Guildhall CHAMBERS

FENCING EASEMENTS AND UNICORNS

Some readers may have heard of the case of Churston Golf Club Limited v Haddock and been variously intrigued or alarmed by the decision of Birss J last year – but, happily, his decision has just been set aside by the Court of Appeal , [2019] EWCA Civ 544. This article explains where matters now stand with fencing easements.

To start – at the beginning – we all know that two neighbours can agree what they like as between themselves (the original covenanting/contracting parties) and this is enforceable between them. So my neighbour agrees to build and maintain a fence of ebony with gold leaf ornaments. I can pursue him for any breach of what is a personal obligation. That was not the issue, in Churston the issue was as to whether the benefit and burden of such an obligation run to bind successors in title.

So in Churston the parties were both successors in title to the original contracting parties and the commonplace covenant created in 1972 read:

The Purchaser hereby covenants with the Trustees that the Purchaser and all those deriving title under it will maintain and forever hereafter keep in good repair at its own expense substantial and sufficient stockproof boundary fences walls or hedges along all such parts of the land hereby conveyed as are marked T inwards on the plan annexed hereto.

That is an absolutely common form fencing covenant and it is the sort of clause conveyancers have recognised as personal for years uncounted.

Enter Mr Haddock who is a tenant of land adjoining Churston's. He says the relevant fences are dilapidated and in the result he has suffered damages pleaded at £150,000 to £200,000. My colleague Matthew Wales handled the trial for Churston and the result was that Mr Haddock's damages were assessed at zero. That was the substance of the trial but as part of his decision the trial judge asserted that the covenant as above – and you will notice dear reader that it describes itself as a covenant – was in fact a fencing easement. Of course a fencing easement does bind successors. It also meant that in the future Mr Haddock could lawfully demand that the boundary was kept in repair at the expense of Churston.

Churston obtained permission to appeal and the appeal came before Birss J – his decision falls into two parts:

1. It was and is possible to create a fencing easement nowadays, and
2. The covenant above was in fact a fencing easement.

At this point there was a concern in some legal quarters. The texts had said it was probably impossible to create a fencing easement since the Victorian decision in Austerberry v Oldham Corporation (1885) LR 29 Ch D 750.

Churston again obtained permission to appeal – now a second appeal – which is the recent decision. So how did the appeal play out?

Well for a start although we use the global term "fencing easements" there are in fact really three possible entities and in order of utility for the dominant tenement they are:

- Fencing easement
- Fencing obligation
- Fencing covenant

Most of the time in the Court of Appeal was taken up with very interesting and erudite arguments as to whether as a matter of law it is possible nowadays to create a fencing easement. However if the covenant here was only ever a humble covenant on its true construction then the appeal was bound to succeed – which it did! For this purposes the Court did look at the format of the document the covenant appeared in which had clearly identified easements and restrictive covenants in their proper places, as one would expect. Plainly the Court of Appeal took the same view as the Appellant that the appeal could succeed on the construction point or the legal point since an issue based argument by the loosing Mr Haddock failed and he was left to pay all the costs of the appeal.

What the Court of Appeal did not do was to come to a reasoned decision on the question as to whether, today, one could create a true fencing easement. They left the reader with the cryptic comment that they felt bound by the Denning MR decision in Crow v Wood [1971]

1 QB 77. So where do matters truly stand on this issue? It boils down to three simple propositions:

1. In theory and by using a specific conveyancing device it is possible to create a fencing obligation (note carefully, not an easement). Emmett on Title paras. 19.15/17 suggested this could be achieved by means of the addition of a variable rent charge and in Austerberry itself Lord Lindley at p.783 highlighted that if one wanted to create something that did run there were well known conveyancing devices to achieve that purposes. Obviously such drafting exercises stand out a mile from a standard fencing covenant (as above).

2. From Crow v Wood it is apparent that a fencing easement can arise by the statutory magic of Section 62 of the LPA 1925. In other words where there is such an obligation undertaken between adjoining occupiers, the conveyance or transfer to one may cause the obligation to ripen into an easement. If the case does go further the operation of S 62 to enhance rights (as opposed to retain the rights as existing) may be ripe for further consideration.

3. A common form fencing covenant only does what we have always thought it does – it binds only the parties and not successors. If it is one of these you can breathe easily.

Consequently any suggestion that the decision of Birss J remains of any relevance resembles taking pains to describe a unicorn. Subject to the Section 62 point all you are ever going to come across in practice is either a common form covenant (which does not bind successors) or some monstrous construct that will set alarm bells ringing enough to wake the dead. Only if you see one of those (and I never have) will you have to determine whether it is a clever fencing obligation with the necessary bolted on provisions so that it runs against successors in title. If you conclude that it still does not run because of the bolted on provisions will you have to fall back on an argument that you may be dealing with a true fencing easement and if a modern conveyance/transfer I have to say that the argument may go to the Supreme Court.

And finally, do I think it is possible to grant a fencing easement nowadays? Frankly I do not. In Crow v Wood Lord Denning MR declared that you could whilst at the same time relying on the earlier Court of Appeal decision in Jones v Price where two members of the Court said you could not. The fascination of the issues stretching back to writs issuing to prevent cattle trespass in the early 1300's, through the invented basis for prescriptive claims produced by the genius of Elizabethan lawyers and then again through the refinement of Austerberry – they are a lawyer's delight. However it is comforting to rest easy with the words of Lord Diplock "…it is by no means clear whether such an obligation can today be newly created so as to run with the land, except by Act of Parliament."

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