

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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### Covenants over land

*Harris v Williams-Wynne- Chancery Division- [2205] EWHC 151 (Ch.) Bernard Livesey QC, sitting as Deputy Judge of the High Court*

*Agreement for sale of land to H- covenant against building- no formal transfer of the land- H building in breach of the covenant- order for specific performance of the agreement- Whether W-W entitled to damages for breach of covenant (waiver, laches, acquiescence or estoppel)- whether H entitled to damages for breach of the agreement.*

*Held:* Claim and counterclaim allowed. However, given the difficulties inherent in proving actual damage to the land which a negative covenant was designed to protect, any damages for breach of contract were likely to be nominal. W-W's delay in agreeing the transfer did not make it unconscionable for him to seek damages for breach of covenant. W-W's damages would be assessed as the sum that he might reasonably have asked to release H from the covenant. However, H was entitled to damages for the extra costs of borrowing incurred by reason of W-W's delay.

ARTHUR J. MOORE

*Englewood Properties Ltd v Patel and another [2005] EWHC (Ch) Lawrence Collins J.*

*Commercial property sold at auction subject to lessor's covenant not to sell or let other adjacent premises for use as a fixed price store- adjacent properties also sold at auction, but without the covenant- purchaser's bank refused to finance purchase- purchaser refused to complete purchase at original price on the basis that vendors were in breach of their duties as trustees by failing to ensure that the covenant was inserted in relation to the sales of the other lots- vendors obtained summary judgment for specific performance- purchaser appealed-*

*Held:* Between contract and completion, the vendor is trustee for the purchaser. The vendor's duties included protecting the purchaser's interest, pending completion and giving good title. But it was not arguable, in the absence of an agreement, that the vendors had a duty to require the purchasers of the other lots to comply with the covenant. As a matter of law, the duty of the vendor did not extend to imposing the covenant on the purchasers of the adjoining land.

ARTHUR J. MOORE

### Beneficial Interest

*Patel and others v Shah and Others -CA- [2005] DWCA Civ 157*

*Properties purchased as Joint venture with the aim of making commercial profit in a short time- market slumps- properties retained, but mortgage payments exceed rental income- investors have to pay the shortfall- G (Appellant's predecessor) does not pay- Appellants seek to assert beneficial interest in the properties.*

*Held:* The parties had not entered into an agreement simply to hold the properties on trust for the investors. The agreement was a series of joint ventures with the aim of making commercial profit. The creation of a resulting trust in those circumstances was incidental. The investors were obliged to contribute to the mortgage payment/rental income shortfall. G had not done so, and the investors were thereby released from their equitable obligations to the appellants. The approach to the Appellants' laches required a broad inquiry into whether it was unconscionable in all the circumstances for the Appellants to assert a beneficial interest.

ARTHUR J. MOORE

**Landlord and tenant**

*Fountains & Colonnade Management Ltd v Westminster City Council [2005] EWHC 260 (TCC) Judge Richard Seymour QC*

*Raft supporting highway and premises above the tracks at Victoria station- raft incorporated four movement joints- claimants' predecessors in title agreed to maintain the structure and service media, including the movements joints- Defendants agreed to pay a fair proportion of the reasonable costs of repairing and maintaining all such items enjoyed in connection with the highway- movements joints replaced by the claimants- proportion of costs sought*

Held: claim allowed. The movement joints were enjoyed in connection with the highway, The Claimant had contracted to repair them, and the Defendant had contracted to pay a reasonable proportion of the cost. Authorities on the distinction between repair and improvement were of little help in this case. The parties experts agreed the replacement

joints were an appropriate solution. The Defendants would pay 90% of the costs, as 90% of the traffic was public traffic, and only 10% referable to the Claimants' business.

ARTHUR J. MOORE

**Amendment/substitution of parties**

*Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd –CA- [2005] EWCA Civ 134*

*CPR 19.5- substitution of parties after expiry of limitation period- Respondent named as claimant in proceedings against Appellant in respect of allegedly defective piping- in fact R not a party to contract- limitation period expired- application to substitute correct claimant (with a name very similar to R's)- whether change of parties after expiry of limitation was "necessary"- amendment allowed- appeal*

Held: Appeal dismissed. *The Sardinia Sulcis* [1991] as pre-CPR authority was not followed. The test was whether the substitution was necessary with regard to the overriding objective. It was clear that the intention had been to name the correct claimant. There was no prejudice to the A by substitution of the correct party. The A would simply be deprived of an unmeritorious defence.

ARTHUR J. MOORE

**Adverse possession**

*Trustees of Grantham Christian Fellowship v The Scout Association Trust Corporation [2005] EWHC 209 (Ch.) Blackburne J.*

*Adverse possession- verbal permission to occupy so long as the land kept tidy- whether acts of planting trees and building a rockery were within or without the permission- on appeal from the deputy solicitor of the land registry.*

Held: Dismissing the appeal. The permission or licence to occupy had not come to an end. The acts were in fact not outside the scope of the consent. Even if they were, it does not follow that the licence came to an end. Any breach of the licence would give rise to a right to terminate the licence or to sue in damages. It would not (without a term to that effect) bring the licence to an end.

ARTHUR J. MOORE

**Town & village greens**

*Oxford County Council v Oxford City Council & another –CA – [2005] EWCA Civ 175*

*Town or village green- use of land for twenty years- whether use required to extend up to date of registration or whether a previous period of use sufficient (up to 1990)- the effect of registration of a class (c) green under the Commons Registration Act 1965- whether an application can be amended- County Council appeal-*

Held: Class (c) registration was conclusive that the land was a town or village green. However, this did not confer or imply any rights for local inhabitants to use the land for sports or other pastimes. The rights which attached to class (a) and (b) greens could not be applied by implication to class (c) greens.

The use relied upon had to continue to the date of registration. The application could not therefore succeed on the basis that the land had become a green by 1990. The applicant bore the primary responsibility for ensuring that the application was correct. He had no right to amend it. However, the county council had the discretion to allow an amendment or to register part only of the land included in the application. The county council had a duty to maintain the register, which carried with it the duty to ensure that it was accessible and accurate, and that there were fair and orderly procedures.

ARTHUR J. MOORE