

Falls in the value of development land have created challenges for solicitors advising landowners. Alison Bailey advises on the best strategy to play.

In the current climate of falling house and commercial property prices it can seem that little development is taking place. Landowning clients are increasingly anxious about the price they might receive for their development land, whether they will receive this and the solvency of their chosen developer.

Many landowners have land presently under contract or option; the terms of which were agreed when the market was buoyant, guaranteed minimum prices per net developable acre were high and developers were keen to acquire land. Should such landowners simply sit back and wait for the market to improve or are there things they can and should be doing?

Land that is under contract or option to a developer who appears to be doing very little with it is not an appreciating asset; development is usually only realised after a considerable amount of effort and expense on the part of a landowner or a developer. If land is not being promoted either because there is no demand or no funds to pay for its promotion by the chosen developer, landowners risk their land being passed over in favour of other land that is being actively promoted.

The issues facing landowners are similar whether the land is subject to a conditional contract or an option, as each agreement will contain obligations on the developer to promote the land through the Local Development Framework and to use reasonable endeavours to obtain satisfactory planning permission as soon as practicable. Many developers seek to interpret the expression “reasonable endeavours to obtain a satisfactory planning permission as soon as practicable” as “reasonable endeavours when we can make a profit”, but this is quite mistaken!

## **Failure to perform?**

The first step landowners should take (which may seem obvious) is to make enquiries of the developer about progress and what he is doing. These enquiries can be augmented by enquiry of the local planning authority about whether proper discussions have taken place about the land and by requesting copies (from the local planning authority and the developer) of all relevant correspondence and submissions.

Landowners then have a judgement to make, based on their findings, about whether the developer is doing enough to comply with his obligations. The developer may be doing nothing (hoping for the credit crunch to pass), he may be making detailed representations and undertaking full investigations, or he may fall somewhere between these two standards.

Consider, for example, the situation where the developer has had initial discussions with the planners about inclusion of the site in the Local Development Framework, has been advised that the planners favour another site and has done nothing more. Each case will depend upon the wording of the obligations in the contract or option and upon the actual facts, but it is possible to form a judgement as to whether the developer's actions were reasonable in the circumstances.

Assuming the conclusion is reached that the developer is not complying with his obligations, the next step is to decide whether to seek to bring the contract or option to an end. The ability

to do so will depend on whether or not the developer's failure can be regarded as a repudiatory breach; that is, one that goes to the root or essence of the agreement. As the purpose of a development agreement is to attempt to obtain planning permission – something many local planning authorities are still keen to grant to meet housing and other structure plan targets – save in exceptional circumstances, doing nothing to achieve that will be a repudiatory breach. It will be more difficult to decide conclusively that there has been a repudiatory breach where the developer has taken some steps to promote the land.

If you believe that there has been a repudiatory breach, the developer should be advised in writing of this and that the contract is being treated as at an end, or else advised that he is being given a time period in which to rectify his breach and what he is expected to do. If the developer disputes this, it will be necessary to bring proceedings for a court declaration whether there has been such a breach.

If there is uncertainty whether there has been a repudiatory breach, an alternative way forward is to bring an action for specific performance to require the developer to comply with its obligations under the agreement. If this is successful and the developer complies, the land will be being promoted. If the developer does not comply with an order for specific performance, that will almost certainly be a repudiatory breach; for which the landowner can determine the agreement.

Specific performance is a discretionary remedy, but a court will lean towards granting specific performance in property transactions, particularly commercial property transactions such as development involving professional developers. It is sensible to attach a list of actions required of the developer to the order, so that each party can monitor progress and the developer can be sure what is required of him.

## **But there's no cash!**

Let us turn to the scenario where the developer has been complying with his obligations and is successful in obtaining planning permission. In the current climate, more and more developers are seeking to renegotiate the price and/or the terms for payment as they are reluctant or unable to fund the full purchase price immediately. A landowner faced with a request to defer part of the purchase price needs to consider security for payment of that price. The traditional method was to take charge back over the site sold. This is still a possibility, but the value of that site needs to be carefully assessed, as it may not be worth now the value attributed to it when the agreement was negotiated.

Another option is a bank guarantee, although there is nervousness over the acceptability of these in the light of recent bank collapses. An alternative solution adopted in the past was for the developer to deposit the money in an escrow account; this is unlikely to be a realistic possibility in the current climate. Solicitors need to discuss the alternative forms of security with their clients and ensure they understand the advantages and disadvantages of each.

## **Tax issues on price deferral**

Advisers also need to be aware of the date on which their landowning clients are due to pay capital gains tax on the sale proceeds. Clients rarely appreciate arriving at that date only to find the purchase price instalments received thus far are insufficient to cover their tax liability. It is worth recommending to clients that they discuss any proposals to defer payment of the purchase price with their tax advisers before accepting them.

## **Don't lose your planning permission**

Another request increasingly received from developers is to defer the completion date into their next financial year or even beyond that. While this may appear more attractive at first sight, as the landowner remains in control of the land, it needs to be remembered that

planning permissions have a limited life and can be lost if not implemented within that timescale.

If completion is delayed and the developer subsequently defaults, the landowning client may find the asset is worth considerably less than he would have received under the original contract or option. Although he may have a claim in damages for loss of bargain, this will take time, cost money and need to be enforced against a developer who may not be able to pay.

## **Early entry – a potential trap**

Let us consider this request from the developer: “We are keen to buy the land and agree the price but complete in 12 months’ time and we would like to come onto the land in the meantime to carry out preparatory works and preserve the planning permission.” At first glance, this may seem a sensible proposal, as it should mean that the planning permission is implemented and therefore does not lapse. There is a potential pitfall for the landowner in allowing entry for works before completion of the sale. If there is a section 106 agreement in place (as there usually will be for a development of any size), any works done to the land that have the effect of commencing development will trigger liabilities under that agreement. These will fall on the owner of the land if the developer does not meet them.

## **Failure to complete**

There is a further issue in the case of a conditional contract where the developer satisfies the condition by obtaining planning permission and then fails to complete. The landowning client cannot, of course, take action until the completion date has passed and there has been an actual failure to complete. At that point, the seller can serve notice to complete and, if completion does not occur, forfeit the deposit.

Some developers will seek to avoid forfeiture of the deposit by using s.49(2) of the Law of Property Act 1925. The case of *Midill v Park Lane Estates* [2008] EWCA Civ 1227 is of benefit to sellers, as this clarifies the availability of s.49(2) and provides that the court will not order repayment unless there have been exceptional circumstances.

If the seller is unable to sell the land for the price he should have received under the contract, he can bring an action for damages for loss, though should take into account the time and expense of this and the need to enforce any judgement. Such steps need to be balanced against the possibility of negotiating a change in the terms of the contract, perhaps by way of deferred completion and/or payment of the purchase price, to avoid the need to find a new buyer for the property and the risk of the planning permission expiring.

The credit crunch has given us an unusual set of circumstances where planning permissions are obtainable but the funds to pay for land with planning permission are in short supply. This situation may be with us for a number of years and give landowners, developers and lawyers advising them a very different environment to that faced for many years.

Postscript:

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