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Wilberforce Chambers

Julian Greenhill QC (top) is a barrister at **Wilberforce Chambers**, **Danny Revitt** (bottom) is a partner and **George Cohen** is a solicitor, at **Irwin Mitchell LLP**

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The acquisition of land on which to build is essential to any development. To enable this to happen, landowners, land promoters and developers commonly enter into option agreements for the purchase of land. Options are commercially useful. They enable developers to obtain a measure of certainty as to the development potential of land before the developer is required to commit to the acquisition of the land itself, and they allow landowners the potential to achieve a share of the increased development land value with limited risk and expenditure of their own.

To fulfil this purpose, option agreements are often conditional on the grant of planning permission for development of the land which is the subject of the option. With a conditional option, the definition of the act or event that is required in order to trigger the option is critically important.

The recent case of *Fishbourne Developments Ltd v Stephens* [2020] once again emphasises the dangers of poorly-drafted option agreements and the importance of carefully defining key terms relating to the trigger of the option such as ‘development’ or ‘planning permission’. It has also provided some further insight into the important question of the circumstances in which the court will look beyond the ordinary meaning of used wording to interpret the agreement in light of the surrounding facts and commercial common sense.

Background to the case

The case concerned land near the village of Fishbourne in West Sussex, famous for the remains of its Roman Palace. Fishbourne is also the site of Bethwines Farm, consisting of approximately 117 acres of farmland on the western edge of the village. The farm comprises open fields with a cluster of farm buildings. In 1990, it was owned and farmed by Mr Roger Bailey. Mr Bailey struck up an acquaintance with a Mr Peter Saunders, who

was in the business of acquiring and promoting land for development. They foresaw potential for residential development of the farm.

Between 1990 and 2001, Mr Bailey entered into a succession of separate option agreements with Mr Saunders in relation to the farm. These options were all 'homemade' and in substantially similar terms, allowing the grantee to purchase the farm at 70% of the 'current market value per developable acre' and obliging the grantee to apply for 'planning permission for housing on this land'. In each case the 'option fee' was nominal; no more than £100 and sometimes as little as £1. In addition, there were various supplemental agreements between them extending the duration of one or more of the option agreements and/or fleshing out their provisions in certain respects.

Mr Bailey died in January 2002. His wife, Mrs Myra Bailey, inherited the farm. Later that year in November 2002, Mrs Bailey entered into a further option agreement with Mr Saunders (the '2002 option'). Mrs Bailey herself died in September 2014 and the farm was inherited by her daughter, Anne Stephens.

All of the option agreements were relatively informal, and not particularly well drafted. There was considerable overlap between them, and they did not consistently refer to one another and appropriately modify the preceding agreement(s). There was a 1990 agreement and a 1991 agreement which appeared to run concurrently, and a 1992 supplemental agreement which varied the 1990 agreement but said nothing about the 1991 agreement. A further 1997 option was made when both the 1990 and 1991 options were still running but did not bring them to an end. The 1997 option was amended in 1999 and extended in 2001 until 31 December 2020. The 2002 option was for the same duration as the 1997 option (until 31 December 2020), although it did not expressly bring the 1997 option to an end.

The case turned on the interpretation of the 2002 option. It was a more formal and lengthier document than its predecessors. Recital D of the 2002 option stated that it was intended to '*clarify the terms on which the Purchaser will be granted an option*'. The 2002 option would be triggered over the property '*if and when the Purchaser obtains a Planning Permission*'. 'Planning Permission' was defined as:

> *… a planning permission granted by the Local Planning Authority permitting any development of the Property.*

The term 'development' was not defined. 'The Property' was defined to mean the whole of the farm.

In 2006, Mr Saunders sold on the benefit of the 2002 option to a third-party development company, which then in turn sold the benefit of the 2002 option on to Fishbourne in 2013. In July 2016, Fishbourne obtained planning permission to erect a new pitched roof on one of the existing agricultural buildings on the farm. Fishbourne argued that this was sufficient to trigger the 2002 option over the whole of the farm and served notices in May and June 2018 requiring the open market value and price of the land to be agreed and determined pursuant to the terms of the 2002 option.

At trial, the judge (HHJ David Cooke sitting in the High Court) held that Fishbourne's 2016 planning permission was not sufficient to trigger the 2002 option. He held that

‘development’ in the 2002 option meant ‘a new building involving a change of use from agricultural use’, and that ‘development of the Property’ meant such development of the whole, or substantially the whole, of the farm. It followed that the erection of a new roof on an existing agricultural building on the farm did not constitute ‘development of the Property’ within the meaning of the defined term ‘Planning Permission’.

Fishbourne appealed. The appeal was expedited by reason of the imminent end date of the option period on 31 December 2020. It was heard (remotely) by Macur LJ, Asplin LJ and Marcus Smith J in November 2020.

In the Court of Appeal

At the appeal, Fishbourne argued that the words of the 2002 option were clear and unambiguous. So, there was no need to refer to the surrounding circumstances and commercial common sense, and no justification for departing from the clear meaning of the contractual language. ‘Development’, and therefore ‘any development’, meant and could only mean anything that constituted ‘development’ for the purposes of the Town and Country Planning Act 1990, defined in section 55 of that act. That statutory definition is wide and includes both building operations such as demolition or structural alteration, and a material change of use. Accordingly, it was argued, the erection of a new roof on an existing building on the farm constituted ‘any development of the Property’ and the option was properly triggered.

The Court of Appeal dismissed Fishbourne’s appeal and upheld the Judge’s interpretation of the 2002 option. It interpreted the word ‘development’ in the particular context of the farm and of the option as a whole, and held that the reasonable reader of the 2002 option with all the relevant background available to the parties would not conclude that ‘development’ in the ‘Planning Permission’ definition would encompass anything within s55 of the 1990 Act. They would not have the breadth and technicality of that statutory definition in mind and would have regard, instead, to the fact that the land in question is a farm (at [40]). The Court of Appeal concluded that an interpretation that enabled the option-holder to trigger the option with an inconsequential planning permission made little commercial sense in circumstances in which the option-holder would be entitled to purchase the farm at a discount of 30% from its open market value. And they held that ‘any development of the Property’ meant that planning permission had to be obtained in relation to the whole, or substantially the whole, of the property and not part only of the property. This was consistent with the definition of ‘the Property’ in the option and its deployment in the option as a whole, despite the fact that this required them to conclude that another term in the option must contain a mistake. The court did not find it necessary to place reliance on the previous option agreements.

Three aspects of the case are of wider interest; first, consideration of how the court will apply commercial common sense when interpreting an option agreement; second, the approach taken to the prior option agreements; and third, a salutary lesson on the importance of clear drafting in option agreements.

Text vs context

In the ongoing battle between text and context in the interpretation of property contracts, *Fishbourne* is an interesting example of which developers, landowners and those acting for them should take heed. The application of the factual context and commercial common sense was pivotal to the outcome of the case.

The court is entitled – indeed required – to have regard to the wider context in determining a contract's objective meaning and, where there are two rival meanings, should prefer the one that is more consistent with commercial common sense (*Rainy Sky v Kookmin Bank* [2011] and *Wood v Capita Insurance Services* [2017]).

The parties had failed in the 2002 option to define what they meant by 'development'. That being so, the Court of Appeal rejected the submission made by Fishbourne that it was only capable of bearing one meaning, namely the statutory definition in s55 of the 1990 Act (at [40]). In this respect, the case was on all fours with the earlier case of *Hallam Land Management Ltd v UK Coal Mining Ltd* [2002], where an earlier constitution of the Court of Appeal had rejected an identical submission in another case about a conditional land option (though the Court of Appeal in *Fishbourne* saw *Hallam Land* as only offering limited guidance – at [46]).

Once the court had accepted that 'development' was capable of bearing more than one meaning, it was necessary to decide which meaning was more consistent with commercial common sense. This, of course, requires the court to weigh up rival submissions as to which interpretation of the 2002 option is the more 'commercial'. In this case, the answer was clear. Understood in context, the Court of Appeal concluded that Fishbourne's preferred meaning made little commercial sense (at [48]). This was because if that interpretation was correct, Mr Saunders could have obtained the 2002 option for a nominal 'fee' of £1, and exercised it shortly thereafter on the basis of an inconsequential planning permission entitling him to purchase the whole farm at a 30% discount, while the vendor would have gained nothing of value from the 2002 option.

Fishbourne is a good example of a case in which the key battleground concerned the first question in *Rainy Sky*: is there more than one reasonably available meaning of the words used in the contract? This case is an important reminder that the concept of 'development', even though property lawyers may think they know what it means, is a flexible concept which takes its meaning from its context. Once this became clear, there was little doubt that in this case commercial common sense would compel an interpretation of 'development' that was narrower than the statutory definition, because otherwise the option made little commercial sense.

Relevance of prior agreements

The relevance and application to contractual interpretation of prior contracts between the parties remains a difficult issue that is under-explored in the authorities. The most full discussion is to be found in the obiter comments of Rix LJ in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] at [81] – [84]. He expressed the view that, unlike mere negotiations and draft agreements, a prior concluded contract was always admissible as part of the surrounding facts but the relevance would depend on

whether the contract being interpreted was intended to supersede the prior contract or not – a question which he accepted was itself difficult to determine. He encouraged a cautious and sceptical approach, but doubted that any such principle could be elevated to a conclusive rule of law and doubted the value of being dogmatic. In other words: it all depends on the facts.

In *Fishbourne* at first instance, the trial judge concluded that it was appropriate to place considerable weight on the prior option agreements between Mr Saunders and Mr Bailey. He also concluded that the number of overlapping agreements and provisions indicated that all the agreements should be read in light of each other (at [64]). The judge rejected Fishbourne's argument (based on the judgment of Stadlen J in *Giedo Van Der Garde BV v Force India Formula One Team Ltd* [2010]) that the 2002 option should be construed as a fresh agreement entirely separate from the parties' previous agreements and therefore falling to be construed by its language alone (at [56]). Rather, each agreement was evidence of a single, continuing contractual relationship indicating that, where possible, their terms should be construed to maintain consistency (at [64]). For these reasons, he concluded that the arrangements between Mr Saunders and Mr Bailey were evolving over time and not being radically changed and replaced by the 2002 option. Therefore, the judge ultimately concluded that references to development in the 2002 option were to be construed consistently with those prior agreements and so as referring to development by new non-agricultural building (at [72]).

The Court of Appeal declined to comment on the correctness of the judge's approach. They saw no need to refer to the prior options in interpreting the 2002 option and so left open the question of whether they had been wholly superseded by the 2002 option or not. This makes it difficult to draw a conclusion about the approach taken by the trial judge. Where there is a clear interplay between overlapping agreements, there is likely to be an argument that the court should seek consistency in the interpretation of the evolving relationship. Where an agreement is the latest in a succession of contracts with overlapping provisions, the court may well be willing to place greater weight on the terms of those prior agreements as part of the wider context and the parties' objective commercial intentions in construing the agreement. This is particularly so where the agreements are all, to one degree or another, informal and/or poorly drafted.

The importance of clear drafting in option agreements

Fishbourne underlines the fact that in the world of real property, context is – often enough – king. Those wishing not to be beholden to context will need to draft with care and precision, which was conspicuously missing here. The facts behind the 2002 option were unusual in that the evidence showed that the document was based upon a template provided to Mr Saunders by a third-party developer, and little or no legal assistance was obtained by him in seeking to make it relevant to the farm, while Mrs Bailey took no legal advice of her own.

In the event, the parties had failed to define the term 'development' that was essential to determining when the option was triggered, added to which there was uncertainty about whether the planning permission had to relate to all or only part of the site. Significant and costly litigation was the result. Landowners entering into option agreements are well-advised to seek legal advice before concluding an agreement. If circumstances change, or

another agreement is needed, think carefully about how the new agreement is intended to interact with any previous agreement(s). Does it terminate and wholly replace the old agreement(s) or merely amend it/them? If the option is conditional on some event such as a grant of planning permission, make sure careful consideration is given as to precisely what is meant by 'development' and the type or nature of the development such a permission should permit in order for the option to be triggered. If only a particular type of development, such as *residential* development, is sufficient, the option should say so. If the option only applies to that part of the land in relation to which the planning permission is granted, say that as well. Make absolutely clear what sort of planning permission is sufficient and to what area of the land the option will relate.

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Cases Referenced

Cases in **bold** have further reading - click to view related articles.

- Fishbourne Developments Ltd v Stephens [2020] EWCA Civ 1704
- Fishbourne Developments Ltd v Stephens [2020] EWHC 932 (Ch)
- Giedo Van Der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB)
- Hallam Land Management Ltd v UK Coal Mining Ltd [2002] EWCA Civ 982
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- Wood v Capita Insurance Services [2017] UKSC 24

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