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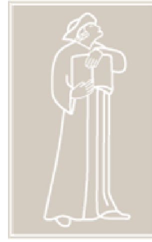

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PROPERTY LAW BULLETIN

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CASE LAW UPDATE

ARBITRATION

An important decision is given by Jackson J in relation to appeals under s.69 Arbitration Act 1996 (appeals to the court on a question of law) in ***Kershaw Mechanical Services Ltd v Kendrick Construction Ltd*** [2006] EWHC 727 (TCC) (full transcript available on www.bailii.org). In considering the correct approach of the court in such appeals, Jackson J held that the principal document which should be considered in any s.69 appeal is the arbitral award itself. The court should also receive any document referred to in the award which the court needs to read in order to determine a question of law arising out of the award. There is no philosophy or ethos of the 1996 Act which should deter the court from answering questions of law correctly, in the event that the arbitrator has erred. The court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be. The court should read an arbitral award as a whole in a fair and reasonable way, and should not engage in a minute textual analysis. Where the arbitrator's experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his experience, has come to the wrong answer. Jackson J approved guidance given in ***The "Chrysalis"*** [1983] 1 Lloyd's Rep 503 and ***The Baleares*** [1993] 1 Lloyd's Rep 215 on the identification of questions of law arising out of the award.

BUSINESS TENANCIES

Although on the facts the claimant landlord had waived its right to insist on compliance with the provisions of break clauses, the court went on to consider what would have constituted vacant possession. There were two possible tests. The first looked at the activities of the party giving up possession. If it continued to use the property, it could not give vacant possession. The second concerned the condition of the property itself, and required that

there should be no physical impediment to a party's right to enjoy vacant possession. In the present case the defendant tenant had breached its obligation to give vacant possession because it had continued to use the warehouse and the claimant could not have gone into occupation on the agreed date. ***Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd*** [28th April 2006] Ch Div; [2006] 18 EG 151 (CS).

COMMONS

Registration under the Commons Registration Act 1965 as a class c town or village green gives rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the land. For the purposes of s.22 CRA 1965 as amended, the use for sports and pastimes has to continue until the date of the application. The registration process was intended to be relatively simple and informal. The registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a fresh application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with the points for which they had not prepared. There is no rule that the amended application must be for substantially the same land as the original application. The registration authority can register a smaller piece of land than that for which registration is sought, if use is only proved for part of the land. The registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. The s.22 question will be dependent on the facts of each case and no specific additional guidance was given by their Lordships. Note: A new Commons Bill replacing the 1965 Act is now before Parliament. ***Oxfordshire County Council v Oxford City Council & anor & other joined appeals*** [2006] UKHL 25, full transcript available on www.parliament.uk /judicial_work/judicial_work.cfm

HOUSING

The Court of Appeal considered the meaning of *"family associations"* in s.199(1)(c) Housing Act 1996 when considering whether Mr Ozbek had established a local connection with Ipswich. The fundamental question was the existence of a local connection. There was no objection to the authority operating a policy provided that it did not close its mind to the particular facts of the individual case. Indeed, in order for the notifying and the notified authority for referrals under s.198 to agree, they would need to approach the question of local connections on a common basis. It is the need for a common basis which provides the imperative for all authorities to apply the guidelines generally to all applications which come before them. However, it is not right that a local connection based on family associations can only be founded on the presence in the district of the notifying authority of near relatives – mother/father, brother/sister, son/daughter. A likely example of a wider but qualifying family association would be the residence of grandparents or uncles and aunts by whom the applicant had been brought up. The presence in the locality of a parent or sibling with whom the applicant has had little contact for years will probably not be sufficient to constitute family association. ***Ozbek v Ipswich Borough Council*** [2006] EWCA Civ 534, full transcript available on www.bailii.org

An interesting decision relating to the provision of temporary accommodation under Part VII of the Housing Act 1996 is given in ***Desnousse v London Borough of Newham & ors***

[2006] EWCA Civ 547 (full transcript on www.bailii.org). By a majority, it was held that Article 8 ECHR does not have the effect of extending the operation of the Protection from Eviction Act 1977 to protect those for whom temporary accommodation has been provided under s.190 HA 1996 but to whom no further housing duty is owed. This upholds an earlier decision, ***Mohamed v Manek & anor*** [1995] 27 HLR 439, in which the Court of Appeal had held that the PEA 1977 did not apply so as to require an order for possession against an occupier for whom temporary accommodation had been provided under s.190. In a strong and very detailed dissenting judgment, Lloyd LJ expressed the view that although ***Mohamed v Manek*** would otherwise be binding, the effect of s.3 of the Human Rights Act 1998 was that it should no longer be followed insofar as its reasoning extended to self-contained accommodation which constituted the home of the occupier. In much shorter judgments, Tuckey LJ and Pill LJ held that Article 8 did not protect the appellant. It was not disproportionate to deprive a Part VII HA 1996 occupier of the safeguards of the PEA 1977. Local authorities should be trusted to act lawfully and responsibly. They often give 28 days notice. There are safeguards for a licensee within the homelessness regime which do not exist for an ordinary licensee. If it was necessary to apply for a court order in every case this would result in significant additional cost and delay. Accommodation would continue to be occupied by a person with respect to whom the Part VII duty had been performed, and would not be available to a homeless person to whom a Part VII duty was owed.

In a further case relating to Part VII of the Housing Act 1996, the Court of Appeal considered the provisions relating to intentional homelessness. The authority must give clear reasons when reaching a decision that an applicant is intentionally homeless. The essential requirements were as set out by Parker LJ in ***City of Gloucester v Miles*** [1985] 17 HLR 292. The review decision must state (a) that the authority is satisfied that the applicant for accommodation became homeless intentionally; (b) when he or she is considered to have become homeless; (c) why he or she is said to have become homeless at that time, i.e. what is the deliberate act or omission in consequence of which it is concluded that at that time he or she ceased to occupy accommodation which was available for his or her occupation; and (d) that it would have been reasonable for him or her to continue to occupy it. The Court of Appeal also made a general point about procedure, saying that if an authority intends to appeal a decision quashing a review, but is obliged to carry out a further review, the obvious and sensible course is that the parties should agree that the further review may await the outcome of the application for permission to appeal or the outcome of the appeal. ***William v London Borough of Wandsworth; Bellamy v London Borough of Hounslow*** [2006] EWCA Civ 535; full transcript available on www.bailii.org

In ***Lin v Barnet London Borough Council; Hassan v Barnet London Borough Council*** [2006] EWHC 1041 (Admin) (full transcript available on www.bailii.org), Hughes J held that the points scheme operated by Barnet LBC under s.167 Housing Act 1996 was unlawful. The question was whether Barnet's scheme lawfully met the requirements of Part VI HA 1996, and in particular whether it accorded to the applicants a reasonable preference as required by s.167(2)(b) (people who are homeless within the meaning of Part VII). Hughes J adopted the formulation of Judge LJ in ***R v Wolverhampton MBC ex p Watters*** [1997] 29 HLR 931: the obligation under the Act is to provide those within s.167(2) with a reasonable head start. It is not to guarantee allocation. Subject to reasonable preference being given and to the other specific provisions of Part VI, it is for the Housing Authority to allocate its housing in such manner as it considers appropriate: s.159(7). The way in which this is done may vary with local conditions. Even without varying local conditions, the policies adopted by different housing authorities may lawfully differ. It is only if a scheme departs from the Act or is

Wednesbury unreasonable, which means in effect perverse or irrational, that it becomes unlawful. The award of 100 transfer points was unlawful in that it failed to preserve the reasonable preference for s.167(2) applicants.

When considering whether it is reasonable to make an order for possession against a tenant on grounds of nuisance, the fact that a tenant has tried to control the person responsible for the nuisance and is unable to do so does not prevent the making of an order. There may be a stronger, not a weaker, case for not suspending an order where the tenant's argument is that she cannot control the nuisance maker. However this may assist the tenant in relation to past breaches, especially if she has done her best to stop the nuisance. The fact that the order can be suspended may well be a relevant factor in deciding whether to make an order at all. Neuberger LJ, giving the judgment of the court, was critical of Sedley LJ's obiter observation in ***Portsmouth City Council v Bryant*** [2000] 32 HLR 891 that *"it may very well be unreasonable to make even a suspended order against somebody who will be powerless to rectify the situation and it will almost certainly be unreasonable to make an outright order against such a person."* The court should not refuse an order for possession on ground 14 just because the person responsible for the acts of nuisance is subject to an ASBO which is directed to preventing the same sorts of acts. However the existence of an ASBO may justify the suspending of an order which would otherwise be an outright one. It will not normally be appropriate to include in an order for possession a term that the landlord should have to apply to the court for permission before applying for a warrant. However in some exceptional cases such a term may be justified. In the present case and in two reported cases such a term was appropriate because the tenant was disabled within the meaning of the Disability Discrimination Act 1995. ***Knowsley Housing Trust v McMullen*** [2006] EWCA Civ 539; [2006] 20 EG 293 (CS). (A useful summary of the relevant principles in ***Newcastle City Council v Morrison*** [2000] 32 HLR 891 is given in the judgment).

LEASEHOLD VALUATION TRIBUNALS

The LVT has jurisdiction to consider a tenant's application under s.158 of and schedule 11 to the Commonhold and Leasehold Reform Act 2002 (determination of liability to pay administration charge) even though nothing may yet be due for payment. Paragraph 3 of Schedule 11 enables a party to a lease to apply to an LVT for an order varying the lease on the grounds that any administration charge specified is unreasonable or the formula specified is unreasonable. This contemplates the ability to make such an application in advance of some dispute arising and in advance of there being some administration charge which is actually payable in the sense of being due. Paragraph 5 expressly recognises that one answer the LVT may give when determining whether an administration charge is payable is that nothing is payable. The lack of a formal demand complying with paragraph 4 did not prevent the LVT from having jurisdiction. The provisions of Schedule 11 regarding administration charges were inserted at least as much (if not more) for the benefit of tenants as for landlords. It can scarcely have been intended that the landlord has the power, by his own unilateral action (in serving or not serving a formal demand) to decide whether and when the tenant has the ability to seek a determination pursuant to Schedule 11. There is no difficulty in an LVT deciding whether or not there has been a breach of covenant if it is necessary to do this for the purpose of deciding whether an administration charge is payable. ***Drewett & Drewett v Bold & Sossi*** [2006] EWLands LRX/90/2005, full transcript available on www.bailii.org

Where freeholders transferred a freehold by way of gift, the tenants were entitled to acquire the freehold from the transferee for nil consideration. The disposal was not excluded from the definition of "relevant disposal" by s.4(1) Landlord and Tenant Act 1987 (disposal by way of gift to member of landlord's family or to a charity). The transferee complained that he had been deprived of his property without compensation, but this was only because he was the recipient of his interest after the wrongful failure to serve an offer notice on the tenants prior to the transfer. Article 1 of the First Protocol to the ECHR was not engaged. There was no reason why an increase in value should not be a change of circumstances within the meaning of s.12(B)(7) LTA 1987. ***Okonedo v Kirby & Davis*** [2006] EWLands LRX/15/2006; full transcript available on www.bailii.org

MORTGAGES

The claimant contracted to buy a property from the defendant for £290,000, with £140,000 of the purchase price secured by a first legal charge in favour of the defendant over the property. After completion, the claimant granted a lease to a third party without obtaining the defendant's prior consent, in breach of the charge. The claimant complained that she had not received good title to all of the land purported to be conveyed. She refused to pay the major part of the money secured by the charge when it became payable. The defendant purported to exercise her power of sale as mortgagee by selling the property. The claimant's claim for damages succeeded. The defendant was not entitled to exercise of her power of sale by claiming that interest under the charge was in arrears under s.103(ii) Law of Property Act 1925. She had not asserted an implied obligation to pay interest until the hearing, and had not specified the rate of interest or the dates upon which it ought to have been paid. The power of sale had become exercisable on the grant of a lease to third parties without the defendant's consent (s.103(iii) LPA 1925). However, the defendant had failed to obtain a proper market price for the property because she had accepted the first offer received. She was liable to account to the claimant for the proper market price of the property. ***Bishop v Blake*** [2006] EWHC 831 (Ch); [2006] 17 EG 113 (CS).

RESTRICTIVE COVENANTS

Shephard & ors v Turner & anor [2006] EWCA Civ 8, previously summarised in the January 2006 bulletin, has now been reported in full at [2006] EG 294.

RESULTING TRUSTS

The fact that a person is entitled to a profit share in a property development project does not entitle him to an equitable interest in the property. The parties' relationship was contractual in nature, as the defendant was not required to make good any share of a loss, over and above his contributions, and he was entitled to interest on his loans. There was no significant attachment to the use of the word "equity" in the correspondence as it was used in a vague, colloquial sense as market value less the amount of the loan. In return for his money, the defendant was entitled to the potential to a share of any profits, in the event that a profit was made, not to an equitable interest in the property itself. The fact that the defendant had contributed to the purchase price and development costs did not give rise to a resulting trust. A resulting trust came into existence where there was a perceived gap in

the beneficial interest of a property, which equity filled. Here the parties had regulated the agreement by contract so there was no gap for equity to fill. ***Assured Quality Construction Ltd & anor v Thompson*** [21st April 2006] TLR.

RIGHTS OF WAY

A claim for a right of way implied by necessity was not made out even though there was presently no means of access onto the land. The land was not surrounded by land owned by the transferor. To the west and east the land was owned by third parties. There was a common law right of access to and from a road on the south side of the land. Planning permission had been refused for access to this road but this did not mean that access would never be possible in the future. The judgment contains a detailed summary of the authorities on grants implied by necessity. ***Adealon International Proprietary Limited v London Borough of Merton*** [2006] EWHC 1075 (Ch); full transcript available on www.bailii.org

OTHER DEVELOPMENTS

HOMELESSNESS

The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI 1294 make provision as to which persons from abroad will be eligible or ineligible for an allocation of housing accommodation under Part VI of the Housing Act 1996, and for housing assistance under Part VII. These Regulations contain similar provisions to those in regulations 4 and 5 of the Allocation of Housing (England) Regulations 2002 SI 3264 and the Homelessness (England) Regulations 2000 SI 701, which are revoked by these Regulations. The main changes are to take account of the implementation of European Directive 2004/38/EC, which makes some changes to the rights of free movement of EU citizens. In particular there is a new initial right of residence of three months in a host country provided that the EU citizen and their family members do not become an unreasonable burden on the social assistance system of the host state, and a permanent right of residence in a host member state for some EU citizens.

LAND REGISTRATION

The Land Registration Fee Order 2006 SI 1332 comes into force on 7th August 2006 and replaces the Land Registration Fee Order 2004 SI 595 (as amended). It makes various changes to the fees payable for land registration, inspection, official copies and official searches.

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