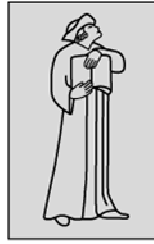


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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ADJUDICATION

A party to a written construction contract has a statutory right to refer a dispute arising under it for adjudication pursuant to s.108 Housing Grants, Construction and Regeneration Act 1996. The current statutory adjudication scheme (if there are no contractual adjudication provisions) is set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 649. S.108(3) and paragraph 23 of the Scheme provide for the temporary binding finality of the adjudicator's decision. More than one adjudication is permissible, provided that the second adjudicator is not asked to decide again that which the first adjudicator has already decided. The scope of an adjudicator's decision will normally be defined by the scope of the dispute that was referred for adjudication. Here, although both adjudications related to applications for extensions of time, the grounds for the applications were substantially different and so the adjudicator was wrong not to consider the second application. ***Quietfield Ltd v Vascroft Construction Ltd*** [2006] EWCA Civ 1737.

BUSINESS TENANCIES

The tenant occupied premises consisting of a basement, ground floor and first floor. The lease described the premises as shop premises, and required the lower part to be used for business purposes with a shop on the ground floor, and the upper part for residential purposes. Although the premises had initially been derelict, the tenant had used them for the purposes specified in the lease for some years prior to the issue of possession proceedings. Following an assignment of the freehold by the local authority and a backdated rent review, the landlord sought to forfeit on the basis of rent arrears. The issue on appeal was whether the lease created a business tenancy under the Landlord and Tenant Act 1954 or an assured tenancy under the Housing Act 1988. The Court of Appeal noted that where the Rent Acts might apply the court was obliged to consider them, whether the tenant took the point or not. However there was no doubt that this was a business tenancy. S.23(1) of the 1954 Act provides that a tenancy is within the Act where the property comprised in the tenancy is or includes premises occupied by the tenant for the purposes of a business carried on by him or for those and other purposes. Schedule 1 to both the Housing Act 1985 and the Housing

Act 1988 exclude 1954 Act tenancies from the schemes for secure and assured tenancies. The present case was plainly within Lord Denning's second illustrative example in **Cheryl Investments v Saldanha** [1978] 1 WLR 1329, at least from the date when the tenant had started to trade from the shop. The conduct of the tenant's first appeal by HHJ Cotran was the subject of a number of criticisms. **Broadway Investments Hackney Ltd v Grant** [2006] EWCA Civ 1709.

CONSTRUCTIVE TRUSTS

Oxley v Hiscock [2004] EWCA Civ 546 set out principles for determining the interests of cohabitants where a property was purchased in the sole name of one of them. These principles also applied to other cases where a party had contributed to the purchase price without becoming a named purchaser and it was clear that it had been intended that he or she should have an interest either at the time of purchase or at a later stage. This was so even if there was no common intention as to the extent of their interest. The court would fix the shares having regard to the amount of the respective contributions and to matters relating to the property which had occurred after the purchase. Each party would be given a fair share taking into account the whole course of dealing between them in relation to the property: see **Stack v Dowden** [2005] EWCA Civ 857. The effect of **Oxley** was to sideline the operation of resulting trusts save where the only relevant circumstances were the respective financial contributions at the time of purchase. **Ledger-Beadell & anor v Peach & anor** [2006] 48 EG 230 (CS).

EASEMENTS

The tenant under a long lease had express rights to use the communal refuse bins at the rear of the building and a right of access through the common parts for that purpose. In 1995 a wall was erected by the then landlord blocking off all access to the rear area, pursuant to a notice served on him by the local housing authority under s.352 Housing Act 1985 as amended. The notice required the construction of the wall in order to maintain adequate fire precautions in the building. It was held on appeal that, contrary to what had been held below, the erection of the wall did not extinguish the tenant's rights once and for all. The lease had 72 years left to run and so there was plenty of time for requirements for fire safety measures in the building to change. There was a practical possibility of the rights reviving at some time during the remainder of the term. However it was clear beyond argument that in carrying out the works required by the s.352 notice the landlord committed no actionable wrong and was not liable for any breach of obligation under the lease. The discharge of a statutory obligation is a complete defence to any claim in nuisance by the tenant. **Jones v Cleanthi** [2006] EWCA Civ 1712. Note: Part XI HA 1985 which included s.352 has now been repealed and replaced by a new regime under HA 2004 for the licensing of houses in multiple occupation which came into force on 6th April 2006.

HOUSING

In an important case on Article 8 and public landowners, the Court of Appeal gave helpful guidance as to the effect of the decisions of the ECHR in **Connors v UK** [2005] 40 EHRR 9189 and, more importantly, the House of Lords in **Kay & ors v Lambeth Borough Council** and **Leeds City Council v Price & ors** [2006] UKHL 10. The local authority sought a summary order for possession of a site which it owned and wished to use for public purposes, namely to provide temporary accommodation for travellers. The site was occupied by a traveller who had lived there with his family for many years. His defence was based solely on Article 8. The decision in **Kay** and **Price** was summarised as follows: (i) The principle in **Qazi** that the enforcement of a right to possession in accordance with domestic law of property could never be incompatible with Article 8 required modification following **Connors**, but the exception should be narrowly defined. (ii) The ordinary presumption is that the property right of the public landowner supplies the justification required by Article 8(2) and in a normal case the authority will not need to plead or prove individual justification. (iii) There are only two possible “gateways” (the Court of Appeal’s term) for a successful defence to summary judgment: (a) a seriously arguable challenge under Article 8 to the law under which the possession order is made, but only where it is possible to interpret the domestic law to make it more compliant; (b) a seriously arguable challenge on conventional judicial review grounds (rather than under the Human Rights Act) to the authority’s decision to recover possession. On the facts of the present case, gateway (a) was closed because the claim for possession was in accordance with a statutory scheme which could not be modified. Gateway (b) was closed because the decision to seek possession depended not on factual allegations of nuisance or misconduct but on an administrative judgment about the appropriate use of the land in the public interest. The Court of Appeal commented on the difficulty of distilling the essence of the decision in **Kay** and **Price** from six fully reasoned speeches and suggested that a single majority speech could have provided clear and straightforward guidance. **Doherty v Birmingham City Council & anor** [2006] EWCA Civ 1739.

LANDS TRIBUNAL: COSTS

Where a party objects to an application to modify or discharge a restrictive covenant, the normal principle on costs is set out in the Lands Tribunal Practice Direction. This provides that an unsuccessful objector who had the benefit of a covenant which has been discharged or modified will not normally have to pay any part of the applicant’s costs unless he has acted unreasonably, and a successful objector will normally get all his costs unless he has in some respect been unreasonable. The rationale of the principle is that the applicant is seeking to have property rights removed from the objector and so it is reasonable that the costs rules should favour the objector. However, the Practice Direction is not designed to cover the position where there is a substantial preliminary dispute as to whether the objector has a property right entitling them to object. It is difficult to formulate a general rule to cover the costs position in the early stages, but as a general rule it would be fair for the applicant not to be at risk as to costs, at least until he has had an opportunity to consider the evidence relied on as establishing the objector’s title. If having had this opportunity he persists in resisting the objector’s claim and loses, there is no reason why he should not pay costs in accordance with the ordinary rule. Conversely, if an objector has held up a potential development in reliance on a claimed right which he is unable in the

event to establish, there is no reason why he should not pay the costs. **Winter & anor v Traditional and Contemporary Contracts Ltd** [2006] EWCA Civ 1740.

NUISANCE

Where a nuisance has allegedly arisen without the act or default of a defendant, liability can only be established if the defendant has continued the nuisance. He can be liable only if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring an end to it though he has had ample time to do so. The defendant must know or be presumed to know of the defect or condition giving rise to the hazard and must, as a reasonable man, foresee that if it is not remedied it will cause damage to the claimant's land. The degree of knowledge required and the nature of any remedial action or investigation raise potentially difficult questions of fact. It may suffice for knowledge that a claimant asserts that there is a nuisance on the defendant's land causing known damage to the claimant's property through water ingress even if the cause is to some extent wrongly identified. **Younger v Molesworth & anor** [2006] EWHC 3088 (QB).

RENT

The tenants of office premises ceased to operate from those premises and ceased to pay the rent. The landlord sued for the arrears and the tenants sought to argue, on contractual principles, that the landlord was obliged to mitigate his loss. The lease had not been terminated and so the claim was founded in debt and was not a claim for damages. There is a limited category of cases where the innocent party to a contract has not accepted a repudiation and is able to continue to perform his obligations, but nevertheless the court will not allow the innocent party to enforce his full contractual right to keep the contract in force. The reported cases principally concern charterparties where the owner claims hire and the charterers wish to be liable, if at all, for damages. The characteristics of such cases are that an election to keep the contract alive would be wholly unreasonable and that damages would be an adequate remedy. The tenants sought to establish that a case where the tenant has failed to pay rent and has abandoned the premises is within this category of cases. It was held that on the present state of English law it was not possible for the tenant to argue that the landlord should have mitigated its loss. There is no case in English law which shows that a landlord can recover damages from a former tenant in respect of loss of future rent after termination, and there is at least one case which decides that he cannot. In these circumstances, either damages are not an adequate remedy for the landlord, or he would be acting reasonably in taking the view that he should not terminate the lease because he might well not be able to recover damages. In principle, if the landlord chooses to regard it as up to the tenant to propose an assignee or sub-tenant or new tenant, rather than take the initiative himself, that is not unreasonable, still less wholly unreasonable. The tenants remained liable for the rent. **Reichman & anor v Beveridge & anor** [2006] EWCA Civ 1659.

RIGHTS OF WAY

For the purposes of prescription, the relevant owner of the servient tenement is the owner of the freehold interest, not the owner of any leasehold interest. When considering rights of

way in the context of tenanted land, the Court of Appeal derived the following principles from the earlier case of **Pugh v Savage** [1970] 2 QB 373: (1) Where the grant of a tenancy of the servient land predates the user by the owner of the dominant land, it is necessary to ask whether the freehold owner of the servient land could take steps to prevent user during the tenancy. This will probably depend on the terms of the tenancy. (2) If, notwithstanding the tenancy, the owner of the servient land could take steps to prevent the user, it is necessary to ask whether the freehold owner had knowledge (actual or imputed) of the user. If, on the facts, the owner of the servient land has knowledge of the user and could take steps to prevent it but does not do so, prima facie acquiescence is established. (3) Where user of the servient land began prior to the grant of the tenancy, it is necessary to ask whether the freehold owner of the servient land knew of it at or before the date of the grant. If so, the terms of the tenancy are probably immaterial. If the owner of servient land grants a tenancy on terms which put it out of his power to prevent the user, he can properly be said to have acquiesced in it. (4) If the owner of the servient land did not have knowledge at the date of grant, the position is the same as if the grant had pre-dated the user. If, notwithstanding the tenancy, the owner can take steps to prevent the user the question is whether and if so when they had knowledge of it. On the facts of the present case, the freehold owner had knowledge of the user and could have taken steps to prevent it but did not do so. Accordingly it had acquiesced in the user and the rights of way were made out. **Williams & Hibbitt v Sandy Lane (Chester) Ltd** [2006] EWCA Civ 1738.

The Court of Appeal considered the powers of a local authority under the Highways Act 1980 to create, divert and extinguish footpaths. A scheme was proposed which would rationalise an existing network of public paths. The new paths were to be created by agreement under s.25 HA 1980 rather than by the compulsory powers of creation under s.26. The inspector refused to confirm three public path extinguishment orders under s.118 HA 1980. s.118(5) allowed her to take into account the effect of an alternative path which was to be created or diverted concurrently with the path that was being extinguished, but only where the creation or diversion was done by order, not where it was done by agreement. Sullivan J and the Court of Appeal agreed that this was the correct approach and accorded with the proper interpretation of s.118. Parliament had laid down a carefully structured scheme for the creation, extinguishment and diversion of footpaths in Parts III and VIII HA 1980. If no alternative is immediately available for a path to be extinguished under s.118, it follows that the path is needed for public use and the Secretary of State is entitled not to confirm the extinguishment order. If Parliament had intended public path creation agreements to be taken into account when considering public path extinguishment and diversion orders, it would have said so. Their exclusion from s.118(5) was deliberate and fitted in with the overall statutory scheme. Where the creation of new paths involves the extinguishment of existing paths, the interest of the public is very much engaged. The process should not be the subject of private agreement between the landowner and the local authority, however well motivated both may be. Alternative routes should not be dependent on uncertain future events deriving from a private agreement of this sort. **Hertfordshire County Council v Secretary of State for the Department of Environment, Food and Rural Affairs** [2006] EWCA Civ 1718.

A right of way providing access to business premises from the highway was moved, at least in part because the existing access was on a blind bend and was not safe. The occupier of the premises, Maison Maurice Ltd, paid Bexley LBC's costs and also the costs of closing the existing access and constructing the new one. Some two years after the access had been moved, Bexley LBC started to make demands for a modest payment for a temporary right of

access and a very substantial payment for a permanent right, on the basis that the new access crossed a ransom strip of land owned by Bexley. The court took the view that the ransom strip was not part of the highway. The physical features of the locality are not the only relevant consideration, unless the origin of those features is unknown. Although there was a fence it was not intended to fence against the highway. The court considered whether Bexley LBC was estopped from demanding additional payments for the new access. It held that the grant of planning permission for an access and crossover could not without more found an estoppel against the local planning authority as regards a right of way. However on the facts the ingredients of estoppel were established and Maison Maurice had a permanent right of access without needing to make further payment for it. ***Bexley LBC v Maison Maurice Ltd*** [2006] EWHC 3192 (Ch).

OTHER DEVELOPMENTS

HOMELESSNESS

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (No.2) Regulations 2006 SI 3340 come into force on 1st January 2007. They amend the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, which determine which persons from abroad, other than persons subject to immigration control, are ineligible for an allocation of housing accommodation under Part 6 of the Housing Act 1996 or for housing assistance under Part 7 of that Act. A person who is not subject to immigration control is ineligible for an allocation or for housing assistance if he is not habitually resident in the UK, unless specifically exempted from the habitual residence requirement. The effect of the amendments is to insert a new category of persons who are exempt from the habitual residence test, namely nationals of Bulgaria and Romania, which accede to the European Union on 1st January 2007.

HOUSING ACT 2004: COMMENCEMENT

The Housing Act 2004 (Commencement No. 6) (England) Order 2006 SI 3191 brings sections 225 and 226 HA 2004 and paragraph 47 of schedule 15 to HA 2004 into force in England on 2nd January 2007. S.225 imposes duties on local housing authorities in relation to the accommodation needs of gypsies and travellers and s.226 provides guidance about the effect of s.225. Paragraph 47 of schedule 15 relates to housing strategies and statements under s.87 Local Government Act 2003.

HOUSING: GYPSIES AND TRAVELLERS

S.225 Housing Act 2004 imposes a duty on local authorities to carry out an assessment of the accommodation needs of gypsies and travellers residing in or resorting to their district, when undertaking a review of housing needs in their district under s.8 Housing Act 1985. The Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations 2006 SI 3190 define gypsies and travellers for the purpose of that duty within England. The definition includes all persons with a cultural tradition of nomadism or of living in a caravan and all other persons of a nomadic habit of life, whatever their race or origin. The Regulations come into force on 2nd January 2007.

Note: Where cases are given a universal reference but no other reported reference is given a transcript can be found in full at www.bailii.org

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