



Land development and liability for flooding

Lambert v. Barratt Homes

August 2010

The Court of Appeal decision in *Lambert v Barratt Homes Ltd and Rochdale Metropolitan Borough Council* [2010] EWCA Civ 681 provides some clarity on the extent of the measured duty of care that a landowner owes to its neighbour to prevent a nuisance that it did not itself create. However, a considerable amount of uncertainty still remains for landowners in this position and expert advice at an early stage may help to avoid costly litigation.

In November 2009 we reported on the High Court decision in *Lambert v. Barratt Homes* in which both the residential developer, Barratt Homes Limited, and the landowner, Rochdale Metropolitan Borough Council, were found liable to the residents of neighbouring homes which had been flooded following the completion of the development.

The developer had purchased the lower section of playing fields owned by the local authority for the purposes of residential development. The local authority retained the higher section of the playing fields. Rainwater from the playing fields had previously drained through an open water course and a culvert that ran between the playing fields and the claimants' properties. In the course of the development, Barratt Homes filled in the water course and culvert such that rainwater flowing from the retained playing fields still owned by the local authority had nowhere to flow but into the claimants' properties.

The High Court found that Barratt Homes was liable in negligence and nuisance for filling in the water course and culverts. This decision was not surprising and was not subject to appeal. The High Court also held that the local authority was under a measured duty of care to alleviate the nuisance arising from the rainwater falling on the playing fields and flowing towards the claimants' properties and that it had breached that measured duty of care in failing to take remedial action. The measured duty of care arose because the local authority was aware of the problem and was in a position (logistically and financially) to take the necessary steps to alleviate the problem. It was this second issue, regarding the extent of the local authority's measured duty of care, that was referred to the Court of Appeal.

The Court of Appeal judgment contains a helpful analysis of the case-law surrounding the extent of the measured duty of care which landowners owe to their neighbours to abate a nuisance which they have not created. The Court of Appeal was satisfied that the local authority did owe a measured duty of care. However, this duty did not extend as far as requiring the local authority to design and implement

drainage relief works for the development at its own expense. The measured duty of care included allowing others to have access to the land, cooperating with any relief works and, possibly, carrying out some works to its own land, but would not extend to paying for the entire scheme. The Court of Appeal refused to define the exact scope of the measured duty of care because the scope in all cases depends upon the facts and the Court of Appeal did not consider that it had sufficient facts before it to make a definitive ruling. The case was referred back to the High Court for a decision on the exact scope of the measured duty of care and a determination of the relevant contributions to the relief works to be paid by each party. The Court of Appeal did, however, express its hope that the parties would reach agreement out of Court as to the contributions expected from each party so that relief works could be completed without further delay and without further legal costs.

Although no final decision has been reached on the scope of the measured duty of care in this instance, the case does provide some very helpful commentary.

First, it provides some clarity on the "deep pockets" factor within the scope of the duty. It is now well established that the financial means of the defendant is one of the considerations to take into account when deciding the extent of the duty. The Court of Appeal acknowledged that local authorities might be expected to have access to funds far in excess of those available to individuals, but it went on to make it clear that local authorities are under financial pressure and the funds available to it are for public purposes and not generally for the benefit of private citizens. The Court of Appeal noted that there were other potential sources of funding for the relief works, chiefly the liability of Barratt Homes, but also the home insurance policies of the claimants. Therefore, the Court of Appeal was not persuaded that the local authority should pay for any of the works, let alone the entirety of the relief works.

continued overleaf

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Secondly, the Court of Appeal acknowledged that, whilst the nuisance is continuing, the scope of the duty of care would vary in accordance with the circumstances. Once the High Court had determined that Barratt Homes was liable for the cost of the relief works, it was not then fair, just or reasonable to impose on the local authority a duty to meet those costs. This is, we think, an interesting conclusion, because it indicates that, had Barratt Homes' not been found liable, it is possible that the scope of the local authority's measured duty of care could have increased to include a contribution to the costs of those works.

Throughout its judgment the Court of Appeal is clear that the local authority was under a measured duty of care. The only question was the extent of that duty. This reinforces the trend in the recent case-law to impose a duty on landowners for

nuisances which arise on their land through no fault of their own.

The question then arises, what is the extent of the duty? The answer is entirely dependent on the facts of the case, the means of the defendant, and whether other defendants are potentially liable for the creation of the nuisance. This will create a difficult issue for landowners who find themselves in such a position in the future, because the extent of the duty will not be clear, especially when the matter first comes to light and before detailed investigations have been made. Is it sufficient simply to cooperate with the neighbour and allow access, or is a financial contribution required, and if so, how much? These questions have no easy answers and we recommend that expert advice is taken at an early stage to avoid the prospect of complex and expensive litigation.

Contact us

Burges Salmon's specialist environmental litigation team has extensive experience in flood risk and flooding litigation. If you have any questions or would like to discuss these issues in more detail, then please do not hesitate to contact:



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