Business or pleasure?

IN *SCULLION V BANK OF SCOTLAND* [2011] EWCA CIV 693, THE CLAIMANT, A RETIRED BUILDER, INVESTED HIS HARD EARNED SAVINGS IN THE BUY TO LET MARKET. HE PURCHASED A FLAT WITH THE AID OF A MORTGAGE. HIS LENDER INSTRUCTED A VALUER. THE VALUER NEGLIGENTLY OVERVALUED THE FLAT. MR SCULLION RELIED ON THE LENDER'S REPORT, AND WAS THEREBY MISLED AS TO THE LIKELY RENTAL INCOME FROM THE PROPERTY. LOSS AND RECRIMINATIONS ENSUED.

Naturally, Mr Scullion relied at trial on *Smith v Bush*. That case establishes that, because the overwhelming proportion of purchasers rely on lenders' valuations, a valuer assumes a duty of care to the purchaser even if he is solely instructed by the lender. The court held that it is unreasonable, particularly where the property is of modest value, to seek to exclude that duty under UCTA 1977.

In *Scullion*, the judge, applying *Smith*, had found the valuer liable. However, the Court of Appeal has now overturned that decision. Lord Neuberger held that it would not be "fair just and reasonable" to impose a duty on the valuer, and distinguished *Smith* on the basis (amongst other reasons) that Mr Scullion was not "an ordinary domestic householder purchasing a home", but was essentially engaged in a commercial transaction. In justifying that distinction, he held (perhaps questionably) that those who engaged in buy to let transactions tended to be more commercially astute than those who buy to occupy. They are therefore less in need of the law's protection by the imposition of a duty of care.

The distinction upon which *Scullion* rests, between the commercial and domestic spheres, is hardly new. After all, residential and commercial leases have had little in common for decades. But the readiness with which the courts have been resorting to the distinction as a determinative factor in their decisions is striking. To take the two most obvious recent examples from the property world, in *Stack v Dowden*, the House of Lords rewrote the law of common intention constructive trusts – but only as they apply to the acquisition of a family home; and in *Cobbe v Yeoman's Row,* it all but eviscerated the doctrine of proprietary estoppel, but only (as we subsequently learned to our collective relief in *Thorner v Major*) in the commercial context. It seems proprietary estoppel is now confined to assisting the many who live in blissful ignorance of the rudimentary formalities of conveyancing.

Thus *Scullion* rests on the distinction (as did *Stack*) between the acquisition of a home and a mere house, and refuses (as did *Cobbe*) to protect those whose fingers are burned in commercial rather than domestic transactions. In this regard, it seems to be the latest manifestation of an increasing trend.

> "*Scullion* rests on the distinction (as did Stack) between the acquisition of a home and a mere house."

TOM BRAITHWAITE'S expertise includes property law, and he often acts in professional negligence cases in this and other fields.

serlespeak

ISSUE NO.7

"I am very pleased to introduce you to this new edition of Serlespeak on the subject of property law. In the first article below I discuss the extent to which injunctions may be available when proprietary rights have been infringed, particularly given the decision in *Heaney*. Subsequently Andrew Francis highlights the recent impact of competition law on freehold and leasehold covenants, whilst Andrew Bruce considers recent authority on the construction of leases. Tom Braithwaite's piece is concerned with the Court of Appeal's decision in *Scullion* to limit the range of circumstances in which a valuer owes a duty of care to a mortgage borrower. Finally, Jonathan Fowles asks whether it is ever possible to acquire an easement to create noise nuisance by prescription."

CHRISTOPHER STONER QC

Think Injunction

IN MARCH 2011, SHORTLY BEFORE IT WAS DUE TO BE HEARD BY THE COURT OF APPEAL, SETTLEMENT WAS REACHED IN THE CASE OF *HKRUK II (CHC) LTD V HEANEY* [2010] EWHC 2245 AS A CONSEQUENCE OF WHICH ANY PRACTITIONER FACED WITH A SCENARIO IN WHICH PROPRIETARY RIGHTS HAVE BEEN INFRINGED MUST GRAPPLE WITH THE CONSEQUENCES OF THE 1ST INSTANCE DECISION OF HHJ LANGAN QC SITTING IN THE HIGH COURT IN LEEDS.

The case concerned a building in Leeds called Cloth Hall Court. It had been redeveloped by the claimant before, as the servient owner, it took the unusual step of seeking declaratory relief as to its freedom from liability to the defendant, Mr Heaney, who owned the neighbouring Yorkshire Penny Bank building and whose rights to light had been infringed by the construction of new 6th & 7th floors, albeit only in respect of less than 1% of the total lettable area of his building.

The claimant had been aware of the fact its redevelopment would infringe Mr Heaney's rights of light and had written to him on a number of occasions, including before it acquired Cloth Hall Court. The Judgment records that there were some without prejudice negotiations and that Mr Heaney threatened, through solicitors, on a couple of occasions that he would initiate proceedings if relevant undertakings were not given and the work which would infringe his rights did not cease. However he took no affirmative action until he sought a mandatory injunction requiring the cutting back of the 6th and 7th floors by way of counterclaim to the claimant's declaratory relief.

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The total cost of the redevelopment, including acquisition and financing, was recorded in the judgment as being in excess of £35m. The judgment also records that the costs of compliance with the mandatory injunction sought were estimated as being up to £2.5m and that the newly constructed 6th and 7th floors were partially occupied by third parties.

The Judge considered the judgment of Mummery LJ in *Regan v Paul Properties* [2007] Ch 135 and in particular its reaffirmation of the principles from *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, especially the well known "working rule" which appeared in the judgment of A L Smith LJ in the latter case, namely that (1) if the injury to the claimant's legal rights is small; (2) is one which is capable of being estimated in money; (3) is one which can be adequately compensated by a small money payment; and (4) the case is one where it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given.

Furthermore, the Judge considered the judgment of Lloyd LJ in *Jacklin v Chief Constable of West Yorkshire* [2007] EWCA Civ 181 in which he determined that the four elements of the working rule were cumulative requirements.

It is worth noting that in *Shelfer* Lindley LJ had commented that the judicial discretion to award damages in lieu of an injunction should not be exercised to deprive a claimant of his *prima facie* entitlement to an injunction "except under very exceptional circumstances" (as distinct from simply exceptional circumstances!).

The strict approach evident in the cited cases was applied by the Judge as he refused the claimant the declaratory relief it had sought and granted Mr Heaney his mandatory injunction apparently unperturbed by his delay in seeking relief. Instead the focus was on the fact Mr Heaney's rights had been infringed.

The decision presents clear difficulties for anyone asked to advise a developer who wishes to proceed with a development but fears it may infringe proprietary rights.

The only totally safe advice can be to proceed with the development only after prior clearance has been obtained from the court to any potential or actual difficulties. Such advice, however, is unlikely to be commercially realistic or acceptable to the developer, especially as litigation delays may make a development uneconomic.

On any view, whilst every case ultimately turns on its facts, given that the Judge determined that an interference with light to less than 1% of the net lettable area of Mr Heaney's property was not a "small" injury in the *Shelfer* sense a robust approach must be expected.

This was further illustrated in the rejection of the claimant's contentions that to award an injunction would be oppressive: ultimately the claimant had proceeded with a view to making a profit knowing that it was infringing Mr Heaney's rights.

Against this the decision provides ammunition for the adviser to the wronged party. It will at least be worth considering a strategy which does not seek interim relief, thereby avoiding the risk of cross undertakings in damages and instead simply waiting until the developer is at its most vulnerable, namely after the development is complete and it is seeking financial return, whereupon a mandatory injunction is sought on the back of a simple reservation of rights during the currency of the development.

On a more general assessment of the decision there must also be a real concern, especially when considered in the context of the decision in *Jacklin*, that A L Smith LJ's well known working rule in *Shelfer* is being elevated to a set of absolute criteria which must in any case be wholly established before damages in lieu will be considered. Furthermore, there must also be a real concern that when the economy favours a return to development, especially in city and town centre locations, there will be sterilization of development sites given the need to resolve issues before work can commence.

Whosoever the client may be, however, the appropriate mantra in circumstances in which proprietary rights may be infringed is:
Think Injunction!

CHRISTOPHER STONER QC specializes in all aspects of property litigation.

"Excluded no more"

THOSE OF US ADVISING CLIENTS WHO HAVE PROPERTY INTERESTS WHERE COMPETITION COVENANTS, OR AGREEMENTS ARE IMPORTANT MAY BE AWARE THAT ON 6TH APRIL 2011 THE LAW RELATING TO THEM WAS CHANGED, IN SOME CASES WITH RETROSPECTIVE EFFECT.

On 6th April the Competition Act 1988 (Land Agreements Exclusion and Revocation) Order 2004 (S.I. 2004/1260) ("the 2004 Order") was revoked.

This means that the regime set out in Chapter 1 of the Competition Act 1988 ("the 1988 Act") will apply to all new and existing arrangements between undertakings which might appreciably distort, or prevent competition in the United Kingdom. Until 6th April 2011 "land agreements" were exempt from Chapter I.

Since 6th April covenants on freehold titles, or in leases, or licences to assign, which (for example) prevent a rival business from opening in the same shopping centre, or an agreement requiring land not to be used for a particular trade (e.g. a petrol station) are now within the terms of the 1988 Act. Non-compliance makes the restriction void and unenforceable.

In practical terms advisers should carry out three tasks. First check existing documents to see whether there is any risk of non-compliance. Secondly revise or note up precedents. Finally ensure that clients are fully aware of the new law; e.g. when advising on terms of leases or assignments, or when selling land with restrictions to protect trading interests. Reports on title must now consider the new law if it will be material to the transaction.

In addition you should check that terms designed to protect clients' trading interests do not fall foul of the EU restrictions in Arts. 101 and 102 of the Treaty of Lisbon, and in Chapter II of the 1988 Act. Those clients who are within the Groceries Market Investigation (Controlled Land) Order 2010 (large grocery retailers) need to consider the effect of any competition agreements affecting land.

The question whether an agreement is void and unenforceable is a question of fact. Much will depend upon the evidence whether the impact of the agreement on competition is "appreciable". This will invariably require expert evidence relating to trading patterns; e.g. in the town where the business is situated. If the agreement will affect at least 10% of market share, that will usually be treated as appreciable. Quite apart from the invalidity of the agreement, the sting in the tail for clients who infringe Chapter I of the 1988 Act will be the ability of the OFT to direct that the infringement ends, to impose fines of up to 10% of the infringing party's worldwide sales and to seek directors' disqualification orders. There is also the threat of injunctive relief by the party potentially adversely affected by the competition agreement.

The subject is complex and this is no more than a thumbnail sketch of the law. The OFT website has an invaluable guide which sets out the policy of the OFT in policing and enforcing this law; see www.oft.gov.uk.

ANDREW FRANCIS is the author of *Restrictive Covenants and Freehold Land, A Practitioner's Guide, 3rd Ed. (2009).*

> Serle Court is one of the great success stories of the last decade

Chambers & Partners 2011

Easy tiger!

IT HAS BEEN DOUBTED WHETHER AN EASEMENT TO CAUSE A NOISE NUISANCE CAN BE ACQUIRED BY PRESCRIPTION.

In *Lawrence v Fen Tigers* [2011] EWHC 360 (QB) HHJ Seymour QC (sitting as a High Court Judge) went further and held that the law does not recognise an easement of noise: [223]. The case concerned the noise produced by a stadium and adjoining track where speedway, stock-car racing, and motocross events were held. The claimants were the owners and occupiers of a nearby bungalow. The noise to which their land was exposed was so loud and frequent that it was held to have given rise to an actionable nuisance.

As an alternative case to their denial of nuisance, the defendant operators of the stadium contended that they had acquired the benefit of a prescriptive right to cause a noise nuisance. The Judge held that no such right could be acquired. First, the extent of the right could not be measured and determined in the way necessary for acquisition by prescription; this was a particular problem in the case of a supposed right to create noise: [215]. In this case, it was also impossible to show the required level of continuity of noise: [216]. Second, whilst there are some dicta suggesting that a right to make noise could be acquired as a prescriptive easement, there was no reported decision in which it had been held that such a right had been acquired: [222].

However, these reasons do not seem to support the conclusion that the law does not recognise an easement to commit noise nuisance. They show only that the would-be dominant owner will usually face an uphill struggle to show that such an easement has arisen. The Judge appears to have seen a prescriptive right to create noise as a potential (and undesirable) addition to the anomalous category of negative easements: [217] where his Lordship quoted *Hunter v Canary Wharf Ltd* [1997] AC 655 at 726 per Lord Hope of Craighead.

I would respectfully suggest that while there are good reasons not to extend the category of negative easements (although they are not to be abolished: see 3.81, *Making Land Work: Easements, Covenants, and Profits à Prendre*, Law Commission, 8 June 2011), a right to create a noise nuisance is not akin to such an easement.

Negative easements are distinguished from positive easements by their preventing the owner of the servient tenement from doing something on its own land e.g. the beneficiary of a right of light may be able to prevent its neighbour from erecting a building. It is unclear why, except in the most general sense of "prevent", this is true of a right to create a noise. Further, unlike in many cases of the passing of light or air (both to an extent the subject-matter of recognised negative easements), the adjoining owner will be readily aware of the noise to which its land is exposed and be able to restrain the activity of its neighbour.

Whilst the decision in *Fen Tigers* (now under appeal) was in my view correct on its facts, I doubt whether the judgment was right to rule out claims to acquire easements to commit noise nuisance in all circumstances e.g. where the noise complained of is continuous. The survival in rare cases of such a claim is consistent with the existence of easements to discharge smoke through a party wall or water onto another's land.

> The Judge appears to have seen a prescriptive right to create a noise as a potential (and undesirable) addition to the anomalous category of negative easements.

JONATHAN FOWLES frequently acts in and advises on claims to easements.

Chambers news

Awards

We are delighted to announce that Serle Court has been awarded the Chambers of the Year award at the STEP Private Client Awards on 15 September 2011. The judges said "Serle Court has appeared, with honours, in probably the most significant private client cases not just of the last 12 months but of the last several years". On announcing the award STEP commented that "building on a decade of success Serle Court had another excellent year growing its private client and international business. It was one of the first sets to develop an international practice and is one of the most widely-used sets for trust litigation in Jersey, the Eastern Caribbean, Bermuda, Cayman and the Bahamas. It also covers domestic matters". Only five Chambers were short listed and being a finalist for the fourth year running was already a "real accolade as the number of entries this year has been the highest ever, with the sifting panel only putting forward those entries they considered to be potential winners".

Publications

Victor Joffe QC, David Drake, Giles Richardson, Daniel Lightman and Timothy Collingwood have published the 4th edition of *Minority Shareholders: Law, Practice and Procedure*. This authoritative and popular textbook on the law of minority shareholders has been fully updated to incorporate developments that have occurred since the 3rd edition, including the significant changes brought about by the Companies Act 2006 and the amendments to regulation under that Act.

The Law Commission's long awaited Report and draft Bill on the reform of easements, covenants and profits à prendre was published on 8th June. Andrew Francis was a member of the Advisory Board for this reform programme. The Report and draft Bill is a "must read" for all property advisers!

Directories

The latest edition of Chambers and Partners Global was published earlier this year and we are delighted that Serle Court is recommended as a set in Dispute Resolution: Commercial Chancery. Sixteen barristers are also recognised individually in this practice area, three barristers are recommended in Dispute Resolution: Commercial and a further one in Arbitration (International) – The English Bar.

Conferences, Seminars and Roadshows

Two members spoke at conferences in the Autumn; Michael Edenborough QC at the Butterworths' Enforcing & Protecting Trade Marks conference and Professor Jonathan Harris at the Butterworths' Trusts & Estates Litigation conference.

We continue to run our popular in house seminars and so far this year topics have included repudiation in LLP law (a moot), Cross Border EU Litigation, recent developments in property litigation, and the Ecclesiastical Law Society lectures. In March we ran a roadshow in Manchester and in October we ran one in Bristol.

Future events will appear at www.serlecourt.co.uk/Resources/Events.aspx

Edited by Jonathan Fowles

Oops!... I did it again

IT IS AN UNFORTUNET FACT OF LIFF THAT ERRORS SOMETIMES CREEP INTO WRITTEN DOCUEMENTS *[SIC]*. THE ERROR MAY MAKE THE DOCUMENT INCOMPREHENSIBLE OR UNGRAMMATICAL OR SIMPLY UNCOMMERCIAL.

It is now well-established that the Court may correct errors in written documents as a matter of construction. It will do so where: (i) there is a clear mistake on the face of the instrument; and (ii) it is clear what correction ought to be made in order to cure the mistake (see *East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61).* Whilst the Court will, as part of the exercise of construction, be entitled to take into account the relevant background and context of the document, it must not have regard to the communications passing between the parties. This can be problematic for, as Baroness Hale noted in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, it was not until she saw the evidence of the parties' negotiations that the proper construction of the disputed clause in that case became "crystal clear". Moreover in many cases the party seeking correction of the error will rely upon rectification in the alternative such that, at first instance, the Court will have before it all the relevant correspondence necessary to support a claim in rectification. The Judge is, though, required to disregard this evidence in determining whether the error should be corrected as a matter of construction. This is because such evidence goes to the subjective states of mind of the parties rather than to background which is within the compass of objective knowledge.

This point was emphasized by the Court of Appeal in *Company Developments (Finance) Ltd v Coffee Club Restaurants* [2011] EWCA Civ 766. The case concerned the construction of guarantee obligations in a lease. It was common ground that something had gone wrong in the drafting of the lease such that part of the definition of the "liability period" applicable to the guarantors had been omitted. At first instance, the Judge had paid particular regard to a precedent which had clearly been used by the landlord's solicitors when they had drafted the lease. This showed what the omitted words were. However the Court of Appeal held that this material was probably not admissible. Without evidence that both parties' solicitors had known the terms of the precedent, the precedent could not be relied upon as showing what correction ought to be made. The case was distinguishable from *The Starsin* [2004] 1 AC 715 because there "the correct form of the clause was a matter of common knowledge to all parties" (per Lloyd LJ at para.11). The Court of Appeal in *Company Developments* nonetheless held that, as a matter of construction, the omitted words ought to be read into the lease having regard to the "context" of the operative provisions. There was no suggestion from the Court of Appeal that, absent the precedent, the construction would have been other than "crystal clear"

ANDREW BRUCE appeared for the successful claimant in *Company Developments (Finance) Ltd v Coffee Club Restaurants* [2011] EWCA Civ 766.

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