WHEN THE PURCHASER WANTS OUT

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Various issues might arise when the purchaser signals his intention that he does not intend to complete his purchase. Unless he is insolvent and simply does not care for the consequences, it is unlikely that he will simply refuse to complete. Typical early warning signs are a pedantic approach to the vendor's obligations in the agreement, stalling and, ultimately, alleged excuses to complete. This talk considers three of the various aspects which seem to be emerging in the current climate:

(a) condition precedents to reach an agreement;

(b) repudiation and specific performance; and

(c) damages in a falling market.

Conditions to reach an agreement

Conditions which amount to little more than an agreement by the parties to agree are void for being too uncertain to be capable of enforcement. So too are agreements to use best endeavours to reach agreement as Millet LJ explained in *Little v Courage* (1995) 70 P & CR 469. So if the contract required the parties to use reasonable endeavours to agree the subject of the planning application, the whole agreement may well be rendered void for uncertainty. Thus, for example, a clause under a preliminary agreement whereby the parties undertook to use reasonable endeavours to agree the terms of a joint venture was too uncertain to be capable of enforcement in *London and Regional Investments v T.B.I.* [2002] EWCA Civ 355.

However the fact that an agreement leaves certain elements to be the subject of further agreement between the parties will not necessarily render the agreement void. The more limited the scope for future agreement, the less likely it is that the Courts will find the agreement void. The Court of Appeal considered the principles *obiter* in *Petromec Inc. v. Petroleo Brasileirio* [2006] 1 Lloyds Rep. 121 at 152 per Longmore LJ. In that case, in the context of a complex, wide-ranging agreement, the parties provided in one clause for the parties to negotiate in good faith the cost of a particular upgrade. Longmore LJ pointed out that there was no question of the overall agreement being void for uncertainty: to single out this particular clause as having no legal content would be "*for the law deliberately to defeat the reasonable expectations of honest men*". In that case the agreement was to be distinguished from a bare agreement to negotiate: there was already an agreement and the obligation was to negotiate the price of one particular aspect in the context of that agreement. Accordingly if the conditional agreement left open one particular aspect: a planning application to be made by the purchaser, which was to be the subject of agreement between the parties, one might imagine that the Court would strive to rescue the agreement having regard to:

(a) reasonableness;

(b) the context of the agreement, looking for clues as to the sort of thing the parties had in mind which would inform any enquiry as to reasonableness; and

(c) escaping down the route of any expert determination clause in the agreement.

Different issues arise where the object of such a clause is to secure some form of permission or agreement with a third party. A contract may, for example, be conditional upon both planning permission and securing the release of restrictive covenants with a neighbouring farmer. The latter plainly requires an agreement (with the farmer) but so might the former, if planning can only be secured by entering into a section 106 agreement. Such clauses are in principle enforceable: in *Yewbelle Ltd v London Green Developments Ltd and another* [2007] 2 EGLR 152, the Court of Appeal endorsed the view that an agreement to use "all reasonable endeavours" to obtain a section 106 agreement was perfectly enforceable.

In *Rhodia International Holdings v Huntsman International LLC* [2007] All ER (Comm) 577, the court recognised the possible distinction between an obligation to use "reasonable", "all reasonable" or "best" endeavours:

> "An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours … "

The Courts are sympathetic to the view that in identifying any reasonable course a party is not obliged to do anything which is commercially harmful: see *Yewbelle* above. Thus in *Phillips Petroleum Company United Kingdom Limited v Enron Europe Ltd* [1997] CLC 329, it was found acceptable for a party obliged to agree a date for the commencement of an energy supply to delay agreement purely because this allowed it to take advantage of a falling market. Similarly, in *P & O Property Holdings Limited v Norwich Union Life Insurance Society* (1994) 68 P. & C.R. 261, the House of Lords appear

to have based their reasoning on the fact that, on the particular, detailed contractual structure in that case, an obligation to use reasonable endeavours to secure lettings did not extend to requiring the payment of reverse premiums.

Typical scenarios might involve:

(i) an obligation to obtain planning permission;

(ii) an obligation to secure the removal of a restrictive covenant;

(iii) an obligation to obtain title indemnity insurance.

There can be no doubt that if there is an obligation to use reasonable or all reasonable endeavours to secure these things, this will encompass making applications, paying administration fees, engaging professionals. Where matters become more uncertain is whether or not this could encompass an obligation to pay money. A planning permission may only be achievable at the cost of an expensive section 106 agreement. The neighbour may be prepared to release his restrictive covenant but only for the payment of a substantial premium.

Realistically, it is hard to see how release of a restrictive covenant might be achieved without the payment of money or other inducement. A developer might be unlikely to succeed in an argument to the effect that, simply because he could not secure agreement without payment, this was contrary to his commercial interests. However, if the farmer were too greedy and D's margins tight, there may come a point where it would indeed be commercially harmful for D to finalise the deal with the farmer.

Repudiation and specific performance

The basic rules remain those set out in the leading case of *Johnson v. Agnew* [1980] AC 367:

(1) where time is or has been made of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation and claim damages or he may seek an order for specific performance with damages for any loss arising from delay in performance;

(2) the vendor may proceed for the above remedies in the alternative, making his election at trial; (the purchaser's refusal to complete taking the form of a "continuing breach" entitling the vendor to rescind, notwithstanding an earlier affirmation of the contract);

(3) accordingly, if the order for specific performance is made but not complied with the vendor may apply for the enforcement of the order alternatively he may apply to dissolve the order and ask the Court to put an end to the contract; the Court's power to do this is an equitable power; damages can be awarded, usually on the same basis as common law damages for repudiatory breach;

(4) however if the vendor repudiates the contract his election is final and he cannot later seek specific performance.

Most conditional contracts will contain a long-stop date. (If not, theoretically, the rule against perpetuities might be engaged.) If a condition is not met by the long-stop date then one party or other or both will usually be entitled to further notice of termination. It is at that point that many

disputes take place. Typically, the purchaser will claim that the occasion has arisen for him or her to serve a notice; typically the vendor will deny this.

One question that might arise is whether or not the wrongful service of such a termination notice might amount to a repudiatory breach in itself. If the purchaser is a man of straw and specific performance or damages neither here nor there, then in practice the only thing to fight over might be the deposit. Terminating the agreement may be a way of securing this but it pays to have right on one's side. If a party is entitled to serve a termination notice then that will usually be the end of that. But if a party is not entitled to serve a termination notice may the other party take advantage of this and accept the purported termination as a renunciation of the contract and by so accepting, terminate the contract himself?

In *Woodar v. Wimpey Construciton* [1980] 1 WLR 277 the purchasers entered into a contract to buy certain land. The contract contained a purchaser's termination clause in the event of a CPO of the property. The ensuing purported termination was in the event held to be invalid. Meanwhile the vendor had sought damages for repudiatory breach of contract. The House of Lords was split 3:2 against any repudiation or renunciation having taken place by the wrongful service of the termination notice. Lord Wilberforce, one of the majority, said:

> "*… a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating … it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having*

> *repudiated his contractual obligations if he turns out to be mistaken as to his rights …*"

Lord Keith of Kinkel referred to the party serving the termination notice as acting "*honestly but erroneously*". Lord Scarman referred to their reliance on the termination clause as indicating that the terminating party was not "*evincing an intention not to be bound by the contract*".

It is not easy to apply this authority in practice. What is the meaning of 'ulterior motive' where the party serving the notice is thereby plainly intending and hoping to end the contract? What is meant by "honest"? Must the party serving the notice genuinely believe that the clause entitles him to do so? He may do but his lawyers may advise to the contrary. Alternatively his lawyers may advise him that he has a good case but he may think that that is all lawyers' tosh and he just wants out of the contract on any ground. What if he argues that the clause is susceptible to rectification: he may have a sincere belief that he agreed X whereas what was written down was Y; if the Judge rejects his case on the balance of probabilities does it nevertheless mean that his plain desire to bring the contract to an end in reliance on a clause which ostensibly does not entitle him to do so nevertheless is not a renunciation of the contract?

Matters are made no easier when one considers the earlier HL decision in *The Nanfri* [1979] AC 757 that it is no defence to a party who has repudiated a contract to say that he acted in good faith under a mistaken understanding of the law. In that case there was not simply the service of a contractual termination notice but an act (an instruction by the ship owner to the master not to sign pre-paid bills of lading which in turn deprived the charterers of virtually the whole benefit of the charter since the issue of such bills was

essential to their trade). The owner's actions viewed objectively were repudiatory. As Lord Wilberforce said (780):

> "*If a party's conduct is such as to amount to a threatened repudiatory breach, his subjective desire to maintain the contract cannot prevent the other party from drawing the consequences of his actions.*"

However it is difficult to see any essential difference between repudiatory acts and erroneous termination notices: whether the alleged repudiatory act is a service of a notice to terminate or an activity which effectively brings the purpose of the contract to an end, the party who takes that act is indeed intending to bring the contract to an end.

Both cases are House of Lords decisions and must be reconciled. This difficult task fell to Christopher Clarke J. in *Dalkia Utilities v. Celtech* [2006] 1 Lloyds Rep 599. The case before him concerned service of a contractual termination notice. In the event Christopher Clarke J. held that the party serving the notice was entitled so to do. However, he went on to consider what would occur if that were not the case. The other party, on receipt of the notice, purported to accept it as a repudiation of the contract. The Court held that such acceptance would indeed bring the contract to an end, contrasting the situation before it with *Woodar v. Wimpey*. In the latter case the majority of the House of Lords felt able to conclude that the circumstances in which the notice was given did not manifest an intention to refuse further performance. In particular the parties had agreed that the dispute could go before the Courts and both parties would be bound by the outcome. By contrast, in *Dalkia*, there was no understanding that Dalkia would continue to perform should its interpretation be wrong.

By contrast Aikens J. considered that the two cases were not difficult to reconcile in *Golf Agri Trade v. Aston Agro Industrial* [2008] EWHC 1252 (Comm). His Lordship considered that both cases held that it is necessary to ask the question: What, objectively, is the intention of the party who has done something which is said to be a repudiation of the contract? Is it (objectively) that party's intention to abandon or repudiate the contract or not? This is a question of fact. With respect, I would submit that that is simply not the ratio of the majority in *Woodar*. The House of Lords required one to go behind the contractual termination notice to see what was that party's subjective intention: was he acting "honestly", did he have an "ulterior motive"? Surely, if his objective intentions are all that matters then, to quote the minority view of Lord Salmon if the notice of rescission did not evince an intention no longer to be bound by the contract and therefore amount to a repudiation, His Lordship could not imagine what would.

Thus the present state of the law on this subject would appear to be as follows:

(1) the *bona fides* and 'honesty' of the repudiator would normally be irrelevant when considering alleged repudiatory acts;

(2) if however a party honestly but erroneously relies upon a termination provision in a contract, this act may not be repudiatory providing that he can demonstrate that he genuinely thought he had the right to terminate and that he will be bound by the contract if the validity of his actions are not upheld.

But this attempt to reconcile the irreconcilable, leads, inevitably, to an absurdity. A party who erroneously relies upon a termination provision apparently will not be treated as renunciating the contract if – for example –

his solicitors write saying that, if they are wrong, of course their client will abide by any order the court makes. However if the other party decides to treat the purported termination as itself a renunciation of the contract this will not be pursuant to any term of the contract. The acceptance of the renunciation will be an act which purports to bring the contract to an end but one which, on the above supposition, does so erroneously. The accepting party will not have the defence of good faith. Accordingly the party who serves the erroneously termination notice in the first place will thereupon have the ability the bring the contract to an end by accepting the innocent party's purported acceptance of his erroneous termination notice!

Damages in a falling market

There is a dearth of cases illustrating the approach of the Courts to assessing damages for breach of sale contracts in a falling market. On reflection, this is not surprising: if the purchaser is refusing to complete this will normally be because he cannot complete and this will often mean that he is not worth suing; alternatively if the purchaser is of substance he is likely to renegotiate the contract or otherwise settle the action.

By contrast there are plenty of cases of aggrieved purchasers suing vendors who have refused to complete. This is occasioned by a rising market. When the market is moving fast in one direction or another, questions as to the date at which damages are assessed are crucial. The point is well illustrated by the case of *Suleman v. Shahsavari* [1988] 1 WLR 1181, set against the backdrop of the 1980s boom. The purchaser agreed to purchase 25 Tylecroft Road in Croydon in April 1986 for £46,500. Completion was set for 5th September 1986 when the value of the house had reached £56,000. At the hearing date of 14th April 1988 the value of the property was agreed to be

£76,000. Damages were assessed at the difference between the purchase price and the value of the property at the date of hearing, the purchaser having acted reasonably throughout in pressing for completion until the last minute.

The principles which emerge from the authorities are as follows:

(i) damages are compensatory;

(ii) normally one would assess damages as at the date of breach;

(iii) however this is not an absolute rule: the Court will pick a later date if otherwise injustice would arise;

(iv) generally speaking, if the innocent party reasonably holds out for performance damages will be assessed at the point he recognises the contract is lost, unless he ought reasonably to have mitigated sooner.

Where at trial the claimant abandons his claim for specific performance and seeks damages instead then, assuming that he was reasonable in pressing for specific performance up to that time, damages will be assessed at the date of the hearing. There is then coincidence between the date the contract is reckoned to be lost and the date of the hearing.

However there will not always be such coincidence. What occurs where the claimant abandons the contract between breach and the hearing? Just as there is no rigid rule to the effect that damages are assessed at the breach there is no rigid rule to the effect that the only alternative is damages are assessed at the date of the hearing. The ascertainment of the date is inexorably bound up with the duty to mitigate. If mitigation has failed, the market continues to fall and the property remains unsold at the date of the

hearing then I would submit that justice would require that the date of the hearing be taken as the date for assessing damages rather than the date the contract is recognised to be lost: "*changes in price levels may have rendered such assessment no guide to the Plaintiff's true loss*" (per Cumming-Bruce LJ in *Malhotra v. Choudhury* [1980] 1 Ch 52 at 78).

The point is perhaps illustrated by the case of *Techno Land Improvements v. British Leyland* [1979] 2 EGLR 25. In that case a vendor faced with a repudiating purchaser attempted to relet the premises. He let one of two units in 1976 and the second in 1977. The question before the Court was whether to take the earlier date which coincided with the acceptance of the purchaser's repudiation or whether to take a later date when the reletting was completed and the actual loss became ascertainable as a matter of fact. The market was rising during this period and so it suited the vendor to seek the earlier date. Goulding J. held – against the vendor – in favour of the later date. This illustrates that the Courts will not shut their eyes either to events post the breach or to events post the issue of the writ. The Courts will attempt to get at the true loss of the claimant. This will mean taking into account events subsequent to the breach.

A defendant may complain with some justification that if the hearing date is chosen in these circumstances, the claimant has an incentive to delay the proceedings and indeed the amount he will have to pay is entirely at the mercy of the Listing Office. However the mirror arguments met with short shrift in *Techno*. There, in a rising market the vendor/claimant was arguing for an earlier date and he made the point that otherwise the action was a gamble and he may indeed fail to prove actual loss at the date of trial even though (when the market was much worse) he began the action quite

reasonably. Goulding J. thought that any apparent injustice could be obviated with an appropriate costs order. In the present example it might be thought that, providing the vendor is indeed genuinely attempting to mitigate his loss, the fact that it has taken him a very long time to sell the property is not something about which the repudiating purchaser can complain.

If this is right this adds an extra horror rating to the usual nightmare of making a Part 36 offer. If at the date of issue and at the date of making the offer the market continues to deteriorate, a defendant attempting to formulate an offer may well get cut by the proverbial "falling knife".