Case law update

Megan Vick reports on the latest case law developments.

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Fearn and others v Board of Trustees of the Tate Gallery [2020] EWCA Civ 104

The Court of Appeal has denied claims in private nuisance by neighbours of the Tate Modern (the Tate), attempting to prevent the public from looking over to their flats from the Tate's viewing platform. The case confirms that landowners cannot use the law of private nuisance to defend their privacy rights.

The case involved residential flats on the South Bank of London, facing the Tate building. The Tate has a viewing platform on its exterior, and this platform faces the floor-to-ceiling windows of the flats. Viewers on the platform often look into the windows of the flats, and sometimes take photographs or use binoculars to look in.

Owners of several of the flats brought a claim to seek an injunction to stop the public from looking into their homes from the platform. Using the principles of private nuisance, they argued that the viewing platform unreasonably interfered with their enjoyment of their properties.

The owners also made an argument that their rights to a private and family life under Article 8 of the Human Rights Act 1998 had been infringed, but this claim was not successful because the Tate was held not to be a public body to which the act applies.

The judge at first instance rejected the owners' claims, and they appealed to the Court of Appeal, but this appeal was also unsuccessful.

The Court of Appeal decided that the law of private nuisance could not protect privacy rights. Their key reasons were: that privacy (particularly in relation to overlooking) is already dealt with by planning law; that if privacy laws were extended too far then developments in towns and cities would be restricted; and that it would be difficult to create an objective test to decide whether privacy had been unreasonably interfered with.

Landowners must therefore rely on planning regulations to address privacy issues, and this will usually mean looking to prevent such issues before buildings are developed or altered, rather than bringing claims later. In certain, limited circumstances the law on harassment and stalking may also provide a remedy.

Berkeley Square Investments Ltd v Berkeley Square Holdings Ltd [2019] UKUT 0384 (LC)

The Upper Tribunal has ordered the modification of a leasehold covenant, showing that applications for such modifications under section 84(12) of the Law of Property Act 1925 can be successful when properly argued. The case also provides useful clarification of the points the tribunal is likely to consider when deciding these applications.

The applicant, Berkeley Square Investments Ltd, is a long leaseholder of 45 Berkeley Square, a Grade I-listed building. The respondent, Berkeley Square Holdings Ltd, owns the freehold.

The user covenant in the lease permitted use as offices only, and the leaseholder sought to have this covenant modified in order to use the building as a private members' club.

In accordance with the criteria under section 84, the leaseholder argued that the use as offices was now 'obsolete', and alternatively that continued existence of the restriction would impede reasonable use of the building.

The Upper Tribunal did not accept the first argument, as although demand for offices in older, listed buildings may have decreased, such demand does still exist and so the use could not be said to be obsolete. However, the Upper Tribunal did accept the second argument. It held that use as a private members' club was reasonable (and indeed there are several such clubs in the immediate area) and that it would not diminish the value of the reversion. In addition, the applicant had

obtained planning permission for the change of use from Westminster City Council.

The freeholder made arguments against the modification based on the noise and disruption that may be caused by the use, and the possible impact on the freeholder's rental income for its own private members' club. The Upper Tribunal rejected these arguments, as they did not detract from the fact that the proposed use was reasonable.

Man Ching Yuen v Landy Chet Kin Wong, First-tier Tribunal (Property Chamber), 2020

The First Tier Tribunal (FTT) has considered the question of whether the signature to a deed can be witnessed remotely, and have not reached a definitive conclusion. The case therefore confirms that the safest course is still to have deeds witnessed in person (i.e. with physical presence) and not to rely on remote forms of communication.

The case involved a dispute over whether a transfer of property had been forged. Wong argued that when she signed the document in Hong Kong, her solicitor witnessed this from London over Skype. The solicitor then signed the document to attest to having so witnessed, several days later. Yuen argued that a signature could not be witnessed remotely in this way.

This meant that the court had to decide firstly whether the signing had been validly witnessed, and secondly whether the witness had validly attested (i.e. whether the solicitor had made a valid declaration that they had witnessed the signature), for the purposes of section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989.

The FTT considered whether a signature could be witnessed over Skype. They reviewed the legislation and case law to date, and decided that the law on this is currently inconclusive. For that reason, the FTT held that it was certainly possible for a court to decide that physical presence is needed for witnessing to be valid, and therefore that Yuen had a good prospect of success on this point.

Regarding the attestation by the solicitor, the FTT reviewed the law on this point and held that the attestation does not need to be contemporaneous to the witnessing. However, they did not give an indication as to how much of a time gap would be permissible, so the position on this matter is still not clear and it is therefore safest to ensure that a witness signs his/her attestation at the same time as he/she witnesses the party's signature.

In these times of remote working and communication, it is worth noting that the Law Commission carried out a review of the law on electronic execution of documents in 2019. In this review, the Law Commission noted that the law on witnessing is not sufficiently clear, and suggested that the government should consider legislative reform to allow for video witnessing. The government has recently responded to this report with a statement expressing agreement that clarity is needed, and announcing that an industry working group will be convened to consider the matter of video witnessing (and other matters related to electronic execution of documents).

https://www.lawcom.gov.uk/project/electronic-execution-of-documents