

A road less travelled

The scenario where a developer acquires land which is to be serviced by another party at a date in the future and in accordance with a certain specification, is not uncommon. What happens where the party obliged to deliver this infrastructure does not do so in accordance with that specification can depend on what remedies (if any) the parties have provided for in their agreement.

The recent case of Bovis vs Persimmon^[1] serves as a reminder of the importance of ensuring all parties understand the markers for compliance with their obligations. The case also illustrates a contractual solution that provides for a straightforward commercial remedy in preference to damages where one party does not fulfil its obligations.

The facts

Bovis purchased land from Persimmon for development under an agreement made in December 2007. Part of that sale agreement included an obligation on Persimmon to develop a bypass to service the Bovis land. The agreement contained a 'put' option enabling Bovis to require Persimmon to repurchase the land from them at the price they paid, if the bypass had not been built and opened to the public by 31 October 2009. It was a condition of the planning permission for the Bovis land that their development could not be occupied until the road was built.

Importantly, reference to the bypass in the sale agreement between the parties was defined by reference to the Section 106 Agreement existing for the development, which in turn referred to the bypass as set out in the planning permission for the road. This specified the roadway was to be part single carriageway and part dual carriageway.

On 30 October 2009 Persimmon granted permission for public access on to a single lane of the bypass in each direction. Persimmon maintained that it had complied with the terms of the agreement as the road was being used by the public and the council that had imposed the planning condition requiring the bypass were happy with this position. However, Bovis contended that, as one lane of the bypass was still coned off in either direction and the remaining lane was subject to speed restrictions, Persimmon had not complied with its

obligation under the sale agreement. In addition many of the lights on the road were not functioning on 31 October 2009.

Bovis sought to exercise the option to require Persimmon to buy back the land on 2 November 2009 on the basis that the bypass was not open to the public on 31 October. Persimmon appealed the initial decision to require specific performance under the sale agreement, requiring them to buy back the land.

When is a road not a road?

The Appeal Court allowed Bovis' claim for specific performance of the put option and required Persimmon to re-acquire the land. The fact that the public had been given permission to use the road was not material in this case, as the agreement has specifically defined the bypass by reference to the Section 106 Agreement and that bypass had not been opened to the public by the deadline date.

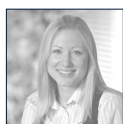
The enforceability of the option turned on the specific definition used in the sale agreement and the Court's interpretation of the parties intentions when drafting it. What was important for the Court was that the agreement indicated the intention of the parties was to deliberately refer to the 'Bypass' in the Section 106 Agreement. The deadline of 31 October was not (as Persimmon had argued) just the date on which the planning authority were satisfied that the condition relating to the planning permission had been discharged. The Section 106 Agreement had defined the bypass as including "ancillary engineering operations" and comprising part single carriageway and part dual carriageway and what had been constructed and opened may have satisfied the planning condition but did not fulfil these terms. Bovis' action to require Persimmon to buy the land back was therefore allowed.

A well timed provision

The Judge referred to the acknowledgement by the parties that what lay behind the dispute was, in part, the dramatic fall in the property market between the date of the sale agreement and the date on which Bovis served notice exercising the option. The outcome was a costly one for Persimmon. The land was ordered to be re-transferred in line with the total purchase price of £9,062,500.

The inclusion of the put option allowed Bovis to bring a relatively straightforward action for specific performance, to require Persimmon to remedy their breach by complying with their contractual obligation to buy back. Had the agreement not included this provision, Bovis may still have brought an action for damages for breach of contract and sought to quantify their loss caused by the road not being completed and opened, but direct enforcement of Persimmon's obligation to buy back must have been a simpler and preferable action to bring. The benefit of having such a provision in the event of non compliance by a party is clearly apparent, although inevitably the likelihood of agreeing one will be dictated by the bargaining strength of parties.

[1] [2010] EWCA Civ 1252



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