

Taking advantage

The Message:

A contract breaker could not benefit from his own default.

The Case:

Extra MSA Services Cobham Limited ("Extra") v Accor UK Economy Hotels Limited [17 March 2011] considered the significant commercial issue of whether a party to a conditional agreement could exercise a right to terminate the agreement because the condition had not been satisfied, even though the failure to satisfy the condition was caused by that party.

In 2005, planning permission was obtained for the development of a new motorway services area on the M25 at Cobham. In 2007, Extra, a commercial property developer, entered into an agreement with Accor (a member of the international hotel group) to grant them a lease for a 15 year term, with an 85 bedroom hotel being constructed as a term of the arrangement.

In 2008, the parties agreed to extend, by six months, the longstop date by which certain consents had to be obtained under the agreement for lease. On the extended longstop date, Extra contended that the consents had not been granted. In 2009, there was another agreement between the parties for a further one year extension to 30 September 2009. Subsequently, Extra argued that the consents had still not been granted by that date.

In December 2010, Extra served a notice purporting to terminate the agreement due to the consents not having been granted. Accor's solicitors argued that the notice was ineffective, because the agreement required Extra to use all reasonable endeavours to satisfy various conditions (including the obtaining of the consents) as soon as possible after the date of the agreement. Accor claimed Extra had not done so and, therefore, Extra could not end the agreement. That was because, according to Accor, Extra's termination right was conditional on proper performance of Extra's obligations under the agreement.

Extra sought a declaration from the Court that, on a true construction of the agreement, the termination right was not conditional (by implied term or otherwise) on Extra's proper performance of its obligations under the agreement. So Extra could terminate if the condition was not satisfied by the relevant date, regardless of whether Extra had complied with its obligation to satisfy the condition.

Accor argued that neither a landlord nor a tenant should be able to rely on the termination provisions in the agreement if that would involve relying on its own breaches. Therefore, Extra

could not terminate on the basis of outstanding consents where Extra, itself, was in breach of its obligation to obtain those consents.

The High Court agreed with Accor. A contract will be construed, so far as possible, so as not to allow a party to take advantage of its own wrong. That principle is not absolute and may be displaced by express contractual provision or the parties' intention to be understood from the express terms.

The Court analysed the purpose behind the termination right in the agreement. The right allowed the parties to get out of the agreement if the consents proved impossible to obtain. Commercial parties to such agreements know that, through no fault of their own, they can sometimes fail to get the necessary consents within the time frame envisaged by their agreement. If that is the case, the parties should be able to walk away.

However, the Court considered it quite wrong to suggest that the parties envisaged that a party could terminate (to its advantage), when it had failed to comply with its obligation to get the consents. Termination is conditional on Extra not having brought about its right to terminate by its own breaches of the agreement.

The Court's decision related to a single point of law and did not prejudge whether Extra, in fact, breached the agreement and whether any such breach caused the consents not to have been obtained. Those issues would be determined at a future trial or application.