Commercial Property: Toms v Ruberry [2019] EWCA Civ 128

Dominic Bright

This is an important commercial property case, holding that, a notice under section 146(1) of the Law of Property Act 1925 ("a notice") can not be given until the landlord's right of re-entry has accrued under the provisions of a lease.

Issue

The only substantive judgment was handed down by David Richards LJ, with which Holroyde and Nicola Davies LJJ agreed, permission to appeal having been granted by the leading authority on property law in the Court of Appeal, Lewison LJ. It was rightly introduced it in these terms: "The point of principle raised by this second appeal is whether a notice may be served … before the right to re-entry has arisen under the provisions of the lease."

Discussion

In dismissing the first appeal, Dingemans J accepted the tenant's case. The landlord was not entitled to serve a notice until a default notice under the relevant clause of the lease had been given, and the period specified in that clause had passed, without the breaches being remedied. Only then would the landlord's right of re-entry be exercisable.

This judgment was upheld for at least three reasons. First, "the authorities establish that section 146 must be given a common-sense interpretation". Second, the two-fold purpose of section 146: 1) "to give the tenant notice of the breaches, so that he knows what needs to be remedied"; and 2) "to enable the tenant to make an application for relief against forfeiture." Third, it would be inconsistent with section 146(2) had the breach not yet occurred, as the landlord could only be 'proceeding, by action or otherwise, to enforce such a right of entry or forfeiture' if the right *had* become enforceable under the terms of a lease.

Outcome

The landlord's appeal – that a notice only requires the underlying breach of covenant *which could give rise to a right of re-entry* to have occurred before service of the notice – was dismissed. A notice: 1) must state the particular breach complained of; 2) if it is capable of remedy, require the tenant to remedy the breach; and 3) can only be given if the tenant has failed to remedy the breach within a reasonable period of time. These requirements only make sense if the relevant breach has occurred.

Ecclesiastical: Court of Arches: no retrospective permission where works were illegal when carried out
Re Christ Church, Spitalfields [2019] EACC 1

David Willink

A school building constructed illegally on a disused burial ground must be demolished. To mitigate the waste of public funds, it can stand for 10 years.

In 2013, a Nursery was built on the disused graveyard of Christ Church, Spitalfields. Although a faculty had been granted for the work, it was (unappreciated at the time) unlawful under the Disused Burial Grounds Act 1884, as the ground was still consecrated. This was discovered, and brought to the church's and the court's attention, in late 2012, but the building was still completed (conduct described by the court as "extraordinarily cavalier").

An application for a restoration order (requiring the unlawful works to be undone) was struck out as an abuse of process, as the issue of illegality should have been raised at the earlier stage. (This was a bit rich. The church had falsely certified that the ground was unconsecrated. If the court was misled, how can objectors be taken to know the truth?) This decision was overturned on appeal in 2015, and remitted to be heard by a different judge.
In the meantime, the law changed: from March 2015, s.18A Care of Churches and Ecclesiastical Jurisdiction Measure 1991 empowered the court to permit building on a disused burial ground. In an epic, 523-page judgment in December 2017, the court refused to make a restoration order, and instead exercised its power under s.18A to grant a confirmatory faculty.
One final appeal: did s.18A give the court the power to legitimise works which had been carried out illegally? The Court of Arches held that s.18A was entirely prospective. It did not permit a confirmatory faculty, whether the illegal works were carried out before or after it came into effect. The remedy? The court took into account the need to preserve the rule of law; the flagrancy of the church's misconduct and the failure to stop work when the unlawfulness was disclosed made a restoration order appropriate despite the inevitable cost and disruption. The building would be allowed to stand for at most 10 years, so that the cost would not be entirely wasted.
David Willink advised the successful Appellants on aspects of the appeal.

Commercial: Jaguar Land Rover Ltd. v Twisted Automotive Ltd. [2018] EWHC 3536 (Ch)

Tim Sampson

This was a recent decision of Mr Justice Rose in respect of an appeal from a decision of the UKIPO (Registrar of Trade Marks) where Jaguar Land Rover ('Jaguar') sought to overturn the decision refusing registration of the mark 'JR" in class 12 – the registration having been opposed by Twisted Automotive ('Twisted') on the basis that it had goodwill in the unregistered sing "JR motors".

Twisted's business over many years was in relation to the sale of second-hand Land Rovers and was inevitably dwarfed by the multi-billion pounds a year turnover of Jaguar. However, Jaguar had no prior registrations in relation the "JR" branding and there was no evidence that it had ever made any use of such a sing (although not mentioned in the judgment this case seems to have a degree of similarity with the decision of Pumfrey J. in *DaimlerChrysler AG v Alavi (t/a Merc)* [2001] RPC 42 – in relation to the right to use the sign 'merc').

The judge concurred with the decision of the IPO hearing officer that Twisted had the necessary goodwill in the sign "JR motors" such that its use by Jaguar would be deceptive rather than confusing – "mere confusion" not enough being enough to make out a claim in passing off, which is the basis of the opposition under s.5(4) Trade Marks act 1994: *Phones 4U Ltd. v Phone4U.co.uk Internet* [2006] EWCA Civ 244. And that there was nothing in principle wrong with the conclusions reached by the Hearing Officer – conclusions that the court should be cautious in overturning on appeal: *Apple Inc v Arcardia Trading Ltd. [*2017] EWHC 444 (Ch).

One further important point to come out of the decision is in relation to the geographical extent that a single physical showroom business can acquire through its on-line presence – both in terms of advertising on trade-sites and through use of social media platforms [4] and [16] leading to country-wide sale. The evidence showed that an assertion that Twisted's business was simply local to its showroom was plain wrong.

A further consideration regarded as noteworthy was the fact that should Jaguar be allowed to use the JL sign there was a real danger that Twisted would be seen by the public as an authorised dealer for Jaguar – and not the independent business that Twisted wished to be.

For those reasons – and despite the vast gulf in size of the two businesses – the Court upheld Twisted's opposition to registration of the JR mark. When it comes to rights in passing off size is clearly not everything.