

CASE LAW KALEIDOSCOPE

by

Hazel Williamson QC

Hazel Williamson QC is a senior member of Maitland Chambers, the largest Chancery Chambers in Lincoln's Inn, which provides specialist services in all the major areas of contentious commercial chancery work and includes a strong real property group.

She is recognised as a leading practitioner in the field of property litigation in both the Legal 500 and Chambers directory, and has become particularly well-known as an expert on rent reviews, and in the field of leisure property; she is co-editor and contributor to *The Law and Valuation of Leisure Property* the leading text book on this subject. Her work covers all aspects of real property, and also matters such as professional negligence, partnership, commercial disputes and insolvency, especially in a property related context.

Hazel has extensive experience of arbitration and mediation, both on behalf of clients and as arbitrator or mediator. She sits part time as a deputy High Court judge in both England and the Isle of Man. She is a member of the legal advisory board of the *Estates Gazette* to which she contributes a monthly column.

Her recent cases include *Mason v TotalFinaElf UK Ltd* (2003), one of the few dilapidations cases ever to be fully worked out in the High Court, and the well known case of *Bakewell Management Ltd v Brandwood and others*, (2004) in the House of Lords, a case which has raised fundamental questions over the acquisition of vehicular rights of way by prescription.

MAITLAND CHAMBERS

7 Stone Buildings

Lincoln's Inn

London

WC2A3 SZ

Tel: 020 7406 1200

Fax; 020 7407 1300

DX; LDE 326 Chancery Lane

Email: clerks@maitlandchambers.com

CASE LAW KALEIDOSCOPE

A kaleidoscope takes numerous disparate pieces of coloured glass and by the clever use of mirrors, converts their appearance into a symmetrical, coherent and beautiful pattern. Any similarity between this process and the contents of these notes, or my talk, is entirely coincidental.

The following notes refer to the more interesting general property cases, (ie excluding such specialist areas as housing and leasehold enfranchisement) decided at first instance, in the Court of Appeal and in the House of Lords during the last year. Those marked * will be discussed in more detail at the conference, time permitting.

Boundaries

A lot of activity here.

Gillon v Baxter 2003 EWCA Civ 1591

If the plan is either too small to be capable of delineating boundaries accurately or is expressed to be for identification only, the only way to ascertain the boundary is to consider what must have been intended, from a combination of the general indication on the plan, and the likely intention to be inferred from looking at the physical features of the property at the time.

A lesson for conveyancers. A description, all too often found, of the conveyed land as being “shown and edged red on the plan and known as X” will not suffice to define boundaries precisely, and should not be used where these are important.

Beale v Harvey 2003 EWCA Civ 1883

Again, this case illustrates problems caused by choosing a plan without sufficient care. Here, the plan was sufficiently detailed to use to determine the boundary, but was confusing. An architects’ drawing was used, showing the relevant boundary as a straight line marked in red, but indicating that a wall was intended to be constructed on it. By the time of the transfer, the wall had been constructed - but in the wrong place. It was held that the position of the line on the plan delineated the true boundary.

****Joyce v Rigolli*** 2004 EWCA Civ 79

Yet another case about imprecise plans and drawing rebukes from the CA (Arden LJ) about “sloppy conveyancing”.

This case raised the issue whether a boundary agreement can fall foul of Section 2(1) of the LR (MP) Act 1989, if it “demarcated” the land. Arden LJ held that it did not. As the section applied to a “contract for the sale or other disposition” of land it did not

catch a boundary agreement which did not intend to effect any disposition of land. Even though “conscious transfers” of small pieces of land might be intended to be effected, Section 2(1) could not have been intended to apply where such transfers, in their aggregate, were trivial, because of the strong public policy consideration of upholding boundary agreements. A boundary agreement would be presumed to be within this principle until the contrary was shown. (The same result could also be arrived at via proprietary estoppel in the circumstances of the case.)

A pragmatic and practical result, even though the dependence on “triviality” for taking the case out of Section 2(1) must surely be questionable as a matter of legal purity. Where does such an exchange cease to be *de minimis*?

Chancel repair liability

Parochial Church Council of Aston Cantlow and Wilmcote with Bilesley v Wallbank 2003 UKHL 37 9HL

A reminder that even the most abstruse of overriding interests can sometimes get up and bite. The case was actually decided on the question whether a parochial church council could be a “public authority” for human rights purposes. The conclusion was that as it was not involved in governmental activity, it was not.

Easements

****Bakewell Management Limited v Brandwood and others*** 2003 1 WLR 1429 (CA)

A party cannot claim an easement by prescription or under the doctrine of lost modern grant by asserting user which, at the time it occurred, was a criminal offence.

Since it is an offence to drive a car across a common which is subject to section 193 of the Law of Property Act 1925 (and also, more far-reaching, to drive a vehicle on land other than a public highway save within 15 yards of it for the purpose of parking the vehicle: *Massey v Boulden* 2003 2 All ER 87) without lawful authority (which means the consent of the landowner) an easement to carry on such activity cannot be claimed by prescription.

This position was endorsed by s68 of the Countryside and Rights of Way Act 2000, which enacted that those who had been prejudiced by this principle, once it became well known by the CA decision of *Hanning v Top Deck* on 5th May 1993, should be given a statutory right to purchase the necessary right of way for a modest sum tied to the value of their property.

Note: An appeal in this case was heard in the House of Lords on 25th-26th February 2004 and judgment is awaited. Whichever way it is decided will have extensive repercussions.

***R v Sunderland City Council (ex parte Beresford)* 2003 3 WLR 1306 (HL)**

A “village green” case, but illuminating on the concept of user “as of right” in the context of prescription. The landowner’s cutting grass and providing benches did not amount to an implied “licence” so as to preclude user as a village green “as of right”; a licence was not to be implied from mere inaction by a landowner who knew what was going on. This case follows and reiterates the guidance in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* 2000 1 AC 335, that user “as of right” does not require any subjective belief of right by the user.

****McAdams Homes Ltd v Robinson* 2004 EWCA Civ 214**

An easement of drainage passing by implication on the conveyance of a bakery in 1982. After 1986 the bakery ceased to operate and in 2001 it was demolished and two four bedroomed houses erected on the site, causing overloading of the drain.

This case reviews the principles of “excessive user” in relation to easements, and concludes that the test is a twofold test, namely, whether the development of the dominant land amounts to a “radical change in character” or “change in the identify of” the site, as opposed to a mere intensification of the use of the site, and also whether the use of the site as redeveloped would in fact result in a substantial increase or alteration in the burden on the servient tenement.

On the facts of the case, the conclusion that the development had been a “radical change” in the site was one the judge was entitled to reach. With regard to the second test, the correct approach was to compare the likely range of intensities of use for the actual use and for the developed use. With some hesitation, it was found that the judge’s conclusion that there was excessive use was, again, permissible on the evidence.

Human Rights

***BLCT (13096) Ltd v J Sainsbury plc* 2003 EWCA Civ 884**

The Article 6 right to a “fair and public hearing” does not necessarily mean a hearing at which the litigant is entitled to attend (!). Consequently there is no right to an oral hearing in respect of a request for permission to appeal under the Arbitration Act 1996 s 69.

****Stretch v United Kingdom 44277/98* 2004 04 EG 100 (ECHR)**

The application of the doctrine of *ultra vires* to prevent a local authority from granting an option to renew a lease, contrary to the original expectations of both parties, was held to contravene the human rights of the tenant, by depriving him of “legitimate expectations”.

A surprising decision, since, on analysis, the infringement of human rights was committed either by the statute which conferred only limited powers on the local authority, or the court which enforced that interpretation: note that the analysis of it in

Rowland v Environment Agency 2003 EWCA Civ 1885 is in the passive, and never asks: what public authority did any infringing, and how?

Landlord and Tenant

- Break Clause

***JIS (1974) Ltd v MCP Investment Nomnees Ltd* 2003 EWCA Civ 721**

A warning as to the care necessary when drafting, or accepting, the conditions of exercise of a break clause. A requirement to give vacant possession will be impossible to comply with if there are non-determinable sub-tenancies in the premises.

- Dilapidations

****Mason v Totalfinaelf UK Limited* 2003 EWHC 1604 Blackburne J**

A terminal dilapidations case, unusual for the fact that the landlord had also been the occupational licensee of the relevant premises, an old-style garage and petrol filling station, at the time. Interesting as an example, as one rarely gets a dilapidations case being fully worked through by a High Court judge. Two points of note:

(a) a provision that premises are to be repaired "to the satisfaction of the landlord's surveyor" means what it says, absent "Wednesbury" type unreasonableness on his part.

(b) in complex cases, there is a huge logical, and therefore practical, problem in deciding disputes as to what repairs are required under the repairing covenant, and whether their cost exceeds the diminution in value of the reversion, at the same hearing. The valuation experts cannot know for certain what they are supposed to be valuing.

- Repairing covenant

***British Glass Manufacturers' Confederation v Sheffield University* 2004 09 EG 146 Lewison J**

Under a 1000 year building lease made in 1958, the tenant was not precluded by the repairing, yielding up and similar obligations from demolishing the laboratory and offices built on the land for the purpose of redevelopment as residential premises, and, in any event, an injunction to prevent such works would not be granted since the act of waste perpetrated would be meliorating waste.

- **Rent Review**

***Canary Wharf Investments (Three) v Telegraph Group Ltd** 2003 46 EG 0132
Neuberger J

The hypothetical term of a rent review was held to run from the rent review date rather than the original term date. Valuable for cautioning that “the presumption of reality must not be mechanistically applied”

Beegas Nominees Ltd v Decco Ltd 2003 43 EG 138 Patten J

Where a rent review directs the assumption that values in other specified areas are evidence of the market value of the demised premises, it is not intended that the valuer should then adjust those values. Interesting as an instance of the rent review direction telling the valuer “how” to value.

***Burford UK Properties Ltd v Forte Hotels (UK) Ltd** 2003 EWCA Civ 1800

A rent review of a hotel which was to be determined by a formula based on “Net Bedroom Revenue” (the accounting calculations for which were set out) then “provided” that “the tenant shall at all times use its best endeavours to [obtain maximum net bedroom revenue]”. This was held – but only by a majority (Arden and Auld LJ) - to take effect as a proviso that the formula for NBR was to take effect on the hypothesis that the tenant had maximised net bedroom revenue, if not the fact; It was not a covenant of the lease.

The dissentient was Chadwick LJ, who drew the line at construing “gross amount received” as meaning not merely “receivable” in the actual sense, but in a completely notional sense, and who treated the “proviso” as a condition precedent to the determination of the NBR, such that if it were not satisfied NBR could not be determined. A complete failure of the rent review provisions was, however, avoided because of a general arbitration provision, referring the resolution of “any ...question whatsoever with respect to the amount of the Notional Rental Value” to an arbitrator. (Regular readers of this column will recall that Chadwick LJ gave the leading judgment in *Allied Dunbar v Homebase* 2002 EWCA Civ 666)

- **Set off**

***Smith v Muscat** 2003 EWCA Civ 962

A tenant is entitled to set off damages due for an assignor’s breach of covenant (here, repairing obligations) against rent originally due to the assignor, but now being claimed by the assignee pursuant to Section 141 of the Law of Property Act 1925. The argument that if the tenant could not bring direct proceedings for damages for the breach against the assignee, it was anomalous that he could achieve the same result by set off, was rejected. A welcome confirmation of what one would have hoped and expected.

Mortgages

- Clogs

Warnborough Ltd v Garmite Ltd 2003 EWCA Civ 1554

The doctrine striking down “clogs” on the equity of redemption in respect of mortgaged property is still a live one. However, the question whether any particular element is such a “clog” must be decided on the facts of the individual case, having regard to the real substance of the transaction in question, and probably cannot be decided from looking at the transaction documents alone.

Where a vendor of property sells it to a purchaser leaving the price outstanding as a loan secured on the property, the transaction is *prima facie* likely to be regarded as one of sale rather than mortgage. Thus, if the purchaser simultaneously grants an option back to the vendor to (re)purchase the property, the question whether this is a clog on the equity of redemption is a matter for trial.

- Receivers

Silven Properties v Royal Bank of Scotland 2003 EWCA Civ 1409

Mortgagors frequently complain that their property has been imprudently sold by a mortgagee or by a receiver appointed by him. This case conveniently reviews the authorities on the duties of mortgagees and of receivers, and affirms that (a) a mortgagee’s duty to obtain the best price reasonably obtainable for the security applies only to the security as it stands; whilst he must take proper care to market that property effectively, he owes no duty to the mortgagor to postpone a sale or to spend money, in order to improve that value; (b) the duties of a receiver are effectively no different, as the scope of their agency for the mortgagor must be dictated also by their fiduciary relationship with their appointing bank.

The actual decision was that a receiver who has commenced steps to obtain planning permission with a view to improving the sale value of the security is under no duty to pursue that course to a conclusion.

Nuisance

Marcic v Thames Water Utilities Ltd 2003 UKHL 66 (HL 4 December 2003)

Even though the water authority “occupied” sewers, its liability for common law nuisance as an occupier of land was limited by the context of the statutory scheme under which it came to have the sewers vested in it, and could not impose a liability outside those imposed by such statutes; the claimant’s remedy lay in the statutory scheme for raising his complaint with the director.

A further example of the House of Lords avoiding finding the existence, in a property context, of a common law liability where this would impose significant and imponderable costs on a publicly funded authorities: cf *Southwark LBC v Mills* 2001 AC 1 in the context of quiet enjoyment.

***Network Rail Infrastructure Limited v Morris* 2004 EWCA Civ 172**

A case of claim to nuisance to a sound studio by electromagnetic vibrations emanating from Railtrack property failed on foreseeability of damage, on its evidence. However, this case emphasises that nuisances now adapt themselves to modern occupational circumstances, and that, following *Delaware Mansions v Westminster CC* 2002 1 AC 332, liability in the law of nuisance has now become that of “working out the fair and just content an incidents of neighbour’s duty” rather than affixing a label of “negligence” or “nuisance”. Reasonableness of behaviour is therefore now the general touchstone, and the assimilation of the law of nuisance with negligence seems to be largely complete.

Sale of Land

– Representation

***McMeekin v Long* EG 19 July 2003 Astill J**

Though actually decided in October 2002, included as a salutary reminder of everyday life. An oral statement that neighbours were “good and friendly” coupled with a formal representation that there were “no” disputes or complaints was held to be a fraudulent misrepresentation where there was an atmosphere of constant confrontation about parking vehicles, and rubbish, etc. The dangers of salesmanly “puffs” in fact being representations.

- “Subject to contract”

***Gonthier v Orange Contract Scaffolding Ltd* 2003 EWCA Civ 873**

A case which raises, but does not decide, whether there is now a possibility that one can be estopped, by conduct, from relying on a “subject to contract” label, if there have been sufficiently strong indications given that one would not rely upon it, notwithstanding the countervailing strength of the general proposition that a party must be taken to know that anyone who has agreed terms “subject to contract” remain free to withdraw.

Village greens

Quite a lot of activity here.

***R (on the application of Beresford) v Sunderland City Council* 2003 3 WLR 1306 (HL)**

The landowner’s cutting grass and providing benches did not amount to an implied “licence” so as to preclude user as a village green “as of right”; a licence was not to be implied from mere inaction by a landowner who knew what was going on.

R (on the application of Laing Homes Ltd) v Buckinghamshire CC 2003 29 EG 119

Here the landowners' activities interfered with any local recreational use *pro tem* and this use was not seemingly being asserted as a public right. Registration refused.

R (on the application of Alfred McAlpine Homes Ltd) v Staffordshire County Council 2002 EWHC 76 (Admin)

User by 6 local inhabitants satisfied the test.

Oxford County Council v Oxford City Council 2004 06 EG 144

The Countryside and Rights of Way Act 2000 did not remove the status of a village green from any area which had acquired it under the Commons Registration Act 1965, even if it had not been registered. Registration notes status, but does not confer it. (Similar principles apply with regard to classification of public footpaths/bridleways, and BOATs [sic]).