

Boundary Dispute Highlights Need for Clarity

A recent boundary dispute has illustrated the desirability of ensuring that when a property is sold, the description of it in the conveyance is as clear as possible.

The dispute arose after a farmhouse and the surrounding fields, which were at one time under common ownership, were sold separately. The nub of the problem was that when the farmhouse was sold, a fence, which the deeds said had to be maintained by the owner of the adjacent fields, was shown on the plan filed at the Land Registry as being on the farmhouse land. So, who owned the land on which the fence stood?



The court ruled that title to the land was clearly meant to stay with the owner of the fields - how else could he maintain the fence?

We can assist you to ensure that your interests are protected in any property transaction.

Business Valuation on Divorce

On divorce, the valuation of a family business is often a highly emotional and contentious issue, so it was unsurprising when the divorce of a couple after 15 years of marriage led to an acrimonious dispute over the value of their successful restaurant business.

The ex-husband valued the total assets (including the business, which he had run for 33 years) at £4.2 million. His ex-wife placed a valuation on the assets of £7.6 million, valuing the business at £5.3 million. She sought 50 per cent of the net assets plus school fees for the children. Her ex-husband offered 42 per cent of the net assets (£1.7 million), although this offer was later reduced.

Each produced an expert witness to back up their respective valuation of the business, which was the main point of dissent. The experts differed, but the main point of contention was whether the valuation should be based on a multiple of six times 'maintainable earnings' or nine times.

The judge relied on evidence of transactions in similar circumstances and ruled that the multiplier should be 6.5. He commented that the valuations of experts were of 'doubtful utility' because they are a matter of opinion and experts' opinions differ. He therefore adopted a broad brush approach. Since there were insufficient

resources for a 'clean break' arrangement to be financed, he ordered that the wife should receive £1.45 million plus periodical payments of £60,000 annually, child maintenance of £20,000 per annum and the cost of the school fees.

Few aspects of the financial arrangements in a divorce can be as contentious as the value of a family business and it is by no means uncommon for quite unrealistic values to be put forward. In many cases, the best overall result is achieved by the use of a single joint expert and sensible negotiation.

Non-Disclosure Did Not Affect Settlement

In divorce proceedings, it is usual to make a full disclosure of assets and future financial prospects when agreeing the financial settlement. Failing to do so can cause a legal battle, as a recent case illustrates.

It involved a couple who had met at university and married. Both worked for a time, but the wife stopped working when the couple had children, who were aged 10 and 8 at the time of the divorce.

The husband was a stockbroker. Because of the nature of his earnings and the fact that the majority of the couple's assets were tied up in the family home, a clean break was not achievable. Neither the husband nor the wife had any material assets when they were married, so the question of whether assets were 'matrimonial' or 'non-matrimonial' assets did not arise.

The court therefore ordered the ex-husband to pay his ex-wife £75,000 per year, plus the children's school fees and extras, and gave the family home to her with the provision that if it were sold, 24 per cent of the gross sale

proceeds would belong to her ex-husband.

Normally, that would have been the end of the story. In this case, however, within a fortnight of the financial provision order being made, the man left his employment for a new job which left him better off.

As a result of this, his ex-wife sought to have the order set aside, her main argument being that he had not disclosed that he was in negotiation for a new position that would make him materially better off. Had she known of it, she would not have agreed to the financial settlement.

The question for the court, therefore, was whether or not the ex-husband was under an obligation to disclose his negotiations. He admitted that he had not, but held that he was under no obligation to do so. He argued that the new job was not a 'done deal' and that the negotiations did not affect what he thought was a fair offer to his ex-wife. Furthermore, he considered that disclosure might have been harmful had the job offer not materialised.

In addition, he had originally offered

her a percentage of his income (34 per cent up to £350,000 and 10 per cent of any excess). It was she who demanded a fixed sum.

The court ruled that the ex-husband had breached his duty to disclose material information. The question which then needed to be considered was whether the absence of full and frank disclosure led the court to make an order substantially different from that which it would otherwise have made. On this issue, the court ruled that the job offer had not affected the proposed financial settlement – there were still uncertainties in the contract. In addition, had the ex-husband stayed in his previous job, his earnings would also have risen and the difference between what he would have earned in his old job and his earnings in the new job was not substantial enough to set aside the original financial arrangements.

To fail to make a full disclosure in such circumstances is a risky strategy, but in this case it did not backfire. Achieving a just result normally depends on sensible negotiation based on sound legal advice and experience. We can advise you on all family law matters.

Normal Risks Not Actionable

Health and safety legislation requires that premises are kept safe for both employees and visitors alike. When someone is injured in an accident as a result of a failure by the property managers to maintain premises in a safe condition, they can be prosecuted under the criminal law.

Clearly, there are times when premises have been allowed to remain in an obviously dangerous state and in such circumstances a prosecution is normally successful. However, in many cases, the position is less clear cut and in

these circumstances the issue will be decided on whether or not the injury happened as a result of a normal risk of everyday life.

In a recent case, a school headmaster appealed against his



conviction under the Health and Safety at Work Act 1974. The case involved a three-year-old child who fell down steps at the school and sustained a head injury. The child contracted MRSA in hospital and died.

The case turned on whether the risk to which the child had been exposed (i.e. falling down the steps) was a real risk which was caused by the conduct of the school. The Court of Appeal found that it was not and so the headmaster's conviction was overturned.

Loss Calculation Date Must be Reasonable

House purchasers who acted on a structural engineer's advice, which subsequently proved to be incorrect, were able to claim for their loss based on a valuation made seven years after the event, the court ruled recently.

The mortgage company which was to provide the finance for the purchase required the purchasers to engage a firm of structural engineers to investigate the cause of cracks in the walls of the property and to suggest remedial work. The engineers issued a report to the effect that there was structural movement of the premises. They concluded that the cracking was due to trees growing close to the house and recommended that all large trees within four metres of the property be removed. The purchasers bought the property and removed the trees. However, further cracks appeared over time and the owners instructed a new firm of structural engineers, which concluded that the new cracks were the result of the removal of the trees. Whilst the original cracks had been caused by dehydration of the soil, the removal of the trees had led to the subsequent rehydration of the soil, and this was the cause of the new cracks.

It was established by a period of monitoring that the property was now stable and needed no further remedial work. However, the home owners sued the original firm of engineers for the loss of value of the property that had resulted from its negligence. Once the issue of liability was settled, the question which then arose was what should be the basis for calculating the value of the claim? The loss was valued at £20,000 by an expert valuer and the claim was brought for that sum.



The engineers argued that the loss should not be calculated based on 2007 values (when the valuer's report was prepared) but on 2000 values, as this was when the negligent advice was given. As property prices had risen considerably in the intervening

period, this would be a considerably smaller sum.

The court decided that the homeowners were entitled to £20,000 for the loss in value of their property on the basis that it would have been worth that amount more had the trees not been removed. In the view of the court, provided that the loss relates directly to the breach and the valuation of the loss took place at a reasonable date, 'there is nothing inherently wrong in principle in valuing a diminution in value loss at a later date than the date of the breach'.

Normally, such damages are calculated based on the loss at the date of the breach. However, in this case the claimants had started their claim without delay once the further cracking had been discovered. In addition, the defendant failed to provide evidence of the value of the loss in 2000. This prevented the judge from using the 2000 value even if he had chosen to do so. In the court's view, the choice of 2007 as the date on which to base the claim was reasonable.

When a Home is Not a Dwelling

To most people, 'dwelling' is just a fancy term for 'home' or possibly 'house'. However, the difference in the meaning of words is a common source of legal dispute, as was illustrated in a recent case that also has significance for tenants of holiday park homes and similar properties and their landlords.

The case concerned bungalows at a holiday park in Cornwall. As is common in such cases, the planning permission under which they had been built prohibited permanent occupation of the bungalows, which were stipulated as being for holiday purposes only. The tenants also covenanted with the park owner

landlord 'not to use the...bungalow for any purpose other than that of a holiday bungalow'. It was recognised that this restriction was not adhered to by several of the tenants.

As is also normal, the tenants were required to contribute to the costs of maintaining the site etc. by payment of service charges. The dispute arose because some of the owners claimed that the service charges were excessive and relied on the Landlord and Tenant Act, which provides that only reasonable service charges can be recovered from tenants of 'a dwelling'.

The Leasehold Valuation Tribunal refused to hear their claim on the ground that the holiday bungalows were not dwellings since they could not be used as permanent residences. The tenants appealed.

The question that needed to be settled was whether a home can be a dwelling, for the purposes of the Act, if it is a place in which a person cannot permanently reside. Unfortunately for the tenants, the Tribunal could not agree that the protection offered by the Landlord and Tenant Act was intended to apply to premises such as the bungalows in this case.

Animal Damage Liability Depends on What is Expected

The law takes different positions on the responsibility of owners for damage caused by their animals, depending on the type of animal and the circumstances under which the damage occurred. A recent case illustrating this dealt with a road traffic accident caused by a runaway cow.

The cow had escaped from a field and strayed onto a road, where it was hit and killed by the claimant. The claimant was injured and one of the passengers in the car was killed. The claimant sued the cow's owner under the Animals Act 1971, claiming that the cow had escaped as a result of his negligence. The Act holds owners of animals to be liable for injuries etc. caused by their animals when the injury or damage arises because they have failed to control behaviour which might be expected from the animal in question. The case turned on whether the cow's owner could reasonably have expected the animal's behaviour to occur.

The cow had been separated from its calf on the same day it escaped.

In such circumstances, a cow's maternal instincts will often make it restless. However, in order for the cow to get out of the field and onto the road, it had to get over a farm gate and then cross a 12ft cattle grid.



The claimant argued, in effect, that in the circumstances special care should have been taken to make sure the cow was contained securely in the field. The defendant farmer argued that the physical ability exhibited by the cow in clambering over the gate and across the cattle grid was beyond anything he could reasonably have anticipated.

At issue was whether the behaviour was a 'dangerous behavioural characteristic' of the animal, in which case the farmer would be liable under the Act. Because the animal was behaving in a dangerous and agitated way because of her maternal instincts, she was in effect a wild animal.

After an appeal to the Court of Appeal, the claim against the farmer failed, the Court taking the view that the farmer could not have anticipated the exceptional physical feats of the cow.

The nub of the law relating to animals is what would be reasonable for their owners to do, bearing in mind the range of likely behaviours of the animal, and the possible effects of the animal being uncontrolled.

If you are hurt by or suffer from a nuisance caused by an animal or animals owned by someone else, contact us for advice.

CHILD
&
CHILD
—
INCORPORATING
PETTMAN SMITH

14 Grosvenor Crescent, London, SW1X 7EE
Tel: 0207 235 8000 Fax: 0207 235 9447 DX 38155 Knightsbridge
Email: info@childandchild.co.uk Website: www.childandchild.co.uk

The information contained in this newsletter is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances, please contact us.