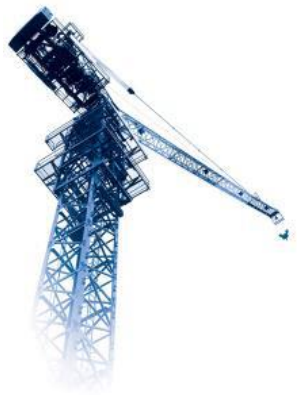
Spotlight on Development December 2017



It seems little time has passed since I wrote that the then current edition of this newsletter was being sent nice and early to avoid the Christmas rush. However, another year has passed and I find myself writing the same words by and large: the winter edition of our newsletter is here, before the sherry and mince pies take hold. Virgil wrote that time passes irrevocably and so it does, but at times it seems to be galloping along as well.

The order of business for this quarter includes articles by Andrew Wade on the subjects of overage and rights of light, commentary by Jonathan Came on the decision in *Adam Architecture Limited v Halsbury Homes Limited* and a review by Jay Sattin of air quality in the context of the grant of planning permission.

It remains only for me to wish our readers a happy Christmas and a prosperous 2018.

Clive Lovatt

A Question of Overage

Overage provisions have a habit of causing disputes long after a transaction has been completed. Two recent, and very different, cases illustrate the pitfalls – particularly when the commercial matrix may have changed.

Sparks v Biden – sales v lettings

The first such case is *Sparks v Biden (2017)*. Here, the overage provisions in an option agreement obliged the buyer to use all reasonable endeavours to obtain planning permission, and, if the option was exercised, to proceed with the development as soon as practicable – and thereafter to make overage payments on the sale of the newly constructed properties.

In the event, the buyer occupied one property and let the others – and argued that the overage payments were not triggered. However, the High Court implied a term into the overage provisions requiring the buyer to market and sell the newly constructed properties within a reasonable period of time after the exercise of the option, in order to avoid the overage payment being delayed indefinitely.

The Court said that the contract would otherwise have lacked practical or commercial coherence. This should not be taken as confirmation that the court will always imply such a term, as it will apply a stringent test before doing so.

Burrows Investments v Ward Homes – what price social housing?

The second case, *Burrows Investments Limited v Ward Homes Limited (2017)*, is a classic illustration of changed circumstances. Back in 2007, Burrows sold Ward a plot of land for residential development. In the sale contract, the definition of "permitted disposal" limited Ward to making open market residential sales, plus transfers of site infrastructure or for "other social/community purposes".

In 2012, Ward obtained planning permission to add further units to the development, beyond those originally envisaged. However, one of the planning conditions was that a small number of units be used for affordable housing. Ward subsequently transferred five residential units to a social landlord for this purpose.

Ward argued that this was a "permitted disposal" for the purpose of the overage provisions. The Court of Appeal disagreed. It held that affordable housing did not fall within this definition – and that Burrows should be awarded negotiating damages, as it had been deprived of the opportunity to negotiate the price for giving its consent to this disposal.

So, two cases which illustrate the need, when agreeing overage provisions, to cover every possible circumstance - however unlikely.

Andrew Wade

Developers beware: Court of Appeal confirms pay less notices apply to any payment

Many developers will be aware of pay less notices and their significance in construction contracts: section 111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended) requires the paying party to make payment to the payee by the final date for payment, unless it serves a valid pay less notice (failure to do so leaves the paying party at risk of being on the receiving end of a "smash and grab" adjudication).

In the recent case of *Adam Architecture Limited v Halsbury Homes Limited (2017),* the Court of Appeal had to decide whether section 111 applies only to interim payments, or whether it also applies to payments due following completion of the works or termination of the contract.

In *Adam Architecture*, the defendant property developer engaged the claimant firm of architects in connection with a housing development project. The contract between the parties terminated, and the architect rendered an invoice for its services up to the date of termination. The developer did not pay the invoice and failed to serve a pay less notice, following which the architect obtained an adjudication award requiring the developer to settle the sums owed.

Each party subsequently issued proceedings in the Technology and Construction Court - with the architect attempting to enforce the adjudicator's award, and the developer seeking declarations that the pay less regime did not apply to the invoice and that the adjudicator's decision was unenforceable. The TCC agreed with the developer, and the architect duly appealed.

The Court of Appeal allowed the architect's appeal, and ruled that section 111 applied to both interim and final applications for payment. The Court considered previous case law and also the language used in section 111 before reaching its conclusion, stating that it seems "clear that section 111 relates to all payments which are “provided for by a construction contract”, not just interim payments". Accordingly, if the developer wished to resist paying the architect's final account or termination account, then it was obliged to serve a pay less notice.

The Court's decision in *Adam Architecture* is a warning to developers (and those acting on their behalf) of the need to serve a valid pay less notice to any payment due under a construction contract (interim or final), and even if the final payment arises after completion or termination of the contract.

Jonathan Came

Planning applications refused on air quality grounds

In our December 2016 Newsletter we alerted our readers to a High Court decision (*Wealden DC v SSCLG & Knight Developments Limited)* on the potential air pollution impacts of a development in a sensitive area for birds. In this article, we outline a recent case (*Gladman Developments Limited v SSCLG and Swale Borough Council and Campaign to Protect Rural England (2017))* that considers the potential air pollution impacts of a development in a sensitive area for people.

The UK has the second highest number of premature deaths due to exposure to NO^2 levels in Europe, according to EEA Report No.13/2017. Many areas in the UK are exceeding EU limits for Nitrogen Dioxide (NO^2), and the UK Government is required to put in place a national plan to achieve compliance with these limits by the earliest possible date. Local authorities are required to declare areas where limits are being exceeded as Air Quality Management Areas (AQMAs), and to prepare a local air quality action plan for such areas.

Can a planning application be refused due to its potential to increase NO^2 levels? Can an Inspector take into account air pollution mitigation measures when reaching a decision? These questions were considered by the High Court in the *Gladman Developments* case.

In January 2017, an Inspector dismissed two appeals by Gladman Developments against refusals of planning permission by Swale Borough Council for residential development – the first for 330 dwellings, and the second for 140 dwellings plus 60 extra care units. The Inspector refused the appeals in part due to the potential impact on air quality in an AQMA.

Gladman Developments challenged the Inspector's decision in the High Court, arguing that the Inspector had incorrectly assessed the area to be sensitive to NO^2 increases. The background NO^2 levels would be reduced over time, as the UK government was legally required to reduce NO^2 levels in the area - and therefore the increases to NO^2 from the development would only have a marginal impact.

However, the Court agreed with the Inspector's determination that there was insufficient evidence to show that the UK government was likely to put in place effective measures. The area was, therefore, still likely to be breaching limit levels during the development, and was rightly judged to be sensitive to changes in NO^2.

The Court also agreed with the Inspector that there was insufficient evidence that the mitigation measures being put forward by Gladman Developments to reduce NO^2 levels would be effective. Further, the developments were likely to conflict with the Council's air quality action plan.

If a proposed development has the potential to increase air pollution (e.g. by increasing road traffic in an area), developers should seek guidance from the local planning authority, and an air quality consultant, on the requirement for an air quality assessment.

If there are likely to be air quality impacts, the assessment should factor in the current uncertainty surrounding the government's ability to improve air quality. Any mitigation measures should also be supported with reliable evidence on their effectiveness (in this case Gladman Developments provided insufficient evidence to support the effectiveness of electric vehicle charging points, and green travel measures, in reducing the use of private petrol and diesel vehicles).

An Inspector may give more weight to measures which show a decrease in traffic congestion or site-specific design solutions (such as fewer car parking spaces, or paying for lower emission buses to be used at the development). If Gladman Developments could have reduced the 'significant' air quality impacts through effective mitigation measures, it may have tipped the balance in favour of granting permission for a development that had 'substantial' economic and social benefits.

Jay Sattin

Rights of light – again

Rights of light are frequently an issue for developers. When it comes to securing their release, one of the first issues is to establish who has, or may have, the benefit of such rights.

A recent dispute between a freeholder and its head tenant demonstrated, yet again, the complexities of this area of the law. The case, *Metropolitan Housing Trust Limited v RMC FH Co. Limited (2017)*, concerned premises which included a block of 20 flats known as 1-20 Royal Mint Street, London E1.

Both parties took the view that some of the windows in the block, which is let by RMC to Metropolitan, enjoyed rights of light over a major development site directly opposite. They also considered that the development, if carried out, would cause an actionable interference with the use and enjoyment of light to the block. The prospective developer was not a party to the proceedings, so the question of possible infringement of rights was not before the High Court. Rather, the argument was about whether Metropolitan had the right to release any such rights it may hold – and thereby receive monetary compensation from the developer.

Metropolitan, the tenant under a long lease at peppercorn rent, argued that it was entitled to do so. The benefit of the rights of light had, it said, passed down to it under the lease - and there was nothing in the lease terms to stop it releasing the rights. Accordingly, Metropolitan sought a declaration that it could proceed to deal with the developer, to release the rights and thereby claim compensation.

However, RMC argued that for Metropolitan to do so would breach clause 3 (12) of the headlease – under which the tenant was "Not to give permission for any window light opening…or other encroachment to be made nor to permit any easement to be acquired upon or against the demised premises which might be or grow to the damage annoyance or inconvenience of the landlord…".

The rights of light, said RMC, were part of the demised premises. Any interference by the developer with such rights would be "an encroachment" upon or against the demised premises - and that encroachment might grow to their damage, annoyance or inconvenience. The tenant had covenanted not to permit such an encroachment. The tenant's proposed release of its rights of light would, therefore, amount to permitting the encroachment, in breach of the lease. In addition, the tenant had an obligation under the lease to take steps to prevent such encroachments.

RMC then put forward broadly similar arguments in relation to any light emanating from the windows in the new development - which could in time acquire rights of light over the demised premises, an encroachment which Metropolitan was contractually required to take steps to prevent.

Metropolitan denied these claims. However, the Court found for RMC and refused the declaration Metropolitan had requested.

So, from the developer's perspective – where there is any doubt, make sure the other parties have agreed between themselves who is entitled to release the rights and claim compensation.

Andrew Wade

If you require further information on anything covered in this briefing please contact
Clive Lovatt
clive.lovatt@farrer.co.uk
+44(0)203 375 7223
or your usual contact at the firm on 020 3375 7000.

Further information can also be found on the Property page on our website.