

Legal alert

May 2016

Specific performance of obligation to execute s.106 agreement

Redrow Homes Ltd v Martin Dawn (Leckhampton) Ltd [2016] EWHC 934 (Ch)

In this case, Redrow Homes (“Redrow”) bought a development site from Martin Dawn (Leckhampton) Ltd (“MDL”).

As part of the deal, Redrow had agreed that, following completion, it would make an overage payment to MDL calculated by reference to the net developable area resulting from any planning permission obtained by Redrow for the site. The greater the net developable area, the greater the overage. Moreover, Redrow had agreed to use all reasonable endeavours to achieve a planning permission for a net developable area of not less than 28.88 acres.

On completion, Redrow had executed a legal charge in favour of MDL to secure this and other overage payments. As part of the terms of the charge, MDL had agreed to be a party to any section 106 agreement required by the local planning authority.

Planning authorities still use s.106 agreements as a method (alongside planning conditions and the community infrastructure levy) of procuring infrastructure and affordable housing.

A section 106 agreement is binding on “any person deriving title from” the person who enters into the agreement. However, case law says that the agreement will not be binding on anyone whose interest in the land pre-dates the agreement (unless that person agrees to be a party to the agreement).

In other words, since its legal charge pre-dated the s.106 agreement, MDL would be able to enforce its security by selling the site free from the s.106 obligations. To counter this possibility, the local planning authority insisted that MDL should join into the s.106 agreement.

The planning authority subsequently resolved to grant planning permission to Redrow in return for a section 106 agreement executed by both Redrow and MDL.

However, the net developable area resulting from the permission was only 26.7 acres. This was less than the hoped-for 28.88 acres and would mean reduced overage for MDL. MDL therefore refused to execute the section 106 agreement, in the hope that its refusal would force Redrow to try again for a better permission.

In response to MDL’s refusal, Redrow applied to court for an order (for specific performance) requiring MDL to execute the section 106 agreement. MDL argued that such an order would be inappropriate because (in MDL’s view) Redrow was in breach of contract because it hadn’t tried hard enough to fulfil its reasonable endeavours promise to obtain permission for 28.88 acres.

The judge sided with Redrow. He did so despite the long-established principal (under the maxim “he who comes to equity must come with clean hands”) that an order of specific performance should not be made in favour of someone who is themselves in breach of contract. The judge felt that Redrow’s supposed breach was not sufficiently important (having regard to its connection with MDL’s s.106 obligation) to make it unfair to force MDL to execute the agreement. In other words, if Redrow was in breach of contract, then MDL would be entitled to damages for the breach, but would not be entitled to refuse to execute the s.106 agreement.