

“DEVELOPMENT AGREEMENTS”

WORKSHOP PROBLEM

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1. On 1 January 2008 Dodgideal Ltd and Brenda Vendor enter into a contract for the sale and purchase of developable land (“the Agreement”). The land is to be sold to Dodgideal Ltd for development as housing. The Agreement is conditional on the obtaining of Acceptable Planning Permission. The relevant provisions of the Agreement are attached in a separate document.
2. During the negotiations for the Agreement, Mr Dodgi, the Chief Executive of Dodgideal Ltd, expresses anxiety about the potential for some weakening of the housing market. At a meeting at which the heads of terms are agreed, Mr Dodgi and Brenda Vendor agree that if the value of the Site drops to less than £275,000 per acre “all bets are off”. Brenda Vendor emails Mr Dodgi straight after the meeting in the following terms:

“As we discussed earlier today, £275,000 is the bottom line price...”

Dodgideal Ltd does not respond to that email, but as a consequence of this discussion, the heads of terms contain the following clause:

“If at the Completion Date the Price equates to less than £275,000 per acre of Net Developable Area then the Seller shall not be obliged to sell the Property to the Buyer and the Buyer may within 10 Working Days of the Completion Date serve notice on the Seller that it will pay £275,000 per acre of Net Developable Area”

3. This becomes clause 6.4 of the Agreement. Brenda Vendor signs the heads of terms without reading the clause. Mr Dodgi tells Dodgideal Ltd's bank manager that *"if the value falls through the floor, I can walk away from the deal"*.
4. Soon after entering into the Agreement, Dodgideal Ltd and Brenda Vendor begin the process of applying for planning permission. In pre-application discussions with the local planning authority, it is made clear that permission is only likely to be granted if there is a 10m-wide landscaped buffer around the Site. Brenda Vendor does not own the entirety of the 10m strip and enters into discussions with a neighbouring landowner, Farmer Giles, to acquire the remainder of the strip. Dodgideal Ltd is kept informed of these discussions and is copied in to relevant correspondence between Brenda Vendor and Farmer Giles.
5. In fact the housing market falls further and faster than either party had anticipated. As the credit crunch takes hold during 2008, Dodgideal Ltd's resources are overstretched. Brenda Vendor is sympathetic and does not press for action whilst the markets are in turmoil: for a period of about a year neither party takes any steps towards obtaining planning permission and thereafter progress is slow. A planning application is finally made in December 2010 and permission pursuant to that application is granted on 9 January 2012. As expected, the planning permission contains a condition requiring a 10m landscaped buffer around the Site.
6. Planning permission having been granted, on 15 January 2012 Farmer Giles enters into a contract to sell Brenda Vendor the 10m buffer strip, completion of the contract to take place within 28 days.
7. Dodgideal Ltd does not now want to complete the purchase, taking the view that the development is uneconomic in the current market. It believes that the land is worth substantially less than £275,000 per acre (the price provided in clause 6.4). Dodgideal Ltd says that the idea was that if the price was less than

£275,000 per acre, Dodgideal Ltd was entitled to pay that price or walk away. Brenda Vendor says that the purpose of clause 6.4 was to allow her to demand the £275,000 per acre as a minimum price, or walk away herself.

Current Position

Dodgideal Ltd does not want to proceed to acquire the Site and wants to use:

- (a) the need for an agreement with Farmer Giles in relation to the landscaped buffer;
- (b) the fall in price to less than £275,000 per acre;
- (c) the failure to satisfy the planning condition in time;

to get out of completing the Agreement.

Questions

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

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

4. What does clause 6.4 mean? Does it give Brenda Vendor or Dodgideal Ltd – or both - the right to terminate the agreement? Is any of the evidence in para 2 of the problem admissible on the issue of construction?
5. Could either party seek rectification of this provision?

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

6. Is the date for expiry of the Planning Condition Period “of the essence”?
7. Is Dodgideal Ltd in breach of its reasonable endeavours obligation under clause 3.2?
8. If so, does that prevent it relying upon the expiry of the Planning Condition Period?
9. Alternatively, is Dodgideal Ltd estopped from relying on the expiry of the Planning Condition Period, given the facts in paragraph 4?
10. 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?

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