#50 10/16/68

First Supplement to Memorandum 68-98

Subject: Study 50 - Leases

Attached is a copy of the latest letter received from the California Real Estate Association. (Exhibit I) Generally speaking, the letter reflects a much more favorable attitude towards the present recommendation than existed with regard to previous drafts. Nevertheless, CREA suggests that the Commission's Comments are often both inaccessible to lay persons, lawyers, and trial judges and disregarded by the lower courts. For these reasons, the Association would still generally favor specific incorporation of material in the statute rather than in Comment form. In this regard, the following portion of the opinion of the California Supreme Court in Van Arsdale v. Hottinger, 68 Adv. Cal. 249, 253-254 (1968), is noteworthy:

> Section 815.4 of the Government Code was adopted as proposed by the California Law Revision Commission without change. (See 4 Cal. Law Revision Com. Rep. 839.) The commission's comment to the section in its entirety states: "The California courts have held that public entities--and private persons, too--may at times be liable for the acts of their independent contractors. Snyder v. Southern Cal. Edison Co., 44 Cal.2d 793, 285 P.2d 912 (1955) (discussing general rule); Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Assn., 188 Cal.App.2d 850, 10 Cal.Rptr. 811 (1961). This section retains that liability. Under the terms of this section, though, a public entity cannot be held liable for an independent contractor's act if the entity would have been immune had the act been that of a public employee."
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> Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. . . . [Citations omitted.] This is particularly true where the statute proposed by the commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislator's votes were based in large measure upon the explanation of the commission proposing the bill.
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> The commission has cited Snyder v. Southern Cal. Edison Co., supra, 44 Cal.2d 793, as "discussing general rule," and we must look to the case as the point where we must

commence our analysis of the liability of a public entity for torts of an independent contractor.

It also should be noted that both West Publishing Company and California Deerings Codes print the Comments under the statute sections in the annotated codes so that they are readily available to anyone who examines the statute in the annotated codes.

The CREA's specific suggestions are as follows:

Section 1951

The CREA reiterated their request for inclusion of a definition of "reasonable expenses of re-letting." As indicated in the Minutes of the September meeting, this term no longer is used in the statute and the Commission felt that Section 1951.2 and the Comment thereto adequately cover the issue of what damages the lessor is entitled to. The staff suggests, therefore, that no further action be taken on this matter.

Section 1951.2

(1) The CREA suggests that the second sentence of subdivision (a) be redrafted as follows: "Upon such termination, the lessor has an immediate cause of action for damages and may recover from the lessee: . . . ." This additional language was suggested as an alternative by the staff in its memorandum for the September meeting. You will recall that the phrase was deleted by the Commission as unnecssary and confusing. It appears to merely state the obvious and its inclusion is not therefore recommended.

(2) The CREA indicated they are pleased with the solution evolved to deal with the discount rate in subdivision (b). They do not, however, comment on the staff's suggestion in Memorandum 68-98 that the discount rate be inalterably fixed at the federal reserve rate plus one percent.

(3) The Comment to paragraph (4) of subdivision (a) has been redrafted, but the substance of the Comment remains the same. The current version is found on the bottom of page 20 and the top of page 21. Because of the inclusion of other unrelated material in the Comment, this discussion has been moved from its earlier position which may account for the CREA's incorrect observation that the discussion was omitted entirely. Presumably, on the basis of this incorrect impression, the CREA strongly urges that the earlier language and a suggested addition to it be reincorporated in the Comment. This language was as follows:

> For example, it will usually be necessary for the lessor to take possession for a time to prepare the property for reletting and to secure a new tenant. The lessor is entitled to recover for the expenses incurred for this purpose that he would not have had if the lessee had performed his obligations under the lease. In addition, the lessor is entitled to recover his expenses in retaking possession of the property, making repairs that the lessee was obligated to make, refurbishing and preparing the property for reletting, and in reletting the property. Thus, the cost of moving partitions or of installing partitions or other modifications designed to meet the needs of the new tenant would be recoverable by the lessor from the defaulting lessee. However, expenditures by the lessor in remodeling the premises would not be recoverable to the extent that they constitute a capital improvement in the property. In some cases, a portion of expenditures in remodeling will be recoverable as refurbishing (such as moving partitions and repainting) but the remainder (such as improvements designed to modernize the property) would constitute a capital improvement the need for which was not caused by the tenant's breach and will not be recoverable by the lessor.

The staff feels that the recommendation as presently drafted deals adequately with the issue and that no change in required. (You will recall that representatives of lessors present at the last meeting objected to revising the Comment to read as set out above.)

(4) Memorandum 68-98 (page 4) points out that the second sentence of what is now subdivision (c) has been deleted and gives the reasons

for this deletion. This sentence provided in substance that the lessor was entitled to retain any profit obtained on reletting, subject first to an offset against damages recoverable under subdivision (a). CREA urges that the sentence be retained. The staff, of course, is opposed. The sentence is at best unnecessary. Subdivision (a) provides for automatic termination of the lease in the appropriate circumstances. Upon termination, the lessee no longer has an interest in the property and, therefore, on common law principles has no right to future rents. Since subdivision (a) provides specifically for an offset of future rents against recoverable damages, it is simply redundant to restate this in subdivision (c). Indeed, this redundancy invites an interpretation that it has some substantive content and therefore expresses some different meaning and could perhaps cause some erroneous results.

Section 1951.8

Although a copy of Memorandum 68-98 was forwarded to CREA, they appear to have failed to note the staff's recommended draft of Section 1951.8 contained in Exhibit I. Their letter states:

> It is our belief that the language added to this Section incorporating a reference to liquidated damages is an improvement. We believe further however, that some affirmative, positive statement should be incorporated in this Section to indicate that the retention of advance payments is permitted and is justified when it bears a reasonable relationship to such factors as consideration for the right of possession under the lease; or conversely, that the definition of advance payments exclude specifically a valid consideration for the right of possession or similar payments.

The staff's draft of Section 1951.8 does precisely what the CREA requests.

In summary, with the changes already made in this recommendation, together with those suggested in Memorandum 68-98, we will perhaps

receive the endorsement of the CREA and certainly should have no substantial opposition.

Respectfully submitted,

Jack Horton
Junior Counsel

CALIFORNIA REAL ESTATE ASSOCIATION
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October 14, 1968

Mr. John H. DeMoully
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Stanford, California 94305

Dear Mr. DeMoully:

The California Real Estate Association is very appreciative of the changes which have been effected in your study No. 50 on leases as reflected in the revised tentative recommendation of October 1. Particularly we are pleased with the inclusion of specific reference to liquidated damages in the proposed statute and for other revisions, some of which have been incorporated as a result of our prior suggestions.

While discussing liquidated damages, we would like to observe that the change does not accomplish our total objectives which we believe coincide with the interests of a vast number of both lessors and lessees to such contracts. Your observation in your Minutes for the September meeting to the effect that the Commission believed that a major overhaul of the law on this topic would be beyond the scope of your present study, leads us to suggest that the Commission initiate or that the legislator members of the Commission propose through appropriate channels, an independent study of liquidated damages by the Commission. We believe that this is of importance to the public and would be of a character susceptible to the approach used by your Commission in its work.

Before discussing the specifics of your revised recommendation, let me make one more general note. Apparently as a matter of policy, the Commission, to a material degree, excludes some detail from its statutory proposals and relies instead on the Commission comments

which thereafter are published in your report and are frequently summarized as an expression of legislative intent in the Journal of the Senate or Assembly following action on the bill.

This relatively new extrinsic aid in ascertaining legislative intent and attempting to guide or influence the interpretation of the courts is a constructive step. Nevertheless, we believe that the lower courts often totally (perhaps, aided by uninformed counsel) disregard this so-called published legislative intent because of lack of access to information or for other reasons. Certainly a lay person attempting to obtain some guidance from the statute itself would be totally uninformed on how to utilize this tool.

Obviously, in important cases before appellate tribunals, the court will consider your comments but it is the courts interpretation of that intent which becomes the final standard. Lessor and lessee operating in the practical relm cannot await detailed piece-meal higher court interpretation in many instances.

Thus we believe it preferable to incorporate matters in the statute where it would seem there could be reasonable anticipation of ambiguity and thus litigation. That is why at a number of points we re-emphasize our prior recommendation for specific incorporation of material in the statutes.

Our position, however, is somewhat ambivalent by virtue of the fact that on other occasions we will urge inclusion of added material in your comments. In these cases we would agree the matter should not be treated in the language of the Code itself, but believe that illustration or other guide lines toward interpretation should be incorporated in written form to demonstrate intent.

Proceeding then to specifics and relating to some degree, to our letter of September 11 to you which contained our original recommendation on this subject:

1. Section 1951---Definitions:

For the reasons stated above, we would like to reiterate our recommendation for inclusion of a definition of "reasonable expenses of re-letting".

2. Section 1951.2---Damages:

a. We appreciate the inclusion of the words "upon such termination," in the first paragraph of this Section as an indication that the lessor shall have the immediate right to instigate an action. On the other hand, we believe that this could be stated more strongly and prefer the language proposed as an alternate by the staff in your first supplement to Memorandum 68-74, at page 4.

b. We are pleased with the solution the Commission evolved to deal with the question of the rate of discounting advance payments as incorporated in subdivision (b) of this Section.

c. We are prepared to accept the Commission's decision with respect to mitigation as it might effect re-letting, except that we note that the comment contained in the recommendation of July 31 on page 17, commencing "for example, it will usually..." and expanded in the first supplement to Memorandum 68-74 at the bottom of page 9, has been omitted entirely from the recommendation of October 1. No reason for this omission is disclosed in the Minutes or otherwise, and we would strongly urge that this comment be re-incorporated in your report.

d. CREA had not previously commented on what has become subsection (c) of this Section. We note, however, that the second sentence of this subsection which was contained in the July 31 draft has been omitted. On this point, your Minutes for the September meeting, at the top of page 8 indicate an intent to incorporate new language which presumably would become a second sentence of this subsection. We strongly urge the insertion of this material again in your new recommendation. Its omission would be most unfortunate.

3. Section 1951.8---Advance Payments:

It is our belief that the language added to this Section incorporating a reference to liquidated damages is an improvement. We believe further however, that some affirmative, positive statement should be incorporated in this Section to indicate that the retention of advance payments is permitted and is justified when it bears a reasonable relationship to such factors as consideration for the right of possession under the lease; or conversely, that the definition of advance payments exclude specifically a valid consideration for the right of possession or similar payments.

On each of the other points raised in our communication of September 11, we are either satisfied or are prepared to accept the latest proposal of the Commission on these topics.

Your invitation to me to attend the meeting of the Commission on the evening of October 17, in the capacity of an observer, is appreciated. Unfortunately, I will be in Los Angeles attending a series of meetings which will prevent my attendance---and the individual who has served in a special committee on this topic on behalf of CREA from the San Francisco area will be in Los Angeles for the same occasion.

The consideration which you and the Commission have given in supplying material to us and in weighing the points which we have raised is much appreciated.

Sincerely,

Dugald Gillies

Dugald Gillies
Legislative Representative

DG/jw
cc: H. J. Pontius
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