THE CREDIT CRUNCH: "PLANNING" IN THE SLOW-DOWN

ESCAPING AND ENFORCING LAND CONTRACTS

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Introduction

1.1 It is well established that developers looking to acquire land frequently enter into contracts which are conditional upon the obtaining of a 'satisfactory' grant of planning permission.

1.2 Whilst the drafters on both side of the transaction will have been keen to ensure that the agreement included reasonable safeguards for both parties, the vendor, in particular, has had some security in knowing that the market was ripe for land with development potential and that if the purchaser pulled out, then is was likely that an alternative buyer could be found with relative ease. There was also, perhaps, less desire on the part of both parties to rely on strict time deadlines by which certain conditions or obligations were to be fulfilled, and/or on a strict interpretation of the terms of the contract.

1.3 With the recent downturn in the market, and increasing difficulties in obtaining financing for development projects, this position has dramatically altered and those conditional agreements are now being subjected to a level of scrutiny which was perhaps not envisaged at the time they were drafted.

1.4 The key question for the vendor is how to ensure that the sale will complete. For the developer/purchaser, on the other hand, the question is what can be relied upon in the contract to enable them to escape the obligation to acquire the land.

1.5 This talk addresses how a vendor can attempt to enforce the contract – or at least resist an attempt to terminate it – and defences which may be available to a developer to such claims. It looks at two common conditions which are found in such contracts and also the various forms of procedure which might be adopted to resolve disputes of this nature. Finally, a case study is provided which addresses some of the types of issues which might arise in practice.

Enforcing Land Contracts – The law of specific performance

2.1 Specific performance is the name given to an equitable – and therefore discretionary – remedy which is available to either party to a contract, the effect of which is to compel the other to perform an identified obligation under the contract.

2.2 As a general principle of law, specific performance will not be granted where damages would adequately compensate the claimant for the other party's breach and put him back in the position in which he would have been if the contract had been performed. However, a court will usually order specific performance in the case of contracts for the sale of land where the relevant conditions are fulfilled. Such a practice is premised upon the idea that land, unlike goods or money, is "unique" or has a "peculiar value" to a purchaser. A court therefore usually orders specific performance in favour of purchasers and thus, it is regarded as mutually fair, for a vendor to be similarly entitled to the remedy of specific performance.

2.3 A vendor wishing to avail itself of the remedy of specific performance to compel the developer/purchaser to complete on a contract for sale must establish the following the following requirements:

(1) That there is a complete and definite contract which confers a right to performance upon the party;

(2) That it (or where contracts have been exchanged, they) complies with the requirements of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, namely:

(a) the contract must be in writing;

(b) incorporating all the terms agreed by the parties – whether expressly or by reference to some other document; and

(c) signed on behalf of each party.

(3) If the contract has been made, but the relevant obligation is subject to a condition precedent, that such a condition has been fulfilled,[1] or, if it is solely for the benefit of the claimant, has been waived by the claimant[2];

(4) That the contractual obligation is sufficiently certain to be enforceable; and

(5) That he is ready and willing to perform his obligations under the contract.

Escaping Land Contracts – defences to specific performance

3.1 In addition to relying on the terms of the contract, there are a number of other defences available to a purchaser seeking to resist a vendor's claim for specific performance:

(1) Misrepresentation by the vendor, which has induced the developer purchaser to enter into the contract and which justifies the rescission of the contract;

(2) If the contract is somehow tainted with fraud – whether this is a fraud on the purchaser or on the public at large;

[1] *Heron Garage Properties Ltd v. Moss* [1974] 1 W.L.R. 148
[2] *Hawksley v. Outram* [1892] 3 Ch. 359

(3) If, in the absence of fraud, there has been some trickiness or unfairness, such that the vendor has not come to the court "with clean hands". This may arise if the vendor has failed to disclose a material fact during the sale which he ought to have disclosed;

(4) There has been a fundamental mistake in the formation of the contract, common to both parties;

(5) There has been a unilateral mistake on the part of the purchaser, where the grant of specific performance would be "highly unreasonable"[3] or cause the defendant "a hardship amounting to injustice"[4];

(6) The written contract does not evidence the true agreement between the parties, i.e. there has been some mistake in recording the agreement reached between the parties;

(7) The contract contains a substantial misdescription of the property to be purchased.[5] This is not available as a defence where the misdescription is insignificant, such that the purchaser would be getting substantially what he bargained for, and where damages would be adequate compensation;

(8) The contract was wanting in mutuality – i.e. that the court could only grant specific performance at the suit of one of the parties. This is not an absolute bar to the remedy being granted,[6] but rather a factor which will be taken into account when the court is determining whether it would cause injustice or unfairness to the defendant to decree specific performance, having regard to all the facts and circumstances of the case, including the conduct of the parties;

(9) There has been some default by the claimant, i.e. that the claimant

(a) has not performed, or is not been ready and willing to perform the obligations required of him under the contract at that point in time (other than trivial ones);

[3] *Stewart v. Kennedy* (1890) 15 App.Cas 75, per Lord MacNaghten at 105
[4] *Tamplin v. James* (1880) 15 Ch.D 215, per James L.J at 221
[5] For example, where the vendor has purported to sell the property with absolute title, but only has possessory title in fact (*Re Brine and Davies' Contract* [1935] Ch 388) or where it transpire there is no, or only a limited, right of access to the property (*Denne v. Light* (1857) 8 De G.M. & G. 774 – no right of cartway to agricultural land)
[6] See, for example, *Joseph v. National Magazine Co Ltd* [1959] Ch 14

(b) is not ready and willing to perform all obligations required to be performed thereafter; or

(c) has acted in a way that contravenes an essential term of the contract.

(10) The vendor has failed to perform his obligations under the contract within the time specified in the contract for so doing, where an essential time limit has been missed (e.g. the date for completion has passed), where time is of the essence, or within a reasonable time, where it is not. Alternatively, that there has been such a delay by the vendor in performing his obligations under the contract, as to evidence an abandonment of the contract on his part.

(11) The vendor does not have good title to the property, or is founded on a doubtful question of fact, or if there are undisclosed encumbrances on the title;

(12) The vendor is relying on an illegality to enforce the contract – for example, if the contract has been entered into by a company beyond its powers, or if there has been a breach of a previous agreement;

(13) Granting specific performance would inflict great hardship on the defendant, which hardship existed at the date the contract was entered into, and is not a supervening hardship.

3.2 Whether any of these defences can be relied upon will depend on the facts and circumstances prevailing in a given case.

Contractual Conditions

4.1 A purchase is often made conditional upon a grant of planning permission not being subject to "onerous conditions" or "unacceptable conditions". This is also usually accompanied by a contractual obligation on the part of the purchaser/developer to use "reasonable" or "best endeavours" to obtain such a planning permission. The two may have different consequences in respect of whether or not the contract can be enforced, and are discussed in turn.

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"Onerous conditions" or "unacceptable conditions"

4.2 The vast majority of contracts which provide that a "Satisfactory Planning Condition" is one free from "Onerous' or "Unacceptable" conditions will attempt to define what falls within those categories of conditions. Whether or not a planning permission is satisfactory will therefore depend in such cases on whether the planning conditions falls within those categories as a matter of fact.

4.3 However, this may not be the end of the story. There may be a number of difficulties encountered when construing the attempted definitions given in relation to such terms. For example, if the obligation sought to be relied upon as 'onerous' is not one which originated in the conditions attached to the planning permission but rather in a section 106 agreement or in a unilateral undertaking, then this raises an issue as to how the agreement should properly be interpreted. An example of this is provided in the Case Study below.

"Reasonable endeavours" or "best endeavours"

4.4 It is important to appreciate that in a case where a clause requires a planning permission to have been obtained by a certain longstop date, a failure to do so will usually enable the other party to terminate the contract. This is the case even if delay has been occasioned by a failure to comply with a contractual obligation to use "reasonable" or "best endeavours" to obtain the same. In such a case, the usual analysis is that the contract will have come to end but there is an independent cause of action in damages for breach of the obligation to use "reasonable" or "best endeavours" to obtain the planning permission.

<u>Resolving Disputes</u>

5.1 Aside from a claim for specific performance, there are other means which may be employed sometimes be pursued by a vendor in an attempt to require the developer/purchaser to complete on the sale.

5.2 The first is a claim for a declaration, asking the Court, for example, to order that, on a proper construction of the contract, there are no "onerous conditions". This is likely to be of particular use where the purchaser has purported to terminate the contract because a certain event has or has not occurred, and the vendor seeks to prevent him from doing so,

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on the basis that the contractual entitlement to terminate has not arisen. The Case Study below provides an example of such a dispute.

5.3 Certain disputes are also susceptible to the procedure of a 'vendor and purchaser summons', which is little known about and therefore rarely used. This is a summary procedure designed to enable either party, vendor or purchaser, to obtain a decision on a particular point or issue arising between contract and conveyance. The law is set down in section 49 of the Law of Property Act 1925 which makes it available:-

> *"In respect of any requisition or any claim for compensation or any question arising out of connected with the contract (not being a question affecting the existence of validity of the contract)"*

The procedure is available to decide a wide variety of disputes, such as whether a party has validly withdrawn from a contract and the validity of a completion notice. The Court can determine whether or not a contract has been validity rescinded under the terms of the contract[7] or whether by reason of hardship or on some other ground the contract is one for which specific performance would not be given against an unwilling purchaser[8]. However, this procedure cannot be used in relation to 'difficult' questions of construction and it is not appropriate where there are strong disputes of fact or complicated issues are involved. Such applications are heard by a Master of the Chancery Division and the court may make such order as may appear just.

5.4 Thirdly, a vendor or purchaser may make an application for summary judgment, under Part 24 of the CPR, in order to have a case determined without the need for a full – and costly – trial. In order to succeed, it will have to be established that the claim – or the defence – "has no real prospect of success" and that "there is no other compelling reason why the case or issue should be disposed of at trial". Alternatively, sometimes an application for the determination of a preliminary issue is an alternative way of bringing about an early form of resolution to the dispute. An example of this is provided in the Case Study below.

[7] *Re Jackson and Woodburn's Contract* (1887) 37 ChD 44
[8] *Re Davis v Carey* (1888) 40 ChD 601

5.5 A fourth (although costlier, and less attractive) option, is an application for injunction to either restrain a party from doing something – for example, purporting to terminate the contract, or selling the land to another purchaser – or to mandate them to perform an obligation. Such an application is unlikely to be successful where the obligation sought to be compelled is to complete on the contract for sale, but may be of use where one party is refusing to perform a time-sensitive contractual obligation and where there is a dispute between the parties as to the validity or continuation of the contract, which is only likely to be resolved in time.

5.6 Finally, the parties may consider that there is merit in pursuing alternative forms of dispute resolution, whether as a means of determinatively resolving the dispute, or as a precursor to litigation. In cases involving a dispute on technical factual issues or matters requiring some industry expertise, this may well prove a more attractive option than litigation in the Chancery Division. A procedure permitting the parties to have the dispute determined by arbitration or expert determination might be written into the parties' contract. Alternatively, there is nothing to stop them from drawing up an agreement to this effect after their dispute has arisen in order to enable the dispute to be determined by these means. A further alternative would be for the parties to seek to mediate their dispute. However, in more legalistic disputes concerning construction issues under the terms of the parties' contract, both parties will usually feel safer entrusting their dispute to a Judge of the Chancery Division.

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A Case Study – A claim for a declaration that Planning Permission granted without Unacceptable Planning Conditions

The Facts

6.1 The Vendor and the Developer enter into an Agreement to sell a Property, subject to the terms of the Agreement. The Developer intends to demolish the existing dwelling and to construct a block of residential flats, with a small element of commercial/business use. The terms of the Agreement include a requirement on the part of the Developer to submit a planning application to the Local Planning Authority ("the LPA") within a certain timescale and to use reasonable endeavours to secure that the LPA grant the Planning Permission free from Unacceptable Planning Conditions as soon as possible. Unacceptable Planning Conditions are specified in the Agreement to include ones which:-

(a) directly or indirectly require the provision of more than 20,000 square feet of affordable housing;

(b) prevent the Developer from commencing the development within 3 months of Planning Permission being granted;

(c) prevent or restrict the development without the agreement or co-operation of an independent third party, other than the LPA, which cannot be obtained within a reasonable period and at a cost acceptable to the Developer;

(d) will or are likely to reduce materially the profitability of the development.

6.2 The Agreement also provides that if the LPA refuse planning permission, the Developer is to appeal that decision, and to use all reasonable endeavours to secure that on the Planning Appeal, the Secretary of State grants the Planning Permission free from Unacceptable Planning Conditions as soon as possible. If Planning Permission is granted, then it is to be deemed to be free from Unacceptable Planning Conditions unless within 30 working days after receiving a copy of the decision, the Developer gives written notice to the Vendor specifying which of the conditions the Developer considers to be Unacceptable Planning Conditions. The Developer may at the same time or within 2 working days of the date of that notice, make a written request to the Vendor to terminate the Agreement.

6.3 A planning application is submitted and allowed on Appeal, subject to a Unilateral Undertaking provided by the Developer. The effect of that Unilateral Undertaking, read with the application, is to require affordable housing provision in excess of 30,000 square feet. The Appeal Decision also imposes several conditions which require that prior to the commencement of the development there should be detailed site investigations, the submission of drainage details for the consent of the Environment Agency, a programme of archaeological works and provision made for site operatives etc.

6.4 The Developer then purports to give notice to the Vendor that the Planning Permission is subject to Unacceptable Planning Conditions, and to terminate the Agreement. Is the Developer entitled to do so?

Legal Arguments

7.1 Under the terms of the Agreement, the Developer will only need to establish that there is one "Unacceptable Planning Condition" in order to escape from the contract. This immediately gives him a starting advantage.

7.2 Taking each of the attempted definitions of "Unacceptable Planning Conditions" in turn:-

(a) The Developer says that he would now be required to provide more than 20,000 square feet of affordable housing. The Vendor argues that the Developer cannot rely upon this because the requirement flows from the Unilateral Undertaking rather than the conditions attached to the Planning Permission.

(b) The Developer says that the conditions requiring detailed site investigations, the submission of drainage details, a programme of archaeological works and provision for site operatives etc. prevents the Developer from commencing the development within 3 months of Planning Permission being granted. The Vendor says that all of these conditions are standard and would have been reasonably anticipated as standard conditions likely to be imposed upon the grant of a planning permission such that they should not be treated as falling within the definition of "Unacceptable Planning Conditions".

(c) The Developer says that the condition requiring land drainage consent from the Environment Agency means that there is a restriction upon the development without the agreement or co-operation of an independent third party which cannot be

obtained within a reasonable period and at a cost acceptable to the Developer. The Vendor says that such a consent can be obtained within a reasonable period and at a reasonable cost.

(d) The Developer says that some of the conditions imposed will or are likely to reduce materially the profitability of the development. The Vendor says that this is not the case and that they are standard conditions which the Developer could reasonably have anticipated would be likely to be imposed, such that they should not be treated as "Unacceptable Planning Conditions".

7.3 A dispute of this nature is likely to take the form of proceedings for a declaration by the Developer or Vendor on the question of whether the Planning Permission has been granted free of "Unacceptable Planning Conditions". In addition, the Vendor would also be likely to try and introduce an alternative claim for damages alleging that the Developer acted in breach of his obligation to use "reasonable endeavours" to obtain a Planning Permission free of "Unacceptable Planning Conditions".

7.4 The only way of shortening the potentially protracted dispute occasioned by these facts would be to hold a preliminary issue on the question of whether a restriction imposed by the Unilateral Undertaking was capable of treatment as an "Unacceptable Planning Condition". If that was the case, then the Developer could show that there was one clear "Unacceptable Planning Condition" and that would avoid the parties having to go to trial on the other issues. If the preliminary issue did result in the end of the dispute, then the parties would need to anticipate a dispute necessitating the provision of detailed witness statements explaining the progress of the Planning Application and the exchange of various experts reports setting out expert evidence on such matters as the likely cost and burden involved of fulfilling the planning conditions in issue.

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