Hardwicke Building

# Property Team

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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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|---|---|---|---|
| Stephen Lennard | 1976 | Alexander Bastin | 1995 |
| Robert Leonard | 1976 | Edward Rowntree | 1996 |
| Wendy Parker | 1978 | David Pliener | 1996 |
| Karl King | 1985 | Fiona Scolding | 1996 |
| Michelle Stevens-Hoare | 1986 | Brendan Mullee | 1996 |
| Steven Woolf | 1989 | Nicola Muir | 1998 |
| Sara Benbow | 1990 | Alison Meacher | 1998 |
| Daniel Gatty | 1990 | Alastair Redpath-Stevens | 1998 |
| Rupert Higgins | 1991 | Andrew Lane | 1999 |
| Jon Holbrook | 1991 | Sarah McCann | 2001 |
| Arthur Moore | 1992 | Dean Underwood | 2002 |
| Kerry Bretherton | 1992 | Michael Wheater | 2003 |
| Alexander Goold | 1994 | Alice Marshment | 2003 |

Property Team Newsletter

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

**Landlord and Tenant**

***Possession Orders- non-secure tenancies***

*Haringey LBC v. Hickey* [2006] EWCA Civ 373, 10/4/06
*Appellant (A)t tenant appealed against a possession order made in favour of the respondent local authority (R)- property leased to A by private individual (P)- successive leases from P to R during A's occupation- premises expressly rented by R for provision of temporary accommodation- Para. 6 Sch.1 Housing Act 1985 excluding such letting from secure tenancy regime- each lease provided for P- R served NTQ on A to terminate tenancy- pre;liminary issue whether para. 6 Sch. 1 applied- DJ decided that the exception in para.6 applied so that A did not have a secure tenancy - possession order made. A argued that the exception in para.6 did not apply because (1) the requirement in para.6(a) for the property to have been leased to the local authority with vacant possession had not been fulfilled because A had been in possession of the property when the lease had been renewed; (2) the requirement in para.6(b) for the lease between P and R to include a provision for P to obtain vacant possession "on the expiry of a specified term or when required" by P had not been fulfilled because it required a single provision dealing with both alternatives.*
Held: Appeal allowed: (1) It was clear from the word "and" at the end of para. 6(c) that all four requirements in para. 6 had to be satisfied for the exception to apply. It was agreed 6(c) and 6 (d) made out. Paragraph 6(a) was only concerned with the position between P and A. The head lease between those parties showed that the flat had been leased to the local authority with vacant possession. A's actual occupation at any given time was irrelevant. (2) Para.6(b) was not satisfied. A single provision was required entitling P to seek possession at the expiry of the fixed term, or when required by him. The lease only provided for P to regain possession on expiry of the fixed term. Where there were two terms, the second would be otiose as every lease effectively gave the landlord the right to possession on expiry of the fixed term.

### Comment

Local authorities, particularly in London, have enormous pressure on their housing stock. Demand is considerably higher than supply. One possibility for alleviating this pressure is for a local authority to take leases of residential accommodation off private sector individuals, and then to sublet these premises to people waiting for housing.. The problems with this arrangement are immediately apparent. Where a local authority grants a residential tenancy to an individual person (as opposed to a legal "person", such as a limited company) the tenancy will be a "secure" tenancy within the meaning of the Housing Act 1985. Such a tenancy, as is well known, confers considerable security of tenure on the tenant, as well as other benefits (such as the Right to Buy). These right sit ill with the status of sub-tenant.
In an attempt to get round this and to encourage private landlords to put their properties in the public sector, Parliament enacted Paragraph 6. of Schedule 1 of the Housing Act 1985. This provides an exception to the general rule that a residential letting by a local authority to an individual will be a secure tenancy. It provides:
"Short term arrangements- A tenancy is not secure if: (a) the dwelling-house has been leased to the landlord with vacant possession for use as temporary housing accommodation, (b) the terms on which it has been leased include provision for the lessor to obtain vacant possession from the landlord on the expiry of a specified period or when required by the lessor, (c) the lessor is not a body which is capable of granting secure tenancies, and (d) the landlord has no interest in the dwelling-house other than under the lease in question or as a mortgagee".
The Court appeal in *Haringey v. Hickey* (supra.) has recently had cause to examine this exception closely. In this case, Haringey had taken a lease of a flat from a Mr Patel for a fixed period. They had then sublet to a Ms Hickey. The sub-tenancy made it clear that the property was not being let on a secure tenancy, and that para. 6 of Schedule 1 of the 1985 Act applied. During Ms Hickey's ocupation Haringey had renewed their lease with Mr Patel several times. Each lease had contained a clause which provided: "In the event that the [Council] shall decide to terminate this Lease before the expiry of the Term then notwithstanding anything hereinbefore contained the [Council] may terminate this Lease by giving [Mr Patel] not less than four weeks previous notice of the date of termination of this Lease (to expire at any time)...". There was no similar early termination provision in Mr Patel's favour. The Court of Appeal's findings are set out

in the case summary above. It is clear from these findings that local authorities must be very careful as to the terms of the lease that they take from private sector individuals. Any failure to comply with para. 6 of Sch. 1 will mean that the exemption cannot apply, and the sub-tenant will be a secure tenant, with all that implies. The assumption had hitherto been that para. 6(b) was satisfied if the landlord could regain possession EITHER at the end of the tenancy OR when he wished. It was assumed that these two alternatives were disjunctive i.e. that they did not both need to be satisfied. However, as Sir Martin Nourse pointed out, this cannot be the case. Any lease gives the landlord the right to possession at expiry of the fixed term. Any clause purporting to grant this "right" must therefore be otiose. The requirements of para 6(b) can only make sense therefore if both elements are required.

This now leaves local authorities in a difficult position. They of course want the certainty which a fixed term lease would give them. However, in order that any subtenancy be excluded from the secure tenancy regime, the lease must in fact give the landlord the ability to terminate the lease when he wants. The way round this clearly is to build in a break clause which the landlord can operate at any time, but which has a sufficient period of notice to enable the local authority to have time to re-house the subtenant.

Arthur J. Moore

**Gypsies**

***Unlawful occupation of land-Injunction- Variation of injunction pending outcome of planning appeal***

*Wychavon DC v. Rafferty & others* [2006] PLSCS 103, 27/4/06

*Appellant (A) Romany gypsies appealed against a decision refusing to vary an injunction obtained by local authority (R)- injunction had been obtained ex-parte- restrained A from (inter alia) stationing caravans on a piece of land acquired by one of A, or from using the land for residential purposes- A applied for planning permission to use the land to station three mobile homes- planning application refused- appeal lodged with planning inspector- A moved caravans onto the land and made an application to vary the injunction- The local authority made an application for committal on the grounds that R had breached the injunction- A's application dismissed and judge ordered A to be committed to prison for six weeks suspended on the condition that the caravans were removed- A appealed- not disputed in contempt of court- argued that the judge had erred in his refusal to vary the injunction in particular that he had erred in failing to enter into a more detailed analysis of the prospects of success of the planning appeal.*

Held: Appeal dismissed. (1) J had applied the principle of *Mid Bedfordshire v. Brown* correctly. (2) J not obliged to second-guess the outcome of the planning appeal. Planning inspector would have more evidence than had been before the judge. J entitled to find that there was no realistic prospect of success. It was not enough for A to say that others took a different view. There was nothing perverse in J's decision.

***Unlawful occupation of land- Direct action pending outcome of planning appeal***

*R v. Basildon DC exp. O'Brien & others; R v, Basildon DC exp. Casey & others* [2006] PLSCS 94

*Claimants (C) Romany gypsies- owned plots of land- occupied them unlawfully in that planning applications had been made and refused- appeals pending- Council (D) served enforcement notices under s.178 Town and Country Planning Act 1990 (to remove caravans)- C did not comply- continued occupation became a criminal offence- D sought to enforce notice by direct action- C challenged D's resolution to pursue direct action-*

Held: Claim allowed. S.178 did not state explicitly, or impliedly, that the direct action should not be taken in the case of land occupied of residential purposes. It may not always be proportionate. There was no reason in principle why D could not choose to use a power given to them by parliament which did not require the intervention of the Courts. The enforcement of the criminal law was to be given considerable weight in considering proportionality. The prospects of a successful appeal might not be relevant where criminal prosecution was envisaged. In the present case, however, D had failed to consider the prospects of success on the planning appeal, and the time scale within which that might be resolved. The decision was therefore disproportionate and illegal.

**Procedure**

***Appeal from party wall award***

*Zissis v. Lukomiski & others* [2006] EWCA Civ 341, 5/4/06

*Z appellant (A) and L first respondent respondent (R) were the separate owners of adjoining buildings- dispute in respect of works that A intended to carry out- each party appointed a surveyor, including C- the two surveyors appointed a third surveyor who made an award authorising the works but did not deal with C's fees- third surveyor declared himself incapable of acting- C served a request on A's surveyor in respect of his fees- A's surveyor failed to respond and C purportedly made an addendum award under s.10(17) Party Wall Act 1996- under award, A required to pay award- A appealed against award by way of claim under CPR 8- sought rescission of the addendum award or alternatively an order modifying it- DJ held panel of surveyors improperly constituted therefore addendum award invalid- appeal was a statutory appeal - should have been brought under CPR 52- A out of time for bringing appeal therefore A's claim dismissed- A appealed-*

Held: Appeal allowed in part. (1) CPR 52 was intended to deal with statutory appeals, such as the present. The Court, on appeal, had power to admit evidence. Since the award was made without a hearing, an appeal by way of rehearing would normally require a court to receive evidence in order to reach its own conclusion. The DJ was wrong to dismiss the claim. He should have either allowed A's amendment (seeking a declaration that the award was a nullity) or ordered the case to proceed under CPR 52. Under CPR 52 there was no reason why A could not claim that the award was a nullity, or that it be varied.

Case summaries by Arthur J. Moore