

## 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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Civil Clerks: Kevin Mitchell, Danny O'Brien, Daniel Kemp, Paul Martenstyn & Oliver Edwards

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 Wheeler	2003
Alexander Goold	1994	Alice Marshment	2003

### New member of the Team....

The members of Hardwicke Building are delighted to welcome **Alice Marshment** to the Property Team. Alice was called to the Bar by Lincoln's Inn in 2003. She studied at Oxford University, during which time she won the Times Law Awards, and subsequently at Toronto University, where she was awarded a Graduate Fellowship for her LL.M. On her return to the UK Alice volunteered for *Liberty* and *Justice* and spent time working as a freelance legal researcher. Alice completed pupillage at a general common law set in the Temple, before moving to a purely civil set where her practice encompassed areas as diverse as property, personal injury, commercial, employment and housing. Since joining Hardwicke Building Alice has focused on Commercial and Property work although she continues to accept instructions in housing matters.

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

#### Landlord and Tenant

##### **Possession Orders- Human Rights**

*Kay & others v. London Borough of Lambeth & others; Leeds CC v. Price & others* [2006] UKHL 10  
*First case, local authority (R) had arrangement with a housing trust whereby appellants (A) occupied properties on short-life tenancies- R terminated arrangement with trust and sought possession-*  
*Second case, A set up camp on R's land- fact of trespass not disputed-*  
*Only real defence on each case was reliance on art. 8 of the ECHR*  
*Issues before the Court were: (i) how the Courts could give effect to the occupiers' art. 8 rights to respect for their home where the public authority sought possession to which it was entitled under domestic law (ii) the compatibility of the Harrow LBC v. Qazi [2003] UKHL 43 with Connors v. United Kingdom [2004] 4 PLR 16, and (iii) the perceived incompatibility of binding domestic precedents with European Court Jurisprudence*  
 Held: *Connors* and *Qazi* were not incompatible. However, in so far as *Qazi* held that the enforcement of a right to possession in accordance with domestic law could never be incompatible with art. 8, the principle had to be modified in the light of *Connors*. The public authority would ordinarily be entitled to possession where the occupiers' rights had been determined in accordance with domestic law, or where the occupiers were trespassers. The Court should proceed on the basis that domestic law struck a fair balance between the right to possession and the occupiers' convention rights and thereby provided the justification required by art. 8(2). The local authority was not bound to prove that possession was justified under art. 8 in every case. If the issue were raised, the Court could decide it, or refer it to the High Court. However, a defence which did not challenge the domestic law as being incompatible with the convention but relied solely on the occupiers' personal circumstances, would be struck out. In exceptional cases, the authority's decision to pursue possession (in cases where domestic law did not provide for consideration of the occupiers' personal circumstances) could be challenged in the High Court on the basis that no reasonable authority would have brought the proceedings. Lower Courts must abide by the English rules of precedent and follow binding domestic authority, even where it is inconsistent with Strasbourg authority (a Judge may, however, give leave to appeal).  
 In the first case, A's rights against the trust were not enforceable against R as the trust had been a mere licensee. In the second appeal, A did not have sufficient continuing links with the land for it to be regarded as their home for art. 8 purposes.

**See comment (below)**

## Comment

The House of Lords sat as a committee of seven in order to sort of the varied and important issues which arose in the cases of *Kay* and *Price* summarised (supra.). As might be expected on such complex matters, there were differing views- not so much on the answers to the important questions but rather on the way those answers are reached. We therefore have seven opinions to digest rather than a single majority concluded view. What follows can therefore only be the briefest overview.

Perhaps the central issue before their Lordships was the extent to which a person who was in occupation of land without any right to be under the domestic law could rely on his art. 8 rights to prevent his removal from that land. The short answer seems to be that he cannot.

Their Lordships have held that where art. 8 engages, the eviction will inevitably be justifiable under art. 8(2) if the domestic law has been properly followed. That is, it is the existence of the domestic law and NOT the individual circumstances of the occupier which are relevant for justification purposes. Thus, a local authority is not bound in each possession case to prove justification under art.8(2). It is assumed that justification is made out. Their Lordships have determined that any defence which does not attack the compatibility of the domestic law with the convention should be struck out. Assuming that the law is compatible, the eviction will be justified. It has to be said however, that Lord Bingham did hold (as a minority) that there may be truly exceptional cases where the personal circumstances of an occupier might provide a defensive under art. 8. This appears to be a view shared by Lady Hale, but not by the majority of their Lordships.

It is suggested that the majority decision is plainly right.

Where an occupier's rights of occupation have been determined in accordance with the domestic law, he has (by definition), no right to remain. If art. 8 could somehow defeat the owner's right to possession, what would be the status of the occupier? He cannot fall within any of the categories of occupier recognised by the domestic law. How therefore, would his relationship with the owner be regulated? Would he pay rent? Who would carry out repairs? The present decision goes some way to answering these questions. by saying, effectively, that there cannot be a type of occupation which exists outside the domestic law. Moreover, the domestic Court is bound by domestic precedent and is therefore bound to follow it, even in the face of apparently contradictory Strasbourg jurisprudence. The Court cannot therefore refuse to grant possession where domestic law and precedent require it. In some very exceptional cases (where the domestic law is found to be incompatible with convention rights) it may be necessary for the domestic law to be extended or altered so that the occupier falls with the domestic law..

Arthur J. Moore

### **Rent Arrears Equitable set-off**

*Edlington Properties Ltd v. JH Fenner & Co. Ltd* [2006] PLSCS 71, CA

*A lessee. R assignee of reversion. Original reversioner had agreed to construct factory on land subject to the lease. R brought action against A for post assignment arrears of rent. A sought to set off damages for defective construction of the factory by the original owner. High Court held not possible to set of damages against the pre-assignment landlord against post assignment arrears- appeal;*

Held: Appeal dismissed. It was not possible to set-off damages for a claim arising pre-assignment against rent arising post assignment, unless the lease, or agreement for the lease, so provided. An equitable set of impeached a claimant's right to sue. It was personal in nature. It could not run against third parties. A purchaser of land could take subject to such an equity where he had had notice of the right and where the right created a legal or equitable interest in the land. The lease in this case would not have precluded A's right to set-off (had it existed). The right to set-off will exist unless excluded by a clear provision using the term "set-off".

### **Easements Leasehold enfranchisement**

*Kent & another v. Kavanagh & another* [2006] EWCA Civ 162, CA

*A and R owned and occupied neighbouring houses- path between the two properties- boundary line down the centre of path- properties originally held leasehold- enfranchised in 1976- county court held R had right of way along the half of the path owned by A- rule in Wheeldon v. Burrows (1879) 12 ChD 31 applied- appeal.*

Held: Appeal dismissed. The rule in *Wheeldon v. Burrows* has no application in conveyances which give effect to the obligations under s.8 Leasehold Reform Act 1967. However, the wording of s.62 Law of Property Act 1925 is apt to convey the rights of way over the retained land which, at the time of the conveyance, are being enjoyed by the tenant in occupation of the land conveyed without need or any recourse to the principles in *Wheeldon*. S.62 could not operate to reserve out of the land conveyed rights for the benefit of the land retained. Under general law, a grantor wishing to retain rights over the conveyed land for the benefit of the retained land must do so in writing (second limb of the rule in *Wheeldon*). s. 10(2)(ii) of the 1967 Act can be seen as a statutory exception to this general rule. Thus, the effect of a conveyance on the enfranchisement of one part of land in common ownership (plot A) on the retained part of the land (part B), if plot B was tenanted, was that the former tenant of plot A would continue to enjoy the rights over plot B which he enjoyed under the lease, but in respect of both the freehold and the leasehold interests, and the tenant of plot B would continue to enjoy the rights over plot A which he enjoyed under his lease, but in respect of the freehold as well as the former leasehold of plot A. When plot B is then conveyed on enfranchisement, the former tenants of each plot will enjoy, as freeholders, the rights they had previously enjoyed as leaseholders.

Case summaries by Arthur J. Moore