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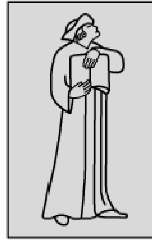

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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

CHARGING ORDERS

More than ten years ago, Greening & Sykes (Builders) Ltd had agreed to sell a small building plot to the appellant, a Mr Nelson. Mr Nelson had acted on behalf of a Ms Hanley. Protracted litigation had ensued. G&S now sought to enforce various costs orders against Mr Nelson by obtaining a charge over the plot which they had sold to him. The Court of Appeal agreed that this was possible. At the date of the charging order in 2003, legal title to the plot of land had not been transferred and was still held by G&S. This meant that as from the date of the contract for sale of the plot in October 1997, the property was held by G&S for Mr Nelson under a vendor/purchaser trust. Mr Nelson was a nominee for Ms Hanley and held his quasi-trust interest on trust for her. Legal title did not vest in Ms Hanley until 2004. The fact that the intermediate trustee (here Mr Hanley) has a very limited function does not mean that he ceases to be a trustee. Mr Hanley's interest as bare trustee was in existence at the date of the charging order in 2003, which meant that he had a sufficient interest in the property for the purposes of s.2(1)(b)(i) Charging Act 1979. ***Nelson v Greening & Sykes (Builders) Ltd (Interested Party: Hanley)*** [2007] EWCA Civ 1358.

CONSTRUCTIVE TRUSTS

In ***Powell & Powell v Benney*** [2007] EWCA Civ 1283 the Court of Appeal explored the distinctions between constructive trusts and proprietary estoppels, and the two types of proprietary estoppel, bargain and non-bargain. The appellants claimed interests over properties worth nearly £300,000 which they had been allowed to use, and promised, by a single man whom they had befriended and assisted and who had died intestate. The judge held that their claims of proprietary estoppel and constructive trust would be satisfied by a payment of £20,000 out of the proceeds of sale. The appellants attempted to rely on the bargain category of proprietary estoppel, which they argued could be indistinguishable from a constructive trust and in respect of which the Court's natural response would be to fulfil the claimant's expectation (citing Robert Walker LJ in ***Jennings v Rice*** [2003] P & CR 100). However as the deceased had not required the appellants to do the detrimental acts they relied upon Sir Peter Gibson held that the case fell into the non-bargain category where the

Court would, in exercising wider judgmental discretion, consider if the claimant's expectation was proportionate to the detriment. He further held, in light of Lord Walker's latest dicta in ***Stack v Dowden*** [2007] 2 WLR 831 (at paragraph 37) that there was a clear distinction between a proprietary estoppel, the satisfaction of a mere equity based on detrimental reliance, which did arise in this appeal; and a constructive trust, which did not, where the issue was the identity of the beneficial owners and size of their interests. The judge's exercise of his discretion could not be faulted.

ESTATE MANAGEMENT SCHEMES

The Lands Tribunal has considered the LVT's jurisdiction to vary charges under estate management schemes pursuant to s.159(3) Commonhold and Leasehold Reform Act 2002. The LVT had reluctantly concluded that it did not have jurisdiction, but this decision was overturned by HHJ Gilbart QC on the appeal of Mr Botterill, one of the residents of Hampstead Garden Suburb who is subject to the scheme in question. The starting point is to address what one may expect will occur under a management scheme. Various kinds of costs will be incurred and not all of them can be quantified in advance. It can be appropriate for a scheme to decide not to identify the level of costs more than a few years in advance. The adoption of a method of certification and then collection according to a formula is entirely to be expected. On any view this would be an *"estate charge"*. Disputes could arise on (a) the amount of expenses certified and (b) the terms of the formula by which it is collected from individual property owners. A *"variable estate charge"* is defined in s.159(2) so as to exclude from its definition a figure which is calculated in accordance with a formula specified in the scheme. Here the payments were calculated in accordance with just such a formula. The fact that the inputs to the formula are unknown until after certification does not mean that the formula is not a formula. The LVT's approach had been too restrictive. It did have jurisdiction under s.159(3) and indeed it would be remarkable if it did not. ***Botterill v Hampstead Gardens Suburbs Trust Ltd*** [2007] EWLands LRX/135/2007.

HOUSING

The Court of Appeal, dismissing an appeal by the tenants, held that the judge had taken into account the fact that a nuisance had abated to some extent prior to trial, and that he had been entitled to make an immediate, rather than a suspended, order for possession. The tenants suffered from mental health problems, the main symptoms of which were hypersensitivity to noise, a propensity to exaggerate the effect of noise, agoraphobic tendencies, a tendency to misunderstand, and chronic complaining. They had complained repeatedly about their neighbours, the Dixons, in such a way as to cause the Dixons nuisance and annoyance within the meaning of ground 14 of schedule 2 to the Housing Act 1988. They had complained 36 times to the Environmental Health Department, 90 times to the Housing Association, and to the police on a number of occasions. They had also procured the sending of unsolicited mail to the Dixons, which had caused the Dixons some humiliation. The judge had noted that many of the complaints had occurred long before trial, but as the tenants would not accept treatment there was a risk of recurrence or of similar behaviour. Their attitude and therefore the likelihood of offending conduct had not changed. ***Accent Peerless Ltd v Kingsdon & Kingsdon*** [2007] EWCA Civ 1314.

When considering an application for housing, there is a duty on a housing officer to make the necessary inquiries. In the event of a review, such a duty also falls on the senior housing officer. The test in every case is whether no reasonable council would have refrained from making the further inquiries under consideration. Here, although Mr Dostenko had been street homeless for two months at the date of the review, his solicitors had not suggested that further inquiry be made of him personally and had not made further representations as to the effect of street homelessness upon him; nor had he made such observations himself despite having been in personal contact with the local authority. In these circumstances, to impose on the decision-maker a further obligation to make inquiry as to the effect of two months of street homelessness went well beyond the scope of the duty to make inquiries. Permission for a second appeal was refused. May LJ expressed specific concern that the appeal seemed to be a lawyer's exercise with little pragmatic regard for the basic personal well-being of Mr Dostenko himself. Success on appeal could only result in requiring the local authority to reconsider its decision on the basis of up-to-date information. Substantially the same outcome could have been achieved much earlier if Mr Dostenko had been advised to make a fresh application for assistance. ***Dostenko v City of Westminster*** [2007] EWCA Civ 1325.

In another case relating to the duty of the housing officer to make inquiries under s.184 Housing Act 1996, the Court of Appeal considered whether a local authority could ever go behind what a court had apparently decided in a possession action. Here possession had been given on the basis of rent arrears, with the result that Croydon LBC took the view that the appellants were intentionally homeless. However there was some dispute as to whether the rent was properly £700 or £650 per month. If the latter, there would not have been arrears justifying an order for possession. On the facts, the Court of Appeal took the view that it was impossible to say that a reasonable reviewing officer would have carried out further investigation. There was evidence to support the court's implicit finding that the rent was £700 pcm. In a normal case a housing authority can rely on what a court decides or seems to have decided. It would have to be decided elsewhere whether there could ever be a case which was abnormal enough to require a different view to be taken, but this would be likely to be an extreme case, if it existed at all. ***Green & anor v Croydon LBC*** [2007] EWCA Civ 1367.

When considering whether or not a person is homeless, s.175(3) Housing Act 1996 provides that a person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy. Mr Maloba had an interest in a family home in Uganda, and Waltham Forest LBC took the view that he was not homeless as he could occupy the home in Uganda. The Court of Appeal held that s.175(3) should be construed so as to treat the words *"reasonable for him to continue to occupy"* as synonymous with *"reasonable for him to occupy for a continuing period"*, or as *"occupy or continue to occupy"* i.e. for the future, whether or not he was in occupation at the moment of the application or decision. If accommodation is so bad that leaving it for that reason would not make a person intentionally homeless, then in law they are already homeless. Logic and justice suggest that the same should apply if a person has for the same reason not occupied accommodation which is physically available to him. The council thus had to consider whether it was reasonable for Mr Maloba to occupy the property in Uganda. In doing so it was not entitled to consider reasonableness solely in terms of size and structural quality of the accommodation and its amenities. There may be other reasons why it would not be reasonable to expect a person to occupy accommodation which was available to him. The reviewing officer had misdirected herself in failing to consider whether

it was reasonable to expect Mr Maloba to relocate to Uganda. The judge's order quashing the council's decision was upheld. ***Waltham Forest LBC v Maloba (Interested Party: The Law Society)*** [2007] EWCA Civ 1281.

HUMAN RIGHTS

In ***Smith (on behalf of the Gypsy Council) v Buckland*** [2007] EWCA Civ 1318 on appeal against a suspended order for possession made under the Caravan Sites Act 1968 (as amended by the Housing Act 2004) the appellant attempted to re-open the House of Lords' restrictive interpretation of ***Connors v United Kingdom*** (2004) 40 EHRR 189 and the Article 8 defence to possession claims (see ***Kay v Lambeth LBC*** and ***Price v Leeds City Council*** [2006] 2 AC 465). In ***Connors*** the ECtHR found a breach of Article 8 but the House of Lords interpreted ***Connors*** to mean that if domestic law provided for an unqualified right to possession once certain requirements of the law were made out, a valid defence would have to amount (i) to an Article 8 challenge to the legislative framework (ii) to an unreasonableness challenge to the decision of the public authority to seek possession. Jan Luba QC for the appellant argued that the ***Connors*** decision was also founded on discrimination between gypsies occupying public and private land and a positive obligation on member states to facilitate the gypsy way of life. The Court of Appeal, as it was bound to, followed ***Kay*** (and its own decision in ***Doherty v Birmingham City Council*** [2006] EWCA Civ 1739) and upheld the judge's decision that the public law and Article 8 defences were unarguable. The amendment of the 1968 Act allowed for suspension of possession after judicial examination of the circumstances, making it hard to conceive of a case in which the public law challenge could succeed, and curing the legislation of any incompatibility with Article 8 whose focus was on eviction, the justification for which could now be scrutinised by the Court. Any surviving discrimination or failure to facilitate the way of life of gypsies came within the margin of appreciation accorded to the state in these matters.

LEASEHOLD ENFRANCHISEMENT

Where the agreement of surveyors as to the price of a freehold on collective enfranchisement was reached on an erroneous assumption that rights which would otherwise be included pursuant to s.62 Law of Property Act 1925 would be excluded and the surveyors had not even considered inclusion of a sum in respect of those rights, it was held that the price remained 'in dispute' at the relevant time and the LVT had jurisdiction to determine it pursuant to s.24(1) of LRHUDA 1993. ***Broomfield Freehold Management Ltd v Meadow Holdings Ltd*** [2007] EWLands LRA/148/2006.

MORTGAGES

The Court of Appeal dismissed the occupiers' appeal against an order for possession in mortgage possession proceedings. Mr and Mrs Banfield had taken out an endowment mortgage of £30,000 in 1984. Payments became erratic from around 1990, and in 1996 the building society sought to surrender two policies which guaranteed the mortgage. There

were administrative problems with the surrender of the policies and although one was surrendered in 1996, the other was not surrendered until after the order for possession had been made in 2007. The Court of Appeal held that HHJ Cowell was right to apply the principle that a person who has the benefit of a mortgage guarantee (here the building society) is not obliged to account. If the contract is one of guarantee the right of the guarantor against the borrower is a right of indemnity. If it is a contract of insurance, then the right of the insurer would be based on its right of subrogation. But in either case the borrower cannot be heard to say, as against the lender, that the debt is reduced by the guarantor/insurer's payment under the mortgage guarantee. In relation to the delay in surrendering the second policy, there is no duty to mitigate a claim in debt. The terms and conditions of the policies made it clear that the building society had the ability to surrender the policies, but was not obliged to do so. Even if the second policy had been surrendered earlier there would still have been some arrears and the building society would still have been entitled to commence proceedings for possession. ***Banfield & anor v Leeds Building Society*** [2007] EWCA Civ 1369.

NUISANCE

The object and effect of s.198(6) Town and Country Planning Act 1990 is to disapply a tree preservation order made under s.198(1) in particular circumstances including cases where a tree is dying or dead or has become dangerous; in compliance with a statutory obligation; or to prevent or abate a nuisance. The test under s.198(6) is whether works to the tree are "necessary", not "reasonably necessary". This does not mean that regard is not to be had to all the circumstances, including the possibility of carrying out other works, unrelated to the tree, in order to abate the nuisance. The existence of an alternative engineering solution which would or might prevent or abate the nuisance is relevant in determining whether operations to the tree itself are necessary. A protected tree should remain protected unless there is a real need to lift that protection. It is impossible to determine what is the minimum that needs to be done to the tree without first deciding that something needs to be done. If the existence of alternative schemes is relevant, it is inevitable that account will need to be taken of the costs of such schemes and the ability of the party on whom those costs will fall to meet them. The extent of the nuisance is relevant to the works that are necessary to prevent or abate it. ***Perrin v Northampton Borough Council*** [2007] EWCA Civ 1353.

PROFESSIONAL NEGLIGENCE

Jack J has given a preliminary judgment on damages in the Bournemouth Airport litigation. He held at an earlier stage that the Malmesbury Estate, by reason of the negligence of Strutt & Parker, had lost a right to a turnover rent of 10% of the net car parking income from the land in question over the period of the leases. Jack J agreed with the defendant that the proper measure of the loss was the loss in capital value of the land in question as at the date the cause of action accrued. This involved a comparison of the capital values of the two actual leases with the capital values of two hypothetical leases with 10% turnover provisions. The appropriate date of assessment was the date of the leases. Evidence was also available to assess damages on a loss of income basis, and Jack J assessed damages on both bases so that if there was a successful appeal against his choice of basis there would be no need for a

further hearing. He largely rejected negative factors put forward by the defendant's surveyor/valuer, and adopted the Estate's figures for projected passenger numbers, but the defendant's figures for discount for risk. Further work is needed by the experts before his findings can be translated into figures, so the total figure for damages is not yet determined. ***Seventh Earl of Malmesbury & ors v Strutt & Parker (a partnership)*** [2007] EWHC 2641 (QB).

REPAIRS

In ***Ravensgate Estates v Horizon Housing Group and others*** [2007] EWCA Civ 1368 the Court of Appeal held that the calculation of the diminution in value to a reversion in the context of s.18(1) Landlord and Tenant Act 1927 involves two imaginary sales: one the sale of the demised property in proper repair, and one the property not in repair, the difference being the diminution in value. It was observed that best practice for experts is to set out the figures for each with justification covering the nature of the market and the nature of the purchaser (per Mann J at paragraph 21).

SERVICE CHARGES

Where a lease obliged the landlord to paint the outside of a building, including wooden windows, wherever necessary, applying a proprietary pre-paint repair system to windows was *"necessary and advisable for the proper maintenance safety and administration of the buildings"* and therefore properly included in service charges. This was so even though the preparatory work would involve repairs to individual windows. The landlord had an absolute discretion and was entitled to do the work as *"necessary and advisable"* rather than insist that each tenant repaired their own windows first. ***Ashley Gardens Freeholds v Cole*** [2007] EWLands LRX/130/2006.

OTHER DEVELOPMENTS

BUILDING REGULATIONS

Changes are made to the Building Regulations 2000 and the Building (Approved Inspectors etc.) Regulations 2000 by the Building and Approved Inspectors (Amendment) Regulations 2007 SI 3384, parts of which come into force on 2nd January 2008 and the remainder on 6th April 2008, subject to transitional provisions.

PROPERTY SEARCHES

A good practice guide has been published giving advice to local authorities and personal searchers on providing access to property information held by local authorities. Among other things the guidance provides that where an appointment system is operated, appointments should be flexible and should allow access to local authority records no later than the next working day. In exceptional circumstances (e.g. high demand or staff sickness, access should be made available no later than three working days from the date of the request. The guidance can be seen in full online at:
www.communities.gov.uk/publications/housing/personalsearchguide

PUBLIC LOCAL INQUIRIES FOR COMPULSORY PURCHASE ORDERS

New rules for the procedure to be followed in connection with public local inquiries relating to the authorisation of compulsory purchase orders come into effect on 29th January 2008. They are the Compulsory Purchase (Inquiries Procedure) Rules 2007 SI 3617, and replace the Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990 and the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994. They relate to orders where a Minister is either the confirming authority in the case of a non-ministerial order or, in the case of inquiries relating to a compulsory purchase order made in draft by a UK government minister, the appropriate authority. Where on 29th January 2008, the date that the new rules come into force, the Secretary of State or the Minister has already given written notice of his intention to hold an inquiry, the old rules shall continue to apply to that inquiry.

Note: Where the only case reference given is a universal reference, readers will find a full transcript of the decision available on www.bailii.org. Statutory instruments can be found on www.opsi.gov.uk.

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