REAL ESTATE

November 2019 Issue 110

NEWS

It's my party

RICS has published a new edition of its guidance note for party walls. Party wall regulation and procedure (7th edition) applies to all surveyors undertaking work under the Party Wall etc. Act 1996. The guidance offers a useful introduction to party wall notices and awards. The Act applies to construction work close to boundaries as well as party walls. The purpose of the Act is to facilitate works in the vicinity of a boundary with adjoining land. Any works authorised by a party wall award must be carried out in accordance with the award and should not cause unnecessary inconvenience to the adjoining owner. The landowner has a right of access to adjoining land for the purpose of executing work pursuant to the Act. The guidance also provides suggested forms of relevant correspondence and notices as well as a form of award. The guidance is available from the RICS website

Borderline

The Welsh Revenue Authority has updated its guidance on Land Transaction Tax (LTT). LTT applies to land transactions involving land and buildings in Wales. SDLT continues to apply to transactions involving property in England. The guidance covers cross-border transactions involving the transfer of a portfolio of properties in England and Wales and also transactions involving those properties which comprise land on both sides of the Welsh-English border. Note that land transactions in Wales are no longer linked to any transactions elsewhere in the UK for LTT or SDLT purposes. In both instances of cross border transactions, the consideration must be apportioned on a just and reasonable basis. The guidance includes examples of how the apportionment should be made. That part of the consideration attributable to land in Wales is subject to LTT and that part attributable to land in England is subject to SDLT. The return for LTT must be filed with the Welsh Revenue Authority. An application to register a cross-border transaction at HM Land Registry must include both an SDLT certificate and an LTT certificate. The guidance suggests that there are about 1,000 cross-border registered titles that are partly in England and partly in Wales.

Are "friends" electric?

The Law Commission has published a report on its project on the electronic execution of documents. The Law Commission confirms its provisional view that electronic signatures are valid for both contracts and deeds. It also believes that a witness must be physically present to meet the formalities of witnessing. The Law Commission has recommended further investigations into the technical and practical issues relating to electronic execution and has also recommended future reviews of the law in relation to the execution of deeds and the possible codification of the law on electronic signatures. From a property perspective, the Land Registry still requires wet ink signatures for most registrable dispositions and is still looking into the introduction of a comprehensive system of electronic conveyancing and registration. The Law Commission is also of the view that real estate contracts can be signed electronically for the purposes of S2 of the Law of Property (Miscellaneous Provisions) Act 1989. This view is supported by the *Neocteous v Rees* decision set out below. The Law Commission has

recommended that an industry working group should be established to consider the practical and technical issues associated with the electronic execution of documents

CASES ROUND UP

Not fair

Forfeiture rights not affected by CVA

Discovery (Northampton) Ltd v Debenhams Retail Ltd: [2019] EWHC 2441

The High Court has considered the challenge made by a group of landlords to the Debenhams company voluntary arrangement (CVA). The challenge was made on the grounds of unfair prejudice and material irregularity. The claimants had been parties to a sale and leaseback transaction with Debenhams in 2010. All the leases were for a term of 33 years and subject to upwards only rent reviews. Under the CVA, the payment of future rent under the leases was to be compromised and changes were to be made to the leases, including the right to forfeit. The grounds of challenge were as follows: the landlords argued that they were not creditors for future rent within S1 of the Insolvency Act 1986; that the reduction in future rent was automatically unfair; and that they had been treated less favourably than other creditors and that there had been without proper justification. They also claimed that their right to forfeit was a proprietary right which could not be affected by CVA, and that there had been irregularities in disclosure for the purposes of the Insolvency Rules 2016.

The landlords were only successful with their claim that a right to forfeit could not be interfered with by a CVA. The landlords' right to forfeit the leases was a proprietary right that could not be altered by the CVA, accordingly, the modifications to the forfeiture provisions were deleted. Although this is good news for landlords, forfeiture is often not the most attractive option for landlords seeking to maintain an income stream. In addition, once in administration, the tenant has the protection of the statutory moratorium preventing forfeiture without the administrator's consent or the leave of the court. The landlords failed on the other grounds. The court found that future rent was a debt for the purposes of the Act and reducing future rent was not automatically unfair. Valuation evidence indicated that the stores were over-rented and the reduced rents did not fall below market value. The rent reductions were necessary to achieve the purpose of the CVA. In addition, there was justification in treating the landlords differently to short-term trade creditors and business realty justified paying trade creditors in full. However, the court indicated that there would have been unfairness if the landlords had been required to take reductions in future rent below market value.

Together in electric dreams

Email exchange created binding contract

Neocleous v Rees: [2019] EWHC 2462 (Ch)

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that a contract for the sale or other disposition of an interest in land must be made in writing, incorporate all the terms of the contract and be signed by or on behalf of each party. In this case, the court considered whether an exchange of emails satisfied the requirements of S2. The parties disputed the existence of a right of way over the claimants' property to gain access to the defendant's mooring/landing plot on Lake Windermere. The right of way appeared on the defendant's title but not on the claimants' title. The defendant applied to the Land Registry to register the disputed right of way against the claimants' title. Before the First-tier Tribunal hearing, a compromise was reached whereby the defendant agreed to transfer her landing/mooring plot to the claimants in return for £175,000. The defendant had instructed her solicitor to accept the claimants' offer. The compromise agreement was set out in an exchange of emails between the parties' solicitors. The defendant failed to transfer the plot and the claimants sought specific performance. The defendant argued that the agreement was not enforceable because the emails had not been signed by both parties in accordance with S2.
The court found in favour of the claimants. As mentioned above, the Law Commission's view is

that an electronic signature is capable of meeting a statutory requirement for a document to be signed. This case turned on whether the "footer" automatically added to the defendant's solicitors' emails constituted a signature. The main issue was whether the signature was applied with the intention of authenticating the document. The use of the words "many thanks" at the end of the email showed that the solicitor intended to sign off the email using his name. The recipient did not know that the footer was generated automatically and, looked at objectively, the presence of the sender's name in the footer indicated a clear intention to be associated with the email and to authenticate it or to sign it. The court also considered the policy behind the 1989 Act. Section 2 sought to achieve certainty and avoid the need for extrinsic evidence when considering a contract for the sale of land. The court was satisfied that the defendant's solicitor had signed the relevant email incorporating the terms of the compromise agreement on her behalf. It is worth noting that the defendant was seeking to renege on an agreement set out in email correspondence on the basis of a technicality. In most cases, the terms of the disposition will be contained in a draft contract and, to avoid any doubt, the associated email correspondence can be marked "subject to contract".

Just keep swimming

Court determines what was included in sale of land

Borwick Development Solutions Ltd v Clear Water Fisheries Ltd: [2019] EWHC 2272 (Ch)

The claimant owned a commercial coarse fishery that was sold to the defendant in 2016. The sale was effected by Law of Property Act receivers appointed by a mortgagee of the land. The claimant's claim was in conversion in respect of the assets which it argued still belonged to it. The relevant assets were, first, the solar panels attached to the café at the fishery and, secondly, the coarse fish in the man-made lakes comprising the fishery. The claimant had spent considerable sums stocking the lakes with coarse fish including specimen carp aimed at attracting anglers. The fishery was a closed system, preventing fish from moving into other rivers or lakes. The claimant had been in negotiations to sell the fishery business to the defendant for a total sum of £900,000, representing £700,000 for the land and £200,000 for the fish stock. Negotiations fell through and the LPA receivers ultimately sold the site to the defendant for £625,000. The sale contract made it clear that the sale did not purport to include the fish as these were not mentioned in the bank's security. The defendant claimed that title to the fish had passed to it. Either because they were wild animals that could not be owned or because they had passed with the land.

The court considered the ownership of fish in a commercial fishery. It contrasted the position between rivers, where fishing rights existed, and enclosed waters created for the specific purpose of providing a commercial fishery. The claimant retained qualified property in those fish that had been introduced into the fishery and which could not pass out of the fishery system. Accordingly, the claimant had a claim in conversion in relation to the fish. However, title to the solar panels had passed to the defendant. Whether or not something is a chattel or a fixture depends on the method and degree of annexation and also the object and purpose of the annexation. The defendant contended that the solar panels were fixtures. There was a significant degree of attachment and their removal would involve considerable work and cause substantial damage. In addition, the object of the panels was to provide electricity for the long term benefit of the restaurant premises. The court found that the purpose of the solar panels was for their use as an integral part of the land. Having regard to the method and degree of annexation and also to the object and purpose of the annexation, the panels had become fixtures and ceased to be chattels. Accordingly, title passed with the sale of the land.

Changes

Modification of leasehold covenant restricting use

Shaviram Normandy Ltd v Basingstoke and Deane BC: [2019] UKUT 256 (LC)

Under S84 of the Law of Property Act 1925, an application can be made to the Upper Tribunal (Lands Chamber) to discharge or modify a restrictive covenant. This includes restrictive covenants in long leases, where an application can only be made after the expiry of 25 years of a term granted for more than 40 years. The applicant was the tenant of office premises under a long lease

and the Council was the landlord. The tenant wished to convert the building from offices to residential. The Council, in its planning capacity, confirmed that the conversion was allowed under permitted development rights. The lease restricted use to offices and also provided that the tenant was to pay a percentage of the rent received and had to use its best endeavours to sublet the building as offices. The landlord's consent was required to any subletting. The landlord refused to vary the lease to permit residential use and the tenant made an application under S84.

The Upper Tribunal accepted that the user clause should be modified to permit residential use. However, the alienation covenant requiring landlord's consent to any underletting was not a "restriction as to user" and could not be modified. Under S84(1) the Upper Tribunal's power only applies to covenants relating to the user of the land or building. In allowing the modification of the user covenant, the Upper Tribunal applied the established S84 principles. After comparing the likely capital value and returns for both office and residential use, it held that the covenant conferred no practical benefit of substantial value or advantage to the landlord. The Upper Tribunal rejected that Council's "thin end of the wedge argument" that other tenants of office premises would make similar applications.

OUR RECENT TRANSACTIONS

We are advising Arsenal on an extensive upgrade programme at the Emirates Stadium.

We advised Tottenham on its stadium refinancing arrangements. We also acted on the original financing.

AND FINALLY

Reely?

Scientists believe that the Loch Ness monster may be a very large eel after DNA tests of water samples failed to reveal evidence of Nessie.

Cock fight

A French holiday home owner has lost his battle to stop the crowing of a cockerel at a neighbour's property. The battle to silence Maurice, a four-year-old cockerel, has come to symbolise the conflict in France between the old rural way of life and modern values.

Unhappy meal

The population of Rutland, England's smallest county, are divided as to whether it should allow the development of its first McDonalds.

Jane Edwarde
T +44 (0)20 7090 5095
E jane.edwarde@slaughterandmay.com

John Nevin
T +44 (0)20 7090 5088
E john.nevin@slaughterandmay.com

Richard Todd
T +44 (0)20 7090 3782
E richard.todd@slaughterandmay.com