 All ER 891].

Where a “signature” was taken from an incomplete draft of an agreement, and subsequently attached to a complete draft that included substantially different terms, the court rejected the contention that there was either implied or express authority or ratification.

The judge observed that “the requirement that a party sign an existing authoritative version of the contractual document gives some, albeit not total, protection against fraud or mistake” [*Mercury Tax Group v HMRC* [2008] All ER (D) 129 (Nov)].

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Prohibited pastures – procuring a breach of contract

Where litigation is concerned, the deepest pockets make the best targets. In a claim based on breach of contract, the other party to the contract may not have sufficient resources to make litigation worthwhile. In those circumstances, a claim for damages based on the tort of procuring a breach of contract may be an attractive option.

Yeeles v Lewis [2010] EWCA Civ 326 concerned a joint venture between Miss Yeeles (the claimant) and Mr Benton to develop a property.

Miss Yeeles had no experience of property development, and contact with Benton came about through her partner Clive Taylor, a builder. Having found a property (Seal Road) to convert, Miss Yeeles provided a substantial deposit (£42,500), while Benton raised the balance of the purchase price (£132,500) by way of a secured loan from the Bank of Scotland. Seal Road was transferred into Benton's sole name.

Miss Yeeles was to receive her share of the equity in Seal Road partly in the form of a lease of the ground floor flat. However, Benton and Clive Taylor had by then fallen out over allegations of defective work at another property (Broadview), and Benton claimed entitlement to recoup his losses from the proceeds of sale of Seal Road. Benton completed an arm's length sale to a third party, effectively removing any possibility that Miss Yeeles could compel Benton to transfer the Seal Road flat to her.

Miss Yeeles' claim was issued against Mr Lewis. Lewis was, with Benton, a co-director of Strand, a corporate vehicle formed for the purchase and redevelopment of Broadview. A substantial part of the proceeds of sale from Seal Road were paid to Strand. The claim was that Lewis had procured Benton's breach of contract. Bernard Livesey QC allowed that claim, awarding damages and making a costs order against Lewis.

Dismissing Lewis' appeal, Mummery LJ set out the key elements of the tort of procuring a breach of contract, and emphasised the personal nature of liability. It was no defence to say that Lewis was acting as director for a limited liability company.

The key elements

Procurement date

Lewis could be liable for procuring a breach of contract only if the relevant act occurred before the breach. There must be a causal connection with the breach.

On the facts, the Court of Appeal was satisfied that Lewis procured the breach by urging Benton to take a "tougher line" in his dispute with Clive Taylor and by persuading Benton to appoint Lewis' own solicitor to deal with the sale of Seal Road.

Knowledge of the contract

The court rejected Lewis' argument that he could not be liable since he had no knowledge of the contract between Benton and Miss Yeeles. The legal principle underpinning Lewis' argument was clear and correct.

There is no liability for procuring a breach of contract unless there is "intentional causative participation". The defendant must know that there is a contract.

On the facts, however, the court was satisfied that Lewis knew that there was a contract and that Benton had used a substantial "deposit" from a third party to purchase Seal Road. Awareness of those facts was enough – Lewis did not need to know the terms of the contract or the identity of the contracting parties.

Mere advice

Lewis argued that his actions did not amount to procurement of a breach. He had merely advised Benton on the facts and effects of the contract, and urged Benton to instruct Lewis' solicitor rather

than his own. While "mere advice" will not give rise to liability, the court found that Lewis had crossed the line from advice to persuasion. His urging of Benton to take a tougher line, even though based on his view that there was a strong and legitimate case for doing so, "entered the prohibited pastures of persuasion and procurement".

Capacity

Finally, the Court of Appeal rejected Lewis' argument that he could not be personally liable because he had acted as director of Strand, a limited liability company.

The personal nature of the tort meant that even though Lewis' correspondence on the matter was on Strand headed notepaper, and he was acting at all times in his capacity as director of the company, he could not hide behind the corporate veil. Mummery LJ emphasised: "the fact that a director acts as agent for his company does not give him a defence to personal liability for torts committed by him."

A developing trend?

Claims in tort against parties alleged to have procured or induced a breach of contract have gathered momentum in recent years. The court has proved itself willing to impose sanctions on those who might previously have considered themselves safe as bystanders egging on a breach of contract.

In landlord and tenant matters claims in tort have generally concerned those who take unauthorised subleases or assignments, calculating that the landlord is unlikely to forfeit the lease and that damages for the breach will be minimal.

In those cases [eg *Hemingway v Dunraven* [1995] 1 EGLR 61; *Crestfort v Tesco* [2005] EWHC 805 (Ch)] the court has awarded an injunction requiring the transaction to be undone by surrender of the unlawful sublease. Yeeles demonstrates that in the case of a contract, where specific performance is not available, a claim in tort can result in the award of substantial damages and costs. Bystanders who are not innocent can certainly not consider themselves safe.

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Commercial property

Good Harvest brings bad news for landlords

Everyone dealing in the commercial property sphere needs to be aware of the recent decision in *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] EWHC 330 (Ch). At issue was the effect of the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) where a person who had guaranteed the obligations of a tenant, was being required to provide a guarantee of the obligations of an assignee to whom the tenant had assigned a lease.

In the years since the coming into force of LT(C)A 1995, new leases have increasingly purported to permit a landlord reasonably to refuse consent to the assignment of a lease unless and until the guarantor of the current lessee's obligations (provided he was not a guarantor pursuant to an AGA) provided a guarantee of the assignee's obligations. In the case of intra-group assignments, and even where such an express provision might not be found in the lease, a guarantor of an existing tenant might voluntarily offer such a guarantee.

Good Harvest concerned an underlease demised on 5 October 2001 by Gladman Homes to Chiron CS Limited (Chiron) for a term of 10 years from 16 July 2001. The defendant, Centaur Services Ltd (Centaur), was also a party to the underlease, as guarantor for Chiron.

The alienation provisions in the underlease provided that the landlord was entitled to impose certain conditions on giving a licence to assign the premises, including, firstly, a condition that a guarantor (who had not already entered into an AGA) entered into an AGA; and, second, a condition that the tenant procure that any security for its obligations which the landlord held immediately before the assignment was continued or renewed under the authorised guarantee agreement.

On 1 September 2004, the underlease was assigned by Chiron to Total Home Entertainment Distribution Ltd (THED). On the same day, Gladman Homes, Chiron and Centaur entered into a guarantee agreement, described as an AGA. It recorded that Gladman Homes had agreed to grant Chiron a licence to effect the assignment to THED subject to, among other things, Chiron and Centaur entering into the guarantee agreement. It included

covenants from Chiron and Centaur to Gladman Homes (and their successors) that THED would pay rent, and otherwise perform the lessee covenants, "from the date of the Assignment [to THED] until the next lawful assignment of the underlease". Subsequently, the headlease was surrendered and the claimant, Good Harvest Partnership LLP (Good Harvest), became the registered freehold proprietor and THED's direct landlord.

In June 2009, Good Harvest issued a claim against Centaur seeking to recover rent arrears pursuant to the guarantee agreement. Centaur defended on the grounds that its covenants in the guarantee agreement fell foul of LT(C)A 1995, and were therefore void. Good Harvest applied for summary judgment.

Centaur's argument was simple. Pursuant to s 5(2) of LT(C)A 1995, following Chiron's assignment of the underlease, it was released from its tenant's covenants. Therefore, pursuant to s 24(2) of LT(C)A 1995, following Chiron's assignment of the underlease, Centaur was also released from its guarantee to the same extent as Chiron had been released from its tenant's covenants. Requiring Centaur to provide a further guarantee of THED's obligations constituted an attempt to "exclude, modify or otherwise frustrate" the operation of LT(C)A 1995 releasing Centaur from its obligations as guarantor of the lessee covenants and therefore, pursuant to s 25 of LT(C)A 1995, Centaur's covenants in the guarantee agreement were void. They were not saved by s 16 of LT(C)A 1995, which permits tenants to enter into an authorised guarantee agreement, but which does not permit a guarantor of an existing tenant to do so.

Good Harvest's argument was equally simple. Pursuant to s 24(2) of LT(C)A 1995, Centaur's covenants in the underlease to guarantee Chiron's lessee obligations were released when Chiron assigned the underlease to THED, and no attempt was being made to exclude, modify or otherwise frustrate that release. By the guarantee agreement, Centaur had entered into *fresh* obligations with effect from Chiron's assignment of the underlease to THED. Clear words to the contrary are

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required to restrict the freedom to enter into lawful contracts, and the provisions of s 24(2) of LT(C)A 1995 do not constitute clear words prohibiting Centaur from entering into a fresh contract guaranteeing THED's lessee obligations. If s 24 took effect in that way, it would be entirely arbitrary.

Newey J noted that in *Avonridge Property Company Ltd v London Diocesan Fund* [2005] UKHL 70, Lord Nicholls (with whom Lords Hoffmann and Scott expressed agreement) said, in para 18, that s 25 is, "to be interpreted generously, so as to ensure that the operation of LT(C)A 1995 is not frustrated, either directly or indirectly".

Adopting such an approach, Newey J concluded in para 22(ii) of his judgment that:

"If the guarantor is required to enter into a further guarantee when the lease is assigned, it seems to me that the guarantee can, as a matter of language, fairly be said to 'frustrate the operation of any provision of [the] Act' (to quote from s 25(1)(a)), in that it would, if valid, impose on the guarantor obligations equivalent to those from which s 24 was designed to secure his release. This conclusion is reinforced by the fact that s 25 is, as noted above, 'to be interpreted generously'."

To find otherwise would, he concluded, drive the proverbial coach and horses through LT(C)A 1995. It was clear that the legislation was intended to restrict freedom of contract; the question was how far those restrictions go. If Parliament had intended a tenant's guarantor to be able to guarantee the obligations of an assignee it could have been expected to say so explicitly, but it had not done so. Centaur's covenants in the guarantee agreement were therefore void.

It is unclear whether Newey J's decision is limited to alienation provisions purporting to permit a landlord reasonably to refuse consent to an assignment of the term unless and until the guarantor of the current lessee obligations (provided he was not a guarantor pursuant to an AGA) guarantees the assignee's obligations; his reasoning clearly suggests that no guarantee of an assignee's lessee obligations, given by a person who was also guarantor of the assignor's lessee obligations, will be enforceable; even if given willingly and without compulsion.

Good Harvest has issued an appeal.

Tim Polli

is a Barrister at Tanfield Chambers

When did you stop cheating your wife?

Non-disclosure of an affair could provide a defence of undue influence or misrepresentation when a wife is persuaded to join in a charge of the matrimonial home as security for the husband's debts

In *First Plus Financial Group v Hewett* [2010] All ER (D) 248 (Mar), the bank seeking to enforce its charge by way of a possession order acknowledged that it had not complied with the guidelines laid down by the House of Lords in *Royal Bank of Scotland v Etridge* (No 2) [2001] 4 All ER 449, and so was fixed with constructive notice of any undue influence or misrepresentation practised by the husband on his wife, if that could be proved.

The wife was persuaded to enter into a charge of the matrimonial home on the strength of promises by the husband made "on their children's lives" to pay mortgage instalments, and his assertion that it was the "only way" to save the family home. At the time, the husband was involved in an affair. He left the home, and ceased paying instalments approximately a year later.

The court found that, although the wife was not entirely supine, financial decisions were primarily made by the husband. Consequently, the wife was found to have "reposed a sufficient

degree of trust and confidence in her husband to give rise to ... an obligation of candour and fairness owed to her". Briggs J considered that "the purpose of an obligation of candour is that the wife should be able to make an informed decision (with or without the benefit of independent advice) properly and fairly appraised of the relevant circumstances".

In the circumstances, non-disclosure of the affair amounted to undue influence sufficient to vitiate the re-mortgage as between husband and wife.

The court emphasised: "The question is not whether failure to disclose that fact automatically vitiates the transaction, but whether it was sufficiently material to the decision facing [the wife] that its non-disclosure or, worse, deliberate concealment amounted to an abuse by [the husband] of the trust and confidence reposed in him by his wife".

Briggs J considered that "the issue may be best addressed by asking whether a solicitor, consulted by [the

wife] for the purposes of the transaction, would have thought it relevant to know that her husband was, while asking for her unqualified trust, at the same time conducting a clandestine affair". He went on to say that in his view there can "only be an affirmative answer to that question".

In practice, therefore, it is likely that solicitors should ensure that the

The question is not whether failure to disclose that fact automatically vitiates the transaction, but whether it was sufficiently material to the decision facing [the wife] that its non-disclosure or, worse, deliberate concealment amounted to an abuse by [the husband] of the trust and confidence reposed in him by his wife".

question of trust and candour is raised in order to comply with the *Etridge* guidelines and, specifically, to ensure that a wife who is being asked to charge matrimonial property to secure her husband's debts has "a realistic and accurate understanding of the implications and the risks".

The principle is easy enough to state. In practice, though, it places solicitors in the awkward (and possibly intractable) position of asking a wife whether there is any possibility that her husband might be concealing an affair.

Landlord's costs and damages

Landlord's costs and damages for loss of rent irrecoverable where contractual entitlement depended on s 146 proceedings

In *Agricullo v Yorkshire Housing* [2010] EWCA Civ 229, a tenant had been in breach of its obligations to repair premises, including the roof and roofspace. The landlord had served a

s 146 notice. The tenant had served a counter-notice claiming the benefit of the Leasehold Repairs Act 1938 (LRA 1938). Once that counter-notice was served, the landlord could not forfeit the

lease or recover damages without leave of the court. After protracted and difficult negotiations with the landlord, the tenant carried out the works.

The landlord subsequently claimed the costs that it had incurred in connection with those negotiations, plus damages for loss of rent in respect of other premises that had been affected by the disrepair.

The court rejected the landlord's claim for damages and costs. The claim was based on a lease clause that allowed recovery of costs "in contemplation of or in relation to any proceedings under ss 146 or 147 of the Law of Property Act 1925 or the

Case notes

Leasehold Property (Repairs) Act 1938, including the preparation and service of all notices, and even if forfeiture is avoided (unless it is avoided by relief granted by the court)".

The tenant successfully argued that nothing was recoverable under that clause. Once the counter-notice had been served invoking the protection of LRA 1938 the landlord could have proceeded under s 146 only with leave of the court. It made no application for that leave so there were no relevant proceedings.

"Where a tenant serves a counter-notice invoking the protection of the 1938 Act Agricullo suggests that any leverage achieved by serving the s 146 notice is lost, and that the landlord is at risk on costs unless it resorts to litigation".

The court found that the landlord had elected to proceed by negotiation rather than (i) applying for leave under the 1938 Act, or (ii) going into the premises and carrying out the works itself, relying on a *Jervis v Harris* clause [1996 All ER 303] that would have allowed it to recover its costs and expenses as a debt.

In effect, the landlord was penalised for negotiating rather than litigating. Faced with this decision, landlords must now ensure that new leases contain a clause providing for the recovery of costs incurred in enforcing or seeking to enforce tenant covenants by whatever means (ie, not limited to s

146, 147 or 1938 Act proceedings).

However, clauses similar to that in *Agricullo* are common in existing leases, and many draftsmen have taken the view that (as argued by counsel for the landlord) the terms "in contemplation of" and "in relation to" were broad enough to include circumstances where the s 146 notice and the possibility of further proceedings was being used as leverage to bring the tenant to the negotiating table. In those cases, landlords must now consider:

- going directly to court to make an application for leave under the 1938 Act; or
- relying on a *Jervis v Harris* clause which would allow them to enter the premises, carry out the works and recover its costs as a debt without engaging the LRA 1938.

Neither course is attractive. Where a tenant serves a counter-notice invoking the protection of the LRA 1938, *Agricullo* suggests that any leverage achieved by serving the s 146 notice is lost, and that the landlord is at risk on costs unless it resorts to litigation.

The ruling arguably undermines the landlord's ability to achieve a satisfactory settlement through negotiation and requires a "protective" application to the court.

Faced with that prospect, landlords may well be inclined to take direct action under a *Jervis v Harris* clause. However, the effectiveness of that approach was called into question by the ruling in *Hammersmith v Creska*, where the landlord was refused access to the premises, and the court would not grant an injunction ordering the tenant to permit entry.

Unreasonable Appeals

A costs order can be made against a person who unreasonably appeals against an enforcement notice

Section 250(5) of the Local Government Act 1972 enables the Secretary of State to make an order as to the costs of the parties at inquiries. Government policy in relation to awards of costs on appeal brought under s 174 of the 1990 Act before 6 April 2009 is set out in Circular 8/93 (Department of the Environment).

The default rule in planning appeals is that parties normally meet their own costs. However, Annex 1 to the Circular provides that costs may be awarded against a party where "unreasonable behaviour" is alleged to have occurred.

In *Nestorova-Goremsandu v Secretary of State for Communities and Local Government* [2010] All ER (D) 86 (Apr), the court held that the inspector had not erred in law in finding that one of the grounds of appeal was unreasonable. The matter concerned an extension which extended beyond the rear wall of the existing house by more than four metres and so fell outside the scope of permitted development. The inspector made a factual error, referring to an excess projection of nine metres rather than five metres if part of the extension was removed. However, that did not amount to an error of law because even if the appellant was correct a projection of five metres would still be too great to bring the extension within the permitted development order.

The judge added that any court should be reluctant to overturn a finding on a costs issue. In this case, the Inspector's decisions on costs issues could not be properly impugned.

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