

“DEVELOPMENT AGREEMENTS”

ANSWER SHEET

NRM5 Property Litigation Training Day

2 February 2012

Scenario 1

(a) Can Dodgideal Ltd use the need for an agreement with Farmer Giles in relation to the landscaped buffer to get out of the agreement?

1. *Is the need for a landscaped buffer a “Buyer’s Onerous Condition”?*

Construction of definitions in clause 1 of the Agreement: for general principles, see: Chartbrook v Persimmon [2009] 1 AC 1101; Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896; Multi-Link Leisure Developments Ltd v North Lanarkshire Council [2010] UKSC 47

- Definition of “Acceptable Planning Permission” requires that it is not subject to “Onerous Conditions”.
- “Buyer’s Onerous Condition” includes a condition imposed in the Planning Permission which has the effect of preventing the development without the agreement or co-operation of an independent third party.
- 10m-wide landscaper buffer cannot be obtained without agreement of Farmer Giles
- Planning permission cannot be obtained unless contains condition requiring agreement with third party.

2. *Does it make a difference that the problem has been resolved since the grant of planning permission by Brenda Vendor’s contract with Farmer Giles?*

- The Planning Permission still contains the Buyer's Onerous Condition: the subsequent contract with Farmer Giles does not alter the nature of the planning permission as granted.

2. *Does it make a difference that Dodgideal Ltd has been privy to the correspondence between Brenda Vendor and Farmer Giles?*

General principles of promissory estoppel: Hughes v Metropolitan Railway (1877) 2 App. Cas. 439; Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130:

- (a) a legal relationship giving rise to rights and duties between the parties
- (b) a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship
- (c) an intention on the part of the former party that the latter will rely on the representation
- (d) such reliance by the latter party
- (e) inequitable for the first party to go back on his promise.

See also MW Trustees Ltd v Tellular [2011] L & TR 19 at [40]-[42] which suggests that waiver (in this context) has similar requirements.

- Brenda Vendor will probably not be able to establish an estoppel or waiver. If the correspondence has made clear that Brenda Vendor and Farmer Giles were deliberately waiting until after the grant of planning permission to enter into their contract, then Brenda Vendor might argue that Dodgideal Ltd has, by remaining silent, represented that it will not enforce its strict legal right to say that a contract with Farmer Giles must precede the planning permission before it is an Acceptable Planning Permission and that Brenda Vendor has changed her position in reliance upon that representation, by failing to press for an earlier contract with Farmer Giles. But it is very difficult to imply a sufficiently clear and unequivocal representation from silence alone (Allied Marine Transport v Vale do

Rio Doce Navegacao SA (The Leonidas D) [1985] 1 WLR 925 at 937) and only if it was clear from the correspondence that Brenda Vendor was labouring under a mistake (for example that she could not enter into a contract with Farmer Giles before planning permission was granted) is an estoppel likely to succeed: see Moorgate Mercantile v Twitchings [1977] AC 890 at 903B; Youell v Bland Welch & Co Ltd (No 2) [1990] 2 Lloyd's Rep 431 at 452.

- See also the effect of clause 12.1 on any claim of estoppel or waiver, discussed below.

4. *What steps does Dodgideal Ltd need to take to rely on the defective Planning Permission?*

- Clause 3.3 provides the Buyer shall notify the Seller of whether a condition is a Buyer's Onerous Condition within 10 Working Days of receiving notice of the condition
- Planning permission was granted on 9 January 2012
- Time for notification under clause 3.3 will expire on 23 January 2012
- Notice will need to be served by 23 January 2012
- But is it necessary to serve notice at all? Clause 3.3 does not specify what the consequence is of a failure to serve notice and it is perhaps not the case that Dodgideal is prevented from relying upon the lack of an Acceptable Planning Permission by virtue of a failure to serve notice.

(b) Can Dodgideal Ltd use the fall in price to less than £275,000 per acre to get out of the agreement?

1. *What does clause 6.4 mean? Does it give Brenda Vendor or Dodgideal Ltd – or both - the right to terminate the agreement?*

- Clause 6.4 – to which clause 6.1 is subject – is ambiguous. Brenda Vendor wants to argue that it gives her a unilateral right to terminate the Agreement and she can point to the phrase “then the Seller shall not be obliged to sell the Property” in support of that. However, on that basis it is difficult to know what the second part of the clause is intended to achieve. Dodgideal Ltd wants to argue that if the price falls below £275,000 per acre, the bi-lateral agreement is turned into a call option, which it has the choice whether or not to exercise. This is not a straightforward argument to make, and would rest on the second part of the clause, which appears to give the Buyer a choice as to whether to pay £275,000 per acre or, it is to be implied, not to do so and to terminate the agreement.
- None of the evidence in para.2 of the problem would be admissible on the question of construction: *Chartbrook v Persimmon*, above.

2. Could either party seek rectification of this provision?

- Requirements of rectification based on mutual mistake: Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 E.G.L.R. 71 at [33], per Peter Gibson L.J :-
 - (a) common intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
 - (b) there was an outward expression of accord;
 - (c) common intention continued at the time of the execution of the instrument sought to be rectified; and
 - (d) that, by mistake, the instrument did not reflect that common intention.

Burden - convincing proof: see Joscelyne v Nissen [1970] 2 QB 86, 98 per Russell LJ giving the judgment of the CA.

See Chartbrook v Persimmon, above at [48]-[66] and Daventry DC v Daventry & District Housing Ltd [2011] EWCA Civ 1153 on the need for the common intention to be objectively ascertained (reflecting the requirement for an “outward expression of accord”).

- Rectification is not available here. The communications between the parties do not show, objectively, that there was a clear and continuing common intention as to the way in which clause 6.4 was to work so as to allow for a rectification claim. The subjective intention of the parties is irrelevant but in any event both parties appear, subjectively, to have had a different understanding of the purpose of the clause.

(c) Can Dodgideal Ltd use the failure to satisfy the planning condition in time to get out of the agreement?

This question concentrates on the *timing* of the planning permission – it has to be assumed that the planning permission is an Acceptable Planning Permission, whatever decision has been reached under (a).

Planning Condition Period expired on 31 December 2011; planning permission is not granted until 9 January 2012.

1. *Is the date of expiry of the Planning Condition Period “of the essence”?*

- Because the date relates to a condition precedent, time will be of the essence of this stipulation: Aberfoyle Plantations Ltd v Cheng [1960] AC 115 : (1) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (2) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;

(3) where a conditional contract of sale fixed (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

- Consequently, unless for some reason (discussed below) Brenda Vendor can show that Dodgideal is prevented from relying on the absence of planning permission as at 31 December 2011, on that date Dodgideal's obligation to buy the Site fell away – it never became unconditional.

3. *Is Dodgideal in breach of its obligation to use reasonable endeavours as required by clause 3.2?*

General principles: Yewbelle Ltd v Green Developments Ltd [2008] 1 P&CR 17; Rhodia International Holdings [2007] 2 Lloyd's Rep 325; Hargreaves Transport v Lynch [1969] 1 WLR 215

- Reasonable endeavours requires the parties to take all steps available until those reasonable endeavours have been exhausted and to carry on would be mere repetition
- Our view is that the delay in making an application until December 2010 was a failure to use reasonable endeavours which could not be justified by the difficulty economic situation or Dodgideal's own strained resources.

3. *If Dodgideal Ltd is in breach of its obligations to use reasonable endeavours, does that prevent it relying upon the expiry of the Planning Condition Period?*

- See Chitty on Contracts, 30th edn, para. 12-082 and Lewison on the Interpretation of Contracts, 4th edn, para. 7-10 for a discussion as to

whether the principle that a contracting party may not take advantage of his own wrong is (a) a principle of construction or (b) the basis for an implied term or (c) a free-standing principle of law.

- It would seem likely that the Court would imply a term preventing reliance by Dodgideal Ltd on the failure to obtain planning permission before the cut-off date when this is directly linked to its own failure to apply for that permission earlier.

4. *Alternatively, is Dodgideal Ltd estopped from relying on the expiry of the Planning Condition Period, given the facts in paragraph 4?*

This is perhaps a different way of making much the same point, but we are inclined to think that the argument is better put on the basis of an implied term preventing Dodgideal Ltd relying on its own breach of contract. It is, however, possible to argue that by failing to progress the planning application during 2008-late 2010, Dodgideal was representing that it would not keep Brenda Vendor to the timescales in the agreement in such a way as to lull Brenda into a false sense of security, in that she did not press for action.

5. *If Dodgideal Ltd would otherwise be estopped from relying on the expiry of the Planning Condition Period, can it use clause 12.1 to get around the estoppel?*

Clauses like clause 12.1 are becoming increasingly common features of commercial contracts. We are not aware of any authority which considers a clause like this, but an appropriately-drafted contractual provision could be said to prevent a party relying on a claim of estoppel which would otherwise be available to it: i.e such a clause gives rise to a contractual estoppel, analogous to a “no reliance” clause: see Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] 2 Lloyd’s Rep 511 at [54]-[60] and

FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd [2010]
EWHC 358.

See also Lloyd v MGL (Rugby) Ltd [2007] EWCA Civ 153 – appellants argued that the "entire understanding" clause in the agreement should have precluded the judge from relying on extraneous material as establishing the understanding about the development that was the necessary initial constituent of proprietary estoppel. Held: estoppel was not to be inconsistent with the entire agreement clause on the facts. But the Court of Appeal recognised that a clause in suitable terms could preclude estoppel. Facts: (i) the arrangement which formed the basis of the estoppel claim had not been "dealt with" in written agreement so that the entire understanding clause had not been engaged. Although the project in respect of the site had been mentioned in the agreement, it did not dispose of the arrangements in relation to that development. (ii) the entire understanding clause could preclude reliance only on such understandings extraneous to it as had arisen prior to its date, and there was ample evidence that the terms of the understanding had been reiterated by the appellants after the agreement had been made.

The question is, therefore, whether the claim of estoppel which Brenda Vendor might wish to make falls within the terms of clause 12.1:

- There appears to be no direct authority dealing with a clause such as this
- Query whether the Lloyd case is distinguishable – as it relied on conduct *before* the agreement was entered into.
- It is more difficult, conceptually, for an entire agreement clause to cover *future* variations – can parties contract out of the ability to make future variations?
- At least one of us think that there is no reason in principle why an appropriately-drafted contractual provision could not be said to prevent a party relying on a claim of estoppel which would otherwise be available to it: i.e analogous to a "no reliance" clause.

Assuming that is right, we are inclined to think that the reference to “oral or other arrangements” is wide enough to catch it.

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