Property Update - February 2014

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Recent decisions have thrown up a mixture of interesting points including some traps for conveyancers.

1. <u>Boundaries</u> – points regarding fights over boundaries continue to crop up notwithstanding the common sense contribution by the Court of Appeal in Pennock v Hodgson [2010] EWCA Civ 873. Mummery LJ stated that when construing a conveyance in order to ascertain a boundary a permissible exercise is to stand with the plan in hand looking at the actual and known physical condition of the land at the date of the conveyance. In Lanfear v Chandler [2013] EWCA Civ 1497 it was argued that there was a presumption of law that the siting of "T" marks on the plan indicated ownership of the boundary feature. The "T" marks related to the repairing obligations from which it was argued that there was an inference as to ownership. This was rejected. It was factor to be taken into account and balanced with other relevant including the conveyance, features on the plan and evidence of the position on ground. It was not, however, a pre-eminent factor.

Patten LJ stated (at para. 16) that "the task of the court is to decide by reference to all these elements how the conveyance or transfer should be construed. All are relevant but none is necessarily conclusive. To say that the use of "T" marks raises a presumption of law (even a rebuttable one) that the boundary feature belongs to the adjoining landowner indicated by the use of the marks seems to me to be wrong in principle and in effect to pre-empt the process of construction on which the court is engaged."

In that case the plan was inaccurate and so the physical condition of the land was more important than the "T" marks which had to give way.

2. **<u>Fiduciary obligations and Property joint ventures</u>** – the issue of fiduciary obligations in the context of property joint venture has been revisited again in Pennyfeathers Limited v Pennyfeathers Property Company Limited [2013] EWHC 3530. The allegation was that there was a joint venture between the individual parties to be carried on through the corporate claimant to obtain planning permission for residential development of farm land on the Isle of Wright. It was alleged that the individual defendants had diverted the opportunity to a Channel Island company and acquired adjoining land. The claim succeeded but not on the basis of fiduciary obligations as between joint venturers as in Ross River v Waveley Commercial. The claim succeeded on the more straightforward basis of breach of the statutory/fiduciary obligations owed by the individual defendants as directors of the joint venture company.

Lessons from the judgment

(1) an independent fiduciary duty did not arise over and above the joint venture agreement because the joint venturers were equally involved in the project. A distinction was drawn with the Waveley case where the claimants had no nominee director on the board of the company and no control over the joint venture funds. This could be a serious practical limitation on the imposition of fiduciary obligations on joint venturers.

(2) Without argument it was the judge's view that the remedy for the claimants was a proprietary interest in the purchase of the farm land and the options over the surrounding land and this would not be affected by the outcome of the appeal in the Mankarious case in the Supreme Court.

The decision serves to emphasise that the contractual terms of the joint venture will not comprise a comprehensive statement of the obligations. Fiduciary obligations may be imposed on joint venturers as in the Ross River case or may arise from the parties being directors of the venture company as in this case.

3. Need to focus when imposing a Quistclose trust on advances – monies are often advanced for a specific purpose in property arrangements including property joint ventures. Is there a claim for breach of a Quistclose trust if the money is applied for a different purpose? This query can arise in the context of funding for a development. In Gabriel v Little [2013] EWCA Civ 1513 this was one of the claims made by the claimant. Money was advanced by him to a developer to fund the costs of a development of a building in poor repair and much of the advance was used to fund the purchase price with the consequence that the developer put little funding into the venture. The Quistclose claim failed because there was

(i) no express condition the advance would be applied for the specific purpose;

(ii) a failure to keep the monies separate;

(iii) a failure to apply the monies for the specific purpose was not one of the specified events constituting a default.

It emphasises that when acting for the funder party this aspect has to be specifically considered and provision made. To impose such a trust and in turn the more extensive remedies the arrangement should spell out that it is a condition of the advance that it is to be applied for the intended purpose and require that the monies are kept separate.

4. **Adverse consequences from landlord's grant of licence to alter premises** – a nasty trap for conveyancers has been highlighted once again in the Court of Appeal decision in Topland Portfolio No. 1 Limited v Smiths News Trading Limited [2014] EWCA Civ 18. A lessee's obligation had been guaranteed under the lease by another group company as surety. The lessee went into administration with the administrators disclaiming the lease

and then later the company being dissolved. The landlord sought to enforce the guarantee provisions by compelling the surety to take a new lease. The surety refused on the ground that the landlord had given a licence to alter the demised premises which the surety was not a party to thereby releasing the surety applying the rule in Holme v Brunskill (1878) LR 3 QBD 495. This defence was upheld and the landlord failed. It is a very easy trap to follow into. The fact that the surety is in the same group as the lessee makes it all the harder for the landlord to bear.

The onus of proof was on the landlord to prove that the change self–evidently did not increase the burden on the surety. This is a heavy burden as any doubt means the landlord fails to discharge the onus and the guarantee will be unenforceable. In this case the terms of the lease expressly provided that the alterations became part of the demised premises and thus subject to the lessee's repairing obligations. Thus the potential burden on the surety was increased by the licence to alter.

There was a proviso in the lease that neglect or forbearance to enforce covenants or the giving of time shall not affect the surety's liability. Granting a licence was held not to constitute forbearance. Forbearance supposed a breach had occurred rather than one being avoided by a prior consent.

Not only does the decision serve to give a valuable warning of this trap it emphasises yet again the problems that so often arise with the enforcement of guarantees. To say that care is needed is an understatement in this area of law. When there is a surety in the arrangement alarm bells need to ring every time a change is considered or step taken.

5. **Temporary exemption from rates for unoccupied new non-domestic builds** – relief from rates on non-domestic properties is now available in relation to new builds at the discretion of the local authority. This is an attempt to prevent developers being deterred from constructing new commercial buildings. It applies for a maximum of eighteen months from the date of completion to buildings completed between 1st October 2013 and 30th September 2016. Completion is when the building is ready for occupation for the purpose for which it was constructed. The building must comprise wholly or mainly qualifying new structures (foundations, walls and roofs). For this purpose the guidance indicates that mainly means more than half. This exemption is to apply not to refurbished buildings but ones where new structures have been constructed including a building constructed on an existing foundation or round an existing façade. The usual periods of exemption will continue to operate so this relief will provide a benefit for less than the full eighteen months.

6. **Chancel repairs liability** – on 13th October 2013 chancel repairs liability ceased to qualify as an overriding interest. This has not brought about a clean break but rather an extremely messy and uncertain state of affairs. The government lacked the courage to abolish the liability or rather was not prepared to pay compensation to the Church of England. In pursuing its campaign for abolition the Law Society unfortunately raised the possibility that the chancel repair liability was not an interest in land. If this is correct then ceasing to be an overriding interest would have had no actual effect as the liability will continue regardless. On purchases notwithstanding chancel repair liability no longer

constituting an overriding interest the question still frequently arises as to what steps should be to protect the purchaser from it. The continuing confusion with it is such that the only sensible course for the moment is to continue taking out insurance cover.

Even if the contention that it is not an interest in land but a personal liability could be disregarded there are still problems that can arise after its ceasing to be an overriding interest. To summarise these possible continuing problems with chancel repair liability which mean that taking out insurance remains the sensible course there is:

6.1 the suggestion that chancel repair liability is not an interest in land but enforceable against an owner of land as a personal liability and it has been further suggested that even after the sale of the land the vendor is not released from liability;

6.2 the risk that chancel repair liability may be noted on a registered title before the occurrence of a sale to a purchaser for value after 13th October 2013. If it is then the liability will continue indefinitely with regard to the property;

6.3 the consequence that a donee of registered land will tale subject to such liability unless there has been a prior sale for value post 13th October 2013. This applies also to the vesting of registered land on an insolvency or inheritance or possibly divorce;

6.4 the risk that a purchaser of registered land relying on priority search for protection must complete before expiry of priority period in case an attempt is made to enter notice relating to chancel repair liability. Even if the late completion is due to fault on the part of the vendor it will expose the purchaser to this risk.

6.5 the risk that possible claims for contributions may be made by another person subject to the liability who has already paid it. The position regarding such claims remains very unclear following the judgment of Lord Scott in the Aston Cantlow case. A claim for contribution could be made even if notice of the liability is only entered on the title register of the person making claim to contribution and not on the title of the person against who the claim for contribution is made;

6.6 the concern that the application of the standard conditions of sale to this liability is unclear.

It is extraordinary that clear advice about the legal position is still impossible with regard to chancel repair liability.

7. **Community infrastructure levy** – the original amendment regulations laid in Parliament in December have been replaced on 20th January. This may put the timetable out. The issues covered by the amendments were discussed in an article headed "Amendments to Community Infrastructure Levy – work in progress or overload?" which appeared in the February 2014 issue.

Amongst the amendments to the regulations is the extension of the deadline for the imposition on all local authorities of the pooling restriction on section 106 obligations by a year to April 2015. This is giving time to bring to the fore two general and important issues.

7.1 Whether to introduce CIL - The first is whether CIL will be introduced by authorities. Two more authorities have said that they will not – Wolverhampton and North Hertfordshire. The recommendation to Scarborough is not to. One reason for this refusal is that those authorities consider that they can receive more funds from section 106 obligations than under CIL. Some authorities are using the extension to consider whether to delay introducing CIL so that section 106 monies can continue to be collected free from the pooling restriction until April 2015. This emphasises the continuing issue over the duration of the lifetime of CIL. It seems to me that the greater the diversity between authorities the greater the likelihood that it will have to be replaced.

7.2 Complexity - the second general issue that has been brought to the fore is the divergence of views between local authorities as to the operation of section 106 obligations under the CIL regime. For example, some seem to believe that restrictions on section 106 obligations will operate differently in zones where there is no CIL rate charged. I can see no basis for that but it will obviously have a major influence on the authority's estimate of future section 106 monies. One thing is obvious now if not before and that is CIL is not going to be simple and straightforward.

Another trend is beginning to develop. With the possible upturn in the residential market local authorities are poised to take advantage by increasing the CIL rate for residential development. The Royal Borough of Kensington and Chelsea had originally proposed a CIL rate of £650 psm for residential development in the Knightsbridge zone but in its updated proposals it now proposes a rate of £750 psm. The justification is the increase in house prices. The link between the developer's profits and the CIL rate is very tempting but it is the impact of the development on the local infrastructure which is meant to be the determining factor.

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