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Case No: PT- 2022-000499

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS & PROBATE LIST

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 26 July 2023

Before :

MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

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Between :

DENTON HOMES LIMITED — **Claimant**

- and –

(1) CHRISTOPHER COBB
(2) NICHOLAS COBB — **Defendants**

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Mr John Randall KC (instructed by **Gateley Legal**) for the **Claimants**
Mr Mark Sefton KC (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 18 July 2023
Circulation of draft judgment: 19 July 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 26 July 2023

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MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

Mr David Halpern KC :

1. These Part 8 Proceedings require the court to construe clause 4 of an option agreement (the "Agreement").

The facts

2. The Agreement is in the form of a deed made on 17 March 2016 between the Defendants as "Intending Seller" and the Claimant as "Intending Buyer". By clause 2, in consideration of an Option Payment of £100,000, the Intending Seller grants to the Intending Buyer an option to buy land off Send Marsh Road, Send, Woking, Surrey (the "Property") for the fixed price of £1.4 million "*during the Option Period*".

3. Clause 4 provides as follows:

> "*4.1 If the end of the Option Period, the Intending Buyer is awaiting a written decision on the Application (and a resolution to grant Planning Permission shall not constitute a written decision), the Option Period will be extended for a period ending at midnight marking the end of the 50th day after the date the written decision notice is issued.*
>
> *4.2 If at the end of the Option Period, the Intending Buyer has submitted an appeal pursuant to clause 3.6 and has not yet received the written decision notice, the Option Period will be extended for a period ending at midnight marking the end of the 50th day after the date the written decision notice is issued.*
>
> *4.3 If Planning Permission has been granted within the last 50 days of the Option Period then the Option Period will be extended for a period ending at midnight marking the end of the 50th day after the date the written Decision Notice is issued*
>
> *4.4 If the Option Period is extended under clauses 4.1, 4.2 and 4.3 any references to the Option Period elsewhere in this agreement are to be read as references to the Option Period as so extended.*
>
> *4.5 The Option Period may not be extended beyond the Long Stop Date.*"

4. The issue before the court is whether clause 4 permits multiple extensions, subject to the Long Stop, by combining the different provisions of subclauses 4.1 to 4.3.

5. Some, but not all, of the capitalised terms in clause 4 are defined in the Agreement:

   (1) The "Option Period" is defined as "*the period of four years from the date of this Agreement*".

(2) "Planning Permission" is defined as "*detailed or outline planning permission for the Proposed Development*", but "Proposed Development" is not defined.

(3) The "Long Stop Date" is defined as "*the period of six years from the date of this Agreement*", i.e. 16 March 2022 (or possibly 17 March 2022, but nothing turns on this).

(4) "Application" is not defined.

6. Mr John Randall KC, who appears for the Claimant, draws my attention to clause 3 of the Agreement, which deals with planning issues and which he submits assists in the construction of clause 4:

(1) By subclause 3.1 the Intending Seller consents to the Intending Buyer making "*one or more planning applications and any appeal*". I agree that this shows that the parties were contemplating that there might be multiple planning applications.

(2) By subclause 3.2 the Intending Buyer is required to promote the Property "*as a site suitable for residential allocation in the Local Plan*". I agree that this shows that the parties were contemplating that the planning application(s) would be for residential development (and Mr Mark Sefton KC, for the Defendants, agrees). I therefore accept Mr Randall's submission that "Application" in clause 4 means one or more applications for residential development.

(3) Subclause 3.3 requires the Intending Buyer to ensure that various planning-related surveys are undertaken at its expense.

(4) Subclause 3.4 requires the Intending Buyer to use reasonable endeavours to obtain the Planning Permission "*as soon as reasonably practical and in any event within the Option Period*".

(5) Subclause 3.6 permits the Intending Buyer, at its own cost, to appeal against a non-determination (referred to as a deemed refusal), an actual refusal or a grant subject to unacceptable conditions. I agree with Mr Randall that this clause duplicates clause 3.1 and therefore shows a degree of surplusage in the Agreement.

7. The Agreement has been varied by three subsequent agreements dated 6 March, 15 July and 16 November 2020. Each subsequent agreement was made before (and, in some cases, only just before) the expiry of the Option Period. The first two extensions were made in consideration of substantial payments. The third and final variation extended the Option Period to 29 January 2021 (a period of less than 11 weeks) in consideration of £1. These subsequent agreements do not contain any material provisions, save for an extension of time in consideration of a further payment.

8. Mr Randall relies on the following facts and matters which he submits form part of the factual matrix:

(1) Both parties contemplated that the Claimant would incur significant expense in promoting the Property for development and, in particular, in seeking to have it removed from the Green Belt. The Claimant was successful in having the Property removed from the Green Belt in April 2019.

(2) In August 2017 the Claimant applied for a licence to thin trees on the Property. It obtained that licence and then spent further sums on implementation.

(3) From April 2019 the Claimant spent further sums on various professionals. The total amounts spent by the Claimant up to November 2019 were about £75,000 (including (1) and (2) above)

(4) The Claimant paid an additional sum for the first and second of these variations and spent further sums on each of the planning applications and the appeal. I do not have evidence as to how much had been spent in total by the date when Mr Sefton says that the option expired.

(5) By the date of the variations, especially the last one, it had become clear that the local planning authority was being very slow and inefficient.

9. The planning history, following the publication of the new Local Plan in April 2019, is as follows:

(1) A planning application was made on 19 November 2019. It had not yet been determined by the date of the final variation on 16 November 2020.

(2) An appeal against that non-determination was lodged on 28 January 2021. It is common ground this was just inside the Option Period as varied, and that subclause 4.2 had the effect of extending time until 50 days after issue of the written decision notice in respect of the appeal. The appeal was dismissed, and notice of dismissal was issued on 25 October 2021. The 50th day thereafter expired at midnight on 14 December 2021.

(3) However, on 10 December 2021 the Claimant made a fresh application for planning permission. Mr Randall contends that this resulted in a further extension of the Option Period under subclause 4.1.

(4) On 15 March 2022, which was just before the Long Stop Date, the Claimant served notice exercising (or purporting to exercise) the Option at a time when the new application had not yet been determined.

The law

10. The legal principles relevant to the construction of agreements have been authoritatively summarised by the Supreme Court in *Arnold v Britton* [2015] AC 1619 at [15-23] and *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [8-15]. These principles are sufficiently well-known not to require repetition in this judgment.

11. Mr Randall sought to add two glosses, which I must consider. First, Mr Randall submitted that the factual matrix is capable of including all events up to 16 November 2020, the date of the final variation. In making this submission, he relied on the undoubted rule that "*when parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety*": *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38 at 45C and 48E, quoting earlier authority. *McCausland* and the earlier cases cited in it were concerned with the question whether there had been compliance with the formalities required to make the contract. Neither counsel was aware of any authority which has considered the relevance of facts, post-dating the original contract but pre-dating the variation, in considering the factual matrix.

12. Mr Sefton submitted that, whilst such facts could theoretically be relevant, it would only be in an exceptional case that they would be likely to be relevant. In the present case clause 4 had a meaning when it was first entered into in 2016. It was inherently improbable that the parties intended the very same words to bear a different meaning in the subsequent contracts, whose sole effect was to extend the definition of Option Period in clause 1.

13. Mr Randall submitted that it was not helpful to consider hypothetically what meaning might have been given to clause 4 if a dispute had come before the court prior to any of the variations. I disagree. The Agreement had a meaning at the date it was entered into, having regard to the factual matrix at that date and no later. Unless there is something to the contrary in the wording of the variations or in the factual matrix at the date of the respective variations, in my judgment the original meaning should continue in force. It would be wrong to start with a clean slate and assume that everything up to the date of the last variation formed part of the factual matrix, without having regard to the fact that most of the wording of the varied contract was fixed four years earlier and did not change.

14. Secondly, Mr Randall referred to the following dictum of Leggatt LJ (as he then was) in *Minera Las Bambas SA v Glencore Queensland Ltd* [2019] STC 1642 at [20]:

> "*As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance*."

15. Mr Sefton submitted that this was taken into account in Lord Neuberger's fourth factor at [18] of *Arnold v Britton* ("*the worse their drafting, the more ready the court can properly be to depart from their natural meaning*") and by Lord Hodge in *Wood v Capita* at [11] ("*in striking a balance between the indications*

given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause") . I agree that, where relevant factors are set out in the Supreme Court's valuable (albeit non-exhaustive) summaries, there is little to be gained by citing further authorities. In any event, I do not detect any significant difference in Leggatt LJ's dictum.

16. In the present case the Agreement is drafted by lawyers, but it is clear that it has not been well drafted. This makes it easier to depart from the natural meaning than would be the case if it were better drafted, but the court would still need to be satisfied that the language used in the Agreement, construed in the light of the factual matrix and the commercial purpose of the Agreement, required it to depart from the natural meaning. I accept that the Agreement clearly contains some surplusage (e.g. subclause 3.6), but it does not follow that subclause 4.4 should readily be dismissed as surplusage if it can properly be given a sensible meaning.

Construction of the clause 4

17. I shall use the term "Primary Option Period" to mean the Option Period as defined in clause 1. Following the three subsequent agreements, this period expired on 29 January 2021. I shall use the term "Extended Option Period" to mean the period as extended by clause 4. I use these terms purely for identification and without prejudging the issue which I am required to decide.

18. I approach the issue of construction in three stages as follows:

    (1) What is the literal meaning of clause 4?

    (2) What is the commercial purpose of clause 4, so far as discernible from the language used and the factual matrix?

    (3) If (1) and (2) lead to the same answer, all well and good. If they lead to different answers on a provisional basis, in the course of this iterative process, how is the court to balance the indications given by each?

19. Mr Sefton's submission as to the literal meaning of clause 4 is as follows:

    (1) Each of subclauses 4.1 to 4.3 provides for "*the Option Period*" to be extended to deal with a particular problem resulting from the absence of planning permission by the end of the Primary Option Period. In these subclauses "*the Option Period*" bears its definition in clause 1, i.e. the Primary Option Period. It is not permissible to treat the term as meaning the Extended Option Period in subclauses 4.1 to 4.3, so as to enable the Claimant to combine extensions under these different subclauses.

    (2) This is clear from these subclauses, but it is reinforced by subclause 4.4, which reads: "*If the Option Period is extended under clauses 4.1, 4.2 and 4.3 any references to the Option Period elsewhere in this agreement are to be read as references to the Option Period as so extended.*" The key words are *"elsewhere in this Agreement*". The Shorter Oxford English Dictionary (2007) defines "elsewhere" as meaning "*at some other place*

or places", i.e. a place other than the one already referenced. The places which have been referenced in subclause 4.4 are subclauses 4.1 to 4.3; hence subclause 4.4 confirms that the Extended Option Period applies to all clauses in the Agreement save for subclauses 4.1 to 4.3.

20. Mr Randall's submission as to the literal meaning of clause 4 is as follows:

    (1) If one looks solely at subclauses 4.1 to 4.3, they are capable of operating together; hence "*the Option Period*" means the Extended Option Period. Accordingly, as actually happened, the Claimant is able bring about an extension under subclause 4.2 by lodging an appeal within the Original Option Period. The Claimant may then make a fresh application outside the Original Option Period but within the Extended Option Period pursuant to subclause 4.1.

    (2) It is clear that this extended definition is meant to apply at least to all parts of the Agreement other than subclauses 4.1 to 4.3. If it is correct that it also applies to subclauses 4.1 to 4.3, then subclause 4.4 is simply making the point that it does extend to the rest of the Agreement, not that it does not extend to subclauses 4.1 to 4.3. In that event subclause 4.4 is mere surplusage, but then so is subclause 3.6.

    (3) If, contrary to (1), "*the Option Period*" in subclauses 4.1 to 4.3 would otherwise be limited to the Primary Option Period, its meaning is extended in those subclauses by subclause 4.4. This is because "*elsewhere in this agreement*" in subclause 4.4 means everywhere in the Agreement other than subclause 4.4 itself. The reason for including these four words in subclause 4.4 is to prevent circularity.

21. In my judgment Mr Sefton's argument as to the literal meaning is clearly to be preferred for the reasons which he gives. Mr Randall's construction, whilst ingenious, turns the clear wording of clause 4 on its head.

22. For the sake of completeness, I note that the word "*and*" in the opening words must be disjunctive, as both Counsel agreed; however in my judgment that minor infelicity does not throw light on the difference of interpretation set out above.

23. I now consider whether there is anything in the commercial purpose of clause 4, so far as discernible from the language used and the factual matrix, which points in the opposite direction. Mr Randall relies on the following:

    (1) The Agreement clearly envisages that the Claimant might make more than one planning application. Further, its obligation to use reasonable endeavours might require it to do so. The parties must have contemplated that the Claimant would need a longer period than the Original Option Period to obtain planning permission, possibly on appeal. This is particularly the case with the final variation, which extended the Original Option Period by less than 11 weeks. It must have been understood by both parties that that would not be sufficient time.

(2) The Property was part of the Green Belt in 2016. Subclause 3.3 required the Claimant to promote it for residential allocation. It was known from the outset that this would take some time and would need to be completed before planning permission could be sought. In the event it was not formally released from the Green Belt until the new Local Plan was adopted in April 2019. It would have been obvious to the parties that it might take more than one application to obtain planning permission thereafter.

(3) In the events which happened, the Claimant remained under a duty under subclause 3.4 to use reasonable endeavours at its own expense to seek to obtain planning permission at least up to 14 December 2021 (the date of expiry of the Extended Option Period on the Defendant's case).

(4) It cannot have been intended that the Defendant should obtain a windfall from all the work and expense put in by the Claimant, without the Claimant having a reasonable period of time within which to see if planning permission was obtained and hence to be able to make an informed decision whether or not to buy the Property for £1.4 million.

(5) Preparing and submitting residential planning applications or appeals was not a "free ticket" to obtain extensions to the Option Period, because doing so involved the Claimant in more work and expense in using reasonable endeavours to obtain planning permission.

24. Mr Sefton's response is as follows:

(1) The literal interpretation of the Agreement is coherent. It provides for a basic option period of four years (with three subsequent variations). It permits limited extensions, where a planning application (subclause 4.1) or an appeal (subclause 4.2) is outstanding at the end of the Primary Option Period, or where planning permission has been granted so close to the end of the Primary Option Period that the Claimant has not had sufficient time to make an informed decision (subclause 4.3). These limited extensions are to deal with delays in the planning process which are outside the Claimant's control.

(2) But if the Claimant were right, it would in effect have a unilateral power to extend the period until the Long Stop Date, by making a fresh application within 50 days of each and every event under subclauses 4.1, 4.2 and 4.3. Mr Sefton likened this to "chain-smoking" or "daisy-chaining". Indeed, even if the Claimant obtained a satisfactory planning permission, it could then make a fresh application within a further 50 days for the sole purpose of extending time until the Long Stop Date.

(3) Mr Sefton accepts that subclause 3.4 imposes an ongoing obligation on the Claimant, but submits that it is an obligation to take reasonable steps to obtain planning permission within the Option Period. If one is nearing the end of the Option Period, there is no obligation to take further steps which might lead to the grant of planning permission after the end of the

Option Period. I am inclined to agree with Mr Sefton, but there is no need to reach a final view on this point.

(4) On the Claimant's own evidence, it knew before entering into the Agreement that the Property was to be allocated for release from the Green Belt in the draft Local Plan. There was therefore very little risk of this not happening.

(5) It is not possible for the court to form a view as to whether there was a windfall, because it does not know the market value of the Property, neither in March 2016 when the price was fixed, nor in November 2020 when the final variation was agreed, nor in December 2021 when the Extended Option Period expired (on Mr Sefton's case). Nor does the court have sufficient evidence to form a view as to the amount of work and expense attributable to compliance with the obligation to use reasonable endeavours up to December 2021. In any event, even if there were a windfall on the facts, it does not follow that the Agreement is commercially absurd.

25. I agree with Mr Sefton that it is not possible discern a clear commercial purpose to permit multiple extensions:

(1) Whilst there may be good commercial reasons for saying that the Claimant would have benefitted from a longer period, that belongs to the realms of what the Claimant would like the Agreement to have said with the benefit of hindsight. The literal construction which I have applied makes commercial sense, for the reasons given by Mr Sefton.

(2) Whilst I agree that the parties might not have anticipated in March 2016 that the planning authority would move as slowly as it in fact did, I do not consider that the later delays can be taken into account as part of the factual matrix (see paragraph 13 above). But, even if those facts are taken into account, they do not change my view. If the parties had intended to allow the Claimant more time so that it could appeal and then, after the appeal failed, make a fresh application, they should have provided expressly for this. In any event, there was always a risk (as actually happened) that the Long Stop Date would arrive before the new application had been determined.

(3) The final variation extended the Original Option Period by only 11 weeks, but there was provision for further extension under subclause 4.2, as in fact happened. This meant that the Claimant actually obtained more than 12 months extra time by that variation.

Disposition

26. I have concluded that the literal meaning of clause 4 is that multiple extensions of time are not permitted and that the factual matrix and commercial business sense do not point in the opposite direction.

27. I therefore declare that, in the events that have happened, the Claimant did not validly and effectively exercise the Option in accordance with the terms of the Option Agreement.

28. Permission to appeal is refused. The Claimant will need to seek permission from the Court of Appeal, who will no doubt grant it if they consider that there is a realistic prospect of reaching the opposite conclusion from the one I have reached.