received considerably less than a market rent without receiving any compensation in lieu: *Mellacher* v. *Austria* (1989) 12 E.H.R.R. 391. After *Chassagnou*, it appears that in cases of control, the social and economic aims of the legislation will be a very significant factor in determining whether there is the necessary proportionality between ends and means. The Court has recently indicated that it will accord particular respect to a State legislature's view "in spheres such as housing, which plays a central role in the welfare and economic policies of modern societies": *Immobiliara Saffi* v. *Italy* (judgment of 28 July 1999, §49). *Chassagnou* suggests that, in relation to other matters, the margin of appreciation will be less generous. The case contrasts strikingly with the earlier decision of the Commission in *Banér* v. *Sweden* (above). In that case, public rights to fish free of charge in Swedish waters were extended. Compensation was only payable if loss of income could be proved by adjoining landowners. The absence of economic loss by the claimant proved fatal to his claim.

If, as it seems, *Chassagnou* heralds a change of direction, the implications for the development of English law could be considerable. It seems likely that the courts will develop a domestic doctrine analogous to the margin of appreciation once the Human Rights Act 1998 is brought into force. However, even if they do, it is difficult to see how, after *Chassagnou*, it will be possible (for example) to enact Convention compliant legislation which imposes a general right of open access to the countryside on unwilling landowners, without making provision for compensation.

CHARLES HARPUM

## FOR SALE: CAVEAT EMPTOR!

THE system of land registration was, according to Lord Wilberforce in *Williams & Glyn's Bank* v. *Boland* [1981] A.C. 487, 503, "designed to free the purchaser from the hazards of notice—real or constructive—which, in the case of unregistered land, involved him in enquiries, often quite elaborate, failing which he might be bound by equities". The hapless purchaser of land may well consider the remedy just as hazardous as the complaint. Certainly, in the light of *Ferrishurst Ltd.* v. *Wallcite Ltd.* [1999] 2 W.L.R. 667, no obituary can yet be written for elaborate enquiries.

The case concerned an acrimonious dispute about an option to purchase. Ferrishurst occupied a suite of offices under a sub-underlease which had also granted them an option to purchase the reversion. The reversion, however, was not confined to the offices but extended to a neighbouring garage, and the whole was part of a single registered title. Wallcite purchased the title, and then opposed Ferrishurst's subsequent application to exercise the option. No entry relating to the option appeared on the regis-

https://doi.org/10.1017/S0008197399293014 Published online by Cambridge University Press

ter, but Ferrishurst claimed the benefit of an overriding interest, by virtue of section 70(1)(*g*) of the Land Registration Act 1925, which protects the rights of persons in actual occupation of the land.

The issue before the judge was thus quite simple – whether or not Ferrishurst could rely upon section 70(1)(*g*) when the interest claimed extended beyond the area of land that they occupied. Unfortunately for Ferrishurst, the Court of Appeal in *Ashburn Anstalt* v. *Arnold* [1989] Ch. 1 had already decided that section 70(1)(*g*) only protected interests which were coterminous with a claimant's occupation. At first instance, the judge quite properly held himself bound by this precedent. So, on appeal, counsel for Ferrishurst bravely argued that *Ashburn* should not be followed.

Robert Walker L.J., with whom Stuart-Smith and Thorpe L.JJ. agreed, was convinced by this bold attack. He held that *Ashburn* was inconsistent with the reasoning of the House of Lords in *Boland*. From the latter case, and those decisions which were approved in it, he drew the following principles: namely that (1) the function of overriding interests in registered conveyancing was comparable to that of notice in unregistered land, but that there were significant differences; (2) the rights of an occupier of registered land were to be distinguished from the fact of his occupation; and (3) the occupier need not, in order to rely on section 70(1)(*g*), be in actual occupation of the whole of the land comprised in a registered disposition. From these premisses, Robert Walker L.J. was able to conclude that an occupier of part of land comprised in a registered disposition could enforce against the purchaser an overriding interest which extended beyond the area occupied. He found that *Ashburn* had been wrongly decided on this point.

From a logical point of view, and from the survey of the case law, the judgment cannot be faulted. The interest is indeed separate from the fact of occupation. This accords with the rationale behind section 70(1)(*g*), that the person *in situ* should be protected against a purchaser, who will, after all, be likely to have had legal advice and the opportunity to make enquiries.

It is interesting to note, however, that the Joint Working Group of the Law Commission and the Land Registry, whose consultation document (Law Com. No. 254) was published in September 1998, two months before the *Ferrishurst* judgment, obviously thought that *Ashburn* was right, and that the enforceability of an interest should be limited to the area of occupation. Indeed, they recommended legislation to ensure that there was no mistake about this.

One can sympathise with their position. Section 70(1)(*g*) seems to have been initially included in the legislation as a relatively insignificant backstop, but the massive changes in land ownership since 1925 and, in particular, the growth of informal interests in land, have resulted in the provision's proving a grave danger to a purchaser. The threat posed by the subsection was pointed out in argument by Wallcite's counsel, who drew a

https://doi.org/10.1017/S0008197399293014 Published online by Cambridge University Press

horrifying picture of an unwitting purchaser of the Barbican's freehold being subjected to an option to purchase owned by the occupier of a single flat. This did not deter Robert Walker L.J., and rightly so, for the real problem lies in the discoverability of an occupier, not in the nature or extent of his or her interest.

Judicial notice has been taken of the danger of the hidden occupier—see Vinelott J.'s criticism in *Kling* v. *Keston Properties* (1985) 49 P.&C.R. 212—but so far the weight of authority considers that notice of the occupation is irrelevant, and Mustill L.J.'s suggestion in *Lloyd's Bank* v. *Rosset* [1989] Ch. 350 that notice should flavour the construction of the section has generally been treated as heretical. The Joint Working Group recommended that the occupation under section 70(1)(*g*) should be apparent, and this reform is urgent. If implemented, both occupiers and purchasers would be sufficiently and fairly protected. The judgment in *Ferrishurst* could then be left intact, as a logically coherent part of the whole scheme. A purchaser would merely have to make reasonable enquiries to be protected.

In the meantime, however, and pending such reform, a purchaser of registered land will need to guard against the risk of a hidden occupier with extensive equities. Thus he will be well advised to make elaborate enquiries – *plus ça change, plus c'est la même chose*.

A final point to consider is the reputation of *Ashburn*, and the extent to which it can still be treated as authoritative. In its relatively short life, it has been overruled by the House of Lords (in *Prudential Assurance Co. Ltd.* v. *London Residuary Board* [1992] 2 A.C. 386) on the issue of certainty of a leasehold term, and now not followed by the Court of Appeal. One must question whether its remaining tenet, that a contractual licence is not proprietary, is now quite as impregnable as it formerly seemed. Lord Denning's ghost may yet have the last laugh.

LOUISE TEE

## CHINESE WALLS

UNDER what circumstances may a solicitor or forensic accountant who has obtained confidential information from a client act against him? This question was considered by the House of Lords in *H.R.H. Prince Jefri Bolkiah v. KPMG* [1999] 2 W.L.R. 215, where the House reconsidered *Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch. 831 and found the criticisms, both academic and judicial, of the test laid down by the Court of Appeal to be well founded.

Prince Jefri was the chairman of the Brunei Investment Agency (BIA). Since the BIA was established, KPMG had acted as its auditor. Subsequently, KPMG acted personally for Prince Jefri. Differences emerged between Prince Jefri and the Sultan and it was suspected that

https://doi.org/10.1017/S0008197399293014 Published online by Cambridge University Press