OUTER HOUSE, COURT OF SESSION

[2019] CSOH 1

CA83/18

OPINION OF LORD ERICHT

In the cause

RAMOYLE DEVELOPMENTS LIMITED

Pursuer

against

SCOTTISH BORDERS COUNCIL

Defender

Pursuer: Connal QC, (sol adv); Pinsent Masons LLP
Defender: MacColl QC, McKinlay; Davidson Chalmers LLP

8 January 2019

[1] The pursuer, a property developer, entered into missives for the purchase from the defender of land at Burgh Yard, Galashiels at a price of £1,053,000 in order to regenerate the site with a mixed development of retail, hotel and houses. The defender sought to rescind the missives. The case came before me on the question of whether, as a matter of interpretation of the missives, the defender had been entitled to rescind.

[2] As the defender was both the seller of the land under the missives, and the planning authority, it is important to keep clear in what capacity the defender was acting. In this opinion, when the defender is acting in its capacity as planning authority, I will refer to it as

"the Planning Authority". When it is acting in its capacity as seller under the missives, I shall refer to it as the defender.

Term of the contract

[3] The missives were conditional on the various conditions. In particular, they were conditional upon planning permission, as set out in condition 2.2.2 as follows:

> "the Purchasers having obtained planning permission, roads construction consent and all other necessary consents of whatever nature for a mixed use development which shall include *inter alia* retail, leisure, hotel, bar and restaurant, residential and other commercial uses with servicing and car parking provision".

[4] Further provision was made in respect of planning permission in condition 2.5.2 as follows:

> "As regards to the suspensive condition contained within Clause 2.2.2, the Purchasers shall lodge the application for planning consent with the local planning authority as soon as reasonably practicable following the date of purification or waiver of the suspensive condition contained within Clause 2.2.4 and no later than the date falling 6 months after the said date of purification or waiver. Following submission of the said application, the Sellers hereby undertake to the Purchasers not to do anything which could prejudice the progress of the application nor shall they take any action which could obstruct or materially impede the application process. In the event that the Purchasers have failed to submit the said application for planning permission with the local authority by the expiry of the said 6 month period then either party shall be entitled to rescind the Missives (with no rights or liability due to or by either party) on serving written notice to that effect on the other before any subsequent waiver or purification of the said suspensive condition".

[5] The six month period referred to in condition 2.5.2 expired at 23.59 on 22 November 2017.

Planning application

[6] The Planning Authority uses a system for the submission of planning applications on-line through the eplanning.scot web portal. On 20 November 2017 at 16.48, the pursuer

submitted an application for planning permission online using that system. The application was for planning permission in principle.

[7] In order to apply using the portal, an applicant answers various online questions and inserts certain information on-line.

[8] The portal provides for payment of the application fee after the application is submitted. The portal contains a fee calculator and contains the following text:

> "Whilst every effort will be taken to ensure that the fee has been calculated correctly, the resulting fee may not be exact and should be treated as an approximation. Determination of whether the fee is correct is solely the responsibility of the relevant local planning authority and you may wish to check with your planning authority that the fee is correct before submitting an application".

The portal gives four options for payment including Credit/Debit Card, Cheque, Departmental Charge Code or Telephone and states:

> "The method of payment you select here will be applied once you have submitted the application or appeal. You won't be able to submit the application or appeal until you select one of the options below."

The pursuer selected the option to pay by cheque. The fee was calculated as £3609. An e-portal email of 20 November 2017 timed at 16:48 was sent to the pursuer containing the following text:

> "Your application has been successfully submitted using eplanning.scot... Your application will now be sent to Scottish Borders Council who is responsible for processing and determining your application ... You will receive a confirmation email once it has been received by Scottish Borders Council."

[9] On 22 November 2017 at 15.59 Caroline Law of the Planning Authority emailed the pursuer's director Mr Turnbull stating:

> "I am in receipt of your application for planning permission in principle ...
>
> My calculation of the site area is 0.69 ha which means the fee appropriate to your application is £2807 although you indicate on your form the fee you are submitting is £3609. Can this be clarified please".

Mr Turnbull replied at 16.29 stating that he was travelling but would come back to Ms Law on her queries tomorrow. Ms Law replied at 16.31 stating "We can discuss when you are back in the office."

[10] The pursuer sent a cheque for the application fee of £2,807 to the defender. The pursuer avers that the cheque was sent on 23 November 2017. The defender avers that the cheque was not received until 1 December. I take the pursuer's averment *pro veritate* for the purposes of the debate.

[11] The Planning Authority determined the application under delegated procedure as of 30 January 2018. The decision was to grant a conditional approval, subject to a section 75 agreement which addressed financial contributions towards the Borders railway line, local schools, affordable housing (or on site provision) and play space. The planning consent would be issued once the section 75 agreement had been concluded.

[12] However, immediately upon the expiry of the six month period, and prior to receipt of the cheque, the defender had purported to rescind the missives. The defender's solicitor sent a formal letter at 00:01 by fax on 23 November 2017 stating:

> "On behalf of and as authorised by The Scottish Borders Council ('the Council'), and as your clients Ramoyle Developments Limited ('the Purchasers') have failed to submit a planning application in terms of Condition 2.5.2, and therefore in terms of that Condition, I hereby rescind the Missives entered into between the Council and the Purchasers being the Offer and formal letters dated 7 and 10 August 2015, 4, 10 and 21 September 2015, 5 and 19 October 2015, 4, 16 and 27 November 2015, 10 and 22 December 2015, 12 January 2016, and 7 and 10 February 2017, your formal waiver letter dated 22 May 2017 and your formal purification letters dated 2 and 8 August 2017 and hereby hold the transaction to be at an end."

The issue

[13] The issue before me was whether the submission of the planning application on the on-line portal without a cheque constituted "submitting" the application in terms of clause 2.5.2.

Statutory background

[14] The procedures for planning applications are set out in the *Town & Country Planning (Development and Management Procedure) (Scotland) Regulations* 2013.

[15] Regulation 10 provides:

> "**10.—Application for planning permission in principle**
>
> (1) An application to a planning authority for planning permission in principle is to be made in accordance with the requirements of this regulation.
>
> (2) An application for planning permission in principle must contain—
>
> (a) a written description outlining the development to which it relates;
>
> (b) the postal address of the land to which the development relates or, if the land in question has no postal address, a description of the location of the land; and
>
> (c) the name and address of the applicant and, where an agent is acting on behalf of the applicant, the name and address of that agent.
>
> (3) The application must be accompanied—
>
> (a) by a plan—
>
> (i) sufficient to identify the land to which it relates; and
> (ii) showing the situation of the land in relation to the locality and in particular in relation to neighbouring land;
>
> (b) where any neighbouring land is owned by the applicant, by a plan identifying that land;
>
> (c) by one or other of the certificates required under regulation 15;

(d) where access to the site is to be taken directly from a road, by a description of the location of the access points to the proposed development;

(e) where the application relates to development belonging to the categories of national developments or major developments, by a pre-application consultation report;

(f) where the application relates to Crown land by a statement that the application is made in respect of Crown land; and

(g) by any fee payable under the Fees Regulations."

[16] Regulation 14 provides:

"**14.—Validation date**

(1) An application made under any of regulations 9 to 12 is to be taken to have been made on the date on which the last of the items or information required to be contained in or accompany the application in accordance with regulations 9, 10, 11 or 12 respectively is received by the planning authority.

Submissions for the defender

[17] Senior counsel for the defender submitted that properly construed, condition 2.5.2 of the missives required the pursuer to have provided the Planning Authority with the complete application for planning consent, which could have been processed and determined by the Planning Authority. The tendering of payment of the requisite fee for a planning application was a necessary part of such an application. It was not sufficient for the pursuer to send to the Planning Authority only some parts of a planning application, but to leave out other required parts (such as the fee). Accordingly, the pursuer having failed to make payment of the required planning application fee by 22 November 2017, it had not lodged or submitted a planning application within the time scale specified in condition 2.5.2 and the defender was entitled to resile from the missives. The interaction with the online planning portal did not amount to the submission or lodging of an application for planning permission for the purposes of condition 2.5.2: no application for planning permission was

submitted or lodged until all material required in order to allow the Planning Authority to process the application had been received by the Planning Authority. Counsel submitted that the provisions of the missives fell to be construed in accordance with the normal approach to be taken to the construction of commercial contracts, under reference to *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900 at [14]; *Arnold* v *Britton* [2015] AC 1619 at [15] and *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173.

[18] Counsel submitted that on an ordinary structure of the language used, condition 2.5.2 required the pursuer to provide the Planning Authority with a complete planning application, which could be processed and determined by the Planning Authority. He submitted that this was consistent with the language of the missives and also commercial common sense. He further submitted that the missives ought to be construed with the planning legislation in mind (Lewison, *The interpretation of Contracts*, 6th edition page 203). The 2013 Regulations require that an application must be accompanied with the requisite fee, and that any application is to be taken as having been made on the date on which the last of the accompanying items is received by the Planning Authority.

Pursuer's submissions

[19] The pursuer was in agreement with the defender as to the law on the interpretation of commercial documents.

[20] Senior Counsel for the pursuer drew the court's attention to two particular aspects of the context. The Planning Authority had produced supplementary planning guidance which was specifically for the site and which was lengthy and contains significant detail. Thereafter the pursuer had specifically incorporated the supplementary planning guidance into the missives. Accordingly, the content of the planning application was of less moment

than it would have been in other situations, as it had been tied down in detailed supplementary planning guidance which itself formed part of the missives. He also drew attention to the lack of any provision in the missives focused on the pace or steps of the planning application once it was submitted: there was only a long stop of 31 December 2018. In that context, the construction which made best commercial sense was one which required the lodging of a recognisable planning application ie the substantive content of the application, to be achieved by 22 November. The processing of that application thereafter as a matter of formality or paperwork or fee must be taken to have been of no moment to the parties. On that interpretation, an application as required by the missives was lodged on time.

[21] Counsel drew a distinction between the position of a statutory Planning Authority with a seller under missives. The present case fell to be determined in the context of the missives not planning procedures. The legal requirements for the validity of the processing of a planning application was a different issue from interpretation with and compliance with contractual missives. In any event, the 2013 Regulations clearly distinguished between the planning application itself and the other things which must accompany the application (including the fee) and accordingly the lodging of a planning application was achieved.

Discussion and Decision

[22] The Missives provided that either party may rescind "in the event that the Purchasers have failed to submit the said application for planning permission with the local authority" by a deadline.

[23] The question which arises in this case is what is the correct interpretation of "submit the said application for planning permission with the local authority". The reference to the local authority is a reference to the Planning Authority.

[24] The Planning Authority uses a system for submission of planning applications on – line through a web portal. The portal specifically uses the words "submitting" and "submitted". The portal advises the applicant to check the amount of the fee "before submitting an application". It states that "you won't be able to submit the application" until a payment method is selected. The system expressly provides that an application can be submitted without the fee having been paid: the portal states that "The method of payment you select here will be applied once you have submitted the application." The system advised the pursuer that the pursuer's application had been "successfully submitted".

[25] In my opinion the successful submission of an application under the system used by the Planning Authority for on-line submission satisfies the requirement to "submit" an application under condition 2.5.2. This is in accordance with the natural and ordinary meaning of the word "submit". In addition in my opinion it makes commercial common sense in this digital age for the pursuer to use the Planning Authority's on-line submission system and comply with the provisions of that system. That system provided that an application is successfully submitted prior to payment of the fee by cheque.

[26] The alternative construction put forward by the pursuer was that "submit" meant make an application which complied with the 2013 Regulations. However, the word which is used in condition 2.5.2 is "submit" That word appears in the system used by the Council for on-line applications. It appears nowhere in regulations 10 or 14 of the 2013 Regulations. The 2013 Regulations refer to an application being "made", not submitted. The Missives, which were drafted by solicitors, do not use the word "made." The use of the word

"submit" rather than "made" points to the correct interpretation being that submission in accordance with the on-line system used by the Planning Authority is sufficient.

[27] Accordingly, I find that the successful submission of the planning application through the online planning portal on 20 November 2017 constituted submission in terms of condition 2.5.2, notwithstanding that the fee had not been received at that time. The consequence of this is that the defenders were not entitled to rescind.

[28] The declarator sought in the first conclusion refers to "resile" rather than "rescind". I shall put the case out by order for discussion as to the appropriate order, and as to further procedure in the case. I reserve all questions of expenses in the meantime.