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**Binding Contract or Agreement to Agree? Commercial Property Ruling**

In the context of a commercial property dispute concerning the proposed erection of an anaerobic digestion plant, the Court of Appeal has given important guidance on how to distinguish a binding contract from a non-binding agreement to agree.

A landowner entered into negotiations with an energy company that wished to site the plant on its land. Heads of terms were signed whereby it was agreed that a 25-year lease, at a rent of £150,000 a year, would be drawn up within one month of planning permission for the development being granted.

Such permission was duly obtained, but the landowner subsequently lost confidence in the company and concluded a deal with a third party. The company argued that, subject only to the grant of planning permission, the heads of terms constituted a binding contract to enter into a lease from which the landowner was not entitled to walk away. Its arguments, however, failed to persuade a judge.

Rejecting the company's challenge to that outcome, the Court noted that the heads of terms included an exclusivity or lock-out clause which was agreed to be binding and which precluded either party from entering into negotiations with third parties for a period of about eight months.

The Court questioned whether there would have been a need for such a time-limited lock-out clause had a binding agreement for a 25-year lease been completed. The clear import of the clause was that, once the exclusivity period expired, either party would be free to negotiate with others, as the landowner proceeded to do.

The heads of terms also envisaged that the prospective lease would be contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954. Such a course requires intended tenants to make a formal declaration that they have understood the consequences of contracting out before they become contractually bound to take a lease. The fact that no such declaration had been made was a weighty pointer against a conclusion that a binding agreement had been reached.

The heads of terms left a number of important issues entirely up in the air: they did not address such matters as regulatory compliance and how the plant was to be constructed, repaired or insured. The question of whether it would be removed or retained at the end of the 25-year term was expressly parked for further discussion.

The heads of terms did not impose on the company any express obligation to apply for planning permission and, even if such an obligation were to be implied, there was no timetable for making such an application. If the heads of terms had created a binding contract for a lease, the relevant land might therefore have been sterilised indefinitely. Overall, the Court ruled that the judge's conclusion was amply justified.

We can advise you on any matters relating to commercial property law. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd [2023] EWCA Civ 482*

**Property Information Forms – Developer Pays Price for Inaccurate Answers**

Property vendors are nowadays routinely required to fill in lengthy information forms, giving answers to a multitude of questions that may be important to a purchaser. That task may seem mundane but, as a High Court ruling showed, it is vital to perform it with the utmost care and accuracy.

A woman bought a leasehold flat from a property development company which had recently refurbished it. Prior to the sale, the company's sole director signed a Law Society information form which confirmed that the vendor was unaware of any unresolved planning issues in respect of the property. The form also confirmed that the vendor was unaware of any breaches of planning conditions or of any works carried out that did not have all the necessary consents.

The woman was subsequently informed by the local authority that a skylight window had been installed in one of the flat's two bedrooms without planning consent. Such permission was required because the property was in a conservation area. In order to avoid enforcement action, she removed the window.

The room was thereby deprived of natural light and ventilation so that it could not lawfully be used as a bedroom. Extensive reconfiguration works were required to maintain the flat as a two-bedroom property. The woman launched proceedings against the company, seeking damages for misrepresentation.

The director confirmed that, when filling in the information form, he had not referred to planning permission documents but had relied on his memory as to what was in them and what work had been carried out. He had no understanding at the time that the window, which had been installed during the refurbishment, required planning permission. He had not been personally involved in installing the window and there was nothing to put him on notice that planning consent was required.

Upholding the woman's claim, however, the Court noted that the room was referred to as a bedroom in an estate agent's email and on plans with which she was provided before the sale. That would have reasonably led a purchaser in her position to believe that the room was at least capable of being lawfully used as a bedroom.

Whilst not questioning the director's integrity, skill or expertise as a developer, the Court found that, when he signed the information form, he did not have reasonable grounds for believing that no work had been carried out that lacked a required consent. The case, the Court noted, underlined the need to make appropriate enquiries before filling in a property information form.

The Court was satisfied that, had it not been for the misrepresentations, the woman would not have proceeded with the purchase. The company was ordered to pay her £30,000 in damages, reflecting the difference between the price she had paid for the flat and its true value at the time. Her total award, including various costs and expenses arising from the misrepresentations, came to £34,142.

**Partner Note**

*Rosser v Pacifico Ltd [2023] EWHC 1018 (Ch)*

**Supplies of Land v Supplies of Services – Tax Tribunal Draws the Distinction**

The difference between a supply of services and facilities and a supply relating to an interest in land is important because only the latter is exempt from VAT. A tax tribunal ruling, however, showed that distinguishing one from the other is often a highly fact-sensitive exercise and no easy matter.

The case concerned a hair salon which licensed a beautician to occupy a back room in its premises. HM Revenue and Customs raised an £18,649 VAT demand against the salon on the basis that the arrangement amounted to a standard-rated supply of services and facilities.

Ruling on the salon's challenge to that outcome, the First-tier Tribunal (FTT) noted that the beautician had a right to exclude others from the room, where she carried out such intimate tasks as personal waxing. She occupied a defined area, accessed by a separate staircase, and paid rent on a rolling month-to-month basis. The FTT found that the salon's arrangement with her was not immediately precluded from being a supply related to an interest in land.

The salon provided the beautician with certain services: amongst other things, they shared a receptionist and use of a toilet and staff room. The salon advertised the beautician's services on its website and by putting a poster in its window. On the other hand, there was very little crossover between their clients and the beautician provided all her own equipment. She was free to decorate the room, which was provided to her unfurnished, however she wished.

In upholding the salon's appeal, the FTT found that the services provided by the salon were ancillary to the supply of the room and not a predominant part of the supply. The beautician was not required to use those services and their provision was clearly not essential to her business. The arrangement was properly characterised as a VAT-exempt, relatively passive, supply of land.

If you are involved in a tax dispute related to commercial property, we can assist. Contact us for advice.

**Partner Note**

*Errol Willy Salons Ltd v The Commissioners for Her Majesty's Revenue and Customs [2022] UKFTT 17 (TC)*

**Topography and Common Sense Prevail in High Court Right of Way Dispute**

In resolving right of way disputes, judges' first port of call is to the precise wording of relevant property deeds, as illustrated by any plans attached to them. However, as a High Court ruling showed, topography and common sense can also have a crucial part to play.

The owner of a farmhouse claimed a vehicular right of way – known as an easement – to and from his property over neighbouring land, through a yard and from there onto an unclassified highway. He contended that the right of way was established by a deed entered into by him and previous owners of the land.

However, the current landowner argued that, on a true reading of the deed and its accompanying plan, the right of way came to an end at a gate, or in the middle of the yard, and in any event some metres short of the highway.

Ruling on the matter, the Court noted that the deed described the right of way as passing between two points on the attached plan, marked A and C. The plan showed point A in the yard, some distance from the highway. An area of yellow shading, indicating the extent of the right of way, stopped at the gate.

However, the deed referred to the right of way as an 'accessway to gain access to and egress from' the farmhouse owner's property. In upholding his interpretation of the deed, the Court found that it would be straining the meaning of those words to read them as conferring a right of way only to and from the gate, or the middle of the yard, rather than to and from the highway beyond.

The yellow shading was of limited assistance in that its purpose was only to illustrate the right of way's approximate route. The farmhouse owner's undertaking, contained in the deed, to close the gate after passing through it was a further indication that no one had intended the right of way to stop at the gate.

An ordinary reader of the deed would find the landowner's interpretation surprising and would conclude that the intention of the deed's signatories was to provide access and egress between the highway and the farmhouse owner's property for all purposes connected to its use as a private residential dwelling. Had it been necessary to do so, the Court would have rectified the deed to that effect.

For expert advice on right of way disputes, contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Weaver v Smith PT-2022-CDF-000028*

**When Does an Old Barn Become a New House? Court of Appeal Ruling**

At what point do repairs or improvements to an old building become so extensive as to effectively create a new one? The Court of Appeal addressed that issue in the case of a landowner who spent over 20 years transforming a Victorian barn.

The landowner said that he had done no more than repair and improve the existing barn, using much of its original fabric and building materials. The local authority took a different view, however, and served him with an enforcement notice requiring him to remove the entire building. That was on the basis that he had erected a new building in the Green Belt without planning permission.

The notice was later upheld by a planning inspector who found that the overall effect of the works carried out on the barn over the years was to create a new and unified structure. The building lacked heating and sanitation; electric work was incomplete and doors and windows had yet to be fitted. However, the inspector found that it was designed for residential rather than agricultural use and was unmistakably a dwelling house in the course of construction.

He further ruled that the incremental works were not substantially complete on a date four years prior to service of the enforcement notice and that the development did not, therefore, enjoy immunity from enforcement action under Section 171B of the Town and Country Planning Act 1990. The landowner's challenge to the inspector's decision was later rejected by a judge.

Dismissing his appeal against that outcome, the Court detected no legal error in the inspector's conclusion that a new building had been created in place of the old. The building's residential purpose was plain from its appearance and physical layout. The inspector's conclusion that the works had not been substantially completed before the relevant date was legally impeccable.

The Court noted that the result of the case was unfortunate for the landowner. In the light of the inspector's assessment, however, the reality was that, instead of applying for planning permission, he pressed ahead with the erection of a new building in place of the one he had acquired when he bought the site. He continued with the unauthorised building works for many years and the council was entitled to take enforcement action. The requirement to remove the building was not punitive, disproportionate or unjust.

We can advise you on all aspects of planning law.

**Partner Note**

*Devine v Secretary of State for Levelling Up, Housing and Communities [2023] EWCA Civ 601*

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