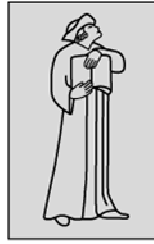


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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

CIVIL PROCEDURE RULES

In *Estate Acquisition and Development Limited and Wiltshire & Another* [2006] EWCA Civ 533, the Court of Appeal considered what constitutes “a good reason for not attending the trial” under the provisions of CPR 39.3(5), to allow a party who has failed to attend a hearing to apply for a judgment or order made against him to be set aside. In the present case the appellant tenants were appealing against forfeiture of a lease for arrears of rent in proceedings in which they took no part and of which they had no knowledge. The court considered that if the reason for a party’s non-attendance is that he was unaware the hearing was taking place, it will be necessary to ask why the party did not know: a mere assertion of the lack of knowledge of the hearing date is unlikely to constitute a sufficiently good reason. Enquiries should be made for instance as to whether the party was aware that proceedings had been issued and served. In the present case the appellants’ appeal was granted as they were found to be unaware of the existence or imminence of legal proceedings, in spite of the fact that it was they who had failed to provide their landlord with a forwarding address to which any communications could be sent. The contrary may have been found if the court had concluded that the appellants had deliberately avoided receiving such communications in order to frustrate the litigation process. The court further stated that while it is generally undesirable to seek to define “a good reason” within its meaning in CPR 39.3(5)(b), it is

necessary to interpret the provision so as to give effect to the overriding objective of deciding cases justly.

FORFEITURE

The Court of Appeal held in ***Pirabakaran v Patel*** [2006] EWCA Civ 685 that the phrase “let as a dwelling” in s.2 of the Protection from Eviction Act 1977 means “let wholly or partly as a dwelling”, and so in circumstances in which premises are let for mixed residential and business purposes, and in which the tenant is residing in the part let for residential purposes, the landlord is required by s.2 of the Protection from Eviction Act 1977 to enforce any right of forfeiture under the lease only by way of proceedings in court. In the present case the appellant tenant conducted a retail business on the ground floor of the demised premises and resided on the first floor. Being in arrears of rent, the landlords had exercised their right of re-entry against him, provided for in the terms of the lease, by causing bailiffs to change the locks of the shop on the ground floor. They had then subsequently been granted an order for possession of the flat on the basis that by their re-entry the lease had become forfeit. The Court of Appeal allowed the tenant’s appeal and set aside the order for possession, commenting that there was no reason to suppose that Parliament had intended that tenants who hold tenancies for mixed purposes should not also enjoy the protection afforded to purely residential tenants. Further, it stated that reference to the Human Rights Act 1998 and the requirement to give effect to s.2 in a way which is compatible with that Act would fortify this interpretation, the tenant’s right to respect for his private life and for his home pursuant to article 8(1) of the European Convention on Human Rights clearly being engaged.

JUDICIAL INTERVENTION

In ***Southwark Borough Council v Kofi-Adu*** [2006] EWCA Civ 281 the Court of Appeal allowed the appeal of the Council against the dismissal of its claim for possession against the respondent and ordered a retrial before another judge, ruling that frequent and lengthy interventions by a judge in the course of oral evidence could lead to impaired judgment and

render a trial unfair. Intervening in the course of oral evidence, as opposed to during counsel's submissions, must inevitably carry the risk that the judge had descended into the arena.

LANDLORD AND TENANT

The defendant was the freehold owner of a plot of land of which the claimant was the lessee. Pursuant to the terms of the lease the claimant had applied to the Council for approval for the erection of a building on the demised premises, which had been refused, the defendant stating that the claimant was not entitled under the existing terms of the lease to carry out the proposed residential development on the premises, but that it would be willing to enter into a Deed of Variation of the lease for "a proper consideration". Two issues arose for the consideration of the court: firstly, the true construction of the relevant covenant of the lease and whether it did indeed impose restrictions on the use of any building erected on the land; and secondly, whether the Council had unreasonably withheld consent under that clause of the lease. The court found in favour of the claimant, holding that the relevant clause of the lease held no words of limitation on the use of the building. In answering the second question the court explained that in such cases the approach should first be one of subjective inquiry: what reasons did the lessor actually have for refusing consent; and secondly, whether the reasons in the lessor's mind were reasonable or unreasonable. **GMD Developments v Leeds City Council** [2006] EWHC 1142 (Ch).

LEASEHOLD VALUATION TRIBUNAL

In **Southend-on-Sea Borough Council v Skiggs and others** [2006] EG 132 the Lands Tribunal considered the jurisdiction of the Leasehold Valuation Tribunal. The respondents held their respective premises at low rents from the appellant landlords and the leases provided for the payment of service charges. A dispute arose as to the payment of these service charges, and, on a reference to the Eastern Leasehold Valuation Tribunal, the appellants' case was upheld and the ELVT determined that the respondents were liable to pay the service charges in issue. However the ELVT went further and decided that it had

jurisdiction under section 27A of the Landlord and Tenant Act 1985 to exercise a discretion as to the timetable within which the outstanding charges were payable. The appeal was allowed. It was held that the jurisdiction of an LVT under section 27A is to make a determination on certain specified matters concerning the liabilities existing between the parties. The provision does not use appropriate language to confer a jurisdiction to decide what liabilities an LVT might conclude in its discretion should exist between the parties. Paragraph 35 of the explanatory note to the Commonhold and Leasehold Reform Act 2002 makes it clear that the purpose of section 27A, as introduced by amendment into the 1985 Act, is limited to conferring upon LVTs a power to determine whether leaseholders are liable to pay service charges, in addition to the original power to determine the reasonableness of such charges.

RESIDENTIAL TENANCIES

Bristol City Council v Mohamud Hassan & Anr [2006] EWCA Civ 656 provided the Court of Appeal with the opportunity to review the consequences of its decision in ***Harlow District Council v Hall*** [2006], to give directions as to what orders a court may make under ss.82 and 85 Housing Act 1985, and to set out the practice and procedure to be followed. When a court decides that a local authority landlord has established that statutory grounds for making a possession order exist and that it is reasonable to make such an order, the standard form N28 currently in use in the county courts has the effect of terminating the tenant's secure tenancy on the date set out on the face of the order. If the court also directs that the possession order is not to be enforced so long as the tenant complies with the requirements set out in the order, the tenant enjoys the status of "tolerated trespasser", and not of secure tenant, as long as he remains in possession of the premises after the date for giving possession has passed – this is the effect of the recent decision in ***Harlow***. In the present case the district judge had stated that it was her belief that the court was required to fix an absolute date for possession on the face of the order. The Court of Appeal held that a judge is not so obliged. It is lawful for the judge to make an order in a revised form which sets out a date for possession but provides that the date will be postponed and the tenancy will continue so long as the conditions set out in the order continue to be satisfied. The title of the order was also to be changed from "Order for possession (rented premises)

(suspended)” to “Order for possession (rented premises) (postponed)”. The court further set out a revised draft form of order for possession.

RESTRICTIVE COVENANTS

The claimant and defendant both owned houses on a residential estate which were separated by one other property, and all of which had originally formed part of the same plot. The cause of the dispute was a development consisting in the building of an additional house on land behind the original house belonging to the defendant. The claimant claimed that by using part of the original land for access to the new development the defendant was in breach of a restrictive covenant imposed by the previous transfer of the original plot in 1925, restricting the use of the land to private residences, and which did not authorise use of the land for access. He therefore applied to the court for a permanent injunction to prevent access to the development, contending that he was entitled to the benefit of the covenant by annexation, or owing to the existence of a building scheme. The claim was allowed in part. The court held that the claimant had the benefit of the relevant covenant by reason of the annexation of its benefits, although not because the two properties formed part of the building scheme. The requirements of a building scheme were that the land should have a common owner, should be sold in lots, any restrictions should benefit all the lots and the obligations in the covenants should be reciprocal. In the present case the claimant had failed to show that the several purchasers of properties on the estate were aware of the reciprocal nature of the obligations in the covenants. An existing strong suspicion that the purchasers were likely to have known of the intended reciprocity was not enough; to make the move from suspicion to inference was a step too far: *Elliston v Reacher* [1908] 2 Ch 374; *Reid v Bickerstaff* [1909] 2 Ch 305; and *Jamaica Mutual Life Assurance Society v Hillsborough* [1989] 1 WLR 1101 were considered. Access to the development therefore amounted to a breach, but it was inappropriate to grant a permanent injunction, damages in lieu of an injunction being adequate. *Small v Oliver & Saunders (Developments) Limited*. EWCH 1293 (Ch).

OTHER DEVELOPMENTS

HOUSING

The Home Information Pack Regulations 2006 SI 1503 make provision as to which documents are to be included in home information packs and the circumstances in which they are to be included. They provide for exceptions from the home information pack duties as set out in Part 5 of the Housing Act 2004 and make provision for the approval of certification schemes in connection with home condition reports. The Regulations further specify the level of penalty charge that may be levied for a breach of the home information pack duties, and make transitional provision for homes already on the market when the home information pack duties come into force, which is expected to be on 1st June 2007. The Regulations as to approved certification schemes will come into force on 6th July 2006 and for all other purposes on 1st June 2007.

TENANCY DEPOSIT PROTECTION

A summary of the response to the Government's consultation paper on the arrangements for Tenancy Deposit Protection in the private rented sector: Tenancy Deposit Protection: consultation on secondary legislation, can be found on the website for the Department for Communities and Local Government (www.communities.gov.uk). It appears in the DCLG News Release section at 23rd June 2006. The Government is expected to confirm a commencement date for the Tenancy Deposit Protection scheme before Parliament rises in the summer.

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