



Property Problems: Dangers of Granting Licences

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Property Problems - Care is needed when owners grant licences for access or landlords give consents to carry out works. Andrew Tugwell and Richard Manyon seek to raise awareness of issues arising from two recent cases.

Dangers of Granting Licences

Problem no 1 - Avoid giving permanent rights

The issues

If a land owner can prove that any long use of its land by a third party was by permission it might be possible to prevent a claim for prescriptive rights. To prevent neighbours and other users of land acquiring permanent rights, land owners often grant permission by way of a licence. However, a licence to allow a neighbour to have a right of access if made personal will expire if the licensee sells or transfers its interest. A new neighbour/owner (unbeknown to the licensor) could therefore acquire permanent rights to the lessor's detriment.

The law

The Supreme Court has recently refused leave to appeal further in the long running battle of *London Tara Hotel Limited -v- Kensington Close Hotel Limited*. The stakes were high involving two substantial London hotels and a critical access road. The law is settled in that if a licence grants a personal right only and defines the licensee to exclude successors in title then permanent rights could be acquired even though the licensor was not aware of any change in ownership. L.J. Neuberger (Master of the Rolls) explained that such a licence is a "fragile instrument" and that in these circumstances a licensor takes a risk and will need to make enquiries to check the identity of the party using the right of way, so be warned.

Practice Points

Take steps to demand rent (even if a peppercorn) or otherwise make enquiries concerning the identity of the party using any right of way/licence and carefully consider the pros and cons of granting a licence that is personal to one particular user. (note - *PHB acted for Kensington Close Hotel in the High Court, Court of Appeal and in respect of leave to the Supreme Court*).

Problem No. 2 - Make sure permissions are consistent with lease terms

The issues

Leases of units in shopping centres or blocks of flats often have mutually enforceable covenants such as the type of retail trades permitted or permitted alterations. A licence authorising a tenant to carry out works that are inconsistent with lease provisions or regulations might leave a landlord open to claims

from other tenants.

The law

In *Faidi -v- Elliott Corporation* [2012] ECCA Civ 287 the landlord gave a licence enabling the tenant to install a new oak floor with special under-floor heating at a substantial cost. Unfortunately, the leases for all flats contained a proviso that floors must be carpeted to reduce any sound nuisance. A neighbour took action seeking an injunction that the new floor should be carpeted (rendering valueless the new floor) because the Landlord's consent was inconsistent with the lease obligations that the floors should be carpeted.

Fortunately, on this occasion, although there was an inconsistency with terms the leases contained a provision allowing any regulation such as the requirement for carpets to be waived by the landlord at its absolute discretion. The Court of Appeal held that this meant the landlords consent and licence for the new floor was reasonable but otherwise, the works might have been unacceptable because of the overall lease covenants.

Practice Point:

When granting a licence, giving consent or considering possible variations or uses, a landlord needs to take into account any express provisions in the lease and the leases of any larger property overall and the effect of such works or changes of use on other tenants. In a previous case a shop tenant's lease referred to a high quality shopping centre and so the tenant objected to nearby low quality tenant lettings saying the character of the centre had been altered to the extent that the tenant should not be able to be help to the terms of the lease. This claim was upheld and the retail tenant could walk away from a lease because the character of a shopping centre had changed in a way inconsistent to the terms of the original lease. The law concerning departing from the terms of the lease (or "derogation from grant") is likely to be developed further and is clearly an important issue to take into account.

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