Spotlight on Development

March 2016

Editorial

Welcome to the March edition of the Farrer & Co Commercial Property department newsletter, reviewing matters affecting the world of property development.

This edition of our newsletter has an environmental flavour, with a look at flood insurance. We also examine waste and planning enforcement and the mitigation of biodiversity impacts. Finally, we have a timely reminder from the Supreme Court that they are not in business to remedy inadequately drafted contracts and that the parties to a contract should address the detail of the deal being made between them.

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

Don't expect the courts to remedy omissions

What if material wording is omitted from an agreement – and that wording would probably have been agreed by the parties (had they considered it) as fair? But the agreement is perfectly operable without the wording?

If the wording later operates to one party's disadvantage, it may fall to the courts to resolve the issue.

It is long-established law that the courts will imply additional wording where this is necessary. This may be to give business efficacy to a contract – or the wording may be so obvious that it went without saying that the parties must have intended it to be included. Historically, it was very difficult to persuade the courts to imply such wording, but the judicial approach appeared to have softened in recent years.

This was the background to the recent case of ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*** [2015] UKSC 72. M&S exercised lease breaks under four identical leases. It was a condition of the breaks that there be no arrears, so M&S paid the full quarter's rent and other outgoings that fell due shortly before the break dates. However, it then failed to recover the proportion of the payments it had made that related to the period falling after the break dates - over £1 million.

The Supreme Court accepted that (if they had considered the point during lease negotiations) the parties may well have included wording that entitled M&S to recover the relevant monies. However, it stated that there was nothing in the wording of the leases to allow such a provision to be implied, and there was nothing in statute to assist.

Moreover, the lease was a very full and carefully considered contract and did not require additional words to be implied in order to work. It may be that it operated to the detriment of one of the parties – but they were both commercial parties who had been professionally advised.

So the moral is – if you miss something out of a document, don't expect the courts to bail you out, however unfair the result may seem.

Andrew Wade, Consultant

Mitigation of biodiversity impacts

It has long been established that mitigation measures designed as part of a project can be taken into account at the screening stage of environmental impact assessment ("EIA"), under the EIA Directive and for the purposes of appropriate assessment under the Habitats Directive depending on the detail and certainty of whether they can be delivered. Indeed, avoiding the costs and delay of a full environmental assessment provides no small incentive to developers to design in features that avoid, reduce and mitigate any negative effects right from the start.

Indeed, paragraph 118 of the NPPF embeds this "mitigation hierarchy", into decision making, requiring that planning permission be refused if significant harm to biodiversity cannot be avoided, adequately mitigated or as a last resort, compensated for. Failure to apply the mitigation hierarchy appropriately could render a decision vulnerable to challenge: all the more so where the procedural requirements of one or other of the Directives are engaged. In practice, distinguishing between these measures is not always easy, but the consequences of not addressing the issue clearly can be far-reaching.

Increased focus is likely to turn on this distinction following the European case last year, of ***Briels,*** in the context of appropriate assessment, and separately as a result of changes to the EIA Directive yet to take effect.

Under the Habitats Directive, if an appropriate assessment finds that an adverse effect on the integrity of a European Site is likely, the project cannot proceed, subject to the provision, in certain restricted circumstances, of compensatory measures. In ***Briels***, the Minister sought to recreate new molinia meadow within a European Site, in place of the meadow which would be lost to a motorway widening scheme. Here, the CJEU cautioned against dressing up compensatory measures as mitigation to circumvent the need for an appropriate assessment. It held that the new habitat was intended to "compensate after the fact" and did not guarantee that the integrity of the site would not be adversely affected. It is important, said the Court, to identify precisely the damage to the site, so that any compensatory measures can be properly tested against the prescribed conditions. It gave useful guidance on the characteristics of each, to which reference should be made in cases of uncertainty.

With EIA, a project can still proceed even if there is a negative impact, and there is no obligation to compensate for any harm identified. Member states have until May 2017 to implement the latest amendments to the EIA Directive which amongst other changes targeted at biodiversity, requires them to ensure that mitigation, prevention, reduction and offsetting measures referred to in the Environmental Statement are actually implemented. In practical terms this means that planning conditions and obligations will be scrutinised, with pressure on Councils to enforce in the event of a breach.

Developers are advised to identify clearly the nature of any measures offered, to reduce the risk of challenge to a consent (usually obtained at great cost) where the mitigation hierarchy has been misapplied.

Jo Gliddon, Associate

Flood Re

Storms Desmond and Eva have once again brought flooding to the headlines. Even before December's devastation, however, the increasing risk of flooding had left an estimated 350,000 UK households without affordable flood insurance. The Flood Reinsurance Scheme, 'Flood Re', seeks to relieve this problem by giving insurance companies financial backing. It will be introduced in April following a Memorandum of Understanding agreed between the government and the Association of British Insurers, and will allow commercial insurers to purchase subsidised reinsurance against flood risk.

The problem, however, is that not all land will be covered by this not-for-profit scheme. Commercial property, residential property built since 1 January 2009, mixed-use property, purpose built blocks of flats, buy-to-let properties where the landlord arranges the buildings insurance and most houses that have been converted into flats will not be covered. Owners and prospective buyers of these types of property that fall within flood-prone areas will be left to seek insurance subject to the usual market forces.

The scheme will be funded by insurance companies paying fixed premiums to the scheme based on the properties' council tax bands, policy excesses and an £180m levy per year. The aim is for the insurers to pass on the benefits of the low premiums and excesses to their customers. However, as the insurers will remain responsible for the pricing of policies, whether this will be the case remains to be seen.

For all its shortcomings, the scheme is at least evidence of the government taking action on the issue of flooding. The recently announced National Flood Resilience Review, to be chaired by Oliver Letwin MP and published this summer, will assess how the country currently stands up to flooding and what can be done to better protect it against the increasingly severe weather. Flood Re is set to operate for only 25 years by which time it is hoped that more effective flood risk management will be in place.

Claudia Levine, Solicitor

Waste and Planning Enforcement

A recent High Court decision has illustrated the importance of clarity, and natural language rather than legal jargon, in a planning enforcement notice, especially in view of the criminal sanctions for non-compliance with such a notice. In ***Collins v Secretary of State for Communities and Local Government*** the offending notice was flawed because it depended on the recipient having a technical understanding of that very complex legal term "waste" in order for him to understand the steps required of him to comply with it.

If you require further information on anything covered in this briefing

Mr Collins wanted to harvest timber from woodland he owned and transport it from the site, an operation which did not require planning permission. However, he imported rubble onto the site to create the foundations of an access road to enable the timber to be removed, prompting Hampshire County Council to take enforcement action, in respect of the alleged change of use from woodland to the "importation and disposal of waste". Disposing of waste is a material change of use (section 55 of the Town and Country Planning Act 1990).

The definition of “waste” is the subject of a substantial and complex body of law, stemming from the Waste Framework Directive. While the owner accepted that the rubble brought onto the land may have been waste he disputed that he had disposed of it. A disposal, under Article 3(19) of the Directive, means any operation which is not recovery, even where that operation has as a secondary consequence the reclamation of substances or energy, and includes the deposit into or onto land. On that basis the introduction of the rubble pending its incorporation into the road, was a disposal, regardless of the owner’s ultimate intention.

However, the Court quashed the notice because there had been a failure to distinguish between tipping waste as landfill, and depositing it temporarily before using it all with the result that it would no longer be waste. The Council should have considered whether it was expedient to take enforcement action against the importing and depositing waste pending reuse, and if so, then this should have been specified in the notice as the activity that breached planning control. Moreover, as most people without expert legal knowledge would consider “disposal” to mean “get rid of”, the requirements of the enforcement notice were insufficiently clear to enable Mr Collins to know what he had to do to comply with it.

Jo Gliddon, Associate

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