Magnus Hassett looks at recent case developments surrounding TVGs, the meaning of quiet enjoyment and wind farm planning

Commercial property update

Section 15 of the Commons Act 2006 allows for an application to be made for the registration of land as a "town and village green" where a significant number of local inhabitants have indulged as of right (i.e. not by force, nor stealth, nor the licence of the owner) in lawful sports and pastimes on the land for a period of at least 20 years, including in certain circumstances where such activity has ceased at the time of application.

Interpretation of this legislation, and that which preceded it, has led to the registration of parcels of land which may be far removed from the general public's idea of a village green. In the recent case of *R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council* [2013] EWCA Civ 276, the Court of Appeal (in a majority decision) overturned the first instance decision and held that a tidal beach in Newhaven, known as West Beach, was capable of being registered as a town or village green.

These were some of the key points made in the leading judgment of Lord Justice Richards:

- There is no requirement that a town or village green has to be predominantly "grassy", or be in a village or town location. It is the activity taking place on the land – the lawful sports and pastimes being undertaken by a significant number of the inhabitants of a locality on the land for a period of at least 20 years – which is key.
- There is no basis to imply into the Commons Act 2006 a qualification that incompatibility with the landowner's statutory functions and obligations (in this case, the operation of the port at Newhaven) are a ground to quash a commons registration application.
- The fact that a tidal beach may have no fixed boundary and cannot be used at all times in its entirety, due to the ebb and flow of the tide, does not defeat its registration as a town and village green.
- The fact that the land was subject to certain byelaws did not imply that it was being used with the licence of the owner (if such licence was implied it would have defeated the claim that the land was being used "as of right"). The byelaws, which had been made in 1931, were not properly enforced and had not been displayed to the users of the land during the relevant 20-year period. There was nothing to indicate to the public that use of the beach was subject to the permission of the landowner. (In the dissenting judgement, Lord Justice Lewison held that the making of the byelaws in 1931 was a once and for all communication to the public that the owner's permission to use the land was required and that no further periodic communication of that permission was necessary.)
- The absence of a properly documented public right of way to get on to the beach in the first place did not prevent the land's registration as a town and village green.

The case is likely to be subject to a further appeal by Newhaven Port and Properties but, in the meantime, practitioners and landowners should be aware of the potentially wide application of these provisions of the Commons Act 2006. Those advising landowners should be alert to activities which could give rise to potential claims and, where their clients are happy for such activities to continue, should at least advise their clients to erect suitable signage on land. This will make it clear that any sports and pastimes taking place are done so with the express consent of the owner, which can be revoked at any time.

Quiet enjoyment

The landlord's covenant for quiet enjoyment has been considered recently in the case of *Shebelle Enterprises v Hampstead Garden Suburb Trust Limited* [2013] EWHC 948 (Ch). The case involved a long leaseholder of property in Hampstead Garden Suburb who wished to object to basement works being carried out by a neighbour. The long leaseholder was arguing that the trust would be in breach of its covenant for quiet enjoyment in granting consent to the neighbour's works. But the court's view was that the trust, in properly exercising its powers and rights under the Hampstead Garden Suburb scheme of management, could not be in breach of its landlord's covenant for quiet enjoyment.

For practitioners, the case also provided a useful restatement of what a landlord's quiet enjoyment covenant amounts to. In every lease, there is either an express or implied covenant by the landlord for quiet enjoyment. Such a covenant is sometimes misunderstood – the word quiet has nothing, in this context, to do with the making of noise. Rather, the covenant

means that a tenant has the right to enjoy lawful possession of the premises without, according to case law, any "substantial interference" by acts of the landlord.

The covenant for quiet enjoyment often has to be considered against contrasting rights reserved to the landlord, e.g. to build or otherwise deal with adjacent premises. The court will generally try to make the respective rights of the landlord and tenant work together but will not allow a landlord to "derogate from grant", i.e. act in a way that was never intended and which causes substantial interference to the enjoyment of the premises.

It is a question of fact and degree in each case whether there is "substantial interference" with the tenant's lawful possession of the premises, but the following are examples of cases where breaches of the quiet enjoyment covenant have been found by the courts:

- significant obstruction of access to premises e.g. by scaffolding which has been erected to allow the landlord to repair property lying above the premises, or by an advertising hoarding that obscures the premises;
- excessive noise, dust and dirt caused by building works carried out by the landlord on adjacent property;
- flooding of premises caused by water discharging from neighbouring land of the landlord;
- obstruction of a right of way to the premises; and
- interference with access to common areas of a shopping centre caused by erecting stalls in the malls.

On the other hand, a landlord's covenant for quiet enjoyment is not generally breached by:

- a landlord letting adjoining premises to a competing business; or
- unlawful acts by tenants of the landlord who occupy adjacent premises – if adjacent tenants cause unreasonable noise or disturbance, any claim is against them only.

Well-advised landlords will, as ever, seek to ensure that leases permit sufficient "lift and shift" rights so as to enable rights of way, parking spaces etc, to be varied and should also reserve to themselves sufficient express rights to build and redevelop neighbouring property, not simply relying on the usual rights to interfere with access of light and air.

Older is better

In the recent case of *South Northamptonshire Council v Secretary of State for Communities and Local Government and Broadview Energy* [2013] EWHC 11, the High Court quashed a planning permission for a wind farm, on the basis that the inspector failed to prioritise policies set out in the local development plan.

On 12 July 2012, a planning inspector appointed by the secretary of state granted planning permission for a wind farm of five 125 metre-high turbines at Spring Farm Ridge, near Brackley. The council and a local resident challenged the decision on the basis that the inspector had failed to have proper regard to the correct test for dealing with conflicts between the proposed development and the local plan. They also claimed the inspector did not have proper regard to the desirability of preserving the setting of nearby listed buildings and the impact on neighbouring conservation areas.

Under the Planning and Compulsory Purchase Act 2004, any determination must accord with the relevant development plan, unless material considerations indicate otherwise. The Planning (Listed Buildings and Conservation Areas) Act 1990 also requires special regard to preserving listed buildings and the character and appearance of their setting.

The inspector considered whether the harm caused by the development would outweigh the benefits. She laid great emphasis on the benefits of renewable energy generation and felt these outweighed the effect the turbines would have on the landscape and noise levels. She accepted the impact would be substantial, but said conditions could be imposed to safeguard residents' interests.

The court, however, agreed with the claimants that the inspector had failed to apply the correct test. She had not started from the position of giving the development plan priority and then considering whether material considerations outweighed its requirements. Although the inspector paid regard to the plan and the way in which it conflicted with the proposed development, she had, by relying on the National Planning Policy Framework, placed too much emphasis on allowing the development to proceed unless demonstrable substantial harm would result.

The court did hold that the inspector had otherwise acted in accordance with the statutory requirements – the inspector had properly considered the visual and noise impact on the locality. But the court made clear that national policy seeks well-planned developments and the quest for renewable energy should not be at the expense of environment or heritage. It therefore quashed the permission.

The decision effectively restates the position that local policy should be given first priority over national policy, even where that local policy is out of date. Only then can it be outweighed. Once again, the secretary of state's objective of reserving centralising powers to himself appear to have been curtailed. This following the House of Lords' insertion of provisions into the Growth and Infrastructure Act which mean that the criteria for designation of an "underperforming" local planning authority need to be subject to parliamentary scrutiny.

No requirement to register

Under the Companies Act 2006 (amendment of part 25) Regulations 2013 and the LLP Amendment Regulations 2013, all charges created on or after 6 April 2013 by UK incorporated companies/LLP's require registration, subject to certain limited exceptions.

These exceptions include: "a charge in favour of a landlord on a cash deposit given as a security in connection with the lease of land".

Under the new regime, rent deposit deeds should no longer require registration at Companies House. This also seems to be the confirmed view of Companies House – on a recent trial run of submitting a post-6 April 2013 rent deposit deed to Companies House recently, this firm received a reply from Companies House confirming that "under the new company charges regulations, which came into effect on 6 April 2013, there is no requirement to register the enclosed charge".

There remains a potential argument that, where the tenant holds the deposit monies or otherwise retains some control over them (such as charging them by way of floating rather than fixed charge), such an arrangement may continue to be registrable.

Practitioners encountering these sorts of deeds may wish to send them to Companies House to see whether such deeds are accepted for registration.

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