GUILDHALL CHAMBERS

Property News

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Team News

We are delighted to announce a new member of our team.

Jennifer Newstead has joined us after successful completion of her pupillage. She came to us following a glittering academic career at Nottingham University, where she obtained a 1st class degree and an M.Phil. She has experienced a wide range of matters during her pupillage but now intends to specialise in Commercial and Property work. She is already attracting praise for her work, and will be a valuable addition to our team at the junior end. She is available for instruction in a wide range of property matters at very competitive rates.

Welcome to another edition of the Guildhall Chambers Property Team newsletter. 2004 was another significant year for property law. Conveyancers are wrestling with the complexities of stamp duty land tax, the Commonhold and Leasehold Reform Act has come into force, and the courts continue to generate decisions of interest across the whole spectrum of property law. The House of Lords in *Bakewell Management v Brandwood* killed off *Hanning v Top Deck* and most of the statutory procedure previously introduced to alleviate its effects. This issue considers two current topics of great interest. Restrictive covenants (particularly those relating to the erection of additional dwellings) have continued to attract interest and litigation. Further, the so-called 'right to roam' is now a reality across much of England.

As ever, if you need any advice or assistance on any aspect of property law, get in touch!

Ewan Paton, Editor

Seminar News

We have recently completed a successful round of our ever-popular Property Law Seminars in Cardiff, Swansea, Cirencester, Salisbury and Exeter.

The talks covered pre-contract enquiries, leasehold notices, covenants and easements.

If you missed them and would like either to see the notes or arrange your own in-house seminar, let me know!

Special topic

Restrictive covenants

The property boom of recent years has fuelled great interest in, and many Lands Tribunal applications or court proceedings relating to, restrictive covenants. As values rise, a second dwelling squeezed on to a corner plot becomes increasingly attractive. The ransom or 'veto' value of the benefit of a covenant similarly rises in value and importance. The courts have recently considered the law in this area in three quite different, but equally interesting cases.

No need to rush?

In *Mortimer v Bailey* (CA, 29/10/04, as yet unreported), the Court of Appeal reminded us that the courts will sometimes grant final injunctions to pull down buildings built in breach of covenant, even where an interim injunction was not sought. It is a common assumption that this will not happen if the builder moves quickly enough, and that the only issue to worry about will be the assessment of damages in lieu. In Mortimer, the Defendants' property was bound by a covenant not to carry out building works without the prior approval of the neighbouring property owners (the Claimants), such approval not to be unreasonably withheld. The Defendants proposed an extension to their home. The Claimants withheld their approval. The Defendants, considering the refusal unreasonable, decided to build it anyway. The Claimants did not apply for an interim injunction until there was only a week's worth of work to be completed, and it was refused. However, the judge at the final trial held that their initial refusal had been reasonable, that damages were not an adequate remedy, and that the extension should be pulled down.

The Court of Appeal upheld this. There was no general principle that a party who refrained from seeking an interim injunction to restrain construction works thereby barred himself from later obtaining a final mandatory injunction. Such a party might not wish to risk giving an undertaking in damages at the interim stage. As for those who wished to build, the prudent course was to have the covenant issue determined first. In building in potential breach of covenant, they ran the risk of a later mandatory injunction. *Gafford v Graham* (1999) 77 P&CR 73 was distinguished as a case where damages had been an adequate remedy.

A road is not a dwelling

In *Jarvis Homes Limited v Marshall* [2004] EWCA Civ. 839 (6/7/04), Jarvis had purchased a property subject to restrictive covenants preventing use a)"for the erection of more than one two storey private dwelling house with all necessary outbuildings ... "and b)"for any trade business or manufacture but [to] use the same as a private dwelling house only". They proposed to demolish the existing house on the property, and build a new one. That was agreed to be permitted by the covenants. They also wished to build on part of the property a substantial two-laned metalled roadway, with lamp posts, as a link road to their development site beyond, on which they would build a further 10 houses. It would later be adopted as a highway. That was resisted by neighbours with the benefit of the covenants.

The Court of Appeal, reversing the decision of the trial judge, held that this would breach covenant b) above, and that the lamp posts would breach a). The restriction on use extended to the whole of the property, including its curtilage, and not just the actual dwelling house site. Use of that property as a roadway, by owners of properties on the adjacent site granted rights over it, would be use by"persons deriving title" of the owner of the property for a purpose other than a dwelling house on that property. Nor could lamp posts be construed as part of the outbuildings of a dwelling house.

"A" is not "one"

Finally, better news for developers in *Martin v David Wilson* [2004] EWCA Civ. 1027 (28/6/04). The relevant plots were burdened, inter alia, with a covenant:

ì..not at any time to carry on or permit or suffer to be carried on the said land or any part thereof or in any building or buildings erected or to be erected thereon any trade or business whatsoever and not to use or permit or suffer any buildings erected thereon or any part thereof to be used for any other purpose than as a private dwellinghouse either with or without garages and other necessary outbuildings"

The developer had already built an additional dwelling (a show house) on one plot, and wished to build 12 more on another plot. Would that be a breach?

The trial judge thought so, but the Court of Appeal disagreed. Buxton LJ, giving the leading judgment, held that the context in which the phrase"a private dwelling house" appeared in this and other clauses in the relevant conveyances indicated that a plurality of"buildings" on each plot was contemplated as permissible. The use of the indefinite article"a" private dwelling house carried no necessary implication of singularity (i.e. it did not mean"one only"), contrary to the view taken by Neuberger J. (as he then was) in *Crest Nicholson v McAllister* [2003] 1 AER 46. This was a user covenant rather than a covenant against building. Use as"a private dwelling house" was the permitted purpose, and that purpose applied to any"buildings" (plural) on"any part." of the overall property. So if 12 houses were built on different parts of the land, the covenant would not be breached so long as they were all used for that purpose.

One or all of these decisions may at first seem contrary to what one might have expected, or even previously advised. However, some caution is necessary. Despite the apparent familiarity of the covenants concerned, the Court of Appeal made clear in both *Jarvis* and *Martin* that the overall context in which those covenants appeared was a crucial aid to interpretation. It cannot always be assumed that a decision on a particular phrase or form of words will necessarily apply in any case where that phrase appears.

Ewan Paton

Special topic

The right to roam *(or rather "to enter*

Section 2 of the Countryside and Rights of Way Act 2000 was brought into force on 19 September 2004, in the southeast and lower northwest areas of England, and on 14 December 2004 in the central southern area. This gave life to the so-called right to roam in those areas. The right is expected to be brought into effect in the other 5 areas of England by the end of 2005, once the process of appealing against provisional maps has been completed and conclusive maps of the entire country have been published by the Countryside Agency.

The Countryside Council for Wales is undertaking a similar process of mapping access land in Wales. The country is divided into 14 areas; conclusive maps for 8 areas have so far been published; and the Welsh Assembly Government plans to bring the new right into force in the spring of 2005.

The right

The right given by section 2 of the Act is substantially more than to roam: it is to enter and remain on any access land for the purposes of open-air recreation. Subject to observance of the restrictions referred to below the right would appear to permit one person to set up an easel and paint the landscape; to sit on a shooting stick to bird watch; or to fly a kite and two or more people to have a picnic or play Frisbee.

Access land

Definitions in section 1 provide that access land includes land shown as open country on a conclusive map and that open country is land which appears to the Agency or the CCW to consist wholly or predominantly of mountain, moor, heath, or down.

Section 6 provides that a landowner may appeal against the showing of land as open country on a provisional map but only on the ground that the land does not consist wholly or predominantly of mountain, moor, heath, or down.

On 1 December 2004 in Norman Court and *Sowley Farms Limited v The Planning Inspectorate*, Sullivan J gave permission for a judicial review of a decision of an Inspector to dismiss appeals against the mapping of downland in Wiltshire. The Inspector had directed himself to the effect that for a parcel of land to consist wholly or predominantly of mountain, moor, heath, or down it had to contain at least two-thirds of the relevant qualifying vegetation. Sullivan J decided that it was at least arguable that the Inspector had misdirected himself because, although in isolation the word predominantly might mean simply more than half, when coupled with the word wholly its meaning changed and called for a greater proportion of the whole. Moreover, when the words were construed as part of provisions that restrict the convention right of every person to the peaceful enjoyment of his property, the words should be construed restrictively.

Excepted land

Access land does not include "excepted land" but the maps will not show what that land is. The maps are intended to endure for up to 10 years (section 10 provides that the Agency and CCW must review the conclusive maps at no greater than 10 year intervals) and expected land can be short lived. Categories of excepted land include:

- land on which the soil is being or has within the previous 12 months been disturbed by the plough for the purposes of planting crops;
- land within 20 metres of a dwelling or of permanent livestock housing;
- land used for the purposes of a golf course; and
- land covered by pens in use for the temporary reception or detention of livestock.

Straying onto excepted land will mean that the person becomes a trespasser by losing the right given by section 2.

The restrictions

The restrictions are that the person exercising the right under section 2 must do so without breaking or damaging any wall, fence, hedge, stile or gate, and that he must observe the general restrictions in Schedule 2 and any other restrictions imposed in relation to the land under Chapter II. Failing to observe these restrictions means that the person not only becomes a trespasser but also loses for 72 hours the right to enter the land in question or any other land in the same ownership.

The Schedule 2 restrictions require the access-taker, amongst other prohibited activities, not to:

- drive or ride any vehicle other than an invalid carriage (no mountain-biking);
- have with him any animal other than a dog (no riding);
- engage in any organised games (so the two people throwing a Frisbee would appear to be permitted but perhaps not five-a-side football);
- engage in any activity organised or undertaken for any commercial purpose (a coach party of ramblers transported to and from access land as part of a commercial enterprise might find themselves caught by this restriction); or
- without reasonable excuse, disturb, annoy or obstruct any person engaged in a lawful activity on the land.

Schedule 2 also requires dogs to be kept on a lead of no longer than 2 metres at all times of the year in the vicinity of livestock and elsewhere between 1 March and 31 July, when ground birds are breeding.

The particular restrictions in Chapter II are two-fold: at the discretion of the landowner for a limited period of time subject only to giving notice to the Agency or CCW; and upon application to the appropriate body for particular purposes.

and remain for open-air recreation")

Section 22 allows a landowner to exclude or restrict access at his own discretion by giving notice to the Agency or CCW. There is a limit of 28 days a calendar year; Christmas Day, Good Friday and bank holidays are excluded; only up to 4 days that are either Saturday or Sunday may be included; and no Saturday between 1 June and 11 August (the eve of the grouse open season) and no Sunday between 1 June and 30 September (the eve of the pheasant open season) may be included. Section 23 allows a landowner, at his own discretion upon giving appropriate notice to the Agency or CCW, to restrict access to moor land managed for the breeding and shooting of grouse for up to 5 years and to land where lambing is taking place for up to 6 weeks in any year, to persons who do not take dogs.

Sections 24, 25 and 26 enable the landowner to apply to the appropriate countryside body for more comprehensive restrictions or even exclusion of access on the grounds that it is necessary for the purposes of, respectively, management of the land; avoidance of danger to the public; or nature conservation and heritage protection.

Before any landowner can hope to establish a case that his rights under Article 1 of the First Protocol have been infringed by section 2 being brought into force in respect of any land of his that is access land, he must have exercised the discretion given by sections 22 and 23 and have applied for restrictions if not exclusion under sections 24 to 26. It is only once those steps have been taken that it will be possible for the court to judge how the balance has been struck between the landowner's right to the peaceful enjoyment of his land and the right of the public to enjoy the land without payment of any compensation to the owner.

Occupier's liability

Another measure designed to appease landowners are the provisions in the Act designed to ensure that landowners owe no greater duty to those exercising the right under section 2 than they did to visitors to or trespassers on their land before the coming into force of the section. Section 12(1) provides that the operation of section 2 *does not increase the liability under any enactment not contained in this Act or under any rule of law, of a person interested in the access land or any adjoining land in respect of the state of the land or of things done or omitted to be done on the land*. Putting a bad-tempered bull in a field of bulling heifers would appear to be a thing done on the land but simply displaying the familiar signs would have been unlikely to absolve the owner in pre-CROW Act days.

Section 13(1) amends the 1957 Act to provide that a person exercising the right under section 2 is not a "visitor" for the purposes of that Act. Section 13(2) moderates the duty owed under the 1984 Act by providing that at any time when the right under section 2 is exercisable in relation to any access land, *an occupier of the land owes ... no duty by virtue of this section to any person in respect of a risk resulting from the existence of any natural feature of the landscape, or any river, stream, ditch or pond whether or not a natural feature*, the only exception being risks deliberately created by the occupier.

Ironically the more onerous duty under the 1984 Act will be owed to the person who strays from access land onto excepted land or who fails to observe all the restrictions and so becomes a trespasser.

Conclusion

The full impact of the right under section 2 of the CROW Act probably cannot be judged until the summer months are upon us but after 3 months of open access in the southeast and the lower northwest of England, the worst fears of landowners do not appear to have been realised. Judicious use of the potentially wide restrictions in Chapter II and co-operation rather than confrontation with those seeking to gain access may mean that landowners have nothing to fear from the new right and might even find that they benefit from the increased tourism opportunities.

William Batstone

Brief case summaries

Boundaries and rights of way

Seeckts v Derwent [2004] EWCA Civ. 393

The normal understanding of the use of "T" marks on a conveyance plan was that they represented existing boundary features, and the ownership of those features. Where they were used on a plan and a boundary feature was found to have existed at the relevant time, that would determine the boundary and would prevail over measurements and dimensions which might produce a different boundary.

Perlman v Rayden [2004] EWHC 2192 (Ch.), Patten J.

Subject to the construction of the particular grant, an express grant of a right of way would generally permit the dominant owner to open up a new access to his land from the way where that was reasonable and would not unduly interfere with the use of the servient land. Grants were not generally to be construed, in the absence of some clear indication to that effect, to limit the access to that actually enjoyed or physically possible at the date of the grant.

Mortgages

Wilkinson v West Bromwich BS, Times, 5th October 2004 ([2004] EWCA Civ. 1063)

A rare victory for the (ex-) homeowner in the battle over mortgage shortfalls. A mortgaged property had been sold by the building society in November 1990, following default in the monthly payments. The last payment had been made in July 1989. Proceedings to recover the shortfall had been commenced within 12 years of the former date, but more than 12 years from the latter. The mortgage contained no express covenant as to the date when the principal became repayable. The Court of Appeal held that an obligation to repay must be implied, and that it arose on default in making the instalment payments, at the same time as the Society's other rights and remedies became exercisable. The court rejected arguments that time ran from the date of the sale, or that the liability to make monthly payments still continued until the whole advance was repaid. The last payment had been made in July 1989. Proceedings for the shortfall were not commenced until November 2002. They were therefore barred by virtue of ss. 8 and 20 Limitation Act 1980.

Edwards v Lloyds TSB Bank [2004] EWHC 1745 (Ch.)

A victory for Chambers' own Neil Levy! A husband had granted the Bank a charge over the co-owned matrimonial home, forging his wife's signature to do so. When he later disappeared, and the bank sought to enforce its charge against his wife, to whom the property had now been transferred on divorce, Park J. held that while the legal charge was void as a forgery insofar as it purported to create a charge over the legal estate, it was still effective to charge the forger's own beneficial interest by way of equitable mortgage. The wife took the property subject to the charge of that interest, and the bank could not be denied such a charge on the basis of any alleged failure to make enquiries.

Park J. then considered his discretion to order a sale under TOLATA 1996, and made an order postponing such sale for five years (until the wife's youngest daughter had reached 18).

Adverse possession

Topplan Estates Limited v Townley [2004] EWCA Civ. 1369 (CA, 27/10/04)

Under the old law as still applied to unregistered land, and accrued claims against registered land prior to the coming into force of the Land Registration Act 2002, it has been confirmed again that squatters are not always obliged to come forward and positively assert their possession when it is challenged. Whether a failure to do so would render their conduct 'equivocal', negating the requisite manifestation of the intention to possess, will depend on the facts of each case. However in this recent case a squatter's claim was successful despite his admission that he had intentionally lain low so as not to alert the paper owner.

The squatter (S) had grazed and mown some 13 acres of agricultural land under a series of licences granted to he and his family up to 1982. After that time, rather as in *Pye v Graham* [2002] 3 WLR 221 (HL), no new licences were granted, S's requests for a new licence went unanswered, and he simply carried on as before. This involved grazing and fertilising the fields. He maintained their existing hedges and padlocked their gates. Proceedings to recover possession were not brought until 1996.

The main point on the appeal was whether a programme of works carried out on the instruction of the owner in 1993 had interrupted S's possession. Road widening works had been carried out adjacent to the land, a boundary hedge and gates at that point removed and new ones established, and a working area fenced off for the temporary use of machinery and workmen. S had watched all this but let it happen, because

"I did not want to draw attention to my occupation of the land - I was conscious that I had no right to be there".

It was held by the trial judge that S had been in factual possession of the land throughout. While the 1993 works sufficed to interrupt possession of those specific small areas of the land where they were carried out, they did not interrupt possession of the remainder of the land (the vast majority of it). Nor did S's evidence negate the requisite intention to possess.

The Court of Appeal agreed. The acts in question clearly amounted to factual possession of the land. The fact that S did not protest at the works did not mean that he did not intend to continue his possession of the vast majority of the land. The Court accepted the submission that there was no obligation in law for S to draw the true owner's attention to the running of time against him, subject to cases of dishonesty or deliberate concealment. The Court (Jonathan Parker LJ) ended by adding that the activities of the squatter must still be "open and apparent to anyone who had eyes to see", but that in this case they were.

The decision highlights a fault line in this area of law, not wholly resolved by *Pye v Graham*. The balance of authority is to the effect that the squatter's possession need not be expressly "open", yet it may still be held that what he has done, even if it might be sufficient as possession in fact, was "equivocal" and not recognisable as possession by an inspecting owner. If the owner comes on to the land for any reason, there is some recent authority that while the mere fact of the entry will not necessarily amount to a "retaking" of possession sufficient to 'stop the clock', his entering unchallenged upon land and not seeing obvious signs of activity may show that the squatter's intent to possess had not been sufficiently "manifest"; even if the squatter's acts were otherwise sufficient factual possession: see *Smith v Waterman & Bostock* [2003] EWHC 1266.

For owners the only safe advice remains to check their properties at all times, and issue possession proceedings if in any doubt about the possessor's intentions. For squatters, the best advice may be to secure the gates, keep their heads down and carry on with their possession until those proceedings are brought. They do not otherwise have to shout or make any fuss about what they are doing.

Ewan Paton

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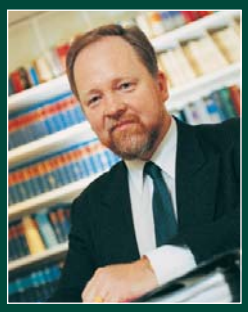

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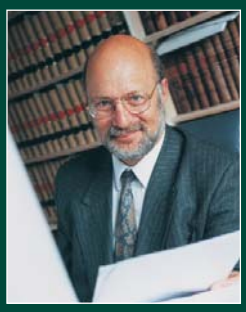

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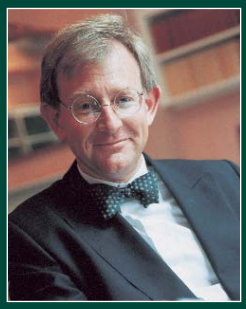

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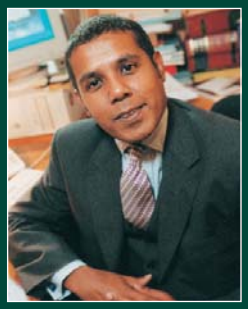

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