Abolition of privity

The Act abolishes liability arising under the privity law in respect of leases granted on or after 1 January 1996 so that a landlord will only be able to pursue the tenant for the time being unless there is an authorised guarantee agreement in force.

Authorised guarantee agreement

A landlord may require an assigning tenant to enter into a guarantee with the landlord as a condition of the landlord giving his consent to the assignment. Under such an agreement the outgoing tenant guarantees the performance of the lease *by his immediate (but not subsequent) assignee*.

Landlord's release

Landlords are allowed to apply for a release from liability when they dispose of their interest in the premises. This would occur when the landlord sold the freehold reversion in the property to another. Release is obtained by serving a statutory notice on the current tenant.

Notice requirement

In both existing and new leases a landlord must notify a former tenant (or guarantor, e.g. of rent) within six months of a breach of a covenant in order to be able to take action against him in respect of the breach.

Limitation on increase in liability

A former tenant will be liable only for rent increases due to rent review clauses in the original lease and not for increases due to changes in the terms of the lease since he assigned it.

Overriding leases

In both existing and new leases a former tenant (or his guarantor) who is called upon to remedy the default of the current tenant is given a right to call for an 'overriding lease' thus enabling him to reacquire the premises. This means that a former tenant will have the right to re-enter the premises if he is paying for them. This was not the case in previous law.

Main commercial effects of tenant release from liability

The 1995 Act has the following main commercial effects:

- Landlords will impose stricter criteria before consenting to the assignment of a lease. This affects the 'consent will not be unreasonably withheld' principle. Consequently, a business entering into a new lease as a tenant will need to take advice as to the covenants relating to assignment.
- Those involved in property investment will be concerned about the effect on investment values resulting from loss of privity. An investor will tend to choose an older lease since the original tenant and subsequent assignees will remain liable for the whole term since the 1995 Act is not retrospective.
- Difficulties in relation to assignment may result in businesses going for shorter term leases.

Landlord selling freehold: release from covenants

Where a landlord disposes of his reversion as by selling the freehold so that the tenant has a new landlord the selling landlord may under ss 7 and 8 of the 1995 Act seek release from his

covenants so that the incoming landlord alone is liable on them. The outgoing landlord must serve notice on the tenant within four weeks of the transfer of his interest and the tenant has four weeks thereafter to serve an objection. If there is no tenant objection the former landlord is released. If the tenant serves an objection the landlord must make application to the court for a ruling that it is reasonable for the covenants to be released.

In *BHP Petroleum Great Britain Ltd* v *Chesterfield Properties Ltd* [2001] 2 All ER 914 the High Court ruled that only covenants appearing in the lease could be released under the 1995 Act. Thus where a landlord had, as in this case, given a personal covenant to repair defective glass cladding on office premises this liability could not be released. It was a personal covenant. This ruling was affirmed by the Court of Appeal in *BHP Petroleum Great Britain Ltd* v *Chesterfield Properties* [2002] 1 All ER 821.

So far as those in business are concerned, there is no reason why both parties to a lease should not state in it that personal covenants also end on assignment.

Contracts (Rights of Third Parties) Act 1999

This Act is given a more detailed consideration in Chapter 10. Briefly the Act enables a third party to enforce a term of a contract where the contract expressly gives him that right. In addition, a third party is able to enforce a term of a contract where that term purports to confer a benefit on him and on a proper construction of the contract it appears that the parties to the contract intended to give him that right, even if there is no express provision in the contract to that effect.

As regards the law of landlord and tenant, the Act could apply where the tenant has sublet enabling the subtenant to enforce a provision against the head or main landlord, e.g. an obligation in the head lease to decorate. This could be done without the involvement of the intermediate landlord. No doubt lawyers will bear this in mind when drafting leases to make sure that the rights, if any are to be given, are made clear in the lease.

Tenants' rights to acquire the freehold of houses and blocks of flats

The Leasehold Reform Act 1967, the Leasehold Reform, Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002 together contain the relevant rights. Although as we have seen it is possible to convert from leasehold to commonhold it is necessary for such a conversion to get the consent of 100 per cent of the existing leaseholders and/or other owners of what would become units in the commonhold. Thus many leaseholders are unlikely to convert to commonhold so that there is a need to address the rights of leaseholders under the above legislation. The main rights and requirements appear below. The chapters referred to are chapters in the 2002 Act and the relationship of that Act and the 1967 and 1993 Acts are explained under the headings set out below to give the current legal regime.

Chapter 1. Right to manage

This introduces a new right for leaseholders of flats to manage their building. The qualifying conditions are that they must hold a 'long lease' of a flat in the building, which is principally any lease granted originally for a term exceeding 21 years. Eligible leaseholders must set up a company known as a RTM (Right to Manage) company in order to exercise the right. The Act,

combined with a power to make regulations, specifies the constitution of the company. In outline an RTM company must be a private company limited by guarantee and must include the acquisition and exercise of the right to manage as one of its objects. A company that is also a commonhold association cannot be a RTM company. Any person who is a qualifying tenant of a flat in the premises is entitled to be a member of the RTM company at any time. A landlord is entitled to be a member but only after the RTM takes over the management of the premises.

Chapter 1 also provides for the service on all qualifying tenants of a notice of invitation to participate. There are also provisions relating to the service upon the landlord of a claim notice and of counter notices by the landlord. Where a counter notice contends that the RTM company is not entitled to manage the dispute will be settled by an application to the Leasehold Valuation Tribunal (LVT). The Act provides that a RTM company may apply to an LVT to acquire the right to manage where the landlord cannot be traced. The chapter also provides for the termination of the right to manage where the company wishes to cease the right and the landlord agrees or where the company becomes insolvent.

Chapter 2. Collective enfranchisement by tenants of flats

This chapter amends the Leasehold Reform, Housing and Urban Development Act 1993 that deals with the right of leaseholders to buy collectively the freehold of their building. The eligibility criteria are simplified. In particular the requirement that at least two-thirds of the leaseholders in the block must participate and that at least half of the participating group must have lived in their flats for the previous 12 months (or periods totalling three years in the last ten) are removed. The proportion of participating leaseholders who must participate is reduced to one-half. The low rent test is abolished in the few situations where it applied (i.e. leases of less than 35 years). Formerly, the rent had not to exceed £250 pa (£1,000 pa in London). The chapter also increases the proportion of the building that can be occupied for non-residential purposes from 10 per cent to 25 per cent and reduces the scope of the exemption for certain resident landlords. Currently, premises converted into four or fewer flats where the landlord or an adult family member has occupied one of the flats as their only or principal home for at least 12 months are exempt. Under the CLRA 2002 the exemption will apply only if the landlord has owned the freehold since before the conversion and carried out the conversion.

The business application. Enfranchisement claims will increase. For example, in the case of a block of flats that contains 12 flats, it was necessary under previous provisions for at least eight leaseholders to participate and at least four had to be resident. Under the CLRA 2002 only six have to participate and none will have to be resident. Also, more leaseholders with flats over shop premises will be able to claim.

Formerly the freehold of the building was acquired by a 'nominee purchaser', but there were no provisions as to the nature and constitution of this purchaser. The 2002 Act amends the 1993 Act so that the freehold is acquired under the tenants' *right to exercise* the purchase by a RTE company of which the participating leaseholders are members. The RTE company must be a private company limited by guarantee and its memorandum must include as one of its objects the exercise of the right to collective enfranchisement. A company that is a commonhold association cannot be a RTE company. All qualifying leaseholders have a right to participate in the purchase by joining the company.

The price of the freehold should also be cheaper under the 2002 Act. This chapter amends the valuation principles of the 1993 Act. It provides that where marriage value exists it should be divided equally between the landlord and the leaseholders in all cases. It also provides that where the unexpired term of the leases held by qualifying leaseholders exceeds

80 years no marriage value is payable. The marriage value relates to the fact that on acquisition the tenant has, in effect, merged the freehold and leasehold interest having a lease and also controlling the landlord function by a collective ownership of the freehold. This obviously increases the value payable to the old landlord but the above rules reduce or eliminate this extra value.

It is not necessary for all the leases to have at least 80 years unexpired. Those that have will have the marriage value ignored.

Chapter 3. New leases for tenants of flats

This chapter amends the provisions of the 1993 Act covering the right of individual leaseholders to buy a new lease. The low rent test is abolished and the same provisions apply to marriage values as those set out above. The former requirement that the leaseholder must have lived in the flat for the last three years (or periods totalling three years in the last 10) is replaced by the requirement to have held the lease for at least two years. Where deceased leaseholders would have been eligible to buy a new lease immediately before death their personal representatives will qualify for a period of two years after the date of granting probate of the will or letters of administration as for example where there is an intestacy.

The business application. Personal representatives can increase the value of the estate by extending a lease that might otherwise be difficult to sell or mortgage.

Chapter 4. Leasehold house

The chapter amends the provisions of the Leasehold Reform Act 1967 that covers the right of leaseholders of houses to buy their freeholds or extend their lease. Qualifying leaseholders have the right to an extended lease 90 years longer than the original terms. The provisions of Chapter 4 reflect those of Chapters 2 and 3 as follows:

- the low rent test is abolished;
- the marriage value provisions are the same as those set out above;
- under the new provisions a leaseholder is required only to have held the lease for at least two years;
- acquisition by the personal representatives of a deceased leaseholder are the same as those set out above.

This chapter also provides new rights for leaseholders who have extended their leases under the 1967 Act. They will be able to buy their freehold *after* the extended lease has commenced. The price will be determined by s 9(1A) of the 1967 Act. Where they do not buy the freehold they will become entitled to an assured tenancy under the Housing Act 1988 Part I when the extended lease expires.

The chapter also amends the 1967 Act in order to simplify the procedure where the landlord cannot be found. Leaseholders can apply to the county court (rather than the High Court) for a vesting order and the price payable will be determined by an LVT rather than a surveyor appointed by the President of the Lands Tribunal. The relevant procedures are the same as those applying to flats under the 1993 Act.

Chapter 5. Other provisions about leases

- The definition of 'service charge' is extended to cover improvement costs. This means that improvement costs must be reasonable and that unreasonableness can be challenged at an LVT.

The business application. Tenants will find that this provision deals with a number of notorious landlord scams particularly where all manner of works have been bundled into 'improvement works' because this head of charge was unchallengeable under previous law.

- LVTs are given jurisdiction to decide whether leaseholders are liable to pay service charges as well as whether these are reasonable. Formerly LVTs had no jurisdiction to consider the reasonableness of service charges once they had been paid. They now have that right (CLRA 2002, s 155).
- The chapter introduces new accounting and inspection provisions to tighten up the Landlord and Tenant Act 1985. Leaseholders get a new right to withhold payment of service charges if accounts are not provided by the landlord. In future the landlord must hold service charge money, that is subject to a trust to defray the relevant costs, in a separate bank account and it will not be permissible to run a number of properties through one general account. However, the Secretary of State is given power to exempt certain payees from this requirement (CLRA 2002, s 151). This could be used to exempt managing agents whose general client accounts are audited in accordance with statutory requirements.
- Charges that are to be paid under leases for approvals, for the provision of information as a result of a failure to pay rent or other charges on time or as a result of a breach of a covenant or condition of a lease are contained in a new concept called 'administration charges'. These must be reasonable and can be challenged in terms of liability to pay or reasonableness before an LVT.
- Section 20 of the Landlord and Tenant Act 1985 under which landlords must consult tenants before carrying out works above a prescribed sum recoverable through service charges is replaced. The consultation requirements are extended to cover contracts for works or other services of more than 12 months' duration. LVTs (rather than county courts) can grant dispensation if they think that it is reasonable to do so.
- The chapter also introduces a requirement that ground rent is not payable unless it has been demanded by giving the tenant prescribed notice. Application of any provisions in the lease relating to late or non-payment is prevented if the rent is paid within 30 days of the demand being issued.
- Forfeiture procedures for non-payment of service or administration charges are prohibited unless the charge has be agreed or admitted by the tenant or a court or LVT has determined that it is reasonable. Forfeiture proceedings for other breaches cannot be commenced unless a court or LVT has determined that the breach has occurred.
- As regards insurance of long leasehold houses, e.g. those exceeding 21 years, leaseholders can insure wherever they choose provided that the policy is issued by an authorised insurer, i.e. authorised under the Financial Services and Markets Act 2000. The policy must cover the landlord and the leaseholder and provide the cover required by the lease. This provision overrules covenants under which the insurer must be nominated by the landlord, the use of which often gave him large commissions. Owners of other dwellings, e.g. maisonettes, must continue to rely on the Landlord and Tenant Act 1985 and apply to the county court or the LVT for an order requiring the landlord to nominate another insurer but only on the grounds that the cover is inadequate or the premiums excessive. The CLRA 2002 however makes it clear that this ability to apply to the county court or the LVT applies where the insurer has to be *approved* by the landlord as well as cases where the insurer must be *nominated* by him.

Chapter 6. Leasehold Valuation Tribunals

There are important new powers here to make regulations to exclude the case of a party before an LVT, in whole or in part, where the party fails to comply with the directions of the

LVT. Costs can be awarded of up to £500 or any higher amount that regulations might prescribe against frivolous, vexatious or disruptive parties and those who act unreasonably.

Effect of Human Rights Act 1998 (HRA)

This legislation came into force in October 2000. In terms of its effect upon the law of landlord and tenant, the following material should be noted.

Forfeiture and distraint

These self-help remedies of landlords may be subject to challenge under the HRA.

Forfeiture. It is the better view so far that forfeiture will survive a challenge under the HRA. This is based upon the fact that both landlord and tenant have agreed in the lease that forfeiture will be the consequence of breach of covenant, e.g. non-payment of rent. Also the state has provided a method of relief through the courts.

Distraint. This remedy, widely known as distress for rent, is seen as unfair in terms of the fact that the tenant's goods can be taken and sold at cheap prices by the landlord because of problems of title in sheriffs' sales. There is statutory intervention by the state, and the state sanctions the mechanism for distraint by certifying bailiffs. Third parties' goods on the premises may also be taken. For these reasons, exercise of this remedy appears threatened by the HRA.

The Competition Act 1998

This Act came into force on 1 March 2000. Property transactions are subject to the competition rules.

Penalties for infringing the Act

Those who infringe the Act with their property documents will find that these documents, i.e. leases, will be void and there may be exposure to significant fines or litigation brought by a third party claiming to have suffered loss through the anti-competitive behaviour. Fines can be up to 10 per cent of annual turnover for the previous three years.

Exclusions

The Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310) applies, and gives a specific exclusion for 'land agreements' covering transfers of freeholds, leases, assignments of leasehold interests, easements, licences and agreements to enter into any of these. The exemption will apply if the restriction is concerned to protect the interest in land, but not if it is intended to protect trading interests.

Examples

- ***A landlord is an insurance company.*** The lease requires the tenant to insure the premises with the landlord's company. *This restriction would not benefit from the exclusion because the landlord is protecting his business, which is insurance, and not his interest in the land.*
- ***A landlord is the owner of the only retail park outside a particular town.*** He proposes to increase the rents under his business leases by 200 per cent. *This increase is not within the exception. The landlord is abusing a dominant position within the market.*

There will, of course, be many fine distinctions made, but until we have case law, it is difficult to be precise in marginal cases.

Servitudes

Servitudes are rights over the property of another and may be either *easements* or profits *à prendre*.

Easements

An easement may be defined as a right to use or restrict the use of the land of another person in some way. There are various classes of easement and these include:

(*a*) rights of way;
(*b*) rights of light;
(*c*) rights to abstract water;
(*d*) rights to the support of buildings.

To be valid an easement must satisfy the following conditions.

There must be a dominant and servient tenement

The land in respect of which, and for the benefit of which, the easement exists is called the dominant tenement, and the land over which the right is exercised is called the servient tenement. A valid easement cannot exist *in gross*, i.e. without reference to the holding of land. A right of way enjoyed by members of the public generally is a public right of way but not an easement.

Hill v *Tupper*, 1863 – No easement 'in gross' (**485**)

The grant of a right of way over his land by a landowner to be exercised by the grantee personally, and without reference to any land capable of deriving benefit from the right of way, is merely a licence and not an easement.

The easement must accommodate the dominant tenement

The easement must confer some benefit on the land itself so as to make it a better and more convenient property; it is not enough that the owner obtains some personal advantage. A right of way over contiguous (adjoining) land generally benefits the dominant tenement, and an easement can exist even where two tenements do not actually adjoin, provided it is clear that the easement benefits the dominant tenement.

Thus it is not possible to have a right of way over land in Kent as the result of owning land in Northumberland. There is no connection between the two. Equally the sole and exclusive right given to the leaseholder of land on a canal bank to let out pleasure boats on the canal does not constitute an easement; it is not beneficial to the land on the canal bank as such (see *Hill* v *Tupper* (1863), above).

The dominant tenement and the servient tenement must not be both owned and occupied by the same person

Thus, if P owns both Blackacre and Whiteacre and habitually walks over Blackacre to reach Whiteacre, he is not exercising a right of way in respect of Blackacre, but merely walking from one part of his land to another. For this rule to apply, P must have simultaneously both ownership and possession of the two properties concerned. It is not enough that he owns the two if they are leased to different tenants, or that he is the tenant of both if they are owned by different owners.

The easement must be capable of forming the subject of a grant

This means that the right must be sufficiently definite. There must be a capable grantor and a capable grantee, and the right must be within the general nature of the rights capable of existing as easements.

> ***Bass*** v ***Gregory***, 1890 – Is the easement definite enough? (**486**)

An easement is a right to use or restrict the use of a neighbour's land which should not normally involve him in doing any work or spending any money, though the Court of Appeal has recognised an easement of fencing.

> ***Crow*** v ***Wood***, 1970 – An easement of fencing (**487**)

The categories of easements are not closed and new rights have from time to time been recognised as easements, though in general the courts are still reluctant to extend the categories.

> ***Re Ellenborough Park***, 1956 – Expansion of easements (**488**)
> ***Phipps*** v ***Pears***, 1964 – No easement of property protection (**489**)
> ***Grigsby*** v ***Melville***, 1972 – No easement giving exclusive right of user (**490**)

Profits *à prendre*

A profit *à prendre* is the right to take something of legal value from the land of another, e.g. shooting, fishing and grazing rights; the right to cut turf or take wood for fuel. The exception is a right to take water from a stream which is treated as an easement because running water cannot be privately owned and is not therefore a thing of legal value.

A profit necessarily involves a servient tenement but there may or may not be a dominant tenement, for a profit can exist *in gross*. A profit may be a several profit, where enjoyment is granted to an individual as is often the case with shooting and fishing rights; or a profit may be in common which may be enjoyed by more than one person, as is often the case with grazing rights and the right to take various materials for use as fuel.

The expression is legal French for 'profit to take'. An acceptable legal pronunciation of the third word is 'prawn-dra'.

Acquisition of servitudes

Servitudes may be acquired (*a*) by statute, (*b*) by express or implied grant, (*c*) by prescription, (*d*) by equitable estoppel (see *Crabb* v *Arun District Council* (1975) (Chapter 10)).

Easements created by statute are usually in connection with local Acts of Parliament.

When land is sold, a servitude may be expressly reserved in favour of another tenement of the seller, or may be expressly granted in similar circumstances by deed; and under the Law of Property Act 1925, s 62, a conveyance, if there is no contrary express intention, operates to convey servitudes appertaining to the land conveyed (see *Crow* v *Wood* (1970)).

Under the rule in *Wheeldon* v *Burrows* (1879) 12 Ch D 31 where a vendor sells part of his land, the purchaser will have rights over the vendor's retained land if:

- such rights were previously used by the vendor for the benefit of the land conveyed and either;
- they were reasonably necessary for the land conveyed; or
- were continuous and apparent.

Section 62 has, therefore, a similar effect to the rule in *Wheeldon* but, whereas s 62 applies only where the property is transferred by conveyance, *Wheeldon* applies to other transfers, e.g. where property is left by a will.

Where an owner of two plots conveys one of them, then certain easements are implied. These are *easements of necessity*, as where the piece of land would be completely surrounded and inaccessible without a right of way; *intended easements*, which would be necessary to carry out the common intentions of the parties; *ancillary easements*, which would be necessary in view of the right granted, as the grant of the use of water implies the right of way to reach the water. Where part of a tenement is granted, then the grantee acquires easements over the land which are continuous and apparent, are necessary to the reasonable enjoyment of the land granted, and have been and are used by the grantor for the benefit of the part granted. An example of this is a window enjoying light.

Ward v *Kirkland*, 1966 – An easement for reasonable enjoyment (**491**)

It will be appreciated therefore that easements do not always show up in the title deeds. Although the Law Society's National Conditions of Sale put the seller under a duty to disclose latent easements, this only applies if they are known to him. The purchaser must take the risk of unknown easements such as an underground sewer the existence of which was unknown to the seller (*William Sindall plc* v *Cambridge County Council* [1993] NPC 82).

Even where there is no easement, access to adjacent land may in certain circumstances be obtained under the Access to Neighbouring Land Act 1992 which is further considered in Chapter 21.

Prescription

Prescription may be based on a presumed grant or alternatively may be established by use as of right.

Prescription at common law depended on use since time immemorial, which at law means since 1189. Clearly in most cases it is out of the question to show continuous use for this period, and so the courts were prepared to accept 20 years' continuous use as raising the presumption of a grant. This presumption may be rebutted by showing that at some time since 1189 the right could not have existed, and it follows that an easement of light cannot be claimed by prescription at common law in a building erected since 1189. This serious difficulty was met in part by the presumption of a lost modern grant, and juries (when they were in use in civil matters) were told that if there had been use during living memory or even for 20 years, they might presume a lost grant or deed, and this ultimately became mandatory, even though neither judge nor jury had any belief that such instrument had ever existed.

The position is now clear under the Prescription Act 1832, which was passed to deal with the difficulties arising under the common law. Under this Act, which supplements the common law, we must distinguish easements other than light from easements of light and easements from profits.

Tehidy Minerals v *Norman*, 1971 – Lost modern grant (**492**)

Easements other than light

Twenty years' uninterrupted use as of right will establish an easement. Use as of right means *nec vi, nec clam, nec precario*, i.e. without force, stealth or permission. The law of prescription rests upon the acquiescence of the owner of the servient tenement. Thus he must have knowledge of the exercise of the right claimed. If the owner of the so-called servient tenement can prove that he has given verbal permission, i.e. that the easement is *precario*, then it cannot be claimed. Nevertheless 40 years' similar use will establish the easement, and in this case, if the owner of the servient tenement wishes to prove that the right was exercised by permission, he must produce a written agreement to that effect. To establish a right of way by prescription, periods of use of an original and a substituted way may be added together.

Diment v *Foot*, 1974 – Where there is no knowledge (**493**)
Davis v *Whitby*, 1974 – Original and substituted ways (**494**)

Easements of light

These can be established by 20 years' use, the defences being that the owner of the servient tenement gave permission and that there is a deed or written agreement to this effect, or that the owner of the servient tenement interrupted the enjoyment of the right for a continuous period of a year by erecting something which blocked the light. Under the Rights of Light Act 1959 (as amended by the Local Land Charges Act 1975), it is no longer necessary to erect something of this nature; the owner of the servient land may now register on the local land charges register a statutory notice indicating where he would have put up a screen, and this operates as if the access of light had been restricted for one year. Use as of right is not necessary, and oral consent will not bar the claim even if the claimant has made regular money payments for the use of the right.

The right can only be claimed having regard to the type of room affected. A bedroom does not require the amount of light that other rooms do, and if the claimant has used the bedroom to repair watches for 20 years, he will still only be able to claim that amount of light appropriate to a bedroom. There is no right to receive unlimited light but in *Ough* v *King* [1967] 3 All ER 859, the Court of Appeal held that in determining whether there was an infringement of a right to light regard must be had to the nature of the locality and to the higher standard of lighting required in modern times.

However, in *Allen* v *Greenwood* [1979] 2 WLR 187, the Court of Appeal held that the measure of light which can be acquired by prescription can, so far as a greenhouse used for its normal purposes is concerned, include the right to an extraordinary amount of light, and also to the benefits of that light, including the rays of the sun. Nevertheless, there is no claim to a view or a prospect which can be seen from a window.

The right to light is not limited to a freeholder and may be claimed by a tenant.

Artificial light

In *Midtown Ltd* v *City of London Real Property Co Ltd*; *Joseph* v *City of London Real Property Ltd* [2005] 1 EGLR 65 the High Court appears to have dealt a severe blow to those trying to protect the right of light to their properties. On the facts of the case it was accepted by the parties that the activities of a developer would have a significant effect on the claimant's right to light to its property. Nevertheless, the court refused an injunction to prevent the development on the basis of the presence of artificial light which the claimant could use. The court did not rule that the existence of artificial light would prevent *all* claims for infringement of a right to light, but the case will no doubt be raised by defendants in future cases.

The ruling suggests that there is no absolute right to natural light as some previous cases have suggested.

Distinction between presumption of grant and Prescription Act 1832

It is worth noting that the period of user under the 1832 Act is a period of enjoyment *immediately before a claim* to establish the right is made by bringing an action. However, the period under prescription by lost modern grant is *not limited to the period next before the claim is made*.

For example A uses a track over B's land giving access to a wood from A's house. A uses the vehicular access for 20 years. It is then interrupted by B who orders A to stop using the track. A acquiesces in this for 14 months while he tries to negotiate a compromise with B. This fails and A goes back to using the track. It was held in these circumstances in *Smith* v *Brudenell-Bruce* [2002] 2 P & CR 51 that A succeeded under the rules of lost modern grant but failed under the Act of 1832.

Profits *à prendre*

The general period for prescription here is 30 years under the Act of 1832, though 20 years is enough if the court is presuming a lost modern grant (see *Tehidy Minerals* v *Norman* (1971)).

If an easement is denied or threatened, it would be necessary to ask the court for an injunction to prevent the owner of the servient tenement from acting contrary to the easement, and its existence would have to be proved under one of the headings given above. The court may then:

(*a*) find the easement not proved; or
(*b*) grant an injunction to restrain the owner of the servient tenement from acting contrary to it; or
(*c*) if the infringement is not serious, award damages once and for all, in which case the servient owner will have bought his right to act contrary to the easement.

Reduction of easements

The court has power to reduce the scope of an easement when insistence on full use of it is unreasonable. Thus in *B & Q plc* v *Liverpool and Lancashire Properties Ltd* [2000] 39 LS Gaz R 41 the defendants wished to extend their premises over part of an easement of access possessed by B & Q. The easement of way would not be extinguished but reduced. B & Q asked for an injunction to prevent the extension and the court granted it. B & Q had shown that they would be placed in a difficult access situation otherwise and it was not unreasonable of them to resist a reduction in their easement of way. The High Court made clear however that where the holder of an easement would not be placed in difficulty by its reduction and was unreasonably resisting a reduction the court would not grant relief.

Termination or extinguishment of servitudes

Servitudes may be extinguished by statute, as where the property concerned is compulsorily purchased under statutory powers, or by express or implied release. At law a deed is necessary for express release, but in equity an informal release will be effective if it would be inequitable for the dominant owner to claim that the right still exists.

An example of an easement being extinguished under statutory authority is provided by *Jones* v *Cleanthi* [2006] 1 All ER 1029.