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February 2023

Legal developments in construction law

1. Supreme Court says Tate Modern viewing gallery arrangements are a nuisance

The categories of nuisance are not closed. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance. So said Lord Leggatt, in ruling, in the majority judgment of the Supreme Court, that the Tate Modern's arrangements in inviting the public to visit and look out from its top floor viewing gallery, including at flats only 30 odd metres away, are a nuisance.

He noted that the harm from which the law protects a person claiming in nuisance is diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it. At a general level, private nuisance is concerned with maintaining a balance between the conflicting rights of neighbouring landowners and not every interference with a person's use and enjoyment of their land can be actionable as a nuisance.

The first question which the court must ask is whether the defendant's use of land has caused a "substantial" interference with the "ordinary" use of the claimant's land and the test is objective. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position.

Fundamental to private nuisance is the priority given to the general and ordinary use of land over more particular and uncommon uses. What is a common and ordinary use of land is also to be judged with regard to the character of the locality. The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for their neighbour as they would expect their neighbour to show for them.

Anyone can build whatever they like on their land, unless this violates an agreement not to do so or an acquired right to light or to a flow of air through a defined aperture. Interference with the use of land caused by the mere presence of a building on the defendant's land could not give rise to a claim for private nuisance and nor can any claim be made for interference with a view or prospect. The right to build (and demolish) structures is fundamental to the common and ordinary use of land, as it involves the basic freedom to decide whether and how to occupy the space comprising the property. Interference resulting from construction (or demolition) works will consequently not be actionable provided that all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours.

Lord Leggatt also noted that it is not a defence to liability in nuisance that:

- the defendant's use of their land is reasonable;
- the defendant was already using their land in the way complained of before the claimant acquired or began to occupy the neighbouring land;

- the defendant's activity did not amount to a nuisance until the claimant's land was built on or its use was changed;
- the activity carried on by the defendant is of public benefit.

Fearn & Ors v Board of Trustees of the Tate Gallery [2023] UKSC 4

2. Termination – where does that leave liquidated damages?

A contractor under an EPC contract argued that the employer's claim for liquidated damages was lost on termination of the contract and was replaced by a claim for general damages for delay. It said that, since liquidated damages were calculated by reference to the difference between the actual and contractual dates of Take Over, no liquidated damages were payable on the termination of the contract before Take Over was achieved.

In rejecting that argument, the court cited the analyses of the issue by Lady Arden and Lord Leggatt in the Supreme Court, which noted that parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract, and that, after that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law. Parties do not have to provide specifically for the effect of the termination of their contract.

Subject to contrary agreement, the parties' accrued rights are preserved on termination and the court must approach the question of construction from the starting point that it is ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract. The purpose of agreeing in advance on a sum payable as liquidated damages for each day of delay caused by the contractor would be defeated if the stipulated sum was payable only if, and when, the contractor chose to complete the contract.

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Ors [2022] EWHC 3275

3. What exactly might "wilful default" mean?

If a contract refers to "wilful default" what might that mean?

In ***Energy Works (Hull) Ltd) v MW High Tech Projects UK Ltd***, the court referred to the case law, including ***De Beers UK Ltd v Atos Origin Services UK Ltd***, which had to consider the terms fraudulent misrepresentation, wilful misconduct and deliberate default. Dealing with the concepts in descending order of culpability, the court in ***De Beers*** said that:

- fraudulent misrepresentation involves dishonesty;
- wilful misconduct refers to conduct by a person who knows that they are committing, and intends to commit, a breach of duty, or is reckless in the sense of not caring whether or not they commit a breach of duty; and
- deliberate default means a default that is deliberate, in the sense that the person committing the relevant act knew that it was a default but it does not extend to recklessness and is therefore narrower than wilful misconduct (although the latter will embrace deliberate default).

The court in ***Energy Works*** concluded that a wilful default is wider than a deliberate default and may be established on proof of recklessness and that, to prove a "wilful default" within the meaning of the relevant contract clause, the employer had to prove that the contractor was in breach of contract and that either it intended to commit such breach or was recklessly indifferent as to whether its conduct was in breach of contract or not.

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Ors [2022] EWHC 3275

4. Does a breach of contract give rise to a right to suspend work?

The Housing Grants Act gives a statutory right to suspend performance of a construction contract for non-payment but what about cases where the Act does not apply? The judgment in ***Energy Works (Hull) Ltd) v MW High Tech Projects UK Ltd*** provides a helpful reminder of the answer.

The contractor claimed that, where a contract is silent, a party can respond to the other's breach of contract "as it sees fit", subject only to its response not being unreasonable. Rejecting this argument,

the court said that the primary remedy for a breach of contract is a claim for damages and, where a party is in serious breach of contract, the innocent party may be entitled to bring further performance of the contract to an end. Unless, however, there is some term of the contract to the contrary, the innocent party is not entitled to keep the contract alive and suspend performance of its own obligations, whether such course would be reasonable or not.

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Ors [2022] EWHC 3275

5. Noise nuisance – does it keep you awake at night?

Just like buses, you wait a while for a nuisance case to appear and then two or three come along. ***Tejani v Fitzroy Place Residential Ltd*** was all about noise coming from the façade of an apartment. The most likely cause was thought to be thermal expansion of façade components as a result of changes in temperature, but the actual cause of the noise could not be pinpointed. The claimant alleged that the noise was unbearable and that the apartment was unfit for habitation but what was the legal test?

Revisiting the law, the court noted that Clerk & Lindsell on Torts (23rd Edition) states that "[t]he essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land" and that whilst actionable nuisance is incapable of exact definition a private nuisance is "an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise of enjoyment of … [their] ownership or occupation of land …".

The textbook also refers to the need for there to be "a real interference with the comfort or convenience of living according to the standards of the average [person]" and that: "… the discomfort must be substantial not merely with reference to the claimant; it must be of such a degree that it would be substantial to any person occupying the claimant's premises, irrespective of [their] position, in life, age, or state of health; it must be "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people"".

After considering the case law, the court said that, for the noise the subject of the case to give rise to an actionable nuisance it must be such as to materially interfere with the ordinary comfort of the average person living in the apartment, taking into account the character of the neighbourhood. Both parties seemed to accept that a key indicator as to whether the noises were such as to materially interfere with the ordinary comfort of the average person living in the apartment was whether the noises would cause a person to wake up at night.

The court ruled that the noise was not such as to wake the average person sleeping in the apartment, let alone frequently, and nor did it materially interfere with the ordinary comfort of the average person living in the apartment.

Tejani v Fitzroy Place Residential Ltd [2022] EWHC 2760

6. First Tier Tribunal makes s124 remediation contribution order

18 lessees applied to the First Tier Tribunal Property Chamber for a remediation contribution order under s124 of the Building Safety Act in respect of the contributions that they had paid in service charges for the remediation of relevant defects.

There were three respondents to the application, the freeholder and developer, its parent company and two directors of the developer. The application against the directors was dismissed, as a s124 order can only be made against a "specified body corporate or partnership", the parent company, which was in liquidation and subject to an automatic stay of proceedings, was removed as a party and, on failing to comply with the Tribunal's directions and serve a statement of case, the developer was barred from taking further part in the proceedings. The leaseholders were not legally represented.

Under s124 the Tribunal must be satisfied that it is just and equitable to make a remediation contribution order. The tribunal considered that, to comply with this condition, it must be satisfied that the lessees paid for work for which the developer landlord was responsible. As the first respondent was the developer and landlord at the relevant time, the tribunal made a remediation contribution order in favour of the lessees.

https://assets.publishing.service.gov.uk/media/63c57179e90e074ef04efe0a/20230113_Decision___Order_Combined.pdf

7. CMA prioritises housebuilding for next market study

The Board of the Competition & Markets Authority has decided, in principle, that homebuilding should be prioritised as the next market study that the CMA launches. Once finalised, the proposed scope of the project will be put to the Board for formal approval of the launch of the market study, which is expected to take place in the next few weeks.

See: Letter to the Secretary of State for Levelling Up, Housing and Communities (publishing.service.gov.uk)

8. DLUHC sets 6 week deadline for developers to sign remediation contracts

On 30th January, the government set a six week deadline (expiring 13 March 2023) for developers to sign contracts that require them to:

- take responsibility for all necessary work to address life-critical fire-safety defects arising from design and construction of buildings 11 metres and over in height that they developed or refurbished over the last 30 years in England;
- keep residents in those buildings informed on progress towards meeting this commitment;
- reimburse taxpayers for funding spent on remediating their buildings.

The government has warned that companies who fail to sign and comply with the contract will face significant consequences. In legislation to be brought forward this spring, a Responsible Actors Scheme will be created (under sections 126-129 of the Building Safety Act), allowing the Secretary of State to prevent developers who have not signed the contract, or failed to comply with its terms, from carrying out development and from receiving building control approval.

The Levelling Up Secretary is also to take action to ban managing agents and freeholders from taking commissions when they take out building insurance and the government is to bring in further measures to make service charges more transparent and empower leaseholders who want to challenge their bills.

See: https://www.gov.uk/government/news/six-weeks-for-developers-to-sign-contract-to-fix-unsafe-buildings

9. Draft regulations detail key higher-risk building information required by the BSR from the accountable person

With its response to the consultation, the government has published draft regulations detailing key building information required by the Building Safety Regulator from the accountable person for a higher-risk building. The intention is for the regulations to come into force on 6 April 2023.

This information is to enable the Regulator to carry out an initial triage of the potential risk levels in the existing 13,000 higher-risk residential buildings. The Regulator will require building assessment certificate applications as a priority for the buildings where, based on the information provided and other sources of intelligence from other regulators, the Regulator assesses the building's potential for a building safety risk materialising to be higher than others.

The information required (to be submitted in an electronic format) includes information about potential risk factors including use, change of use, the external wall system, the structural design type of the building, the number of storeys and staircases, energy supplies, the evacuation strategy for the building, and whether it is attached to any other building.

The principal accountable person will have to submit the information within 28 days of submitting an application for registration of a higher-risk building and must also notify the Regulator of any change to the information within 28 days of becoming aware of the change. If there is more than one accountable person for a building, then each accountable person is responsible for providing the principal accountable person with information to submit to the Regulator.

The regulations also specify for which parts of the building accountable persons are responsible.

Existing buildings can be registered from 6 April 2023 but enforcement powers only come into force when the new regime starts (which the government expects to be 1st October 2023).

The Regulator is to set out guidance to support meeting the requirements brought in by the regulations.

See: The Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023 (legislation.gov.uk)

10. Banks and RICS issue statement on lending on buildings with safety concerns

Six mortgage lenders and the Royal Institution of Chartered Surveyors have issued a statement on lending for buildings affected by building safety concerns.

It states that, providing a mortgage application meets individual lenders' policy and regulatory requirements, lenders will lend on buildings that will be self-remediated by developers or captured under a recognised government scheme or there is evidence of a qualifying lease certificate.

The recognised remediation schemes are:

- the Developer Remediation Contracts (11 metres+);
- the Medium Rise Scheme (11-18 metres); and
- the Building Safety Fund (18 metres+).

See: https://www.ukfinance.org.uk/policy-and-guidance/guidance/statement-industry-support-leaseholder-protections-within-building

11. New government consultation on BSA building control changes

The government has opened a consultation on the details of the changes to the building control profession and process for approved inspectors, who will in future be known as registered building control approvers.

The consultation closes on 14 March 2023.

See: https://www.gov.uk/government/consultations/changes-to-the-building-control-profession-and-the-building-control-process-for-approved-inspectors/consultation-for-changes-to-the-building-control-profession-and-the-building-control-process-for-approved-inspectors-in-future-to-be-known-as-register

12. BSR seeks views on competence information for managing HRB building safety

The Building Safety Regulator is seeking views on its information document that highlights the necessary competency for those managing high-risk buildings, including a summary of British standard PAS 8673:2022 Built environment – Competence requirements for the management of safety in residential buildings.

The consultation closes on 24 April 2023.

See: https://consultations.hse.gov.uk/bsr/managing-building-safety/

13. Consultation on recovery by landlords of remediation costs

The government is seeking views on statutory guidance and policy proposals for legislation creating a duty for landlords to take reasonable steps to ensure that all alternative avenues of cost recovery have been explored before passing remediation costs on to leaseholders. It seeks views on proposals for:

- the buildings and defects to which the new duty should apply;
- the detailed steps that landlords should follow before passing on remediation costs to leaseholders;
- the information that landlords must pass on to leaseholders to demonstrate they have complied with this duty.

The consultation closes on 31 March 2023.

See: https://www.gov.uk/government/consultations/alternative-cost-recovery-for-remediation-works-consultation-on-proposals-to-make-regulations-and-statutory-guidance

14. Consultation on service charge recovery by landlords of ongoing costs of building safety duties

A further consultation deals with the recovery, from leaseholders, through the service charge, of the ongoing costs of compliance by landlords and building owners of higher-risk residential buildings with some of their Building Safety Act duties to keep their building safe.

This consultation also closes on 31 March 2023.

See: https://www.gov.uk/government/consultations/service-charge-transparency-requirements-ongoing-costs-of-the-new-building-safety-regime-consultation-and-call-for-evidence

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