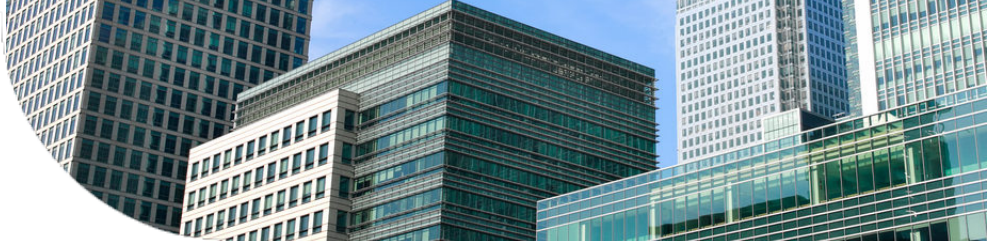

Developer Case Law Update

AUTHOR / KEY CONTACT

Mark Benham
Partner

mark.benham@la-law.com
01202 786318

Recent case law has reinforced some central tenets of property development:

1. Get your contract drafting right.
2. Don't buy land without completing your utilities due diligence (or understanding the risks involved).
3. Don't assume that restrictive covenants will be insurable or variable.
4. Sometimes a local planning authority will be flexible in its approach in order to deliver a consent.

When is a planning permission not a planning permission?

Question: You are reading your option agreement and your development lawyer has negotiated some wonderfully wide definitions. You realise you might be able to trigger your ability to exercise your option without the time, expense and risk of an application over the whole (very large) site. What do you do?

This is what happened in Fishbourne Developments v Stephens [2020]. A developer had the right to buy a 117-acre farm in West Sussex at 70% of market value once planning was obtained for development. The developer obtained a consent for a new roof on an agricultural building and sought to exercise the option.

How should the contract be interpreted? A strict, narrow interpretation of the definitions would mean that the crafty developer could obtain the land at a lower value than the owner anticipated, despite a mutual intention for the developer to seek permission for housing.

The Court of Appeal took an objective approach – as there was ambiguity, they gave weight to the implications of the various meanings to see which was more consistent with business common sense. They, therefore, concluded that the planning permission needed to be for the development of the whole, or substantially the whole, of the farm.

Developers and landowners must think about the “what ifs” both before and after exchange; although the landowner was bailed out by the court in this instance (no doubt at a significant cost), a rushed or poorly-drafted contract, or an ill-advised decision post-exchange, could come back to bite.

Can you go with the flow?

It is not uncommon for developers to delay finalising their utilities due diligence, sometimes until after a site is acquired. But that approach is evidently not without risk.

In Bernel v Canal and River Trust [2021], a developer owned a site (comprising a dwelling and an adjoining field) and intended to build nine houses. An old pipe ran from the site onto neighbouring land, which the developer intended to use for surface and foul drainage. The land did not benefit from an express right to drain, but the developer claimed an easement through long use.

The case failed on its facts - long user could not be proven. However, of interest to developers, the court decided that any prescriptive right would have been limited to the curtilage of the dwelling and not the adjoining land – the right could not be extended beyond the land that had benefited from the right.

Interestingly, even though the development would be a radical change (increasing from one to nine dwellings), the judge felt that the use of the drain would not have been substantially different, therefore all of the dwellings could have used any prescriptive right.

The case is a salutary reminder that developers should satisfy themselves as to the position with utilities – or understand the risks of not doing so – before committing to acquire development land.

Let’s not dwell on it

An old covenant prevents the development of some garden land; a landowner nevertheless obtains planning for a new dwelling. So far so common, and that’s what happened in Re Copleston’s Application [2021], a recent reminder that overcoming restrictive covenants can be challenging, even where the covenant is outdated and the proposed use is reasonable.

Planning permission was obtained for a house on garden land which was subject to a 1960 restrictive covenant preventing development other than a garage or shed. The developer, therefore, applied to the Upper Tribunal (UT) for the covenant to be modified or discharged.

The UT held the proposed development was a reasonable use of the land, but neighbours (who benefited from the covenant) objected to the application as the new house would be detrimental to the privacy and enjoyment of their house. The developer argued that, as the neighbours’ house did not benefit from the covenant, the objection should be rejected.

Tel: 0344 967 0793 | Email: info@LA-Law.com | www.lesteraldridge.com

Even though the covenant only benefited the neighbours garden land, the UT decided it was necessary to consider the effect of the covenant on the neighbours' *whole* property. The UT believed the practical benefits of the covenant should be construed widely, in particular as the neighbours acquired their land as a single, integrated property.

The owner potentially tried (and failed) to obtain a satisfactory indemnity insurance policy; title insurance is a useful remedy when confronted with restrictive covenants, but is not always the panacea that some people believe it is.

Don't stop the party

Is there a situation more frustrating to developers than trying to get a s106 agreement over the line where there are multiple parties with interests in the site and the planning officer is otherwise ready to issue a consent?

A case earlier in 2021 was a good example of where a planning authority correctly focused on the enforceability of planning obligations and the mitigation of the impact of the development, ensuring that only the appropriate parties (and not the whole world and his dog) needed to be bound to perform obligations.

In R (McLaren) v Woking Borough Council [2021], Woking BC resolved to grant planning permission for the construction of a six-storey building containing 46 flats. The owner of about half of the site refused to be a party to the s106 agreement, so the other landowner entered into it, binding only their part of the site, and planning permission was issued accordingly.

The "excluded" owner challenged the decision to grant planning permission, but the judicial review was dismissed, the court deciding that the council had not made an error.

Section 106 Town and Country Planning Act 1990 does not require an agreement to bind all interests in a site. The claimants had not been excluded from the agreement, and no prejudice had been caused – the claimants could enter into a unilateral undertaking in the future and would be within their rights not to develop their land.

If you have any questions about the cases discussed within this blog or require assistance with any development issues, please contact our specialist development solicitors today on 0344 967 0793 or by emailing online.enquiries@la-law.com.

Tel: 0344 967 0793 | Email: info@LA-Law.com | www.lesteraldridge.com