Case Commentary

Trespass and Injury to the Reversion

Walton Family Estates Ltd v GJD Services Ltd [2021] EWHC 88 (Comm)

To what extent can a landlord who holds only a reversionary interest sue upon a trespass affecting the demised property? This was the question posed in the recent High Court decision in Walton Family Estates Ltd v GJD Services Ltd [2021] EWHC 88 (Comm).

Facts

The freehold owner of an aerodrome sought summary judgment on its claim for an order requiring the defendants to remove certain aircraft which were parked there or, in default of removal, an order permitting the claimant to sell, remove or scrap the aircraft.

There were a number of aircraft parked at the aerodrome. The freeholder had granted a 35-year lease of the part of the aerodrome where the aircraft were parked to a company which carried on an automotive business and used the runway to park cars. Under the lease, the freeholder had the right to retain the aircraft and certain scrap at the aerodrome and had covenanted in the lease that it would remove them from the property by no later than 31 December 2020. Under the lease, it was entitled to access to the aerodrome for that purpose with its workers and contractors.

The fifth defendant owned six Lockheed Tristar aircraft that had been parked at the aerodrome since 2014. The eighth defendant owned two Boeing 747-300 aircraft which had been parked at the aerodrome since 2012. The aircraft were not airworthy and work needed to be done to them before they could be removed. The freeholder's case was that the Tristars were parked under an informal licence arrangement with the sixth defendant, which was the fifth defendant's parent and predecessor in title, and that it had given notice terminating the licence from September 2019 and requiring removal of the aircraft. The freeholder argued that the eighth defendant did not have the benefit of any licence to park the 747s on the aerodrome and that they should be removed. The defendants submitted, inter alia, that the freeholder did not have title to sue in trespass because the tenant had exclusive possession of the aerodrome under the lease and there was no damage to the freeholder's reversionary interest by reason of the aircraft being at the aerodrome.

Decision

On the primary issue, the High Court held that the freeholder had established a sufficient interest in the aerodrome to sue for trespass, assuming that no right for the

aircraft to remain on the aerodrome was established. The lease, properly interpreted, gave it the right to occupy the land within the aerodrome on which the aircraft were parked and to have access to the property for the purpose of fulfilling its obligations to remove them. However, the alternative basis, namely, damage to the revisionary interest, was not made out. The continued presence of the aircraft, which on any view was not going to be for a lengthy period, could not be regarded as "permanent" so as to entitle the freeholder to sue for trespass. The case was distinguishable from *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393, which concerned the rights of a riparian owner on the banks of a natural stream, where a local authority was committing a trespass by permitting faecal matter under its control to escape. Parker J, at 404, stated:

> " . . . it is reasonably certain that a reversioner cannot maintain actions in the nature of trespass, including, I think, actions for infringement of natural rights reversion. If the thing complained of is of such a permanent nature that the reversion may be injured the question of whether the reversion is or is not injured is a matter for the jury . . . I take 'permanent', in this context, to mean such as will continue indefinitely unless something is done to remove it. That a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in the nature permanent within the rule, for they cease of themselves unless there be someone to continue them. In my opinion, what is complained of in the present case is of a permanent nature within the rule. The sewage of Llanwrst will continue to be turned into the Conway unless and until something is done to divert it elsewhere."

In *Jones*, therefore, the trespass was not only of a permanent nature, but also the claimant's reversion had, in fact, been injured and depreciated in value by the continuing discharge of sewage into the stream.

Commentary

The decision in *Walton* confirms that a reversioner cannot bring proceedings for trespass during the currency of the lease except in so far as it has caused permanent damage to the land, leading to a reduction in the value of the reversioner's interest. In *Mayfair Property Co v Johnston* [1894] 1 Ch 508, the occupiers of a house and garden (No 37) pulled down and rebuilt a wall which separated the garden from that of the adjoining house (No 36) and, in doing so, they trespassed on the garden of No 36 by extending the foundations of the new wall into the garden. The house at No 36 was in the occupation of a tenant under a lease. It was held that the owners of the reversion could, though the tenant made no complaint, maintain an action in respect of the permanent trespass to the garden at No 36. North J stated, at 516:

> "It was said on behalf of the plaintiffs that the counter-claiming defendants are not entitled to sue in respect of the trespass, because they are only reversioners, they having let the house to the other defendants. In my opinion, that is not the law."

And at 517:

> "In the present case there was a taking of part of the land, carrying away of the existing materials, and putting in the foundations of a building which was clearly intended to be permanent, and by which, at any rate if they are left there long enough, a right to support would be gained."

And at 519:

> "I have found no difficulty in coming to the conclusion of fact that there was a trespass in putting upon the defendants' land something which was intended to be permanent."

Similar principles will apply where the injury consists not of a trespass, but a nuisance affecting the demised property. Here again, a reversioner, who is not in occupation, will not be entitled to sue unless he can prove permanent injury to his reversionary interest: see, for example, *Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, (physical damage to the reversioner's buildings). In such circumstances, his right will be co-existent with that of the occupier and the damages will be apportioned between the two parties according to the relative interests of reversioner and occupier: *Hunter v Canary Wharf Ltd* [1997] AC 655, at 707. In this context, a "permanent injury" is again defined as one which "will continue indefinitely unless something is done to remove it": see, *Jones*, at 404.

An interference of a temporary nature, on the other hand, which is capable of being ended before the reversion falls into possession and which does not cause any lasting damage to the land, has been held not to suffice even if this causes the tenant to leave or reduces the letting value of the demised property: see, *Simpson v Savage* (1856) 1 CB (NS) 347; *Mumford v The Oxford, Worcester and Wolverhampton Railway* (1856) 1 H & M 34 and *Cooper v Crabtree* (1882) 20 Ch D 589. Thus, the emission of smoke or the erection of a temporary hoarding or causing a temporary annoyance do not permit the reversioner to sue in nuisance for lack of any permanent injury to the reversion. By contrast, in *Bell v. Midland Railway Co* (1861) 10 CB (NS) 287, the reversioner permanently lost the right to royalty payments caused by a temporary obstruction to the tenant's access rights on the land. Significantly, the court held that the loss of these payments constituted a sufficient (permanent) injury to the reversion enabling the claimant to sue in nuisance - although the interference was temporary, the injury to the reversion was lasting and permanent.

The decision in *John Smith & Co (Edinburgh) Ltd v Hill* [2010] EWHC 1016 (Ch) is also noteworthy in suggesting that a reversioner may claim in nuisance even where the interference complained of is only temporary, provided he can show permanent injury to the reversion. In that case, the dispute concerned a six-storey building owned by a company (Urbis Freehold) in liquidation. The first and second defendants were the administrators of the company. The third defendant held a sublease of the ground floor and basement of the property for a term of 30 years but had ceased occupation. The claimant held a concurrent lease of the ground floor and basement thereby becoming the immediate landlord of the third defendant. Both the sublease and concurrent lease enabled the respective landlords to erect scaffolding around the

building for the purpose of redevelopment with the proviso that the scaffolding should be completed and removed "as quickly as reasonably possible, causing as little nuisance, inconvenience, annoyance or disturbance to the tenant as reasonably possible" without committing a breach of the covenant for quiet enjoyment. The redevelopment, however, ran into difficulties and work ceased on the building with the consequence that the scaffolding remained in place for almost a year until the freehold was sold to a third party.

Although not in occupation of the premises, the third defendant complained about the continued presence of the scaffolding alleging that it interfered with its attempts to market the ground floor and basement by way of an assignment of the sublease. The third defendant eventually refused to pay rent relying on the claimant's (i.e., its landlord's) breach of covenant for quiet enjoyment. The claimant responded by issued proceedings for arrears of rent which (in turn) were met by a counterclaim from the third defendant seeking to set-off damages for breach of covenant for quiet enjoyment against the liability to pay rent. The claimant also sought a claim in nuisance against the first and second defendants (as administrators of Urbis Freehold) in the form of an indemnity for any damages awarded to the third defendant by way of the latter's set-off against rent. The primary issue before the court was whether the temporary interference caused by the continued presence of the scaffolding could qualify as the basis for a claim in nuisance by the claimant as reversioner upon the third defendant's sublease.

Applying the reasoning in *Bell*, mentioned earlier, Biggs J concluded that it was at least arguable that a temporary interference with the third defendant's quiet enjoyment could be actionable by the claimant because the former's right of equitable set-off for damages against rent in respect of the interference (albeit temporary) would amount to a permanent deprivation of the rent and, hence, constitute an actionable injury to the claimant's reversionary interest. In this connection, rent was an aspect of the proprietary rights constituted by a landlord's reversion. A set-off against rent triggered by the retention of the scaffolding, therefore, affected the reversion as it "permanently deprive[d] the landlord of a valuable part of his rights constituted by his reversionary interest: at [24]. His Lordship, however, was mindful that such cases were likely to be "unusual" given that" in most factual situations "the perpetrator of the alleged nuisance [is] a mere third party neighbour, rather than anyone in respect of whose conduct the claimant reversioner . . . had given his tenants a covenant for quiet enjoyment": at [27].

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