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Property Litigation
Case Law Update
Rosling King LLP

The Facts

On 9 June 2005, the Claimant, Mr Sparks, entered into the Agreement with the Defendant, Mr Biden, whereby, if Mr Biden was to obtain residential planning permission for a piece of land owned by Mr Sparks, Mr Sparks would sell him that land. Mr Biden was subsequently able to obtain planning permission for 8 houses on the land and accordingly, purchased the land from Mr Sparks. The option agreement (the "**Agreement**") was prepared on the parties' behalves by their respective commercial solicitors.

The Agreement contained an overage provision which stipulated that following the sale of each of the houses, an overage payment would be payable to Mr Sparks. The Agreement stipulated that 33.3% of the sale price of each of the houses was payable to Mr Sparks and specified a minimum total payment of £700,000, the outstanding balance of which would become immediately due and payable upon the sale of the final house. The Agreement did not however, stipulate a deadline by which the houses were to be sold once completed.

Following the development of the land, and upon completion of the houses, Mr Biden moved into one of the houses and tenanted the remaining 7. Accordingly, the overage provision did not become exercisable.

In light of this, Mr Sparks brought a part 8 claim against Mr Biden arguing that Mr Biden should be required to sell the houses within a "reasonable time" frame following completion.

The Decision

On 3 August 2017, the Court found in favour of Mr Sparks and ruled that a term should be implied into the Agreement to state that "the buyer is under an obligation to market and sell each house constructed as part of the development within a reasonable time of the option having been exercised and the planning permission having been obtained".

When coming to a decision Judge Davis-White referenced The Interpretation of Contracts (Sir Kim Lewison, 6th Edn) which states that "where a contract does not expressly… fix any time for the performance of a contractual obligation the law usually implies that it shall be performed within a reasonable period". The basis for Judge Davis-White decision was that without such an implied term the Agreement did not make good business sense as the "value of the development" could not be released. Judge Davis-White held that "such a clause is one that is necessary as a matter of business efficacy and without it the option agreement lacks practical or commercial coherence".

The barrister for Mr Sparks argued that it would have "seemed an improbable contingency" that the houses would not be sold and therefore it was "unsurprising" that such a term was not expressly included in the Agreement. In comparison, the barrister for Mr Biden argued that as the Agreement took almost a year to negotiate and draft, Mr Sparks had multiple opportunities to consider and include such an apparently essential term. Nevertheless, Judge Davis-White considered that "the clause is so obvious that it goes without saying" and should

be implied in order as per what the Court held to be the true purpose of the overage clause and the intentions of the parties when entering into the Agreement. There would be little sense in including an overage provision in an agreement for the sale of land for residential development, if the parties did not expect the provision to be exercised in the near future and within a reasonable time frame.

The Claim has been listed for a Case Management Conference at which it is to be determined what will constitute a "reasonable time" in these circumstances.

Commentary

This decision highlights the importance of ensuring concise and clear wording is used when drafting option agreements and overage provisions and that even if a clause seems obvious, one should err on the side of caution and include it. By ensuring that all parties are fully aware of their obligations and expectations in accordance with any such agreements or provisions, the risk of litigation further down the road will be minimised.

Nevertheless, this case does provide comfort for parties to such agreements as it shows that, depending on the circumstances, the Courts are willing to imply contractual terms, thus protecting the relevant parties' position. Though it should not be overlooked that this is entirely at the Court's discretion and terms will likely only be implied into an agreement in limited circumstances.

For further information, please contact Ann Ebberson or the Partner with whom you usually deal.