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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ADJUDICATION

The court will not grant an injunction to prevent one party from commencing and pursuing arbitration proceedings, even if there are already court or arbitration proceedings in respect of the same dispute. The court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate, just as it has with any other enforceable agreement for ADR. The court's discretion whether or not to grant a stay should be exercised bearing in mind that if a binding adjudication agreement has been identified then the persuasive burden is on the party seeking to resist the stay. In the present case there was a binding adjudication agreement and there was an overwhelming case for granting a stay of the court proceedings. ***DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd*** [2007] EWHC 1584 (TCC).

BUILDING DISPUTES

Where there are two competing remedial schemes, the cheaper must clearly be preferred unless the criticisms of its expected effectiveness are made good on the balance of probabilities (approving the statement to this effect by HHJ Hicks QC in ***George Fischer (Holdings) Ltd v Multi-Design Consultants Ltd*** [1998] 61 Con LR 85). The outstanding works were more than mere snagging, and arose out of the Defendant's failure to build the property properly in the first place. The Claimants were entitled to conclude that they did not want the Defendant to carry out the remedial works. However the Claimants should have made other arrangements for the remedial works to be completed by the end of 2004 at the latest. General damages were awarded for disruption at the rate of £750 per annum for each claimant, HHJ Coulson QC noting that the sums awarded by way of general damages in claims of this sort are modest. ***Iggleden & Iggleden v Fairview New Homes (Shooters Hill) Ltd*** [2007] EWHC 1573 (TCC).

CHARGES

The issue was whether the priority of legal charges on the register could be altered by estoppel. The Lancashire Mortgage Corporation Ltd's charge had been executed on 6th October 1999 but was not registered until 17th November 1999. Scottish & Newcastle PLC's charge was executed on 7th October 1999 and was registered on 15th October 1999. The net proceeds of sale of the property were insufficient to meet both charges. The Court of Appeal held that an estoppel was made out. There was no positive representation, encouragement or promise, but S&N had passively acquiesced in LMC's belief that LMC's charge would have priority. This was sufficient to found an estoppel. There was no contravention of s.2 Law of Property (Miscellaneous Provisions) Act 1989 (contract for sale of land must be in writing). The substantive effect of the estoppel was not the disposition of an interest in the property but a variation in the beneficial interests of the parties in the net proceeds of sale of the property. S.2(5) LP(MP)A can cover cases of the equitable intervention of a proprietary estoppel where, as here, there is an overlap with constructive trust principles. It was not necessary to rectify the register but an appropriate notice should be added to the register to reflect the order of the court that S&N was estopped from asserting a prior beneficial interest in the proceeds of sale ahead of LMC. **Scottish & Newcastle Plc v Lancashire Mortgage Corporation Ltd** [2007] EWCA Civ 684.

DISABILITY DISCRIMINATION

In an important and detailed judgment, the Court of Appeal has held that the Disability Discrimination Act 1995 is capable of affording a defence to a claim for possession by a landlord in a case where the court has no discretion as to the making of an order. The Disability Rights Commission was involved in the proceedings as an intervenor. The appellant, Mr Malcolm, was a schizophrenic whose condition was controlled by medication. He stopped taking his medication and lost his job. He had had a secure tenancy under s.79 Housing Act 1985, but had sublet without the permission of the landlord, Lewisham LBC, causing the tenancy to lose its secure status. Possession proceedings were issued. S.22 DDA 1995 defines prohibited discrimination in relation to premises, and s.24 sets out the meaning of discrimination for the purposes of s.22. There is a potential defence of justification but Lewisham LBC did not seek to rely on it. Richard LJ's statement of issues arising under s.24 in **Richmond Court (Swansea) Ltd v Williams** [2006] EWCA Civ 1719 was a useful starting point but was not a comprehensive statement of the reasoning process or a template of issues in every case. The decision of the EAT in **Goodwin v Patent Office** [1999] ICR 302 was adopted and approved. Mr Malcolm could rely on s.22(3)(c) DDA 1995 in the possession proceedings even though he had no security of tenure and the court had no discretion not to make an order for possession. Mr Malcolm had a disability and the unlawful subletting was related to the disability. There was no need to show that the disability was the actual cause of the subletting. Lewisham LBC's lack of knowledge of the disability did not preclude a finding of discrimination under s.24, though it might be relevant to the defence of justification. The possession proceedings were dismissed. Permission to appeal has been granted and so some of these issues may be argued before the House of Lords in due course. **Lewisham LBC v Malcolm & Disability Rights Commission (intervening)** [2007] EWCA Civ 763.

Circumstances could arise where positive obligations are engaged under Article 8 ECHR to require the state to provide a disabled person with housing, and to abstain from interference

in important aspects of his family and private life. However the issues are fact-specific and depend on careful factual evaluation of the impact of the decision in question on the individual. The Social Security Commissioner was held not to have erred in holding that there was no interference with Mr Hook's Article 8 rights. Mr Hook's partner had dissipated capital before moving in with him, and this disqualified him and her from receiving benefit. He was in arrears with his rent and it was possible that he would lose his home. The Commissioner held that the benefits legislation contained legitimate anti-avoidance provisions and that any interference with Mr Hook's Article 8 rights was authorised by Article 8(2). No argument was developed linking Article 8 with Article 14 in suggesting that the rules applying to those whose partners have previously dissipated capital had a disproportionate impact on disabled people, who are often dependent on their partners for housing and support. **R (Hook) v Social Security Commissioner & Secretary of State for Work & Pensions** [2007] EWHC 1705 (Admin).

HOUSING

The Court of Appeal considered the effect of paragraphs 1, 2 and 3 of schedule 2A to the Housing Act 1988. These paragraphs set out various ways in which a non-shorthold assured tenancy can be created. Although Mr Cunningham had moved into the flat in May 1999, the earliest he could have been an assured tenant was November 2003, two years after the death of the resident landlord Mr Hodges. Mr Cunningham had been given a Rent Book and said that Mr Hodges had promised that he could stay at the flat for as long as he wanted. The Court of Appeal agreed that a notice under paragraphs 1 or 2 of schedule 2A could be given by the landlord after an existing tenancy ceased to be excluded (e.g. when there was no longer a resident landlord). However the Rent Book could not on any view amount to such a notice, as it was just as appropriate for an assured shorthold tenancy as for a non-shorthold. The expression "Assured Tenancy" on the front of the Rent Book included assured shorthold tenancies, which are a form of assured tenancy. The Rent Book was simply intended to record the payment of rent. Paragraph 3 of schedule 2A provides that a tenancy is a non-shorthold assured tenancy where it contains a provision to the effect that the tenancy is not an assured shorthold tenancy. The Court of Appeal declined to decide whether this meant that a written document was required. There were arguments both ways and it was not necessary to decide the point. Even if there was an agreement in the present case that Mr Cunningham should have security of tenure on a long-term basis, this was not sufficient to engage paragraph 3. **Andrews & Andrews (Executors of the Estate of William George Hodges, deceased) v Cunningham** [2007] EWCA Civ 762.

It is clear that in principle a party may waive a breach of an order. However there had been no waiver on the present facts. An anti-social behaviour injunction had been imposed on Mr Lee pursuant to s.153A Housing Act 1996 following an application by Accent Foundation Ltd. Consents from Mr Lee's mother and sister were relied on as amounting to waiver, but they had not obtained the order. The order was obtained for the benefit of others, including neighbours, as well as for Mr Lee's mother and sister. It was not open to Mr Lee's mother and sister to waive breaches of the order. **Accent Foundation Ltd v Lee** [2007] EWCA Civ 665.

The Court of Appeal declined to grant permission to appeal against an order for possession against a Rent Act tenant. The order was made on the basis that suitable alternative accommodation was available to the tenant. The tenant had been debarred from defending

because she had failed to comply with an unless order relating to medical evidence. Notwithstanding the debarring order, the judge had heard the tenant on points of importance and had considered all of the main points which were capable of being made on her behalf. The judge had taken into account all relevant matters when concluding that it was reasonable to make the order. It was not necessary for the Court of Appeal to decide whether an assured tenancy offered equivalent security to that provided under the Rent Act, because a direction was made pursuant to s.34(1)(c)(iii) Housing Act 1988 that the new tenancy of the alternative accommodation should be a protected tenancy. **PB Investments v Mclnnes** [2007] EWCA Civ 666.

To determine whether a person is within the statutory definition of intentional homelessness, all the circumstances of the case must be considered. One of the relevant circumstances in the present case was that the previous home was a family home. There are significant differences between the family home and rented accommodation. Nonetheless, people living together must show each other appropriate respect. This necessarily involves complying with any reasonable requests which one person makes to the other. In the present case, Mr Denton's mother reasonably expected him to behave so as not to cause a nuisance to her or to others but he did in fact cause a nuisance. The cause of his being asked to leave was his bad behaviour. A person does not have a right to require the state to provide him with accommodation if he deliberately conducts himself so that he is no longer able to live with members of his family. The local housing authority must determine whether it is reasonable for the applicant to continue to occupy premises ignoring the acts or omissions for which the applicant is himself responsible. It is for the authority to decide what inquiries to make and the court will not intervene unless the decision not to make further inquiries is perverse. It was also said that intentional homelessness is fact sensitive and the court cannot give general guidance for the situation where a teenager or young adult leaves the family home, beyond what is contained in this judgment. **Denton v Southwark LBC** [2007] EWCA Civ 623.

When considering intentional homelessness, the requirements that accommodation must have been available for the applicant's occupation and that it was reasonable for him to continue to occupy that accommodation must be considered at the time at which he ceased to occupy that accommodation. **Osei v Southwark LBC** [2007] EWCA Civ 787.

The parties, a divorced couple, had agreed that Mrs Graves would live in a property owned by Mr Graves as an assured shorthold tenant, on the basis that 90% of the rent would be paid by housing benefit. It subsequently became apparent that housing benefit was not payable. Thomas LJ considered the law of mistake and frustration, but concluded that there was an implied condition that if housing benefit was not payable the tenancy would come to an end. Mrs Graves wanted to leave the property but was unable to do so without making herself intentionally homeless. In the unusual circumstances of the case, it was difficult to see that there was any basis for an implied promise to pay reasonable rent until notice to quit was served. Mrs Graves was not a trespasser as she was in the premises with the permission of Mr Graves. Nor was there any restitutionary basis on which Mr Graves could be said to be entitled to be paid for the period until notice to quit was served. Once notice to quit had been served, Mrs Graves was liable to pay an occupation rent. **Graves v Graves** [2007] EWCA Civ 660.

The transfer of freehold title to the Parkside estate in Tower Hamlets from Tower Hamlets LBC to Old Ford Housing Association will go ahead after the Court of Appeal dismissed an

appeal by Carole Swords who had, with others, campaigned against the transfer. The consent of the Secretary of State was required by ss.32 and 43 Housing Act 1985. The Secretary of State had a legal obligation either to take account of the views of leaseholders or clearly to explain why she was not doing so. She did take account of leaseholders' views, but resolved to give them no weight. The Secretary of State is likely to wish to take into account, as relevant to the adequacy of the local authority's consultation exercise and thus to her grant of consent, the extent to which the local authority has in any significant way failed to follow guidance. The Secretary of State had had sufficient regard to any alleged deficiencies. There was a period of more than a year between the application for consent and its grant, during which a protracted dialogue took place between Tower Hamlets and the Secretary of State in relation to the consultation process and the ballot. The consent to the transfer was lawful. **Swords v Secretary of State for Communities & Local Government & ors** [2007] EWCA Civ 795.

LEASEHOLD ENFRANCHISEMENT

Where qualifying tenants serve a notice under s.13 Leasehold Reform, Housing and Urban Development Act 1993 but the notice fails to comply with the requirements of s.13(3) and so is ineffective, the tenants are entitled to serve another notice without delay. An ineffective notice is not to be treated as having other statutory consequences such as remaining in force, so as to prevent the immediate service of a valid notice. This decision accords with a comment made by Auld LJ in **9 Cornwall Crescent London Ltd v Kensington & Chelsea RLBC** [2005] 2 EGLR 131, and with observations in Hague on Leasehold Enfranchisement. An estoppel argument by the landlord failed in the absence of evidence of reliance. The tenants, having served an ineffective notice on 19th December 2005 and a valid notice on 20th April 2006, were entitled to enfranchise in accordance with the notice of 20th April. **Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Company Ltd** [2007] EWHC 1776 (Ch).

LEASEHOLD VALUATION TRIBUNALS: PROCEDURE

Regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 provides that the LVT may dismiss an application where it appears to the LVT that the application is frivolous or vexatious or otherwise an abuse of the tribunal. This power is not a limited initial filter. There is nothing in paragraph 7 schedule 12 of the Commonhold and Leasehold Reform Act 2002 (under which the 2003 Regulations are made) or in the Regulations themselves to suggest this. It may often be difficult to see whether an application is frivolous etc. when it is originally made. The costs provisions do not indicate that the conduct of an applicant cannot be a relevant consideration informing a decision as to whether an application is frivolous etc. It would substantially weaken the case management powers of the LVT if Regulation 11 was read only as an initial filter power. The fact that it is only an applicant who is at risk of having the application dismissed is not a reason for reading down Regulation 11. However on the particular facts the LVT's decision to strike out parts of the Appellant's application was legally flawed and could not be allowed to stand. **Volosinovici v Corvan (Properties) Ltd** [2007] EWLands LRX/67/2006.

RIGHTS TO LIGHT

Where a lease reserves to the landlord a right to build on adjoining land, the question whether this prevents a tenant from acquiring an absolute and indefeasible right to light by prescription must depend on the interpretation of the clause in question. It is not essential that an agreement or consent for the purposes of s.3 Prescription Act 1832 must expressly refer to light. The real distinction that the cases draw is between clauses that deal with the position as it exists at the date of the lease, and clauses that deal with what might happen in the future. Clauses of the first kind are effective only to prevent the creation of easements by express or implied grant; and do not prevent the subsequent acquisition of a right of light by prescription. Clauses of the second kind may prevent the acquisition of a right of light by prescription if what they authorise would interfere with light. If on a fair reading they do, it is not necessary for the clause to use the word "light". The clause must make it clear that the enjoyment of light is not absolute and indefeasible. A clause in a lease which authorises the landlord to build as he pleases is likely to satisfy that test. The clause in the present case was a clause of the second kind and so prevented the acquisition of rights of light over the Defendants' land. ***RHJ Ltd v FT Patten (Holdings) Ltd & anor*** [2007] EWHC 1655 (Ch).

SERVICE CHARGES

In considering whether the amount charged for a single contract for cleaning and gardening services was reasonable, it was necessary to ensure that the market had been properly tested. That market was defined by reference to the suppliers capable of complying with the specification for a single contract for all of the appellant landlord's estates, and not by reference to the suppliers of individual services to individual estates. The two markets are not the same and the LVT was not comparing like with like when it said that the tender for the single contract should not be out of line with the market for local suppliers. The appellant landlord had properly tested the market for a single contract. It had appointed independent advisers to help prepare the specification and tender. It invited ten contractors to bid, it received two compliant bids, and it negotiated with the successful bidder to amend the specification and to achieve an overall reduction in cost of more than 50%. The charges under the single contract were reasonably incurred for the purposes of s.19(1) Landlord and Tenant Act 1985. ***A2 Housing Group (formerly Airways Housing Society) v Taylor & ors*** [2007] EWLands LRX/36/2006.

OTHER DEVELOPMENTS

HOME INFORMATION PACKS

The Home Information Pack (Redress Scheme) (No.2) Order 2007 SI 1946 provides that estate agents in England and Wales must be members of an approved redress scheme for the purpose of dealing with complaints related to Home Information Packs. The Order comes into force on 1st August 2007.

HOUSES IN MULTIPLE OCCUPATION

Two further statutory instruments relating to houses in multiple occupation come into force on 1st October 2007. They are:

- The Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 SI 1903. These regulations impose various duties on a person managing s.257 HMOs. S.257 HMOs are buildings which have been converted into and consist of self-contained flats, where the building work undertaken in connection with the conversion did not and does not comply with appropriate building standards, and fewer than two-thirds of the flats are owner occupied. The duties include providing information to occupiers; taking safety measures including fire safety measures; maintaining services such as gas, electricity, water and drainage; maintaining the common parts and living accommodation; and providing waste disposal facilities. Failure to comply with these duties is a summary offence punishable with a fine not exceeding level 5 on the standard scale. Regulation 12 of this SI also amends an earlier SI relating to HMOs (SI 2006/373).
- The Houses in Multiple Occupation (Certain Converted Blocks of Flats) (Modifications to the Housing Act 2004 and Transitional Provisions for section 257 HMOs) (England) Regulations 2007 SI 1904. This SI modifies Parts 2 and 4 and s.263 Housing Act 2004. Various definitions are modified, including the definition of a “person having control”; the matters about which a local housing authority must satisfy itself when deciding whether or not to grant a licence; the licence conditions; the person in respect of whom a rent repayment order may be made; and the circumstances when a notice under s.21 Housing Act 1988 may be served. The SI also contains transitional provisions in relation to s.257 HMOs.

HOUSING GREEN PAPER

The Government has published a Housing Green Paper entitled: Homes for the future: more affordable, more sustainable. The paper can be downloaded from www.communities.gov.uk/index.asp?id=1511890 and the consultation period is 23rd July 2007 to 15th October 2007.

RIGHTS OF WAY: HEARINGS AND INQUIRIES

The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 SI 2008 come into force on 1st October 2007. They set out the procedure for hearings and inquiries afforded or caused to be held by the Secretary of State in connection with the modification and/or confirmation of disputed rights of way orders made by local authorities. The orders may relate to the creation, stopping up, diversion or extinguishment of footpaths, bridleways and restricted byways, and the modification of the definitive map and statement. By Rule 32, the rules do not apply to any hearing or inquiry held in relation to an order submitted to the Secretary of State for confirmation before the date on which the Rules come into force.

SHARED OWNERSHIP AND LEASEHOLD ENFRANCHISEMENT

A consultation document describing proposed changes to current leasehold enfranchisement rules to simplify and clarify the position in relation to shared ownership is available online at www.communities.gov.uk/index.asp?id=1511931. The consultation period is 19th July 2007 to 19th October 2007. The proposals would remove the possibility of shared owners being able to enfranchise before they have bought 100% of a property under the terms of their shared ownership lease. The paper also proposes a power to restrict the purchasing of additional equity shares in shared ownership properties in areas where this type of housing would be particularly difficult to replace.

TENANT EMPOWERMENT

A consultation document entitled Tenant Empowerment is available online at www.communities.gov.uk/index.asp?id=1511393 with a consultation period from 19th June 2007 to 11th September 2007. The consultation sets out proposals including a new draft statutory instrument to simplify the right to manage regulations for local authority tenants, a voluntary tenant management process for all social housing tenants and landlords, and a National Tenant Voice.

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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