CONDITIONAL CONTRACTS AND LOCKOUT AGREEMENTS – MARCH 2017

By Richard Snape
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CONDITIONAL CONTRACTS

In Rentokil Initial 1927 Plc v Goodman Derrick LLP [2014] EWHC 2994 (Ch) relates to a claim in negligence by a seller of property, Rentokil, against its lawyers. Rentokil had agreed to sell property to Taylor Wimpey for £4.388m conditionally upon the grant of a satisfactory planning permission for residential development. A satisfactory planning permission was one that was free from “Unacceptable Planning Conditions”. Following the grant of planning permission on appeal (subject to conditions largely on terms the same as those negotiated by Taylor Wimpey with the local planning authority) Taylor Wimpey asserted that some of the planning conditions attached to its planning permission fell within the definition of “Unacceptable Planning Conditions” under the conditional sale agreement. Rentokil contested this, and brought about arbitration proceedings, but ultimately compromised those proceedings on terms that resulted in a revised sale to Taylor Wimpey at £2.5m. Rentokil brought an action in negligence against its lawyers, alleging that as a result of the definition of “Unacceptable Planning Conditions” Taylor Wimpey was able to argue that the planning conditions that were ultimately imposed were unacceptable and entitled to treat the contract as terminated.

Wide sweeper-up provisions.

A seller should try to resist the addition by the buyer to the list of "Unacceptable Planning Conditions" of a general sweeper up provision e.g.

“….or any other condition which in the opinion of the Buyer is unsatisfactory.”

If the buyer feels that conditions attached to a planning consent are onerous, but the seller disagrees, there may need to be a mechanism in the contract for breaking the deadlock. Such a mechanism could involve the service of notices and counter-notices by the parties, with a reference to a third party expert in the event of a dispute.

In the Rentokil case above, the sweeper-up condition was:

“...any other condition in the reasonable opinion of the reasonable developer in any other way restricting the carrying out of and/or the use or occupation of the whole or any part of the Development or requires the incurring of expenditure which would be likely to have a materially detrimental effect on the financial viability or the investment value of the Development.”

Absolute Discretion?

Can the buyer exercise an absolute discretion given by the contract?
The contract may be conditional upon a planning permission that is satisfactory “in the Buyer’s opinion”. This gives the buyer something which is closer to an option than a conditional sale agreement. Where drafting to achieve this, it might be preferable for the contract to say “at the Buyer’s absolute discretion” since, where giving the buyer the ability to reject a permission, an absolute discretion is probably preferable. The buyer would want to avoid any possible implication of terms requiring the buyer to act reasonably.

However, it may still be the case that the court analyses the exercise of the buyer’s discretion to check it was used for proper purposes. In Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No 2) [1993] 1 Lloyd’s Rep 397, a case concerning a charter party under which the owners had an unqualified discretion in determining whether any port to which the vessel was ordered was dangerous, Leggatt LJ said that:

"Where A and B. contract with each other to confer a discretion on A, that does not render B subject to A’s uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably."

Avoid Vague Concepts

Some drafting might appear to be a little too vague. In Century 2000 Enterprises Ltd v SFI Group Plc [2001] EWCA Civ 1986 the Court of Appeal had to interpret drafting which referred to:

“…any condition restriction or obligation whether in or to be imposed in a Planning Agreement or in a planning consent which is not acceptable to the Landlord acting as a reasonable property developer or would normally make the use of the Property economically unviable to a modern theme-type cafe-bar operator.”

Long-stop Dates

The contract will, of course, specify a date by which any condition is to be satisfied. Agreements linked to planning applications need a long-stop date (or an expiry date, or conditional date, or trigger date) – i.e. a point in time by which the relevant planning event has occurred, or, if not, the parties are released from their obligations.

Time of the Essence

Where the contract fixes a date for compliance with the condition (which the vast majority will) the court has no power to extend the stipulated date. The agreement should therefore provide a time limit within which the planning permission must be obtained which should be of sufficient length to allow the application to the local planning authority to succeed. Thereafter, the contract can provide for termination.
In Cohen v Teseo Properties Ltd [2014] EWHC 2442 (Ch), the purchaser (Teseo) had contracted to buy property in London conditionally upon the grant of a satisfactory planning permission for residential redevelopment. It had paid an “Initial Payment” of £50,000 at exchange of contracts, to be treated as a deposit. The contract provided for a “Long Stop Date” of 6 January 2014 by which time the condition of the contract was to be satisfied. However, the contract also provided for an “Extension of Time” allowing the long-stop date to be extended up to and including 9 June 2014. Clause 13.5 of the contract enabled the buyer, by written notice to the seller, to request an extension or extensions of not more than six months, subject to payment of further initial payments of £8333.33 for each month of extension. Although the buyer’s planning application was progressing, no notice requesting an extension of time was served before the Long Stop Date. When the seller enquired about the buyer’s position, the buyer’s solicitor purported to serve notice to extend the long-stop date. The seller declined to extend it, and asserted that the contract was to be regarded as terminated at the original long-stop date. Could the buyer serve notice requesting an extension of time after the original long-stop date? The High Court held that it could not.

Providing for Extensions

Where acquiring land conditionally upon planning (whether by option or conditional agreement) the buyer may need to cater for:

- a delayed determination, as in Cohen v Teseo Properties;

- a refusal of planning permission, followed by an appeal – to be determined after the long-stop date in the agreement;

- the calling-in of an application for determination by the Secretary of State;

- the possibility of judicial review challenges;

- actual judicial review challenges, which may not be finally disposed of until after the long-stop date in the agreement.

Long-stop extension provisions can operate to protect either the seller or the buyer, depending on the circumstances of the transaction. Does the buyer need to keep a good deal alive despite planning delays; does the seller need to keep a buyer on the hook at a good price?

Does the contract cater for third party challenges?

Time limits for challenging planning decisions by way of judicial review were changed as from 1 July 2013. The Civil Procedure (Amendment No. 4) Rules 2013 (SI 2013/1412) reduced the time limit for judicial review applications in planning matters from 3 months to 6 weeks.
Best practice is to provide in the contract that the agreement does not become unconditional until a period of at least six weeks has expired following the receipt of the written notification of the grant of planning permission.

In practice, it is usual to add on a further 7 to 14 days so as to provide time in which enquiries can be made as to whether any judicial review proceedings have been commenced. This is because the current rules do not require the application to be served upon the successful applicant for planning permission.

**Waiver**

A buyer may wish to have the right to waive a condition of its contract to buy. This may enable the buyer:

- to proceed with its purchase even if planning permission has not been, or cannot be obtained; or
- to dispense with the judicial review protection clause, and proceed to completion without delay.

If the buyer wishes to elect to waive a condition, this should expressly be provided for. If not expressly provided for, the buyer will only be able to waive the condition if it is for its exclusive benefit. Since the agreement is a commercial document giving benefits to both parties, (of which the condition about obtaining planning permission usually forms an integral part), this will often be difficult to establish. See *Heron Garage Ltd v Moss [1974] 1 WLR 148*, where the presence of a right for the seller to terminate the contract if planning was refused was influential in the court disallowing the buyer’s attempt to waive the condition.

Careful thought needs to be given to the implications of allowing the buyer a right of waiver. In *Walker v Kenley [2008] EWHC 370 (Ch)*, an additional consideration was payable by a buyer in relation to the construction of “residential flats”. The buyer was able to waive a condition of the acquisition agreement requiring residential planning permission, and implement an existing permission for holiday flats instead. Apartments whose use was restricted to holiday accommodation were not residential flats – hence, no additional consideration was payable.

**Will Community Infrastructure Levy impact upon development?**

More and more local authority areas are adopting Community Infrastructure Levy charging schedules to enable the levy to be imposed on new chargeable development carried out in the local authority area.

Where planning development, key issues to consider in relation to the Community Infrastructure Levy include:
Whether a Charging Schedule is in force in the local authority area in which the development is proposed, or whether a Charging Schedule is likely to come into effect in the future? The cost of the levy will need to be considered in relation to future land acquisitions.

How planning permissions obtained before a Charging Schedule is effective will be dealt with? These may have been granted subject to section 106 TCPA 1990 (Planning obligation) requirements. Such planning consents are immune from CIL.

How CIL will inter-relate with section 106 TCPA 1990 requirements? There should be no double-take: under regulation 123(2) of the CIL Regulations 2010, once a Charging Schedule comes into effect, a planning obligation may not constitute a reason for granting planning permission to the extent that it provides for the funding of a relevant infrastructure project (i.e. infrastructure which the local authority has published on its website [i.e. the “Regulation 123 list”] as intended to be, or which may be, wholly or partly funded by CIL, or if there is no such list, any infrastructure).

How much CIL will be payable on new development, what rates of levy are applicable, and how the liability is calculated?

At what point does a CIL liability arise, by when must it be paid, and will the liability affect successors in title? (Successors will know if there is an undischarged CIL liability because it will be a local land charge affecting the property).

What reliefs and exemptions apply?

The double impact of CIL and s106 agreements

Section 106 agreements will continue to sit alongside the obligation to fund infrastructure by way of CIL to enable local authorities to extract contributions to site-specific or site-related infrastructure requirements.

The CIL Regulations 2010 seek to scale back the use of section 106 obligations generally by enshrining in statute the original policy tests (set out in ODPM Circular 05/2005) - see regulation 122 of the CIL Regulations. Under regulation 122(2), a planning obligation may only constitute a reason for granting planning permission for development if the obligation is:

(a) necessary to make the development acceptable in planning terms;
(b) directly related to the development; and
(c) fairly and reasonably related in scale and kind to the development.
It should be noted that, under regulation 123(3) of the CIL Regulations 2010, once a charging schedule comes into effect, or in any event as from 6 April 2015, the local planning authority is not able to seek more than five individual planning obligation contributions towards a “relevant infrastructure” project (as above). This is a strong discouragement/prohibition on the use of section 106 agreements for infrastructure. The aim, therefore, is for section 106 agreements to continue in the long term for provision that is not capable of being funded by CIL, such as affordable housing.

**Redlawn Land Ltd v Cowley 2010 EWHC 766 (Ch)**

An option agreement did not specify a valuation date in the event of a dispute. It was decided that the relevant date was the day on which the independent expert decided on the valuation and not on the date of appointment of the expert.

**HHR Pascal v W2005 Puppet II [2009] EWHC 2771**

Notice to complete depended on a series of stages. One of the stages, i.e. the buyer not being given time to inspect the property: a hotel which was undergoing refurbishment, resulted in the buyer being entitled to rescind and to a return of its deposit of 25,000,000 Euros. This was in spite of the fact that there were no defects in the property. Where legal completion is dependent on prior completion of works or other conditions, it was essential that the terms of the contract were followed to the letter. Moreover the contract involved the purchase of a portfolio of hotels and a problem with one of them brought the whole contract to an end. In such circumstances, it may be desirable to agree that an issue with one property does not affect the others.

**Stoll v Wacks Caller [2009] EWHC 2299**

The contract was conditional on obtaining planning permission. Planning permission was granted; completion occurred but then planning permission was lost on judicial review. The solicitor was held to be negligent in not suggesting to the client that the possibility of a successful appeal should be dealt with.

In **Extra MSA Services Cobham v Accor UK [2011] EWHC 775 (Ch)** a contract to build an hotel was conditional on the landlord obtaining consents before a certain date. The landlord failed to do this. The court held that if the landlord was in breach it would not be able to rely on such a breach to terminate the contract.

**Good Faith**

In **Berkeley Group v Pullen 2007 EWHC 1330** there was provision in the overage clause that the parties would act in good faith. B would maximise potential value by procuring planning permission and when P disposed of the land B would obtain further payment. B acted to obtain planning permission but became aware that P wished to sell the property to a third party. B successfully obtained an injunction to prevent this on the basis of the good faith clause. Likewise, in **Ross River**
and Blue River v Cambridge City Football Club [2007] EWHC 2115 presence of good faith enabled an overage buyout agreement to be recinded because of lack of openness of the developer.

See also Sainsburys Plc v Bristol Rovers Football Club [2016] EWCA Civ 160. In this case a requirement of good faith did not mean that Sainsburys had to appeal conditions as to planning permission and therefore could avoid a contract which was subject to satisfactory planning permission. In the present case Sainsburys had contracted to buy the Memorial Ground, home of Bristol Rovers Football Club, from the latter. They were then going to lease back the site to Bristol Rovers for £1 whilst the latter built a new stadium that the University of West of England. The purchase price was £30m.

The contract was subject to satisfactory planning permission for a supermarket. Planning permission was granted but it placed restrictions on delivery which the contract specifically stated would allow Sainsburys to terminate it. Sainsburys were seeking judicial review but applied out of time as they had decided that they did not want the site after all.

Bristol Rovers argued that a good faith provision in the contract required them to pursue an appeal. The courts held otherwise especially as legal opinion was that there would be less than 60% chance of success.

The Court of Appeal have now confirmed this decision. A requirement to act in good faith will not override clear provisions of the contract.
LOCK OUT AGREEMENTS

In *Walford v Miles* [1992] 2 AC 128, the House of Lords ruled that a lock out agreement without a longstop date was void for uncertainty. In *Tye v House* [1997] 2 EGLR 171, the Court held that where a lock out agreement was breached and property sold to a third party during its duration, as there is no duty to sell to the beneficiary at the end of the Agreement, damages were limited to administration costs. Likewise in *Dandara Holdings v Cooperative Retail* [2004] EWHC 1476, there were no damages available for breach of a lock out agreements although the Court did recognise that in certain circumstances damages for lost opportunity may be available.
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