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Review

Property @ction

Welcome to the Fourth Edition of the Quarterly Review prepared by Hammonds' Property@ction Team. In this issue we will look at the following:

(i) Supreme court sanctions public recreation on private golf courses;
(ii) A clean break;
(iii) Where does rent rank now in administration?;
(iv) Negotiating the slip hazard;
(v) The truth, the whole truth and nothing but the truth?;

We welcome all contributions to this review and if you would like to discuss this further please contact any of the editorial team.

Supreme court sanctions public recreation on private golf courses

The decision in brief

The Supreme Court has ruled in *R (on the application of Lewis) v Redcar and Cleveland Borough Council and Another*[1] that where land which formed part of a golf course was also used by local residents for informal recreation (principally dog walking), the use by the public was sufficient to allow the land to be registered as a Village Green under the provisions of the Commons Act 2006 (the "Act"), thus creating permanent recreational rights for the public including, to walk dogs, picnic, fly kites, and play ball games. The decision will appear absurd to many but coming from our highest court, is unlikely ever to be overturned.

Why is this decision important and what are its implications?

The decision marks a worrying change of approach to the way that questions of competing use of land are considered in applications under the Act. It is now the case that where members of the public have had access to golf courses there is a real risk that their use of the land could be relied upon to register that land as a Town or Village Green, even when their use would appear to be secondary to the use of the land by golfers.

Registration of land as a Town or Village Green under the provisions of the Act imposes an obligation upon the landowner to maintain the land for use as a Village Green, including maintaining suitable public indemnity insurance. As a result, in the case of registration of a golf course any use by golfers would have to defer to public recreation such that in practical terms it may be impossible for golf use to continue if it interferes with that public use. Land registered as a Village Green can never be developed or altered in any way that would reduce the amenity value of the land as a Village Green for the public.

In short, a substantial asset will be converted overnight into an ongoing liability. Even the threat of an application may blight land for years.

1 [2010] UKSC 11

The Decision in detail

The land in Lewis formerly included the tees, fairways and greens of the first and eighteenth holes and a small practice area at Cleveland Golf Club Links. For at least 80 years leading up to 2002 it had formed part of the golf course. It was also used by the local inhabitants for informal recreation including dog walking. The public use did not interfere with or interrupt play by the golfers and members of the public would generally wait until play had passed or until they were waved through by the golfers. The two activities therefore appeared to have co-existed during that period.

In June 2007, five local residents applied to register the land as a Village Green under the provisions of s15 of the Act. In order to succeed in their application, the residents would have to demonstrate that a significant number of people living within a distinct neighbourhood or locality had used the land “as of right” for the period of 20 years for lawful sports and pastimes. “As of right” in this context means not in the face of clear and express objection by the landowner, nor with the express permission of the landowner, nor in secret.

However, central to Lewis was the question of whether the public use of the land had “deferred” to the use by golfers, that is to say whether the public would as a matter of practice allow golf play to take priority over their own use, and vice versa. If use by the public could be said to have deferred to golf use then the public use should fail to be use “as of right” for the purposes of registering the land.

The application was dealt with by way of a Pubic Inquiry at which it was held that the overwhelming evidence was that informal recreational use of the land deferred to its extensive use as a golf course by the Cleveland Golf Club. As such, use of the land by local people was held not to be “as of right” until use of the golf club ceased in 2002. The application was therefore rejected.

The residents sought to judicially review the decision to reject the Application but failed on the basis that local residents’ deference to golfers had prevented their use being “as of right” prior to 2002. The residents were not deterred and took the matter to the Court of Appeal. The appeal was unanimously dismissed when again the decision was made that deference had prevented use being “as of right”.

The residents proceeded to take the question of “deference” to the Supreme Court. Here it was held that the mere fact that the public showed civility to the golfers by allowing golf use to take precedence was not sufficient to prevent that public use from being use “as of right”. As a result the appeal was allowed and the land was registered as a Village Green.

So, the fact that local residents defer in their use to those playing golf will not necessarily mean that an application to register land as a Village Green will fail.

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A clean break

Tom is an Associate at Watts Group's Manchester office. As a chartered building surveyor Tom regularly provides technical property and construction advice to solicitors on a range of dispute matters.

Property leases are a special form of contract, and whilst many clauses are somewhat standardised every so often there is one that is less regular. Break clauses are such variables, allowing landlord or tenant early termination of the contract. Often these break clauses bring in the lease as the equivalent of small print, break conditions, that may not have the effect the party exercising the break desires. Failure to discharge these conditions fully may render the break ineffective. The conditions vary from lease to lease and may be as simple as providing vacant possession, or as strict as complying with all the obligations of the lease.

It is essential to identify the conditions early to allow sufficient time for any notices to be served, work specifications drafted, tender periods and repair or reinstatement works to be undertaken to avoid the possibility of the lease continuing for the remainder of the contractual term. Given the complexity of the clauses it is worthwhile seeking specialist legal advice.

Compliance with repair and reinstatement liability is a common condition in break clauses, but how far does a tenant have to go to comply? Unfortunately there is no clear and definitive answer. There is however case law that may give guidance on how break clauses may be interpreted by the courts.

The case of *Fitzroy House Epworth Street (No. 1) Ltd v The Financial Times Ltd*[1] gives some guidance as to the extent of works required in order to comply where the operation of the break was conditional on the tenant having 'materially complied' with all its obligations in the lease. The tenant undertook £900,000 of work. The court held that the £20,000 of remaining work alleged by the landlord would not adversely affect the value of the property and would not prevent the landlord re-letting quickly. It held that the tenant had 'materially' complied with its obligations and permitted the break.

The Fitzroy case did however go further in establishing that whilst there is no obligation on the landlord to advise the tenant as to the requirements of the break, as this is the tenant's liability; nevertheless the landlord should behave reasonably.

Whilst the Fitzroy case provides the reassurance that it is possible in some circumstances 'materially' to comply with your obligations in a lease, the specific wording of the lease can and does override this. In the case of *Osborne Assets Ltd v Britannia Life Ltd*[2] the lease required absolute performance of the clauses in the lease. The redecoration clause in the lease required that the tenant should redecorate with 3 coats of paint. Whilst the tenant had redecorated, only 2 coats had been applied. The requirement for compliance with the condition imposed on the exercise of the break was held to be absolute, the break was held to be ineffective and the lease term continued.

It is not however all about what is written in the original agreement. *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd*[3], demonstrates that subsequent agreement can release the tenant from compliance with the original lease clauses, and care is required as to what is being agreed by default. In the L&G case a financial settlement was agreed in respect of the break clause despite the lease having no provision for this. When the tenant did not provide vacant possession on the break date to the landlord the courts held the financial agreement varied the lease to the extent that vacant possession was not required, providing compensation was paid.

So before considering a break operation, read the lease, re-read the lease, and ask someone else to read the lease (preferably your legal advisors), check and double check whether the break clause is conditional. When you are confident of the requirements then, and only then, start the process.

Tom Kibblewhite
Watts Group plc

1 [2006] 2 All ER 776
2 1997 Unreported
3 [2007] L&TR 229

Where does rent rank now in administration?

In the event of a tenant becoming insolvent, it is clearly important for a landlord to know where rent payable ranks in administration. A recent landmark decision handed down by the High Court strengthens the position of landlords by deciding that rent can now be more widely payable as an expense of the administrator.

Background

Simply, if rent is ranked as an expense of the administration[1] then it is almost always discharged in full as a mandatory expense of the administrator, rather than being placed with lower priority creditors.

Previous case law suggested the favoured approach taken by the Courts was to treat any rent payable on leasehold premises in administration on an individual basis to decide whether rent could be classed as an expense. The former leading case[2] held that when deciding where the landlord's claim should lie, the interests of the landlord in being denied his property and the interests of the creditors as a whole needed to be balanced. However, an important case decided in December 2009 has now modified this principle.

Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration)[3]

The facts

Goldacre (Offices) Limited ("Goldacre") was the landlord of Nortel Networks UK Limited ("Nortel"), who went into administration. Once in administration, Nortel scaled down its operations but remained in occupation of a small part of the leasehold premises owned by Goldacre, whilst the other parts were sublet to various tenants.

The High Court held that if a company in administration uses leasehold property for the benefit of its creditors, any rent that falls due during the period of use will rank as an expense of the administration as it is one of the necessary disbursements of the administrator[4]. The Court was not bound to follow any previous decision[5] as it was made under the pre-Enterprise Act administration regime.

When does rent become payable as an expense?

Rent only becomes payable as an expense if two criteria are fulfilled.

Firstly, the company in administration must be using the premises for the benefit of the creditors. There is no detailed guidance arising from cases involving administration but cases involving instances of liquidation hold that use will include entire occupation[6], partial occupation[7] and keeping assets in the premises to achieve a better sale price[8]. On the contrary, complete vacation of the property[9] and simply allowing the lease to subsist will not constitute use[10] by the administration.

Secondly the rent must fall due for payment when the company in administration is using the premises for the benefit of its creditors. If the rent does fall due during such a period, then the full amount will become due, possibly irrespective of the proportion of the property being used[11] or the length of the occupation.

Conclusion

It is clear that the decision in Goldacre can significantly improve the position of landlords who are presented with a tenant in administration. A prudent administrator will assume they will have to provide for the full amount of rent that falls due if the company uses the premises for the benefit of the creditors.

However, landlords must not be complacent as even if the rent is classed as an expense of the administration, there must be sufficient assets to discharge the liability. Furthermore, administrators are likely to be more cautious with leasehold properties and will ascertain the tenant's leasehold properties and liabilities more quickly in order to avoid unnecessary expenses. They may vacate properties as soon as possible if they anticipate that they will be unable to meet the rent liability, and the landlord will lose any entitlement to have the rent paid as an expense. As a result, landlords may now wish to liaise further with administrators than previously to agree reduced rents rather than lose all income or become involved in any dispute over rent.

1 *Such as any costs incurred by the administrator when performing their function in the administration of the company (rule 2.67(1)(a) of the Insolvency Rules 1986)*

2 *AIB Capital Markets plc & Another v Atlantic Computer Systems plc & Others [1990] EWCA Civ 20*

3 *[2009] EWHC 3389*

4 *Rule 2.67 of the Insolvency Rules 1986*

5 *See footnote 1*

6 *Re Oak Pits Colliery Company (1882) LR 21 Ch D 322*

7 *Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration) [2009] EWHC 3389*

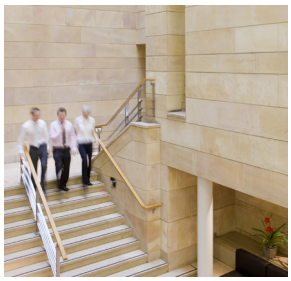
8 *Re Linda Marie Limited (in liquidation) (1988) 4 BCC 463*

9 *Re ABC Coupler & Engineering Co Ltd (No.3) [1970] 1 WLR 702*

10 *See footnote 6*

11 *See footnote 4*

Negotiating the slip hazard



The Jackson Report enthusiastically encourages mediation including for personal injury claims, but is it a life-saver or a banana-skin?

In what many call a statement of the “bleedin’ obvious”, Sir Rupert Jackson has concluded that mediation remains an ‘under-used facility’ which has a ‘vital role to play in reducing the costs of civil disputes’, particularly in personal injury and clinical negligence cases.

However, without a wider understanding of the process and its limitations, promotion of mediation will create huge expectation without equivalent delivery. Done right, parties in a mediation can expect a 75% or more prospect of a low cost settlement from the mediation process. But get it wrong and entrenched positions, duplication of costs and additional delay will ensure that nobody is a winner.

So then, what key considerations should ensure success?

1. When to mediate

Mediating without proper gathering and exchange of information is often futile: leaving it too near to trial may make costs an insurmountable hurdle. The balance is not easy but litigators usually have a feel for the time at which they have enough information to provide unconditional advice on the merits of mediation. Issue of proceedings should not be seen as a necessary precursor.

2. Choosing the mediator

Where possible consider only those with recognised accreditation. The leading training organisations are CEDR (Centre for Effective Dispute Resolution) and ADR Group, but there are also other, smaller reputable institutions.

Try to select a mediator with an established track record. Approach service providers for their recommendations, but be wary of providers who suggest only their own mediators, as these are not necessarily the best fit for your mediation. Associations such as the Association of Northern Mediators have a good reputation for neutrality.

Both Chambers and Legal 500 directories include mediator recommendations for established mediators, but do tend to exclude younger mediators. Mediator directories like disputesloop.com focus on independent feedback provided for its subscribers.

Finally, talk to the mediator. Even a brief telephone conversation will often give more than a clue as to whether a particular mediator will understand the issues and, equally importantly, gain the trust of the parties.

3. Specialist or generalist?

It is important to identify at an early stage whether the case throws up real questions of law which require a legally trained mediator, or whether relatively uncontroversial propositions of law form the backcloth to a dispute of evidence and fact. In many cases some specialist knowledge can save a good deal of time prior to and at the start of a mediation, but that benefit is lost if the specialist allows the process to become bogged down in debate of finer points of law which will only be resolved at trial, if at all.

4. Costs of mediation

Costs of mediation are usually very modest in comparison to trial costs, but if the mediation is unsuccessful there is inevitably some additional expense. Often the addition is less than first appears because even an unsuccessful mediation regularly facilitates valuable client conference and preparation time.The focus should still be upon smart mediation – mediating early but with adequate information, preparing properly and giving it 100 per cent.

A good mediator will spend time in advance encouraging parties to seize the opportunity, even when mediation was first countenanced only to appease a pro-active judge or secure some protection against an adverse costs order. Mediation costs are usually borne equally but the parties are free to make another agreement. Funding from insurers may be an option, particularly in cases where the dispute relates solely to quantum.

5. Telephone mediations

The Jackson Report encourages telephone mediation, but this should be avoided for all but the simplest disputes. The importance to the mediator of body language and other usually unspoken messages that can only be received in a face-to-face situation cannot be overstated.

6. Legal Representatives

Many litigation solicitors are mediation aware, and increasingly trained as mediation advocates or even mediators. There are obvious benefits to having a mediation-trained lawyer on board; they may be able to negotiate a settlement without the assistance of a mediator, and, where mediation is required, those solicitors tend to be much more constructive and successful at mediation. Even if their clients do most of the talking, the all-important binding and comprehensive agreement which follows is much more difficult to achieve without representation.

Of course, mediation is not the only form of alternative dispute resolution. Early and judicial neutral evaluation continues to be piloted, and arbitration should not be dismissed as "litigation with coffee". However, when drawing the route to successful dispute resolution in most cases mediation will be the sharpest pencil in the box!

The truth, the whole truth and nothing but the truth?

In May 2008 the Property Litigation Association produced a draft pre-action protocol for the conduct of dilapidation claims. Whilst it has not been embodied in the court rules, it forms part of the RICS Guidance Note on the subject and is considered to be best practice.

Paragraph 3.6 of the Dilapidations Protocol provides that a surveyor should include an endorsement on his schedule that:

"…in the opinion of the surveyor, all the works set out in the schedule are reasonably required… that full account has been taken of the landlord's intentions for the property…. and that the costs, if any, quoted for such works are reasonable".

Paragraph 3.6 has caused concern amongst surveyors that this endorsement may leave them open to claims of fraudulent or dishonest behaviour in the circumstances where such endorsements accompany schedules of dilapidations which contain exaggerated or indeed under-estimations of any required works or repairs which are subsequently found to be untrue.

In examining the potential risk to surveyors, it is important to distinguish the two different roles a surveyor may have and any existing rules or other constraints on their professional conduct.

One of the roles of a surveyor is as a "negotiator", whereby he may be engaged by a landlord or tenant in the preparation of a schedule of dilapidations intended to be used as a bargaining resource by either party. In the preparation of such schedules, surveyors should abide by the rules contained in the latest "RICS Rules of Conduct for Members" (published 2007, updated January 2010):

"Professional behaviour

3. Members shall at all times act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with their professional obligations" and

"Competence

4. Members shall carry out their professional work with due skill, care and diligence and with proper regards for the technical standards expected of them."

The other role a surveyor may have is as an expert witness in disputes which have become litigious. In such cases, surveyors (and indeed all expert witnesses) are bound by the rules contained in Part 35 of the Civil Procedure Rules ("CPR"). CPR 35.3 states that an expert witness has an overriding duty to the court:

"35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid"

Surveyors are also more particularly instructed by the guidance produced by RICS in the "Expert Witness Practice Statement and Guidance Note".

As well as those rules already mentioned it is important to remember that surveyors who make exaggerations or under-estimations in a dilapidations dispute could also fall foul of parts of the Theft Act 1968, or the Fraud Act 2006 (for example, s.2 Fraud by false representation).

Surveyors are under a duty to their client to provide professional advice, and must adhere to the standards required by their Rules of Conduct. As an expert witness, a surveyor must not mislead the court. It is important for a surveyor to consider carefully which of the roles he is at fulfilling any point in time, and which set or sets of guidelines apply.

Whilst it is clear that any exaggeration or under-estimation of works and repairs required in a schedule of dilapidations which is deliberately dishonest would be in breach of paragraph 3.6, this would also be in breach of the other regulations and rules which apply. Surveyors are subject to many rules and guidance notes, but it would appear that paragraph 3.6 of the Protocol does not create an additional burden of "truth" on the surveyor acting in his capacity as a either a negotiator or an expert witness.

Surveyors must also wait to see what ramifications are in store following the Jackson Report[1] (published January 2010). Jackson LJ has made several recommendations in relation to pre-litigation protocols, and the roles of expert witnesses. It is clear that the full implications of paragraph 3.6 are far from set in stone.

1 Lord Justice Jackson's Review of Civil Litigation Costs: Final Report

Latin Quarter

Each quarter we shall be describing a Latin phrase commonly used in property law which we hope you find useful.

Nec vi, nec clam, nec precario

This literally means "neither by force, nor in secret, nor by permission".

Easements are rights for the benefit of one landowner over the land of an adjoining landowner. They can be acquired by a long period – typically 20 years – of use, provided that use is "nec vi, nec clam, nec precario". For easement to be acquired by prescription, the landowner affected must know and (by his actions) consent to the easement. Use of force or violence evidences lack of consent, use of secrecy may prevent knowledge, and the existence of permission (such as a licence) would show that the landowner considered the right to be something other than an easement.

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