Hardwicke Building

Property Team

January 2005
Vol 6 - Part 11

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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Jon Holbrook	1991	Sarah McCann	2001
Arthur Moore	1992	Dean Underwood	2002
Kerry Bretherton	1992	Michael Wheater	2003
Alexander Goold	1994		

Property Team Newsletter

Go Getting Daniel Arrives.....

We are delighted to welcome Daniel Gatty to Hardwicke Building's Property Team. Daniel was called in 1990. He joins us from Lamb Chambers where his practice encompassed property and commercial work. His most recent reported case concerned business tenancies (Brighton & Hove CC v Collinson [2004] 28 EG 178, CA) but he is experienced in most areas of property law. Daniel is an approachable, practically minded practitioner which when combined with his strong legal and advocacy skills has persuaded us he will will go from strength to strength as a member of our team.

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On 15th December 2004 the Court of Appeal considered the nature of the requirement for a landlord to include in his counter-notice under the Leasehold Reform, Housing and Urban Development Act 1993 a statement indicating whether the premises were within an estate management scheme ("EMS"). The Court concluded the requirement was, where there was no such scheme, directory and not mandatory.

In 7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd [2004] EWCA Civ 1669 a number of tenants had served a notice of collective enfranchisement under the 1993 Act. The landlord's counternotice contained the information required by s. 21 of the Act but omitted to state whether the premises were within an EMS. In fact they were not. The requirement to state whether the premises were within such a scheme was added by the Leasehold Reform (Collective Enfranchisement) (Counter-notices) (England) Regulations 2002 pursuant to the power given to the Secretary of State by s. 99 (6) of the Act. It provided: "A counter-notice given under s. 21 ... of the 1993 Act shall contain (in addition to the particulars required by that section) a statement as to whether or not the specified premises are within the area of a scheme approved as an estate management scheme under s. 70".

The requirements of s. 21 are mandatory. Failure to comply leads to very unpleasant consequences for the landlord. If he does not oppose the collective enfranchisement but takes issue with the proposals, (most importantly, the price proposed) he needs to comply with the requirements. Failure to do so will prevent him challenging the price at the LVT, unless the price proposed is so low as not to amount to a genuine proposal, which will invalidate the tenants' notice – Cadogan v Morris [1999] 1 EGLR 59.

Whether the consequences of failure to comply with the requirement of the Regulations had a similar effect was therefore critical to the landlords' wish to take issue with the tenants' proposed price of £117,000. They were not in a position to say that it was so low as not to amount to a genuine offer.

Arden LJ held: first that notwithstanding its wording the requirement of the Regulations was self-standing and did not become part of the s. 21 requirement, with the consequence that it did not for that reason fall within Cadogan. Second that although "shall" was capable of being a mandatory word, the question of whether it was mandatory or directory in these circumstances depended on the substance of the requirement, which had to be construed in the context of the statutory scheme. In the present case it was directory only because if the need to state whether the premises were in an EMS was an essential part of collective enfranchisement the requirement would have been brought in much earlier; the quality of the information required by s. 21 was of a different order; a requirement such as this could be in part directory and in part mandatory and if directory in the present case (where there was no EMS) might well be mandatory where there was such a scheme; there was no possible prejudice to the tenants in the omission and no benefit to them in requiring a negative statement.

It would seem to follow that the omission of this requirement where the premises are in fact the subject of an EMS is likely to be fatal to the landlord's wish to contest the price of other matters relating to the tenants' proposals - save in the rare case of a gross undervalue proposed.

ROBERT LEONARD

The views and opinions expressed in this article are the author's own and do not purport to be advice on any particular set of facts.

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

Landlord & Tenant

Scribes West Ltd v Relsa Anstalt – CA- [2004] EWCA Civ 1744
Assignment of reversionary interest – Delay in registration – Notice of assignment to tenant – Peaceable reentry for Arrears of Rent by Assignee – Subsequent Registration – Validity of Forfeiture
Held: The Assignee of the reversionary interest was entitled to receive rents/income from the property in equity. Equitable entitlement was sufficient for s141(2) of the LPA 1925. It mattered not the assignor was also entitled to enforce. That section was concerned with the extension of rights to enforce, it was not designed to reduce existing rights. Any enforcement by the assignor would be as trustee for the assignee. **MICHELLE STEVENS-HOARE**

Clear Channel UK Ltd v Manchester C C – Ch D – Etherton J – [2004] EWHC 2873 (Ch)
Lease/License – Agreements to locate advertising hoardings – 13 different sites – Agreements identify site by generalised addresses alone – Occupants claim leases – Owner dispute anything other than licences – Further agreement re 1 site – Draft unsigned agreement specifying the land actually occupied by the hoarding, a fixed period and a rent.
Held: The first question when ascertaining where a lease or a licence was granted was whether the participants intended to grant exclusive possession of land for a specified period at a rent. Reference to undefined or unnecessarily wide and poorly defined areas in which hoardings could be located did not amount to a grant of exclusive possession. The unsigned agreement did evidence a clear intention to grant exclusive possession as it defined the area of land actually occupied by the particular hoarding. Since ther was nothing in the draft that was contrary to that concept and it provided for a specified period and rent the evidence demonstrated the necessary intention.
MICHELLE STEVENS-HOARE

Nrth British Housing Assoc Ltd v Mathews and related appeals – CA – [2004] EWCA Civ 1736
Assured tenancy – Rent Arrears – Possession Claim – Mandatory 8 week ground – Adjournment
Held: The Court's power to adjourn was not abrogated by the 1988 Act. However, save in exceptional circumstances, it would not be a proper exercise of the Court's discretion to allow an adjourned so that the tenant can reduce the arrears below the mandatory level. The fact the arrears are caused/contributed to by maladministration of benefits would not be exceptional circumstances.
MICHELLE STEVENS-HOARE

Nutting v Southern Housing Group Ltd – ChD – Evans-Lombe J - [2004] EWHC 2982
Same sex relationship – possession claim – D claims succession rights – violence, non-molestation and period of committal – Cohabitation resumed – Deceased negotiating for new flat on own prior to death.
Held: For succession rights to arise it is necessary for the nature of the relationship to be "spousal". The relevant test is whether the couple have a lifetime commitment rather than an arrangement of convenience, simply friendship or compansionship or they were no more than lovers that lived together.

Planning

South Cambridge DC v First Secretary of State & ors – [2004] EWHC 2940
Ds couple of gypsy origin and grandson – occupation of rural land – Secretary of State granted planning permission for residential caravans and shower block and quashed enforcement notices – C challenged secretary of state under ss288 and 289 – Inspector concluded the couple had lost their gypsy status – Grandson's status remained but his need was found to be meet by other facilities – Nevertheless planning policy HG29 justified planning permission given family ties with others and need for healthcare and support.
Held: Judicial review of the Inspectors decision. Inspector failed to weigh the relevant considerations against development plan policies as s54A of the 1990 Act required. Given factual findings HG29 did not apply. It was wrong to weigh their loss of gypsy status against their personal circumstances rather than weighing their personal circumstances against the relevant development plan. **KERRY BRETHERTON**

R (on the application of the Council for National Parks Ltd) v Pembrokeshire Coast National Park Authority – [2004] EWHC 2907 (Admin)
Outline planning permission for holiday village – Contrary to local plan policy – Decision challenged on basis no overriding national need and two members of authority bias.
Held: Consideration was given the local economic benefit and other relevant considerations. There was no need to find overriding national need. There is a difference between bias in the sense of a closed mind and legitimate predisposition towards a particular stance. In this instance there was no evidence of a closed mind. **KERRY BRETHERTON**

Mid-Bedfordshire D C v Brown & ors – CA – [2004] EWCA Civ 1709
Gypsy owner of green belt agricultural land – Commenced construction of site for caravans – Planning department obtained injunction – Owner carried on in breach of injunction – Owner applied for retrospective planning permission – Application for final injunction – Application granted but suspending pending determination of retrospective planning permission.
Held: The decision to suspend failed to take account of the vital role of the Courts in ensuring Court orders were obeyed. The owner could and should have applied to discharge or vary the order as expressly provided for and not just proceeded in breach. Further no apology or explanation was offered. The public interest in preventing a diminution in the authority of the Court outweighed the factors in favour of suspension. **KERRY BRETHERTON**