

## housing update

Spring 2009

### Hope value ruling could save landlords millions

The House of Lords has ruled that hope value does apply to collective enfranchisements and can be included in assessing the purchase price of the freeholds to non-participating tenants.

The ruling is a major boost for large property owners who could save millions of pounds in future when dealing with collective enfranchisements.

The Lords were required to consider Earl

Cadogan v Pitts together with four other related appeals.

In giving the leading judgment, Lord Neuberger outlined some of the basic concepts which were central to the issue. "When the property to be valued is a freehold subject to a long lease, there is an obvious special purchaser, namely the tenant. The reversion is worth more to him than to others because his lease is a wasting asset, the value of which

will inevitably decline to zero unless reinvigorated by extension or merger with the freehold.

"Thus the value of the lease merged with the reversion is always greater than the sum of the separate values of the two interests. This difference is called the marriage value."

At the same time, a third party purchaser might consider the possibility of later selling to the tenant at an enhanced price. That is the hope value.

### High Court upholds ASBO term against wearing a hoodie

A term in an ASBO prohibiting a 'gang member' from wearing hooded tops in certain areas has been upheld by the High Court.

The order was made at Greenwich Magistrates Court following an application from the Metropolitan Police. During the hearing the court found that the defendant had a history of committing anti-social acts and was a member of a gang which had intimidated people.

The agreed statement of facts said that the defendant and the gang gathered together in the street, in housing estates, railway stations, bus stops and similar locations. The statement goes on to say: "Members of the gang intimidate members of the public through language and gestures. They wear hooded tops to help conceal their identity."

The court considered it necessary to make an order to reduce the "swagger, menace and the fear of the anti-social behaviour". The ASBO contained a term prohibiting the defendant from wearing any item of clothing with an attached hood in the London borough in question.

He responded by applying for a judicial review of the decision to include such a term. He argued that it was unreasonable and its purpose and effect was not to prevent anti-social behaviour but simply to prevent him wearing the kind of clothing he may otherwise wish to choose.

The High Court dismissed the claim and held that it was implicit from the magistrates' findings of fact that the defendant had worn a hooded top to



cause fear. The term preventing him from wearing such tops was designed to prevent that fear arising.

It achieved its aim by removing his confidence that he could not be identified and therefore held to account for his actions. The term preventing him wearing a hooded top was therefore necessary and proportionate.

#### The two-stage test for making an ASBO

A court can grant an ASBO under the Crime and Disorder Act 1998 where an applicant can satisfy a two-stage test.

First, the applicant must be able to show that the defendant has acted in a way that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.

Secondly, the applicant must show that it is necessary to make an ASBO for the protection of others.

The Court of Appeal had ruled that an amendment to the Leasehold Reform, Housing and Urban Development Act 1993 had excluded hope value being applied in relation to non-participating tenants in collective enfranchisements. That has now been overturned by the Lords.

Lord Neuberger said: "It would be both arbitrary and unfair, in my judgment, if a landlord, who can recover marriage value in relation to the participating tenants' flats, could not recover hope value in respect of the non-participating tenants' flats."

He went on: "Given that it was thought to be fair to make the participating tenants pay a true market price for the reversion to their own flats, it would be surprising if they did not have to pay a true market price for the investment part of their purchase, and that would include paying for any hope value in respect of the prospect of negotiating new leases of their flats with non-participating tenants."

However, the Lords also ruled that hope value could not be included in relation to the participating tenants in a collective enfranchisement as it would already be accounted for in the marriage value assessment.

The Lords allowed the appeals in Earl Cadogan and Cadogan Estates v 27/29 Sloane Gardens Ltd, and Earl Cadogan and Cadogan Estates v Grandeden Property Management. They dismissed Earl Cadogan's appeals in the three other cases – Sportelli, Pitts and Wang, and Atlantic Telecasters.

# House of Lords clarify the law on tenancy rights and suspended possession orders

An assured tenancy which has become subject to a suspended possession order doesn't come to an end until possession is actually given up.

A tenant subjected to a suspended possession order could have his right to buy reinstated if the order was discharged.

These are two of several rulings by the House of Lords which go a long way towards clarifying the rights and status of secured and assured tenants. The rulings were made after the Lords considered three conjoined appeals from the Court of Appeal. These were *Knowsley Housing Trust v White*, *Honeygan-Green v London Borough of Islington*, and *Porter v Shepherds Bush Housing Association* (2008).

There were several issues to address including the date when an assured tenancy came to an end after being subjected to a suspended possession order under the Housing Act 1988. There

was also the problem of whether a court could make a proleptic – ie anticipatory – direction that the order could be discharged if the tenant complied with the terms. The other main point was whether a tenant's right to buy should be reinstated if a suspended possession order against them was discharged.

In the case of *Knowsley Housing Trust v White*, the tenant had applied for a declaration that she remained an assured tenant pending the execution of a suspended possession order and that she would retain her right to buy under the Housing Act 1985. Her application was refused by Liverpool County Court and that decision was later upheld by the Court of Appeal.

However, the House of Lords has now ruled in her favour. After considering all three cases the Lords ruled that an assured tenancy would not come to an end until possession was delivered up.

Furthermore, after making a possession order a court had wide-ranging powers to later vary or discharge it. The court could also include a proleptic discharge condition. This would help to minimise



future uncertainties and reduce the need for further applications.

The Lords also ruled that a tenant's right to buy was not lost permanently once a secure tenancy was determined pursuant to a possession order. They said that it was a well established rule that once a suspended possession order was discharged, the secure tenancy was retrospectively revived.

This meant that the tenant had to be treated as having had a secure tenancy throughout the period in question and would therefore retain the right to buy.

**Right to buy not lost permanently**

## Failure to follow lease provisions costs landlord more than £263,000

A recent case in the Court of Appeal highlights the need for landlords to make sure they follow the provisions of the lease when making service charges.

Failure to do so has cost Leonora Investments Co Ltd £263,117. Leonora was the landlord of an office block in Croydon. In 2000 it let four floors to engineering consultancy Mott MacDonald.

The leases contained specific provisions for the payment of service charges. The Schedule of Services stated: "The Landlord will (unless prevented by causes beyond its control) prepare and send to the Tenant a statement of actual Service Costs and Service Charge for each Service Charge Year as soon as practicable after the end of such year and in the event of the Service Charge for the Premises exceeding the aggregate amount paid by the Tenant for such year the Tenant will pay the balance due to the Landlord within 14 days of demand and in the event of the aggregate amount being greater the excess will be credited by the Landlord by way of a set-off against the next instalment of Service Charge due from the Tenant."

This set out a clear method of payment. However, the landlord then set about some substantial renovations to all four floors which it regarded as outside the normal service costs so it decided to send separate invoices outside the provisions laid down in the schedule. The tenant refused to pay so the landlord sued.

The Court of Appeal has now ruled in favour of the tenant. In giving his judgment Lord Justice Tuckey said the issue boiled down to a simple question: what does the Lease say has to



happen before the Tenant is obliged to pay Service Charge?" He said the answer was in paragraphs 1 to 3 of the Schedule dealing with Service Charges. "They prescribe the contractual route down which the Landlord must travel to be entitled to payment".

This meant the landlord should have followed the provisions of the lease. In failing to do so it had lost the right to charge for the work.

The obvious lesson is that landlords must ensure that they stick by the provisions of the lease. However, there is also another point that emerges from the case. The landlord in this case did not consider that a mistake had been made. It had submitted that it was entitled to send the separate invoices.

However, had it accepted that a mistake had been made and taken steps to rectify the matter it might have had more success. The trial judge had suggested that the landlord could have issued a revised statement once it realised it had failed to follow the provisions of the lease.

Lord Justice Tuckey supported this approach: "No one has challenged the Judge's conclusion that it was open to the landlord to issue a revised statement. Nor would I. Provisions of this kind should not be seen as procedural obstacle courses. Businessmen dealing with one another often make mistakes and there is no scope for saying that the provisions in this clause only gave the landlord one opportunity to get it right".

# Landlord wins appeal over validity of notice to end lease

A landlord has won its appeal in a case which centred on whether or not a tenant's notice to end a lease under a break clause was valid, even though it wasn't acknowledged until ten months after the break date was reached.

The case involved Reuters Ltd which rented some commercial premises from Orchard (Developments) Holdings on a 15-year lease. The lease contained a break clause that allowed the tenant to terminate after five or ten years by giving six months' notice.

The lease required that notices had to be in writing and unless they were acknowledged by the landlord, they had to be sent by registered post or recorded delivery.

The tenant decided to take advantage of the break clause in July 2005 and sent

## Right to charge rent remains

notices by both letter and fax. The letters were posted by a process server and placed in the wrong box and so were ineffective. The faxes were sent and received by the landlord but at a time when its offices were closed.

The landlord did not acknowledge receipt of these faxes until December 2006 – more than 16 months after the last possible day for serving a six months notice period and more than ten months after the fifth anniversary of the break date itself.

By this time, the tenant had vacated the premises despite protests from the landlord who said the notice was

ineffective and began proceedings to recover rent.

The judge ruled in favour of the tenant saying that the acknowledgement of the faxes by the landlord, albeit several months after the event, had retrospectively validated the tenant's notice. However, that ruling has now been overturned by the Court of Appeal.

It held that the informal notice sent by fax could only become valid once it was acknowledged, but that acknowledgment would have to be before the five-year break point had been reached. The notice could not be retrospectively validated by a later acknowledgment.

It followed, therefore, that the lease had not come to an end and could not do so under the break clause for another five years. In the meantime, the landlord retained the right to charge rent.

# When possible 'use ASBOs not injunctions' to tackle anti-social behaviour

The Court of Appeal has ruled that local authorities should apply for ASBOs rather than injunctions whenever possible when dealing with anti-social behaviour in their areas.

The case in question was Birmingham City Council v Shafi & Ellis (2008). The local authority together with the police and the probation service had begun a campaign against violent and criminal street gangs.

They sought ASBOs against gang members who were under 18 but decided to seek injunctions under s222 of the Local Government Act 1972 in relation to two people who were over the age of 18. The trial judge dismissed the application saying the jurisdiction to grant such injunctions had been revoked by the introduction of ASBOs.

He further held that, even if he were wrong about the jurisdiction issue, he still could not make an injunction unless



he was satisfied to the criminal standard of proof that the defendants had acted in a criminal way or caused a public nuisance.

The authorities pursued the case but the Court of Appeal also ruled against them. The Appeal Court judges agreed that the trial judge had been wrong to think that he did not have the jurisdiction to make an injunction.

However, it would still not be appropriate to do so when the matter could be

dealt with by the use of an ASBO. The Crime and Disorder Act 1998 had been designed to deal with anti-social behaviour and so that was the statute that should be used whenever possible.

That did not mean there wouldn't be exceptional cases where an injunction might be more appropriate.

However, even in those exceptional cases, the court should apply a criminal standard of proof.

## 'Nitpicking courts should give housing officers more leeway'

Lord Neuberger has criticised the way some courts deal with housing cases and local authority review decisions.

He said it should be remembered that housing officers are not lawyers and so it was not appropriate to subject their decisions to the kind of legal analysis that would apply to an act of parliament, a court judgment or a contract drawn up by solicitors.

Lord Neuberger said: "Accordingly, a benevolent approach should be adopted to the interpretation of review

decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision.

"That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions."

The comments came as Lord Neuberger and four other Law Lords considered the case of Holmes-Moorhouse v London

Borough of Richmond 2009 which related to homelessness and shared residence orders.

The Court of Appeal had held that a local authority's resources were irrelevant when considering whether or not a homeless person was in priority need for housing. The Lords have now overturned that ruling.

Lord Neuberger said it was possible for local authority review decisions to stand even if there had been an error in the reasoning behind it.

# Government urged to suspend the right to buy for new tenants

The Government is being urged to temporarily suspend the right of new tenants to buy their homes.

The call comes as research by the National Housing Federation (NHF) shows that the number of affordable homes sold over the last decade is double the number that were built.

The NHF says that 440,000 affordable homes were sold under the right to buy programme between 1999 and 2007. Only 205,123 homes were built over the same period. It means that the overall number of social homes, including both council and housing association, fell from 4.3m in 1999 to 3.99m in 2007. Over the same period the number of households on the waiting list rose by 61% from

1.03m to 1.67m. It's feared rising unemployment and the rising wave of repossessions could add to the problem.

At the same time, the current economic downturn has brought house building to a virtual standstill and now the NHF fears there won't be enough social homes to meet the increasing demand.

Chief Executive David Orr said: "We have sold off twice as many affordable homes than we have built over the last seven years and the point has come where we have to say enough is enough. Set against a backdrop of rocketing waiting list numbers, rising repossessions and unemployment, the country cannot afford to sell off any more affordable homes on the cheap.



"Social housing needs to be treated as a scarce resource and protected. The time has come when we must consider suspending the right to buy for all new tenants in order to ease the dire housing crisis and allow the affordable housing stock to recover."

## Tenants lose right to acquire freehold on four of their five flats

Two tenants who held a long lease on a building comprising of five flats but only served notice to renew on one of them have lost their right to acquire the freehold on the other four properties.

That was the ruling by the Court of Appeal in the case of *Ackerman and Another v Lay and Others* (2008).

The court heard that the tenants held a long lease on a property comprising of five flats, one of which they occupied. Shortly before the lease expired, they served notice under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 that they wanted to exercise their right to acquire a new lease on the flat in which they lived. The notice did not include the other four flats.

The landlord objected but the tenants then pressed ahead with an enfranchisement claim under the Leasehold Reform Act 1967 to acquire the freehold of the whole building

### Enfranchisement claim fails

comprising of all five flats. The claim failed, however, when it came to court. The judge held that when the tenants served their notice under section 42, they were no longer tenants of the whole building because the lease had expired. They were therefore not entitled to acquire the freehold.

The tenants appealed saying that Sch.12 paragraph 5 of the 1993 Act allowed the continuation of the whole lease once a section 42 notice had been served, not just part of it relating to one flat. This meant the lease on the building had not been terminated and the enfranchisement claim should therefore succeed.

However, the Court of Appeal has now ruled against the tenants. It held that only the lease on the flat in which they lived

had been continued because that was the only one they had served notice to renew. That notice had the effect of severing the lease of the flat from the lease of the rest of the property. The paragraph the tenants had referred to was designed to preserve the position pending the determination of the claim, but it only covered the lease on the single flat and could not be used to justify including the rest of the building as well.

In fact, to do so could lead to further problems and inequity whoever subsequently won the case. For example, if the tenants' claim succeeded, the landlord might be prevented from possessing the other flats for a long period that could amount to a number of years.

On the other hand, if the claim proved ineffective, the Act would require that the tenants pay compensation based on the market rent for the whole building, not just the one flat.

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