Spotlight on Development

December 2016

Editorial

Welcome to the final edition for 2016 of the Developers' newsletter. This edition has been timed to reach you nice and early in the month, before inboxes are clogged with electronic Christmas cards and (dare we say it) brains are clogged with seasonal over indulgence.

All in all, it has been an eventful year; it was "events" of course that Harold Macmillan described as the most likely cause of a government being blown off course. In the United Kingdom, the course the government plots for the country has changed seismically during 2016.

In the United States of America, one of the most experienced politicians of the modern era lost the election for the Presidency to a political novice; that event seems destined to have a major impact upon the United States and doubtless the world generally.

2017 would seem to hold no less capacity to prove Macmillan correct, with important events – namely elections - in major European Union nations, specifically France and Germany.

Notwithstanding all this, the United Kingdom economy remains buoyant relatively, with average growth in 2016 likely to be about 2%. Forecasts for 2017 suggest growth at slightly more than 1% and the country avoiding recession. This bears out our own experiences, with most sectors of the property market remaining resilient.

All of which brings us to the day to day issues faced by developers; in this issue, we have articles on the management of flood risk, sensitive habitats, electronic communications and a case involving a developer's misrepresentations.

Management of flood risk

In September, government published two reports setting out its policy responses to the risk of flooding. Briefly, the *National Flood Resilience Review* considered residual flood risk and the resilience of national infrastructure to that risk, while the *Property Flood Resilience Action Plan* set out proposals to improve readiness for flood risk at a property level. Both reports set out measures to improve local and national resilience to flood risk. Perhaps the most eye-catching proposal was a suggestion that the

Building Regulations should be developed to ensure that the country's property stock is less prone to damage caused by rising flood waters.

Whilst these reports will be of interest to the property development industry, they are likely to have relatively limited bearing on the private liability which may exist between neighbouring property owners when flooding does occur. Unsurprisingly, property development can change the profile of flood risk on surrounding property, either independently or in conjunction with natural causes, and there is a well-established body of law which shows that a developer may be liable for flood damage caused by development which alters the flow of water. Perhaps more surprisingly, a developer may also be liable for flood damage where it fails to take proportionate steps to avoid naturally occurring flood damage originating from its land.

In practice, the usual and proportionate remedy for this risk will be suitable professional advice given by consultants with adequate insurance. No consultant can give an unqualified guarantee that flood damage will be avoided, but it is likely that a court would be sympathetic to a developer who inadvertently caused damage which could not have been predicted even with the benefit of expert advice.

Edward Banyard Smith

Exhaust fumes and sensitive habitats

A proposed development will increase traffic levels on a busy road near a habitat that is protected by a European designation (i.e. a "European Site"). Does the developer need to assess potential air quality impacts? What management measures should the developer put in place?

These were the questions that were recently considered by the High Court in the recent case of *Wealden DC v SSCLG & Knight Developments Ltd.*

A developer was granted planning permission on appeal for 103 dwellings. The proposed development would increase traffic levels on the A26 (a busy route) near to the Ashdown Forest (a European Site). The site itself was 2.4km away from the Ashdown Forest.

The Council set out allocated sites for housing in its development plan. The Council had assessed the impacts from the increased exhaust fumes from the traffic created by these sites on the Ashdown Forest. The Council found that the increased traffic from this agreed housing would not have significant impacts but this *did not leave much headroom* for further development.

The developer had offered to provide on-site alternative natural green space and a contribution towards a strategy of measures for protecting the Ashdown Forest. The developer argued that there were no significant impacts from the development and that any impacts would be removed through the proposed management methods. Although the Inspector agreed with the developer's approach, the Council challenged the grant of planning permission.

The Court agreed with the Council and found that the Inspector had been mistaken in considering that the conservation management strategy would protect the habitats

from exhaust fumes. The strategy was in fact aimed at protecting the habitat from the threat of dogs. The developer had also failed to provide sufficient evidence about the effects on the habitat from the exhaust fumes and how effective the mitigation would be.

Developers will need to be cautious if their proposed development will increase traffic levels and there is a sensitive habitat nearby. The habitat can even be several kilometres away. The traffic consultants will need to assess traffic levels from the development in addition to other proposed developments in the development plan and those that already have planning permission. The air quality and ecology consultants will need to provide concrete evidence that the proposed management methods will protect any habitat that could be affected. These measures may be discounted if they are in anyway uncertain.

Jay Sattin

Digital Economy Bill 2016-17: The Electronic Communications Code

The Digital Economy Bill 2016-17 (which includes The Electronic Communications Code) is progressing rapidly through Parliament, and is likely to become law next year. The Code will have significant implications for developers.

The law covering electronic communications, dating back to the Telecommunications Act 1984, has long been regarded as unsatisfactory. However, the new draft Code is couched in very operator-friendly terms, in particular to support the Government's agenda of rolling out high speed broadband as quickly as possible.

Time is of course of the essence as regards preparation for development. And one of the concerns under the existing regime is that, once operators have a tenancy or licence, it is difficult to remove them if they are uncooperative. Unfortunately, despite representations from the property industry, the Government has refused to allow such agreements to be granted without security of tenure.

A developer/landlord will, however, be able to obtain vacant possession for redevelopment, provided such redevelopment could not reasonably be carried out unless the relevant telecoms agreement is terminated. The landlord will have to give not less than 18 months' notice. The tenant will then have three months to serve counter-notice, and a further three months from the date of the counter-notice to apply to the County Court for a new tenancy. The Court must then make an order to end the agreement, if it is satisfied that the redevelopment ground has been established.

Rents or licence fees will no longer be assessed on open market value principles. Instead, they will be based on the use value of the site in question, *disregarding* the prospective telecoms use. So, for example, if a developer wanted to let a far corner of a site for the erection of a telecoms mast, the rent would be based on what other uses that land could command – potentially very little.

The tenant will be able to share the site with other operators, upgrade equipment, and assign the agreement, all without landlord's consent. The landlord will therefore be deprived of all the usual management controls. With the large operators this may be of

little concern, but may be more so with small broadband operators.

Entering into such agreements under the new regime does not look particularly unattractive. So it may be as well to conclude any outstanding agreements before the changes come into effect.

Andrew Wade

Developer's misrepresentations: a rising property market was of no assistance in defence

In the recent case of *Alison Quilter v Hodson Developments Limited*, the claimant sought damages for misrepresentations by the developer made to her in pre-contract enquiries when she purchased an apartment in a development at Chobham Lakes in Surrey.

The developer had impliedly represented (by omissions in its responses) that it did not know of disputes regarding the working of the biomass boiler for the development and related disputes as to the provision of heating and hot water.

The Court of Appeal, which heard the matter on appeal from Central London County Court, agreed with the judge at that court that these were matters which should have been disclosed in the replies to the relevant enquiries.

The detailed analysis of the facts which led to this conclusion is unremarkable; what is of interest is the court's judgement on the measure of damages.

The developer asserted that when the claimant had subsequently sold the apartment, she had made a £35,000.00 profit, an amount unaffected by the matters in dispute; the developer submitted that this was a case in which the measure of damages applied by the judge did not accord with the overarching principle of compensation: in short, the damages payable by the developer should take into account the profit made on the sale of the apartment.

The Court of Appeal said "the contention that that a wrongdoer should be able to take advantage of a rise in the market value of an apartment when he had induced the purchase by a misrepresentation is, at first, rather surprising…", but went on to recognise if a subsequent transaction was all "part and parcel" of the transaction which gave rise to the wrong, any resulting profit could be brought into account.

However, on the present facts, the sale of the property was not part of the same transaction or undertaken as part of an obligation to mitigate loss. It was simply a sale of the property in the normal course of events. The court found that the benefit of the rise in the market value of the apartment should be something retained by the claimant rather than accounted for to the misrepresenting vendor. On that basis, the claimant should be able to recover loss calculated on the difference in value of the between the purchase price and the property's true value at the date of purchase.

Clive Lovatt

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