Worth noticing

Magnus Hassett discusses the importance of clarity and attention to detail, both in terms of complying with regulations and when writing notices and contracts

Magnus Hassett is a partner at Forsters
@ForstersCRE
www.forsters.co.uk

The recent decision of the *Upper Tribunal in Winterburn v Bennett* [2015] UKUT 59 (TCC) serves as a useful reminder of the law on prescriptive rights.

Prescriptive rights can be acquired in three ways: by common law, under the doctrine of 'lost modern grant', and pursuant to section 2 of the Prescription Act 1832. The general premise is that they will arise where one person has exercised rights over another person's land without force or secrecy, and without the consent of the owner of the affected land, for an uninterrupted period of at least 20 years.

The case concerned vehicular and pedestrian access by the customers and suppliers of a fish and chip shop over a car park belonging to a neighbouring Conservative Club. The club had positioned two notices in plain site in the car park which read 'Private car park for the use of patrons only by order of the committee'.

The rights were exercised openly and without the consent of the club. Club officials would occasionally object to this unauthorised use of the car park but did not make any written or formal complaints to the shop owner or to the suppliers or customers, and in general tolerated the everyday parking.

Pedestrian rights

The owner of the fish and chip shop claimed that he had acquired, through the continuous use of his customers and suppliers, vehicular and pedestrian rights over the Conservative Club's car park. The judge at first instance found in his favour.

On appeal, this was partially overturned by the Upper Tribunal, which determined that the presence of the notice was enough to prove that any vehicular use of the car park by non-members was contentious, and so prevented the creation of a prescriptive right to park. However, as the notice only challenged a right of vehicular use, prescriptive rights of pedestrian use were established.

Permission to appeal to the Court of Appeal was granted, so it is unlikely that the story will end there. However, there are some points of note in the Upper Tribunal's judgment:

- The owner of the fish and chip shop relied on the use by his customers and suppliers to establish the prescriptive rights, rather than his own use;
- Landowners must make sure that any notices they erect on their land are sufficiently clear and detailed to cover any and all of the unauthorised uses they are seeking to prohibit;
- Landowners should also consider other methods of protecting their land, including occasionally closing access gates, or erecting fences or other obstructions; and
- Where landowners become aware of unauthorised use of their land, they should immediately take steps to challenge and/or stop such uses, including written formal complaints, and, if necessary, threaten or pursue court action. >>

>> Energy efficiency standards

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations have recently been finalised. The regulations require landlords to ensure properties achieve a minimum energy efficiency standard (MEES) rating of E in their energy performance certificates (EPC) in order to let, or continue to let, them out. However, the obligation to carry out improvement works is limited, to some extent at least, by a 'cost-effectiveness' requirement.

While the regulations also make provision in relation to domestic property, this article will only consider the impact on non-domestic rented premises.

Practitioners will need to highlight to landlord clients the importance of compliance with MEES and the ramifications of breach, both of which could impact on asset value and marketability. It will be key to ensure that copies of EPCs are obtained as early on as possible in a transaction. Some important points to note for landlord clients:

- MEES applies to all let properties, except where the term is less than six months (unless creating an occupancy by the tenant of over 12 months) or more than 99 years. Properties which do not require an EPC will not be caught. There are also some further, more specific exclusions from MEES, but these are fairly narrow in scope;
- The standards come into force on 1 April 2018 where a new lease is being granted, either to a new or existing tenant, and on 1 April 2023 for any other let property, including where a lease is already in place with a tenant in occupation. In some cases, landlords will be granted six months leeway to improve properties or demonstrate that they fall within an exemption, for example, where a non-compliant property is sold;
- Local authorities will enforce MEES through Trading Standards;
- Landlords are to notify any applicable exemption on a centralised register. Local authorities will serve non-compliant landlords with a compliance notice requesting further information. If this is not provided or is insufficient, the local authority may issue a penalty notice, which is subject to a review procedure and appeal process if challenged by the landlord; and
- The penalty for providing false or misleading information to the exemptions register or failing to comply with a compliance notice is £5,000. For renting out a non-compliant property, landlords will be fined (a) 10 per cent of the rateable value, with a minimum penalty of £5,000 and a maximum penalty of £50,000, for less than three months of non-compliance, or (b) 20 per cent of the rateable value, with a minimum penalty of £10,000 and a maximum penalty of £150,000, for three months or more of non-compliance. In all cases the infringement may also be made public.

Commercial common sense

A recent Scottish case relating to a tenant's contractual liability for dilapidations provides a useful insight into the way in which the modern judiciary will seek to interpret contractual agreements in a purposive, rather than literal, manner so as to achieve a sensible commercial result (*Mapeley Acquisition Co (3) Ltd v City of Edinburgh Council* [2015] CSOH 29.

Under their lease, the defendant tenant was required to keep the premises in good and substantial repair, and condition. If the tenant had not complied with this repairing obligation at the end of the term, the landlord had an option to either require the tenant to carry out the entire works at its own cost in order to put the premises into repair or to require that 'the tenant shall pay to the landlord such reasonable sum as shall be certified by the landlord's surveyors as being equal to the cost of carrying out such work'. It should be noted that the statutory cap based on diminution in value contained in section 18 of the Landlord and Tenant Act 1927 does not apply in Scottish law.

The dispute arose when the landlord opted to require the tenant to pay the sum of money which was equivalent to the cost of putting the premises into the repair and condition required by the lease. This sum was certified by the landlord's surveyor as being over £8m.

The tenant contended that the landlord had no intention to carry out all the works and therefore the option did not apply, as any certified sum must be based upon the cost of works that the landlord had already carried out, or intended to carry out. The landlord argued that there was no such pre-condition contained within the agreed wording.

While the court accepted that the landlord's literal interpretation of the wording was the more natural reading, the intention was not entirely clear and the wording was capable of having the meaning claimed by the tenant.

As the court held the wording was ambiguous, it then felt able to find for the tenant on the basis that their construction best accorded with commercial common sense and what the court thought the parties really intended.

This case highlights the importance of ensuring that, where contracts contain onerous provisions, the drafting is abundantly clear and leaves no room for judicial discretion. Otherwise, the court will readily find ambiguity in the wording of a clause, leaving it open for the court to adopt the most commercially fair meaning even where the wording might favour a different interpretation. **SJ**

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