

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 Procedure

Preliminary issues

Southwark LBC v. O'Sullivan CA (CivD) 27/1/2006

A's wife tenant of premises- A not a party to tenancy- A's wife move out, alleging domestic violence- wife served ntq- condition 3.1 of tenancy provided that in the event of relationship break-down R would provide suitable accommodation for the leaving party and grant a tenancy to the remaining party, unless there was domestic violence in which case R not obliged to grant tenancy to remaining party- Possession action- A counterclaimed alleging R obliged to grant him tenancy under 3.1-J ordered trial of a preliminary issue: was A able to enforce the tenancy after termination by wife's ntq? J regarded issue as question of law- J recorded that there may be an issue whether A had operated a trigger for 3.1 by requesting a rent card- J determined that claim for tenancy had to be made before tenancy had expired – possession order made– appeal:

Held: Appeal allowed. By making the order the J had pre-empted the question of whether A's request for a rent card had acted as a trigger for 3.1 . The Court should not embark on a question of construction before the facts had been decided. The J had made a decision on facts which were either decided by him nor ordered to be assumed.

Daniel Gatty appeared for the Appellant.

Service

Kuenyehia & others v. International Hospitals Group Ltd. [2006] EWCA Civ 21, CA

Respondents (R) wanted to sue Appellants (A)- on last day for service R's solicitor 'phoned A's solicitor to see if they were instructed to accept- no response- R's solicitor faxed claim to number on A's solicitors previous correspondence- he had also previously corresponded with A's solicitors on that number- claim form also sent by courier- A asserted claim not properly served- Master ruled not properly served, but dispensed with service under CPR 6.9 High Court reconsidered- held that failure to obtain A's prior written consent to service by fax in accordance with CPR 6.2(1) was a minor departure- service dispensed with- appeal:

Held: Appeal allowed. Service by fax was precluded unless prior written consent had been obtained from the recipient. Sending documents by fax without such consent could not be "service" by one of the methods permitted in CPR 6.2. Furthermore, the failure to obtain the prior written permission could not be regarded as a minor departure from the rules. The time limits set out in the CPR are to be strictly observed. Absence of prejudice to the receiving party did not justify dispensing with service. The Court should not order relief where there was nothing exceptional about the facts. In this case, R's solicitors knew A's address and had failed to effect service by a permitted method. They had waited until the last day before attempting service by a method that was not permitted.

Bias

AWG Group Ltd & another v. Morrison & Another [2006] EWCA Civ 6, CA

Large and complex case involving allegations of misrepresentation and fraud- during pre-reading Judge discovers that one of R's witnesses is well known to him- A applies for J to recuse himself- R decide not to rely on witness's evidence, and propose to call someone else instead- J correctly applied test for apparent bias namely: would the circumstances lead a fair-minded and informed observer to conclude that there was

a real possibility that the tribunal was biased- J went on to balance the risk of apparent bias (minimal) against the administration of justice i.e having to find a new J at short notice- decided not to recuse himself- appeal: Held: Appeal allowed. If the finding was that the principle of judicial impartiality had been, or was likely to be, breached then the J was automatically disqualified from hearing the case. It was not a discretionary matter of case management. The inconvenience, cost and delay of the J recusing himself were therefore not relevant.

Appeals

Starglass Properties Ltd v. Dudgeon another (2006) Ch D (Kitchin J) 16/2/06

Respondent(R) applied to Land Registry to be registered as proprietors of land adjoining their own- adverse possession claimed- Applicant (A) was registered proprietor of that land- matter referred to adjudicator- parties to lodge evidence- A failed to do so- unless order made- A again failed to lodge evidence- A sought permission to appeal unless order- permission refused- A made further application for appeal- treated as a review hearing and dismissed- issue whether appeal from and adjudicator was a review or a rehearing.

Held: Land Registration Act 2002 s.107, the adjudicator was “a person” appointed by the Lord Chancellor. There for under CPR PD52 para. 9 such an appeal must be by way of rehearing where the decision had itself been reached without a hearing. A’s appeal had no real prospect of success, and there was no other compelling reason why the appeal should be heard.

Landlord and Tenant

Agricultural holding

Cook & another v. Horne [2006] PLSCS, Torquay County Court, HHJ Jeremy Griggs

Tenancy of a trout fishery- three separate sites- one site with ponds and a mill race held on 10 year lease granted in 1985- eggs hatched on another site, and small fish transferred to ponds for rearing- subsequently fish transferred to lakes where members of the public could fish for them, and remove any fish caught- lease expired, D served notice under s. 25 Landlord and Tenant Act 1954- C served counter notice, but asserted also that tenancy was an agricultural holding and therefore not governed by the '54 Act- C sought determination of preliminary issue- C argued they were engaged in livestock breeding and keeping within s.96 of the Agricultural Holdings Act 1986

Held: In favour of D. s.96 included within the definition of “agriculture” activities which would not otherwise ordinarily be considered as agriculture in the sense of cultivation of fields. Fish were not mentioned. Livestock breeding and keeping was not wide enough to include the keeping of fish. Further, the fish were not kept for the production of food. The fish were grown for the purpose of stocking the fishing lakes on the other sites. These provided fishing as a recreational activity. The fish caught could be eaten. This was a bonus, not the predominant purpose. While C was using the sites to generate an income, this did not make the business an agricultural one.

Land

Restrictive covenants

Turner & another v. Shephard & others [2006] EWCA Civ 8, CA

Building development in curtilage of house- Appellant neighbours object- land subject to restrictive covenant form 1952- A seek injunction to prevent building- R accepted building in breach- R sought rectification of the covenants at the Lands Tribunal (s.84(1)(aa) Law of Property Act 1925) on the basis that the covenants restricted the reasonable use of the land- application granted- Tribunal decided A entitled to compensation for nuisance while works being carried out- appeal:

Held: Whether the proposals would open up the possibility of further development which would undermine the protection afforded by the covenants was a material issue of fact, not law. This had been considered by the tribunal. The conclusion was not irrational. The purpose of s.84(1)(aa) was to facilitate the development and use of land in the public interest. The concept of reasonable user in s.84(1)(aa) referred to the long term use of the land, and not the period of transition while the works were carried out.

Case summaries by Arthur J. Moore