

# Property News Quarterly Round-up

## Issue 7

### **Dial before you dig**

Utility operators are forever advising developers to check for competing rights before committing a shovel to the ground - 'dial before you dig'. However, in this case, the electricity company overlooked their own advice, with disastrous consequences.

A basement flat was burdened by a servitude right of access to an electricity substation contained in the cellars. The electricity company rebuilt the access to the cellars by excavating some ground belonging to the basement flat and building a stairwell.

Although the company received planning permission (and the previous basement flat owner did not object) at no point did either the previous or current owners of the basement flat consent to the works. Once the works had been completed, the current owner objected to the excavation at his property.

In determining the dispute, the Sheriff Principal said that the starting point must be the terms of grant itself. He held that the grant of a right of access "across the area in front of" the basement flat simply could not bear the interpretation that it incorporated any right to excavate and create a stairwell. The company therefore will have to dismantle the stairwell. (*SP Distribution Limited v. Rafique*, Edinburgh Sheriff Court, unreported)

### **Error in notice was 'cock up, not conspiracy'**

A firm of solicitors sent a notice on behalf of the tenants, purporting to break the lease, but on behalf of the wrong group company. The landlords challenged its validity in court.

The Court began by asking whether the notice complied with the formal requirements of the lease clause and, if so, whether it had been effective in conveying what the clause required of it. The test is a functional one,

where the question is whether the recipient was misled or whether the notice clearly and explicitly conveyed the necessary information.

There were two possibilities suggested here. Either there had been an assignation to the company mentioned in the notice - but as landlord's consent would be required, the landlord is in a position to know that this has not occurred. Or the tenant's solicitors had simply made a mistake - 'cock up rather than conspiracy', according to counsel.

The court held that it was just a mistake. On the basis of the functional test the notice was effective as it clearly conveyed that the tenants were exercising a notice to quit and, considering the factual knowledge of the landlord at the time, the landlord would have been aware which company this referred to. (*AWD Chase De Vere Wealth Management v. Melville Street Properties Ltd [2009] CSOH 150*)

### **Recorded Delivery means what it says on the label**

In another significant decision on notices, the Court conducted a forensic examination of the background to the legislation relating to a notice threatening termination (known as a pre-irritancy notice).

The case involved a notice that was intimated by sheriff officer because of a postal strike rather than sent by recorded delivery, as is required by statute. The tenants claimed that the landlords were not entitled to irritate (terminate) the lease because the statutory method of service had not been properly carried out.

The Inner House considered the intention of Parliament by looking at the underlying Scottish Law Commission report and suggested that the Commission, in formulating their recommendation, would have adopted a cheap and reliable method of formal communication, which could be undertaken by non solicitors without any difficulty. The Court also considered that to hold otherwise would

lead to difficulties in compliance and repeated litigation. Therefore the court held that the legislation refers only to Royal Mail's recorded delivery method and allowed the appeal. (*Kodak Processing Companies Limited v. Shoredale Limited* [2009] CSIH 71)

### Capital Allowances

An issue has recently arisen relating to the use of Capital Allowance Act 2001 Section 198 elections to fix the value of plant and machinery in a property when it is disposed of. It has been common practice when making the election for the seller to use the catch-all phrase "all plant & machinery at the property". HMRC never really appeared to be too exercised by this phraseology.

However, HMRC's technical division have now clarified that not only will they no longer accept that catch-all phrase, but also they will now require plant and machinery to be split between the main pool (chargeable at 10%) and special rate pool (chargeable at 20%). Crucially, HMRC will require this split even where the seller has not actually incurred expenditure themselves on special rate pool 'integral features'. A seller might have to repay capital allowances to HMRC if the issue is not properly addressed in Sale & Purchase agreements.

### Interest to enforce revisited

We noted in Issue 1, in a major decision by a Sheriff Principal, that not all title conditions (or 'burdens') contained on the face of a title will be automatically enforceable - it will depend on the degree of 'material detriment' suffered by the benefited proprietor. We suggested that this might render some title conditions to be effectively worthless.

The Lands Tribunal agrees. In this case the Tribunal considered the enforceability of a title condition, which imposed a prohibition of parking on a shared courtyard in the title to one property. However, it was not reciprocated in the title to the other property - despite the prohibition clearly having been intended to create a mutual scheme to preserve the amenity of the courtyard for both properties.

The benefited proprietor used the courtyard for parking herself but sought to enforce the burden against the burdened proprietors. The Tribunal held that the failure to

bind both proprietors removes the basis of enforcement of the parking restriction by that proprietor.

Crucially, the Tribunal found that the benefited proprietor did not suffer any material detriment to the value or enjoyment of her property as the courtyard is already used for (her own) parking. The Tribunal held that, on that basis, it would be reasonable to discharge the burden. (*Clarke & anr. v. Grantham, Lands Tribunal, unreported*)

### Right to buy to be dismantled

The Scottish Government has announced that the right to buy for new tenants entering the social rented sector will be ended soon under the Housing (Scotland) Bill, to be introduced in early 2010. The Bill will also:

- set separate standard for the regulation of social housing;
- provide the Scottish Housing Regulator with a statutory objective of safeguarding and promoting the interests of current and future tenants; and
- include provisions on private housing to assist local authorities to enforce existing legislation more effectively.

### Expert is not arbiter

One of the main advantages of referring a dispute to an independent expert rather than an arbiter is that an expert will make a binding determination quickly. Determination by an expert avoids the necessity for detailed submissions and counter submissions that are required in arbitration. It also avoids the delay of stating a case to the Court of Session in any appeal. The flip side of the coin is that the commercial reality of tight timescales often means that there can be tactical advantage in characterising the expert as an arbiter to draw matters out.

In this case, it was the 'Independent Expert' (as defined in the missives) himself who carried out quasi-judicial procedure and stated in his determination that he was acting as an arbiter and would therefore be subject to the stated case appeal procedure. The Independent Expert's determination was one of whether the tests in a 'suspensive' planning condition had been met satisfactorily. If it could be drawn out in a lengthy appeal, the timescales would expire and the parties released from their obligations.

In a quick appeal to the Inner House (due to the timescales involved), the Extra Division upheld the previous decision that on the interpretation of the contract, the parties' intention was to refer to an independent expert rather than an arbiter. The Court also considered the timetable in the contract for the speedy determination of any issue in question, which would point towards expert determination rather than arbitration. The terms of the missives should govern the nature of the appointment and therefore the Independent Expert is not an arbiter and cannot state a case for appeal to the Court of Session. (*Macdonald Estates plc v. NCP [2009] CSIH 79*)

## CONTACT US

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:

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