Don’t mess with parking rights

Risk assessment is a crucial element when considering development of land. Are there any rights which may be infringed by the proposed development? If there are then the issue needs to be addressed. Failure to warn the client may result in a negligence claim. Failure to heed the warning may result in a mandatory injunction to undo development work or the award of substantial damages. Ploughing on with the planned development in the hope that the problem will go away carries with it great risks.

Kettel v Bloomfold - This has been emphasised yet again by the recent Chancery Division decision of HHJ David Cooke in Kettel v Bloomfold [2012] EWHC 1422 (Ch). This decision also serves to remind practitioners that it is not just rights of way and rights to light which have to be looked out for. It concerned a right to park which had been granted to the Claimants who are lessees of eight flats in East London. Each had a designated parking space. The landlord wanted to build a new block of 12 flats and to do this needed to move the parking spaces. It set about doing this unilaterally on the basis that it had the right to do so. The Claimants objected and sought an injunction to restrain the landlord.

Nature of right - surprisingly there is still great uncertainty as to the nature of a right to park in a single space. It is a rich source for strong contradictory arguments as to whether it can exist as an easement and if it can what is the test to be applied. Bearing in mind the frequency with which such rights are granted, their importance and commercial value to the grantees and their significance to the grantors such uncertainty is disappointing and a failure of English law. The Kettel case is illustrative of such importance. The parking spaces were blocking the landlord’s proposed development. If it went ahead the lessees’ would lose part of the amenity that they had bought into. The learned judge found that £517,500 was a reasonable assessment of the price that the landlord would have had to pay in order to successfully negotiate the movement of the parking spaces by consent.

A right to park a car may take one of least five possible different forms of legal right – (i) demise; (ii) easement; (iii) protection by the principle of derogation from grant; (iv) irrevocable licence; (v) contractual right. This may affect not just the extent to which the owner’s rights are restricted but also their enforceability against third parties. An assertion that the right is an easement may elicit the response that the particular right is not capable of being an easement at law.

The first issue in the Kettel case was whether the rights demised the parking space or granted an easement. This was important because the extent of the right granted would determine the extent of the limitation on the landlord’s development of the parking spaces. A lease of the space would probably preclude any development subject to arguments as to the extent of the airspace above the surface within the demise. An easement would not stop development involving a “crash deck” scheme open at ground level.

Lease – the learned judge considered the whole terms of the lease and came to the judgment that there was no demise of the parking space. He was guided in this by the clear distinction in his mind between the right and the space when evaluating what is meant by "sole use". This conferred a right to use for parking but not exclusive possession of the space.

Easement - it was then necessary for the learned judge to decide whether the right could be an easement. It is unfortunate that there is not clarity that such a right even if related to a single parking space will undoubtedly be an easement much along the lines of the judgment of Lord Scott in Moncrieff v Jamieson [2007] UKHL 42. At present that is not the position. In London and Blenheim Estates v Ladbroke Retail Parks Limited [1993] 1 AER 307 Judge Paul Baker QC had formulated the test as being whether the right "would leave the servient owner without any reasonable use of his land whether for parking or anything else" (page 317). Such a test means that a right to park related a large area will undoubtedly be valid but there is uncertainty if related to a single space.

The test was approved by the Court of Appeal in Batchelor v Marlow [2003] 1 WLR 764 but doubted without being disapproved in Moncrieff v Jamieson supra. Lord Scott in that case (para. 47) considered it more appropriate to determine whether the right claimed prevented the servient owner from retaining possession and control. Lord Neuberger was not satisfied that "a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property" (para.140) and saw considerable force in the views of Lord Scott "that a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation on the basis that the essential requirement is that the servient owner retains possession and control (para 143). Lord Rodger could see no valid objection on the basis that the servient owner was excluded from occupation as this occurs with the placement of structures, pipes and dams on servient land (para. 76). The House of Lords were wary that there had been limited argument on the point and that there could be unexpected consequences or difficulties which had not been explored.

In the Kettel case the judge took the same approach as HHJ Purle in Virdi v Chana [2008] EWHC 2901 that Batchelor v Marlow supra was not overruled and still bound the lower courts. Both the Virdi and Kettel cases concerned a limited space. Notwithstanding this in both it was held that the right was an easement and that the ownership of the servient owner was not illusory because such owner could cross the space, go on to the space to maintain or resurface it or the adjoining area or the boundary fence in the Virdi case as well as there being the possibility of development of the air space above the parking area or the laying of pipes under it.

The impression given is that it is appreciated that the wrong test is probably being applied at present by the Courts and that to compensate the Courts are striving to ensure that straightforward parking rights are upheld as easements. This will continue until there is a final decision on the correct test to be applied.

Derogation from grant – although not raised in the Kettel case there is scope to protect such parking rights using the principle that a grantor cannot derogate from grant. This will operate most often in cases in which the relationship of landlord and tenant exists. For example, in Dorrington Belgravia Ltd v McGlashan [2008] EWCA Civ 1282 the flow of light to skylights which were integral features of the building was protected by this principle.

Ability to move - the landlord in the Kettel case had placed great reliance in correspondence with the lessees on its ability to move the parking spaces. This was firmly rejected by the judge. He applied the general principle in Greenwich NHS Trust v London & Quadrant Housing Association [1998] 1 WLR 1749 that the servient owner cannot realign a right of way by extinguishing the right of way over one area and replacing it with a right of way over a different area. A principle previously applied by this judge in Heslop v Bishton [2009] EWHC 607 (Ch).

Remedy - to prevent the moving of the parking spaces the judge ordered an injunction against the landlord. The judge took the prima facie right to an injunction as his starting point and looked to see if there was any special factor or good reason which would cause him to award damages in lieu of an injunction. He did not seem overtly concerned to apply the Shelfer conditions. Although no interim injunction was applied for there had not been delayed on the part of the Claimants and no standing by whilst expenditure was incurred by the landlord. There were understandable reasons for not consenting to the move. In contrast the landlord was considered to have acted in a high-handed manner and to be seeking to escape from the burden of the rights it had granted. A desire to carry out a profitable development was not sufficient if it was blocked by rights.

Damages - although not awarding damages in lieu of an injunction the judge did set out how he arrived at the figure of £517,500 that he would have awarded if he had not granted an injunction. Interesting he allowed a slice of the development proceeds to be taken out as developer's profit (25% based on expert evidence) before splitting the final balance of the expected profit 50/50 rather than the third/two thirds split used in Tamares v Fairpoint Properties Ltd [2007] 1 WLR 2148.

Lessons – the decision is a useful reminder of a number of important points:-

(1) Risk assessment is really important before incurring heavy expenditure on a proposed development;

(2) Developers run a serious risk if any issue highlighted by such an assessment is ignored and the development proceeds without addressing the issue. The Courts place a premium on developer's behaving in a neighbourly manner.

(3) The grant of an injunction is the norm if rights, including parking rights, are to be infringed and if the infringement has occurred a mandatory injunction will be granted to undo the work;

(4) The alternative to an injunction will be an award equal to a slice of the expected development profits – in the Kettel case 50%;

(5) Negotiated releases are expensive partly because there is a greater awareness of the willingness of the Courts to protect rights;

(6) From the grantor's perspective it is preferable to avoid granting parking rights in relation to a designated space and to reserve an express ability to change the parking area. No parking rights would be ideal.

(7) Reservation of a right to build will not override the express grant of rights such as parking rights.