

Addendum to

## CASE LAW KALEIDOSCOPE

by

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Since the main piece was written:

### Landlord and Tenant

#### - Licence to assign

***Design Progression Ltd v Thurloe Properties Ltd*** 2004 EWHC 324 (Ch) **25.2.04**  
Peter Smith J

Failure to give a decision regarding consent to assign within a reasonable (or any) period because, if was found, the landlord hoped to negotiate a surrender of the lease of the under-rented premises, which had two years to run. Damages awarded to compensate the tenant for (1) the additional costs of fit out incurred in returning to occupy the premises (2) the additional rent paid during the period the premises were unused (3) costs of lost goodwill of business, and (4) loss of the £75,000 premium contracted for. Most interesting, however, was the additional award of £25,000 exemplary damages, as a “moderate but not excessive “ amount to punish the landlord for his conduct and strip him of any gain. However, this was an extreme case, of deliberate and calculated failure to give a consent.

### Land Registration

#### - Caution

***Kastner v Sherman*** 2004 EWHC 592 Ch **15.3.04** Lightman J

The Claimant had obtained from the Beth Din a Direction, which by common consent was the equivalent of a freezing order, against the owner of a house. He registered a caution to protect “the interest arising under the Direction”. The owner sold the house in breach of the direction. The purchasers’ solicitor negligently ignored the caution and the sale was completed all except for registration, the former owner decamping with the purchase monies. The purchasers nonetheless had constructive notice of the Direction.

However, the Claimant obtained nothing, because no proprietary interest, nor an interest in the nature of a charge on the property, is created by a freezing order.

From a property law point of view, it therefore appears that this is a dead end, but two other points on the general topic of enforcement can be mentioned.

(1) *Customs & Excise v Barclays Bank*, 2004 EWHC 122 Comm, which is going to the CA, may help shed light on whether the purchaser's solicitors could be fixed with a duty of care towards the claimant in this situation

(2) In very extreme cases where a freezing order has been or is likely to be flouted, the court may be prepared to appoint a receiver of the Defendant's property, under S37 of the Supreme Court Act, in aid of the freezing order, to enable property, including property taken abroad, to be got in and under the receiver's control.

## **Mortgages**

### **- Subrogation**

***Cheltenham & Gloucester Building Society v Appleyard*** 2004 EWCA 291 15.3.04

The C&G lent money to the Defendants to pay off two prior loans on their property. One was paid off, but the other was with BCCI and the delay and complications this caused prevented the C&G from being registered. The Defendants paid nothing, but resisted the C&G's claim to possession on every possible point, including arguments about whether they could claim to be subrogated to the security of the paid off loan.

The dispute in the case itself was "arid" (per Neuberger LJ) since on any basis the Defendants had to admit that the Claimant had a security which entitled it to possession. However, it is useful for containing a list of 12 principles relating to the difficult (because it is "flexible") doctrine of subrogation.

The ultimate principle appears (E&OE) to be that

if A lends or pays money to or for the benefit of B, and his money is used to repay a debt of B's (to C) which carried some form of real or personal security, then, unless A demonstrably had no intention of getting security himself, he will be subrogated to C's security up to the lower of C's security rights or A's intended security rights, and always limited so as not to afford A any priority over third parties which he would not otherwise have obtained.

### **And finally**

### **Easements**

**- Bakewell v Brandwood** 2004 UKHL 14 **1<sup>st</sup> April 2004 (!)**

The House of Lords, much to the relief of many middle class property owners, has overturned the CA in **Bakewell v Brandwood** 2003 1 WLR 429, and overruled **Hanning v Top Deck Travel** 1993, 68 P&CR 14 and **Massey v Boulden** (2003 All ER 1429) in the process.

**Lord Hope** merely expressed the view that it was a very fortunate thing that it had proved possible to arrive at a conclusion in this case that the adjacent owners were entitled to their right of way.

**Lord Scott** could not see why it should make any difference that the activity relied upon to found the easement was criminal instead of merely being tortious, certainly if it could have been rendered non-criminal by the grant of the land-owner which was the thing to be presumed under the doctrine of lost modern grant.

**Lord Walker** gave the most intellectually justifiable reason, namely that as the criminality of the act was dependent on the absence or presence of the consent of the land-owner, the statute could be argued not to be simply a statute passed in the public interest, in this respect.

**Lord Bingham** agreed with the above three and **Baroness Hale** agreed with everyone.

It is unsurprising that the House of Lords should seek out a means of reaching this conclusion, although it is ironic that they should now say that **Hanning** was wrongly decided when they themselves refused leave to appeal, on paper, in 1993.

However, one may question whether “a little bit of criminality does not matter” is a totally healthy approach to upholding the rule of law, understandable though it may be in modern liberal times.

None of the speeches grapples with the point that if, at any time, any of the relevant land-owners had been prosecuted for an offence under Section 193(4) they would undoubtedly have been guilty of it, since they could assert no consent or permission, they could prove no actual grant, and any attempt, there, to make out a presumed grant would, in turn require a regression, in terms of the necessary 20 years user, to a point where 20 years user which did not breach the criminal law could be proved – which is exactly the same result as the land-owner contended for.

The ramifications of this decision, when, for the last 10 years, land-owners, whether of commons or adjacent property, the Land Registry itself, and now Parliament (s 68 of CROW) have proceeded on the basis that **Hanning** represented the law, will be considerable. . Given that monies paid under a mistake of law are now potentially recoverable, the repercussions of this case will be reverberating all over the place.

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1<sup>st</sup> April 2004