

Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd

[2018] EWHC 118 (Ch), [2018] EGLR 15, [2018] All ER (D) 07 (Feb)

Court: ChD

Judgment Date: 31/01/2018

Catchwords & Digest

SALE OF LAND - CONDITION – PLANNING PERMISSION

Background

The proceedings concerned a site in Milton Keynes called Elder Gate. The defendant company (Abbeygate) entered into an equal joint venture with two other companies (Helical and Developments) to develop the site. In May 2003 the superior lease on the land was acquired by Abbeygate for £2m. By a transfer dated 4 July 2003, the owner of an ice rink on the site (Planet) transferred to Abbeygate the lease of the rink. Abbeygate paid Planet £1.525m and entered into an overage covenant. By cl 2.1 of the overage covenant, Abbeygate covenanted that it would pay to Planet an additional payment of £1.4m, not more than ten working days after any 'trigger date'. Clause 1.1.15 of the overage covenant defined the trigger date as the date of an acceptable planning permission, a minimum of three months after the actual date on which planning permission was granted. The payment obligation in the overage provision was subject to a proviso, namely that the trigger date had to fall before 4 July 2013 (the long stop date).

Clause 3.1 of the overage covenant specified the circumstances in which the payment of £1.4m would have to be made (for details, see [16] of the judgment). It required that the registered leases had to be merged into a superior lease, and the superior lease had to be merged in the freehold (the assembly condition).

Abbeygate covenanted that it would use its 'reasonable endeavours' to obtain an acceptable planning permission.

In order to keep the rink functioning, Planet exercised an option in the transfer (the rink leaseback), by which it covenanted to keep the rink open. Planet experienced financial difficulties and, in November 2011, in return for a payment of £200,000, it assigned the benefit of the overage covenant to the claimant company, Gaia. On 8 February 2013, Abbeygate obtained planning permissions to allow it to develop the site. If the 2013 planning permission was acceptable under the overage covenant, the provisional trigger date would be 8 May 2013.

On 8 July 2013, four days after the expiry of the date provided for in the overage covenant, Abbeygate completed its purchase of the land. Gaia commenced proceedings against Abbeygate for breach of the overage provision, contending that Abbeygate had failed to use reasonable endeavours to complete the purchase.

Claim allowed.

Issues and decisions

(1) Whether, as contended by Abbeygate, any failure to obtain a trigger date before 4 July 2013 had been the fault of Gaia. Abbeygate submitted that Gaia and Planet had designed a scheme to enable Planet to extract the maximum value from Abbeygate about the refurbishment of the rink. The alleged plan had been for Gaia to allow Planet to delay the negotiations with Abbeygate, with a view to pressuring Abbeygate to agree a more generous specification for the rink in order to meet its own deadlines.

On the evidence, there had been no scheme between Gaia and Planet to 'blackmail' Abbeygate into enhancing the specification of the rink. The fact that the agreement for the lease with Planet had been exchanged outside the long stop date in the overage provision had not been caused by a miscalculation of the trigger date. It had been held up by the unwillingness of Abbeygate to enter into an unconditional agreement before it had sorted out the services easement relating to part of the land (see [55] of the judgment).

(2) Whether the permission granted on 8 February 2013 had been an acceptable planning permission so that, for the purposes of the overage provision, the 8 May became the date of an acceptable planning permission.

The February planning permission had been an acceptable planning permission for the purposes of the overage provision. On the evidence, the fact that there had been some outstanding property interests did not mean that the planning permission had been granted on terms and subjects to conditions that Abbeygate could reasonably have regarded as unacceptable. Further, Abbeygate could not have reasonably held the opinion that the February permission had not been commercially viable, and the court was not satisfied that anyone at Abbeygate had actually held that view (see [58], [61], [63] of the judgment).

(3) Whether the assembly condition had been satisfied at the date of 8 May 2013.

No trigger date had come into being upon the occurrence of the date of an acceptable planning permission because the assembly condition had not then been satisfied (see [67] of the judgment).

(4) What was required to satisfy the assembly condition. It was common ground that, to satisfy the assembly condition, it was necessary for the registered leases to be merged in the superior lease, and that the superior lease be merged in the freehold. That required an identification of the registered leases and a determination of what was required for merger.

The term 'registered leases' referred back to the rink leaseback and the transformer leases. 'Merger' referred to merger in equity (see [72], [74] of the judgment).

(5) What was meant by 'reasonable endeavours' and 'as soon as reasonably practicable' in the context of the overage provision.

Reasonable steps had to be taken to achieve the merger of the registered leases with the superior lease and to achieve the merger of the superior lease with the freehold. The question was whether the relevant step was feasible, and then whether, in all the circumstances, it was reasonable to take it, balancing the risk of adverse consequences against the obligation to perform the promise. The obligation had been not to do it 'when convenient' or 'at the time best suited to Abbeygate', but as soon as reasonably practicable (see [81], [83] of the judgment).

(6) Abbeygate had not, after 31 October 2012, made reasonable endeavours to achieve, as soon as reasonably practicable, the variations in the property interests contemplated by the overage covenant to be found in the transfer of 4 July 2003. If reasonable steps had been taken as soon as reasonably practicable, all necessary property interests would have been in hand sufficiently before 20 July 2013 and the trigger date would have fallen at a time that would have enabled Gaia to claim the overage payment. Therefore, Gaia was entitled to damages of £1.4m (see [110] of the judgment).

Case History

Annotations	Case Name	Citations	Court	Date	
—	Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd	[2019] EWCA Civ 823, [2019] All ER (D) 88 (May)	CACivD	14/05/2019	
Affirming	Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd	[2018] EWHC 118 (Ch), [2018] EGLR 15, [2018] All ER (D) 07 (Feb)	ChD	31/01/2018	

Cases considered by this case

Annotations: All Cases **Court:** ALL COURTS

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Treatment	Case Name	Citations	Court	Date	
Considered	Rhodia International Holdings Ltd v Huntsman International LLC	[2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577, [2007] Bus LR D22, [2007] 2 Lloyd's Rep 325, (2007) Times, 6 April, [2007] All ER (D) 264 (Feb), CSRC vol 31 iss 9/2	Comm Ct	21/02/2007	

Considered	Alghussein Establish- ment v Eton College	[1991] 1 All ER 267, [1988] 1 WLR 587, 132 Sol Jo 750, (1988) Times, 9 May	HL	05/05/1988	
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Document information

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