SAVA Law Notes

A periodic update of some key cases and matters of interest

March 2024

Major changes in the law of relevance and interest to residential valuers and surveyors will, of course, be reflected in online materials and teaching sessions. But this is an update on some pertinent court activity and other news, produced roughly every six months.

Questions, observations and corrections on anything in these notes to be directed to me, Carrie de Silva, via Sava. The content and any inaccuracies, are mine and not Sava's.

As with any other brief notes, this newsletter is intended for educational guidance only and is not a substitute for legal advice, which should be sought on all personal and professional legal issues.

The law is applicable to England. Those in other regions of the UK should check, with the author or elsewhere.

Suggestions are welcomed for any topics hitherto not covered in the teaching materials on which learners seek further information, although not everything will fit within the parameters of the Sava programmes.

Cases covered in this issue:

Brown v Ridley and another [2024] UT	adverse possession
Churchill v Merthyr Tydfil [2023] CA	ADR
Dixon v The Crown Estate Commissioners [2023] Ch	title to land/proprietary estoppel
Griffiths v TUI (UK) Ltd [2023] CA	treatment of expert evidence
Healy v Fraine & Ors [2023] CA	adverse possession
Hope Capital Ltd v Alexander Reece Thomson LLP [2023] KBD	negligent valuation
Infinity Reliance Ltd v Heath Crawford Ltd [2023] Comm	professional negligence
Mackenzie v Cheung and another [2024] CA	restrictive covenants
Sexton v HMRC [2023] FTT	SDLT; spurious tax advice
Van Elle Ltd v Keynvor Morlift [2023] TCC	extent of land; statutory interp.
Wolverhampton CC v London Gypsies and Travellers [2023] SC	trespass

PROPERTY SALES AND LETTINGS – material information

Following the establishment of an industry steering group in 2020, guidance has been issued on what information should be provided when marketing a property to best comply with consumer rights legislation. This is required reading for those in sales and lettings, and is produced by the National Trading Standards Estate and Letting Agency Team, based in Powys County Council.

Material Information in Property Listings (Sales), November 2023
www.nationaltradingstandards.uk/uploads/Material%20Information%20in%20Property%20Listings%20(Sales)%20v1.0.pdf

Material Information in Property Listings (Lettings), November 2023
www.nationaltradingstandards.uk/uploads/Material%20Information%20in%20Property%20Listings%20(Lettings)%20v1.0.pdf

ADVERSE POSSESSION
Brown v Ridley and Anor [2024] UKUT (LC)

It is a defence to eviction by the paper owner in an adverse possession claim on registered property that there has been 'reasonable belief' that the property belonged to the adverse possessor (Land Registration Act 2002, Schedule 6, para. 5(4)). There have been a number of First Tier Tribunal decisions allowing the defence where the reasonable belief was held during *any* 10 year period, prior to the claim.

This case found that *Zarb v Parry* [2011] CA (covered on Sava Diploma Course Law Session 3) was binding authority to the effect that the reasonable belief must have extended to the date of the application (or shortly before).

Key point:

- If claiming the 'reasonable belief' condition regarding adverse possession, ensure evidence supports that the belief endured to the point of application.

ALTERNATIVE DISPUTE RESOLUTION (ADR)
Churchill v Merthyr Tydfil Borough Council and Ors [2023] CA

James Churchill made a claim against the local authority after discovering our old friend, Japanese knotweed, in his garden in Gellifaelog Terrace, Penydarren, Merthyr Tydfil. But this case has far greater significance than a modest, local nuisance claim.

The council indicated that the first step should be to use their in-house Corporate Complaints Procedure. Mr Churchill did not do this, but went straight to court. The court's Practice Direction on Pre-Action Conduct and Protocols (in force from 1999, as amended) indicates that the court expects parties to have tried to settle out of court and to have considered ADR. They state that 'litigation should be a last resort' and that

unreasonable refusal to engage in such attempts may result in unfavourable costs awards, i.e. the winner may not get their costs paid by the other side.

The consideration of what is unreasonable and whether the court can insist on ADR, i.e. refuse court hearing, has wide implications. This is reflected in the fact that the local authority was joined in the appeal by no less than *seven* other parties: The Law Society, The Bar Council, The Civil Mediation Council, The Centre for Effective Dispute Resolution, The Chartered Institute of Arbitrators, the Housing Law Practitioners' Association and the Social Housing Law Association.

The High Court felt itself bound by *Halsey v Milton Keynes General NHS Trust* [2004] CA which suggested that the court cannot *enforce* parties to engage in mediation.

On appeal, it was held that the comments in *Halsey* were *obiter*, thus not binding, and in the light of the Practice Direction, no longer reflected current law. So courts can stay (stop) court proceedings and order the parties to reasonably engage in ADR. Such orders must not impinge European Convention of Human Rights Protocol 6: the right to a fair trial, so must not impair the right to proceed to court *following* ADR, and must be proportionate in terms of cost and speed.

Key point:

- Parties *must* make reasonable efforts to resolve civil disputes out of court, using ADR if more informal means fail.

TITLE TO LAND; PROPRIETARY ESTOPPEL
Dixon v The Crown Estate Commissioners [2023] Ch

Where a freehold estate has no owner, it reverts to the Crown. Readers will be familiar with that point under intestacy, where the deceased freeholder leaves no will and has no relatives, within the statutory requirements. In this case, the lack of a legal freeholder was because a company which held property was wound up. The directors thought that the property in question, two residential lettings, had been transferred to individuals prior to winding up. It had not been, in error.

Cousins, David and Keith Dixon, applied to have the titles vested in them under s181 Law of Property Act (allowing the vesting of property on company dissolution) and s44(ii)(c) Trustee Act 1925 (allowing the vesting of trust property). They argued their claims based on proprietary estoppel because the company, through its accountant, had made representations on which the Dixons had relied to their detriment. It was held that the proprietary estoppel gave rise to an interest by way of trust and made the vesting orders pursuant to s44(ii)(c) Trustee Act.

Key points:

- Where companies are dissolved, be systematic in checking that all assets are clearly transferred such than nothing is still held by the company at the date of dissolution.

- An interesting use of the doctrine of proprietary estoppel, beyond the more usual 'personal promises' cases, very often involving bitter family feuds.

EXPERT EVIDENCE
Griffiths v TUI (UK) Ltd [2023] SC

Peter Griffiths suffered illness which he claimed was caused by contaminated food at his holiday hotel in Turkey. It is being included here with regard to how the court dealt with expert witness evidence.

In the County Court the claimant lost as it was found that the expert evidence, from a microbiologist, had not proved incontrovertibly that the ill-health was the defendant's fault. The defendant did not challenge or cross-examine the claimant's expert evidence but simply stated their disagreement with it in final submission, which the judge accepted.

In the High Court the claimant won. It was held that the court's role with regard to expert evidence was to decide whether the report met the required standards, that it must not be bare *ipse dixit* (i.e. the report must have appropriate support/proofs) and must comply with CPR Part 35. Once the report meets those standards, which the report in question did, the court has no role in evaluating it. It can only be challenged by the opposing party.

In the Court of Appeal the claimant lost. It was held that there was no rule that an expert's report which is uncontroverted, and which complies with CPR PD 35 cannot be impugned in final submissions and ultimately rejected by the Judge.

In the Supreme Court the claimant won. There had not been a fair trial because of the defendant's lack of challenge, giving the expert no chance to defend his report. It was not open to the judge to decide that the evidence was unsatisfactory outside of the usual adversarial trial process.

ADVERSE POSSESSION
Healey v Fraine and Ors [2023] CA

The claimants made an application with regard to the adverse possession of a property in Chorlton-cum-Hardy, Manchester but, in the alternative, that they had a right to the occupation of the property as licensees. The Court of Appeal decided that the meaning of adverse possession had not changed with the Land Registration Act, thus someone in lawful occupation could not claim in adverse possession.

Key point:

The judgment is recommended reading for a clear overview of the law of adverse possession.

NEGLIGENT VALUATION
Hope Capital v Alexander Reece Thomson [2023] KBD

In 2018, Cedar House in Cobham, Surrey, a Grade II listed property, was valued at £4m (based on the assumption that a notice from the National Trust regarding remedial work had been complied with). Lending was done on this basis. On default, with receivers having been appointed, the property sold for just £1.4m in October 2020.

Hope Capital looks at the damages payable on the basis of the scope of duty of care. It departs from the binary 'advice' and 'information' categories (per *South Australia Asset Management Corp. v York Montague Ltd* [1997] SC and *Hughes-Holland v BPE Solicitors* [2017] SC). Rather, it builds on *Manchester Building Society v Grant Thornton UK LLP* [2021] SC, with the court looking towards the purpose of the duty: Why is the advice being given? Against what risk is the duty supposed to offer protection?

In this case, the purpose of the valuation was to protect the lender with regard to the value of the security, not against all other risks associated with entering the transaction. Thus, the lender had suffered no loss as a direct result of the negligent valuation. The loss was due to the non-compliance with required remedial work. The valuer could not be held responsible for all the consequences of entering the transaction, particularly (in this case) unlawful acts of the borrower in not complying with National Trust notices, and the impact of COVID-19 on the market.

Key point:

Be aware that a simple 'advice' or 'information' analysis of a valuation should not be made without wider consideration. In assessing damages, the courts look to the underlying reason for the work, the purpose of the duty undertaken. Any concern about this should be considered against the point that if 'reasonable' care is clearly demonstrated, then claims should be relatively easy to defended in most 'straight forward' valuations. The complexities of the *Hope Capital* case are rare.

PROFESSIONAL NEGLIGENCE
Infinity Reliance Ltd v Heath Crawford [2023] Comm

An online personalised gift business (Infinity Reliance Ltd t/a My 1st Years), based in Northampton, suffered significant losses after a fire for which they claimed on their BI (Business Interruption) insurance. It transpired that they were underinsured by approximately 26%. They claimed against their broker, Heath Crawford, on the basis that:

(a) HC's provision of calculations of the cover required was misleading and led to insufficient BI cover being purchased.

(b) HC should have recommended a different form of BI cover (declaration linked cover) which would have provided the recovery of losses in full.

Although this subject matter is not in readers' direct areas of interest, there were interesting comments about professional work and professional negligence regarding both parties' obligations.

Key points:

- On basic principles, 'but for' the defendant's poor advice, the claimant would not have suffered the loss.
- The professional adviser is not expected to 'second guess' information provided by the client but *is* required 'to follow up reasonably obvious gaps or uncertainties' [at 97].
- Damages were reduced by 20% for contributory negligence as the claimant's financial director had incorrectly calculated the sum insured. This was, in part, due to his own lack of understanding and highlights the need to seek specialist advice when in doubt or operating outside one's own expertise.

RESTRICTIVE COVENANTS
Mackenzie v Cheung and Anor [2024] CA

Land sold by the Whitgift Educational Foundation had a restrictive covenant limiting any future building on land to one dwelling. But the conveyance included terms such that the vendor retained the right to modify at a later date. Could they so modify, or would building be a breach of covenant regardless? It was held in both the High Court and Court of Appeal that whether the covenant could be modified by the vendor, in what circumstances and by what nature, would be matter of construction of the original agreement - there was nothing to prevent such terms

SDLT; BOGUS PROFESSIONAL ADVICE
Sexton v HMRC [2023] FTT

As Stamp Duty Land Tax (SDLT) on residential properties is higher than that payable on commercial buildings, or properties which have an element of both residential and non-residential use, there are many cases seeking to have elements of a holding categorised as non-residential.

Emma and Danielle Sexton acquired the long lease of a flat in Onslow Gardens, SW7, which included the right to use a communal garden. They claimed, through their tax advisers, for an SDLT overpayment of £85,250, asserting that the garden area was not purely residential on the basis that the right was in common with others.

HMRC had rejected their claim and the Tribunal agreed. It applied two possible rulings: either (a) the flat and the garden easement together comprised residential property, or (b) that the garden easement was a right that subsisted for the benefit of the flat, so was itself residential property.

Key point:

The case seems unlikely to have succeeded and is highlighted as an example of the spate of rogue tax advisers targeting the residential market by trawling Land Registry records and cold calling. HMRC issued a press release on the matter in 2022: *New home owners warned over tax refund* claims, www.gov.uk/government/news/new-homeowners-warned-over-tax-refund-claims.

EXTENT OF LAND; STATUTORY INTERPRETATION
Van Elle Ltd v Keynvor Morlift Ltd [2023] TCC

Another case not of direct interest to most readers, but alongside land matters, it highlights the operation of statutory interpretation.

VEL were undertaking the replacement of the RNLI pontoon at the mouth of the Fowey River in Cornwall. The necessary piles were being supplied by KML.

VEL wanted to have an expert adjudicator's decision under the Housing Grants Construction and Regeneration Act 1996 ('the Construction Act') enforced. They had determined that KML should pay to the sum of £335,142.33 being the valuation (plus interest and costs) of VEL's entitlement under their contract.

KML argued that the Act only applied to construction work in England, and that the work they were doing was not in England.

The piling works were just beyond the mouth of a tidal river (in an area described as 'seabed'), below the low water mark, on the seaward side of the Ordnance Survey (OS) boundary line of England.

The OS boundary of England, 'the extent of the realm', is the intangible line where the river meets the sea at mean low water mark (unless extended by Parliament) as set out in the Territorial Waters Jurisdiction Act 1878 and the Territorial Waters Order in Council 1964; land not in England fell outside the scope of the Construction Act.

KML argued for this OS definition of the extent of the land of England.

The Court however, also reviewed the Convention of the Territorial Sea and Contiguous Zone 1958, UNCLOS (United Nations Convention on the Law of the Sea), the Territorial Waters Order in Council 1964 and the Territorial Sea (Baselines) Order 2014. They held that England ends on the baseline as established by the 1958 Convention and UNCLOS, and by the 1964 and the 2014 Orders, all of which are mutually consistent.

References to 'the land' in s105(1) of the Construction Act include land covered by water and, hence, land up to the baseline. The piling works were, therefore, covered by the Act and the adjudicator's decision stood, i.e. KML had to pay the entitlement monies to VEL.

Key points:

- Works offshore but within the OS boundaries are clearly within the terms of the Construction Act.
- Works *beyond* the OS boundary, but within international 'baseline' are also caught.
- Be alert to the many instances in English law where there are potentially conflicting or alternative interpretations of simple words, depending on the legislation being applied.

PARTIES TO TRESPASS INJUNCTIONS
Wolverhampton CC v London Gypsies and Travellers & Ors [2023] SC

Local authorities have sought injunctions against future unauthorised encampments in the name of unknown persons, often referred to as 'newcomers'. They are normally thinking about Romani Gypsies, Irish Travellers and New (Age) Travellers. This case was brought by Wolverhampton City Council as a test case, such that the results will be applicable to other local authorities.

High Court: such injunctions are not lawful as the newcomers were not, other than in the abstract, party to the proceedings.

Court of Appeal: such injunctions *are* lawful.

Supreme Court: Such injunctions *are* lawful. The Supreme Court unanimously dismissed the appeal. It held that the court has power to grant 'newcomer' injunctions. It should, however, only exercise the power to protect civil rights or to enforce public law that cannot adequately be met by other available remedies and should be subject to procedural safeguards designed to protect newcomers' rights.

Key points:

- Local authority powers underpinned so they can make an injunction against unauthorised occupation before it has happened and with no known parties.
- Breach of that injunction would be contempt of court.
- Without going into detail on existing law, the case is significant technically, but the practical implications might be limited given the tools already at the disposal of authorities. This will simply streamline administration, within strict parameters.

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