serlespeak
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Prescription post-*Barkas* – beyond the tripartite test?

IN *R (ON THE APPLICATION OF BARKAS) v NORTH YORKSHIRE COUNTY COUNCIL AND ANOR* [2015] AC 195 THE SUPREME COURT RESOLVED THE DEBATE OVER WHETHER USE OF LAND 'BY RIGHT' COULD ALSO BE USE 'AS OF RIGHT'.

A unanimous court held that use 'by right' does not equate to use 'as of right' and in so doing overturned the House of Lords' decision *R (on the application of Beresford) v Sunderland City Council* [2004] 1 AC 889.

Barkas

The specific question posed by *Barkas* was whether a field owned by Scarborough Borough Council should be registered as 'a town or village green' under section 15 of the Commons Act 2006. The field was maintained by the Council as recreation grounds under section 12(1) of the Housing Act 1985, and had for at least 50 years been used by local residents for informal recreation. In 2007 a local residents' association applied to register the land as a town or village green, requiring the court to determine whether use is 'as of right' when it is contemplated by the statutory provision under which a public body holds the land in question.

Lord Neuberger's leading judgment is premised on the contradistinction between use 'as of right' and 'by right'. A permitted use of land is use 'by right', while use of land without such permission is carried on *as if* by right. Despite academic speculation, the same use cannot be both non-trespassory and 'as of right'. The dichotomy originates from the law on acquiring easements by prescription, and is translated by the tripartite test 'not by force, nor stealth, nor licence'. Each of these 'vitiating circumstances' amounts to a reason why it would not have been reasonable to expect the owner to resist the particular use.

In *Barkas* the public had a statutory right to use the land for recreation, and were using the land 'by right' rather than 'as of right'. Where the owner of the land is a public authority which has lawfully allocated the land for public use, the lack of any objection by the authority to this use is simply consistent with that allocation decision. In the recent case of *R (on the application of Newhaven Port and Properties Ltd) v East Sussex CC* [2015] 2 WLR 601, the Supreme Court reaffirmed that, where a particular use of land is contemplated by statutory provision, such use is by right rather than as of right and, consequently, cannot form the basis of village green registration.

The tripartite test

Despite the clarity brought by the resolution of this debate, the practical effect of *Barkas* remains unclear. While Lord Neuberger deems the dichotomy 'sufficiently described' by the tripartite test, Lord Carnwath suggests that in cases of possible ambiguity the use *"must bring home to the owner, not merely that 'a right' is being asserted, but that it is a village green right" (Barkas, per* Lord Carnwath at [65]). As a statutory requisite of any application to register the land as a town or village green is use as of right for lawful sports and pastimes, it is far from clear what else might be necessary. Lord Neuberger's scepticism that anything more than the tripartite test is required is well-founded.

ZAHLER BRYAN has a broad commercial chancery practice, with a particular emphasis on trusts, insolvency and property.

Welcome to this new edition of Serlespeak on the law of real property. I begin the edition by examining the recent Supreme Court case of *Arnold v Britton* on the interpretation of service charge provisions. Andrew Francis then reviews developments in the field of injunctions since *Lawrence v Fen Tigers*. Later in the edition, Tom Braithwaite explores the scope for using personal claims to escape the straitjacket of land registration. Jonathan Fowles considers recent proposals for legislation to curb the litigation of boundary disputes. Finally, Zahler Bryan discusses the impact on prescription of the decision of the Supreme Court in *Barkas*.

Christopher Stoner QC

Surely my service charge cannot be that much?

IT IS DOUBTFUL THAT THE UNFORTUNATE CONSEQUENCES OF SERVICE CHARGE DISPUTES NOR THE POOR DRAFTING THAT OFTEN BEDEVIL SERVICE CHARGE CLAUSES HAS MORE STARKLY BEEN ILLUSTRATED THAN IN THE CASE OF *ARNOLD v BRITTON* [2015] UKSC 36.

In *Arnold* lessees on a 99 year term of holiday chalets on the Gower Peninsula, which appear to have been available before litigation for a modest premium, now face the prospect of escalating service charges of up to £1,025,004 by the end of the lease in return for the landlord's covenanted provision of run-of-the-mill services, such as maintaining roads, paths, fences, a recreation ground and drains, mowing lawns and removing refuse.

Whilst there were a total of five different (albeit similar) versions of service charge clause across the park, the particular version that had the worse consequences, for 25 of the 91 lessees, required them:

"To pay to the Lessors without any deductions in addition to the said rent as a proportionate part of the expenses and outgoings incurred by the Lessors in the repair maintenance and renewal of the facilities of the Estate and the provision of services hereinafter set out the yearly sum of Ninety pounds and Value Added Tax (if any) for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent year or part thereof."

The parties were agreed that the effect of the clause was to provide for a sum escalating at 10% compounded each year such that by 2012 the original £90 had become £3366 which will soar

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above £1m by the end of the lease terms in 2072.

The primary contentions of the parties were straightforward: the lessor said the leases provided for a fixed sum service charge, starting at £90 for the first year and increasing at the rate of 10% each year on a compound basis. The lessees said that the landlord's argument resulted in an increasingly absurdly high annual service charge in the latter years that no party could have intended and that on the proper construction of the clause the service charge requirement was to pay a fair proportion of the lessor's costs of providing the covenanted services, "up to" or "limited to" a maximum sum, which was £90 in the first year, thereafter increasing at the rate of 10% per annum.

Notwithstanding Lord Carnwath's exhortation in his strong dissenting judgment that *"Long residential leases are an exceptional species of contract, and as such may pose their own interpretative problems. In no other context is a private individual expected to enter into a financial commitment extending for the rest of his or her life, and probably beyond"* the majority of the Supreme Court determined that however unattractive the consequences, both as a matter of common sense and for the individual lessees, usual contractual principles could not be displaced and the court could not re-write what was ultimately a bad bargain on the part of the lessees. The protections for lessees found in sections 18 – 30 of the Landlord & Tenant Act 1985 could not assist.

Whilst, to the annoyance of the court, there was very little evidence available of what would have been known to the parties at the time of execution, it was known that at that time inflation was very high, peaking in 1974 at 24.2% and, inferentially, it appears the provision of the fixed service charge sum was an attempt to predict and counter inflationary tendencies, however unwise and clumsy that might have been given that no economist would be able to predict the value of money during a 99 year term.

In this context the majority of the Supreme Court felt able to apply usual contractual principles, with Lord Neuberger emphasising seven factors which contain a useful forensic focus on interpreting contracts consistently with commercial common sense and, critically, the limitations of interpretation in such circumstances given it is the court's function *"to identify what the parties have agreed, not what the court thinks that they should have agreed"*. Lord Neuberger clearly states:

"… contractual common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

Against this, Lord Carnwath, in his dissent, commented that *"… where an ordinary reading of the contractual words produces commercial nonsense, the court will do its utmost to find a way to substitute a more likely alternative …"* He, in agreement with the Judge at first instance, considered that the lessor's interpretation was so commercially improbable that only the clearest words could justify a court in adopting it, which words he did not find in the clause in issue.

Whilst sympathy for the lessees whose chalets are now worthless and who face potentially ruinous personal liability is obvious, the case provides a useful and powerful reminder:

- of the importance of precision in drafting service charge clauses in new leases, whilst illustrating the lack of precision in so many such clauses in older leases;
- of the importance, if providing for the future when drafting, of not trying to predict what will happen. In passing, in the present instance, a formula linked to RPI would have been preferable; and
- of the undeniable fact service charge disputes continue as a fertile source of litigation.

CHRISTOPHER STONER QC specialises in all aspects of real property and landlord and tenant. He has recently been retained in two representative service charge actions acting in each matter on behalf of a large numbers of tenants.

Fen Tigers 18 months on. Plus ça change, plus c'est la même chose.

ALL THOSE INVOLVED WITH PROPERTY DEVELOPMENT WHERE THERE IS A RISK OF INFRINGING RIGHTS OF THIRD PARTIES WILL BE FAMILIAR WITH THE CHANGE IN THE LANDSCAPE OF REMEDIES WROUGHT BY THE SUPREME COURT IN *LAWRENCE v FEN TIGERS* [2014] 1 AC 822. BUT HOW HAS THAT GONE?

The restoration of the emphasis on the discretionary nature of the remedies of the injunction and damages in lieu, the importance of a proper consideration of all relevant facts and circumstances, and a rejection of the rigid approach demonstrated by some cases in the past decade are all positive elements of the decision in *Fen Tigers.* But the principle that the *prima facie* remedy for breach of property rights is the injunction, and the remaining uncertainty over the assessment of damages in lieu of an injunction, cast a shadow over many development projects. Some cases at first instance in late 2014 and early 2015 (e.g. *Scott v Aimiuwu,* Mr Recorder Cole C.L.C.C. – rights of light - and *Scott v Winter,* Mr Recorder Kramer, Newcastle Upon Tyne County Court – restrictive covenants) demonstrate, as expected, that the Courts are applying the principles in *Fen Tigers.* But developers and those holding the benefit of rights invariably look for certainty. That desire is often impossible to satisfy. The developer will want to complete the development within budget and on time. The person with rights will want to enforce them and may not want to accept the price of a release. Over the past 18 months there appears to have been reluctance by some developers to accept that the injunction is still the *prima facie* remedy, and holding out for extravagant sums by those with rights. Indemnity insurance remains problematic. Finally, the publicity caused by *Fen Tigers* has led to "ambulance chasing" by some advisers attempting to extract inflated release fees from developers.

In essence the post *Fen Tigers* landscape is legally changed, but on the ground the tensions, frustrations and uncertainties remain. The prospect of reform following the Law Commission's Reports and Bills on covenants, easements and rights of light remedies published in June 2011 and December 2014 seems distant. The advice to the developer client is to seek specialist advice pre-planning. Those with rights must be alert and assert rights without delay. Both courses allow a realistic appraisal of risk and the outcome of a claim in Court for an injunction and the amount of any damages recoverable.

> "on the ground the tensions, frustrations and uncertainties remain."

ANDREW FRANCIS has a real property practice and specialises in the law of restrictive covenants and rights of light. He is the author of books in both specialisms.

Trouble at mill

ANY REGISTRABLE DISPOSITION MADE FOR VALUABLE CONSIDERATION, WHETHER IN GOOD FAITH OR BAD FAITH, WILL TAKE PRIORITY OVER AN UNREGISTERED INTEREST IN FAVOUR OF A THIRD PARTY. SUCH AN ABSOLUTE PRINCIPLE CAN LEAD TO UNFAIRNESS.

Land registration can be a tricky thing. Following a transfer of land, registrable but unregistered property rights cannot be asserted against the new landowner, even if he had notice of them before acquiring the land.

A possible solution to this problem comes from looking beyond the law of property. As Lord Wilberforce observed in *Frazer v Walker* in 1967, the mechanism of land registration may preclude the survival of proprietary rights against a purchaser of land, but it *"in no way denies the right of the plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant"*: i.e. personal claims are unaffected by registration.

So what personal claims might exist against a person who acquires land, in breach of the unregistered rights of a third party? The most obvious such claims are under the economic torts: specifically, the torts of procuring a breach of contract, of causing loss by wrongful means, and of conspiracy.

A recent example of such a claim can be found in *Lictor Anstalt v Mir Steel UK Ltd* [2014] EWHC 3316 (Ch). The case concerned a 'hot strip' steel mill (don't google it). The component parts of the mill had been purchased by Lictor in the late 1990s. In 2000 the mill was installed on a site in Wales belonging to a related company, Alphasteel. At the time of installation, Lictor and Alphasteel entered into an agreement, recording that Lictor would have the right to enter upon the land in order to remove the mill, and containing an undertaking by Alphasteel not to sell the mill. The agreement created registrable property rights, but was never registered. Many years later, Alphasteel entered administration, and the administrators sold the site with the mill still on it to Mir.

If the mill had been a chattel, none of that would have mattered: Lictor would have retained title. But as the mill had been annexed to the land, the purchaser acquired the site and the mill, free from Lictor's unregistered rights.

Lictor undoubtedly had a claim against Alphasteel for breach of contract. But that claim was worthless, as the company was insolvent. So instead it sued Mir, the purchaser, for procuring a breach of contract.

The trial judge, Asplin J, held that Mir was liable. It knew about the original contract and knew and intended that the sale of the site with the mill on it would result in its breach. It therefore procured the breach. Although Mir did not 'entice' the administrators to do as they did, Mir was liable because it was guilty of *"intentional causative participation" (OBG v Allan)* in the breach of contract.

Mir objected that the claim circumvented the policy of the Land Registration Act. Mir argued that it ought to have been able to rely on the fact that as Lictor's right was not registered, it could acquire the site free from the risk of any liability. That argument was rejected. The judge held that the Act was only concerned with proprietary rights, and a failure to register a proprietary right could not preclude personal liability.

Lictor v Mir exemplifies how the economic torts can assist the holders of proprietary rights who fail to protect those rights on the register. In particular, where the rights in question are contractual (e.g. a development agreement or estate contract), and where the purchaser acquires the land with knowledge of the rights in question, there may well be liability for procuring breach of contract. Certainly, close scrutiny should be paid to the possibility of personal liability notwithstanding the loss of the proprietary right.

TOM BRAITHWAITE and Dan McCourt Fritz were counsel for Lictor.

Chambers news

People

We are delighted that our current pupils, Anthony Kennedy and Oliver Jones, have accepted offers of tenancies and will become members of Chambers in October 2015. Nicola Sawford has retired after 12 years as Chief Executive at Serle Court and is replaced by John Petrie.

Directories

The Citywealth Leaders List 2015 has been published and Serle Court has 11 barristers recommended as prominent barristers in the field of contentious trusts: Alan Boyle QC, Kuldip Singh QC, Frank Hinks QC, Dominic Dowley QC, Philip Jones QC, Jonathan Adkin QC, William Henderson, Daniel Lightman, Timothy Collingwood, Giles Richardson and Dakis Hagen.

Conferences and seminars

We hosted property litigation seminars in May and June. The seminars considered a problem of a hypothetical multi-storey property containing mixed residential and business accommodation. Christopher Stoner QC, Andrew Bruce and Andrew Francis addressed issues of disrepair, service charge matters and development clauses. A seminar on mediation in competition and regulation was also held in June, chaired by Barling J. Beverly-Ann Rogers led a discussion on current trends in mediation and Suzanne Rab on the role and potential of mediation in competition cases. A conflicts of interest in international arbitration seminar was hosted in July with Khawar Qureshi QC speaking on the role and responsibilities of arbitrators.

In addition, we hosted a roadshow in Manchester, with Kuldip Singh QC, Lance Ashworth QC and Jonathan Fowles leading the corporate disputes seminar and Christopher Stoner QC, Andrew Francis and Andrew Bruce the property litigation seminar.

A successful half-day trusts and commercial litigation conference was hosted in Jersey in June with Serle Court represented by Elizabeth Jones QC (Chair), Frank Hinks QC, Lance Ashworth QC, Nicholas Lavender QC, John Machell QC, Hugh Norbury QC, Timothy Collingwood, Giles Richardson, Matthew Morrison, Sophie Holcombe, Adil Mohamedbhai, Emma Hargreaves, Amy Proferes and Adrian de Froment.

Thank you to all of our clients who attended and gave such positive feedback.

A roadshow in Southampton will be held on 14th October, covering property litigation matters.

Books and publications

The 2nd supplement to the 15th edition of *Dicey, Morris and Collins, The Conflict of Laws* has been published under the joint general editorship of Professor Jonathan Harris and Lord Collins of Mapesbury. Jonathan became the first new general editor since 1987 and only the fifth since the book was first published in 1896. He has also written 11 chapters in the supplement. William Henderson and Jonathan Fowles are the editors of the 10th edition of the established charities text, *Tudor on Charities*, to be published this autumn by Sweet & Maxwell. The new edition, the first since 2003, has been substantially re-written, and includes a chapter on tax by Julian Smith of Farrer & Co. The 3rd edition of *Rights of Light: The Modern Law*, which Andrew Francis co-wrote, was published earlier this year.

LinkedIn

We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

Edited by JONATHAN FOWLES

Fencing off boundary disputes

BOUNDARY DISPUTES ARE ALL TOO OFTEN CLASSIC EXAMPLES OF SAYRE'S LAW THAT THE INTENSITY OF A DISPUTE IS INVERSELY PROPORTIONATE TO THE VALUE OF THE ISSUES AT STAKE. BUT PARLIAMENTARY EFFORTS TO KEEP SUCH DISPUTES AWAY FROM THE COURTS ARE BEING RESURRECTED.

Back in 2012, a Property Boundaries (Resolution of Disputes) Bill was presented to Parliament by Charlie Elphicke MP, having been developed by the Pyramus and Thisbe Club, the well-known association of Party Wall professionals. The Bill was ultimately withdrawn in 2013 as a result of parliamentary time pressure.

The Bill has since been revised and been reintroduced to Parliament by the Earl of Lytton, the chartered surveyor who was responsible for the presentation to Parliament of what became the Party Wall Act 1996. By the time you read this, the Bill will have received its second reading in the House of Lords on 11 September 2015.

The Bill provides for the stay of proceedings concerned with boundary disputes (including as to the location and extent of a right of way) and the reference of the dispute to binding determination by one agreed surveyor, or, if the parties appoint one surveyor each, a third surveyor. The determination would then be subject to an appeal to the TCC.

Where proceedings have not yet been started but a landowner wishes to establish the position of a boundary or right of way, a notice procedure would have to be followed leading, in the event of dispute, to the appointment of surveyor(s).

The introduction of the Bill follows a Scoping Study by the Ministry of Justice which concluded in January 2015 that the case had not been made for a system of expert determination of this kind or any radical reform of the law.

Despite significant backing in some quarters for a system of expert determination, the authors of the Study instead favoured piecemeal improvement of present systems and procedures: including by exploring the scope for encouraging the use of mediation and independent expert determination.

At first glance, the conclusion of the Scoping Study seems persuasive. After all, in many cases the usefulness of a surveyor's report depends on the expert surveyor being properly directed to a conveyance or plan which needs to be construed by the court or being guided by instructing lawyers as to the characterisation of the issues in the case. There is also a clear difference between a Party Wall Act "dispute" where the surveyors are engaged primarily to *enable* works to be done without harm to the parties and a boundary dispute where a surveyor would have to *decide* a dispute which is all too real. It is not clear on the face of the Bill how the surveyor is to decide disputed questions of fact, which would ordinarily call for cross-examination.

However, it is also true that surveyors are generally able to apply the basic legal principles, and the anxieties of the Scoping Study about the expertise of surveyors and likelihood of appeals may have little application in the majority of cases where parties could be prepared to accept a neutral surveyor's view of the position. Arguably it is the neutrality of the surveyor's position, when combined with his or her technical expertise, which would satisfy the parties; it may be only their lawyers who would fret about the scrupulous application of legal principle.

A desirable halfway-house would be to establish a specific pre-action protocol for boundary disputes which, all other things being equal, required parties to consider the involvement of a neutral surveyor for expert determination or evaluative mediation.

As recent cases such as *Gilks v Hodgson* [2015] 2 P & CR 4 indicate, the courts continue to have little appetite for protracted disputes about neighbours and ditches. We may be reaching a "something must be done" moment.

JONATHAN FOWLES has a chancery practice, including property, charities, trusts, and probate. He has acted in many boundary disputes.

serle court

6 New Square, Lincoln's Inn, London WC2A 3QS
T: +44 (0)20 7242 6105 F: +44 (0)20 7405 4004
www.serlecourt.co.uk