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Conveyancing Case Law Update

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Richard Snape

www.LawSureInsurance.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

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ELECTRONIC SIGNATURES

Neocleous v Rees [2019] EWHC 2462

Here solicitors had sent a series of emails in relation to a transaction. The emails contained a footer stating the name, address, firm and occupation of the solicitors. The trail of emails was held to constitute one single document with all the expressed terms of the contract. The footer was held to be a signature which complied with S2(3) of the Law of Property (Miscellaneous Provisions) 1989 and the contract was valid.

In the light of the above, conveyancers should make clear in their emails that nothing in them is intended to be legally binding.

***Hudson v Hathway [2022] EWCA 1648*.** Here the parties were cohabiting and had purchased the property as beneficial joint tenants. Subsequently the man left. There was correspondence via emails whereby he had stated that the woman could have the property and its contents in return for her forgoing any claim on his investments or savings. He subsequently argued that these emails were not legally binding as to claim a constructive trust there must be detrimental reliance on the statements and as the parties cohabited and were not married there was no claim on savings and investments anyway. The Court of Appeal confirmed that detrimental reliance in relation to a constructive trust was still required. However, as the woman had changed her financial position on the basis of the statements there was such reliance. They also stated that there was an express declaration of trust. Under **S53 The Law Property Act 1925** the disposition of an equitable interest in land must be in writing and signed. It was held that the email constituted writing and Hudson had written his first name at the bottom of the email. This constituted a signature. An express declaration of trust must be evidenced in writing and signed. It was held that the email constituted evidence in writing and the subscriber with the names of the parties constituted signature.

Khan v Khan [2024] EWHC 2491. This concerned four properties in South West London. In particular, one property, 7 Essex Grove had been transferred into the name of Mohammed Khan by his sister to avoid her former husband attempting to claim it. It was understood that the property would be held on trust for three sisters but there was initially no express declaration of trust. In 2013 Mohammed Khan sent an email to his sister stating, "I want Essex Grove out of my name by 2014. This belongs to three sisters as stated clearly". He signed the email with his name. S.53 (1) (b) states that a declaration of trust must be manifested and proved by some writing by some person who is able to declare such a trust or by his will. It was held that the email and name complied with this and there was an express declaration of trust in favour of the sisters. The other three properties were held on a prior agreement constructive trust for various siblings as it would be unconscionable for Mohammed to deny otherwise. Such a constructive trust does not require detrimental reliance.

Boundary Issues

Boundary Agreements

White v Alder [2025] EWCA 392 the Court of Appeal accepted that a boundary agreement which had been made between predecessors of the two neighbours would bind the current owners even though they had no knowledge of the agreement. It did not transfer land and did not need to comply with S.2 Law of Property (Miscellaneous Provisions Act (1989)).

In ***Bishop v Jacques (2025),*** the Upper Tribunal recognised that a boundary agreement was binding in relation to a larger piece of land of 4 metres times 30 metres.

Adverse possession

Prior to transitional provisions in the Land Registration Act 2002 coming into force once adverse possession had arisen, the property would be held on bare trust for the claimant who in registered land would have an overriding interest. This ended on October 13th 2006 and now they will only have an overriding interest which is binding on subsequent purchasers if in actual occupation***.*** In ***Clapham v Narga [2024] EWCA 1388*** the lower courts held that the adverse possession did not give rise to an overriding interest under schedule 3 paragraph 2 of the Land Registration Act 2002 as fencing had fallen into disrepair and was not obvious to a purchaser on a reasonable inspection. The Court of Appeal reversed this decision and stated that the lower courts had misunderstood the General Boundaries Rule under S.60 LRA 2002 and that the filed plan at the Land Registry was not conclusive as the boundaries merely identified the property. Adverse possession had been acquired many years previously and the position of the fence determined the boundary. See also ***Drake v Fripp [2011] EWCA 1279*** where the plan showed a boundary 5 metres from the actual boundary fence.

Fencing

Thorpe v Frank [2019] EWCA 150

To claim adverse possession then there must be a factual possession and an intention to possess. Fencing is clear evidence of factual possession but not essential. Here the Court of Appeal accepted that paving a piece of neighboring land could give rise to adverse possession where due to the layout of the land and the existence of restrictive covenants fencing was inappropriate.

Kirkman v Bradshaw Pub Company (2025)

There was a small piece of land enclosed on three sides by buildings and a wall. The fourth side was not enclosed but any gate could only be situated so that if opened it would block a doorway. Adverse possession was successfully claimed.

The Land Registration Act 2002

Post October 13th 2002 where the land is registered then adverse possession may be claimed after 10 years. A Notice of Adverse Possession must be served on HM Land Registry and the registered proprietor will be given 65 working days to object, in which case the applicant must show one or more of three conditions apply. The most common condition is where there is a reasonable mistake as to boundaries one of the requirements of the third condition is that estate to which the land relates was registered more than one year prior to the date of the application. This requirement is imposed because title to *unregistered* land can normally be acquired after twelve years adverse possession while under the third condition title to *registered* land may be acquired after ten years adverse possession. There might be a case where the squatter had been in adverse possession of unregistered land for more than ten but less than twelve years, the title was then registered and the other requirements of the third condition are met. The squatter would not have barred the title of the landowner prior to registration of the title but if this provision was not made, he or she would be entitled to apply to be registered as proprietor as soon as the owner was registered.

In other words, the owner would have no opportunity to evict the squatter. Presumably, the successful applicant would be entitled to absolute title.

This condition can only be used if the land claimed is adjacent to the boundary and there has been no exact determination of the boundary under **S.60 LRA 2002.** In the case of ***Dowse v Bradford Metropolitan District Council [2020] UKUT 202*** only a part of the land claimed adjoined open land belonging to the Council and there could be no claim.

In ***IAM Group v Chowdrey [2012] EWCA 505*** - it was held that in determining a squatter's reasonable belief, they should not be imputed with their agents, e.g. their solicitor's knowledge. In deciding whether the lease is reasonable, it is appropriate to ask whether the squatter ought to have raised questions of their solicitor. However, if the paper owner has not challenged the exclusive possession of the squatter, there would be no reason to raise enquiries.

Zarb v Parry [2011] EWCA 1306 the applicant must reasonably believe that the land is theirs for the previous ten years prior to the claim where there is a reasonable mistake as to boundaries. If circumstances make this belief unreasonable then there can be no claim. Here, however, the fact that the neighbour had queried the boundary line some years previously did not make the belief unreasonable.

Brown v Ridley [2024] UKUT 14. Here the Upper Tribunal reluctantly decided that they had to follow the Court of Appeal cases of Zarb v Parry [2012] and IAM Group v Chowdrey. For registered land claims under the Land Registration Act 2002, as of October 13th 2003 a claim can arise after 10 years but may be defeated if there has been a reasonable mistake as to boundaries. The mistake must be for the 10 years immediately prior to the claim and not for any 10 year period. This case was heard by the Supreme Court in December 2024. The Supreme Court gave their judgment on ***February 26th 2025 [2025] UKSC 7*** and reversed the Upper Tribunal Decision. All that needs to be shown is ten years reasonable mistake of the boundaries at any time in the past. The fact that the Ridleys ought to have known of the mistake when they put in a planning application twenty one months before the claim did not prevent adverse possession.

McGee v Long Term Reversions (Harrogate) Ltd (2025). Here tenants had encroached into the landlord's attic space. The first tier tribunal decided that encroachment was based on the law of estoppel and not adverse possession. Therefore, after the required time periods it was irrelevant that the tenant knew that the attic was not theirs and the landlord did not have the normal defences.

Other Adverse Possession Issues

In ***Atkinson v Browne [2025] EWHC1448*** a residents association could claim adverse possession over private roads and verges even though they were an unincorporated association.

Restrictive Covenants

Whitgift Homes Limited v Stocks [2001] EWCA1732

Unless there is a building scheme, when the first plot on a development is sold the benefit of covenants is not automatically annexed to the sold land. When the second plot is sold the purchaser of this plot will have the benefit against the first plot and so on. The last plot will have the benefit over the whole estate.

Mackenzie v Cheung [2024] EWCA13. Here the Court of Appeal accepted that the original covenantee could include a clause in the covenant whereby the covenant could be unilaterally varied by them, removing a covenant requiring the land not to be used other than as a single detached private dwelling.

The Court of Appeal also confirmed that Whitgift v Stocks above was correct.

Easements

Stenner v Teignbridge District Council [2025] UKUT204 an easement cannot give rise to exclusive possession as it is a right that one person has over another person's land. In ***Batchelor v Marlow [2001] EWCA1051*** parking during working hours on a nearby piece of land to the exclusion of the owners could not give rise to a prescriptive and in ***Copeland the Greenhalf [1952] Ch488*** storage to the exclusion of the owner could not be an easement. However, in ***P & S Platt v Crouch [2003] EWCA1110*** mooring of boats on neighbouring land could be an easement as the boats were not there permanently. In Stenner the claim was to store boats and related equipment on part of a council car park in the Winter months. The applicant claimed that this was not exclusive possession as pedestrians could still walk across the land and the Council retained underground services. The claim failed.

Enquiries

Clinicare Limited v Orchard Homes [2004] EWHC 1694

In response to an enquiry about dry rot, the client replied that he was not aware of any but that the buyer should rely on their own inspection or survey. The buyer then arranged for a survey which revealed major problems in relation to damp, advised that this might have given rise to dry rot and that a further survey was therefore recommended. The buyer went ahead without having had a further survey. The dry rot was subsequently discovered and the sellers were successfully sued.

The court held that knowingly failing to disclose the existence of the dry rot, presumably on instruction from the client, amounted to an actionable misrepresentation. The burden cannot merely be passed on to the buyer and their solicitor by stating that they must rely on their own survey or, presumably, on their own skill and judgment. Where to draw the line is very unclear and this decision may present major difficulties for both solicitors and surveyors and, indeed, their clients. The only thing which may not be construed as a misrepresentation is silence and the buyer's solicitor might not accept this. An impasse between the parties will soon be reached. Furthermore, what does a solicitor do if a seller requires him not to disclose the existence of dry rot, for instance? Will he have to refuse to act as otherwise he may be faced with a conflict of interest? In following instructions, the solicitor may be opening himself to a damages claim. There is, finally, less incentive for the buyer to employ his or her own specialists in the knowledge that they might have a cause of action against the seller in any case. This is indeed regrettable.

The case is based on ***Sindall v Cambridgeshire County Council [1994] 1 WLR 1016*** whereby a local authority selling land for development was asked questions about any property rights affecting the land which could not be seen on inspection and replied that they were not aware of any. If they had looked at their records they would have found that sewers have been laid under the land some 40 years previously. This might have been a misrepresentation which would allow Sindall to rescind the contract. However, the Court of Appeal held that the seller had taken all reasonable steps.

Rosser v Pacifico Limited [2023] EWHC 1018 The case concerned an apartment which was sold as having two bedrooms. The seller responded to 4.4 of the TA6 enquiries by stating *"was not aware of any breaches of planning permission permissions or work that did not have necessary consents".* The property was in a conservation area and one of the rooms had a Velux window overlooking the highway. There was an Article 4 Direction in place. This constituted a breach of planning permission and the local authority required its removal. The consequence of this was that the room did not constitute a bedroom under building regulations. S.2 (1) of the Misrepresentation Act 1967 states that a person making a misrepresentation will be *"liable to damages… not withstanding that the misrepresentation was not made fraudulently unless he proves that he had reasonable grounds to believe and did believe at the time of the contract was made and the facts represented were true."* The court followed the case of ***Sindall v Cambridgeshire County Council (1993)*** and held that 'not aware' was a representation that reasonable steps had been taken to find out. Moreover, the buyer's conveyancer was under no obligation to find out about breaches. The seller was sued for the difference in value between a one bedroom and a two bedroom flat together with additional stamp duty land tax and the cost of removing their window.

Leasehold Case Law

Height of Buildings and the Building Safety Act 2022

Higher Risk Residential Buildings

The Act has also introduced the Building Safety Regulator who will be a part of the Health and Safety Executive. They will have a general role in relation to building safety, but will also be responsible for building control in high risk residential buildings. In England a high risk residential building is one with at least two dwellings which is at 18 metres or more in height or, if less than 18 metres, which has 7 or more storeys. Such a building will have an accountable person who has a legal estate in possession in the common parts or is responsible for repair of the common parts. This will include any Right to Manage Company and any Residents Management Company if there is more than one accountable person then there will be a principal accountable person. A residents' panel must be constituted and the accountable person must listen to health and safety complaints. They will have to produce reports to the Regulator and keep records in relation to health and safety and report any fire safety or structural safety problems that have occurred. Originally, there was meant to be a Building Safety Manager who would be an intermediary between the building safety regulator and the accountable person. This was dropped due to cost. Also, the original Bill provided for a building safety charge whereby any costs could be charged to the long leaseholders. This was also dropped and any charges will now be covered by the service charge.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. If there is more than one accountable person, there will be a principal accountable person. They will have an interest in possession of the structure and exterior or be responsible for repair and maintenance of the structure or exterior of the building. There are also offences if anyone removes or disturbs a relevant safety item. Any high-risk buildings must be registered with the Building Safety Regulator. This came into force in England on April 6th 2023 and the principal accountable person will have to register the building with the Regulator by October 1st 2023. Guidance suggests that the registration must be approved by the Regulator and key building information provided by this date. The Regulator will then have to approve the registration.

Safety case report summarising major fire and structural hazards and risk management is mandatory for higher-risk buildings. Organisations must also establish a mandatory occurrence reporting system detailing communications with other accountable persons, arrangements for reporting to the Regulator and summaries of incidents.

In England, the provisions came into force on April 6th 2023**. The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations** were introduced into parliament on March 9th 2023. There will be a registration fee of £251 which must be paid on the application. For new builds then the accountable person will commit a criminal offence if they allow anyone into residential occupation before completion certificates are available. This will include adding new residential units and doing work that results in the building becoming Higher-Risk. The principal accountable person will have to register the building with the Regulator within six months otherwise they will commit a criminal offence.

There are also **Higher-Risk Buildings (Key Building Information) (England) Regulations 2023**. Within 28 days of an application the principal accountable person must provide details as to use of the occupied building, any attachments or outbuildings, details of materials used, information about structure, storeys and staircases, energy supply and storage and emergency evacuation plans.

There are also **Higher-Risk Buildings (Descriptions and Supplementary Provisions) (England) Regulations 2023** which were laid in front of Parliament on March 6th 2023. A Higher-Risk Building is one which is 18 metres or more in height or has seven or more storeys. Any floor where the ceiling is below ground level will not be included, nor will any top floor which only includes rooftop plant and machinery. The measurement will be from the lowest part of the ground floor to the finished floor of the top floor. A mezzanine floor will be ignored if it is less than 50% in size of the largest storey vertically above or below it. A separate structure will be treated as being the same building if it can be accessed to another part which has a residential unit. This will not apply if the access is only intended for exceptional use for emergencies or maintenance. In the case of ***Waite v Kedai (2023),*** the first measurement of the building was stated to be 17.57 metres, the second measurement was 17.97 metres with a margin of error of 30 centimetres. It was later decided that a roof terrace was the top of the building. This caused it to be well beyond 18 metres in height. As a consequence of this case the RICS told members not to state the height of the building. In the first-tier tribunal decision of ***Smoke House and Curing House, 18 Remus Road, London E3 2NF***, it was decided that a roof terrace constituted a storey thus making the property a higher-risk building which would need to be registered and also have the regulator oversee any building work. This conflicts with the Government guidance which states that a storey must be fully enclosed although this seems to be wrong. On October 4th 2024 the Ministry of Housing and the Building Safety Regulator stated that the guidance should still be followed unless they say otherwise. On May 28th 2025 they confirmed this statement but also announced that they were in consultation to introducing amending Regulations to clarify the issue. On June 5th 2025 the Upper Tribunal gave their judgment on Smoke House in the case of ***Monier Road Limited v Blomfield [2025] UKUT 157***. They stated that the tribunal had no jurisdiction to decide on the height but did not say whether the tribunal was right or wrong. Presumably the same will apply to the Leaseholder Protections for qualifying leaseholders in relevant buildings of 11 metres or more or 5 or more storeys in height.

Service Charges

Tower Hamlets London Borough Council v Long Leaseholders of Brewster House and Maltings House [2024] UKUT 193 The case concerned two blocks of flats originally constructed as council housing in the early 1960's. Some of the council tenants had purchased long leases under the right to buy provisions. The blocks had been constructed with a Large Panel System which subsequently was found to be defective and remedial works was done over the years. After Grenfell inspection of the blocks showed ore defects and remedial work would cost over £9 million. The service charge allowed the Landlord to charge for repair and maintenance and there was also a sweeper provision. The other tribunal held that repair and maintenance did not cover structural defects and the Leaseholders did not have to pay.

It should be noted that short-term leases of dwellings of less than 7 years, the Landlord cannot charge for repair to the structure and exterior under **S.11 Landlord and Tenant Act 1985** but by buying under right to buy the Leaseholders may be charged depending on the wording of the service charge.

Leasehold and Freehold Reform Act 2023

Cost of Enfranchisement and Lease Extensions

The cost of enfranchisement of lease extension will be varied. The premium would be market value with a deferment rate which would be set by regulations and varied at least at 10 year intervals. Market value would be set as the amount the relevant freeholder could be expected to realise on the open market if sold by a willing seller at the valuation date. There is also an assumption that any other leases will be merged with the freehold for valuation purposes. The effect of this would be that the presence of intermediate leases would have no effect on the premium. There is also an assumption that the claimant is not seeking and will never seek to acquire a freehold or a notional lease. The effect of this would be that Landlord's share of marriage value (currently payable when there is 80 years or less left on the lease) would not be payable nor would hope value based on possible marriage value in the future. This provision will almost certainly be subject to judicial review. Compensation will also be payable for buying out a ground rent. Schedule 3 contains complex valuation principles on how to determine this which are probably best left for a valuer. The valuation caps ground rent treatment at 0.1% of freehold value. There will be consultation on the new deferment rate and the ground rent cap in the Summer of 2025.

The Landlord will not be able to charge their reasonable non-litigation costs to the leaseholder unless there is a very short term left on the lease. This provision will almost certainly be subject to judicial review. A provision was introduced in the late stages of the Bill whereby Landlords can charge costs if the reasonable costs are greater than the cost of enfranchisement or extension or if they exceed a statutory amount which is yet to be fixed. The Landlord will not be able to charge costs, save in exceptional circumstances, such as a withdraw or deemed withdraw of the application, for RTM companies as of March 3rd 2025. The same provisions in relation to lease extensions and enfranchisement are subject to judicial review (see below).

Any disputes will be decided by the first-tier tribunal and not by the county court.

On August 23rd 2024 Annington Properties commenced judicial review in relation to the changes. They had to do this within 3 months of the Act receiving the Royal Assent on May 24th 2024. They purchased 55 thousand family service properties from the Ministry of Defence in 1996 for £1.662 billion. They still own 37,000 properties with an estimated value on £8 billion. In July 2023 the Ministry of Defence successfully claimed the right to enfranchise under the Leasehold Reform act 1967. Although the Leases are not at a ground rent Annington are concerned that the MOD may restructure and buy at a low ground rent. On December 17th, 2024, Annington agreed to sell their portfolio worth £10.1 billion for £6 billion.

John Lyon's Charity Trust who are a non-profit making organisation with properties in St. John's Wood in London have also commenced judicial review and are claiming that the changes to marriage value are a breach of article one of the first Protocol of the European Convention of Human Rights has been a breach of quiet enjoyment of property. Various other landlords are understood to be considering similar action, including the Church Commissioners. This will inevitably delay implementation of these provisions and clients should be made aware of this and make a decision themselves as to whether to enfranchise or extend the lease.

On January 28th 2025 John Lyon and five other Landlords successfully applied for judicial review of the changes to costs, limits to ground rents and abolition of marriage value. The case was heard on July 15th – 18th 2025. We are still awaiting a decision: ***R v Secretary of State ex parte ARC & Ors.***

JAPANESE KNOTWEED

Davies v Bridgend County Borough Council [2024] UKSC 15. Here Japanese knotweed was already present on a cycle path owned by the council adjoining Davies' land when he bought the property in 2004. Rhizomes were growing underneath Davies' land but there was no structural damage. The council should have known of the problems by 2013 but did not take steps to irradicate the knotweed until 2018. The Supreme Court reversed the Court of Appeal decision and held that although the council had been liable in tort there was no resulting residual loss due to the fact that the presence of knotweed predated the council's liability.

WORKING FROM HOME

This affects 15% of the adult working population and may give rise to problems in relation to business rates, planning, tax, nuisance, insurance and breaching of restrictive covenants.

Restrictive covenants are of dubious value for various reasons. Long term, in particular, they may be discharged under ***S.84 Law of Property Act 1925,*** for instance if obsolete or if they prevent reasonable use and enjoyment of land. In event of discharge by the Lands Chamber damages may be awarded but may be limited. Moreover, in any court proceedings an injunction will not necessarily be awarded to prevent breach and again damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no enforceability.

Re ***Holden [2018] UKUT 21*** here there was a covenant not to carry out a trade or business. The applicant wanted to convert their garage to a dog grooming parlour. It was held that the covenants were not obsolete as this required material change in character of the locality. The covenant did prevent reasonable use of the land, but as it had been deliberately flouted it would only be modified to allow current and not general business use.

Hodgson v Cook [2023] UKUT 41

Here Mrs H was running a beauty salon in a cabin in the garden. She obtained retrospective planning consent for this and applied to discharge the covenants as preventing reasonable use of the land. Neighbours objected. The Tribunal said that merely taking work home or having an office at home conducting work which might contribute the conducted from home would not be a breach of a trade or business covenant or a private dwelling covenant. But where visitors turned up at the property and parked their cars in the street this would be a breach and unreasonable. They also accepted a thin end of the wedge argument that it would change the character of the locality and the covenants were not discharged.

Caradon District Council v Paton [2000] 33 HLR 34 a private dwelling covenant in a former council house bought under Right to Buy was breached by granting a series of short-term lettings. See also ***Triplerose v Beattie [2020] UKUT 180*** Airbnb also amounted to a breach of a private dwelling covenant as well as a breach of a non-business user covenant.

Short-term Lettings

Business Tenancies: S.23

The first requirement for the Act to apply is that there must be occupation under a lease which is at least partly for business purposes and not excluded. In particular, remember that mixed business/residential use comes within the 1954 Act: S.24(3) see ***Cheryl Investment v Saldhana [1978] 1WLR 132.*** There will not be a business tenancy if the tenant is in breach of any user covenants. Under the **Small Business Enterprise and Employment Act 2015** it is possible to create a Home Business Tenancy if at least one tenant occupies a dwelling house as a home and the business is one that could reasonably be carried on at home, excluding any business which involves the consumption or selling of alcohol. This will be outside the Act but care should be taken if the business use is predominant or where the tenant trades directly from the premises. This may require a change of use for planning purposes.

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