SLAUGHTER AND MAY

REAL ESTATE

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NEWS

Hanging on the telephone

New Telecoms Code comes into force

The new Electronic Communications Code came into force on 28th December 2017. The new Code provides telecoms operators with Code rights to install, keep installed, inspect, maintain, upgrade, operate and share telecoms equipment on another person's land in order to provide network services. The key changes under the new Code include:

- Compensation is calculated on the market value of the Code agreement assessed on a "no scheme" basis that excludes any value attributable to network use. This will mean that landowners are likely to receive lower rents.
- Telecoms operators have new rights to assign Code agreements and to upgrade and share equipment with other operators. A landowner can require the assigning operator to enter into an AGA. Upgrading and sharing is permitted provided it does not have more than a minimal adverse visual impact and does not impose any additional burden on the landowner.
- New procedures to end the Code agreement and for the removal of telecoms apparatus. The operator must be given at least 18 months' notice of termination and the notice must state the grounds for termination. The operator has three months to give a counter-notice and can apply for a court order within three months of the counter-notice. If the agreement is terminated, the landowner must then comply with the removal of apparatus procedure, giving the operator reasonable time to remove the telecoms equipment. The process for terminating Code rights and securing the removal of equipment is a lengthy one which could cause problems for landowners seeking to redevelop.
- Agreements with the primary purpose of conferring Code rights will no longer also have security of tenure under the Landlord and Tenant Act 1954.

CASES ROUND UP

Patience

Right to forfeit had not arisen

Toms v Ruberry: [2017] EWHC 2970

The appellant was the freehold owner of a public house in Cornwall and the respondent was the tenant. The lease contained a right of re-entry. If the tenant was in breach of covenant, the landlord was required to serve a default notice giving the tenant 14 days to remedy the breach. Section 146 of the Law of Property Act 1925 also applied. There had been various disputes regarding responsibility for the state and condition of the premises. The landlord's solicitors served a default notice requiring the tenant to carry out certain works together with a S146 notice. The landlord claimed that there had been a failure to remedy the breach within a reasonable time and brought possession proceedings on the basis that the lease had been forfeited. The tenant argued that the lease had not been forfeited because the 14-day grace period had not expired and, therefore, the contractual right to re-enter had not arisen and there had not been a valid S146 notice.

The court found in favour of the tenant. In cases of doubt, a forfeiture clause had to be construed against the landlord. The landlord was required to serve a default notice stating the particulars of the alleged breaches of covenant and giving the

tenant 14 days to remedy the breaches. A S146 notice could only be served once the right to re-entry had arisen. In this case, the right of re-entry only arose if the tenant had failed to take action to remedy the breach within 14 days of the landlord's default notice. The 14 days had to have elapsed before the S146 notice could be served.

Stop!

Restrictive covenant enforceable by original transferor

Barter Re Ivy House: [2017] UKUT 451 (LC)

The Upper Tribunal (Lands Chamber) considered an application to discharge a restrictive covenant that had been entered into as recently as 2013. The buyers bought a house from the local council and covenanted not to construct any additional residential building in the grounds. The buyers obtained planning permission for residential development and negotiations were entered into with the Council for a release of the covenant. The buyers offered to pay only £5,000, but this was not accepted. The buyers then applied to the Tribunal for the discharge of the covenant under S84 of the Law of Property Act 1925, on the grounds that the covenant's continued existence would impede a reasonable use of the land and also that the proposed discharge would not injure the person with the benefit of the covenant, subject to that person receiving compensation.

The Tribunal found that the grounds were met but refused to exercise its discretion to discharge the covenant. Only four years had passed since the covenant was given by the applicants. However, the Tribunal pointed out that shortness of time was not a decisive factor. There was insufficient evidence of what was an appropriate sum to compensate the Council for the loss of the covenant and the applicant's offer was unrealistically low. The Tribunal also considered the extent of the benefited land owned by the council. The only nearby land owned by the council was the highway and the highway might not be capable of enjoying any benefit from the covenant. However, the covenant was still enforceable by the council as the original contracting party. It is important to remember that a restrictive covenant should genuinely benefit the amenity value of the retained land and it is risky to use restrictive covenants to try to secure a compensation payment. In such a situation, a properly protected overage obligation is generally the better option.

Country house

Injunction awarded for breach of restrictive covenant

Humphrey v Rogers: [2017]

The claimants had purchased a house and land from the defendants. The property's secluded rural location was important to the claimants and, as part of the transaction, they required a restrictive covenant preventing the defendants from building on their retained land without the claimants' consent. However, the defendants intended to convert existing barns into residential accommodation and on two occasions commenced building work without the claimants' consent. The claimants applied for an injunction. At first instance, the judge awarded an injunction preventing the defendants from carrying out the works. The restrictive covenant had been a key factor in the claimants' decision to buy the property and the defendants had behaved poorly in failing to engage with the claimants before starting work. The defendants appealed and argued that, following *Coventry v Lawrence*, the judge had applied incorrectly the principles in *Shelfer v City of London Electric Lighting*. The Supreme Court's support for a more flexible judicial approach should have resulted in an award of damages in lieu of an injunction.

The defendants' appeal was rejected. The judge had considered correctly all the relevant circumstances, including the prejudice an injunction would cause the defendants and the undesirability of leaving the works unfinished. However, it was clear that the claimants wished to live in a secluded rural location away from

other residential properties and the restrictive covenant was of substantial importance and value to them. In addition, the defendants' conduct had been unneighbourly and reprehensible. The restrictive covenant had been required to protect the claimants' interests and they would not be adequately compensated by an award of damages. The defendants themselves had given the covenant and the award of an injunction was not oppressive.

There is a light that never goes out

Tenant could not release right to light without landlord's consent

Metropolitan Housing Trust Ltd v RMC FH Co. Ltd: [2017] EWHC 2609 (Ch)

The defendant was the freeholder of a property including a block of 20 flats in Royal Mint Street, London and the claimant was the tenant under the headlease. Windows in the block benefited from rights to light that had been acquired by prescription after the lease was granted over an adjoining development site. The developer obtained planning permission for a new development and entered into negotiations for the release of the rights to light. The dispute between the landlord and the tenant concerned who was entitled to release the rights to light and receive a payment of compensation from the developer. The tenant argued that it was entitled to the right of light and there was no provision in the lease preventing it from negotiating the release with the developer. The landlord argued that the right to light formed part of the demised premises and there was a covenant by the tenant not to permit any encroachment that might cause damage, annoyance or inconvenience to the landlord.

The court dismissed the tenant's application for a declaration that it was entitled to release the rights to light. Where a dominant tenement was subject to a lease, the acts by the tenant that were relied upon to support a claim for an easement by prescription were treated as acts by the freehold reversioner and any easement acquired would be appurtenant to the freehold title. The easements acquired were appurtenant to the freehold and were treated as being subject to the terms of the lease, even though the lease had been granted before the rights to light had been acquired. In this case, the right to light was treated as having been demised to the tenant as part of the demised premises. The erection of a building on the development site would interfere with rights of light enjoyed by the building and would be an encroachment on or against the premises. The tenant's covenant not to permit an encroachment meant that the tenant required the landlord's consent to release the rights to light.

On the road again

Court rules on extent of Highway authority's ownership of land

London Borough of Southwark and another v Transport for London: [2017] EWCA Civ 1220

This case considered the extent of the highway authority's ownership of the public highway. Transport for London was made the highway authority for roads, which had formerly been the responsibility of the Greater London Authority. To give effect to this, the relevant London borough transferred to TfL the highway "in so far as it vested in the former highway authority". The transfer was effected by the GLA Roads and Side Roads (Transfer of Property etc.) Order 2000. The issue before the Court of Appeal was whether the statutory transfer passed to TfL the entire interest of the relevant Council in the land on which the highway ran or only the surface of the highway and sufficient subsoil as was necessary for the maintenance of the surface. Disputes arose between TfL and both the London Borough of Southwark and the City of London. The arbitrator ruled that the entire interest of the local authority had been transferred to TfL.

The Court of Appeal allowed the Councils' appeal. The purpose of the relevant statutory provisions was that TfL should become the highway authority for

the relevant former GLA roads. All that was needed to achieve this was to vest the surface of the highway and any necessary subsoil in TfL. Accordingly, the remaining subsoil and airspace above the road remained vested in the relevant Council.

DEALS

We advised Everton Football Club in connection with the agreement for lease for its proposed new stadium at Bramley Moore Dock.

We advised Bupa Insurance Limited on the sale of Bupa House, London WC1A. We previously advised Bupa on its new offices at Angel Court.

We advised Legal & General on the sale of 70 Gracechurch Street for approximately £270 million.

We advised Bupa on the sale of 22 UK Care Homes to Advinia Health Care. We also advised Bupa on the sale of 122 care homes to HC-One.

We advised Legal & General Capital on the £56.5 million sale of Two Central Square, Cardiff to Credit Suisse Asset Management.

AND FINALLY

Snake on a bus

Police were called to a bus in Shipley, Yorkshire after a corn snake was found on the back seat. The snake had escaped from a box when the owner was taking it to a reptile shop for a check-up.

Plenty of fish

An angler in Bournemouth who celebrated catching a Dover sole by kissing it needed emergency treatment to save his life after the fish jumped down his throat and stopped him from breathing.

Something fishy

The trend for dressing as a mermaid has hit red tape after a would-be mermaid was prevented from swimming at her local pool in Bromsgrove. Her mermaid tail was ruled to be a health and safety risk.

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