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Review

Property@ction

Welcome to the Ninth Edition of the Quarterly Review from Squire Sanders Hammonds' Property@ction Team. In this issue we will look at the following:

(i) (Some) Relief for Residential Valuers – Court of Appeal overturns Scullion decision

(ii) Unearthing Restrictive Covenants: A Consideration for Developers Carrying Out Construction Work

(iii) The New Valuation Tribunal Regime - One Year On

(iv) Misrepresentation: How far can a seller rely on the Standard Conditions of Sale to exclude liability?

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

(Some) Relief for Residential Valuers – Court of Appeal overturns Scullion decision

In what will come as a welcome relief to residential surveyors (and their insurers), the Court of Appeal has now overturned the controversial decision of the High Court in *Scullion v Bank of Scotland plc (t/a Colleys)*[1] in which the High Court held that a residential surveyor owed a duty of care to a buy-to-let investor is respect of future rental yield.

Background

Mr Scullion, a self employed builder, decided to purchase a new build flat in Cobham, Surrey in 2002 and enter the buy-to-let market. As is usual, the mortgage lender commissioned a valuation survey, which was undertaken by Colleys. The flat was valued on an open-market basis at £353,000 and assessed a rental income of £2,000 per calendar month. Mr Scullion was only able to let the flat out at around half this figure and brought a claim against Colleys for negligence.

The High Court found that Mr Scullion had suffered no loss on the capital value of the flat (mainly due to incentives that were offered by the vendor at the time of purchase). More worryingly for surveyors, the High Court held that Colleys owed Mr Scullion a duty of care despite the fact that he was a buy-to-let investor purchasing a property using finance from a specialist buy-to-let mortgage provider.

The High Court's reasoning was that Colleys "*knew or ought to have known that there was a very high probability*" that Mr Scullion would have relied on the valuation report in his decision making process when deciding whether or not to proceed with the transaction. In fact, on the facts of the case, the report was not received until after exchange of contracts, which had been undertaken by his solicitors without his approval.

1 [2010] EWHC 2253 (Ch)

The Court of Appeal's Decision[2]

The Court of Appeal followed the leading case of *Smith v Bush*[3] which held that although a duty of care was owed by the valuer to a purchaser of low-end residential property in circumstances where a valuation was produced for the lender, the duty did not extend to those transactions which were "essentially commercial in nature". The Court of Appeal held that Mr Scullion's transaction was one such transaction and that no duty of care existed, allowing the appeal and dismissing Mr Scullion's claim.

Comment

Although residential surveyors may now breathe a sigh of relief (particularly given the impact that turbulence in the housing market has had on buy-to-let investors who are looking to recover significant losses), the Court of Appeal did not entirely rule out the possibility that a claim could succeed on this basis in the future.

The distinction between a straightforward residential purchase and a more commercial buy-to-let purchase remains. However, the Court of Appeal made three assumptions which, although they will apply in most cases, if rebutted on the facts of a particular case, would not stand as a barrier to a claim against a valuer succeeding:

(a) Buy-to-let investors can afford a second valuation of their own and are more commercially minded.

(b) Rental assessment is not commented on or researched in much detail by the surveyor; this should be a matter of specialist advice for the buy-to-let investor.

(c) Rental assessment is not as important to the lender as the capital value, as it is this which will be used to repay the loan should the borrower default.

Therefore there are some (albeit limited) circumstances in which a claim against a valuer by a buy-to-let investor could still succeed on the basis of rental yields and residential surveyors should continue to exercise caution when advising lenders in relation to buy-to-let property.

It is also useful to note that the disclaimer in the mortgage valuation report warning the borrower not to rely on the report and to seek his own independent advice was not sufficient to defeat the claim but was determinative on whether or not it was reasonable for Mr Scullion to rely on the valuation.

Whilst there remains the possibility of an appeal, this looks very unlikely. The decision has been broadly welcomed, with the RICS commenting that the decision provides "*welcome relief to valuers facing a barrage of claims from lenders*." Lord Neuberger, who gave the leading judgment in the case, was less excited about the judgment and clearly felt sympathy for Mr Scullion, suggesting that this decision may not be the end of the new wave of valuer negligence claims coming in the wake of the financial crisis.

Unearthing Restrictive Covenants: A Consideration for Developers Carrying Out Construction Work

In *Perkins*[4] the Lands Tribunal refused to modify a restrictive covenant to allow a developer to build a new house on his land. The refusal was based on the disturbance likely to be caused to the neighbourhood during the construction works. The Court of Appeal had recently brought clarity to the issue of construction disturbance in *Shephard v Turner*[6], and *Perkins* follows its lead.

Restrictive covenants are burdens on the land of the person giving the covenant (the covenantor), enforceable against subsequent owners by the person receiving the covenant (the covenantee). In *Perkins*, the restrictive covenant was in the following terms:

> "*not more than one dwelling house and garage shall be built on the land hereby transferred*".

2 [2011] EWCA CIV 693
3 [1990] 1 AC 831
4 *In the Matter of an Application under s.84 of the Law of Property Act 1925 by Alan Perkins and Pauline Perkins* [2011] UKUT 219 (LC)
5 [2006] EWCA Civ 8

The applicant, the covenantor, wanted to build a house on part of his land burdened by the restrictive covenant and applied to the Lands Tribunal to modify the covenant accordingly. The Lands Tribunal, now the Upper Tribunal Lands Chamber, is a statutory body with power to modify or discharge covenants under s.84 of the Law of Property Act 1925 (the "Act").

Section 84 of the Act allows for modification of restrictive covenants if the Lands Tribunal is satisfied certain grounds have been met. In particular, s.84 (aa) of the Act balances the interest of the applicant, whose proposed use of the land is impeded by the restrictive covenant, against the interests of those opposing the modification, the objectors. In *Perkins*, the objectors were numerous, as were their arguments.

The impact during the construction period was a concern "expressed by the majority of the objectors"[6]. In *Shephard v Turner*, the Court of Appeal had held that consideration of an application under s.84 of the Act must take into account the policy underlying the section. Under s.84 (aa) this policy is one of development. The Court of Appeal said:

> "*the primary consideration is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short term disturbance which is inherent in any ordinary construction project*".[7]

In *Perkins*, the ultimate use of the land would be the accommodation of an extra property. The Lands Tribunal in *Re Kershaw's Application*[8] had applied this policy approach. In that case it was held that a covenant restricting use of an area of land to "open space use only", could be modified to allow for the construction of two bungalows. In considering the construction works required to complete that project, the Lands Tribunal found that although the work would prove to be a "considerable disadvantage" for "say about a year", the matter should be examined in a broader context and in that regard the construction works would be a "*short term albeit intensive interference…. to the overall enjoyment*"[9] of the objector's properties.

Although *Re Kershaw* and *Perkins* both consider development, the Lands Tribunal has to view each case on its specific facts. This approach was confirmed by the Court of Appeal in *Shephard v Turner* where Lord Justice Carnworth identified that there may, "be something in the form of the particular covenant, or in the facts of the particular case, which justified giving special weight"[10] to the issue of construction disturbance.

The first consideration, the form of the restrictive covenant, did not help the objectors in *Perkins*. Lord Justice Carnworth had in mind those restrictive covenants where the wording had been specifically drafted to resist construction works on a piece of land. For example, in the Lands Tribunal decision of *Re Tarhale Ltd's Application*[11], the covenant was drafted to restrict the movements of construction traffic along a driveway to a development site. When the applicants attempted to modify the restrictive covenant to allow for construction works at the end of the driveway, the Lands Tribunal found that modification would remove the "*practical benefit of substantial value*" from the objectors, namely their ability to use the driveway to their houses free of construction traffic.

However, the fact specific consideration did assist the objectors in *Perkins*. It was submitted by the objectors that the roads were narrow and that parking in the immediate area was already a problem. The Lands Tribunal identified that, "*the main problem. is just how narrow the road is*"[12].

The development site was situated around a square, two sides of which delivery lorries would have to negotiate, with "*the potential for damage to be occasioned to parked cars, verges and planting on the square*"[13]. Following *Shephard v Turner*, the Tribunal decided that "the facts of this case are exceptional in terms of potential disturbance, and do justify giving special weight to this factor"[14].

This decision further highlights the importance of scrutinising restrictive covenants over development land. In many of the Lands Tribunal's decisions, including *Perkins*, the applicants have already gone through the expense of obtaining planning permission only to be defeated by the restrictive covenant. The Lands Tribunal has consistently considered each case on its specific facts and supports the view that "*protection from intolerable nuisances during a construction period can be a substantial advantage*"[15] to the objectors.

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6 (para 69)
7 See n. 2 at para. 58
8 (1976) 31 P. & C.R. 187
9 See n. 5 at p. 189
10 See n. 2 at para. 58
11 (1990) 60 P. & C.R. 368
12 See n. 1 at para. 70
13 See n. 9
14 See n. 1 at para. 71
15 *Restricitve Covenants Affecting Freehold Land* (1999) Preston & Newsom at p. 255

The New Valuation Tribunal Regime - One Year On

Last year I wrote an article outlining the changes to the Valuation Tribunal (VT) following the creation of the VT England, and the changes arising from the VT for England (Council Tax and Rating Appeals Regulations 2009) (the Regulations). We are now able to consider the effect, intended or otherwise, of the changes and the new VT England procedures.

As a response to the VT Procedural Rules, the Valuation Office (VO) has taken the stance that it is for the appellant to prove its case. Although in principle this is fine, the attitude taken is in contravention of the RICS Practice Statements and is confrontational rather than allowing for an open-minded discussion. As part of this revised stance, the VO no longer provides rental evidence prior to, or in many cases, during the discussion period.

Following the introduction of the VT Practice Statements, the stages of an appeal are now:-

a) A proposal is submitted to the VO and acknowledged.

b) After three months, the VT is notified that the proposal has been received but not settled creating an appeal. At this stage the VT will not be given details of the grounds of the proposal. In practice the proposal has normally been sent to the VT before the VO is willing to discuss it.

c) The VO allocates the proposal to a programme with a Start and Target Date for discussions.

d) After expiry of the Target Date, the VT will set a hearing date (normally giving ten weeks notice), and setting out the Standard Directions.

e) Seven weeks before the hearing, the VO may serve a notice of rental evidence (Reg 17 Notice).

f) Four weeks before the hearing, the appellant must submit a written Statement of Case.

g) Two weeks before the hearing the VO may submit a Statement of Case.

Failure to submit a Statement of Case by the ratepayer will lead to the appeal being struck out. There appears to be no real penalty for the VO failing to comply but it may be barred from taking part in the hearing and may have some, or all, of its evidence disallowed. At no point are the parties required to agree facts.

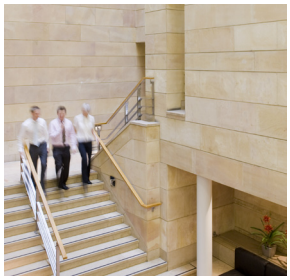
The current timetable allows the VO to withhold information and evidence until after the discussion period and to see the ratepayer's Statement of Case before preparing its own. Given the fact that the VO holds most of the evidence, having the power to demand it from the occupiers and penalise non-compliance, this places the VO at a significant advantage.

It is worth noting that the Practice Statements are sanctioned by the 2009 Regulations, but the timetable set by the VT is rather different to the timetable in the Regulations. For example, in accordance with the Regulations, the Reg 17 Notice need not be served until two weeks before the Hearing. It will be interesting to see whether that minimum period takes precedence over the Practice Statement's seven weeks. If so, this will further reduce the ability of ratepayers to properly argue their case if the VO does not provide its rental evidence until after the ratepayer has been required to submit a Statement of Case.

In effect, the ratepayer's agents have three weeks to verify and analyse evidence before producing a Statement of Case for the VT, and do not have the opportunity to discuss the VO's evidence prior to the hearing. The Reg 17 Notice only provides the bare facts of the source of the evidence, the rent and Rateable Value, it does not show how the evidence has been analysed which is crucial when comparing with other properties. The VO's analysis may not be fully revealed until the day of the hearing. The analysis and application of evidence for 2010 appeals is challenging due to the collapse of the property market in 2008 which was exacerbated by the impact of the Empty Property Rates from 1st April 2008 (i.e. the Valuation Date).

As a result of the changes, few appeals are being settled before the Target Date and are therefore being listed for hearing. Ratepayer's agents are becoming bogged down writing Statements of Case as is the VO. We have had VO caseworkers claiming that they cannot deal with appeals during their programmed discussion period because they are too busy writing Statements of Case, for appeals which are listed for hearing.

Looking to the future, the VT will be absorbed into the lower tier Tribunals system raising the spectre of costs. The majority of ratepayers are already priced out of appeal beyond VT. Are we now heading into a system where almost no ratepayer will be brave enough to appeal due to the threat of costs?



In my opinion, the system is excessively biased in favour of the VO, but could be fixed easily. The VO should be required to reveal all rental evidence (whether it helps them or not) relevant to an appeal at the outset. Since this is a property tax then transparency and Freedom of Information principles should apply. If this simple requirement is put in place then I believe that most appeals will be settled by agreement before the Target Date. The parties should also be required to agree facts prior to the submission of a Statement of Case.

A more radical solution would be that the ratepayer first makes a proposal to the VO and if, after 9 months the proposal cannot be agreed, the ratepayer or VO can submit the proposal as an appeal to the VT. A long stop date of 18 months would allow a longer discussion period for complex cases but would prevent the ratepayer having an open ended appeal period. This would reduce the number of appeals listed for hearing and also reduce the paperwork and cost burden for all parties.

The Regulations have allowed a more formalised system for appeals to be set in place. In practice the system is not working. In part this is due to the VO's changed procedures, but is also the product of a formal system, relevant to discreet litigation, being applied to a bulk process. The system also restricts the access of unrepresented ratepayers to an informal hearing which the VT traditionally provided.

Colin Hunter

Director

Storeys SSP

Colin Hunter MRICS IRRV is a Director of storeys:ssp based in their Leeds office and has more than 25 years experience of rating appeals. He enjoys the challenge of the unusual so that his experience incorporates caves, a gunpowder mill, churches converted to leisure attractions, Spinnaker Tower, docks, and a wide rate of leisure properties from Penzance to the Scottish Borders, as well as the usual run of retail, office, industrial and warehouse properties.

Misrepresentation: How far can a seller rely on the Standard Conditions of Sale to exclude liability?

It is common practice for a seller of property to attempt to limit his liability for misrepresentation as much as possible. Unfortunately for the seller, his ability to do so is firmly restricted by Section 3 of the Misrepresentation Act 1967, which states that any contract term that attempts to exclude or restrict liability for, and/or remedies available in the case of, misrepresentation, is "of no effect" unless it can be shown that the term is "fair and reasonable" in the circumstances.

Condition 7.1.3 of the Standard Conditions of Sale (4th Edition) attempts to provide a standard limitation of the seller's liability for misrepresentation. In contracts where this clause is incorporated, liability is limited to situations where there has been recklessness or fraud on the seller's part, or where there is a substantial difference in the quantity, quality or tenure of the property from what the buyer has been led to believe.

The clause has been in use for many years, and has been adapted on numerous occasions in response to judicial criticism. It could be assumed, therefore, that the clause is now completely "fair and reasonable". However, the recent case of *Cleaver & Others v. Schyde Investments Ltd*[16] casts doubt on its reasonableness in every circumstance.

[16] [2011] EWCA Civ 929

Background to the case

Cleaver agreed to sell a plot of land to Schyde, on the understanding that Schyde wanted to develop the property for residential use. As part of the pre-contract enquiries, Cleaver told Schyde's solicitors that there were no planning applications, letters or notices outstanding against the property.

In the meantime, another potential purchaser applied for permission to build a medical centre plus four flats on the site. Cleaver was notified of the application and passed the information on to its solicitors, but the answers to Schyde's enquiries were not updated and the sale proceeded to exchange of contracts (which incorporated, amongst other things, Condition 7.1.3) without Schyde being informed of the planning application.

When Schyde became aware of the planning application it gave notice to rescind the contract on the basis that Cleaver had innocently misrepresented the position by failing to update their responses to Schyde's enquiries. Cleaver resisted, relying on Clause 7.1.3 for protection. At first instance, the judge found in favour of Schyde, saying that clause 7.1.3 was not a "fair or reasonable" contract term in these circumstances, and was therefore "of no effect" according to the Misrepresentation Act 1967.

Cleaver appealed on the grounds that both parties were legally represented and had agreed to use the standard terms, that the parties had themselves varied other standard terms to suit the agreement and had by implication agreed that Clause 7.1.3 was suitable for the agreement, and that therefore it was "fair and reasonable" to rely on Clause 7.1.3. Cleaver's argument also encompassed the fact that the clause had been in use for a long time and had been endorsed by the Law Society.

On appeal it was decided that, although it would require some "exceptional feature" to persuade the court that a standard term of such long standing and common use was unfair in the circumstances, in this case the judge at first instance was entitled to conclude that Cleaver had not shown the clause to be reasonable because:

- had Schyde known of the planning application prior to entering into the contract, it would not have proceeded with the purchase;
- Cleaver knew of the planning application at the time of exchange, and that it would be material to Schyde's plans;
- Cleaver had expressly promised to update their answers to enquiries if they became aware of any material facts that would alter those answers, and they had not done so.

The Court of Appeal dismissed Cleaver's appeal and permitted Schyde to rescind the contract.

Comment

It is clear that there was some reluctance in the Court of Appeal in agreeing with the decision of the first instance judge. Lord Justice Etherington, giving the leading judgment, was "far from certain that I would reach the same conclusion", while Lord Justice Longmore added that the clause "is, in general, a reasonable clause". However, this case demonstrates that the reasonableness of Standard Condition 7.1.3 is not always beyond question, and that sellers will need to be on their guard and ensure that information given to the buyer remains up to date if they wish to rely on the clause to avoid liability for innocent misrepresentation.

Latin Quarter

Bona vacantia literally means "ownerless goods"

It is used to describe assets (including land and buildings as well as all other items) of dissolved companies, unincorporated associations and deceased persons which have failed to be distributed and some failed trust property. Bona vacantia in England and Wales vests in the Crown. In a property context it is most commonly encountered where the corporate proprietor of a registered title to land has been dissolved, but the title remains registered in the name of the dissolved company. There is even a website: www.bonavacantia.gov.uk.

Rent reviews – Does delay mean a landlord will be out of time?

Rent review clauses are a common feature in leases. They provide for the rent payable by the tenant to be revised in accordance with principles set out within the lease and often allow landlords to ensure that the rent level can react to inflation and to the market.

Rent review clauses sometimes set a deadline for the landlord to instigate a review such that if the landlord misses this then the right to review the rent is lost. But what happens where a lease does not impose such a time limit and the landlord delays in seeking a review? This was the question at the centre of the recent case of *Bello v Ideal View*[17].

Background

In *Bello v Ideal View,* the High Court ruled on appeal that in the circumstances of this case a delay of 13 years would not of itself be sufficient to prevent a landlord from seeking to instigate a rent review. The Court relied upon the decision of the Court of Appeal in *Ameherst v James Walker Goldsmith and Silksmith Limited*[18] in reaching this conclusion. The position may be different where the landlord has said or done something that could be construed as a representation that they will not seek to review the rent.

The court also confirmed that where the tenant had been given an opportunity to raise complaints about the landlord's delay at an earlier arbitration on the rent (which took place in 2007) but failed to do so, then it is not open to the tenant to raise those issues in court to attack the landlord's position. The judge is bound by the decision of the arbitrator.

The facts

Mr Bello bought the remainder of a 50-year lease of a property at auction in 2005, at which point the lease had approximately 14 years left to run. The initial rent was £60 per annum and this had not been reviewed, despite the lease containing a rent review clause under which the rent could be reviewed after the expiry of the first 25 years of the term, that is to say after 24 March 1994.

The terms of sale excluded the seller's liability for any rent arrears over £60 per annum. Whilst this might be expected to arouse suspicion as to the possible existence of an outstanding rent review, Mr Bello raised no enquiries and purchased the leasehold interest.

In 2006 Ideal View bought the freehold interest in the property. They then tried to open discussions with Mr Bello regarding the review of the rent but Mr Bello did not respond. As a result Ideal View invoked an arbitration procedure under the lease to review the rent. Mr Bello did not take an active part in the arbitration proceedings. On 29 September 2007, the arbitrator fixed the reviewed rent at £1,700 per annum.

Ideal View wrote to Mr Bello informing him of the arbitrator's determination and requested that he pay the arrears of reviewed rent (i.e. the difference between the £1,700 as set by the arbitrator and the original £60 per annum under the lease, backdated to 24 March 1994, being the end of the initial 25 year period during which the rent was fixed at £60 per annum).

Mr Bello did not reply and so proceedings for forfeiture were commenced in the County Court. Mr Bello defended but an order for forfeiture was made. Mr Bello appealed to the High Court.

The appeal

Mr Bello argued that the delay by Ideal View in exercising the rent review clause meant that Ideal View was time-barred under section 19 Limitation Act 1980. The High Court agreed with the decision of the County Court that Mr Bello's complaints about delay on the landlord's part could and should have been put to the arbitrator, but were not. The High Court confirmed that it was bound by the decision of the arbitrator and that, as such, the appeal should be dismissed.

17 [2009] EWHC 2808 (QB)
18 [1983] 1 Ch 305

Notwithstanding the above, the High Court went on to look at the question of whether the delay of 13 years could, in the absence of the arbitration decision, prevent the landlord from reviewing the rent. It concluded that the mere fact of delay alone would not be sufficient for Mr Bello to succeed (*Ameherst v James Walker Goldsmith and Silksmith Limited* was applied). If Mr Bello was able to point to other factors, such as a representation on the landlord's part that it would not instigate the rent review, then the position may be different.

The Court also concluded that there was nothing in the rent review clause that said that the review had to take place within any particular time and that the first instance judge was right that there was nothing in the lease, either expressly or by implication, that made time of the essence.

This case should serve as a warning to anyone purchasing a leasehold interest where there is uncertainty as to whether historic rent reviews have been implemented. Enquiries should be made and in the event of any doubt a purchaser should consider seeking an indemnity from the vendor in respect of the risk of rent reviews relating to the period prior to the sale.

FURTHER INFORMATION

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