



Preventing trespass - new rules cont'd

that claimants should be careful not to be over ambitious in defining the land they wished to include in a possession claim.

This decision has left land owners in a difficult position. In theory an injunction could be obtained where a land owner is

concerned that trespassers might move to his land but there are problems of enforcement in the case of travellers who may lack possessions and they are unlikely to be sent to prison if there are families with children. The Court may make a "declaration" that the trespassers have no right to

occupy the land owner's property but again this may be of limited benefit. If all else fails, the owner may now be left with no option but to obtain an order for possession each time trespassers move onto part of his land, which is obviously an expensive and time consuming prospect.

Development land - rights of way

A legal right of access is obviously a key issue in any prospective development.

Where the development land has an existing right of way over land owned by third parties, the question often arises as to whether the terms of the right of way will allow it to continue to be used for the benefit of the development once completed. Private rights of way are often restricted to particular types of use and the legal effect of the words used in the title can be important. Two recent decisions of the Court of Appeal have taken a flexible approach which may be helpful to potential developers.

In the first case, three houses had been granted a right to use a track "for all reasonable and usual purposes" for access to the houses

and their gardens. The current owner wanted to build houses on the gardens which would use the right of way. A lower court said that the right could only be used whilst the land remained as gardens but the Court of Appeal overruled this and said that the use of a plot for building and occupation as a dwelling house was "reasonable and usual" and therefore the right of way could be used.

In the second case, land at the rear of a property was sold off with a right of way "at all times and for all purposes" connected with its use as a "garth" (a piece of land adjoining a house traditionally used for agricultural purposes). A developer wanted to build three houses on this land using the right of way for access. The lower court said that the right of way

was only linked to the agricultural use but again the Court of Appeal disagreed. They did not think that the original intention had been to limit the land to its original use and the phrase "use at all times and for all purposes" was to be taken literally. Unfortunately for the developer however, there was a second problem. A right of way cannot be used excessively and the Court said that the use of what was a small track for accessing three houses would be excessive. A right to use "for all purposes" does not allow a right to be used to an unreasonable level which may cause nuisance to neighbouring owners.

Nonetheless, potential developers may be heartened to see the Court taking what seems a common sense approach.

Assessing the risk of flooding

Recent claims that the remains of Noah's Ark had been discovered on Mount Ararat remind us of the problems posed by the risk of flooding, which has become increasingly frequent and serious in the UK over recent years.

Property buyers will obviously want to assess the extent to which the target property may be affected by flooding.

Unfortunately obtaining an accurate risk assessment may not always be easy. A useful tool is the Environment Agency's flood map, but it is important to appreciate that this is by no means foolproof. The map cannot be searched for a specific site but only by postcodes (which can, of course, include several properties, not all of which will have the same level of risk). The map does not distinguish between properties by their height above sea level and also assumes that flood defences will work properly



(which has often not been the case in the past).

In respect of development sites and other commercial property transactions a specialist flood risk assessment report may be commissioned which is likely to draw on a number of sources. In

addition, prospective buyers and their solicitors should try and obtain the clearest assurances available from the seller (and, if possible from neighbouring owners) to try and build up a clear assessment of risk.



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In this issue...

Unintentional acceptance of surrender - Page 2
Short term lets - Page 3
Preventing trespass - new rules- Page 3
Development land - rights of way - Page 4





Unintentional acceptance of surrender

A tenant can bring his tenancy to an end prematurely by way of surrender with the landlord's agreement and this is often documented by a formal deed of surrender.

It is also possible, however, for a surrender to arise from the actions of the parties and without the need for any deed. During the recession there have inevitably been many instances of cash-strapped tenants closing down their businesses, vacating the property and handing back the keys to the landlord.



In the present market when property may be difficult to re-let and with the possibility that the landlord may become personally liable for business rates on empty property, the landlord may well wish the tenancy to remain in force even if the tenant is paying no rent. In such a case, it is important that the landlord does nothing which might amount to an acceptance that a surrender has occurred.

A case towards the end of last year involving residential property highlighted the problem for landlords and the principles apply to commercial tenancies in just the same way.

Part way through a lease, the tenant vacated the property and returned the keys to the landlord claiming he was entitled to treat the lease as ended following

various complaints about the condition of the property. To try and make it clear that the landlord did not accept a surrender, his solicitors wrote to the tenant making clear that the lease was continuing and that the tenant remained liable for the rent. Whilst the dispute continued however, the landlord redecorated the property, used it for parking cars and an associate of the landlord occupied it for several months.

In deciding whether the landlord had accepted a surrender, the Court of Appeal said it was important to look at the landlord's overall intentions and not just at his solicitors letters.

Although some of the landlords actions could be justified individually they were, taken together, inconsistent with the continued existence of the lease

and therefore there had been a surrender. The Court confirmed that simply taking the keys back will not by itself amount to acceptance of a surrender - someone has to hold the keys to an empty property - and also confirmed that there was nothing to prevent a landlord looking for a new tenant without losing his rights against the original tenant. Letting someone else into possession, however, may amount to an acceptance of surrender as the landlord re-taking possession was not consistent with the continuance of the lease.

A landlord faced with such a situation should always take specialist legal advice before making any response to the tenant's actions or taking any action in relation to the vacant property.

Short term lets

If, because of the economic downturn, a landlord is finding it difficult to secure a long term tenant for his property, a short let may be an attractive way of generating cash.

In addition, whilst the property is let, the landlord will cease to be liable for empty property business rates (and once even a short letting of, say, six weeks comes to an end, the landlord will be able to claim a fresh rate free period before he becomes liable to pay business rates on the property again). There are, however, a number of possible pitfalls which a landlord contemplating a short letting should be aware of.

First of all, the way the letting is documented is important. Whilst a short tenancy will not usually be caught by the Landlord and Tenant Act and therefore will not confer long term security of tenure on the tenant, this may not always be the case.

If the tenant is allowed to remain in possession longer than originally envisaged (and experience shows that this frequently happens) or if the tenant has previously been in occupation, the Act may apply with the result that the landlord finds himself unable easily to remove the tenant if a better prospect comes along. These risks can be avoided if a short term lease is set up from the outset and excluded from the Landlord and Tenant Act. The procedures to exclude the Act are not complicated but must be followed properly to be effective, so legal advice is essential.

The terms of the short tenancy will need to be thought about. Quarterly payment of rent would be normal in a longer lease but is unlikely to be appropriate in these cases and monthly or even weekly payment should be allowed for. A rent deposit will be useful if available. The landlord will probably not want to permit any alterations or, if he does, there will need to be proper provisions



for reinstatement and possibly a security deposit to cover the cost of doing so.

Finally, if a landlord has an ongoing dilapidations claim against a previous tenant, he should take specialist professional advice before granting a short term letting to ensure that the short let does not prejudice the claim. The former tenant may argue that the re-letting of the property shows that the landlord has suffered no loss from the dilapidations.

Preventing trespass - new rules

Trespassers taking possession of their land is a recurring problem for agricultural and forestry land owners and for those with vacant commercial sites.

It is generally understood that people who have taken up residence cannot be removed unless a Court Order is obtained but a further problem for large land owners is that a Possession Order may be obtained on the site

occupied by the trespassers only for them to move immediately to another part of the owner's land. Unfortunately for those land owners a recent decision of the most senior court in the country, the Supreme Court, has made it more difficult to deal with such a situation.

The case involved travellers who had camped in a Forestry Commission wood.

The Commission applied for a Possession Order in respect of that wood and also 13 other woods to which it was thought the travellers might move. The Court refused to make the order on the basis that a Possession Order cannot be made in respect of land not yet occupied by trespassers. The Court did say that a Possession Order might be made in respect, for example, of the whole of a wood when trespassers only occupied part of it but noted

