

real estate update

HBJ Gateley Wareing

Summer 2010

Welcome

Our focus in the Summer edition of the Real Estate Update is on recent development issues which are likely to prove significant in the future, notably the Supreme Court finding in relation to town and village greens which was bad news for developers. It was not all doom and gloom, however, as the same court has confirmed that a developer's right to connect to a public sewer is an absolute one. See *Town and village greens: developers see red* and *Welcome news for developers: Supreme Court confirms absolute right to connect to a public sewer* for further details.

Our client focus is on Opus for their recent well publicised acquisition of Opus Aspect and a note of caution is sounded for landlords and tenants in *Fixing a break – not as easy as you may think*.

I hope you enjoy this current issue and as always, please continue to let us have your feedback to ensure that this newsletter remains relevant to you.

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Town and village greens: developers see red

The Supreme Court dealt developers a serious blow when it overturned the Court of Appeal's judgement in a recent case, *R (on the application of Lewis) v Redcar and Cleveland Borough Council*.

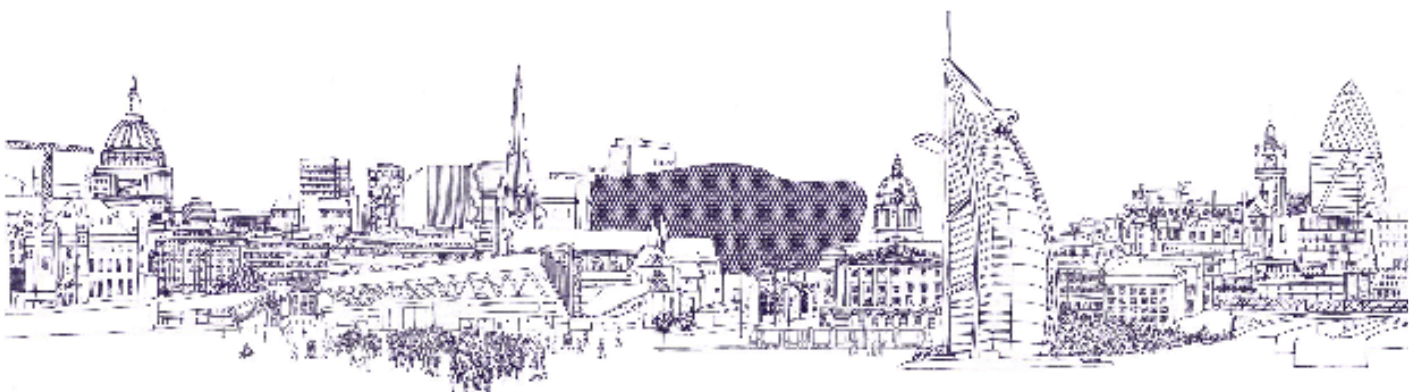
The issue in the case was whether or not a piece of open land ought to have been registered as a village green.

What this case highlights is that anyone can apply to register land as a town or village green if it has been used by local people for recreation "as of right" for at least 20 years.

The facts

Coatham Common, owned by Redcar and Cleveland Borough Council was used as a golf course until 2002. It was also used by local inhabitants for recreational purposes such as dog walking and family games. The inhabitants did not use the common if golf was in play and left if asked to do so by the golfers.

Permission was given to develop the land for mixed residential and leisure use but Mr Lewis, one of the local inhabitants, applied to register the common as a green in June 2007. Although the council was successful in both the High Court and Court of Appeal in opposing the application on the basis that the local inhabitants deferred to the golfers and therefore did not use the common "as of right", the Supreme Court unanimously overturned those earlier decisions and ordered the council to register the common as a village green. What the Supreme Court said was that deference to another user was not inconsistent with the use of the common "as of right": it was merely an acceptance that, where two or more rights co-exist over the same land, there may be occasions where they cannot be enjoyed at the same time.



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Provided an applicant can show that use of land is without force, secrecy or permission and the use had been for the requisite period of time, the claim is likely to be a valid one.

What is a town or village green?

A town or village green is simply an open area of land. What renders it a "green" is the use by the local inhabitants for such activities as dog walking, sports and other lawful pastimes, for a period of at least 20 years. As soon as a significant number of the local inhabitants can establish such usage, they are entitled to apply to the local authority for formal registration. This effectively blocks any development on the land in question.

Why is this a problem for developers?

There are very real dangers in proceeding with an acquisition where long term (20 years plus) recreational use cannot be ruled out. Even apparently abandoned land can become the subject of a town or village green application, as use does not have to be current, provided that the land has been used for qualifying activity within the previous two years. Although a search of the relevant registers can be carried out, the absence of a registration is not conclusive, as a future application may be made.

As well as the difficulties in accurately identifying land which might potentially be a village green, the key point arising from this particular case is that the inhabitants' acquiescence to an alternative use was wrongfully interpreted as negating their own right. Therefore, the risk of the land being a village green was not identified. If a landowner, or successive owners, have not interrupted the use during this time, nor made it apparent (by way of clearly visible signage) that use of the land is with permission, then they are deemed to have acquiesced in the use of the land as of right.

Anyone subsequently seeking to develop the land could inadvertently find themselves the owner of land that is the subject of a village green application which will significantly affect its development value. It is a criminal offence to carry out development on a town or village green and any buildings would have to be demolished.

What can you do?

There are various steps that can be taken to protect yourself against the risk of inadvertently acquiring a site with an established village green:

- Carry out local enquiries;

- Seek assurances from the seller;
- Take out insurance;
- Check statutory time limits which might affect local inhabitants' ability to register.

If there has been use of the land for recreational activities, check whether permission has been granted. This would include clear signage stating that use is allowed by permission only, or limited access arrangements. Find out how long such measures have been in place and whether or not the apparent permission has been challenged by the local inhabitants.



Green risk

Unless a seller is prepared to give unequivocal assurances as to the use of a piece of land, or recreational use is clearly with permission, there is a risk that local inhabitants may be able to substantiate a claim for a declaration of that land as a green. There are measures that you can take to minimise the risk but where the use is not apparent and no assurances are forthcoming, be mindful of the risk of acquiring land which could ultimately prove worthless.

If you would like any further information on any of the issues raised in this article, or any other development matters, please contact **Callum Nuttall**, Partner on **0121 234 0188** or email **CNuttall@hbj-gw.com**

Fixing a break: not as easy as you may think

When a tenant serves a break notice to terminate a lease it may subsequently find that it needs the premises beyond the break date - possibly because its new premises are not ready, or because further works are required in order to satisfy a dilapidations liability. The

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tenant may seek to negotiate the withdrawal of the notice with the landlord. The landlord proving amenable, the parties may well assume that the lease simply continues as though the break notice was never served.

Unfortunately, they would be wrong. Even if the parties agree to the withdrawal of the notice, it is still effective in law and their conduct is deemed to create a new tenancy on expiry of the break notice. The following are some of the unintended consequences which may result:

Problems for the landlord

Alienation

If the landlord is itself a tenant, by inadvertently creating a new lease without the consent of its own landlord, it may be putting itself in breach of the terms of its headlease.

Dilapidations

Any claim for disrepair arising under the previous tenancy will be extinguished, so any rights of claim the landlord might have had against previous tenants as guarantors is lost.

Any obligation to put the demised premises into the same state of repair as at the commencement of the tenancy could now refer to the commencement of the new deemed tenancy which could leave the premises in substantially worse condition than was intended.

Rent review

If there is an outstanding rent review at the break date, when the rent is finally agreed it may not be able to be backdated beyond the start of the deemed new tenancy. There is an argument to say that the rent at the beginning of the deemed new tenancy would be considered to be a provisional sum subject to review by reference to the earlier tenancy, but the position is far from clear.

Former guarantors

As there is a deemed new tenancy from the expiry of the break notice the landlord will lose the ability to claim against any former tenant liable either under security of contract or under an authorised guarantee agreement and any guarantors under the original tenancy.

Problems for the tenant

Apportionments

There is no implied provision into a break clause that the tenant is only obliged to pay rent to the break date. This means that the tenant must pay the entire quarter's rent

with no obligation on the landlord to repay the rent for the period falling after the expiry of the break notice. The tenant might also find itself paying twice for part of the quarter – i.e. it will have paid under the old lease and could then be liable for payment for the same period under the deemed new lease.

Set-off and abatement

The tenant's rights in respect of claims against the landlord for breach of the terms of the original tenancy might well be lost under a deemed new tenancy.

Registration

If a tenant does not register the new tenancy then it will have no legal title and only hold an equitable tenancy. If the landlord transfers the reversion then the transferee will take free of any new deemed tenancy, unless the tenant is in actual occupation which it may not be if there is a sub-lease in place.

Problems for subtenants

A break notice automatically determines any sub-lease granted out of the lease, even if the term has not come to an end. Where a tenant withdraws a break notice and subsequently agrees a new lease with its own landlord, a new agreement must be put in place with the sub-tenant.

Avoiding the situation

Although not yet tested in the courts, there are a couple of options for parties wishing to withdraw a break notice:

- If the notice has not yet expired the parties may vary the lease to provide that the break notice can be withdrawn unilaterally at any time prior to the break date and then withdraw it before expiry.
- The lease could be varied to make the break clause conditional on an act such as the tenant giving vacant possession on the break date. The tenant could then deliberately not comply and if the landlord does not waive the condition the break notice will be of no effect.

If you are facing the prospect of having to undo a break notice that has been served and wish to discuss the matter further please contact **Iain Davies** of our Real Estate Litigation Team on **0121 234 0094** or **IDavies@hbj-gw.com**

Opus launch Opus Aspect

HBJ Gateley Wareing has advised Opus Land on their recent acquisition of Omega Park in Erdington, Birmingham and first pre-let on the site to Selco Trade Centres. Omega Park (which is to be renamed Opus Aspect) is a 10 acre development site close to Junction 6 (Spaghetti Junction) of the M6. It has planning consent for 193,000 square feet of office, distribution and industrial units and will be developed in conjunction with the Palmer Capital Development Fund.

Selco are to take a 20 year lease on a 37,700 sq ft trade only builders' merchant centre which will be built to its specifications. The acquisition marks one of Birmingham's most significant commercial real estate deals so far this year given the jobs and investment which it will bring to north Birmingham. Work is due to start on site in October.

Opus Land is a leader in the commercial property market and lends its name to some of the region's development schemes, including Opus 9 in Wednesbury, Opus Axis in Burton on Trent and Opus 40 in Warwick. Development Director, Gareth Williams said: "With help from HBJ Gateley Wareing we have been able to turn around this major deal in a relatively short time frame. Their support of our goals and flexible approach helped us to conclude the important deal which will bring jobs and investment to Erdington and the surrounding areas".

Andrew Mellor, a Senior Associate in the Birmingham office of HBJ Gateley Wareing, led the transaction for Opus Land.

For more information please contact **Andrew Mellor**, Senior Associate, on **0121 234 0262** or email **AMellor@hbj-gw.com**



Welcome news for developers: Supreme Court confirms absolute right to connect to a public sewer

The Supreme Court has recently confirmed that a developer's statutory right to connect to a public sewer is an absolute right and that an undertaker cannot refuse to permit a connection at a specific point purely because the additional discharge would overburden the system. In addition, the cost of carrying out any consequential works to accommodate the increased load on the public sewer falls exclusively on the sewerage undertaker (*Barratt Homes Limited v DWR Cymru Cyfyngedig (Welsh Water) [2009] UKSC 13, Supreme Court*).

A property owner is entitled to connect to the public sewer under the provisions of the Water Industry Act 1991. The undertaker can only refuse permission if the mode of construction, or condition, of the private drain or sewer is not to a standard reasonably required by the undertaker, or is such that the proposed connection would be prejudicial to the sewerage system.

Where a developer's chosen point of connection is of insufficient capacity to cope with increased discharge, the Supreme Court suggests that the Planning Authority may impose a Grampian condition in the Planning Consent which prevents the developer from connecting to the public sewer until the undertaker has taken steps to upgrade it.

To avoid delay to projects, developers will need to put pressure on planning authorities to disregard undertakers' objections where they are made on the basis of lack of capacity or when there is no good reason why the sewers have yet to be upgraded.

The most practical solution is for developers to ensure reasonable time is allowed for undertakers to budget for and implement improvements.

For more information please contact **Gerry Sheedy**, Director of Planning on **0121 234 0184**, email **GSheedy@hbj-gw.com**