



QuarterDay Issue 80

Many thanks to those of our clients who were interviewed by Chambers Directory of law firms in the last few months. We are delighted that both our London and Sheffield offices have been ranked in the first tier again and we hope we can maintain this success next year.

Merry Christmas and a Happy New Year to all our readers!

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If you have a question about any of the items in this issue of QuarterDay please contact the Editor, Sarah Moore T +44 (0)20 7524 6809 s.moore@nabarro.com.

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Development can breach a covenant against nuisance or annoyance

Summary and implications

In a recent case¹ the Court of Appeal held that building a house extension could breach a restrictive covenant against causing a nuisance or annoyance to the neighbours.

The decision confirms that a covenant against nuisance or annoyance will not be limited just to preventing nuisance activities on the land, but can also prevent the land being developed.

The Court of Appeal also reiterated the test for establishing breach of a restrictive covenant preventing a property owner from causing a nuisance or annoyance to another property owner.

- The test is an objective one, so will not be judged by reference to the neighbours' opinions that they are suffering a nuisance.
- Instead, the court will look at whether the activity would annoy or aggrieve the reasonable neighbour, having regard to the ordinary use of the neighbouring houses for pleasurable enjoyment.
- The fact that planning permission has been granted for the extension does not stop a court finding that there has been a nuisance or annoyance.

Ask a question

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¹Anthony Stephen Davies -v- Richard and Margaret Dennis[2009] EWCA Civ 1081

Mr Davies bought a house and obtained planning permission for his extension

In 1987, a development company built an estate of 47 houses (all with river views). Each of the houses was sold and the communal areas were transferred to a management company. Each house buyer gave various covenants for the benefit of their neighbours and the management company (as set out in the box on the right).

Mr Davies bought one of the houses. He obtained planning permission for a three-storey extension to the house and started building. The work was halted when a number of his neighbours brought a court action to stop the extension on the basis that it would breach the nuisance covenant.

The restrictive covenants

1. The approval covenant

Not to erect any building on their plot without the approval of the management company.

2. The nuisance covenant

Not to do anything on their plot which might be (or become) a nuisance or annoyance to the owners or occupiers of the estate or the neighbourhood.

The arguments on both sides

Mr Davies' neighbours argued that the management company had not consented to the extension in accordance with the approval covenant; and (even if it had consented), the extension would obstruct their view of the river and would diminish the value of their homes, causing them a nuisance or annoyance.

Mr Davies argued that he had email approval from the management company for the extension and that regulation of the work was controlled by the approval covenant. Therefore, his view was that the nuisance covenant could not extend to prevent building on the plot.

The High Court agreed with the neighbours: the extension would cause a nuisance

The High Court held as follows:

- Mr Davies did not have the approval of the management company; and
- the extension would cause a nuisance and annoyance to some of the neighbours and therefore the nuisance covenant would be breached.

An injunction was granted preventing Mr Davies from building the extension.

Mr Davies appealed.

The Court of Appeal agreed with the High Court

The Court of Appeal upheld the decision of the High Court. The nuisance covenant was wide enough to cover activities of any nature on Mr Davies' land, including the building of a house extension which, when built, would cause a nuisance or annoyance.

The nuisance covenant had to be interpreted in the light of the other covenants in the lease. However, there was no good reason why the approval covenant and the nuisance covenant could not operate alongside each other. Therefore, even if the management company had consented to the extension, this would not have limited the scope and effect of the nuisance covenant. The nuisance covenant could still be used to prevent development.

If the parties had intended to limit the scope of the nuisance covenant, then they would have done so expressly in the wording of the covenant.

Developers must check for covenants against nuisance or annoyance before starting work

A developer of land will always check to see if there are any restrictive covenants preventing the land being used in a particular way.

However, developers should now also look out for restrictive covenants preventing nuisance or annoyance to neighbours. Otherwise, the developer may find that a neighbour can rely on such a restrictive covenant to prevent its development from going ahead.

The Court of Appeal agreed that the extension would cause a nuisance, even though Mr Davies had planning permission

Developers must look out for covenants preventing nuisance or annoyance

Administrations: how the court balances conflicting interests

Summary and implications

Two recent cases involving company administrations have seen the court take very different approaches to an administrator's demands. The court has shown that it will look at the overall purpose of the administration before deciding whether to allow administrators to use their powers.

Clients should consider:

- whether the administrators have acted in the best interests of the company's creditors. Clients may wish to challenge the administrators' actions in court if they believe those actions are unfair or irregular; and
- if the administrators' actions have caused prejudice, whether the administrators can explain the reasons for their actions in clear terms and show how this prejudice advances the purpose of the administration; and
- whether the prejudice is suffered by one person in isolation or by a larger group of creditors. The court seeks to balance the interests of the creditors as a whole, against the interests of one party.

Documents requested by the administrators were not crucial to the outcome of the administration

In the first case¹ the administrators requested copies of various building contracts, designs, plans and other documents from a building contractor.

The building contractor had not been paid for its work and it refused to hand over the documents, claiming copyright over the designs.

The request for documents was very broadly worded. It did not set out which specific documents were needed by the administrators, nor what information the administrators already held.

The court was not persuaded by the copyright and non-payment arguments, but it did take into account how useful the information would be to the administrators.

The court held that the indiscriminate nature of the request showed that the documents sought were not crucial to the outcome of the administration. On that basis, the court refused the application which was seen as unfair because of the wide reaching nature of the request.

The court approved a "pre-pack" sale, which was in the best interests of the creditors

In the second case² the directors of a cigarette vending machine company applied to court for an administration order after securing the sale of the company's business to two of its competitors in a pre-packaged (or "pre-pack") sale.

Ask a question

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¹ *Cowlishaw and Wong -v- O&D Building Contractors Limited* [2009] EWHC 2445 (Ch)

² *In the matter of Kayley Vending Limited* [2009] EWHC 904 (Ch)

The administrators sold the business to the competitors as soon as they were appointed. The sale took place before the creditors' meeting, which is usually the time when the creditors discuss the future of the company and approve the way forward.

In accordance with the Statement of Insolvency Practice 16 ("SIP 16") the court was provided with details of the deal and the valuations of the company's assets on two bases: if the deal was done immediately and if the administrators waited until after the creditors' meeting.

The table below sets out a summary of the information which insolvency practitioners are required to provide, where a "pre-pack" sale takes place.

The administrators were able to persuade the court that there would be a greater return to the creditors of the company if the deal was done immediately and the court allowed the pre-pack sale to proceed.

The administrators were allowed to recover their fees and expenses

Because of the nature of the pre-pack sale, the administrators worked on the transaction before they were officially appointed and they would not ordinarily have been able to recover their fees and expenses.

However, the court ordered that, in this instance, the interests of the creditors were best served if the pre-pack sale went ahead and it allowed the administrators to recover their fees and expenses from the assets realised as an expense of the administration, in preference to the creditors. The rationale for this was the benefit that the creditors received from the sale proceeding by way of a pre-pack sale.

In each case, the court looked at the interests of the parties involved and whether the purpose of the administration would be best served in making the orders requested.

Not all administrations proceed by way of a court application and clients should consider whether their interests have been unfairly prejudiced by the actions of the administrators or whether the creditors as a whole have benefitted because of the course of action taken.

SIP 16 – a summary of the information which can be requested by creditors

The Joint Insolvency Committee produced SIP 16 to set out the best practice in pre-pack administrations.

SIP 16 allows creditors to investigate the reasons for the pre-pack sale.

The detail of SIP 16 sets out the information that the insolvency professionals have to provide when contemplating a pre-pack sale.

This information must be given to the court and is disclosable to the creditors of the company once the sale has completed.

If requested, the following information must be provided by the insolvency professionals:

- The value of the company's assets.
- The extent of the involvement of the administrators with the company before their appointment.
- How the purpose of the administration has been achieved by the pre-pack sale.

Developer wins damages: advertising hoarding was encroaching into airspace

Summary and implications

In a recent case¹ a developer, Stadium Capital won significant damages for trespass from a neighbouring tenant, St Marylebone.

The court decided that an advertising hoarding erected on the wall of a building let to St Marylebone trespassed into the airspace of adjacent land owned by Stadium Capital.

Although the hoarding had been removed before trial, Stadium Capital won damages equal to the profits made by St Marylebone from the trespass, including sums received under licences granted to advertisers using the hoarding.

Developers and landowners should note these points:

- The court has upheld the general principle that a freehold owner of land owns both the airspace above the ground and the subsoil.
- It is not possible to acquire title to land by adverse possession (or “squatters’ rights”) if the land is occupied with consent.
- The nature of property demised by a lease can change if an “accretion” to the demised premises occurs.

It is not possible to acquire title to land by adverse possession if the land is occupied with consent

The advertising hoarding was erected with consent and after planning permission had been obtained

The facts of the case were fairly straightforward:

- The entire parcel of land involved was previously owned by the London Midland and Scottish Railway Company.
- In 1931 part of the land was let under a 99 year lease, which was bought by St Marylebone in 1975.
- In 2008 Stadium Capital bought the freehold of the remainder of the site from a successor to the Railway Company. The land was then cleared for development.
- The boundary between these two parcels of land was agreed as being the southern flank wall of the building let to St Marylebone.
- In 1956 a former owner of the land acquired by Stadium Capital had given consent to a former tenant under the St Marylebone lease to install an advertising hoarding on the southern flank wall.
- Repeated attempts were made to obtain planning permission to erect the advertising hoarding and consent was eventually obtained in October 1975 (after St Marylebone had acquired its interest in the lease).

Ask a question

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¹ *Stadium Capital Holdings -v- St Marylebone Properties Co plc* [2009] EWHC 2942 (Ch)

- St Marylebone then granted a series of licences allowing an advertising company to erect a hoarding on the southern wall of the building. The last of these agreements was to end in September 2011.
- The position of the hoarding was moved several times during the intervening years and an access platform was added in about 1986.

The developer demanded possession of its land and removal of the hoarding

In 2004, the owner of the developer's land demanded possession of the land by withdrawing the consent that had been granted, together with removal of the hoarding and the access platform.

This culminated in Stadium Capital eventually beginning litigation in 2008.

The tenant tried several tactics to defend the claim including an argument based on adverse possession

St Marylebone initially argued that the hoarding was actually within the property demised by the lease, but it abandoned this claim at trial.

St Marylebone then argued that it had acquired title to the land occupied by the hoarding by adverse possession.

To succeed, St Marylebone needed to show that it had been in factual possession of the land without consent for at least 12 years and that it had an intention to possess the land.

St Marylebone failed on this argument, as the court found that the consent given by the owner of the Stadium Capital land allowed a hoarding to be erected on the wall of the building.

Accordingly, any occupation of the land (to the extent that occupying the airspace amounted to actual possession) had been with consent, until this was withdrawn in 2004. This was fatal to any claim for adverse possession.

In any event, the judge considered that a claim to title to airspace, without a corresponding claim to the land beneath, was an extremely "strange concept".

St Marylebone also sought to argue that the addition of the advertising hoarding was an "accretion" to the demised premises. This was not pursued in detail by St Marylebone, who tried to establish that, although the hoarding was not part of the original demise under the lease, it had become so by accretion, as an additional parcel to the demised land.

An interesting point is what would have happened if St Marylebone disposed of its interest in the lease. Would the accretion revert to the landlord of the lease or remain in the possession of St Marylebone?

We look at another case on adverse possession on page 10 of this bulletin. In the second case, the owner of a boat obtained title to part of the river bed of the Thames, after mooring his boat on the river.

Adverse possession – the basics

In order to dispossess the owner of the land the squatter must show:

- factual possession;
- an intention to possess the land;
- occupation without consent of the owner; and
- all three criteria have been met for at least 12 years (if the period ends before 13 October 2003) or at least 10 years (if the period ends after 13 October 2003).

1954 Act proceedings: an insolvent landlord cannot buy time

Summary and implications

Whilst the property market remains challenging, the possibility of landlords entering into administration increases and many redevelopment schemes have been put on hold.

In the recent case of *Somerfield v Spring*¹, the court acted to provide access to justice and certainty for a tenant, Somerfield Stores, which was seeking a new business tenancy, rather than imposing a moratorium to protect the position of the landlord's creditors.

The decision in the Somerfield Stores case indicates that the usual statutory protection which surrounds a company in administration may not be enough to prevent or delay a tenant from claiming a new tenancy under the Landlord and Tenant Act 1954 ("LTA 1954").

Somerfield Stores applied to court for permission to progress the lease renewal

Somerfield Stores applied for a new tenancy of its store in Sutton Coldfield. The landlord opposed the claim, relying on section 30(1)(f) of the LTA 1954, as it intended to redevelop the property.

The landlord then went into administration. An administrator was appointed and tried to delay Somerfield's application for a new tenancy, whilst it investigated the possibility of redevelopment. The Insolvency Act 1986 ("IA 1986")² states that no legal process can be commenced or continued against a company in administration without the consent of the administrator or the court. As the administrator was delaying, Somerfield Stores applied to the court for permission to continue its claim. The application was allowed.

Somerfield Stores' arguments: unfair to delay

The tenant argued that the landlord had the opportunity to apply to court to terminate the tenancy³ but it also had the burden of proving its ground of opposition. The crucial issue was whether the landlord intended to redevelop and there was no dispute that the intention was not yet present. The development was only a possibility, on the basis that planning permission was obtained, pre-lets secured and a scheme set up with a third party funder or developer.

The crucial issue was whether the landlord intended to redevelop

The administrator's arguments: protecting the other creditors

The administrator argued that the reason for deferring the 1954 Act proceedings was to allow time for a viable scheme of redevelopment to be put together. Any scheme would enhance the value of the distribution made to creditors (by up to £2m) and in particular to the secured creditor (a bank).

Ask a question

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¹ *Somerfield Stores Ltd -v- Spring (Sutton Coldfield) Ltd* [2009] EWHC 2384 (Ch)

² Paragraph 43.6 Schedule B1

³ Section 29(2) LTA 1954

The High Court decision: the 1954 Act proceedings should continue

Judge Purle QC decided this was a clear case where the tenancy application should proceed with proper expedition.

The administrator could not show any immediate intention to develop and Somerfield Stores was in a state of continued uncertainty in relation to a store which it wished to refurbish.

Interests of creditors are generally unaffected by 1954 Act proceedings

The Judge found that an administrator is required to perform its functions as quickly and efficiently as possible, and the court was not prepared to grant an adjournment of the 1954 Act proceedings.

The court has to carry out a balancing exercise: on one hand, balancing the legitimate interests of Somerfield Stores and on the other hand, balancing the legitimate interests of the landlord's other creditors. The court found that even though the secured creditor might benefit from a delay to the 1954 Act proceedings, the interests of the creditors generally would be unaffected by those proceedings.

There were also other options open to the administrator within the 1954 Act. For example, a tenancy with a break clause could be granted to enable the administrator to end the lease and redevelop if a real opportunity presented itself in the future.

Essentially, the court felt that it would be unfair to improve the position of the administrator to the prejudice of Somerfield Stores.

Administrators cannot delay proceedings until the ground of objection emerges

The continued uncertainty about whether or not the lease would be renewed was causing a potential loss to Somerfield Stores. This outweighed the gain to the creditors of keeping open any redevelopment prospects. The application by Somerfield Stores was allowed and the 1954 Act proceedings continued.

Schedule B1 to the Insolvency Act 1986

The administrator of a company must perform his function with the objective of:

- rescuing the company as a going concern; or
- achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or
- realising property in order to make a distribution to one or more secured or preferential creditors.

Squatters' rights: acquired by mooring a boat on the Thames

Summary and implications

In a recent High Court case¹, the judge decided that a squatter could obtain title to the river bed of the Thames, by adverse possession, by mooring his boat close to the river bank.

Landowners should note the following points:

- The judge said that the boat must spend part of its time resting on the foreshore. It was irrelevant that the boat floated above the foreshore for part of the time.
- The squatter did not need to show actual contact with the land at all times.
- The test as to whether the act of possession was equivocal was how the owner of the land in question would view the act of possession.

Mr Ashmore successfully claimed squatters' rights

In 1983 Mr Ashmore sailed his boat to Albion Riverside, near Battersea Bridge in London. He dropped anchor and tethered the boat to the bank.

Mr Ashmore did not have permission from the Port of London Authority (the "PLA") to moor the boat and the PLA claimed that he was trespassing. Mr Ashmore claimed squatters' rights.

Title to the river bed was not registered and Mr Ashmore's boat had been moored in the same place for more than 12 years, which is the limitation period for acquiring title by adverse possession.

Most of the time, the boat floated in the river but, twice a day, at low tide, it came to rest on the river bed.

The court found that Mr Ashmore had acquired title to the river bed by adverse possession.

The right to acquire adverse possession

To succeed in a claim for adverse possession, a squatter must establish:

- factual possession of the land; and
- an intention to possess the land.

Factual possession: a squatter does not need to prove physical contact with the land at all times

The PLA argued as follows:

- Mr Ashmore did not have exclusive possession of the bed of the Thames as the boat only rested on the river bed at low tide. At all other times, the water rose, so that the boat was not touching the river bed.
- The boat did not occupy a defined portion of space in the water, because it went up and down with the tide and its position varied.

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¹ *Port of London Authority -v- Rupert Gerald Ashmore* [2009] EWHC 954 (Ch)

However, the court rejected these arguments. The judge found that a squatter does not need to be in physical contact with the land at all times. He went on to say that, if continuous contact was necessary, this could be established through the anchor which moored the boat.

A squatter does not have to be in physical contact with the land at all times

Intention to possess: intention was demonstrated by mooring the boat for 26 years

The PLA argued that Mr Ashmore had not demonstrated an intention to possess the river bed because mooring his boat could be an equivocal act. For example, it could be the result of any of the following:

- exercising the public right of navigation of the river; or
- exercising a licence, which might (or might not) be coupled with a lease of the moorings; or
- exercising an easement for the benefit of the land on the river bank.

The judge agreed that, if a third party who came across the boat, he or she may not automatically assume that Mr Ashmore was a squatter who wanted to exclude others from possession. However, that was not the correct test. The right test was how the PLA would view Mr Ashmore's boat and whether the PLA would know that he had an intention to possess .

The judge found that the PLA would have been able to discount the alternative reasons why Mr Ashmore might have moored his boat at Albion Riverside:

- He was not exercising a public right of navigation, as he had occupied one particular spot on the bank for 26 years (since 1983).
- He did not have a licence or lease relating to the river bed.
- He did not own any land adjacent to the foreshore and so could not be exercising an easement.

Landowners should take action quickly

The judgment in this case is a reminder to all landowners to take action quickly if they believe someone is trespassing on their land.

Landowners must act quickly if they believe someone is trespassing on their land

Landowners should consider either regularising the trespasser's occupation by way of a lease or licence or bringing proceedings to evict the trespasser.

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