

CHANCERY & COMMERCIAL GROUP

NEWSLETTER

Spring 2009

1. Restrictive covenants: ‘vendors’ and deceased vendors

Nicholas Jackson represented the claimant in **Wayne Margerison v (1) David Donald Bates (2) Carole Margaret Bates [2008] EWHC 1211 (Ch); LTL 4/9/2008.**

Until 1966, all of the land in question had been in the ownership of one Ms Horn. The land is in an attractive part of Willaston, Wirral. In 1966 Ms Horn disposed of part of her land by means of a conveyance which (while allowing for the construction of a single bungalow) imposed a restriction, for the benefit of her retained land, preventing any addition to, or alteration or enlargement of, that bungalow without plans being “*..first approved by the Vendor ... such consent not to be unreasonably withheld.*”

The bungalow permitted by the 1966 conveyance was built, not long after that, with a flat roof. The claimant came to own the land with the bungalow on it, and the defendants to own the land which Ms Horn had retained. The claimant wished to give the bungalow a pitched roof, and contended that the reference to ‘the Vendor’ in the conveyance meant Ms Horn alone and that, she having died in 1977, the restriction on alteration to the bungalow was effectively discharged. The defendants contended that the reference to ‘the Vendor’ must encompass Ms Horn’s successors in title, so that the defendants had to be asked to approve the plans (which they declined to do), or alternatively that (if ‘the Vendor’ did having the meaning argued for by the claimant) Ms Horn’s death rendered the restriction on alteration absolute, it not being possible to obtain the required approval.

Edward Bartley Jones QC, sitting as a Judge of the High Court in Liverpool, held that:

- (1) on the true construction of the 1966 conveyance, the reference to ‘the Vendor’ in the restriction in question meant Ms Horn alone. The words ‘the Vendor’ were defined at the head of the document to mean Ms Horn alone.

The draftsman had added words such as ‘and her successors in title’ at other places in the document, such that the distinction between Ms Horn personally, as opposed to Ms Horn and her successors in title, had clearly been appreciated (**Mahon v Sims (2005) 3 EGLR 67 QBD** distinguished); and

- (2) the restrictive covenant had been effectively discharged on Ms Horn’s death (**Crest Nicholson Residential (South) Ltd v McAllister (2004) EWCA Civ 410** applied).

Consequently the claimant obtained the declaratory relief sought regarding the proper construction of the 1966 conveyance and was able to build the pitched roof, for which planning permission had been obtained.



The decision on the construction points was all the more critical in light of the Judge’s clear finding that, if the claimant had been required to obtain approval of his plans from the defendants, then the defendants would have been acting reasonably in refusing to give it (having regard to the adverse impact on their visual amenity).

2. R (on the application of Dale) v Solicitors Regulation Authority [2009] EWHC 262 (Admin)

In this case Nick Riddle acted for the Claimants, who applied to the Administrative Court to quash the decision of the Solicitors Regulation Authority (“SRA”) – an arm of the Law Society – refusing them compensation for loss caused by the dishonesty of a solicitor.

As part of a scheme for the refinancing of a company, the solicitor had agreed to negotiate loans from other clients of his. These loans were to be secured by charges on (among other things) the homes of directors, including that of Mr Dale and his wife (“the Dales”). A loan was negotiated from a Mrs Bates, but instead of paying this over to the company the solicitor dishonestly used it to pay his own tax bill. The solicitor also failed to obtain the charge that Mrs Bates had been promised. At a later date he procured the Dales’ execution of a charge of their home, telling them this was necessary to secure money advanced to the company; he did not mention the fact that he had stolen the money. The company failed and the charge was enforced. Mrs Bates received £20,000 out of the proceeds of sale, while the Dales received nothing. The Dales applied for an award out of the Compensation Fund maintained by the Law Society. Their application was refused on the principal ground that they had suffered no loss, but also on the grounds that they were authors of their own misfortune in agreeing to a charge of their home without taking professional advice about it, and that the solicitor had been owed over £20,000 in fees.

The Dales challenged the decision by way of Judicial Review, on the basis that it was **Wednesbury** unreasonable. The challenge succeeded. Saunders J., applying the principles in **R v Law Society ex p. Mortgage Express Ltd [1997] 2 All ER 348** and **R v Law Society ex p. Ingham Foods [1997] 2 All ER 666**, found the suggestion that the Dales had suffered no loss surprising, given that they had lost £20,000 from the proceeds of sale of their home. He also accepted their submissions that the cause of their loss had been the solicitor’s dishonesty, since they had been tricked into giving the charge after the money had been stolen, and that they had been entitled to rely on the solicitor. The costs owed to the solicitor had not been owed by the Dales. The decision was accordingly quashed.

The Judge had no power to substitute his own decision for that of the SRA, and therefore remitted the matter for reconsideration. It remains to be seen what the reconsidered decision will be.

4. VAT recovery: Nigel Ginniff reports

When there is a freehold disposal of or grant of a lease for a term no less than 21 years in a new residential property, the supply is **zero-rated** for VAT purpose. The housebuilder can recover the VAT he has suffered on the costs of construction. In the present economic climate, however, a sale may prove more difficult and rental of the property may be the only option to generate income. Short term rental of a dwelling is an exempt supply, and the VAT suffered on the construction costs cannot be recovered unless certain conditions are met.

HMRC have issued an Information Sheet 07/08 providing guidance on the VAT implications of the change of intended temporary use of the property. There is a de minimis threshold below which no adjustment is required. The check is to multiply the input tax incurred on the construction by the number of months for which the property is to be rented, and divide that sum by 120 (being the expected life of the building for VAT purposes expressed in months). If the result does not exceed £625 per month, or more than half of the total input tax, no adjustment is necessary.

If the de minimis threshold is exceeded, the housebuilder must apply either the standard method of partial exemption calculation or any special method it has agreed with HMRC. A method using the value of rent is given as an example in Information Sheet 07/08. HMRC have also issued a Revenue & Customs Business Brief 54/08 on tax avoidance by housebuilders attempting to avoid such an adjustment by selling the property to a connected company which then rents it out. HMRC have stated that this is acceptable avoidance, but warn that there are certain criteria which might demonstrate that the sole aim was avoidance and in such cases the transaction would be challenged.

5. All change in Tax Appeals

After 200 years a new tribunal will hear tax appeals. From 1st April 2009 appeals will be heard by a Tax Chamber with more formal procedures and the risk of costs. For more information follow this link:-

<http://www.atlanticchambers.co.uk/File/Tax%20Appeals%20Newsheet.pdf>

6. Rights of way: interference and parking

In **(1) Keith Waterman (2) Wendy Waterman v (1) Duncan Boyle (2) Maureen Gwilt [2009] EWCA Civ 115** the Court of Appeal considered a dispute between warring neighbours.

The defendants (“D”) had owned farm buildings, which they developed as three adjoining residential properties. D retained one of these, and sold the other two. The transfer of the claimants’ (“C’s”) property, to their predecessor one Mrs W, granted a shared right of access (with or without vehicles) via an entrance drive leading to the front, together with the right to park two private cars on designated spaces. The entrance drive had a traffic island with a yew tree and two silver birches. The transfer of C’s property also granted them a right of access at the back, via a back lane.

A boundary dispute was the subject of appeal (the Judge’s decision in favour of C was affirmed).

The back lane

Also the subject of appeal was a dispute about whether the erection by D of a wall beside the back lane constituted a substantial interference with C’s way over it. After she acquired the property and so after the way was granted, Mrs W had built a garage, accessed by this back lane. The wall in dispute was built subsequently, after C moved in, and with the wall present C could not get its vehicles (which the Court of Appeal noted were larger than Mrs W’s) to turn into the garage.

The Judge had considered that the grant of the way along the lane had to be interpreted purposively, to give a right of access over a sufficient width of land to allow reasonable vehicular use, and found the wall to be a substantial interference with C’s use of the way.

Lady Justice Arden, giving the leading judgment in the Court of Appeal, held that the Judge was wrong. The grant of the way to Mrs W was over a lane of fixed location, and there was no express or implied agreement at the time of the garage’s construction for its extension. While activity on land beside (i.e. not on) a right of way could potentially constitute a substantial interference with that way, the circumstances would have to be “..quite exceptional..” (para.21), and were not so here where the wall was wholly outside the servient tenement and in itself a perfectly ordinary use of land. Lady Justice Arden also considered that, because C could get its vehicles into the garage if alterations were made to its doorway, insistence on a right of access without altering the garage was not reasonable (and for this additional reason the wall was not a substantial interference with the way over the back lane).

Parking rights

There was yet a further dispute about whether C had a right, not only to pass over the driveway at the front, but also for visitors to park there for the duration of their visit. The Judge had held that there was implied into the right of access an ancillary right for private and trade visitors to park cars on the front drive for the duration of their visit. The Judge considered this to be an application of the House of Lords decision in **Moncrieff v Jameson [2007] 1 WLR 2620**, which establishes that a right to park is capable of being implied into a vehicular right of access if this is reasonably necessary for the exercise or enjoyment of that right.

The Court of Appeal considered that the Judge had applied **Moncrieff** incorrectly to the facts of the present case. At the time the right of way over the front drive was granted, express provision was made for parking two vehicles in designated spaces at the front of C’s property; further, at the time of the transfer there were four other parking spaces at the rear of C’s property (accessed by the back lane). It was not reasonably necessary to the enjoyment of the right of access over the front drive for any right to park to be implied. Further it was clear that the parties to the transfer had specifically considered parking rights, and made express provision for them: Lady Justice Arden considered that “..where there is an express right attaching to the same property of a similar character to the right which is sought to be implied, it is most unlikely that the further right will arise by implication.” (para.31).

7. Virtual Assignments: alienation covenants

In **Clarence House Limited v National Westminster Bank Plc** [2009] EWHC 77 (Ch), His Honour Judge Hodge QC, sitting as a Judge of the High Court, considered whether the defendant tenant was in breach of standard form alienation covenants under its lease (the claimant was the landlord).

With the landlord's consent, the tenant had underlet the premises to a third party ("Mercer"), and Mercer went into occupation.

The tenant subsequently entered into a 'virtual assignment' ("VA"), transferring all the economic benefits and burdens of its lease to a third party ("New Liberty"), but without there being any actual assignment of the leasehold interest. The VAT status of such an arrangement has been considered by the Court of Appeal (**Abbey National Plc v Commissioners of Revenue & Customs** [2006] EWCA Civ 886) but the Judge did not consider that decision to be of great assistance in the instant case, given that it did not deal directly with the position between landlord and tenant regarding possible breach of an alienation covenant. Besides the **Abbey National** case, there was apparently no authority directly on this point.

The lease contained tenant's covenants, essentially (a) not to execute any declaration of trust with regard to the premises (b) not to part with possession of the premises or share possession of the premises (c) not to underlet without the landlord's consent, and (d) not to assign the lease without the landlord's consent.

The Judge held that the VA was clearly not a breach of the covenant against underletting, there being no underletting in form or substance. It was also held that the VA was no breach of the covenant against assignment, and nor did it constitute a declaration of trust with regard to the premises.

The Judge considered, however, that by entering into the VA the tenant had parted with possession of the premises, or at least agreed to share possession with New Liberty. The VA gave to New Liberty full ability to collect monies due from Mercer pursuant to the underlease, and expressly envisaged that New Liberty should step into the tenant's shoes in all dealings with its landlord and its subtenant. Consequently the tenant was in breach of the alienation covenant and an inquiry was directed as to damages.

The case clearly has significant implications for any tenant contemplating a 'virtual assignment', and for those who have already entered into one.

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