REAL ESTATE

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CASES ROUND UP

Can't take that away from me

Licencee entitled to relief from forfeiture

Vauxhall Motors Ltd v The Manchester Ship Canal Co Ltd: [2018] EWCA Civ 1100

This case related to a right granted to Vauxhall to discharge surface water into the Manchester Ship Canal through a spillway. The right was granted in a document described as a licence. The right was granted in perpetuity and Vauxhall was required to pay an annual sum of £50. The licence could be terminated if Vauxhall failed to pay the £50. Vauxhall failed to make a payment and the Canal Company served notice terminating the agreement. Vauxhall offered to pay the arrears, but this was not accepted. Negotiations were entered into for the grant of a new agreement as the right was required in relation to Vauxhall's car manufacturing plant. The Canal Company was asking for a significantly higher annual fee to enter into a new agreement. Vauxhall issued proceedings and applied for relief from forfeiture. The Canal Company argued that there was no power to grant relief in respect of the licence. Even if there were such a power, Vauxhall was estopped from claiming relief by reason of the negotiations for a new agreement. At first instance, the judge granted relief from forfeiture on the basis that the right to discharge water was close to being a proprietary right.

The Court of Appeal has confirmed that Vauxhall was entitled to relief from forfeiture. The licence conferred exclusive rights upon Vauxhall to discharge water and Vauxhall was also responsible for the construction of the infrastructure and its maintenance and repair. In addition, the Canal Company did not reserve any rights to use the drainage. The right granted was in the nature of a possessory right. Accordingly, the equitable jurisdiction to grant relief against forfeiture applied. The termination right must have been intended to secure the payment of money or the performance of other obligations and the judge had jurisdiction to grant relief. The general approach was that relief should be granted on terms that the sums owing and the costs of the other party were paid. The defence of laches might apply but the delay in applying for relief had not caused any prejudice. The court was also entitled to take into account the windfall that the Canal Company would enjoy if relief were not granted.

Turning Japanese

Encroaching knotweed constituted a nuisance

Network Rail Infrastructure Ltd v Williams and another: [2018] EWCA Civ 1514

The Court of Appeal has confirmed that encroaching Japanese knotweed can constitute an actionable nuisance before it causes physical damage to neighbouring land where the encroachment has diminished the amenity value of the claimant's land. The Court of Appeal also confirmed that it is not possible to bring a claim in nuisance for any diminution in value of a claimant's property, as a pure economic loss cannot be claimed in nuisance. The claimants owned residential property in Wales that abutted a railway embankment owned by the defendant. The embankment had been infested with Japanese knotweed and the knotweed had persistently encroached on to the claimants' land. The claimants brought a claim in private nuisance. Cardiff County Court held that Network Rail had caused an actionable nuisance by failing to take reasonable steps to prevent the knotweed from blighting the claimants' property. The claim based

on encroachment failed because it could not be shown that there had been physical damage. However, there had been an actionable interference with the quiet enjoyment or amenity value of the claimants' land.

The Court of Appeal considered the general principles of nuisance. In particular, the proposition that physical damage was an essential requirement of a cause of action was not entirely correct. Physical damage was not necessary in the case of nuisance through interference with the amenity of land. The Court of Appeal accepted Network Rail's argument that the recorder had been wrong to find that the presence of knotweed was an actionable nuisance because it had diminished the market value of the claimants' property. A claim in nuisance could not be brought for pure economic loss. However, the Court of Appeal upheld the County Court's decision that the presence of knotweed had diminished the amenity value of the land. The mere presence of Japanese knotweed and its rhizomes imposed an immediate burden on landowners. Japanese knotweed was a natural hazard that affected the owners' ability to fully use and enjoy the land. There was no reason why a claimant should not be able to obtain an injunction where the amenity value of land was diminished by the presence of knotweed, even where there had been no physical damage to the claimant's property.

Right here, right now

Empty property rates scheme held to be valid

R (Principled Offsite Logistics Ltd) v Trafford Council and others: [2018] EWHC 1687

The Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 provide that empty shops and offices receive empty property rates relief for three months. If a property is re-occupied for at least six weeks, the occupier becomes liable for business rates and the owner can claim another three months' rates relief when the property becomes vacant again. A number of schemes involving short-term occupation have been used to help landlords to reduce their business rates liability. The main business of Principled Offsite Logistics was occupying business premises for this purpose. Premises were occupied on a short-term tenancy for storage purposes at a peppercorn rent. The landlord was then charged 20% of the saving in business rates. The local authority argued that the mere presence of Principled Offsite Logistics' goods on the property for the purpose of business rates mitigation did not amount to beneficial occupation.

The High Court has decided that the short-term tenancy arrangements were not shams. The company had been granted genuine leases creating a relationship of landlord and tenant. The occupation had to satisfy the requirements for rateable occupation, it had to be actual occupation, exclusive and not too transient and it also had to be of some value or benefit to the company. The occupation had to be beneficial in law and in fact. Occupation did not require a purpose or motive beyond that of the occupation itself. Intention to occupy for reward was sufficient without any further commercial or other purpose. It was enough that the company went into occupation to receive the fee payable by the landlord and calculated by reference to the saving in rates. The case means that empty property rate relief schemes involving short-term lettings are likely to be effective.

Don't go near the water

Injunction to prevent unlawful punting

Cambridge City Council v Traditional Cambridge Tours Ltd and others: [2018] EWHC 1304 (QB)

The claimant Council issued proceedings against a number of defendants that it claimed were operating unlawful and unlicensed punting activities on the River Cam involving trespass on various parcels of land owned by the Council. The Council operated six official punt stations where authorised operators paid a licence fee and also paid business rates.

The court awarded the injunction against the

unlicensed punt operators. The use of the public highway by the unlicensed punt operators did not amount to a reasonable use of the public highway. Use of the public highway had to be reasonable and not involve a public or private nuisance or unreasonably impede the public's use. Large numbers of people gathered on the public highway in connection with the taking of punting trips. There was no lawful right to set up a business on the Council's land. The activity on the water without a licence was also unlawful and in breach of the relevant bye-laws. Use of the Council's land to promote an unlawful activity was an unreasonable use. The defendants had persisted with the unlawful punting operations despite a number of measures taken by the Council. It was just and convenient for the court to exercise its discretion and grant an injunction. The threat of future trespass by the defendants and other operators meant that the injunction had to extend to "persons unknown" in relation to all the locations identified by the Council.

Breaking up is hard to do

Break clause not conditional on reinstatement

Goldman Sachs International v Procession House Trustee Limited and another: [2018] EWHC 1523 (Ch)

Goldman Sachs held a 25-year lease of office premises with a right to break at year 20. The break required the tenant to give at least 12 months and one day's notice and was also subject to the tenant being able to yield up the premises with vacant possession as provided in clause 23.2. Clause 23.2 provided that the lease would cease and determine on the expiry of the tenant's notice "and the Tenant shall yield up the premises in accordance with clause 11 and with full vacant possession". Clause 11 contained the tenant's reinstatement obligations. It was accepted that the tenant was required to yield up with vacant possession on the break date. It was also accepted that the tenant was required to comply with its reinstatement obligations. The question was whether the exercise of the break was conditional upon full compliance with the reinstatement obligations. The annual rent was £4 million and the tenant sought a declaration as to the correct interpretation of the break clause.

The court found in favour of the tenant. The break was only conditional upon yielding up with vacant possession. It was not conditional upon compliance with the reinstatement obligation. The reinstatement obligation went far beyond the usual requirement for vacant possession. In addition, there was uncertainty what the reinstatement clause actually required, for example by using phrases such as "to the reasonable satisfaction of the landlord" and "materials of comparable quality". Compliance with the reinstatement clause was not a suitable condition to be attached to the break clause as it would not allow either party to proceed with certainty. If the landlord had wished for the break to be conditional upon compliance with the reinstatement obligations, it should have provided for this clearly in the lease. The court pointed out that the landlord would still be able to claim damages for failure to comply with the reinstatement obligations following the termination of the lease. The case turns on the construction of the particular lease but underlines the need for clear drafting and the problems associated with conditional break clauses. The landlord has been granted permission to appeal.

Up on the roof

Injunction awarded against urban explorers

Canary Wharf Investments Ltd and others v Brewer and others: [2018] EWHC 1760 (QB)

Canary Wharf has obtained an interim injunction against five named defendants and persons unknown. The defendants were "urban explorers" who had climbed buildings and cranes on the Canary Wharf estate and posted images on social media. Canary Wharf was concerned about the safety risk and sought an interim injunction to prevent the defendants from trespassing on the estate and for the delivering up of photographs and videos taken while on the property.

The High Court accepted that a landowner was entitled to an injunction to restrain trespassers even if no damage had been caused. The defendants recognised that they did not have a legal right to enter onto the land but there was evidence that they would continue to do so. Three of the named defendants gave an undertaking that they would not trespass on the estate and agreed to deliver up the relevant materials. The court was satisfied that an interim injunction was appropriate in respect of unnamed persons.

OUR RECENT TRANSACTIONS

We advised Canary Wharf Group on its conversion to a REIT.

We advised UD Europe Limited on the letting of the third and fourth floors of 1 King William Street to serviced office provider, London Executive Offices. We previously acted for UD Europe on the letting of floors 5, 6 and 7 to London Executive Offices;the building is now fully let.

We advised Halsbury Homes Limited on the acquisition of a site at Salhouse Road in Norwich for a residential development of 380 houses.

We advised Pollen Street Capital in connection with its new London HQ on the second and third floors at 11-12 Hanover Square, London W1.

We advised The Panel of Takeovers and Mergers on the lease of its new head offices at 1 Angel Court, London EC2.

AND FINALLY

Late penalty

A man in Pennsylvania has paid a $2 parking penalty 44 years after he received the ticket. The man handed in the 1974 ticket together with a $5 bill to police with an apologetic note signed “Dave”.

Wahey!

Eric Morecambe’s favourite football scoreline has become a reality after Forfar beat East Fife 4-5 on penalties in a Scottish League Cup Match – East Fife 4 Forfar 5.

Shark attack

A man has been arrested after a long horn shark was stolen from its tank at San Antonio Aquarium. The shark, known as “Miss Helen”, was wheeled out of the aquarium in a pushchair.

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