Commercial property update

Magnus Hassett and **Nikolas Ireland** discuss whether an injunction is still the appropriate remedy for an interference with property rights, and how to advise business tenants in the face of recent landlord successes

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In a decision that is likely to have far-reaching consequences about land development, the Supreme Court has examined whether an injunction or damages should be the appropriate remedy for the affected party in a private nuisance case (see *Coventry and Ors v Lawrence and Shields* [2014]).

The judgment should lead to the courts adopting a more flexible approach when considering whether to award damages in lieu of an injunction for infringement of property rights, including rights of light, in a move away from the result of cases such as *Regan* (2007) and *Heaney* (2010).

The claimants had brought proceedings against the owners of a motor sports stadium and track, claiming that noise from the stadium and track amounted to a private nuisance. The defendants operated the property in accordance with various planning permissions and had undertaken noise abatement work in response to notices served by the local authority. However, the claimants said the noise caused an interference with the reasonable enjoyment of their land.

The defendants claimed that the nature of the locality should be taken into account in deciding whether they were acting unreasonably. They also claimed a right to cause a noise nuisance based on over 20 years' use of the stadium and track.

At first instance, the claimants succeeded and an injunction was granted to restrain the defendants from committing any further nuisance. The defendants successfully appealed to the Court of Appeal. The case was then subject to a further appeal.

The Supreme Court reviewed both the law on nuisance and whether injunctive relief should be so readily granted under the long-standing principles in *Shelfer v City of London Electric Lighting Co* [1895]. In a ground-breaking judgment, it held that:

- It is possible to acquire a prescriptive right to cause an unlawful amount of noise or any other nuisance. However, this involves the use being unlawful for more than 20 years. In this case, the defendants could not prove that the current level of disturbance had taken place for more than 20 years before these proceedings commenced.
- It is no defence to argue that a claimant has "come to the nuisance" i.e. bought a property with knowledge of it. However, it may be a defence if the nuisance only arises because the use of the claimant's land changes, e.g. from industrial to residential use.
- The court needs to take into account the nature of the locality when deciding whether the use of land is unreasonable. In this case, when assessing whether there was a nuisance, it was to be assumed the stadium and track were a feature of the locality but were operating at lawful noise levels.
- Planning permission and the public interest may each be relevant when determining the appropriate remedy, but they are not relevant to whether the use itself constitutes a nuisance because the local authority takes many factors into account in planning decisions. Furthermore, the planning legislation provides no compensation for any loss caused to an adjoining owner.
- Although an injunction to prevent the wrong continuing remains the *prima facie* remedy in a nuisance claim, the Supreme Court believed that the law has been too inflexible and that the *Shelfer* test is out of date. The courts' ability to award damages as an adequate remedy instead of an injunction should be used more frequently in appropriate cases where there is planning permission for such use and/or the public interest is served by the use continuing. The courts need to have regard to all factors and exercise their discretion to do justice to all parties. >>

>> Although the Supreme Court allowed the claimants' appeal on the basis that the noise did constitute a nuisance, it opened the door for the defendants to go back to the judge to discharge the injunction on the basis that damages would be an adequate remedy.

Landlord successes and long tenancies

Many practitioners believe that the courts sympathise with business tenants when it comes to determining the length of a new term. The courts have been inclined to grant short leases of five years, or a right to break after that time, irrespective of the previous lease's duration.

Iceland Foods Ltd v Castlebrook Holdings Ltd [2013] gave landlords real hope that, in certain scenarios, the court may grant longer tenancies without the right for the tenant to break. The case concerned a supermarket premises in Cheshire, which Iceland had occupied for about 20 years after taking an assignment of the residue of a reversionary lease of 35 years. Iceland asked the court for a five-year lease but the landlord, Castlebrook, argued that the new lease should last 15 years.

Section 33 of the Landlord and Tenant Act 1954 allows a court to grant a new tenancy on such terms as it determines to be reasonable in all the circumstances. The court sought to have regard to the interests of both parties and it took into consideration the length of Iceland's occupation and the existing tenancy, balancing this against the outdated nature of the premises and additional value to the landlord of a longer lease. The court decided that, in all circumstances, the correct term for the new lease was ten years without a break.

It was an interesting case as it applied a 'dual rate' to the valuation of the premises. The court applied a market rate for the ground retail floor and a discounted rate for the first floor recognising that a supermarket tenant would probably mothball this area and not pay a market rent for it.

The court decided on £63,000 per annum subject to review after five years; the landlord and tenant's annual rent submissions were £182,350 and £37,500 respectively.

The case shows that the courts will adopt a flexible approach to determining terms of a renewal lease and provides hope to landlords that they may be able to secure longer tenancies and increase the value of their investment.

Break options

The Court of Appeal handed down its decision in *Friends Life Ltd v Siemens Hearing Instruments Ltd* [2014] in April. It decided whether a failure by the tenant to comply with the formal requirements of the break clause meant that the break notice was invalid.

The dispute centred on whether the notice was effective as it did not expressly state that it was given under section 24(2) of the Landlord and Tenant Act 1954, as required by the clause of the lease.

Overturning the decision at first instance, the Court of Appeal found that the notice was invalid and allowed the landlord's appeal. In the leading judgment, Lord Justice Lewison held that any mistake in complying with the specific requirements set out in a break clause would be fatal to the exercise of the break.

The right to break is an option, under which he landlord makes a binding offer to terminate the lease. It is the tenant's choice whether to accept or decline that offer, but to accept the offer and create a binding contract, the tenant has to accept it in precise compliance with the terms of that offer (*United Scientific Holdings Ltd v Burnley BC* [1978]).

Contractual requirements must, therefore, be met absolutely. Substantial compliance is not enough, so if the clause says that the notice must be on blue paper, it would be no good serving the notice on pink paper, however clear it is that the tenant wants to terminate the lease.

Even if a mistake is trivial, if it goes to the contractual obligations of what is required in the lease, it will be fatal for the purposes of the notice's validity.

The Court of Appeal decision is unambiguous – anything other than absolute compliance in meeting the contractual obligations in the exercise of the break clause is fatal, unless waived by the landlord.

The court will not rescue a break notice where the conditions are clear. As Lewison LJ said: "The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely."

A small crumb of comfort for tenants and their advisers is that there is still a distinction to be drawn between the formal contractual obligations of the lease (where absolute compliance is required) and a situation where there has been an error in the information being communicated to the landlord in the notice (e.g. a miscalculation of the break date) but where the message is still plain and obvious to the landlord (*Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997]).

It should go without saying that, as well as ensuring that break notices are correct, those acting for tenants should make sure that when negotiating leases, conditions attached to tenant's breaks are kept to a minimum and that the notice requirements for serving such breaks are straightforward and unambiguous. **SJ**

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