Spotlight on Development

June 2016

Editorial

Welcome to the summer edition of our newsletter, focussing on all things affecting the world of property development. We are publishing this edition rather later in the month than would be the case normally; we thought the European Union referendum vote might be worthy of some comment!

Well what can we say? The "remainers" ran "project fear" as their main strategy, which succeeded in unexpected ways as "project panic" seems to have set in for the short term at least following the vote to leave. Even though the economy was showing signs of slowdown in any event, we heard many times that a particular deal would happen "when the Referendum is over". The unspoken assumption was that the United Kingdom would remain part of the European Union.

May we expect all those transactions to be left in the pending tray or abandoned altogether? Perhaps it is time to remember the words of President Roosevelt in his inauguration speech as President of the United States of America in 1933: "*the only thing we have to fear is...fear itself…*".

At the more mundane level, we have this quarter some short pieces on the JCT, easements, the proper execution of documents and bid rigging.

We appreciate your feedback. Comments on the newsletter may be addressed to clive.lovatt@farrer.co.uk.

Is your documentation valid?

Development deals are often exchanged or completed under extreme time pressure. Documentation may even be dealt with by email, with hard copies to follow. But in the urgency to do the deal, can you be sure that the other party's documentation was properly executed? And what are the consequences if not?

It is relatively unusual for the execution of a document to be challenged, but two recent cases serve as a warning not to ignore this issue.

The first is the case of *Re Armstrong Brands Ltd (in Administration) [2015] EWHC 3303 (Ch.).* In June 2008 the company arranged funding, to be secured by a debenture. At some point thereafter, Keiron Armstrong, the sole director of the company (together with the company secretary) signed the debenture. However, it was not dated and completed until September 2008 – by which time Mr Armstrong was no longer a director.

So had it been properly executed? In 2014 the funder appointed administrators, who sought a declaration as to the validity of their appointment - which turned upon the answer to this question. The answer was not clear cut. However, the High Court held there was enough supporting evidence to decide (on a balance of probabilities) that the debenture had been signed when Mr Armstrong was still a director. That meant it had been validly executed, even though it had been dated and completed after he left office. It was, therefore, enforceable by the funder.

The same applies on sales – particularly residential sales to joint purchasers. In *Marlbray Ltd v Laditi and another [2016] EWCA Civ 476*, Dr Laditi had signed a contract (purportedly on behalf of himself and his wife) to buy a hotel room unit in an aparthotel development. He subsequently claimed that the sale contract was unenforceable. One of his arguments was that his wife had not authorised him to sign on her behalf. The Court of Appeal accepted that argument.

However, the contract contained a provision that the named purchasers were jointly and severally liable. In light of that clause, the Court held that the contract was in any event enforceable against Dr Laditi, albeit not against his wife.

These cases are a timely reminder to check the validity of execution prior to exchange or completion.

Andrew Wade

Bid rigging

Whilst trawling through www.gov.uk on an unrelated point, we came across a recently published letter from the Competition and Markets Authority addressed to "procurement professionals", warning as to the risk of bid rigging. The letter is not addressed to the construction industry in particular, but warns all sectors of the dangers of bid rotation (where companies take it in turns to have the most attractive bid), cover pricing (inflating a bid to help another, lower priced bid) and bid suppression (a company not bidding so as to lessen the competition for another company).

Historically, cartel issues have raised themselves in the construction industry, particularly in relation to the supply of specialist services or materials. However, in the current age with (on the one hand) very competitive tendering and (on the other hand) two stage tendering and value engineering, we wonder as to the extent this is a real risk in the construction industry. Are we being naïve? We would be happy to hear from our readers on this issue.

Clive Lovatt

Notices to prevent easements

Landowners often put up notices advising members of the public that the land that they are crossing is private and not a public highway. This is good practice in order to protect their position. However, in many cases the signs are ignored and the public continue using the land. Does that mean that the public become entitled to use it by way of prescription?

This was the question that the Court of Appeal had to resolve in the recent case of Winterburn v Bennett. Next to the car park of a club house was a fish and chip shop, whose suppliers and customers regularly used the car park, despite a notice which clearly stated that it was a private car park and for the use of the club patrons only. The owners of the fish and chip shop claimed that they were entitled to an easement for parking by prescription.

The Court had to consider whether this use was "as of right". It was accepted that the parking on the land was done openly and without permission from the Club. However, the claimant would have to show that the use was not contentious. The Court held that, since the landowner had made the position clear, there was no obligation on it to take further steps. The Court rejected the suggestion that even though the landowner had erected the requisite notices, it should have to confront the wrongdoers. There was no reason why those who chose to ignore such notices should be entitled to obtain legal rights over the land. What a landowner must ensure is that the signs are sufficiently clear and that if they are vandalised or removed they should be replaced.

Robin Holmes

JCT 2016

The JCT is republishing its suite of contracts. Perhaps surprisingly, the first document to have been made available in its 2016 guise is the Minor Works contract. We understand that the remainder of the contracts will be published over a period of several months.

We have reviewed a tracked change version of the Minor Works form. Some changes were to be expected, such as the addition of references to the "Principal Designer" and deletion of references to the "CDM Co-ordinator". In addition, there have been other changes, including substantial ones to the wording of Section 4 of the contract, concerning payment. Notwithstanding the large amount of red ink, the position of the employer and the contractor seem largely unchanged however.

The grapevine had suggested that the JCT had grasped the thorny issue of insurance where works are being carried out in an existing property. (We wrote about this at more length in our January 2015 edition of this newsletter). Certainly the new edition of the JCT sets out in clear terms the respective rights and obligations of the employer and the contractor, but there remains the underlying issue of how to take out and maintain adequate insurance in a multi-tenanted building where the employer has a legal interest in part of the structure only; inevitably so, dependent as that issue so often is on parties other than those to the contract, the overall landlord and his insurers in particular.

Clive Lovatt

If you require further information on anything covered in this briefing please contact Clive Lovatt (clive.lovatt@farrer.co.uk) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the Property page on our website.