

Residential Conveyancing

NEWS

Winter 09

FIRM'S LOGO

PROPERTY 'TRY ON' MAY BE A CRIME

An appearance in the criminal court may await a property owner who tried to be too clever with his local planning department.

The owner submitted a planning application to build a barn to store hay. This was granted on the condition that use was limited to the storage of hay or some other agricultural purpose. The building looked, externally, like a hay barn. However, internally it was fitted out as a house. The owner used it as a home from August 2002 onwards. In 2006, he applied for a certificate of lawful use on the ground that the property had been used for four years as a dwelling. Such applications can be made when the owner can show that the property has been occupied in breach of planning control for the required period of time. The appropriate time limit is four years where there is a breach of operational development or change of use of a building to use as a single dwelling.



The council refused to grant the certificate of lawful use. The property owner appealed the decision and the building inspector upheld the appeal. The council then appealed that decision.

In court, it was accepted that the property owner had intended to deceive the council from the outset. The court suggested that the owner might have committed a criminal offence by obtaining planning permission by deception. If the offence of deception were proved, then the profit from the

crime could be subject to confiscation under the Proceeds of Crime Act 2002.

The court ruled that the certificate should not be granted. Firstly, the construction of the building was not unlawful. It had planning permission and was capable of being used for the allowed purpose. There was therefore no breach of operational development. Secondly, there was no change of use to a dwelling. It has always been used as a dwelling. Accordingly a certificate of lawful use could only be correctly applied for after ten years and the council has until August 2012 to issue an enforcement notice. In the circumstances, the council is unlikely to miss the opportunity to make an example of the property owner.

In this case, the owner was well and truly 'hoist with his own petard'. Any resolution of the situation is likely to prove expensive. It is always better to get it right first time and be safe rather than sorry.

LETTING AGENT'S COMMISSION TERMS UNFAIR

Unclear language in a letting agent's standard terms and conditions has led to a contract being set aside by the High Court.

The case concerned the estate agent Foxtons, which provides a lettings service to private landlords under a standard form of agreement. The Office of Fair Trading (OFT) had applied to the Court for orders against Foxtons for what the OFT deemed to be unfair terms in agreements between the estate agents and various landlords. The terms in question related to renewal commissions.

Foxtons hoped to rely on regulations passed in 1999 relating to unfair terms in consumer contracts. These stipulate that where a term is in 'plain intelligible language', the assessment of fairness of a term shall not relate to the price or remuneration as against the goods or services supplied in exchange.

The Court held, however, that the relevant terms for renewal commission within the old version of Foxtons' contract had not been drafted in plain and intelligible language and so the obligation to pay renewal commission under the relevant terms of the agreement did not escape a fairness test under the regulations.

As far as the actual fairness of the terms was concerned, the Court considered it unlikely that the typical private landlord would expect a repeat bill in year two of a letting and beyond unless the point was spelled out in some way. It was felt that Foxtons had not used a fair and adequate method of bringing the renewal commission clause to the attention of the landlords.

Under the circumstances, the renewal commission clauses of Foxtons' old standard terms and conditions were held to be unfair. This case illustrates the importance of drafting agreements in clear and precise terms. We can advise you on any property or contract matter.

DOES RIGHT OF ACCESS MEAN RIGHT TO PARK?



A case dealing with the parking rights relating to three adjoining houses (all part of a development of older agricultural buildings) has been decided by the Court of Appeal. It has implications for developers of similar properties, such as barn conversions.

The case produced (in the judge's

words) a "snowstorm of incidents and issues" relating to the right of the owners of one of the houses to park on land adjacent to the properties and in spaces in the lane serving them. The Court concluded that for the right to park to be implied by a right of vehicular access, the ability to park must be 'reasonably necessary' for the exercise or enjoyment of the land being accessed. It is not sufficient that the right to park is desirable. Parking must be necessary to make proper use of the accessed land. In other words, there is no automatic right to park if there is a right of vehicular access to a piece of land.

In her conclusion, Lady Justice Arden said, "There is a common misunder-

standing that an Englishman's home is his castle in the sense that he can build walls, put up gates and do other acts on his land whenever he chooses, and without regard for his neighbours...the law expects neighbours to show some give and take towards each other... Parties to other boundary disputes and their advisers should also, at all times, have this point firmly at the forefront of their minds, and seek to resolve their disputes accordingly and without resort to complex and expensive litigation."

If you are considering buying land where there may be issues over access, parking or use of adjoining land, it is important to make sure that your legal rights are clear in the relevant documentation.

PLANNING ERROR PROVES COSTLY

Adding facilities to one's home may raise the prospect of a more congenial lifestyle, but care must be taken when dealing with planning applications.

In a recent case, the owner of a dwelling built in 1995 decided, in 1998, to add a garage and a dormer window. The planning application was accompanied by a new (extended) site plan. Planning permission was granted but because there was no request for a change of use of the land, the planning approval did not, in law, increase the curtilage of the property.

Everything passed without comment until some time later, when a swimming pool and tennis court were built outside the original curtilage of the land. Unfortunately for the owner, the land outside the curtilage of the property was agricultural land and no application for change of use of the land had been granted. The council issued an enforcement notice,

requiring the owner to return the land to use as agricultural land. The owner of the house argued that the 1998 plan had increased the curtilage of the property, so use of land shown on the plan as being for residential purposes did not require permission for change of use.

The matter reached the Court of Appeal. The Court considered that planning permission for a new dwelling would contain an implied permission for a change of use if required. However, an extension to a dwelling does not necessarily do so. In this case, the 1998 permission related to a development which was shown to be within the plans contained with the original planning application.

The swimming pool and tennis court, however, were outside the original curtilage of the land. The 1998 permission had not extended that and had not created any permission for change of use of the land.

COURT FINDS HOLE IN POLO ARGUMENT

In some circumstances, the obligation of ownership of land can be to permit someone else to extract something from the land. This is called a profit-à-prendre and one of the most common of these is the right to graze animals. Where such a right exists, the owner of the land cannot prevent it being exercised. Recently, the High Court had to consider such a case. A farm which reared polo ponies sought

to re-establish the right to graze them from evening until morning for eight months of the year on a piece of adjacent land owned by someone else. The farm sought to register the right at the Land Registry. The application was opposed by the landowners. The landowners had fenced off a part of the land which was being used to keep chickens and a pig. A deputy adjudicator at the Land Registry ruled that the farm had no right to graze its ponies on the land. The owners of the farm appealed against the decision, which led

to the matter being heard in the High Court. After complex arguments, the judge decided that the initial decision had been made on the wrong grounds and that, in principle, a right to profit-à-prendre had been established. The case was remitted back to the adjudicator for reconsideration. The issue arose initially because the owners of the land, which they had bought in 1994, appeared not to be aware of the existence of the legal right to graze the ponies. The result was a court case over a right that, in financial terms, is almost valueless.

FIRM'S CONTACT DETAILS