

Worth considering ADR?

Recent Analysis of the County
Court on the Construction of
Buildings, Use of Land and
Prevention of Nuisance



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Worth considering ADR?

Recent Analysis of the County Court on the Construction of Buildings, Use of Land and Prevention of Nuisance

In a recent decision of the County Court in *Williams v Johnson* ([2015] EW Misc B45(CC)), the claimant sought to enforce restrictive covenants against the defendant relating to the construction of buildings, the use of land, and the prevention of a nuisance. The Court held that the claimant was entitled to damages - and an injunction - in respect of some, but not all, of the claims made.

In 1987 the claimant's parents purchased "Wells Farm". In 1990 the parents sold the northern part of the farm ("Lychcroft") to the first defendant. The 1990 conveyance contained three restrictive covenants which the claimant alleged the first defendant had breached.

may be or become a nuisance, annoyance or cause inconvenience to the vendors, their successors in title, owners and occupiers for the time being of [Wells Farm]" ("the Nuisance Covenant").

Covenants

The covenants (insofar as material) provided as follows:

Construction of Buildings:

"No building shall be erected upon [Lychcroft]... without the previous consent in writing from the vendors" ("the Building Covenant").

Use of Land:

"No trade or business shall be carried on upon [Lychcroft] or any part thereof nor shall the same be used otherwise than as a private dwellinghouse" ("the User Covenant")

Prevention of Nuisance

"Not to do or keep or suffer to be done or kept on [Lychcroft] or any part thereof any act or thing which

Breaches Alleged

The claimant contended, inter alia, that the defendant had:

- a. constructed two poultry sheds on Lychcroft without obtaining the requisite consent (in breach of the Building Covenant);
- b. used Lychcroft as a professional farm and sublet part of Lychcroft for the purposes of market gardening (in breach of the User Covenant); and
- c. breached the Nuisance Covenant:
 - i. in respect of its general conduct and an alleged campaign of "harassment" (the claimant listed numerous examples);

- ii. by permitting water to escape onto Wells Farm as a result of the defective construction of a lake and poor drainage maintenance; and
- iii. by way various "general nuisances" (including the tipping of material on Lychcroft over a prolonged period).

Decision

His Honour Judge David Grant found as follows:

1. An argument advanced by the defendant that the claimant was estopped from raising the claims because the claimant had permitted such conduct and/or acquiesced in any breaches was rejected;
2. The defendant had erected two new sheds on Lychcroft in breach of the Building Covenant. However, as the claimant knew about the erection of both sheds and made no protest, the Court held that only nominal damages should be awarded;
3. The defendant's argument that User Covenant should be read so as to include the words "other than farming or associated acts" was rejected; however, the farming activity had been de minimis. The Court found that the User Covenant had been breached by the defendant letting part of Lychcroft to a market gardener. Damages were assessed by reference to what a willing purchaser would have paid a willing seller for a licence to farm;
4. The defendant's conduct did was not such that it could be constituted as "harassment". Instead, the Court found that the defendant had committed a trespass and other acts which offended the Nuisance

Covenant (for example by paint-spraying lines on the track). These acts were considered by the Court to be minor in nature and therefore only justified the award of nominal damages;

5. The claimant had failed to establish a claim in damages as the claimant was unable to prove loss of rent of a shed and fields on Wells Farm. The Court did, however, find that one of the drains on Lychcroft would have to be re-routed in order to avoid flooding going forwards. Arguments in tort (specifically under the rule in *Rylands v Fletcher*) were also advanced in this regard; and
6. There had been nuisance on the part of the defendant caused by the tipping of soil on Lychcroft over an unreasonable period of time.

Commentary

The facts of this case were quite specific and it is therefore difficult to draw too many definitive conclusions as to what may - or may not - ultimately result in a finding of a breach of a restrictive covenant.

One of the more striking aspects of the decision is the relatively modest level of damages awarded by the Court for those of the covenants which had been found to have been breached (and, we would suggest, flagrantly so). The claimant was not successful in securing injunctive relief, and did not succeed in all aspects of its claim.

It is evident from reading the case report that the relationship between the neighbouring land owners had deteriorated over a considerable period of time, and had effectively broken down by the time the proceedings came to trial. Notwithstanding this, we cannot help but think that, for both claimant and defendant, these types of neighbour disputes

are frequently best settled by alternative dispute resolution (e.g. mediation). Costs should be paramount in the minds of the parties when assessing strategy. Even if the case is “won”, irrecoverable costs are likely to start eating into any damages award. The risk is heightened where several different causes of action are pleaded, not all of which are likely to be successful.

About the Authors



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Andrew is a Partner in Laytons' Property group. Andrew's practice encompasses all aspects of commercial property, secured lending and property finance work including landlord and tenant, real estate development and site assembly and disposal. He has a particular interest in acting for residential developers in the acquisition of sites, either before or after the grant of planning consent. Andrew is involved in the management of various investment property portfolios and also deals with secured commercial property lending and the property aspects of corporate transactions.

Andrew trained with Laytons and qualified as a solicitor in 2004.



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Francesca has over ten years' experience in real estate. Her experience covers:

- high profile development projects
- landlord and tenant work both in the context of portfolio management for major retail occupiers and in acting for smaller investor clients
- acting for large-scale developers both on site acquisitions and subsequent financing
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Francesca has acted for a wide range of clients, from major retail clients to developers, high net worth individuals, local authorities and financial institutions.

Real Estate

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