

No get out for non-performance

Most development agreements will contain one or more long stop dates. Typically, if certain steps have not taken place by a given date, one or more parties to the agreement will be able to rescind, and walk away from the agreement. Where the rescission clause provides that this is 'without prejudice to any claim for any antecedent breach of this agreement', you could be forgiven for thinking that this contemplates a party being able to rescind, even where they may be in breach of an obligation of the agreement. However, this is not so.

The recent case of Extra MSA Services Cobham Limited and another v Accor UK & others (2011) concerned an agreement for a hotel development. The developer was obliged to use reasonable endeavours to obtain a raft of consents and associated agreements. Obtaining the consents and agreements was a condition precedent. If the condition was not satisfied by a long stop date, clause 4.2 provided that either party could rescind and the agreement would end 'and neither party shall have any further claim against the other save in respect of any antecedent breach of obligation'.

The developer served notice to rescind. The hotel operator argued that the notice was invalid, as the developer had not used reasonable endeavours to obtain the various consents. This argument is based on a legal principle that a document should be construed, so far as possible, so as not to permit a party to take advantage of its own wrong.

The judge considered the case law in this area. It is established that the principle will not apply where a document makes it clear that the parties intended rescission to be available, even where the rescinding party is in breach. The question is, did the wording in clause 4.2 to preserve claims for prior breach, demonstrate sufficient intention to disapply the principle? The court did not think so. The preservation of rights could have related to different obligations, or

obligations owed to the party who was rescinding.

The judge in Extra MSA quoted from the House of Lords' judgment in Cheall v APEX (1983), in which Lord Diplock said 'except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches...as bringing the contract to an end'. So how 'express' does a contract need to be? The Court of Appeal has gone some way to clarifying this in the recent judgment in BDW Trading Limited v J M Rowe (Investments) Limited (2011). In this case, both parties to a contract had certain obligations which had to be fulfilled by a long stop date. Either party was entitled to rescind by serving written notice after the long stop date if contractual conditions were not met. The right to rescind was subject to a qualification which prohibited a party from rescinding if they were in breach of their obligations under clause 6.2 in the contract. The buyer sought to rescind. The seller claimed that the buyer was in breach of other terms in the contract (not just 6.2), and that regardless of the wording in the rescission clause, the principle that a party cannot rely on its own breach applied. The Court of Appeal did not agree. The fact that a specific clause had been referred to in the rescission clause meant that these were the only grounds on which a party could be prohibited from rescinding.

If parties genuinely wish a rescission clause to operate independently of any actual or alleged breaches of contract, this should be spelled out clearly. This may provoke other parties to the contract to consider whether any specific breaches should be carved out, to safeguard core obligations. If you would like advice on the type of wording to be used, please contact us.



Matthew Cox
Partner

T: +44 (0)1892 506 335
E: matthew.cox@crippslaw.com