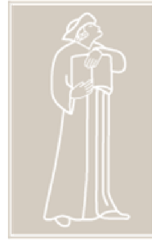

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PROPERTY LAW BULLETIN

MARCH 2006

CASE LAW UPDATE

EXPERT WITNESSES

Numerous authorities have established the principle of immunity from suit arising from courtroom proceedings, and there is no reason in principle why that rationale should not apply so as to protect a witness from the threat of disciplinary action arising from the same proceedings. Blanket immunity from disciplinary proceedings is not desirable and should extend to cover only those proceedings that are based upon a complaint made by a party affected by the expert's evidence. An expert witness whose conduct falls below the level expected, so that he or she should, in future, be prohibited from acting as an expert witness, can expect to have his or her conduct referred to the relevant disciplinary body by the judge. In the present case the complaint against the appellant should not have been pursued. He had immunity because the complaint was based on his evidence in court. The precise boundaries of the immunity would be established on a case-by-case basis. ***Meadow v General Medical Council*** [2006] EWHC 146 (Admin); [2006] 09 EG 182 (CS).

HOUSING

A public authority landlord's unqualified right to possession under the relevant domestic law would automatically supply the justification for interference with an occupier's right to respect for his home under article 8 of the European Convention on Human Rights. A defence by the occupier could only be raised where, in an exceptional case, it was seriously arguable that domestic law was not Convention compatible. A defence based only on his personal circumstances was not permissible. The House of Lords so held in dismissing these appeals against orders for possession. Since the local authority in each case had an unqualified right to possession and the defendants had no right under domestic law to occupy their respective premises or remain on the land, their claims under article 8 were unsustainable. Their lordships commented that a requirement that the article 8 issue had to be considered by the court in every case by taking into account the defendant's personal circumstances would drive a deep wedge into the domestic system for handling possession

cases and would be a colossal waste of time and money. Judges in the county courts faced with such a defence should proceed on the assumption that domestic law struck a fair balance and was compatible with the occupier's Convention rights unless the occupier showed that there was a seriously arguable case to say otherwise, or that, having regard to the occupier's personal circumstances the local authority's exercise of its power to seek possession was an unlawful act within the meaning of section 6 of the Human Rights Act 1998. ***Kay & ors v Lambeth London Borough Council & anor; Leeds City Council v Price & ors*** [2006] UKHL 10; [2006] 2 WLR 570; [10th March 2006] TLR.

The effect of a possession order in respect of a secure tenancy cannot be avoided by a bankruptcy order against the tenant. The Court of Appeal so stated when dismissing for other reasons the appeal of the defendant Mr Hall from a refusal to discharge a possession order made against him in favour of the claimant, Harlow District Council. The order required the defendant to give possession to the council by a nominated date, but was suspended as long as he paid the requisite amount for use and occupation. The defendant subsequently became bankrupt. He applied to discharge the possession order on the ground that his liability for the arrears and costs were debts provable in his bankruptcy, and the order for possession was therefore precluded by s. 285 of the Insolvency Act 1986, being a remedy against the property - in the form of the benefit of the secure tenancy - of the defendant in respect of those debts. However the Court stated that the enforcement of a possession order did not constitute a remedy enforcing the payment of arrears of rent but had the same effect as a possession action following forfeiture of a lease. ***Harlow District Council v Hall*** [2006] EWCA Civ 156; [15th March 2006] TLR; full transcript available on www.bailii.org

Section 193(5) of the Housing Act 1996 is capable of applying to any offer of suitable accommodation, including an offer of an assured shorthold tenancy from a private landlord. S.193 applies where a local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he or she became homeless intentionally. By section 193(2), the local housing authority then have a duty to secure that accommodation is available for occupation by such an applicant (unless the application is referred to another local housing authority). The full s.193 duty may be performed by securing suitable temporary private accommodation. The appellant had initially accepted the offer of a six month AST but subsequently refused to move into the property. The owner of the property then withdrew the offer. It was held that the respondent had fulfilled the s.193 duty. The Court of Appeal commented that misunderstanding by homeless applicants, and those helping them, should be reduced for the future if local housing authorities explain what they are doing in the offer letter. The explanation should include statements to the effect (a) that the authority acknowledges that the accommodation would be temporary if the private landlord lawfully exercises his right to recover possession after the end of the fixed term; and (b) that, if that happens and assuming that the applicant's circumstances have not materially changed, the authority accepts that it would again become obliged to perform its duty under the section to secure that accommodation is available for occupation by the applicant. ***Griffiths v St Helens Council*** [2006] EWCA Civ 160; full transcript available on www.bailii.org

LEASEHOLD ENFRANCHISEMENT

In December 2002, various lessees served on their freeholder, Buildinvest, a notice of collective enfranchisement of their block of flats under s.13 LRHUDA 1993, naming Romeomarch Property Management Ltd as the nominee purchaser. Following a dispute, the LVT determined the price payable in March 2004. About three months later, Buildinvest granted Kintyre Ltd a lease of the flat roof of the block of flats and the airspace above it. The term was 999 years and the permitted user was the development of a flat or flats, and the locating of telecommunications apparatus. Kintyre Ltd applied to the Land Registry to register the lease, and Romeomarch disputed the application. The Land Registry adjudicator Mr Mark dismissed the application for registration. The lease was void under s.19 LRHUDA 1993. The roof space was required for the proper management of the roof, and proper management would not be possible if Kintyre Ltd built flats or erected mobile phone masts on it. Had the lease of the roof space existed prior to the initial notice of collective enfranchisement it would have been liable to acquisition under s.2(1)(b) of the 1993 Act. ***Kintyre Ltd v Romeomarch Property Management Ltd*** [2006] 08 EG 176.

MORTGAGES

Lewison J considered the exercise of a power of sale of a development lease, and the rights and duties of the mortgagee. He held that in exercising a power of sale, a mortgagee's equitable duties to subsequent encumbrancers were measured by the extent of their security. The second defendant (who had exercised the power of sale) owed no equitable duty to the second claimant, whose entitlement was unsecured: it held the equity of redemption in a leaseback option. A mortgagee owed no duty to the holder of an option to take a tenancy of a property. Although the first claimant retained a security for the payment of a debt, the existence of that debt depended on the contingency that the first defendant granted subleases of the completed penthouses. That contingent right would be destroyed by the exercise of the power of sale. Since it would then be impossible to fulfil it, the first claimant would have no interest in the proceeds of sale. In practical terms, the second defendant's duty would be confined to exercising its powers in good faith. The equitable duty owed by a mortgagee arose only when it exercised its power of sale, and did not curtail its right to act in its own interests when deciding whether to exercise the power. The second claimant had exercised the power of sale for a proper purpose and was not in breach of any equitable duty owed. ***Meretz Investments NV and anor v ACP Ltd & ors*** [2006] EWHC 74 (Ch); [2006] 06 EG 170 (CS).

NUISANCE

The Court of Appeal allowed an appeal by Mid Suffolk District Council following the variation of an undertaking by the judge in the lower court. The council were attempting to restrain the well-publicised pigswill making activities of a Mr Clarke. The Court of Appeal held that the judge had misdirected himself and had proceeded incorrectly. He should not have varied the terms of the undertaking to limit it in time. The undertaking had been given at the end of proceedings which might otherwise have resulted in a permanent injunction. It was not relevant that the respondent was acting in person because he could have taken advice before giving a final undertaking. He had not been able to show that the appellants and local residents would no longer require the undertaking on a specified date. The judge

had been wrong to conclude that words should be removed from the undertaking. It was not an appropriate exercise of a judge's discretion at first instance to change the wording of a previous order given on a final basis unless it could be justified by circumstances such as a change of relevant facts. ***Mid Suffolk District Council v Clarke (No 2)*** [2006] EWCA Civ 71; [2006] 08 EG 174 (CS).

RENT REVIEW

In a dispute as to the correct approach to be adopted on a rent review, the court held that although a lease had to be interpreted in accordance with business common sense, the court not rewrite the words which the parties had used. The final wording might not be sensible from a business point of view, but that was a feature of numerous agreements reached as a result of compromise. The clause in contention might not be commercially realistic but it was clear. It was not ambiguous, nor was it incapable of implementation. There were no rival constructions between which the court could make a commercially sensible choice. A claim for rectification was also without merit. There was no evidence of a mistake having been made in a carefully negotiated lease drafted by professionals. ***Earl Cadogan & anor v Escada AG & ors*** [2006] 05 EG 272 (CS).

SPECIFIC PERFORMANCE

Kilmartin SCI (Hulton House) Ltd v Safeway Stores plc [2006] EWHC 60 (Ch), summarised in the January 2006 bulletin, has now been reported in full at [2006] 09 EG 184.

OTHER DEVELOPMENTS

HOUSING: LICENSING AND MANAGEMENT

A series of statutory instruments relating to the licensing and management of housing come into force on 6th April 2006. They are:

- The Housing (Empty Dwelling Management Orders) (Prescribed Exceptions and Requirements) (England) Order 2006 SI 367;
- The Housing (Management Orders and Empty Dwelling Management Orders) (Supplemental Provisions) (England) Regulations 2006 SI 368;
- The Housing (Interim Management Orders) (Prescribed Circumstances) (England) Order 2006 SI 369;
- The Selective Licensing of Houses (Specified Exemptions) (England) Order 2006 SI 370;
- The Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 SI 371;
- The Management of Houses in Multiple Occupation (England) Regulations 2006 SI 372;
- The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 SI 373;

- The Housing (Approval of Codes of Management Practice) (Student Accommodation) (England) Order 2006 SI 646; and
- The Houses in Multiple Occupation (Specified Educational Establishments) (England) Regulations 2006 SI 647.

HOUSING BENEFIT

Following the coming into force of the new consolidating regulations on 6th March 2006 (SI 2006/213, 214 and 217) the first amendment has already appeared in the form of the Housing Benefit (Amendment) Regulations 2006 SI 644. This comes into force on 3rd April 2006 and contains various amendments relating to payment of housing benefit in the form of a rent allowance and the effect of ASBOs in Scotland.

LANDS TRIBUNAL RULES

The Lands Tribunal Rules 1996 SI 1022 are amended by the Lands Tribunal (Amendment) Rules 2006 SI 880, coming into force in England on 28th April 2006. The amendments relate to appeals from the leasehold valuation tribunal and residential property tribunals.

RESIDENTIAL PROPERTY TRIBUNAL REGULATIONS

The new Residential Property Tribunal Procedure (England) Regulations 2006 SI 831 come into force on 13th April 2006. They regulate the procedure to be followed for applications and appeals made to a residential property tribunal under the Housing Act 2004 or Part 9 of the Housing Act 1985. These provisions relate to various powers of a local housing authority in connection with housing conditions and the enforcement of housing standards, including emergency remedial action, demolition orders and slum clearance, management of dwellings including empty dwellings, and overcrowding. Provision in relation to the fees payable is made by the Residential Property Tribunal (Fees) (England) Regulations 2006 SI 830, which also comes into force on 13th April 2006.

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