Under construction: drafting and interpretation of land options

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Land Options

Introduction

1. In H&S Developments v Chant [2016] EWCA Civ 848 in which I acted at first instance and in the Court of Appeal for the respondent development company, H&S Developments, a single, discreet issue of interpretation arose in relation to an option agreement. The question was simply what 'detailed planning permission' meant in the context of the option agreement entered into by the parties.

2. In these notes I have sought to define and explain land options, attempted to show what the general principles of interpretation are in relation to land options and set out how the courts approach disputes about meaning and construction with particular relation to planning permission. I have then looked at the H&S case in detail, including assessing the first instance, first appeal and Court of Appeal

judgments and the authorities on which the court relied to reach its judgments. Finally, I have examined what can go wrong in drafting land options and how to avoid these errors.

Land Options: Definition and Explanation

3. In essence, an option is a contract that gives the buyer the right, but not the obligation, often subject to certain conditions having been satisfied, to buy or sell an underlying asset at a specific price on or before a certain date[1]. In the case of a land option, the underlying asset is land or property that may be bought or sold at specific price within a defined period. It has been said that an option stands mid way between an offer and an unconditional contract. It creates a unique relationship with the characteristics of both of those things[2].

4. An option to buy land is a contract for sale within the Law of Property (Miscellaneous Provisions) Act 1989, s2. However, it plainly has differences from a normal bilateral contract to purchase land. The grant of an option conveys no obligation on the holder of the option. The obligation that it imposes on the grantor is contingent on the exercise of the option (and may also of course be contingent on other conditions being satisfied – see below).

5. When the option is exercised, the seller and buyer come under an obligation to perform as if they had a contract for sale. Ordinarily, an enforceable option to buy

[1] In Nicholls v Lovell [1923] SASR 525 at 545, per Poole J, it was held that the meaning of option depends on the context. The simple definition above is intended as a useful starting point rather than an all encompassing definition.

[2] See Spiro v Glencrown Properties Ltd [1991] CH 537 at 544 per Hoffmann J, as he then was and Barnsley's Land Options, 5th Edition, 1-002.

land confers a right to call for the transfer of land from the grantor to the grantee, provided that the grantee complies with all the terms of the option.

6. An option should be distinguished from a conditional contract on the basis that a conditional contract creates an obligation on the grantee to buy when the conditions are fulfilled, whereas an option gives the grantee the right rather than an obligation to purchase when the conditions are fulfilled; the grantee having bought the right to acquire the land in the future having entered into the option[3].

Interpretation of Land Options

General Principles

7. The normal principles of construction apply to the interpretation of land options and to conditions to the exercise of an option. In the leading case on the construction of notices - Mannai Investment Co v Eagle Star Life Assurance [1997] AC 749 - the court was concerned with the validity of a notice. It was found by the court in that case that the correct date for the expiry of the notice was January 13 1995. The notice was expressed to expire on January 12 1995. The House of Lords held by a majority of 3 to 2 that the notice was, nevertheless, valid. Lord Hoffman's speech set out the difference between the meaning of words and the question of what was understood by those words in their context.

[3] See Barnsley's Land Option, 1-003 and 1-004.

8. Lord Hoffman reasoned that it is only the background to the words used which enables the recipient to discover the intended meaning of those words, where either the words have more than one meaning, or the speaker has uttered the wrong words. The result is that a document is to be construed by asking the question of what a reasonable recipient of that document, with knowledge of the relevant background, would understand the words to mean.

9. Therefore, in determining what the parties to an agreement or option intended, the court is concerned with what an objective reasonable observer would believe was the effect of what the parties to the contract or alleged contract, communicated to each other by words and actions as assessed in their context[4].

10. More recently, Lord Clarke in the Supreme Court said that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other[5].

Construction of Options

[4] See also e.g. Smith v E. Hughes (1871) LR 6 QB 597, 607, Lord Neuberger in VTB Capital plc v Nutritek International Corpn and others [2013] 2 AC 337 at para 140 and see also per Toulson LJ and Lord Neuberger MR in Daventry District Council v Daventry & District Housing Ltd [2011] EWCA Civ 1153 at paras [174], [178] and [202].

[5] Rainy Sky v Kookmin Bank [2011] UKSC 50 at [21]

11. It is often the case that land options in relation to land which is or may be subject to development are made conditional on the grant of planning permission (as was the case in H&S Developments v Chant). The meaning of such a condition precedent and its effect depends on its construction. As above, the normal principles of construction will apply, but the courts have provided guidance where specific terms or particular option related difficulties of construction have been encountered.

12. In Jolley v Carmel[6], a contract for sale provided for completion conditional upon the purchaser obtaining planning permission. In the absence of an express obligation of the purchaser to use reasonable endeavours to obtain the permission and with no long stop date by which permission had to be obtained, there was held to be no implied term that permission would be pursued and obtained within a reasonable time frame.

13. Some agreements have imposed an obligation on the grantee of the option to use reasonable endeavours to obtain planning permission in accordance with the terms of the option[7]. However, such obligation can give rise to difficulties, in particular disputes of fact as to whether reasonable endeavours have been used, when the planning permission has not been obtained.

14. In Smith v Royce Properties[8], problems arose as to the construction of an option where planning permission was obtained for a scheme which included the land

[6] [2003] 3 EGLR 68
[7] See also Rhodia International Holdings v Huntsman International [2007] 2 Lloyds 325
[8] [2002] 2 P&CR 5

subject to the option, but the planning permission related primarily to the neighbouring land. The Court of Appeal held that the planning permission for the adjourning land, being necessary for the development for which the option was granted, was sufficient to grant the option.

15. The two principal cases in the construction of land options relating to planning permission are Hargreaves Transport v Lynch [1969] 1 WLR 215, [1969] 1 All ER 455 and Castlebay Limited v Asquith Properties [2005] EWCA Civ 1734 , [2006] 2P&CR 22. In the former, a Court of Appeal consisting of Lord Denning, Widgery LJ and Russell LJ considered a contract to buy a piece of land subject to the condition that the buyer, Hargreaves, would receive planning permission to develop it for their transport business. Outline planning permission was received but approval of the detailed plan was refused. The question was whether the outline planning permission was enough to satisfy the condition in the contract.

16. In his judgment, Lord Denning held that:

> *"The first point is whether the condition in the contract was satisfied by the grant of outline permission without details. Counsel for the defendant says that, in point of planning law, an outline permission is the only permission that is granted. He has referred us to Hamilton v West Sussex County Council and R v Bradford-on-Avon Urban District Council, Ex p Boulton, and also the Minister's circular which states:*

"An outline permission is in every sense the permission required by section 13 of the Act and the subsequent approval of detailed plans does not constitute the granting of a further planning permission."

So counsel for the defendant urges that the vendor did all he had to do when outline permission was granted; and that it was the responsibility of the plaintiffs to get the details approved.

Whilst I agree that in planning law, outline permission is the permission, nevertheless, I do not think that it is the permission required by cl 9 of this contract. The contract must be construed sensibly. The plaintiffs wanted a planning permission which would enable them to erect buildings and use them for their transport business. An outline permission was quite insufficient for that purpose. They could not turn a sod or lay a brick until the details were approved. In order to make the condition in cl 9 work sensibly it must mean that the plaintiffs are to receive detailed permission from the planning authority so as to be able to use the site as a transport depot and to develop it by putting buildings on it. This view is confirmed by the subsequent conduct of the parties, which is, I always think, a legitimate thing to take into account. As soon as the issue arose in June 1966, the defendant or his advisers did not say: "We have done our part because the outline permission is good enough." They assumed, and I think quite rightly, the details had to be approved, and suggested that there should be an appeal to the Minister so as to get the approval."

17. This was a case therefore in which planning permission was held to mean or encompass approval of the detailed plan. However, it may be said that the construction of the option 'sensibly' by Lord Denning involved the consideration of the context. The context was that the developers needed a permission that allowed them to erect buildings and the permission they had did not allow them to, in the words of Lord Denning, 'turn a sod or lay a brick'. In those circumstances, planning permission, it was held, must have meant approval of the detailed plan. What was critical in that interpretation was the commercial background or reality of the situation.

18. The case of Castlebay superficially appears to contradict the judgment in Hargreaves. The single issue in Castlebay was the meaning to be given, in the context of an agreement between the parties, to the expression 'a decision in respect of a planning application'. What was said by the Appellant was that the approval of reserved matters was necessary to enable the development to be carried out so that the phrase 'application for planning permission for the development' in the agreement must be given a meaning that reflects that need.

19. Chadwick LJ in his judgment held that:

> *"22 - It is common ground, I think – and, if not, it seems to me beyond dispute – that the agreement of 18 August 2003 must be construed with the planning legislation in mind. The planning legislation is, plainly, part of the background which the parties to an agreement of this nature must be taken to have in mind at the time when they make the agreement; and, indeed, the agreement itself*

makes a number of references to the Town and Country Planning Act 1990, which it includes as a defined term."

"33 - It is clear that received planning wisdom – as embodied in the editorial comments in the Encyclopaedia – is that an application for approval of reserved matters is not an application for planning permission. And, as I said, that has a firm foundation in the decision of the Divisional Court in the Bradford upon Avon case."

20. On Hargreaves, Chadwick LJ then stated:

"38- It can be seen, therefore, that the decision in Hargreaves turned on the particular circumstances of that case set out by Russell LJ in his judgment: the urgency known to both parties for the purchaser to start to use the site as its depot as soon as possible; the uselessness of the site to the purchaser until work could be started on it; the fact that the purchaser could not lawfully start work until the condition requiring approval of detail was resolved. Those circumstances were enough – and, in Russell LJ's words, just enough – to justify construing cl 9 in the sense of it being a reference to a planning consent which would enable work to start on the site forthwith."

21. Finally, in concluding that the phrase 'application for planning permission only included outline planning permission, he held:

"46 - For those reasons I do not find assistance in those various provisions, save this: this is clearly an agreement which has been drawn with the provisions of the planning legislation fully in mind. In those circumstances, I would expect the parties to have intended, by the phrase "application for planning permission", the meaning which that phrase has long been recognized to bear in the context of planning legislation. If there were a context which required that meaning to be enlarged, the court would give effect to that requirement, as it did in the Hargreaves case. But, absent any context which requires some larger meaning, I am left with an agreement which is intended to strike a balance between the interests of the owner and the interests of the grantee. And I am left with the firm conclusion that, if these parties had intended some meaning to be given to the phrase, "any application for planning permission" wider than the meaning which that phrase normally bears, they would have made that clear."

22. Accordingly, Chadwick LJ found that absent any relevant background that would allow the court to construe planning permission as including reserved matters, as was the case in Hargreaves, he was bound to find that outline planning permission, as the only planning permission that can be granted under the relevant legislation, was what was referred to in the phrase 'application for planning permission' in the option agreement.

Background to H&S Developments v Chant

23. H&S Developments ('H&S'), a development company, entered into an option agreement ('the Option') with Mrs Chant, a land owner, on 24 February 2010 by which it acquired an option to purchase land ('the Land') from her if '*detailed planning permission*' was obtained in respect of the Land by 23 February 2015.

24. Accordingly, it was accepted by both parties that 'detailed planning permission' was a condition precedent for the exercise of the option. The issue was what that phrase meant.

25. On 29 January 2014 planning permission in an outline form was granted by the Local Planning Authority. On 5 February 2014, H&S served its first notice exercising the option. Mrs Chant declined to transfer the land on the basis of that notice of call of option because, she said, detailed planning permission had not been given in respect of the Land.

26. In April 2014 H&S issued proceedings seeking specific performance and damages. On 19 December 2014 there was a determination by the Local Planning Authority to grant permission in respect of reserved matters in relation to the outline planning permission. On 13 January 2013 the Claimant served a second notice of call of option; this was done before the end of the option period.

First Instance and First Appeal

27. The principal issue at first instance and on the first appeal was whether the outline planning permission obtained by H&S in January 2014 qualified as a planning permission according to the relevant definition in the option agreement i.e. 'detailed planning permission'.

28. Having considered Court of Appeal authority including Castlebay Limited v Asquith Properties Limited in which Chadwick LJ held that *'an application for approval of reserved matters is not an application for planning permission*', both the District Judge and the Circuit Judge came to the conclusion that '*detailed planning permission'* did cover such planning permission as had been obtained in January 2014 and accordingly that the first notice of exercise of the option was valid and should have been complied with. As HHJ Denyer found having cited Castlebay: '*It is clear therefore that in the context of planning law there is only one planning permission'.*

29. As the phrase '*detailed planning permission'* does not actually exist in planning legislation what was argued on behalf of Mrs Chant was that detailed must mean or refer to reserved matters, or put fully the condition precedent should be construed as meaning that until reserved matters had been dealt with, no detailed planning permission had been given for the purposes of the option.

30. HHJ Denyer QC held given the background and the fact that the word '*detailed*' adds nothing to the words '*planning permission'* that if one is to give meaning to the words '*detailed planning permission'* it can only be done in the context of planning legislation and the authority of Castlebay.

31. It was also observed in the judgment on the first appeal that the reserved matters left open by the outline planning permission had been resolved by the end of 2014 and before the second notice of call of option. Therefore, the appeal was an exercise in futility in that, even on Mrs Chant's definition of what the words meant, there had been a grant of outline planning permission and approval of reserved matters by the time the second notice was served.

The Second Appeal

32. On a second appeal to the Court of Appeal the threshold test for granting permission to appeal is whether the appeal raises important points of principle or practice or there is some other compelling reason for the Court of Appeal to hear the second appeal: CPR 52.13(2).

33. The main submission made on behalf of Mrs Chant was that there was an important point of principle or practice involved in the case because the definition of planning permission in the option agreement was in a form which reflected a common precedent for a landowner's option agreement.

34. In his judgment Sales LJ, finding for H&S, held that there was no important point of principle or practice or other compelling reason to grant permission for a second appeal because the option agreement was a non-standard agreement, albeit it bore some similarity to a precedent to which he was referred.

35. In any event, he reasoned that even if successful on the construction point it would amount to a Pyrrhic victory because the second notice of call of option would, even on the interpretation of the contract proposed by Mrs Chant, have been a valid exercise of the option rights under the option agreement because by that stage a detailed planning permission was in place, taking the outline planning permission in conjunction with the reserved matters approval of 19 December 2014. In practical effect, LJ said, the appeal would be academic. Accordingly, the application was dismissed and H&S were successful.

Drafting

36. The question that follows from all of this is how these problems of construction can be avoided. The answer lies in tight drafting of the option agreement itself. Barnsley's Land Options in the preface to the first edition states:

> *"the drafting of the option agreement so as to give full legal effect to the parties' intentions is of a paramount importance."*

No doubt this is true, but the editor also notes:

> *'the dangers of adopting a standard form without considering its suitability for the transaction in hand are obvious."*

37. There are then particular points that should though be borne in mind when drafting or approving an option agreement:

37.1. The drafting of the option should not be treated as a mechanical process involving the copying or strict adherence to a standard precedent with only the names of the parties, the property and the consideration providing variation from the precedent. This is because the drafter needs to be alive to the legal implications of the document.

37.2. Without wanting to state the obvious, it is important that full instructions are taken from the client. Instructions will need to be taken on a number of issues that may not have occurred to the lay client. These might include on assignability of the option and whether a right of pre-emption is intended to be binding on the grantor alone.

37.3. There should be no uncertainty as to the nature of the rights that the option creates. Terms or words such as first option or first refusal should generally not be used as though they are technical terms conveying precise legal meaning[9].

37.4. When drafting the option, it should be remembered that on exercise of the option, a contract for sale comes into force, the terms of which need to be embodied in the option agreement itself. If the option agreements fail to

[9] See Barnsley's Land Options, 1-024

make or make proper provision for this the likelihood of a dispute increases; it being too late to regulate the terms of the sale contract once the option has been exercised.

37.5. The property that is the subject of the option needs to be properly and fully defined.

37.6. The time for, and mode of, exercise of the option needs to be set out in the option. Normally, an option will specify the period within which it may be exercised, although it has been held that this is not he essence of an option[10].

37.7. Finally, and perhaps most importantly given the experience of the parties, in H&S, Castlebay and Hargreaves, the condition precedents to the exercise of the option need to be properly and fully defined in the option agreement.

Conclusions

38. The use of land option in property or land development is and will continue to be a useful tool allowing parties rights and optionality where certain conditions have been satisfied. Where there is disagreement between the parties about interpretation, the relevant background will be critical in determining what the parties intended in entering into the agreement. The uncertainty and expense of the process of using a court to make that determination will clearly be reduced by the

[10] Sainsbury's v Olympia Homes [2005] EWHC 1235 (Ch) at [56].

careful drafting of the option agreement on full and considered instructions from the parties.

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