Butterworths
Property Law Newsletter
June 2012
Vol 4 Issue 6
NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

New RICS guidance for construction industry

Quantity surveying and construction standards (the Black Book) and New Rules of Measurement (NRM) have been published by the Royal Institute of Chartered Surveyors (RICS).

RICS said the use of these standards will provide clients with greater certainty and consistency in the construction process and will reduce risk, enabling a level playing field for clients to measure expectations against when procuring services, and for practitioners to benchmark their performance against.

It also aims to help clients and employers to reap cost and good practice efficiencies through the standardisation of construction and procurement costs and processes.

RICS director, Alan Muse, said there has never been a more relevant or pressing time to introduce this kind of initiative to the construction sector.

"The reforms proposed in the government's Construction Strategy, the 20% efficiency agenda, the increasing focus on Building Information Modelling (BIM), and the ongoing economic challenges the industry faces, all demand a step change in working culture and the need for the industry to deliver consistent best practice. The Black Book and NRM suite directly address this need."

Paul Morrell, the government's chief construction adviser, said: "The launch will help to equip the profession with the means to maintain a high quality of service and advice to its clients through this time of transformation."

Block of flats not a "house", Court of Appeal rules

The definition of "house" does not include flats for leasehold enfranchisement purposes, appeal judges have ruled.

In *Magnohard v Earl Cadogan and Cadogan Estates* [2012] EWCA Civ 594, the court ruled that a purpose-built block of flats did not count as a "house" for the purposes of s 2(1) of the Leasehold Reform Act 1967.

In his judgment, Lord Justice Lewison said the "clear consensus" of judicial opinion was that a purpose-built block of flats cannot reasonably be called "a house".

"It is true that some judges have referred to tower blocks and others to large purpose-built blocks, but in my judgment the underlying principle is clear. It is also true that none of these observations is binding ratio, but such is the strength and consistency of the consensus that it would in my judgment be wrong for us to depart from it."

In his judgment, Lord Neuberger, Master of the Rolls, said: "Unless there is binding authority to the contrary, it appears to me that, simply as a matter of ordinary language, such premises cannot 'reasonably [be] called' a 'house'…A building constructed, laid out and used as a block of substantial self-contained flats throughout its 120 years of existence cannot reasonably be called a house – at least in the absence of very unusual factors."

Lord Neuberger added that the Supreme Court would be considering a similar case, *Hosebay* [2010] 1 WLR 2317, in around ten weeks' time.

Hardwicke barrister, Brie Stevens-Hoare, said high levels of leaseholder enthusiasm for leasehold enfranchisement is matched by the levels of reluctance on the part of substantial property holders to being forced to sell their assets.

"While that enthusiasm and reluctance remain unabated the question of whether a right to leasehold enfranchisement exists in a particular case will continue to be hotly disputed and the meaning of 'a house' will be one element of that."

Pledge to tackle "beds in sheds"

A new national taskforce has been set up to tackle the issue of "beds in sheds" by taking action against criminal landlords and removing illegal immigrants.

A £1.8m fund has been set up by the government to help councils in the worst affected areas to tackle the "beds in sheds" problem head-on.

Housing minister, Grant Shapps and immigration minister, Damian Green, have held the first in a series of cross-Whitehall summits on the matter with representatives from the police, the UK Border Agency and local government.

The meetings aim to to find ways to close down thousands of sheds and outbuildings being rented out illegally to migrants, including some with no right to be in the UK, at extortionate rates.

Their foreign "tenants" often find it difficult to return home quickly after destroying their passports to avoid removal. With few other options, they will put up with cramped conditions, dodgy wiring and poor sanitation as an alternative to life on the streets.

Shapps, said: "I'm determined to flush out criminal landlords who think they can make an easy buck from cramped, cockroach-ridden outhouses. The scandal of 'beds in sheds' must come to an end."

Green said: "Those with no right to be in the UK must leave the country. If they volunteer to leave, we will help. If they refuse, we will enforce their removal. The UK Border Agency will do whatever is necessary...to clear up this problem."

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

Printed by Headley Brothers Ltd.

ISSN: 2040-0128

LexisNexis®

Don't presume too much

A Court of Appeal ruling provides a salutary warning that cohabiting couples should sort out their interests while still together otherwise a court may impose a "fair" solution which neither party envisaged. ***Timothy Hammond*** *reports*

The recent Court of Appeal decision of *Thomson v Hurst* [2012] EWCA shows that the lawyers of ex-cohabitees are seeking to widen the circumstances in which a presumption of an equal beneficial interest in property will apply.

Facts

Ms Hurst was a tenant of a property. Mr Thomson moved into the property as her partner. The parties never married. Thereafter they had two children together. They sought to buy the property. They had intended to purchase the property in their joint names but did not do so upon the professional advice of a mortgage adviser. It appears that Mr Thomson's employment history was chequered such that the adviser considered that it would undermine any joint mortgage application. Ms Hurst therefore applied for a mortgage in her sole name and the property was subsequently transferred into her sole name.

Following the purchase the parties continued to cohabit at the property with their children. Ms Hurst paid the mortgage sums and the outgoings. It appears Mr Thomson made occasional financial contributions (of limited amount) in respect of the children and the housekeeping.

When their relationship broke down and the parties separated Mr Thompson argued that he was beneficially entitled to a half share of the property upon the basis that (prior to the mortgage adviser's advice) it had been the parties' common intention to purchase the property in their joint names.

Previous case law

Reliance was placed by Mr Thomson upon a presumption identified in *Stack v Dowden* [2007] UKHL 17 and confirmed in *Jones v Kernott* [2011] UKSC 53.

Stack v Dowden

Stack v Dowden concerned the interests of ex-cohabitees in a property which they had occupied together as their home until the breakdown of their relationship. Although they had purchased the property in joint names there was no express declaration as to their respective beneficial interests in the property. The following principles were identified by Hale LJ:

- Where there is an express declaration of the beneficial interests that declaration is conclusive.
- Where there is joint legal ownership without an express declaration of the beneficial interests the presumption will be joint beneficial ownership. That is the case even if one party has contributed far more in financial terms to the property than the other.
- Where there is sole legal ownership the presumption will be sole beneficial ownership.
- The onus to rebut either presumption is upon the person seeking to show that the beneficial ownership is different from the legal ownership. In those circumstances the court will have to ascertain the parties' shared intentions with respect to the property in the light of their whole course of conduct in relation to it. This allows for the circumstances where the common intention of the parties changes over the period of the relationship.

Jones v Kernott

Further clarification was provided in the case of *Jones v Kernott*. Walker LJ and Hale LJ jointly set out (at para 51) as follows:

- The starting point is that equity follows the law and that parties who buy in joint names and are both responsible for any mortgage but do not expressly declare their beneficial interests are joint tenants both in law and in equity.
- The presumption can be rebutted by showing either: (a) that the parties had a different common intention at the time when they acquired the property; or (b) that they later formed the common intention that their respective shares would change.
- In those cases where either: (a) the parties clearly did not intend a joint tenancy at the outset; or (b) the parties changed their original intention but it is not possible to ascertain by direct evidence or by inference what their intention was, the court will determine beneficial entitlement based upon what it considers fair having regard to the whole course of dealing between the parties in relation to the property.

In respect of property purchased in one party's sole name, they set out (at para 52) as follows:

- The first issue is whether it was the parties' common intention that the non-purchasing party have any beneficial interest in the property at all.
- If so, the second issue is what that interest comprises. There is no presumption of joint beneficial ownership.
- If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will determine beneficial entitlement based upon what it considers fair having regard to the whole course of dealing between the parties in relation to the property.

Stack v Dowden and *Jones v Kernott* both concerned properties that had been purchased in joint names. In *Thomson v Hurst*, while it had been the intention of the parties to purchase the property in joint names, once professional advice had been given the property was purchased in Ms Hurst's sole name.

Court of Appeal ruling

Mr Thomson argued that since he and Ms Hurst had intended to purchase in their joint names, the presumption as to equal beneficial entitlement where a property is bought in joint names should by logical extension apply. The district judge at first instance disagreed. The Court of Appeal confirmed the approach that the district judge had taken.

The transfer of the property had been into Ms Hurst's sole name so that the presumption that the parties had intended to hold the equity in the property equally did not arise.

In circumstances where there had not been a transfer of property into joint names and a presumption of equal beneficial interests therefore did not arise, the district judge was correct to go on to consider what the parties had in fact intended (following the reasoning in para 52 of *Jones v Kernott*). The district judge identified that the common intention between the parties had been that Mr Thomson would have some beneficial interest in the property, although the parties had never considered what the apportionment of that interest would be. In all the circumstances, therefore, a fair apportionment (having regard to the whole course of dealing between the parties in relation to the property) was deemed to be a 90:10 split in favour of Ms Hurst.

Conclusion

Where property is transferred into the sole name of one of the co-habitees no presumption of equal beneficial interests will arise, no matter how strenuously a clever lawyer tries to argue to the contrary. This case is once again an object lesson in ensuring that interests are declared (and reviewed) by co-habitees during the course of their relationship – otherwise the parties may be left with what the court considers "fair" rather than with what at least one party to the partnership thought they both had intended.

Timothy Hammond
Barrister, Tanfield

Dodgy dealing and clock watching

Three recent cases throw the spotlight on mortgage fraud and limitation

Unsatisfactory replies to requisitions

Nationwide Building Society v Davisons [2012] All ER (D) 141 (Apr) involved a non-existent "firm" of solicitors, purportedly acting for the seller (someone pretending to be an existing solicitor managed to secure registration of a false branch office with the Solicitors' Regulation Authority). The property was registered in the buyer's name, but his solicitor (at the firm of Davisons) never received a discharge of the existing mortgage. Davisons was also acting for Nationwide who were funding the "transaction". It sent the mortgage advance to the seller's "solicitors" and nothing further was heard. The existing charge remained registered against the title. Nationwide had only the protection of a unilateral notice ranking behind it.

The High Court held that Davisons was in breach of the terms of its retainer. There was a clear mandatory requirement in the *Council of Mortgage Lenders' Handbook*, incorporated into the retainer, that Nationwide were to have a fully enforceable first legal charge on completion and the pre-existing charge had to be redeemed. Nationwide did not get this. Davisons was also in breach of trust. It held the money on trust for Nationwide until completion. Neither the requisitions nor any other letter from the seller's "solicitor" contained anything capable of being construed as a solicitor's undertaking to discharge the first charge on completion; not least because any undertaking given would not have been from a solicitor. Davisons should not have released the advance.

The court was not prepared to exercise its discretion to relieve Davisons from the consequences of the breach of trust.

The solicitor dealing with the transaction had behaved honestly throughout and believed that he had a sufficient undertaking. However, a careful and diligent solicitor would expect to be clear that he had an express, not an implied undertaking, still less a mere promise to give an undertaking in the future, on a matter so important. A reasonable solicitor acting carefully in the interest of his lender client would not be satisfied on the information he had. Nonetheless, he had parted with the mortgage advance. The answers given were unsatisfactory. He did not have the authority to take the risk he had with Nationwide's money.Importantly, in terms of best practice:

- the replies to requisitions were not given in the form requested. The solicitor should therefore have examined the replies with great care;
- one of the questions simply asks for information about charges to be redeemed. A response to this question confirming that the existing charge was to be redeemed was not an undertaking to make it happen;
- the solicitor could not rely on a proposal to adopt the Law Society's code for completion by post as being the giving of an undertaking to redeem the charge. The language of the code does not confirm that it is. If the Law Society had intended that the mere adoption of the code meant there was no need for a separate undertaking, the code would have confirmed this expressly and incorporated a form of undertaking.

Concealment must be deliberate

Mortgage Express v Abensons [2012] All ER (D) 140 (Apr) involved a claim by a mortgage lender against a firm of solicitors for failure to report various matters relating to two sets of transactions entered into by its borrower client in 2004 and 2005. The borrower was a shareholder and director of the seller company and was the registered freeholder of the site on which the properties were being built. He sold the properties to the company for nil consideration and then repurchased them on the same day for a full consideration, part of which he paid with the benefit of the claimant's loans. He was effectively buying from himself. Mortgage Express confirmed that if the true facts had been known,

it would have refused to fund the transactions.

The High Court set aside part of an order permitting Mortgage Express to amend its particulars of claim to plead a new cause of action for breach of fiduciary duty, even though the limitation period for such a claim had, on the face of it, expired in relation to the first group of loans, made in 2004.

Where any fact relevant to a plaintiff's right of action has been deliberately concealed from him by the defendant the limitation period does not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it. Deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

Mortgage Express argued that if it made out the newly pleaded cause of action, the limitation defence would automatically be unavailable. The new cause of action required proof of deliberate breach of duty by Abensons. If established, it would inevitably also establish that the breach of duty had been deliberately concealed so that limitation would not run.The High Court disagreed. Allowing the amendments deprived Abensons of a reasonably arguable limitation defence. A limitation defence is only blocked if the defendant is shown to have been aware at the time of the alleged breach of duty that what he had done, or had omitted to do, amounted to a breach of duty. Here, some of the pleadings related to Abensons not taking care to avoid a conflict of duty. It was arguable that this could be proved even if it was not deliberate on the part of Abensons.

A solicitor may be in breach through negligent failure to appreciate the incompatibility of his two sets of instructions.

Limitation and beneficiaries

The case of *Central Bank of Nigeria v Williams* [2012] All ER (D) 38 (Apr) also involved a limitation issue. Dr Williams brought an action against Central Bank of Nigeria (CBN) for fraudulent breach of trust, 24 years after the alleged breach. His case was that a solicitor had held money in his client account in trust for Dr Williams on terms that he would only release it if and when certain funds had been paid in Nigeria. However, the solicitor fraudulently paid away most of the money to CBN.

Limitation Act 1980, s 21 provides that no limitation period applies to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy. CBN argued that this meant that not only must the trustee be party or privy to the cause of action, but that the carve out from limitation applied only to actions against a trustee. It was not a trustee and so was protected by the Limitation Act 1980.

The Court of Appeal disagreed. An action by a beneficiary under a trust may be brought, outside the usual limitation period, in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy against both:

- that trustee; and
- any other person who dishonestly assisted him in the fraud or fraudulent breach of trust.

Joanna Bhatia

Competence required

To rely on its intention to occupy premises to defeat the tenant's application for a new tenancy, a landlord has to have been the "competent" landlord for the five years before termination of the tenancy

Under the Landlord and Tenant Act 1954 (LTA 1954), s 30(1)(g), a landlord may: oppose an application for the grant of a new tenancy; or make an application for the termination of a tenancy without the grant of new tenancy, on the ground that on the termination of the current tenancy he intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him, or as his residence (ground (g)).

The five-year rule

However, under LTA 1954, s 30(2), a landlord is not entitled to rely on this ground if its interest:

- was purchased or created within five years before termination of the current tenancy; and
- at all times since that purchase the holding has been comprised in a tenancy or successive tenancies to which Pt II of LTA 1954 applies (sitting tenant limb).

The competent landlord

The "competent" landlord for the purposes of LTA 1954:

- is the owner of an interest in reversion expectant (whether immediately or not) on the termination of the tenancy;
- which is the freehold or a lease which does not have less than 14 months to run.

Gap in competency

In *Frozen Value v Heron Foods* [2012] All ER (D) 113 (Apr), the landlord opposed Frozen's application for a new tenancy on ground (g). However, from 17 May 2009 until 24 February 2010, when it was granted a new lease by the superior landlord, it was not the competent landlord, as its lease had less than 14 months to run. Frozen's tenancy ended on 14 July 2010.

The Court of Appeal held that Heron could not rely on ground (g) as it did not satisfy the five-year rule. It was not the competent landlord between 17 May 2009 and 24 February 2010. It only became the competent landlord again when its new interest in the premise was created on 24 February 2010.

Court of Appeal authorities

The Court of Appeal was not constrained by existing authorities. They did not deal with the issue of a landlord who ceases to be a competent landlord for a while during the five-year period.

VCS Car Park Management v Regional Railways North East [2001] 1 All ER 403 was authority for the proposition that successive leases (or a sequence of interests including the freehold as well as leasehold interests) will suffice to enable the competent landlord to satisfy the five-year rule, provided those interests were interests of the competent landlord at all times during the five years.

In *Artemiou v Procopiou* [1965] 3 All ER 539, the tenant could not rely on the five-year rule to preclude the landlord from relying on ground (g) because the tenant did not satisfy the sitting tenant limb of the five-year rule. The holding had not been subject to a tenancy to which LTA 1954 applied since the creation of the landlord's interest.

The Court of Appeal in *Frozen Value* went on to consider whether the landlord satisfied the five-year rule. However, on that point, the ratio was only that the landlord may rely on a succession of continuous leasehold interests to satisfy the rule, the earliest starting at or before the beginning of the five-year period. It left open the effect of an earlier leasehold interest having had less than 14 months to run during the five-year period so that, at that time, the landlord was not the competent landlord.

Outcome and policy

The five-year rule was designed to prevent a new landlord coming on to the scene towards the end of a lease and asserting a right to occupy the premises for its own purposes. The 14-month test for a competent landlord, was designed to prevent a landlord whose interest in the property is soon to expire, from asserting substantive statutory rights against the tenant. Heron was not a newcomer on the scene, but its interest had little time to run when the request for a new tenancy was served. It would be contrary to the purpose of the legislation if it could take rapid steps to be granted a new tenancy so as to sidestep the effect of the 14-month test. This would be much the same as the acquisition of an interest by someone who had never been the competent landlord.

Reliance on ground (g) will depend on whether a landlord is aware of the five-year rule and able to agree a new lease where its lease is approaching expiry. If it cannot, it will have to wait until five years have elapsed since the acquisition of its new lease or reversion. This was inherent in a rule which draws a distinction in its effect according to whether something happens or does not happen by a hard and fast cut-off date.

Joanna Bhatia

Reasonable belief

An applicant for adverse possession of the first and second floors of adjoining property reasonably believed that he owned it. His occupation of it had been unchallenged for 18 years and the only access to it was from his property

The Land Registration Act 2002 (LRA 2002) came into force on 13 October 2003 and, subject to transitional provisions, radically changed law and practice relating to the adverse possession of registered land. To claim title by adverse possession, the squatter must show he has been in adverse possession for at least ten years (LRA 2002 s 96).

The registered proprietor can require the application to be dealt with under LRA 2002, Sch 6, para 5. The conditions the applicant must then satisfy include:

- the squatter has been in adverse possession of land adjacent to their own for at least ten years;
- the squatter is under the mistaken but reasonable belief that they are the owner of it;
- the exact line of the boundary with this adjacent land has not been determined under LRA 2002, s 60; and
- the estate to which the application relates was registered more than a year prior to the date of the application.

In *IAM Group v Qamar Chowdrey* [2012] All ER (D) 167 (Apr), Chowdrey had exclusive possession of the first and second floors of property adjacent to his own for more than ten years for the purposes of his business as a retail shop. The first floor was used for the storage of stock, together with an office area, and the second floor was also used for the storage of stock. The only access to those areas throughout the period of his occupation was by means of the rear of the ground floor of his adjacent premises.

Court of Appeal ruling

The Court of Appeal held that Chowdrey's belief that he owned the first and second floors of the adjoining property was reasonable.

The issue of reasonableness did not turn on the knowledge which his solicitors would, or should have had if they had been reasonably competent, when he had purchased his property. There was no evidence before the judge as to what those solicitors did or thought about the matter. The issue was whether Chowdrey's belief was reasonable.

That could involve a question as to whether he should have made enquiries of his solicitors or elsewhere as to whether the disputed property was comprised within his paper title. However, on the facts, when Chowdrey bought his property, there had been nothing to put him on notice that he needed to raise the question of whether his title included the disputed property. He had enjoyed exclusive possession without challenge or question for three years before that and the access to it was solely via his property.

Letters from IAM's solicitor challenging Chowdrey's title to the disputed property made no difference. Following *Zarb v Parry* [2011] All ER (D) 100 (Nov), the mere fact that a paper title owner challenges the asserted ownership of land by the adverse possessor is not sufficient in every case to render unreasonable any continuing belief of ownership on the part of adverse possessor. Indeed, in *Zarb*, the adverse possessor satisfied the requirement of reasonable belief even though the paper title owner had challenged the assertion of ownership by the adverse possessor.

Here, by the time of the letters from IAM challenging Chowdrey's asserted title to the disputed property, he had enjoyed unchallenged exclusive occupation for some 18 years. Indeed IAM's tenants of the property (who had since vacated) had seemingly acknowledged that the disputed land was not being used by them, and access was only obtained via Chowdrey's property. In that context, the letters did not mean that Chowdrey's continuing belief that he owned the disputed property ceased to be reasonable.

Joanna Bhatia

Case digests

IAM Group plc v Chowdrey
[2012] All ER (D) 167 (Apr); [2012] EWCA Civ 505
15 March 2012

Land – Adverse possession – Exclusive possession – Defendant purchasing property believing title including upper floors – Claimant purchasing adjoining property to which upper floors belonging under title – Claimant seeking possession – Defendant asserting adverse possession – Judge finding defendant having reasonable belief that upper floors belonging to him and declaring defendant having defence in adverse possession – Whether judge erring – Land Registration Act 2002, s 98, Sch 6, para 5(4)(c)

These proceedings concerned a property in London (No 26). The areas in dispute were the first and second floors of No 26 (the disputed property). In 1918, the then common owner of No 26 and No 26a granted a 20-year lease in respect of No 26a which described part of the demised property as extending partly over No 26 (the 1918 lease). The 1918 lease confirmed that the room over No 26 which was included within its terms was within the title of No 26. It further provided that, at the termination of the 1918 lease, No 26 and No 26a would be physically separated by blocking up the opening between them. A title deed from 1928, which was held on the Charges Register, showed that No 26 was delineated by a single line of broadly rectangular shape. In 1990, the defendant entered into occupation of No 26a under an oral tenancy. From that time, he had exclusive possession of No 26a and the disputed property for the purposes of his business as a retail shop. The first floor was used for storage and an office area and the second floor was also used for storage. The only access to those areas was by means of the rear of the ground floor of No 26a. In 1993, the defendant bought No 26a, believing he was buying exactly that which he had rented. In January 2001, the claimant became the registered proprietor of No 26 at the Land Registry. In August 2010, it commenced proceedings seeking possession of the disputed property. The defendant counterclaimed, contending that he had been in adverse possession of the disputed property. The judge concluded that, since 1990, the defendant had been in exclusive possession of the disputed property. The judge held that para 5(4)(c) of Sch 6 to the Land Registration Act 2002 (the 2002 Act) had been satisfied as the defendant had held a reasonable belief that the disputed land had belonged to him and that belief had been both genuine and reasonable. Accordingly, the judge declared that the defendant had had a defence based on adverse possession pursuant to s 98(1)(a) and (b) of the 2002 Act. The claimant appealed.

It submitted that the judge ought to have inferred that the defendant's solicitors had not only seen the 1993 transfer to the defendant and the copy entries in the Land Registry, but that they had also conducted all necessary searches on the defendant's behalf, consequently, and assuming suitable enquiries had been made, there had been nothing that had led to a reasonable belief that the disputed property had belonged to the defendant. Further, the judge had failed to address that, for the purpose of establishing reasonable belief or otherwise under para 5(4)(c) of Sch 6, the defendant had had to be fixed with the knowledge of his solicitors or the knowledge which it should be inferred that they would have had if they had acted with reasonable skill and competence. Furthermore, there had been correspondence from the claimant's solicitors to the defendant that had asserted that the defendant was not the owner of the disputed property and that, upon receipt of those letters, the defendant could not have continued to believe that he owned the disputed property.

The appeal would be dismissed.

(1) The issue had not been the knowledge of a reasonably competent solicitor acting for the defendant in 1993, but whether the defendant had been reasonable in holding the belief that he had in all the circumstances. On the facts as found by the judge, there had been nothing that put the defendant on notice in 1993 that he had needed to raise with his solicitors whether his title to No 26a had included the disputed property, of which he had previously enjoyed exclusive possession without challenge or question and the access to which had been solely from No 26a.

(2) In the circumstances, by the time the defendant had received the letters that challenged his asserted title of the disputed property, he had enjoyed unchallenged exclusive occupation for some 18 years. During that time, the defendant's exclusive occupation of the disputed property had never been challenged or questioned by anyone who had had an interest in No 26. Applying established principles to those facts, the judge had been right to conclude that the letters from the claimant had not resulted in the continuing belief of the defendant that he owned the disputed property having ceased to become a reasonable one.

Ashley v Secretary of State for Communities and Local Government and others (judgment delivered extempore)
[2012] All ER (D) 226 (Mar); [2012] EWCA Civ 559
29 March 2012

Town and country planning – Permission for development – Planning inspector hearing appeal by third defendant developer against decision of second defendant local authority to refuse application for planning permission – Inspector determining appeal by way of written representations – Developer submitting expert evidence on final day for written submissions – Claimant not being aware of expert's evidence – Inspector determining appeal in favour of developer on grounds that the expert's evidence was unchallenged – Claimant submitting that failure to permit him to respond to expert's evidence amounting to breach of natural justice – Judge finding claimant could have checked details of representations made – Whether judge erring in finding no breach of natural justice

The claimant (A) had been the secretary of a local residents group created to oppose redevelopment of a nearby site. The site had been a former school, and the third defendant developer had sought planning permission to build a number of dwellings and associated infrastructure. The local authority's planning board had initially refused planning permission on the ground that the development would have introduced the provision of a bank of parking spaces and manoeuvring area to the eastern part of the site, which would have resulted in noise transfer and disturbance from vehicles to the detriment of the residential amenity of the occupiers of a property owned by one of the residents group. The developer appealed

that decision to an inspector appointed on behalf of the first defendant secretary of state. The inspector had decided that, pursuant to the criteria for the purposes of the procedural determination published by the secretary of state in Annex C to PINS Circular 1/2009, the appeal would proceed by way of written representations from the parties. On the final day for receipt of representations, the developer submitted a report of an acoustics expert, which had concluded that the proposed development would not have had the detrimental noise impact that the local authority had found. A had had no knowledge of the expert's report until it had been referred to in the inspector's determination. The inspector determined that, based upon uncontested evidence in regard to noise, the authority's decision would be quashed and planning permission granted. A challenged that decision on the ground that the failure by the inspector to have allowed him to respond to the evidence of the expert had amounted to a breach of natural justice and had been unfair. That challenge had been unsuccessful. The first instance judge found that A had had the opportunity to view the representations made by the developer by merely approaching the authority and requesting sight of the representations that had been made to the inspector, and accordingly, had he done that, A could have sought to make further representations to the inspector. A appealed.

A submitted that the judge had erred since it had been unfair for the inspector to have proceeded in circumstances in which he had failed to give A the opportunity to make representations in regard to the acoustics expert's evidence, particularly where A had not known that the developer had or had been intending to submit expert evidence on such an important issue in the proceedings.

The appeal would be allowed.

A had been unaware that the developer had submitted an expert's report dealing with an issue that was of importance in the dispute, namely the issue of noise. The inspector had placed significant weight upon the expert's report and A should have been given an opportunity to have made representations in regard to it. In addition, there had been no mention in the earlier stages of the proceedings to a need for expert evidence in regard to the issue of noise. The procedural policy under which the inspector had requested that the parties submit any representations on the appeal in writing, and by a specified deadline, had been, on their face, unfair to the interested party in a situation that A had been in. The policy had made it clear that the deadline for written submissions should be adhered to and that representations would only be entertained in exceptional circumstances. The policy accordingly appeared to have prevented an interested party from seeking to make further representations if he had made such a request. Accordingly, the judge had erred in finding that had A sought to make further representations in light of the expert's report that he could have done so. Further, the judge had erred in holding that A could have been alerted to the expert's report by visiting the local authority's offices after the deadline for written submissions had elapsed and requesting details of representations that had been made. That element of his decision had placed an undue burden upon an interested party in requesting details of representations made by the developer after the deadline, in circumstances in which the policy had in any event restricted any further representations. In the circumstances, therefore, there had been a breach of natural justice in the inspector's decision.

Decision of Robin Purchass QC [2011] All ER (D) 323 (Mar) reversed in part.

Barking and Dagenham Borough of London v Bakare
[2012] All ER (D) 27 (May)
2 May 2012

Landlord and tenant – Possession – Possession order for causing nuisance or anti-social behavior – Local authority seeking immediate possession order – Tenant's son committing illegal acts and anti-social behavior – Tenant seeking suspension of possession order – Tenant putting forward package of options to ensure son not attending property – Judge granting immediate possession order – Tenant submitting judge failing to consider package of proposals advanced – Whether judge erring

The defendant was a tenant of residential property in a block of flats owned by the claimant local authority. The authority had commenced possession proceedings on the grounds of rent arrears and anti-social behaviour carried out by the claimant's son (S). At an initial hearing of the claim, the judge made a number of findings in regard to S's behaviour, including possession and use of class B drugs, possession of weapons, and other anti-social behaviour. The judge adjourned determination of the application for possession until a later hearing at which the rent arrears were to have been determined. In the interim, the judge made an anti-social behaviour order (ASBO) against S preventing him from loitering in the public areas of the block of flats and being in the company of named individuals. A second hearing took place, by which stage the rent arrears had been remedied, but it had been clear that S had continued to carry out anti-social and illegal activities and had been in breach of the ASBO. The claimant had sought an immediate possession order. The defendant had invited the judge to made a suspended possession order on the grounds of a package of steps that she had taken or had proposed to take to ensure that S was not at the property and that any anti-social behaviour would cease. The judge held that, in the circumstances, and in particular in light of the illegal and anti-social activities that had been carried out by S since the first hearing and the making of the ASBO, it had been clear that if he were to make a suspended possession order that the anti-social behaviour would have continued. The judge accordingly refused to make a suspended order and granted the claimant an immediate possession order. The defendant appealed.

She submitted that the judge had erred in the exercise of his discretion by failing to adequately consider the package of proposals that the defendant had put forward to show that the behaviour of S would cease.

The appeal would be dismissed.

It had been fair to say that the judge had not expressly set out in his judgment detailed findings on the package of proposals advanced by the claimant, save for reciting the proposals made. However, the second hearing had been a single issue hearing, to determine whether to make a suspended possession order or to grant an immediate order on the basis that there was a likelihood that the anti-social behaviour would have continued. The findings that the judge had made at the first hearing had been a warning to the claimant regarding the outcome of her son's activities and behaviour. Thereafter, S had committed further acts that the judge had found to have been an escalation of his behaviour. It had been plain that the judge had had the proposals advanced by the claimant in mind, but his reasons and his conclusion had been fully justified in the circumstances, in particular, in light of S's acts since the first hearing. The judge had clearly focused upon the future and there was no basis upon which to interfere with the exercise of his discretion.

Legislation update

Localism Act 2011 (Commencement No 5 and Transitional, Savings and Transitory Provisions) Order 2012	**Enactment citation** SI 2012/1008 **Commencement date** 4 April 2012 partially; 3 May 2012 partially; 4 May 2012 partially; 31 May 2012 partially; 15 January 2013 partially **Enabling power** Localism Act 2011, s 240(2), (7)	Brings into force provisions of the Localism Act 2011, 2011/20, relating to grounds for landlords to refuse to surrender and grant tenancies, the London housing strategy, the Mayor's economic development strategy for London, the London Environment Strategy, access to meetings and documents associated with Transport for London, EU financial sanctions and tenancy strategies.
Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals) (Wales) Order 2012	**Enactment citation** SI 2012/899 **Commencement date** 21 March 2012 **Legislation affected** Housing Act 2004, Mobile Homes Act 1983 amended **Enabling power** Housing Act 2004, ss 229(3), (4), 250(2)	Amends the Mobile Homes Act 1983 to give tribunals jurisdiction: ■ to consider proceedings related to protected sites in Wales; ■ to determine whether site owners can terminate agreements under certain circumstances; and ■ details an occupier's right to appeal. It also amends the Housing Act 2004 to prescribe the costs a tribunal may award in exceptional cases.
Local Government (Boundaries) Order (Northern Ireland) 2012	**Enactment citation** SR 2012/Draft **Commencement date** Comes into effect on the day after the day on which it is made **Legislation affected** SR 1992/303 revoked **Enabling power** Local Government Act (Northern Ireland) 1972 s 50(10)	Gives effect with modifications to the recommendations made under the Local Government Act (Northern Ireland) 1972 by the Local Government Boundaries Commissioner in relation to the boundaries and names of the districts into which Northern Ireland is to be divided for the purposes of local government and the number, boundaries and names of the wards into which each of those districts is to be divided. The modifications to the Local Government Boundaries Commissioner's recommendations are outlined in the Statement of Reasons for the Modifications of the Recommendations of the Local Government Boundaries Commissioner prepared under the Local Government Act (Northern Ireland) 1972 s 50(9).
Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012	**Enactment citation** SSI 2012/128 **Commencement date** 1 August 2012 **Enabling power** Housing (Scotland) Act 2001, ss 16(5A)(c), 109(2)	Prescribes the maximum period for which a landlord's right to recover possession of a house in pursuance of a court order under the Housing (Scotland) Act 2001, s 16(2) is to have effect in certain cases where the court order is made on the grounds that rent lawfully due from the tenant has not been paid, or on grounds including that ground. Prescribes a maximum period of six months from the date a decree is extracted. Where an appeal is lodged after the date of extract, and an order for recovery of possession is subsequently upheld, the prescribed maximum period of six months will begin on the date of the interlocutor of the court disposing of the appeal.