Spotlight on Development

September 2016

Editorial

Welcome to the September edition of our newsletter on all matters affecting the property development industry.

It is almost three months since the historic referendum on Britain's membership of the European Union. Since then, to paraphrase Mark Twain, reports of the demise of the U.K.'s property market seem to be greatly exaggerated. In the industry generally, market activity has continued, if not unabated, at least healthily. The fall in the value of the pound immediately following the referendum result provided sufficient motivation for foreign purchasers to buy more properties in London and the South East. Significant housing and quasi-public sector projects are forging ahead. U.K. institutional investors continue to purchase property in the same way.

However, the property development sector overall has in the same period (and to borrow from another American author of the nineteenth century) carried out a passable imitation of Rip Van Winkle. How long will this continue we wonder? Until Article 50 is triggered, when the future of the City is more clearly understood or some other point in the future? Rip Van Winkle slept for more than twenty years. We all hope the current hiatus does not last that long.

On a more prosaic note, we have articles in this edition on easements, works by a landlord causing disturbance to his tenant, nuisance in the context of noise and a case which is ostensibly about liability for defective products, but has a corporate knowledge message for employers.

Signs can be enough to prevent an easement

"Most people do not seek confrontation… Most people do not have the means to bring legal proceedings."

And nor should they have to, states the very sensible judgment in *Winterburn v Bennett*, a recently heard case concerning rights to use a private car park.

Mr and Mrs Bennett owned a former club building and car park in West Yorkshire. The car park was, at all times until 2007, bedecked with clearly visible signs stating that it was private and for club patrons only. Mr and Mrs Winterburn owned a neighbouring fish and chip shop whose suppliers and customers regularly parked in the club car park, ignoring the signs. When in 2012 the Bennetts' tenant obstructed the car park entrance, the Winterburns objected on the basis that they had accrued rights to use the car park by prescription due to their long use of the land.

To establish an easement by prescription, it must have been exercised for at least 20

uninterrupted years "as of right". This means it must have been exercised without force, without secrecy and without permission. There was no doubt in this case that the Bennetts were aware of the Winterburns' use of the car park and had not granted permission. The main issue, therefore, was whether the use was "without force".

The judgment makes clear that the concept of "without force" is much wider than the wording suggests. The owner does not necessarily have to take physical steps or legal proceedings to prevent the wrongful use of land. All that is required is for the use to have been contentious or allowed only under protest. The fact that there were clearly visible signs in the car park which made the Bennetts' position transparent meant that the Winterburns' use was obviously contentious. Because of this, the use was not "without force", and could not therefore be "as of right".

This will be a welcome decision for developers: although there are several methods of preventing an easement accruing by prescription, clear and visible signs may in many cases be enough.

Shona Ferguson

Developer's building works against Tenant's quiet enjoyment

A lease of part of a multi-let building will usually contain a right for the landlord to carry out building works to other parts retained by it. And it will also contain (expressly or by implication) a covenant for quiet enjoyment in favour of the tenant. But what if these rights clash – which one takes priority?

In the recent case of *Timothy Taylor Limited v Mayfair House Corporation* the High Court had to consider these competing rights.

The tenant, Timothy Taylor Limited, held a lease of ground floor and basement premises in 14/15 Carlos Place, Mayfair, which it used as a high class art gallery. Its landlord, Mayfair House Corporation, decided to convert the upper parts of the building into flats.

The tenant suffered major disruption as a result of the landlord's works. Scaffolding enveloped the building and made it appear, at times, that the gallery was closed. The main hoist was placed virtually outside the gallery entrance, inhibiting access. In addition, the noise was so bad that it caused some gallery staff to be off work ill.

The lease contained a very wide reservation in favour of the landlord, permitting it to alter or rebuild the building as it thought fit, even if the works *materially* affected the premises or their use and enjoyment.

The Court held that, although the landlord had the right to carry out the works, it had to take all reasonable steps to minimise disturbance to the tenant. What was reasonable depended on all the circumstances. Where, as in this case, the works were purely for the landlord's benefit the standard was higher than, say, for necessary works to common parts.

The Court held that the landlord was acting unreasonably in the exercise of its right, was in breach of the quiet enjoyment covenant and in derogation of grant, and awarded the tenant damages. These were high class premises; the landlord had refused any rental discount; the way the scaffolding had been erected was unreasonable; and there had been no real liaison with the tenant over the duration of the works or as to how their effect on the gallery could be mitigated.

The moral of the tale for developers, though, is quite clear: liaise with your tenants throughout the process and take all reasonable steps to help them mitigate their loss – however wide your right to carry out works may be.

Andrew Wade

Too much noise?

One of the principles of the law relating to nuisance is that it is no defence to a claim to argue that the claimant came to the nuisance. This could be the case, for example, where someone buys a house near a site and then complains that the activity on the site constitutes a nuisance. However, if there is an alteration in the property owned by the claimant after the activity has started, this may provide a defence. The argument would be that it was only as a result of the claimant changing the use of the land that the defendant's existing activity is claimed to become a nuisance.

This problem has recently come to light where the Ministry of Sound objected to a 41 storey residential scheme, which was proposed near their site. This scheme would provide 335 apartments plus retail and office space. The key issue was that future residents might complain about the noise from the night club who were as a result concerned that this could lead to the revocation of their entertainment licence and perhaps a claim for nuisance.

While we do not know all of the details, it seems that the applicant agreed to revise the design of the building so that all windows on the relevant frontages had to be sealed with high performance acoustic glass. In addition, the parties have, we believe, entered into a deed of easement permitting the Ministry of Sound to create noise to a certain agreed level. This would be an example of an easement expressly permitting the creation of a private nuisance and it would accordingly bind successors in title and all the various residential flats.

This solution may help other developments where there is a clash of interests, particularly if more residential flats are introduced into areas not previously designated as such. This problem is becoming an increasing concern as planning authorities are also required to support existing business sectors. It will be interesting to see how they manage these issues and whether the solution for the Ministry of Sound can give the interested parties sufficient comfort. However, anyone involved in such a case will need to take expert advice.

Robin Holmes

Corporate knowledge

In the recent case of *Howmet Limited v Economy Devices Limited* the claimant's cause of action was based in part on the tort of negligence, a relatively rare circumstance in modern construction law. However, the case is of most interest for the Court of Appeal's comments in relation to corporate knowledge.

The facts of the case as alleged by Howmet were that a temperature valve manufactured by Economy Devices Limited had failed to activate causing a fire in a tank for dip metal castings. The fire, not the first to occur in the chain of events, resulted in extensive damage.

Howmet's case in negligence was that the manufacturer of an article in respect of which there will not be intermediate inspection (between manufacture and installation) owes a duty to the end user to take reasonable care that the article will not cause personal injury or damage to property other than the article itself.

Howmet lost the case at first instance and again before the Court of Appeal. Briefly, the court found that the effective cause of the fire was not the valve, but the failure of the system Howmet had put in place to protect the tank following the initial malfunction of the valve.

The court found in addition that Howmet had discovered the defect before the damage took place, so Economy Devices Limited did not owe Howmet a continuing duty of care in respect of the safety of the valve.

The lead judgement was given by Jackson LJ. He found that relevant employees knew of the defect in the valve; the same employees had set up a system to prevent the tank catching fire. On that basis, the employees' knowledge should be attributed to the company. The ignorance of a more senior manager could not be relied upon by the company.

This alternative ground for dismissing the appeal should be of interest to all employers.

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If you require further information on anything covered in this briefing please contact Clive Lovatt (clive.lovatt@farrer.co.uk) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the Property page on our website.