



Real Estate Disputes Case Review 2011

In case you have missed the last 12 months' most significant property cases, or want a reminder, listed below is our monthly review of the more important cases.

December 2010

Restrictive Covenants

Mr Churchill purchased a property with the intention of demolishing it and erecting a replacement. The land on which the property was situated was subject to a restrictive covenant, contained in a 1967 conveyance, which prohibited any structural alteration or addition to a dwelling-house "without the written consent of the vendors or their surveyor". Mr Churchill sought a declaration that this covenant was no longer enforceable. This was contested by his neighbours who claimed that their property still held the benefit of the covenant. The neighbours were not the original vendor under the 1967 conveyance but a successor in title. The Court identified two main issues. Whether the wording related only to the original vendors or to their successors in title and, if it did relate only to the original vendors, whether their deaths had either made it impossible to obtain consent or discharged the covenant altogether. The Court held that the covenant should be looked at from the viewpoint of both parties. Accordingly, it made perfect sense to interpret the covenant literally so that the right to withhold consent only applied to the original vendors and not to successors in title. This represented a reasonable balance between both parties' interests. The deaths of the original vendors served to discharge the covenant.

Churchill v Temple [2010] EWHC 3369 (Ch)

January 2011

Service Charges

The Court of Appeal held that a landlord will not be able to recover service charge costs if it fails to undergo a proper consultation process with its tenants. The Commonhold and Leasehold Reform Act 2002 paved the way for new legislation (Section 20 and 20ZA of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003) that requires landlords to consult with long residential leaseholders before carrying out works above a certain value or entering into a long term agreement

for the provision of services. The landlord was the freehold owner of a mixed-used building comprising both shops and flats let on long leases. The landlord intended to carry out major works, but failed to comply with all the consultation requirements. In particular, the landlord failed to provide the tenants with the estimates given by the various contractors competing for the works until after a particular contractor had been selected. The landlord applied to the Leasehold Valuation Tribunal under Section 20ZA for dispensation from the consultation requirements. This was refused on the basis that the landlord's breaches had caused significant prejudice to the tenants who had been led to believe that further representations would have been futile. The Court of Appeal dismissed the landlord's appeal. The landlord was therefore only allowed to recover £250 from each tenant in accordance with Section 20.

Daejan Investments v Benson and others [2011] EWCA Civ 38

Split Reversions

The Court of Appeal gave a warning to landlords that suffer from split reversions. Should the tenant acquire a part of the freehold there is a danger that their lease will not come to an end. EDF were the tenant of three areas of land (Plots 1, 2 & 3) pursuant to a business tenancy protected under the Landlord and Tenant Act 1954. The tenancy also granted EDF a right to lay and maintain cables under a fourth neighbouring area of land (Plot 4). Following the grant of the tenancy the freehold interests in Plots 1, 2 & 3 were sold to separate buyers so that the reversion expectant on the determination of the tenancy became severed and the landlord comprised three separate parties. Subsequently, EDF acquired the freehold to Plot 2, on which it had built an electricity sub-station. BOH purchased the freehold to Plots 1, 3 & 4. BOH contended that EDF had no right to enter onto Plots 3 & 4 in order to maintain underground cables that EDF had installed. EDF argued that they had such a right under the 1953 Lease, which was being continued pursuant to Part II of the Landlord and Tenant Act 1954. BOH submitted that the lease had been determined by

a merger of the freehold and leasehold interests when EDF purchased Plot 2. The Court of Appeal upheld the decision at first instance in ruling that no such merger had taken place. The ordinary rule at law was that the holding of a lease and its reversion by the same party would result in a merger and the extinguishment of the leasehold interest. However, equity had developed a principle that there would be no such merger if this was contrary to the intentions of that party. Moreover, in the absence of any evidence expressing such an intention, there was an equitable presumption against any intention of a merger if it would be against that party's interests. It was in EDF's interest to continue the lease to ensure they retained the ancillary rights to run cables to the sub-station and the lease was therefore continuing. A lease subject to a split reversion can only be ended if all the landlords serve the necessary notice under s.25 (Section 44(1A) Landlord and Tenant Act 1954). If EDF did not join in the service of such notice then their tenancy would continue on the same terms.

EDF Energy Networks (EPN) Plc v BOH Ltd [2011] EWCA Civ 19

Break Notice

The tenant had a right to terminate the lease on six months written notice by special delivery post or by hand. The tenant served an invalid notice that was addressed and sent to the former landlord. On realising its error, the tenant sent an email to the new landlord attaching a copy of the notice. The new landlord asked the tenant to send the notice to its managing agents. The tenant duly emailed a copy of the notice to the managing agents, who replied stating that they 'accepted' the notice and were happy for the tenant to exercise the break clause. The managing agents asked that the tenant to re-address the notice to the new landlord. The tenant prepared a fresh, correctly addressed notice but this was never served on the new landlord, who subsequently contested the break. The tenant argued that the notice had been accepted by the managing agents despite the defects in its form and service. The Court ruled in favour of the tenant. Applying the principles in *Mannai Investment Co Ltd v Eagle Star Assurance Life Assurance Co Ltd* it concluded that the new landlord had knowledge that the tenant was seeking to exercise the break. A reasonable recipient of the notice would not have been misled by the incorrect address and would have understood that the tenant was seeking to terminate the lease. The lease required service to be given to the landlord, this did not mean a notice had to be addressed to the landlord. Although the lease did not permit service by email, the managing agent's reply 'accepting' the notice was sufficient to estop the landlord from challenging the validity of the notice, especially as the tenant had subsequently acted on the basis that there was no issue with effective service. Alternatively, the email acted as a waiver of the service requirements in the lease.

M W Trustees Limited v Telular Corp [2011] EWHC 104

February 2011

Collective Enfranchisement

In order to qualify for collective enfranchisement under the Leasehold Reform Housing and Urban Development Act 1993 the premises within which the flats are contained must be either the whole of a self-contained building, or a separate "self-contained part of a building" capable of being divided vertically from the other parts. The tenants of a number of flats within a mansion block served an initial notice of enfranchisement on the landlord. The notice related to a separate self-contained part of the mansion block. The landlord contested the notice on the grounds that the part of the mansion block to which the notice related was capable of further subdivision into smaller self-contained parts. The landlord argued that a notice could only be valid if the property in respect of which it was given could not be further sub-divided. The Court of Appeal rejected this argument and held that the phrase a "self-contained part of a building" did not require that self-contained part to be the smallest self-contained part of a property in respect of which a right of enfranchisement was being exercised. Tenants were free to choose whether to enfranchise a larger or smaller self-contained part of building provided they had the necessary majority. A combined majority of tenants in a larger self-contained part of a building can still enfranchise, despite not having the necessary majority within the smaller parts.

Crafrule Ltd v 41-60 Albert Place Mansions (Freehold) Ltd [2011] EWCA Civ 185

Adverse Possession and Rectification

The Court of Appeal ruled that where a title has been registered in a person's name pursuant to ten years adverse possession under Schedule 6 of the Land Registration Act 2002 an aggrieved party could invoke the remedy of rectification of the register. In 2005 Mr Baxter applied to the Land Registry to be registered as the owner of a field belonging to Mr Mannion on the basis of having been in adverse possession of the field for a period of 10 years. Mr Mannion was given notice of the application, but never lodged an objection and Mr Baxter was duly registered as the new owner. Mr Mannion then made an application for rectification of the title under Schedule 4 so as to substitute his name for that of Mr Baxter. The application was made on the basis of correcting a mistake. The application was heard by a deputy adjudicator who found that Mr Baxter had not been in exclusive possession for the required 10 year period, nor had the necessary intention to exclude the world at large. The rectification was therefore made and Mr Mannion once again became the owner of the field. In making its decision the Court of Appeal stated that it would be an invitation to fraud to see a successful application for adverse possession as final. A registration for adverse possession given to someone not entitled to apply for it would be a mistake and, accordingly, an application for rectification could subsequently be made.

Baxter v Mannion [2011] EWCA Civ 120

March 2011

Rescission

A developer entered into a complex conditional agreement for lease with a tenant relating to the construction of a hotel at a new motorway service station. It was a condition of the agreement that the developer use all reasonable endeavours to obtain, as soon as possible after the date of the agreement, certain permissions, licences and approvals upon which the development was contingent. If the developer had not complied with this condition by a long stop date either party could rescind the agreement. The developer failed to comply with the condition and therefore served notice to rescind the agreement. The tenant disputed the notice, arguing that the developer's right to rescind was conditional upon it having used all reasonable endeavours to comply with the condition. The court agreed with the tenant and held that, as a point of law, the developer should not be able to rely on its own breaches to its advantage. The right to rescind the agreement was conditional on the developer having not brought about its right to rescind by its own breaches of the condition in the agreement. Whether the developer was in breach was a question of fact to be determined by the court at a later date.

Extra MSA Services Cobham Limited v Accor UK Economy Hotels Limited [2011] EWHC 775 (Ch)

April 2011

Execution of Documents

The Court of Appeal warned that where an individual signs a document to which a company is a party, extra wording should always be added to state the capacity in which they are signing. Section 44 of the Companies Act 2006 provides that (in the absence of a common seal) a company can validly execute a document if it is (a) signed on the company's behalf by two authorised signatories or by a director in the presence of a witness and (b) "it is expressed in whatever words to have been executed by the company". A contract for the sale of freehold land by a company was executed by two authorised signatories under the heading "SIGNED...SELLER". The purchaser refused to complete the sale claiming that the contract was invalidly executed as the words "by or on behalf of" had not been included. The company had failed to comply with Section 44 as it had not been properly indicated that the company was executing the document. The Court of Appeal dismissed the purchaser's objections and held that the contract for sale had been validly executed. The company had been defined as the "Seller" in the contract for sale. It would be absurd to say that the absence of the wording "by or on behalf of" the company meant the contract was not expressed as being executed by the company.

Redcard Ltd and others v Williams and others [2011] EWCA Civ 466.

Limitation

Mr Eagle employed Redlime Limited to construct the foundations for a kennel block at his property in 2000. In 2006 he became aware of subsidence problems. After initial repairs had failed to cure the problem, Mr Eagle asked Redlime to inspect and notified both his solicitors and insurers. Following the inspection Redlime wrote to Mr Eagle in October 2006 denying all liability. Mr Eagle subsequently instructed a firm of engineers to provide an opinion, which was provided in November 2006 and indicated that Redlime had been negligent. Although Mr Eagle's solicitors wrote a letter of claim, proceedings were not issued until October 2009, nearly 9 years after the foundations had originally been installed. Mr Eagle argued that the claim fell within Section 14A of the Limitation Act 1980. This provides that, where knowledge of damage suffered by breach of contract or negligence is not apparent to begin with, the claimant has a further three years in which to bring a claim from the date at which it acquires the necessary knowledge to be able to pursue the responsible party. Mr Eagle contended that he had not acquired the necessary knowledge until he had been provided with the engineers opinion. The court held that Mr Eagle was out of time. Prior to October 2006 he had already acquired sufficient knowledge of the problem to be able to bring a claim against Redlime. He was aware of the subsidence, he had contacted his solicitors and insurers and asked Redlime to inspect. All of this indicated that he had a reasonable belief that the damage had resulted from some failure or omission by Redlime. Mr Eagle had delayed too long and lost the opportunity to pursue a strong case.

Clinton Eagle v Redlime Limited [2011] EWHC 838 (QB)

May 2011

Deposit Protection Schemes

Where a deposit is paid by a tenant on the creation of a new residential assured shorthold tenancy the landlord must (a) protect that deposit in an approved tenancy deposit scheme within 14 days of receipt and (b) provide the tenant with information about the tenancy deposit scheme (Section 213 Housing Act 2004). Failure to comply with these requirements allows the tenant to make an application to court that, following a hearing, may result in an order that the landlord pay a sum equal to three times the amount of the deposit to the tenant (Section 214 Housing Act 2004). The Court of Appeal have previously held that the landlord has until the date of the court hearing to comply with Section 213. In other words, late compliance would result in a complete defence to the financial penalties imposed by Section 214. In *Potts v Densley and another* the High Court ruled that the landlord was not liable to pay the penalty of three times the deposit even though the deposit was not protected until after the tenancy had ended. The tenant argued that once the tenancy came to an end the relationship of landlord and tenant ended. It was therefore

impossible to comply with Section 213 as the obligations in that section were imposed on “the landlord”. The High Court disagreed and ruled that the ending of the tenancy had no impact. It was the payment of the deposit into the scheme that crystallised the landlords position as “the landlord” for the purposes of Section 213. The landlord had still paid the deposit into the scheme before the hearing and therefore had a complete defence.

Potts v Densley and another [2011] EWHC 1144

Potts v Densley and another appeared to be directly contradicted by a Court of Appeal decision later in the same month. In *Gladehurst Properties Ltd v Hasemi and another* the landlord had also only protected the tenant’s deposit after the tenancy had come to an end. The Court of Appeal also held that no penalty arose, but gave different reasons to that of the High Court in *Potts v Densley and another*. The Court of Appeal ruled that the landlords compliance with Section 213 was enforceable at the option of the tenant, who could make an application to court under Section 214. Section 214 envisages a situation in which the requirements of the tenancy deposit scheme are still capable of being complied with. As the tenancy had come to an end the grounds for making an application had ceased to exist and the power of the court to exercise its discretion under Section 214 and impose a financial penalty had come to an end.

Gladehurst Properties Ltd v Hashemi and another [2011] EWCA Civ 604

Extent of Landlord’s repairing obligations

The Court of Appeal provided long awaited guidance as to the scope of a landlords covenant to repair in respect of residential dwellings. Where a residential tenancy is for a term of less than seven years, Section 11 of the Landlord and Tenant Act 1985 imposes an obligation on the landlord to keep in repair the ‘exterior and structure’ of the dwelling. In a decision welcomed by tenants, the Court of Appeal held that internal plasterwork forming part of, or applied to the walls of, a dwelling was not merely a decorative finish but part of the structure and therefore fell within the scope of the landlords repairing obligations. It is a well established principle that in order for there to be disrepair the subject matter of the covenant needs to have deteriorated from a pre-existing condition. Historically, this principle caused problems for residential tenants suffering from damp or condensation in properties that had been defectively designed. Defective design was not considered the landlords responsibility, so that, in the absence of any disrepair, no remedy against the landlord was available. In confirming that plasterwork forms part of the structure of a building the Court of Appeal have adjusted this principle and improved the remedies available to residential tenants. Where an inherent defect has damaged the plasterwork, the duty to make good this damage will now fall upon the landlord.

Grand v Gill [2011] EWCA Civ 554

June 2011

Vacant Possession - Break Notice

The tenant exercised a break that was conditional on giving vacant possession of the property on the break date. Towards the end of the notice period it became clear that the tenant did not have sufficient time to complete all the works that had been specified in a schedule of dilapidations served by the landlord. The tenant proposed that it remain in the premises after the termination of the lease as a licensee for the purpose of completing the works. There was no permission or any other correspondence from the landlord in respect of the tenant’s request. Despite this, the tenant’s contractor entered the premises the week after the break date in order to complete the works. In upholding the original decision of the High Court, the Court of Appeal held that vacant possession had not been given and that the break was ineffective. After the break date the tenant had continued to use the property for its own purposes. The concept of ‘vacant possession’ required that the property must be empty of people and that the landlord must be able to assume and enjoy immediate and exclusive possession, occupation and control of the property. Furthermore, vacant possession would also not be given if there were any tenant chattels left in the property that substantially prevented or interfered with the enjoyment of the right of possession for the whole, or a substantial part, of the property.

Ibrend Estates BV v NYK Logistics (UK) Ltd [2011] EWCA Civ 683

Valuers Duty of Care

It is a long established principle that, in the case of domestic property, a surveyor instructed to provide a valuation report for a mortgagee also owes a duty of care to the purchaser of the valued property. The Court of Appeal held that this principle did not extend to buy-to-let transactions. In 2002 Mr Scullion acquired a buy-to-let property with the assistance of a loan from the Bank of Scotland. The valuation report prepared on behalf of the Bank valued the property at £353,000, with an achievable rental value of £2,000 per month. Mr Scullion purchased the property for £300,000 (following discounts from the initial price of approximately £50,000). Following the purchase the property remained vacant for several months and when a tenant did move in, a rental of only £1,050 was achieved. In 2006 Mr Scullion sold the property for £270,000 and brought a claim for damages against the valuer. The High Court ruled in favour of Mr Scullion, holding that a duty of care was owed in respect of the valuation report which had negligently overstated both the capital and rental valuations. The Court of Appeal reversed this decision. The valuation report has been prepared for the Bank of Scotland in its capacity as prospective mortgagee. Although Mr Scullion was responsible for the costs of the report, and it was probable that the report would be shown to him, it was nevertheless not foreseeable that he would reply on the report in deciding to proceed with the purchase rather than obtain his own valuation

advice. A buy-to-let transaction was to be distinguished from the purchase of domestic property due to its commercial nature. The purchaser could be expected to be both wealthier and more commercially astute than the average home buyer and was therefore less deserving of protection against the risk of negligence.

Scullion v Bank of Scotland Plc (t/a Colleys) [2011] EWCA Civ 693.

July 2011

Guarantors on Assignment

We reported last year on *Good Harvest Partnership v Centaur Services Limited* which confirmed that a tenant's guarantor could not be called upon to provide a guarantee for an assignee under the Landlord and Tenant Covenants Act 1995 ("the Act").

Under the Act outgoing tenants are automatically released from their obligations upon assignment but the Act also allows the landlord to seek a guarantee from the outgoing tenant under an Authorised Guarantee Agreement (AGA). *Good Harvest* stated that the original tenant's guarantor can not be called upon to enter into an AGA as it will fall foul of 'anti-avoidance' provisions under section 25 of the Act. This is because section 24(2) of the Act operates to release the tenant's guarantor upon assignment and the Act only envisages the outgoing tenant entering into an AGA.

Good Harvest settled prior to appeal. Now, *K/S Victoria Street v House of Fraser* has dealt with the same question and confirmed *Good Harvest*. It has also confirmed that any form of direct or indirect guarantee by the outgoing tenant's guarantor will be void. Landlords will need to be careful from whom they take guarantees and to check existing guarantee requirements are not void following these two cases.

K/S Victoria Street v House of Fraser (Stores Management) Limited [2011] 32 EG 56

Powers of equitable charge holder

A mortgagee advanced money to borrowers pursuant to a mortgage deed. However, the mortgage deed was not registered because a prior mortgagee had not consented to the new charge. Failing registration, the mortgagee's interest was noted against the title. The mortgagee exercised its power of sale but the Land Registry refused to register the transfer on the basis that an equitable mortgagee could not exercise the power of sale. The High Court confirmed that the mortgagee was entitled to exercise the power of sale under the Law of Property Act 1925 section 104 because the mortgage had been executed as a deed and was therefore a legal mortgage under section 88 of the same Act. The Court ordered the transfer to be registered. Incidentally, the Court also confirmed that the sale had overreached two other existing charges which had been registered which would overcome any

objections the prior chargees may have had.

This case has revolutionised the definition of "legal mortgage" which previously would only have been equitable until registered. It also confirms a more direct remedy for equitable charge holders, avoiding the need to seek a charging order and order for sale. It remains to be seen whether the Court of Appeal will agree.

Swift 1st Ltd v Colin [2011] EWHC 2410 (Ch)

August 2011

Odour Nuisance

Pervasive odours emitted from a commercial property may amount to a claim in nuisance for damages. Where the odour producing property belongs to an estate, these issues will usually be governed by any restrictive covenants relating to the use of the units on the estate. In this case, a food additive manufacturer operated on an estate adjacent to an office unit which also formed part of the same estate. The smell was a garlic/curry smell and the estate was a light industrial estate. The office owner issued a claim for nuisance and claimed damages for the cost of leasing alternative premises.

The Court of Appeal confirmed that the nature and character of the estate had a bearing on the types of permitted and expected use. The production of food additives was consistent with light industrial use and as a result there was insufficient interference with the office building to cause a nuisance. The smell would have to be 'bad' whereas food smells are often pleasant, even if overbearing.

Hirose Electrical UK Ltd v Peak Ingredients Ltd [2011] EWCA Civ 987

Damages for misappropriation

Where another party misappropriates part of another's property, they may be liable to damages for (1) loss of profit from use of property or other connected property, (2) breach of trust arising from misappropriation, (3) mesne profits and (4) exemplary damages. Each type of damage is independent and not cumulative. However, it would be unfair to award all of them to the owner. The misappropriation meant that the owner lost use of part of the property which had been taken over and this consequently affected access to other parts of the property. The Court of Appeal confirmed that it could elect to award whichever is the greater of loss of profit or breach of trust but not both. The Court can also award mesne profits even if the owner had no intention of using the property in the way that the other party used it. The purpose of mesne profits is to reverse the wrong-doer's benefit but, as before, it cannot be awarded where damages for loss of profit are being awarded. The Court of Appeal also confirmed that the loss of profit can only be for the period which the owner could have used the property if he had control of it;

the Court had to deduct any period of fit-out which the owner would have required. Exemplary damages may be available in addition to any other damages but this will depend upon the circumstances of each case.

Ramzan v Brookwide Ltd [2011] EWCA 985

September 2011

Negligent Valuation

The Court found the valuation of a factory outlet shopping centre to have been negligently prepared. The property had been valued at £62.85m representing an overvaluation of £18.05m which resulted in the purchasers overpaying by this amount. The purchaser had difficulty letting the retail units and rents were below the valuation forecasts. The value was dependent upon turnover as the tenants were liable to pay turnover rents. The purchaser claimed that the valuers lacked the requisite expertise to value this type of property and that the valuers should be liable for the over-valuation and also the losses suffered as a consequence of the purchase. The High Court agreed that the valuers should have refused the instruction because the valuers did not have experience of factory outlet centres. However, the Court decided that the valuation had been provided to allow the purchaser to decide whether to proceed; the valuation did not go so far as to provide financial advice as to whether the purchaser ought to proceed with purchase. Therefore damages were limited to the overvaluation of £18.05m and excluded the losses suffered as a result of the purchase. This case demonstrates the importance of agreeing the scope of any valuation and the duty which the valuer will owe to its client.

Capital Alternative Fund Services (Guernsey) Ltd v Drivers Jonas [2011] EWHC 2336 (Comm)

Interim Rent

Tenants protected by the Landlord and Tenant Act 1954 can serve notice under section 26 of the Act to renew the lease at the end of the term. Alternatively, the landlord can serve a notice under section 25 to either terminate the lease or state that he is not opposed to the grant of a new lease. If the parties cannot resolve the matter, either can apply to Court to determine whether the lease should be renewed and on what terms. This process can be lengthy and the landlord can apply under section 24A for interim rent to be paid, even if he does not wish the lease to continue, because the tenant will still be in occupation. In this case the Court determined that the lease would not be renewed. The procedure took 3 years from the expiry of the landlord's section 25 notice to determination. Under section 24D(1) and (2) the Court can determine the interim rent based on rent which it would be reasonable for the tenant to pay and also the passing rent under the existing tenancy. The Court confirmed that the interim rent would be the same as that under the existing

tenancy. The tenant argued this was not fair and that it should be based on the much lower market rent. The Court of Appeal disagreed because section 24D gave the Court wide discretion to ascertain a reasonable interim rent by reference to the passing rent and the market rent. The background to this provision was to protect the tenant from steep rent increases, but as there was no prospect of the rent increasing or any continuing lease, there was no need to protect the tenant.

Neale v Witney Electric Theatre [2011] EWCA Civ 1032

October 2011

Undue Influence

The tenant entered into a lease of a property in which a guarantee was provided by one of the tenant's directors. The tenant went into liquidation and the landlord sought to enforce the guarantee for rent arrears and damages for breach of repairing covenants. The guarantor defended on the basis that he did not know what he was signing, believing that he was only witnessing other signatures to a document. He also argued undue influence as he only signed the document as a result of misrepresentations from the other directors of the tenant company. The High Court determined that the usual principles for undue influence were made out because the director was a particularly junior director and the circumstances indicated that he knew little of what he was being asked to do. The Court concluded that misrepresentation would amount to undue influence rendering the guarantee void. The Court also added that it was evident that independent legal advice should have been sought for the guarantor. The difficulty this case raises is when can a landlord know whether the guarantor requires independent legal advice. A prudent landlord may have to make direct enquiries of the guarantor and, if in doubt, request that he takes independent legal advice.

Trustees of Beardsley Theobalds Retirement Benefit Scheme v Yardley [2011] EWHC 1380 (QB)

November 2011

Boundary Issues

Section 58 of the Land Registration Act 2002 provides that the Land Registry register provides conclusive title. If a proprietor suffers loss as a result of an error by the Land Registry he can apply for compensation. However, this does not apply to the title plan which only gives an indication of a boundary for illustrative purposes and therefore is not absolute. A boundary may be defined in any deed or document registered at the Land Registry which shows the property 'more particularly delineated' on a plan. Thick pen outlines and small scale maps mean that this may not resolve

the problem. Parties can refer the matter to the Land Registry Adjudicator to determine the boundary but the process is often expensive and may depend upon interpretation of historic documents.

This was confirmed by the Court of Appeal recently which held that, despite the title plan at the Land Registry clearly indicating that the boundary was a hedge, the true boundary had receded by four or five metres to a wire fence. The appellant lost one and half acres of land without recourse for compensation from the Land Registry. The Court decided that the description by reference to acreage for the parcel of land was not determinative. In the absence of any real definition in the historic transfer, the Court had to interpret the requirement in an old transfer for the erection of the wire fence as indicating that the original parties had intended the boundary to be set at the fence.

Drake v Fripp [2011] EWCA Civ 1279

Adverse Possession

Boundary disputes may also manifest themselves as adverse possession claims. In similar circumstances to *Drake v Fripp*, the owners of neighbouring land claimed adverse possession against the registered owner over a strip of land between the original boundary and a hedge. The neighbours had been using the strip of land for more than ten years. The registered owner of the strip of land argued that the neighbour did not satisfy the requirement of exclusive possession under the Land Registration Act 2002 Schedule 6 because (1) the neighbour had been allowed to occupy the land by permission and (2) the neighbour's exclusive possession was interrupted when the registered owner started to fence the area off. The Court of Appeal dismissed the appeal and determined that (1) implied permission was not sufficient to defeat adverse possession and (2) interrupting exclusive possession required the registered owner to actually end the neighbour's factual possession by reclaiming possession himself; starting to erect a fence was not sufficient. The neighbour had been in exclusive possession for over 10 years before the registered owner asserted his ownership.

Zarb v Parry [2011] EWCA 1306

Certainty of Term

In order to qualify as a tenancy, a tenancy agreement must state that it is for a fixed term or a term which is capable of being determined. The Supreme Court has held that where the term is expressed to be 'from month to month until determined' it is not capable of being a tenancy because the term is not sufficiently certain. The landlord argued that the term indicated that it was a periodic tenancy to which the first instance Court and the Court of Appeal agreed. The Supreme Court overturned it on the basis

that, although a tenancy could be granted from month to month, the term expressed in the agreement could not be a tenancy because of the uncertain term. The Court held that the tenant had instead been granted an equitable life interest which was converted by section 149(6) of the Law of Property Act 1925 into a term of 90 years determinable upon the tenant's death or any set circumstances specified in the agreement. This decision is set against the background of a sale and rent back landlord and arose as a result of the landlord obtaining a possession order. This case reinforces an important principle of certainty of term and landlords wishing to create a periodic tenancy will need to be particularly careful that drafting does not accidentally create a 90 year interest for the tenant.

Berisford v Mexfield Housing Co-operative Ltd [2011] UKSC 52

Collective Enfranchisement

A tenant converted a property into four flats and then assigned his interest in the flats to two different people so that one assignee held flats 1 and 2 and the second assignee held flats 3 and 4. The assignees claimed rights of enfranchisement under section 13 of the Leasehold Reform Housing and Urban Development Act 1993. This provision allows 50% or more tenants to purchase the freehold property from the landlord. The landlord had not consented to the assignments and argued that the assignees did not qualify under the Act because the assignees should be regarded as tenants of all four flats. The Court of Appeal disagreed and confirmed that the two assignees were qualifying tenants under the Act. This was because the original tenant's lease was severed and rent apportioned just as the property had been physically severed. This meant that the two assignees were only liable for the rent and obligations arising from the flats which had been assigned to them. The assignees were therefore two separate tenants of specific parts who qualified to exercise their rights under the Act.

Smith v Jafton Properties Ltd [2011] EWCA Civ 1251

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Property related disputes including claims of adverse possession, the enforcement, modification or lifting of restrictive covenants, rights of way and other easements, and rectification of leases and other deeds.

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