



PROPERTY GROUP NEWSLETTER



"I am happy to be able to report yet more good news. Since the last issue of the Property Group Newsletter, Chambers was shortlisted for Chambers of the Year at The Lawyer Awards 2009 and the Property Group won Chambers of the Year at the Enfranchisement Awards 2009, where I also was delighted to win Barrister of the Year. This issue includes recent cases in the Court of Appeal involving Nick Isaac, Chris Coney and Geraint Jones QC."

Philip Rainey, Head of the Tanfield Property Group

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TENANT IN CVA: MAXIMISING THE LANDLORD'S CLAIM

Tim Polli considers a method for a landlord in uncertain economic times to maximise its claim for rent from a tenant company who enters into a CVA.

The recession has led to an increase in the numbers of companies entering into Company Voluntary Arrangements. When the company is a tenant of premises, its landlord will be concerned to minimise its losses.

In circumstances where the tenant company proposes to continue to occupy and trade from the premises, then any CVA that does not provide for the company's ongoing obligations in respect of the premises to be met in full might be challenged by the landlord – see the comments made by Neuberger LJ (as he was then) in *Thomas v Ken Thomas Limited* [2007] 1 EGLR 31. In other cases, however, it is clear that the landlord can prove in the tenant company's CVA in respect of future rent and terminal dilapidations – see *Re Cancol Limited* [1996] 1 All ER 37 and *Doorbar v Alltime Securities Limited* [1996] 2 All ER 948. The liability exists at the time of the CVA as a liability obliging payment in the future.

In *The Cotswold Company Limited subnom Threadneedle Pensions Ltd v Asher Miller* [2009] EWCA 1151 (Ch), The Cotswold Company Limited ('the Company') entered into a CVA. It was the tenant of premises pursuant to a lease continuing until March 2018 but it had no intention of continuing to occupy the premises. The Company's CVA proposal was, essentially, that its entire shareholding would be purchased for £1.45 million, which payment would be made available for distribution to the unsecured creditors. The proposal was accepted at a creditors' meeting, which the landlord did not attend and at which it did not vote. The CVA proposals did not specifically deal with any liability arising under the lease, but the statement of affairs stated that a contingency of £200,000 had been allowed in respect of a claim for dilapidations.

TENANT IN CVA

NO PARTY FOR PARTY WALL ACT LAWYERS

A POINT OF VIEW UPDATE

CONTINUED OVERLEAF

The landlord submitted a claim in the CVA in respect of rent and service charges, legal costs, agents' fees, refit costs and terminal dilapidations. The claim for rent included an element for loss of the rent that would have been paid up to the end of the term in 2018. The supervisor did not respond to the landlord's claim.

The landlord subsequently wrote to the supervisor pointing out that it could not mitigate its loss and re-let the premises until it had received a surrender of the same from the Company. The Company subsequently agreed a surrender with the landlord which included a recital stating that the surrender was for the purposes of enabling the landlord to re-let the premises to mitigate its claim in the CVA. The surrender expressly released the Company from all liability, claims and demands in respect of all the covenants and conditions contained in or otherwise arising in respect of the lease "save in respect of the landlord's right to claim within the CVA".

Subsequently, the supervisor refused to admit in the CVA the landlord's claim for rent and service charges for any period after the surrender. The supervisor argued that the landlord's claim had not yet been admitted into proof when the surrender was agreed. The effect of the surrender was to extinguish the claim for future rent and, as a consequence, it was entitled to refuse that part of the landlord's claim in the CVA which related to future rent.

The landlord argued that its claim to future rent and service charges was compromised once and for all in the CVA in which it had claimed. That compromise having been made, the subsequent surrender of the Company's lease had no effect on the rights and liabilities that had been created by the CVA (including, in principle, no effect on the amount of the claim in the CVA).

The matter came before Mr Jules Sher QC, sitting as a Deputy Judge of the High Court, who was unable to accept in full either of the parties' submissions. He rejected the supervisor's submissions on the grounds that the approval of the CVA clearly constituted a binding compromise of the landlord's claim for future rent with quantification of that claim deferred pending an assessment of the loss that was or would be suffered by the landlord. On the other hand, he was unable to accept that the compromise constituted by the CVA settled the landlord's claim so completely as to prevent the subsequent surrender from having any effect at all. In his view, the terms of the surrender were of crucial importance. If the surrender had not expressly reserved the landlord's rights to claim in the CVA, then the surrender would have adversely affected the amount of the landlord's claim that was admitted into proof. But, on its true construction, it did preserve the landlord's right to claim in the CVA for future rent, service charges and dilapidations, and the supervisor should have admitted the landlord's claim for future rent and service charges into proof.

The decision was one as to principle only. The Judge expressly declined to make any finding as to the quantum of the claim that should be admitted; expert evidence was to be obtained and a further hearing would be required. It is clear from the tenor of his judgment, however, that he would have rejected any submission by the landlord that credit should not be given for rent subsequently received from any re-letting. That potentially overlooks the extent to which the making of a CVA constitutes a binding compromise.

The decision is clear authority for the proposition that a landlord faced with a tenant entering into a CVA (or, in principle, a tenant entering into an IVA) can, by a properly drafted surrender, receive a surrender of the lease and still claim in the CVA (or IVA) in respect of future rent or service charges that would have become due under the lease. Whether that is correct, and would survive an appeal, is unclear. It is understood that the supervisor in that case has not appealed.

TIM POLLI



NO PARTY FOR PARTY WALL

Nick Isaac recently appeared in *Reeves v Blake* [2009] EWCA solutions.

The Court of Appeal has recently decided the case of *Reeves v Blake* [2009] EWCA Civ 611. This is only the second case relating to the Party Wall etc. Act 1996 ("the Act") to have reached the Court of Appeal since the Act replaced the London Building Act 1939 and expanded its ambit to the whole of England and Wales. The case provides a timely opportunity to review the Act.

The Act remains something of a mystery to many property litigators, not through a lack of diligence on their part, but simply because party wall disputes do not often become litigious independently of other factors.

Lord Justice Etherton's concise summary of the purpose of the Act was as follows:

"it provides procedures, similar to those in the London Building Acts, for authorising property owners to carry out work to an existing party structure or otherwise on or near to the boundary with the adjoining property, but which at the same time protect the legitimate interests of the adjoining owner. They are intended to constitute a means of dispute resolution which avoids recourse to the courts."

Section 10 of the Act provides a procedure which is intended to provide that means of dispute resolution, primarily by surveyors making an "award", but with a right of appeal to the County Court in the event a party still disputes the result.

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The procedure calls upon either a single surveyor jointly appointed by the parties, or two out of three surveyors (appointed one each by the parties, and the third by those two surveyors) to determine a "dispute or deemed dispute". Determination is contained in an "award", which is a written decision of the surveyor. The award is not required to give reasons for the decision, but will generally do so.

Appeals to the County Court, although they do not require permission, are uncommon. This is both because the 14 day time limit for appeals cannot be extended and is thus often missed, and because the amounts of money involved (at least when the properties concerned are residential) rarely justify the expense.

The second of these reasons also applies to appeals to the Court of Appeal, but the main reason for the paucity of appeals to that court is that such an



NICK ISAAC

Nick joined Tanfield in February 2006 from 199 The Strand. Nick has a special interest in, and is regularly instructed in, Party Wall and boundary disputes. He contributes on both subjects on the www.isurv.com web-site, and last year published a book on "Easements and Other Rights" through RICS books. He appeared

for the (unsuccessful!) appellant in *Reeves v Blake*. Outside work Nick skis, runs marathons and around golf courses, and is attempting to learn the violin with his children.



TIM POLLI

Tim's practice encompasses all aspects of property and property-related work, with a particular emphasis on landlord and tenant, and, in the current financial environment, mortgage fraud and the professional negligence claims that follow.

He is recommended for his property work for a number of years in *Chambers & Partners*, in the current edition of which he is commended for being "business-focussed and sensible". When not working, he enjoys the theatre and cinema, and spending time with his two-year-old son, Toby.

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Civ 611 and discusses the case and offers some practical

appeal is treated as a second appeal. Permission therefore normally requires that the appeal raises a point of general public importance.

The issue in *Reeves v Blake* went to the extent of the surveyors' jurisdiction under the Act.

"This decision leaves an adjoining owner who wishes to enforce a building owner's compliance with the Act in a difficult situation."

The building owner had invoked the Act by service of a section 6 notice (relating to excavations). A preliminary award was made by the surveyors dealing with the validity of the notice, but which did not authorise the works to commence. The adjoining owner therefore threatened proceedings for an injunction when the building owner commenced work. After proceedings had been prepared by the adjoining owner, but before they had been issued, the building owner gave an undertaking not to continue with the works until a further award was in place. The second award, as well as authorising works to be carried out, awarded the adjoining owner her legal costs of preparing the proceedings for an injunction. The building owner appealed.

Both the County Court and the Court of Appeal agreed that the surveyors did not have jurisdiction to deal with those pre-commencement litigation costs, despite the apparently wide scope of the wording in sections 10(12) and 10(13) of the Act. The two reasons for that decision were that (1) allowing surveyors to make awards in relation to such costs would be inconsistent with the statutory objective of resolving disputes without recourse to the courts, and (2) there is a general presumption that costs fall where they lie unless proceedings are commenced; a presumption the court saw no reason to depart from.

However, the Court did accept that there were situations in which legal costs "reasonably and properly" incurred could be the subject of an award. These would certainly include the costs of advice in relation to the applicability of the Act to works proposed or being carried out, as well as advice as to the validity of notices served. It is less clear whether the cost of advice as to the availability of an injunction to prevent works in breach of the Act would qualify.

This decision leaves an adjoining owner who wishes to enforce a building owner's compliance with the Act in a difficult situation. It encourages a building owner towards brinkmanship in the knowledge that unless proceedings are actually commenced for an injunction, he will not be at risk of having to pay the costs of them. And it will tend to cause adjoining owners to delay the threat or preparation of proceedings for an injunction for the same reason.



I offer a couple of possible practical solutions to the problem:

- (1) If an undertaking is offered at the last minute, the adjoining owner can refuse to accept it except on the basis that the building owner agrees that the surveyor or surveyors (as the case may be) shall have power to determine liability for all costs, including pre-commencement legal costs. Such agreement should ideally specify whether the surveyors are to determine that liability as arbitrator or expert;
- (2) If an initial letter before action in which the adjoining owner demands that works cease and threatens an injunction does not result in the immediate cessation of works, proceedings should be issued without further communication. An undertaking given thereafter down to the date of any award would still leave the Court with jurisdiction to award the adjoining owner its costs.

NICK ISAAC

A "POINT OF VIEW" UPDATE

In the last edition Chris Coney discussed whether (contrary to the view expressed in *Gale on Easements*) the grantee of a right of way could restrain the grantor from interfering with its use by obstructing the "visibility splay" by relying on the doctrine of derogation from grant. The point had been decided in the grantee's favour by HHJ Cowell in the CLCC in a case called *Carter v. Cole*.

At the time of publication, the appeal by the defendant grantees was pending in the Court of Appeal.

The Appeal

Chris Coney was led by Geraint Jones QC on appeal (for the Respondents).

The Appellants did not dispute the general principles as to derogation from grant (adverted to in the previous article). Jacob LJ, giving the only judgment, summarised them as "one cannot take away with one hand that which has been given by the other". He quoted a passage from the judgment of Neuberger J in *Platt v. London Underground* [2001] 2 EGLR 121 at 122: "One test that is often helpful to apply where the act complained of is the landlord's act or omission on adjoining land is whether the act or omission has caused the demised premises to become unfit or substantially less fit than the purpose for which they were let".

The Appellants argued that it was not the interference by the Appellants with the splay which was the cause of the problem, but rather the insistence of the local authority that the Respondents were not in a position to exercise control over the splay which caused the problem.

The Court of Appeal dismissed this argument as circular: the Respondents did have control in the sense that neither the Appellants nor their successors in title could interfere with the splay.

Further the court held that HHJ Cowell had acted correctly in granting a mandatory injunction to remove the hedges, fencing and trees which obstructed the splay. The local authority had refused planning consent for any commercial use because obstructing the visibility splay made use of the right of way dangerous, whereas if the splay had not been interfered with there was a strong possibility that some sort of planning permission would be granted and the Appellants "were not entitled to deprive the [Respondents] of that prospect".

The Court of Appeal did, however, reduce the amount awarded by way of damages.

Conclusion - and implications

It appears that it is now established beyond argument that Derogation from Grant is a wholly free-standing principle. Practitioners should consider whether it may be employed when advising clients where other more obvious principles do not assist. They should bear in mind that it is useful because it might be used to restrict the servient owner from doing something when such could not exist as an easement, even in the use of the grantor's own land. It might be used where a restrictive covenant was not taken. Note, too, that it applies to restrict the activities of successors of the grantor.

CHRIS CONEY

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