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PROPERTY TEAM NEWSLETTER

Article: B&B or not B&B? – that is the question

This article is an extract from Brendan Mullee's [full article](#) which can be found on the Hardwicke Building website.

Local authorities, and in particular those within the Greater London area are increasingly under pressure to confirm that suitable accommodation is available for their ever increasing number of homeless applicants. In many instances the authority is compelled, given the lack of available housing, to place applicants and their families in accommodation secured from the private sector. By way of a cautionary tale I will recite the circumstances and eventual outcome of a matter in which I was instructed by a large London local authority. I have anonymised the parties but I am confident the principles involved will be of some interest to members of the profession and local authorities.

The background

In about May 2005 the Claimant, his wife and their five dependent children applied to the Council for housing assistance as homeless persons. Pending a determination as to whether they owed the Claimant and his wife a homelessness, duty the Council secured accommodation for them pursuant to s.188. Housing Act 1996. The property which comprised a 3 bedroom semi-detached house was situated in a residential area in West London. The Council had an informal arrangement with a substantial number of property owners who complied with the criteria of BABIE (Bed and Breakfast Information Exchange Agreement). Accommodation was obtained via one of those property owners, thus creating what is frequently referred to as a tripartite agreement. In this particular case, the subject property was owned by a private company which had licensed it to a private individual who had in turn sub-licensed it to the Council.

The Claim

The Claimant claimed that he was, from May 2005 for approximately 1 year, the secure tenant of the Council. He claimed that the Council was in breach of its' repairing obligations to him and that he was therefore entitled to damages. The Court decided as a preliminary issue whether he was a tenant of the Council or not.

The Claimant's contention

The argument of the Claimant was in brief (1) there was a contractual relationship between the Council and the Claimant; (2) the Council provided the Claimant with accommodation; (3) the terms on which the accommodation was provided, when one looked at the reality and stripped away the verbiage and pretence, were such that the contractual relationship created a tenancy. It was immaterial that the Council had no rights in the property.

He submitted that the arrangement created by the Council was a sham because the accommodation was not "bed and breakfast". The provision of ingredients from which breakfast could be prepared was not the same as providing breakfast and the connotation of "bed and breakfast" as overnight accommodation rather than a fixed home. He asserted that the description of the property as a hotel was a sham and suggested the intention was to give an ordinary house the appearance of an hotel. The reality, he asserted, was that there was a landlord and tenant relationship between the Council and the Claimant.

The County Court's determination

In his judgment, the District Judge held that the arguments relied upon by the Claimant were 'hopelessly flawed'. The Council had a statutory obligation to provide accommodation for the Claimant and his family. One of the ways in which it could fulfil that obligation was by confirming that the Claimant obtained suitable accommodation from some other person. It did so by contacting with the property owners and procuring that they provided suitable accommodation. Whether the resulting relationship between the property owners and the Council was that of licensor and licensee or landlord and tenant, the relationship in respect of the occupation of

the property was between the property owners and Claimant, not between the Council and the Claimant.

The Court of Appeal's view

The Court of Appeal, reaffirming the lower court's refusal, held that the Claimant was not the Council's tenant. The court held that in the instant case the terms of the offer letter did not indicate that there was a landlord and tenant relationship between the Council and the Claimant. Accordingly, there was no real prospect of any appeal succeeding. Neuberger LJ sought to encapsulate the instant scenario in the following terms; 'A can provide B with accommodation by arranging with C (in this case the owner) that C grants a tenancy or a licence to B, to whom I have committed myself to providing accommodation. The fact that A has agreed to provide accommodation for B does not mean that A is creating a tenancy between himself and B.' He further held that that the language of the first two paragraphs of the 'Bed and Breakfast Agreement' letter could not, in all the circumstances, be said to indicate that there was a landlord and tenant relationship between the Council and the Claimant, 'or, to put it another way, that a tenancy is being granted.'

Conclusion

Given the example outlined above, it would be wise for those local authorities engaging in the aforementioned tripartite agreements to closely scrutinise the precise wording and form of any such agreements and ensure that ambiguity is avoided. I would suggest that a useful initial step would be to require that all owners of private accommodation, used for these purposes, are in possession of formal written agreements, duly signed by the relevant parties, clearly identifying the relationship envisaged and in so doing avoid potential traps for the unwary, which, given the court's allusion to the 'fact sensitive' approach, may result in potential catastrophe for local authorities. (Brendan Mullee)

Did you see.....? Recent cases you may have missed.

Trusts/real property

Interpretation of a trust deed

Jennifer Margaret Chopra v Angela Bindra [2009] EWCA Civ 203

A brother and sister jointly owned a property as tenants in common pursuant to a trust deed. The deed contained a clause which provided that on either of their deaths the survivor would be entitled to the whole proceeds of a sale of the property. Following the death of her brother, the sister commenced proceedings for the value of the whole of the property pursuant to that clause. It was argued by the brother's widow that this clause was void because the first clause in the lease gave the brother an absolute interest in his share of the house and its proceeds.

Held: the court was entitled to interpret the trust deed to give effect the clause allowing for the surviving joint owner of the property to obtain the whole interest of the property. It was relevant that the parties intended this clause to be effective and that the first clause did no more than reflect the background to the deed. (**Laura Tweedy**)

Implied Grant of Profits

S.62 Law of Property Act 1925, Rights of Common, Interpretation of rights reserved

Hall v Moore and another [2009] EWCA Civ 201

The trustees of a farm had registered rights of common of pasture and had granted a tenancy from year to year of the farm to C. He had relied upon an implied grant under s.62 and sought injunctions to restrain the Ds (owners of neighbouring land) from interfering with his grazing of livestock. It had been held as a preliminary issue that the rights reserved to the trustees by the tenancy agreement included the rights of common and further that a commons committee had waived the rights, in any event.

Held: The appeal would be allowed. The term 'rights affecting the farm' would be contextually construed to mean rights burdening it, not benefiting it. Therefore the rights had not been reserved and could be the subject of an implied grant. Neither the committee nor the trustees had authority to waive the C's rights.

Landlord and Tenant

Rent review clauses, s.45 Arbitration Act 1996

Nissim and others v Ablethirst Ltd [2009] EWHC 585 Ch

Preferring the claimant landlord's construction, where a lease provided for rent review by reference to a hypothetical lease, which expressly disregarded an uplift proviso in the actual lease, the lease would be construed so as to apply the uplift to the open market rental valuation provided by the hypothetical lease to produce an actual rent. This was in line with the commercial background in which the lease had been agreed.

(Andy Creer)

Proprietary Estoppel

Judge's finding on sufficiency of representation upheld

Thorner v Majors [2009] UKHL 18

(1) For proprietary estoppel an assurance should be clear enough. This dependent on the particular case. Here the Court of Appeal should not have overturned the trial judge's decision which was based on all of the parties' dealings and the evidence before him.

(2) Proprietary estoppel requires assurances relating to identified property that is either owned or will shortly be owned by the representor. In the present case the deceased and C both understood that the property was to be a farm as it stood at the deceased's death, whatever that was. The precise extent of the property subject to the estoppel did not need to be identified in advance.

Per curiam: The need for a "clear and unequivocal representation" to generate a proprietary estoppel is subject to three qualifications:

- (i) The words should be assessed in their particular context;
- (ii) The words should be assessed practically and sensibly, not searching for ambiguity or uncertainty;
- (iii) It may be that the words could have more than one possible meaning. If all the other requirements of an estoppel are present the ambiguity should not deprive the representee of all relief but may require the relief be assessed on the least favourable interpretation. (**Philip Fellows**)

STOP PRESS!

Experienced commercial and chancery barrister John de Waal has joined Hardwicke from St Phillip's Chambers, Birmingham. John has a particular interest in property and property related professional negligence work. Michelle Stevens Hoare comments:

"Securing a leading property lawyer of John's capabilities, who shares our client focused values and displays a strong "can do" attitude, really enhances our commitment to our property clients".

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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