

selborne

CHAMBERS

ENDEAVOURING TO ESCAPE FROM A CONTRACT

Introduction

The rise and fall in the value of land over the last few years has tested the ingenuity of lawyers in assisting their clients to escape from contracts. Familiar phrases or concepts have been deployed, sometimes successfully, sometimes not. This talk seeks to examine certain aspects of contract law in the context of two recent cases. Hopefully it will prove useful to use these cases to study the working of the legal concepts in practice. The two topics to be discussed are:-

- (i) What are reasonable endeavours?
- (ii) When is there a repudiatory breach?

The first topic involves a scrutiny of the case of **Yewbelle Limited v. Knightsbridge Green Limited**, decided at first instance by Lewison J at (2006) EWHC 3166 (Ch) and on appeal by Lord Justices Waller, Buxton and Lloyd and reported at (2007) EWCA Civ. 475 (2008) 1 P&CR 17 (2007) 2 EGLR 152.

The second topic was most recently considered by Robin Knowles CBE QC (sitting as a Deputy Judge of the Chancery Division) on 22nd October 2009 in **Quest Advisors Limited v. Thomas Bernard McFeely** (2009) EWHC 2651 (Ch) reported on Lawtel.

Yewbelle

The Tower, Colliers Wood, lay on a triangular site opposite Colliers Wood underground station in South London. It comprised a development of extreme ugliness (voted London's ugliest building by architects) and

comprised a 1960s 17 storey office building and a 5 storey circular car park (imagine "Get Carter").

By late 2004 Yewbelle's predecessor-in-title as freehold owner, had obtained planning permission for a redevelopment, mixed residential and commercial. A draft 106 agreement existed. A buyer was sought for the freehold. LGD appeared.

On 23rd May 2005 a meeting took place at the vendor's solicitors' office. The buyer's solicitor asked "*Is the Section 106 agreed?*". The vendor's solicitor telephoned the council's solicitor and she said "yes". On the basis of this interchange clause 25.2 was entered into the contract, reading:

"The Seller will use all reasonable endeavours by completion to obtain the completed S.106 Agreement and the Buyer will not be bound to complete until the S.106 Agreement has been obtained by the Seller subject to the Buyer hereby indemnifying the Seller against all obligations contained in the S.106 Agreement and the Buyer paying the legal costs of the London Borough of Merton in connection therewith".

The S.106 Agreement was defined as "*The proposed agreement to be entered into between the Seller (1) the Seller's mortgagee (if any) (2) and the Mayor and Burgesses of the London Borough of Merton (3) substantially in the form of the draft attached to this agreement*". The completion date was fixed for 15th September 2005, the price was £13.75 million and there was no long stop date. Post exchange the vendor's solicitors e-mailed the council for written confirmation of what was said on the telephone. The result was unexpected. On 15th June the council's solicitor apologised but said there were a "*couple of important issues that required resolution*". One involved the highway (which did not prove problematical) but the second involved the provision, within the development, of a public library. Merton wanted this library on a lease without a premium and at a peppercorn rent. Negotiations with Merton did not produce a S.106 agreement by the date for completion.

Indeed a further problem arose. A small portion of land at the south east of the site, believed to belong to Merton, turned out to belong to a rival

developer. There were more negotiations, but the library issues were not resolved. The buyer was invited to complete without the S.106 Agreement. It refused to do so and it certainly had no obligation to do so pursuant to the Agreement.

On 23rd May 2006 the vendor's solicitors wrote asserting that all reasonable endeavours had been used, and since no S.106 Agreement had been completed the Agreement was discharged. The buyers refuted this assertion.

On 27th June 2006 proceedings were brought seeking a declaration that the contract had come to an end. The trial was expedited.

On 30th June the buyer entered into a conditional contract with a rival developer to buy the land at the South East of the development site, with the contract to remain open for one year.

On 3rd October 2006 the buyer wrote to the vendor stating that it was prepared to complete without a S.106 Agreement.

The trial took place in November 2006 with judgment on 8th December 2006. There was a dispute as to how the contract "worked". The vendor said that there was a reasonable time to obtain the completed S.106 Agreement. If in the exercise of reasonable endeavours this reasonable time had expired, and there was no S.106 Agreement the contract came to an end. The buyer said there was no question of reasonable time, it was unnecessary to input such a provision into the contract.

The Judge asked himself "How does the contract work?" He then embarked upon an analysis (which anticipated the approach now approved by the Privy Council in **Attorney General of Belize v Belize Telecom** (2009)2 AER 1127). He adopted the vendor's "fall back" position and accepted a three stage approach, namely:-

- (i) The seller complied with its obligation to use all reasonable endeavours to complete the S.106 Agreement and persisted in those endeavours for a reasonable time.

- (ii) The seller gave the buyer an opportunity to complete the sale without any S.106 Agreement.
- (iii) The buyer chose not to complete the sale.

What amounted to "reasonable endeavours" lay at the centre of the case. The Judge's analysis is at paragraphs 118 to 122. This analysis was accepted by the Court of Appeal. Lewison discussed two issues, money and timing, namely:-

- (i) Money - A party can take account of its own financial position when considering what are its reasonable endeavours. Thus:
 - (a) Where a developer had an obligation to "*use their reasonable endeavours to secure a letting of each lettable part of the development*" as in **P&O Properties v. Norwich Union** (1994) 68 P&CR 261, that developer did not need to pay a reverse premium to secure a letting, even if a reasonable landlord would pay such a premium.
 - (b) Where, in **Phillips Petroleum v. Enron** (1997) CLC 329 both parties had an obligation to use reasonable endeavours to reach an agreement on certain dates for a new natural gas plant, including the Commissioning Date, and the date for a test, Enron argued that the only relevant criteria for the selection of those dates was "*criteria of technical and operational practicability*", and the parties could not have "*regard to selfish or commercial motives*". The Court of Appeal disagreed. Potter LJ said: "*I see no reason to suppose that it was the expectation, let alone the obligation, of the parties that, in any area of activity in which room was left for manoeuvre or further negotiation they were not at liberty to take into account their own financial position and act in the manner most beneficial to them short of bad faith or breach of an express term of the contract*".

- (ii) Timing - For how long must the seller continue to use reasonable endeavours to achieve the desired result? *"[The vendor's counsel] said that the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again. I am prepared to accept this formulation, subject to the qualification that account must be taken of events as they unfold including extraordinary events"*.

The above analysis was also followed by Julian Flaux QC, sitting as a Deputy High Court Judge (now Flaux J), in the commercial case of **Rhodia International Holdings v. Huntsman International LLC** (2007) 2 LI LR 325, where he added the (obvious) proviso that *"where the contract actually specifies certain steps have to be taken ... as part of the exercise of reasonable endeavours those steps will have to be taken even if that could on one view be said to involve the sacrificing of a party's commercial interests"*.

Having examined the evidence, Lewison J considered that further endeavours might have resulted in a S.106 Agreement, so that the vendor was wrong to stop using any endeavours. The Court of Appeal (2:1) disagreed. They did not depart from the Judge's view that *"a tougher line of negotiation"* might have resulted in the library issues being settled. However because the vendor was not obliged to pay for the third party land this was not resolvable with reasonable endeavours. As Waller LJ explained at paragraph 126 :

"the obligation is one composite obligation and if any use of reasonable endeavours is going to fail to produce a compliant agreement then I see no basis on which the sellers would be bound to go on endeavouring to negotiate some other aspect of the agreement"

Moreover, at that stage, the buyer was not willing to proceed without the S.106 Agreement. Thus by 23rd May 2006 the vendor was correct to end the contract. Interestingly, the majority of the Court of Appeal

believed that if the buyer had earlier indicated that its own endeavours might produce a compliant S.106 Agreement then the vendor may have been obliged to allow a further reasonable period for this to happen (see in particular Waller LJ at page 130).

One final point, the foregoing is concerned with reasonable endeavours, or all reasonable endeavours. In **Rhodia** (supra), having heard detailed argument, the Deputy Judge arrived at the, obvious, conclusion that “*an obligation to use reasonable endeavours is less stringent than one to use best endeavours*”.

Quest

On 4th May 2005 an agreement was entered into, whereby Quest agreed to sell to Mr McFeely a development site on the north side of Stratford High Street, just to the south of the new Olympic park. There was planning permission for a major development comprising a tower (of nearly 300 flats) and ground floor shop units. The buyer was to pay a substantial sum. In addition the buyer undertook a contractual obligation that, once the development was completed, it was to grant to Quest 999 year lease(s) of the shops at a peppercorn rent.

Completion took place and the development progressed. Quest executed an assignment of its entitlement to the commercial lease(s). The assignee was an associated company called Sharriba. When the buyer learnt of this assignment it contended that the contract to grant the lease(s) had been repudiated by the assignment, because the Agreement forbade any such assignment. Thus the obligation to grant the valuable shop lease(s) was now ended.

At trial the Judge decided that the entitlement to the new commercial lease(s) was non-assignable. However he concluded that Quest had not intended to deprive itself of the right to take the new lease(s). He examined the law, including **Woodar Investment Development Limited v. Wimpey Construction (UK) Limited** (1980) 1 WLR 277 and stated the following propositions of law:-

- (i) *"The real matter for consideration is whether the acts or conduct ofone do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract"*
- (ii) *"Repudiation is a drastic conclusion which should only be held to arise in clear [or "plain"] cases of refusal, in a manner going to the root of the contract, to perform contractual obligations"*
- (iii) *"Subjective intention is not decisive tThere remains the question of whether, objectively regarded, [the] conduct showed an intention to abandon the contract" ...*
- (iv) *"Where one party, honestly but erroneously, intimates to the other reliance upon a term of the contract which, if properly applicable, would entitle him lawfully to rescind the contract, in circumstances which do not and are not reasonably understood to infer that he will refuse to perform his obligations even if it should be established that he is not so entitled, proceedings to decide that issue being in contemplation" the other party will not be allowed to treat such conduct as a repudiation ...".*

There are many situations where one party seeks to use a provision within an agreement to bring it to an end. If that party is concerned that its exercise of this provision might turn out to be misconceived then it should indicate that it was acting upon a genuinely held view but, if that view was wrong, it was not refusing to perform its obligations. See the approach of the Privy Council in **Vaswani v Italian Motors (Sales and Services) Ltd** (1996) 1 WLR 270, as explained by Christopher Clarke J in **Dalkia Utilities v Celtech** (2006) 1 Lloyd's LR 599, at paragraph 148.

Lessons from the above?

The law is both dynamic and commercial. Litigators should be prepared for an elaborate game of chess, with moves and counter-moves. Even the order of the moves can prove important. Thus if the buyer in Yewbelle had signalled to the vendor the existence of its negotiations with the owner of the

third party property (rather than kept quiet about this) the result of the case is likely to have been different.

Litigation experience also underscores the good sense of being prepared to have one or more "fall back" positions. Thus even if some step is taken (eg service of a termination notice or assignment) it is wise not to be too dogmatic, but to couch the step in language that permits the subsequent argument that the step was not a repudiatory breach.

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