



Resolving business issues

the latest news and advice on commercial law

Developers: Beware!

The case of *J A Pye (Oxford) Limited and J A Pye (Oxford) Land Limited v UK* was recently decided in the European Court of Human Rights and emphasises that Developers must take adequate steps to protect their land from trespassers whilst awaiting planning permission for development or risk losing it.

J A Pye (Oxford) Land Limited ("the Developer") was the registered owner of 23 hectares of land in Berkshire. The owners of the property adjacent to the land, Mr and Mrs Graham occupied the land under a grazing agreement. The Developer wrote to the Grahams asking them to vacate the land after the expiry of the agreement. Notwithstanding this the Grahams remained in occupation, continuing to occupy the property for grazing and other agricultural purposes. This continued for more than 12 years and at no point during this time had the Developer taken any further steps in the matter. After 12 years had gone by the Grahams registered a caution against the Developer's Title on the grounds that they had obtained title by adverse possession.

The Developer brought possession proceedings seeking cancellation of the caution. The case went to the highest UK Court, the House of Lords where it was held

that the requirements for adverse possession had been established.

The UK law debarred the Developer from bringing an action to recover any land after the expiration of the 12 years of adverse possession and so the Developer took the case to the European Court of Human Rights alleging that it was a breach of Article 1 (protection of property) of the Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

At the first hearing the Court accepted the loss of title to such a large plot of land without compensation was a violation. On appeal the European Court of Rights found to the contrary by a 10 to 7 majority, since the UK legislation and many other European legal systems recognised the loss of title through inaction over the course of time. Furthermore, the legislation has been in

force for many years, so it should have come as no surprise to the Developer and it would have taken very little action on their part to prevent the Grahams claiming adverse possession.

A Word of Warning to Developers

- In this case the developer had asked the Grahams to vacate but not taken any further steps.
- It was therefore their inaction that meant the Grahams had a sufficient period of adverse possession.
- If the grazing agreement had not been terminated then the Grahams could never have claimed adverse possession.

Adverse Possession - New approach

If you are concerned contact us. ■■■■



Increase in holiday entitlement

Since 1st October 2007, under statute, all employees (subject to certain exceptions) have the right to a minimum of 4.8 weeks paid annual leave (equivalent to 24 days for a full time employee). This is due to increase to 5.6 weeks in April 2009 (28 days for a full time employee). There is no minimum period of continuous employment that is required for an employee to be entitled to this increase.

The aim of the increase is intended to address the issue that there was no additional entitlement to public holidays and many

employers were counting the 8 public holidays (in England and Wales) in their employees' holiday entitlement.

Despite this change, there is no statutory right to time off (paid or otherwise) on any public holiday. Whether an employee can be required to work on a public holiday is a matter of the contract or, in some cases, simply the employer's managerial prerogative. In many industries or occupations (such as retail, travel or emergency services), working on public holidays is a commercial or operational necessity. ■■■■

Directors' Duties: Companies Act 2006

Background

Historically, a Director's fiduciary and common law duties evolved through case law. Broadly these comprised the following:

- 1 Duty to exercise skill and care
- 2 Duty to act in good faith in the best interests of the company
- 3 Duty to act within the powers conferred by the company's memorandum and articles of association and to exercise powers for proper purposes.
- 4 Duty not to fetter discretion.
- 5 Duty to avoid conflicting interests and conflicting duties.
- 6 Duty to not make a secret profit.

Breach of any of these duties made the transaction voidable, so, provided it would not amount to fraud on the minority, shareholders could ratify a breach by ordinary resolution.

The 2006 Act

The Companies Act 2006 provides for the codification of directors' duties. Chapter 2 of part 10 of the 2006 Act contains the provisions on the general duties of directors, most of which came into force on 1st October 2007, although sections 175 to 177 have not come into effect and at present no date has been fixed as to when they will come into effect.

The most significant changes in relation to directors' duties are:

- 1 The statutory requirement for directors

to have regard, amongst other things, to a list of factors in exercising their duty of good faith.

- 2 Allowing independent directors to authorise a director's conflict of interest.

Codified duties

The codified duties are as follows:

- 1 Duty to act within powers (section 171)
- 2 Duty to promote the success of the company (section 172). In fulfilling the duty in section 172, a director must have regard (amongst other matters) to:
 - The likely consequence of any decision in the long term;
 - The interests of the company's employees;
 - The need to foster the company's business relationship with suppliers, customers and others;
 - The impact of the company's operations on the community and the environment;
 - The desirability of the company maintaining a reputation for high standards of business conduct;
 - The need to act fairly as between the members of the company.
- 3 Duty to exercise independent judgement (section 173)
- 4 Duty to exercise reasonable care, skill and diligence (section 174)
- 5 Duty to avoid conflicts of interest

(section 175)

- 6 Duty not to accept benefits from third parties (section 176)

- 7 Duty to declare any interest in the proposed transaction or arrangement with the company (section 177)

Conclusion

It is essential that directors are aware of the changes in the law in the area of directors' duties. Additionally, implementation of these directors' duties means the profiles of directors' roles may need to be reviewed and amended, engagement letters may need to be checked and amended and existing corporate practices will need to be reviewed in the light of the changes. ■■■■

Marsonstips

- All directors should be made aware of the changes brought about by The Companies Act 2006.
- All documentation, including engagement letters relating to directors' appointments need to be checked.
- Directors should be alert as to when Sections 175 to 177 become operative. ■■■■

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- Easiest place on an email to include this information would be in the auto signature (with the email disclaimer).
- Take this opportunity to review your website and check whether you have terms of use and appropriate privacy policies. And also an email disclaimer if you do not have one. ■■■■

Just a reminder - Company correspondence

It is a well known requirement that every company must state its name in certain places and on its business stationery. But as a reminder, from 1st January 2007, the company must state its name (including "limited" or "plc"), its place of registration (e.g. England and Wales or Scotland) and registered number, address of the registered office and VAT number on:

- All business letters (including e-mails) and order forms
- Invoices and receipts
- On company websites

Failure to comply will make the company liable to a fine. In addition, any director who issues or authorises correspondence which does not comply with these regulations may also be personally liable. ■■■■

Is your Lease “Code Compliant”?

At the end of March, the Code for Leasing Business Premises in England and Wales 2007 (the Code) was launched by the Minister for Housing and Planning. The aim of the Code is to help promote efficiency and fairness in landlord and tenants relationships.

The Code is voluntary and was published by a consortium of business, property, finance and legal organisations and sets out 10 key points for a code compliant lease as follows;

1 Lease Negotiations

Landlords should clearly state the principal terms of the lease: the rent, the length of the term, break clauses, repairing obligations. Landlords should also state whether they are prepared to offer alternative terms and upon what basis.

2 Rent Deposits and Guarantees

The heads of terms should state any rent deposit proposals, the amount and the arrangements for paying or accruing interest. The Code also states that Tenants should be protected against Landlords default or insolvency. The very fact that a Tenant has to provide a rent deposit often means that Tenants are in a weaker negotiating position because they have to trust that their Landlord is credit worthy and their money will be returned.

3 Break clauses and renewal rights

The only pre-conditions to Tenants exercising any break clauses is that they are up to date with the main rent, give up occupation and leave behind no continuing sublease. In certain leases, there may be a requirement that a Tenant has to pay an increased rent for the benefit of a break clause and in such situations it would seem inequitable that that a Tenant could then be trapped by a string of conditions attached to the break clause. The Code expressly states that disputes about the state of the premises should be resolved later as a damages claim.

4 Rent review

Landlords should be flexible and suggest alternatives to upward only rent reviews, for example up/down review to market rent or reference to another measure such as annual indexation.

5 Assignment and subletting

Landlords should not insist on an Authorised Guarantee Agreement as a condition to assignments, unless at the date of assignment the proposed assignee when assessed together with any proposed guarantor:

- is of a lower financial standing than the assignor
- is resident or registered overseas

For smaller Tenants a rent deposit should be an acceptable alternative.

6 Service charge

Landlords are encouraged to be as transparent as possible by providing best estimates of service charges, insurance premiums and other outgoings that Tenants will incur under their Lease.

7 Repairs

Tenants' repairing obligations should be appropriate to the length of the term. Unless stated in the heads of terms, Tenants should only be obliged to give the premises back at the end of their lease in the same condition as they were in at the start of the lease.

8 Alterations and changes of use

Landlords are encouraged to take a more relaxed approach and should not require Tenants to remove permitted alterations and make good at the end of the lease, unless reasonable to do so. This however does not alleviate the historical problem of what is reasonable and who should make this assessment.

9 Insurance

The Code recommends that rent suspension should apply not only if the premises are damaged by an insured risk but also an uninsured risk. Landlords should provide appropriate terrorism cover if practicable to do so. Although the Code does not recommend rent suspension on flooding this could become a real issue.

10 Ongoing Management

The Code states that Landlords should aim to handle defaults promptly and deal with Tenants and Guarantors in an open and constructive way. This includes when Landlords receive applications for consents and where practicable they should give Tenants an early estimate of the costs involved.

CONCLUSION

Whilst the Code is voluntary, the Government is threatening legislation to enforce the issues set out in the Code if the industry does not take this opportunity to adopt the above measures. The realities remain to be seen as to whether Landlords are prepared to comply with the Code. If so, it may be that Tenants will have to accept higher rents in return for greater flexibility. ■■■■

- 1 Assisting an Investor Client in preparing leases to enable marketing, sale and conveyancing of Long Leasehold residential element of mixed use properties to concentrate on maximising return on Commercial element.
- 2 Attending to enfranchisement requirements for leaseholders.
- 3 Preparing terms and conditions for a start up recruitment website.
- 4 Acted for a shareholder in disposal of shareholding in a private company to the other shareholders.
- 5 Acted for a company in the buy back of shares by the company.
- 6 Acted for a sub contractor in the successful defence of a construction dispute with the main contractor.
- 7 Acted in the recovery of debts and other contractual sums for companies and not for profit organisations.
- 8 Acting for a distributor in a product liability matter brought by a customer.

some recent cases

Small Developments & Restrictive Covenants

It is not unusual for the title of some larger urban freehold properties to contain a covenant restricting the use of the property by preventing it from being converted into flats or maisonettes.

Assuming that planning permission for the conversion of the property can be obtained how does the developer deal with the restrictive covenant? The Law of Property Act 1925 allows an application to be made to the Lands Tribunal for the restrictive condition to be discharged or modified. The Land Tribunal needs to be satisfied that one of the following applies:-

- 1 The covenant is obsolete.
- 2 The covenant impedes some reasonable use of the land.
- 3 Those with the benefit of the restriction have given their consent.
- 4 No injury will be caused to those with the benefit of the restriction.

Another way of approaching the problem is to apply to the County Court in terms of Section 610 of the Housing Act 1985 to vary

the title insofar as it relates to the restrictive covenant thereby allowing the conversion to proceed. The procedure under the Housing Act is relatively unknown and rarely used. It is interesting to note that a similar provision to Section 610 had first been introduced in the Housing Act 1949 during the time of the post war housing shortage. The shortage of housing that existed in 1949 is still a problem today.

In its 2007 pre-budget report the Government set a target to increase housing supply by an additional 240,000 homes per year by 2016. To achieve this target it is highly likely that more conversions of existing houses will be needed.

Section 610 of the Housing Act 1985 provides a useful tool for potential developers to deal with restrictive covenants preventing properties to be used for any other purpose than as a single private dwelling house.

The Appeal Court has recently provided guidance on the exercise of the County Court's discretion under Section 610 of the

Housing Act 1985 to modify restrictive covenants or lease terms that prevent the conversion of a property from a single dwelling house into flats. The relevant case is that of *Lawntown Limited v Mr & Mrs Camenzuli* [2007] EWCA Civ 949. The case allowed for the conversion to be given effect to. Should anybody require any further information or guidance relating to the above, please do not hesitate to contact us.

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- Identify title conditions which may inhibit development as early as possible
- Consider the nature of the restriction and possible remedies
- Think "outside the box" and consider all and not only the most common remedies. ■■■■

SEMINARS

Marsons Solicitors are holding further seminars and networking evenings in our popular series. These are held with a number of other organisations such as Accountants and Management Consultants. The seminars are on a wide range of topics to help you achieve outstanding results in your business and guide you through difficult times. The topics range from selling your business; communication and other management topics to board room bust ups. If you wish to have details of our current seminar timetable please e-mail jennifer.white@marsons.co.uk. ■■■■

commercial team

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I qualified as a solicitor in 1991 and have worked in a number of commercial areas with specific emphasis upon commercial litigation. My experience covers all manner of company and commercial disputes; product liability; intellectual property protection and "passing off" action; professional negligence action; insolvency and debt recovery action; shareholder claims and director disputes; warranty arguments arising out of sales of companies; and all types of construction disputes (including adjudication).

As a commercial team we can provide a complete service to business clients, whether it be advice on lease renewals or business premises acquisitions; advising and drafting contracts, whether with customers, employees or shareholders; or recovering monies arising from unpaid invoices to advising on complex trade disputes. Through our team we are able to provide effective solutions to business issues. ■■■■

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I have 23 years experience in law graduating way back in 1979 with an LLB degree having completed a Bachelor of Commerce degree in 1977. I have specialised in Property Law and Conveyancing and, save for a period of three years when I took a break to acquire accounting and business knowledge and skills, have practised law in both England and South Africa and I am dual qualified and admitted in both jurisdictions.

I like the fact that as a Firm, Marsons adopts a robust commercial approach to property matters and have on the whole a relationship with clients that lends itself to effective communication resulting in clear instructions and no doubts as to client's expectations. Clients seem to be appreciative of the cost effective service, delivered on time and in a user friendly manner. ■■■■

Marsons Solicitors is recognised by its peers and clients in both the Legal 500 and Chambers - A client's guide to the legal profession. Recognised in the South East by the Legal 500 for its corporate and commercial services as well as its commercial litigation services, and the 2008 Chambers guide says: "this cracking team provides a professional and good value service...in land acquisition and development".