

Supreme Court rules on property rights for cohabiters

The Supreme Court has handed down a judgment clarifying the property rights of unmarried couples.

In *Jones v Kernott*, the court ruled that where a home is jointly owned, a court can decide proportions of ownership where the parties' intentions are not clear.

After jointly purchasing the house in 1985, Kernott moved out in 1993 and Jones from then on covered mortgage payments on her own.

Overturing the previous Court of Appeal decision to split the property 50/50, the Supreme Court reinstated the county court's ruling that the property should be split 90%/10% in favour of Jones.

Cumberland Ellis partner, Graeme Fraser, said that until new laws are passed, reforming this area of law – which will not happen for at least three years – it will be left to the courts to grapple with disputes on a case-by-case basis.

He said: "There are four different judgments all reaching the same conclusion, and in such circumstances there continues to be confusion as each case has to be decided on its own facts. As Lord Walker and Lady Hale stated 'there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence'."

The government's Actuary Department has predicted that by 2031, nearly four million people will be cohabiting, Fraser added, so an increase in this kind of property dispute is inevitable.

Government publishes new housing strategy

The government is to make £400 million available for stalled developments and provide indemnity for mortgages of up to 95% of the value of new houses as part of its new housing strategy.

Funding worth £100 million has been earmarked to bring empty homes back into use, while another £50 million has been pledged for areas with a high concentration of empty homes.

The government is also to consult on proposals that could allow developers to require local authorities to reconsider s 106 agreements that were set up before April 2010, when market conditions were better. Under the Town and Country Planning Act, s 106 agreements usually require developers to provide infrastructure for communities

in which they build.

The new £400 million "Get Britain Building" fund will allow builders – who were forced to put developments with planning permission on hold because of cashflow problems – to bid for development finance.

The strategy said that there are presently 133,000 partially built houses that have not progressed within the past 12 months.

Under the proposals to help more people onto the housing ladder, homebuyers will be able to secure loans on newly built homes with only a 5% deposit.

The government and housebuilders will help provide security for the loan, so if the house is sold for less than the outstanding mortgage total the lender can recover its loss.

Proposals to increase discounts for social tenants under the Right to Buy scheme to up to half the value of the home are also to be put out for consultation, the government has said, with the money raised to be pumped into funding new affordable homes for rent on a "one for one" basis.

A spokesman for the Royal Institution of Chartered Surveyors (RICS) said: "RICS... hopes that the proposals can go some way to boosting the stagnant housing market. Given its central role in driving economic growth, it is right that housing is now at the top of the political agenda."

Updated protocol to get legal status

The protocol used by the property industry to avoid court action to recover damages relating to the physical state of a property at the end of a commercial lease is to be given formal legal status for the first time.

The Property Litigation Association (PLA) has provisionally issued a revised version of its Dilapidations Protocol, which will be formally incorporated into the Civil Procedure Rules. It is expected to take effect from 1 January 2012.

The protocol covers "terminal dilapidations claims", ie, claims for damages for dilapidations by landlords against tenants at the termination of a commercial tenancy.

The PLA's protocol for terminal dilapidations claims was published in 2002 and

since has been widely taken up by the property industry and endorsed by the Royal Institution of Chartered Surveyors as best practice. It was presented to the Civil Justice Council for adoption as a formal protocol in 2009.

The updated protocol stipulates that the tenant's surveyor will now have to endorse the tenant's response to the landlord's claim for damages. The endorsement must confirm that the works the tenant is calling for are all those reasonably required to remedy the alleged breaches, that any costs quoted in the tenant's response are reasonably payable for those works and that account has been taken of what the tenant, or tenant's surveyor, reasonably believes to be the landlord's intentions for the property.

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Possession woes: assured shorthold tenancies

TANFIELD CHAMBERS
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Various legal pitfalls have arisen in the courts recently which have made recovering possession under an assured shorthold tenancy much harder than originally envisaged. Rebecca Cattermole reports

A landlord who lets a dwelling-house under an assured shorthold tenancy should, in theory, be able to recover possession easily and swiftly following the service of a written notice, commonly known as “the section 21 notice”. This was further facilitated by the introduction of the accelerated possession procedure under CPR Pt 55 which provided a quicker means of obtaining the possession order, conceivably on the papers rather than at a hearing.

It seemed so straightforward that housing associations – which had been brought within the remit of the private sector regime under the Housing Act 1988 – grant assured shorthold tenancies (commonly known as probationary or starter tenancies) as opposed to fully assured tenancies which confer greater security of tenure. The thinking behind this is that for a 12-month period the tenant is on probation, thereby giving the landlord an opportunity to assess and decide whether the person is a good tenant. If not, the landlord has the option of being able to recover possession on a mandatory ground following service of the two-month s 21 notice. Conversely, if the tenant proves to be a good tenant then the tenancy converts to fully assured status either by service of a notice or under the terms of the tenancy agreement.

Human rights challenges

To a significant degree, such a policy has been scuppered by two developments. First, the categorisation of housing associations as public bodies for the purposes of the Human Rights Act 1998 which are, therefore, amenable to judicial review (*R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587). Although Elias LJ said that not every housing association would be in the same position as the trust in that case – determination of public status is fact-sensitive – many cases have proceeded

on the basis that housing associations are public bodies.

Second, the use of art 8 (right to respect for home etc) proportionality as a defence to claims brought on mandatory grounds for possession (*Manchester City Council v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8). Although the Supreme Court held (in both cases) that the circumstances where a proportionality argument would give rise to a right to continue possession where the applicant had no right under domestic law to remain would be rare, the experience at the coal face has been quite different. In seeking to recover possession of premises let under starter tenancies, pursuant to s 21 of the Housing Act 1988, many associations complain it has taken successive adjournments and lengthier hearings to have such defences summarily dismissed. This, in time, may subside as the courts at first instance grow more confident in routinely dismissing them. Nonetheless, it remains the case that defences which simply deny, for example, nuisance behaviour which led to the service of the notice, and assert personal circumstances, are still pushing through that door which has been left ajar.

The permission decision in *West Kent Housing Association Limited v Haycraft* [2011] EWCA Civ 992 is a case in point which concerned a claim for possession by a social landlord of a property let under an assured shorthold tenancy. The landlord had served a s 21 notice following a complaint of nuisance and upheld the decision to seek possession on review. The Court of Appeal gave permission to appeal – albeit with some reluctance – on the basis that the judge did not consider the tenant’s conduct since the nuisance incident, his vulnerability and allied personal circumstances, and that he was likely to be intentionally homeless as result of the finding on disputed allegations. Interestingly, the Court of Appeal said it

must be arguable whether a registered social landlord is to be treated as in a different position from a housing authority under a housing duty and it is understood this is to be considered at the appeal hearing.

It would be easy for private landowners to consign such cases to the social housing basket. Be warned: the Supreme Court left open the question whether art 8 is relevant to a private sector landlord, “it is preferable for this court to express no view on the issue until it arises and has to be determined” (para 50 *Pinnock*).

Conversion to fully assured tenancy

Additional pitfalls associated with assured shorthold tenancies have been highlighted more recently in *Saxon Weald Homes Limited v Chadwick* [2011] EWCA Civ 1202.

By s 19A of the Housing Act 1988, a tenancy which is entered into after 28 February 1997 is an assured shorthold tenancy unless it falls within any of the specified exceptions in Sch 2A of the 1988 Act. One of those exceptions is where a notice: (a) is served after the tenancy has been entered into; (b) is served by the landlord under the assured tenancy on the tenant under that tenancy; and (c) states that the assured tenancy to which it relates is no longer an assured shorthold tenancy (para 2). Another exception is where the tenancy contains a provision to the effect that the tenancy is not an assured shorthold (para 3).

In *Saxon Weald*, the landlord and tenant had entered into a probationary tenancy agreement which stated that for the first 12 months the tenant would occupy the property as an assured shorthold tenant. The agreement went on to provide that the tenancy would become assured at the end of the 12-month period unless before the end of that period possession proceedings had been commenced or a notice requiring possession had been served. If the tenancy did convert to a fully assured tenancy, a letter would be sent confirming the change in status. Following complaints of nuisance, the landlord’s solicitors served

a s 21 notice requiring possession. The letter was dated 7 August 2009. This was followed by a further letter, dated 11 August 2009, sent by the landlord to the tenant, informing him that “following the successful completion of your one year starter tenancy, you are now an assured tenant.” The landlord successfully obtained a possession order from the district judge. On appeal, however, a circuit judge found that the tenancy was fully assured; the 11 August letter was a notice for the purposes of para 2.

The Court of Appeal agreed when dismissing the landlord’s appeal; the 11 August letter naturally and objectively read is a notice for such purpose. The Court of Appeal gave short shrift to the landlord’s argument that following *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1999] AC 749 a reasonable recipient would have been in doubt what the letter intended to convey and so it was insufficient as a notice. This case was very different; *Mannai* involved an identifiable internal ambiguity within the notice itself, whereas in the present case there was no such ambiguity. The mistake was not in the wording; the mistake was in the fact the letter was sent at all.

The case of *Barclays Bank plc v*

Bee [2002] 1 WLR 332; [2001] EWCA Civ 1126 did not assist either. In *Bee* two conflicting notices had been sent together in the same envelope. In the present case, the letter of 11 August was sent subsequently and distinctly from the previous letter and notice.

It should be noted that the landlord did not rely on mistake as a discrete ground of appeal that the 11 August letter was of no effect as notice.

Tenancy deposit

Finally, the tenancy deposit schemes introduced under the Housing Act 2004 continue to catch landlords unawares. The decision in *Suurprere v Nice* [2011] EWHC 2003, is a salutary reminder that the landlord’s obligations under Pt 6 of the Housing Act 2004 are twofold; the duty to provide the prescribed information is of equal importance to the duty to safeguard the tenant’s deposit. The landlord does, however, have the opportunity of complying with his obligations before the date of hearing the tenant’s claim and avoid paying out the sum of three times the deposit.

Three further interesting and related points come out of this decision. First, Cox J rejected the landlords’ argument that they had complied with the

obligation because the information was (a) provided in a letter from the Deposit Protection Service (DPS); and (b) available on the website. It was held that the obligation is on the landlord personally and thus not fulfilled by reference to DPS. Second, the obligation to give the prescribed information continues irrespective of the return of the deposit before the date of the hearing. Third, Cox J distinguished *Gladehurst Properties Ltd v Hashemi* [2011] EWCA Civ 604 which held that the power of the court to make an order requiring payment of the deposit and three times that sum is no longer exercisable once the tenancy has come to an end. In the present case Cox J said that the tenancy had not been determined because she had brought a claim for wrongful eviction and there was no evidence of surrender. Strangely though, the claim for wrongful eviction had already been dismissed at first instance.

In summary, landlords need to be very careful in how they manage their tenancies and are fully aware of the requirements of statutory provisions.

Rebecca Cattermole is a barrister at Tanfield Chambers

Filling the void?

Where a home is jointly owned, a court can decide proportions of ownership where the parties’ intentions are not clear

Jones v Kernott

In *Jones v Kernott* [2011] UKSC 53 the Supreme Court took the opportunity to clarify the principles for ascertaining the proportions of beneficial joint ownership as set out in *Stack v Dowden* [2007] 2 All ER 929. Lord Collins pointed out that the decision in *Stack* was a response to:

- the increasing number of cohabiting couples with joint interests in their homes;
- the fact that they rarely make agreements about their respective shares in their homes;
- the enormous inflation in property prices which has made the division of ownership by reference to initial financial contributions “artificial and potentially productive of injustice”.

Lord Wilson pointed to the “continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship”. The Law Commission Report no. 307 – “Cohabitation: The Financial Consequences of Relationship Breakdown, 2007” – recommended giving the court such limited jurisdiction, but there are no plans to implement the recommendations in the near future.

Lord Collins confirmed that the absence of legislative intervention has made it necessary for the judiciary to respond by “adapting old principles to new situations”. The fact that this was not an easy task was illustrated by the fact that in both *Stack* and *Jones v Kernott*, “the results at the highest appellate level have been unanimous, but the reasoning has not.”

The parties were unmarried. Mr Kernott moved out of a jointly owned property in 1993. Ms Jones remained there with their children. He made no further contribution towards the mortgage. The property was put on the market in 1995, but was not sold. The parties subsequently cashed in a joint life insurance policy to enable Mr Kernott to put down the deposit on a home of his own. He bought this property in 1996. The trial judge observed that he was able to afford his own home because he was not making any contribution towards the former home. The judge held that the intentions of the parties at the outset were to provide them as a couple with a home for themselves and their children, but that those intentions had altered significantly over the years. He concluded that the value of the jointly owned property should be divided as 90% for Ms Jones and 10% for Mr Kernott.

Supreme Court decision

The Supreme Court agreed with the trial judge and reversed the Court of Appeal decision. However, the justices of the Supreme Court reached this conclusion in different ways.

In practice

Common ground

Where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their interests, the following reasoning can be applied:

- The starting point is that equity follows the law and they are joint tenants, entitled to equal shares, in both law and equity. The assumptions as to human motivation which led the courts to impute particular intentions by way of resulting trust (which depends upon the law's presumption as to the intention of the party who makes a financial contribution to the purchase) are not appropriate to the ascertainment of beneficial interests in a family home. There is no presumption of a resulting trust arising from a couple having contributed to the deposit (or the rest of the purchase price) in unequal shares.
- The presumption of a beneficial joint tenancy can be displaced (stage 1) by showing either that the parties had a different common intention when they acquired the home or that they later formed a common intention that their respective shares would change.
- That common intention, if it can be inferred, is to be deduced objectively from the parties' conduct.
- Where the parties clearly did not intend a beneficial joint tenancy at the outset, or did but the intention has changed, and it is not possible to ascertain by direct evidence or inference what their actual intention was as to the shares in which they would own the property (stage 2), each is entitled to the share the court considers fair having regard to the whole course of dealing between them relating to the property. So, where it is impossible to divine a common intention as to the proportions, the court is driven to "impute" an intention to the parties which they may never have had.
- Each case will turn on its own facts. Financial contributions are relevant, but there are many other relevant factors.

Inference and imputation

Lord Kerr said the areas of differences in reasoning between the justices were: whether there was sufficient evidence from which the parties' intentions could be inferred; and whether the difference between inferring and imputing an intention was likely to be great in practice.

All the justices agreed that it was open to the court to impute an intention to the

parties. The court must reach a conclusion. It cannot impose a solution on the parties which is contrary to what the evidence shows they actually intended. However, if the court cannot deduce what shares were intended it may have no alternative but to ask "what their intentions as reasonable and just people would have been had they thought about it at the time".

Lord Walker and Lady Hale held that there was no need for the court to impute any intention to the parties in this case. The logical inference from the parties' conduct was that the parties intended that Mr Kernott's interest in the property should crystallise circa 1995 when the property failed to sell. A new plan was then formed. The policy was cashed in to enable him to buy a new home. He would not have been able to do that if he still had to contribute towards the mortgage, endowment policy and other outgoings on the property. A rough calculation on that basis produced a result so close to that of the trial judge it would be wrong for an appellate court to interfere.

Lord Walker and Lady Hale confirmed that while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great. The law recognises that "a legitimate inference may not correspond to an individual's subjective state of mind." A finding as to subjective intention "can only be made on an objective basis".

Lord Collins agreed that "in the present context the difference between inference and imputation will hardly ever matter".

Lord Kerr disagreed. He approved Lord Neuberger's description in *Stack*, where he said that an imputed intention was one which was attributed to the parties even though no such actual intention could be deduced from their actions and statements, and even though they had no such intention. This drew the "necessary and strong demarcation line between attributing an intention to parties and inferring what their intention was in fact".

Imputing an intention (where the court decides what is fair in light of the whole course of dealing with the property), had nothing to do with what the parties intended or what might be supposed would have been their intention had they addressed that question. Deciding what is fair is an obviously different examination from deciding what the parties actually intended. Lord Kerr found it difficult to infer that the shares were to be 90/10, but had no difficulty concluding that that was what was fair. He preferred to allow the appeal on the basis that it was impossible

to infer the parties' intentions, but that the intention should be imputed to them.

Lord Wilson also thought that the observation of Lord Walker and Lady Hale that in practice there may be little difference between inference and imputation went too far. "Reflective perhaps of the more rigorous approach to the task of inference which I prefer", he regarded it as more realistic to conclude that inference was impossible, but to proceed to impute to the parties the intention that the property should be held 90/10.

What the judgment does not cover

Lord Wilson pointed out that the case did not require them to consider whether an intention could be imputed, rather than inferred, at stage 1 (ie, whether the presumption of joint beneficial ownership could be displaced in the first place) if one was not otherwise identifiable. That question would "merit careful thought".

Sole legal ownership

The case was not concerned with the situation where the home was in the name of one party only. The starting point there was different. The first issue was whether it was intended that the other party have any beneficial interest in the property at all (which he must do by establishing a "common intention" constructive trust). If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. The common intention has to be deduced objectively from the parties' conduct. If the evidence shows a common intention to share beneficial ownership, but does not show what shares were intended, the court must proceed as above; ie, first to infer the parties' intentions and if this cannot be done to impute them.

Going forward

It remains to be seen whether Lord Collins' view that the differences in reasoning between the justices were "largely terminological or conceptual and are likely to make no difference in practice" proves correct. He hoped that the decision meant that it would not be necessary to revisit *Stack*. However, if it were necessary the court "no doubt with a panel of seven or nine" would need "much fuller argument (together with citation of the enormous critical literature which the decision has spawned) than was presented to the Court of Appeal".

Joanna Bhatia

Challenges to compulsory purchase orders

An application to challenge the making of a compulsory purchase order (CPO) had to make some reference to the statutory grounds of challenge and be brought within six weeks of the CPO's publication

Analysis

The Acquisition of Land Act 1981 (ALA 1981), s 23 provides a power to challenge a CPO (within six weeks of its publication) on the grounds of:

- lack of empowerment to grant a CPO; or
- failure to comply with any requirements within ALA 1981 or Tribunals and Inquiries Act 1992.

In *IA v Secretary of State for Communities and Local Government* [2011] All ER (D) 17 (Nov), the claimant owned a property subject to a CPO which challenged by way of judicial review. He wrote to the court claiming his judicial review application was also an application under s 23 of ALA 1981. No grounds of challenge accompanied the letter.

At the hearing, the claimant conceded that judicial review was not the correct procedure to challenge the CPO. Instead, he applied for an adjournment and temporary stay of proceedings so that they could be converted into an application under s 23, and advanced grounds for challenge under that statutory head. The judge refused the application.

The Court of Appeal dismissed the claimant's appeal against the judge's decision.

Validity of s 23 application

It was not enough for an application simply to describe or label itself an application under s 23. To be a valid application under s 23, the application had to make some reference to the grounds which might entitle the claimant to some

relief (ie, a lack of empowerment to grant the CPO and failure to comply with the requirements of the 1981 Act).

The claimant's letter, which gave no indication of the statutory grounds for challenge to the CPO, had not been a valid application for the purposes of s 23. Therefore, the grounds put forward at the hearing had been wholly new and were well outside the six-week limitation period for bringing a s 23 application.

Prospects of success

The inspector had applied the correct proportionality test set out in *Daly v Secretary of State for the Home Department* [2001] 3 All ER 433, in justifying interference with the claimant's human rights. The inspector's finding on the proportionality of the making of the CPO was essentially fact-based and not amenable to review.

There was no evidence to suggest that the inspector had acted unfairly over the course of the inquiry, or that the claimant had been denied an opportunity to engage with the issues or make out his case. He had also fully taken into account the relevant factors relating to the claimant's disability before reaching his conclusion.

If the matter were to proceed further, the prospects of success would be low.

Jen Hawkins

Defining single dwellings

Availability of SDLT multiple dwelling relief depends on being able to show that the dwellings for which relief is sought are "single dwellings", which is not a defined term

A "dwelling" is a building or part of a building which is "suitable for use as a single dwelling" or is being constructed or adapted for such use. The legislation (Finance Act 2003, s 58D, Sch 6B) prescribes whether certain types of property are dwellings or not (eg residential accommodation for school pupils is, but a children's home is not). However, there is no definition of a "single dwelling". HMRC guidance on the relief is now contained in the *SDLT Manual*. While helpful, it does not expand upon what amounts to a single dwelling for the purposes of the relief.

Assured tenancy definition

In *Uratemp v Collins* [2002] 1 All ER 46, (a case dealing with occupation rights)

the House of Lords held that cooking facilities were not an essential attribute of a dwelling house. A hotel room occupied by a long-term resident was a separate dwelling, despite its lack of cooking facilities. The result was that the occupier had an assured tenancy.

Capital allowances and student accommodation

In Revenue & Customs brief 45/2010, HMRC announced a prospective change (applying to capital expenditure incurred after 22 October 2010) to the meaning of dwelling house in relation to capital allowances to "reflect the evolution of student accommodation".

Expenditure on plant and machinery

for use in a dwelling house does not qualify for capital allowances in certain cases (eg in the case of an ordinary or overseas property business). The term "dwelling house" in the part of the Capital Allowances Act 2001 (CAA 2001) dealing with assured tenancy allowances is given the same meaning as in the Rent Act 1977. Traditionally, HMRC has assumed that this interpretation applied throughout CAA 2001. This impacted particularly on student accommodation. HMRC had not traditionally treated university halls of residence as dwelling houses. In the case of "cluster flats" or houses in multiple occupation, it considered (in line with *Uratemp*) that individual study bedrooms (lockable with en suite facilities) were dwelling houses, but that the communal rooms such as the kitchen and lounge were not part of the dwelling houses. HMRC came to this conclusion because the study bedrooms allowed for exclusive occupation and access.

HMRC explained that it now considers that the definition of dwelling house in the context of assured tenancy allowances

is specific to that part of CAA 2001 and that in other parts it takes its ordinary everyday meaning, pointing out examples in CAA 2001 where the draftsman clearly saw – eg, hotels and dwelling houses – as being separate and distinct from one another. HMRC is adopting the definition in *Gravesham Borough Council v Secretary of State for the Environment* [1982] 47 P&CR 142, where it was held that the distinctive

feature of a dwelling house was its ability to afford to those who use it the facilities required for day-to-day private domestic existence. On that analysis, student accommodation as a whole, together with the communal kitchen and lounge, constitutes a dwelling house, but not the common parts such as stairs. The individual study bedrooms alone do not qualify as dwelling houses as they do not afford the occupants the facilities

required for day-to-day private domestic existence.

It may be that, contrary to the decision in *Uratemp*, HMRC take this approach in relation to SDLT multiple dwelling relief. If so, this the purchase of a block of bed-sits which are not self-contained will not qualify for the relief.

Joanna Bhatia

Case digests

Hertsmere Borough Council v Lovat
[2011] All ER (D) 238 (Oct);
[2011] EWCA Civ 1185
27 October 2011

Landlord and tenant – Leasehold enfranchisement – Authority freeholder of site – Tenant having leasehold of house and garden within site – Authority disputing tenant’s right to acquire freehold of house – Court finding that rural land not adjacent to house as house surrounded by garden – Authority claiming court erred in proper interpretation of statutory test – Leasehold Reform Act 1967, s 1AA(3).

The authority was the freehold owner of the site of a former hospital. There was a house on the site. By a lease dated 20 July 1993, the authority leased the site to a charitable trust (the trust) for a term of 150 years. By an underlease dated July 1995, the trust leased the house and its grounds to the tenant. In 2006, the tenant served a notice under the Leasehold Reform Act (LRA 1967) on the trust and the authority as freeholder, of her desire to have the freehold of the house and its grounds. The authority disputed the tenant’s right to acquire the freehold, on the ground that it was an “excluded tenancy” within the meaning of s 1AA(3) of LRA 1967. At the county court trial, the central question was whether the tenancy had been an “excluded tenancy”. If it had been, the right of enfranchisement conferred by s 1AA(1) was not open to her. There was no dispute that the house was within a designated rural area for the purposes of the Act, that the freehold of her house and of other land in the rural area that touched and lay beyond the boundaries of her house had been owned by the authority since 1 April 1997 when the relevant sections of LRA 1967 came into force, and that the house and the

“premises” let with it, namely the garden, were occupied for residential purposes and that the rural area that touched and lay beyond its boundaries was not so occupied. The critical question was whether such rural area was “adjoining land” within the meaning of s 1AA(3) (b) of LRA 1967. The tenant submitted that the meaning “house” in s 1AA(3) of LRA 1967 included the house only, and not its surrounding garden, and that the meaning of “adjoining” was “touching”; accordingly, as the rural land was not touching the house, because the house was surrounded by a garden, her tenancy was not an excluded tenancy. The judge accepted that the authority’s rural land did not adjoin the tenant’s house, and that the tenancy of her house was therefore not an excluded tenancy. The authority appealed.

The authority submitted that the judge had erred in finding that the meaning of “house” in s 1AA(3) of LRA 1967 excluded the premises that surrounded it, and also that “adjoining” did not have to mean immediately touching.

The appeal would be allowed.

It was a settled presumption of statutory interpretation that Parliament had not intended to enact legislation whose application resulted in absurdities.

The word “house” had been defined in opposition to the phrase “house and premises”, and so had to be taken to mean only the house, and not its surrounding land. The statutory context of the words “adjoining land” had to be interpreted in relation to the word “house”, whose defined meaning was the building alone and which could not safely be read as meaning “the house and premises”. If “house” meant “house without premises”, the interpretation of “adjoining land” as meaning land that touched the house led to anomalies and absurdities of a nature that parliament could not have intended.

The language of s 1AA(3) admitted of an interpretation that would avoid such absurdities, by reading “adjoining land” as meaning “neighbouring land”. Once that was adopted, the precise location of the house in relation to the boundary of house and premises became unimportant.

A declaration would be made to the effect that the tenant was not entitled to acquire the freehold of her house and premises.

Great Estates Group Ltd v Digby
[2011] All ER (D) 160 (Oct);
[2011] EWCA Civ 1120
13 October 2011

Estate agent – Commission – Entitlement – Agreement for sole agency – Enforceability of contract – Claimant signing sole agency agreement with defendant to sell property – Defendant finding purchaser without help of claimant – Defendant paying another estate agency commission – Claimant suing for commission – Whether sole agency contract being affected by statute – Whether contract complying with statute – Meaning of sole agency – Estate Agents Act 1979, s 18 – Estate Agents (Provision of Information) Regulations 1991.

The claimant was an estate agent. In 2007 it signed an agreement with the defendant (the contract) which was described as a sole agency agreement. On the day the agreement was signed, the claimant introduced three potential purchasers for the defendant’s property. On the next day, the defendant met another potential purchaser who made a higher bid. That bid proceeded to contract and completion. Another agency was involved in that process and the defendant paid commission to that other agency. The claimant alleged that that was a breach of the agency agreement it had with the defendant and it sued for damages for loss of commission. The judge dismissed the claim, holding that

the agreement was unenforceable. The judge found that the contract had failed to comply with the requirements of the Estate Agents Act 1979 (the Act) and the Estate Agents (Provision of Information) Regulations 1991 (the regulations), SI 1991/859. The claimant appealed.

The issue was whether the Act and the regulations applied to the contract if and so, whether the contract had complied with them.

The appeal would be dismissed (Lloyd LJ dissenting).

Where an agency contract used the expression “sole agency”, the effect of s 18 of the Act, together with reg 5 of the regulations and para (b) of the schedule to the regulations, was to place an obligation on the agent to inform his client what “sole agency” meant.

The statutory background had been enacted precisely because parliament had concluded that the ordinary client could not reasonably be expected to determine for himself the significance and effect of such terms as “sole agency” unless the agent provided a sufficient and accurate explanation. A contract that employed the expression “sole agency” and used language borrowed, albeit incompletely, from the statutory explanation of that expression, could not be construed in ignorance of that statutory background.

In this case, the contract had to be read alongside the statutory background. It followed that the contract, in failing to explain the significance and effect of the expression “sole agency”, had failed to comply with the statutory scheme. On that basis, the judge had been entitled to refuse to enforce the contract.

Alford v Hannaford and another
[2011] All ER (D) 58 (Oct); [2011] EWCA Civ 1099
7 October 2011

Easement – Right of way – Extent – Claimant owning land with express right of way along track by defendants’ land – Claimant owning another parcel of land adjacent to dominant tenement – Claimant having oral agreement with successor in title – Whether transfer limited right of way to pedestrian and vehicular use only – Whether oral agreement prohibited use of track for farming purposes – Whether grant to use land for grazing sufficient to constitute implied easement – Law of Property Act 1925, s 62.

The claimant owned a farm near

Tavistock. In 1991 she bought by way of a transfer (the transfer) 40 acres of land from a neighbouring farmer, H. The transfer granted the claimant a limited right of way over a track (the track) that ran between the claimant’s farm and another farm belonging to her son, with H reserving to himself a right of way over the remainder of the track. In 2003 the claimant made an oral agreement with H’s daughter, V, which supplemented the transfer. The claimant then brought a claim against the defendants, H’s successors in title, that the right of way granted in the transfer included a right to drive animals along the track, and that this right had not been affected by the oral agreement of 2003. In October 2010 the judge dismissed the claim, ruling that the transfer laid down that the track was limited to pedestrian and vehicular use only, and that the 2003 agreement reinforced that restriction by prohibiting use of the track for farming purposes. The claimant appealed.

The issues were whether: (i) the judge had improperly construed the transfer as restricting the claimant’s use of the track to pedestrian and vehicular use only; (ii) the judge had improperly construed the transfer granting a right of way over a track existing at the time of the transfer as opposed to a separate one that had once existed but had by then largely disappeared; (iii) the claimant had in any case an implied right of way under s 62 of the Law of Property Act 1925 (the Act) resulting from a grant to her to use land for grazing; (iv) there was no evidence before the judge to justify his ruling on the 2003 agreement; and (v) the judge’s declaration that the claimant or successors in title could not bring an action for interference in the right of way was unclear and that he was wrong to order an injunction prohibiting the claimant from obstructing the track when there was no finding or evidence of any risk of such interference.

The appeal would be dismissed.

- (1) It was settled law that, unless it was clear from the document itself that something must have gone wrong with the language, the court had to give the language used by the parties in transfers its natural meaning consistent with the context in which the words were used. There was nothing unconventional or obviously wrong about the language used by the transfer. It was not a complicated document and there was

no evidence to suggest that it had contained any error by the draftsman. If there had been such an error it was almost impossible to believe that it would not have caught the attention of the claimant or her solicitors. The judge was accordingly right to construe the transfer in the way he had.

- (2) The judge had been entitled to have regard to the situation on the ground when considering what rights H intended to grant the claimant. Given that there was only one usable track on the ground at the time of the transfer, the judge had been entitled to conclude that this was the track to which the transfer referred. It was the only sensible meaning which the parties, given the relevant factual background, could reasonably have understood the grant to have had.

- (3) The operation of s 62 depended on proof of the prior exercise of liberties, privileges, easements, rights and advantages appertaining to the relevant land.

In this case, the grant of a licence to use land for grazing did not therefore amount to occupation of the land by the claimant sufficient to engage the general words in s 62(1) by creating identifiable rights over the land. In any case, the transfer expressed a contrary intention by requiring there to be secured boundaries at all points and this was sufficient to exclude the grant of a right of way under s 62.

Consequently there was no implied grant under s 62.

- (4) There was ample material in V’s evidence to justify the judge’s finding that there had been an agreement by the claimant to desist from using the track for farming purposes in the disputed areas. At the same time, there was no material on which the judge could have based a finding that the claimant was entitled to do so. The judgment on that point therefore had to stand.

- (5) The judge was entitled to make a declaration prohibiting the claimant and her successors in title from bringing an action for interference in the relevant right of way to as to prevent unnecessary future disputes. Similarly, the injunction preventing the claimant was within the judge’s discretion to include in his order. Consequently, there were no grounds for interfering with this part of the judge’s order.

Legislation update

<p>Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2011</p>	<p>Enactment citation SI 2011/2452</p> <p>Commencement date 6 April 2012</p> <p>Legislation affected SI 2007/991 amended</p> <p>Enabling power European Communities Act 1972, s 2(2)</p>	<p>Amend the Energy Performance of Buildings (Certificate and Inspections) (England and Wales) Regulations 2007, SI 2007/991.</p> <p>Provide that it is mandatory for owners of air conditioned buildings to lodge inspection reports of air-conditioning systems (above 12kW) on the England and Wales central register.</p> <p>Make a number of changes to the system of compliance and enforcement in respect of energy performance certificates by, in particular, extending the compliance and enforcement regime to all buildings marketed for sale or rent.</p>
<p>Home Energy Assistance Scheme (Scotland) Amendment (No 2) Regulations 2011</p>	<p>Enactment citation SSI 2011/350</p> <p>Commencement date 30 November 2011</p> <p>Legislation affected SSI 2009/48 amended</p> <p>Enabling power Social Security Act 1990, s 15(2)(c)</p>	<p>Amend the Home Energy Assistance Scheme (Scotland) Regulations 2009, SSI 2009/48, to extend eligibility for the receipt of grants for improving the thermal insulation and energy efficiency of dwellings. Eligibility is extended to include applicants who are, or who live with a partner who is, in receipt of carer's allowance and to those caring for a severely disabled person, subject to certain conditions.</p>
<p>Commons Act 2006 (Commencement No 6) (England) Order 2011</p>	<p>Enactment citation SI 2011/2460</p> <p>Commencement date 31 October 2011</p> <p>Enabling power Commons Act 2006, ss 56(1), 59(1)</p>	<p>This Order brings into force the following provisions of the Commons Act 2006 on 31 October 2011:</p> <ul style="list-style-type: none"> – Sch 5, paras 1, 2 and 5 (in relation to England); and – Sch 5, paras 3, 6(b), 7(2)–(4), 8 (in relation to the pilot areas specified in the Sch to the Commons Act 2006 (Commencement No 4 and Savings) (England) Order 2008, SI 2008/1960).
<p>Registration of Deeds (Fees) Order (Northern Ireland) 2011</p>	<p>Enactment citation SR 2011/347</p> <p>Commencement date 1 February 2012</p> <p>Legislation affected SR 2007/3 revoked</p> <p>Enabling power Registration of Deeds Act (Northern Ireland) 1970, s 16(1)</p>	<p>Revokes and replaces the Registration of Deeds (Fees) Order (Northern Ireland) 2007 (SR 2011/347).</p> <p>Specifies the fees to be taken in respect of documents lodged for registration in the Registry of Deeds and for other work carried out by the Registry.</p> <p>Sets out the main changes effected by the Order.</p>

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