Spotlight on Development

March 2017

Editorial

Spring is upon us, "the time of plans and projects" wrote Tolstoy in Anna Karenina.

For those of you with plans and projects looking to come into full bloom, this quarter's review of law and policy affecting the property development industry includes a look at that often contentious subject, basement extensions; we also have an article on the new Environmental Impact Assessment Regulations, a case on breach of copyright, a timely warning on fraudulent transfers and finally a helpful decision from the Supreme Court on rates.

We appreciate your feedback. Comments on the newsletter may be addressed to clive.lovatt@farrer.co.uk.

Residential Basement Developments – the battle between neighbours

The increasing pressure for space, particularly in central London, has in recent years led residential property developers and owners to look to develop new basements. That, in turn, has often caused neighbours to oppose such development, out of concern for the potential adverse impact on their own property.

So, to what extent can subterranean development be carried out relying on permitted development rights under Class A, Part 1, Schedule 2 to the Town and Country Planning (General Development) (England) Order 2015 (SI2015/596)? Or at what point do the engineering operations involved amount to a "separate activity of substance", requiring planning permission?

These issues have recently been considered by the High Court, in the case of Eatherley v London Borough of Camden and another. Mr Eatherley challenged the Council's grant of a lawful development certificate to his neighbour James Ireland, for the excavation of a single storey basement under the footprint of a mid-terrace house in north London.

The Council's planning committee focused on its officer's report, which stated that the works would "by necessity" involve engineering works, and that these were "entirely part" of the overall development. The committee concluded that, because that was the case, the works did not constitute a separate activity of substance, requiring planning permission, and granted the requested certificate.

That, said the Court, was the wrong approach. The planning committee should not have asked itself whether the engineering works were part and parcel of

making a basement, but whether they constituted "a separate activity of substance".

It needed to address the nature of the excavation and removal of the ground and soil, and the works of structural support to create the space for the basement – that is, the correct approach was to assess the additional planning impacts of the engineering works, to decide whether they amounted to a separate activity of substance.

The planning committee had misdirected itself and, accordingly, the Court quashed the issue of the certificate.

Developers will now need to consider critically the engineering aspects of any proposal for residential basement development, to assess whether planning permission may be required for them.

Andrew Wade

New Environmental Impact Assessment Regulations

The UK Government will make changes to the Environmental Impact Assessment ("EIA") regulations by 16 May 2017.

An EIA is required for certain projects that are likely to have a "significant effect" on the environment, and is used to help to determine the planning application.

A developer can request that the planning authority "screens" the project to decide whether an EIA is required. A developer must now include any proposed mitigation measures in the request. Bringing these measures to the fore-front of the EIA process should also bring them to the fore-front of the design process, and hopefully design out the need for an EIA.

A developer can request the authority to provide a "scoping opinion" setting out the type and level of assessment to be included in the EIA. The new changes require the EIA to only be "based on" the assessment requirements set out in the scoping opinion, unless the development changes. However authorities will not want to restrict themselves in case they miss something in the scoping opinion, so these opinions may be very wide and of limited use, putting the onus back on the developer on what should be assessed.

Significant effects will now need to be monitored. These monitoring requirements will be secured via planning conditions or planning obligations. Increased monitoring will mean increased costs for developers and a greater focus on whether the mitigation measures put forward at the design stage actually work in practice.

Jay Sattin

Copyright law shows its teeth

The Copyright Designs and Patents Act 1988 is unlikely ever to trouble those

compiling best seller lists, but a case heard before the High Court in November of last year, Signature Realty Limited v Fortis Developments Limited and another, is a reminder of its importance.

The facts will be familiar to all developers; the claimant, a property development company, saw the opportunity to convert existing office space into student accommodation. It engaged an architect to assist in that process. As is common place, the architect retained copyright in the drawings and the developer was granted a licence to use them. The architect's drawings were used in the planning applications, which were successful.

The claimant was unable to proceed with the development and the site was purchased by the first defendant with the similar intention of developing student accommodation. Minor amendments to the planning permissions were applied for and granted. A different architect was used for this purpose.

When the claimant became aware of the defendants' project, it decided that the scheme was almost the same as that for which it had obtained consent. The claimant took an assignment of the architect's copyright and brought proceedings for breach.

The judge, based on the apparent misunderstanding of one of the claimant's directors, pointed out that there was no copyright in a planning permission; however, the drawings were a different matter. Although the defendants submitted that what the architect had done was to "divide up the space in an entirely commonplace, logical and utilitarian manner and that the resulting drawing was not sufficiently original or did not have sufficient intellectual input to justify the subsistence of copyright", the court disagreed.

The judge did not decide the question of damages, but the case is a reminder that taking on an existing planning permission may involve the developer in more than just getting on with the scheme.

Clive Lovatt

Fraudulent Transfers – Two salutary takes

There have been two recent cases of fraudulent transfers which produced very different results for the parties and make uncomfortable reading, not least for solicitors.

The first case (Freddy's Case) concerned the sale of a house by a fraudster to a Mr Finegold. Mr Finegold then agreed a sub-sale to Freddy's Limited who specialised in dealing with distressed properties. Both Mr Finegold and Mr Darazami, managing director of Freddy's Limited, separately visited the property and spoke to the occupiers and neighbours. After some negotiations contracts were exchanged and a completion took place six days later. Registration of both transfers took place and then Freddy's Limited sought to gain vacant possession. Shortly after this the fraud became apparent.

The original owner of the property applied to the court for rectification of the register on the grounds that Freddy's Limited failed to check the title of their

seller to the property and to make proper enquiries of the occupiers. The Court however disagreed and held that the claim for rectification failed. It did not regard it as normal professional practice for the buyer's solicitor to check the identity of the seller; that is for the seller's solicitors. The Court also considered and rejected the consideration that the buyer contributed to the mistake by lack of proper care.

The position can be contrasted with a subsequent case (Mishcon's Case) where the buyer's solicitors paid the money over to solicitors acting for the fraudulent seller. The fraud was uncovered when the buyer's solicitors attempted to register the transfer at the Land Registry who were making periodic checks to provide greater security for the register. The Land Registry informed both solicitors that it could not link the true owner with the address given and wished to make contact with the true owner. Shortly thereafter solicitors acting for the true owner made contact so that the real position became apparent.

The Court held that, despite the seller's solicitors admitting that they did not carry out the required identity checks on the seller, they were not liable for breach of trust, breach of warranty or breach of undertaking. The buyer's solicitors were not negligent in recognising the risk of fraud but they were held to be in breach of trust; they were only authorised to release the purchase monies for a genuine completion of a genuine purchase.

In his judgment in Mishcon's Case the judge did acknowledge that the buyer's solicitors would be insured so that their client would be protected, but he did not think that the solicitors should be relieved from the breach of trust under S61 of the Trustee Act 1925. This can be contrasted with Freddy's Case, where the Land Registry effected the transfer and the true owner was seeking to have the register rectified. Rather than the Court deciding at its discretion whether to give relief under the Trustee Act, it would have to exercise its discretion under the Land Registration Act to alter the register, which it was not inclined to do because the lawyer had not caused or substantially contributed to the mistake. The remedy for the true owner in Freddy's Case would be against the person who had defrauded him and that may have been of little comfort to him. The solicitors in Mishcon's Case have lodged an appeal and it will be interesting to see what the result is. In the meantime should there be suspicious circumstances these cases confirm the need to be extra vigilant.

Robin Holmes

Rates and redevelopment

The Supreme Court has given recently judgment in Newbigin (Valuation Officer) v SJ & J Monk (a firm).

The question before the court was whether commercial premises in the course of redevelopment should be valued for rating purposes as if they were still useable offices. The premises in question were being renovated and improved with a view to making them more adaptable for use as either three separate suites of offices or a single suite. The works were substantial, involving the removal of all internal elements except for the enclosure for the lift and the staircase to other floors.

The matter had been before the Valuation Tribunal, the Upper Tribunal and the Court of Appeal. The Court of Appeal had held that the long established "reality principle", namely that a property should be valued as it in fact existed on the material day, could be displaced by a "counter factual" assumption created by statute (in this case the ratings acts). The Court held that the works would return the premises to their former state economically and the statutory assumption was that the premises should be valued as if they were in a state of reasonable repair.

The Supreme Court overturned the Court of Appeal and held that the reality principle applied. It said (summarising the Upper Tribunal's findings of fact) that the "premises were incapable of beneficial occupation…they were in the process of redevelopment [and] there is no basis for applying [the statutory] assumption … to override the reality principle…".

The decision is not a panacea of course and it will still be necessary to establish that redevelopment works mean a property is not capable of occupation; but notwithstanding, the Supreme Court's ruling will be welcomed by developers.

Mark Gauguier

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.