



Neutral Citation Number: [2010] EWHC 1535 (Ch)

Case No: HC09CO4260

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2010

Before :

MR JUSTICE VOS

Between :

CPC Group Limited	<u>Claimant</u>
- and -	
Qatari Diar Real Estate Investment Company	<u>Defendant</u>

Lord Grabiner Q.C., Mr Neil Kitchener Q.C. and Mr Alexander Polley (instructed by Wragge & Co LLP) for the Claimant

Mr Joe Smouha Q.C. and Mr Andrew Twigger (instructed by Herbert Smith LLP) for the Defendant

Hearing dates: 17th to 21st, and 24th to 28th May, and 14th June 2010

SUMMARY

This is not part of the judgment

Mr Justice Vos:

1. This is a summary of my judgment for the use of the parties and the press, but the judgment itself should be regarded as definitive, and no reliance should be placed upon the summary, which is simply an accessible means of seeing at a glance the outcome of this case.

Background

2. The site of the Chelsea Barracks in Chelsea Bridge Road, is some 5.2 hectares. Qatari Diar Real Estate Investment Company (“QD”) is a subsidiary of the Qatar Investment Authority, a sovereign wealth fund. CPC Group Limited (“CPC”) is a Guernsey company
3. CPC and QD entered into a joint venture. The Chelsea Barracks site was acquired from the Ministry of Defence on 5th April 2007 by Project Blue (Guernsey) Ltd. (“PBGL”) for £959 million.
4. On 2nd April 2008, PBGL applied to Westminster City Council (“WCC”) for planning permission to redevelop Chelsea Barracks on the basis of a design by Rogers Stirk Harbour + Partners (“RSHP”) (the “Planning Application”). The Planning Application sought detailed consent for some 638 residential units (329 market and 319 affordable), a luxury 108 bedroom hotel, a restaurant, a community hall, a sports centre, flexible retail space, a landscaped park, and a café within the park.
5. By a Sale and Purchase Agreement dated 6th November 2008 (the “SPA”), CPC sold its interest in PBGL to QD for an initial consideration of £37,917,806, and a deferred consideration totalling a maximum of £81 million, depending mainly on future progress being made in obtaining planning permission for the proposed development.
6. QD owed CPC various obligations including one to use all reasonable but commercially prudent endeavours to enable the achievement of the thresholds for the payment of the deferred consideration, and both parties owed each other an express duty to act in the utmost good faith.
7. On 1st March 2009, His Royal Highness the Prince of Wales (the “Prince of Wales”) wrote to QD’s Chairman, His Excellency Sheikh Hamad Bin Jassim Bin Jabr Al-Thani (“Sheikh Hamad”), the Prime Minister of Qatar and a cousin of His Highness the Emir of Qatar (the “Emir”), expressing his dislike of RSHP’s design for Chelsea Barracks.
8. On 11th May 2009, the Emir met the Prince of Wales, and they discussed the proposals for Chelsea Barracks. Sir Michael Peat, who is the Prince of Wales’s private secretary, prepared a note of the meeting recording that “*the Emir was surprised by the Rogers design for Chelsea Barracks and said that he would have them changed*”. On 12th June 2009, QD withdrew the Planning Application.

9. The Mayor of London, Mr Boris Johnson, (the “Mayor”) at various stages, both personally and through his officers at the Greater London Authority (“GLA”), expressed his concerns about the proposals. The Mayor’s concerns were not the same as the Prince of Wales’s concerns. The Mayor thought the scheme was repetitive and lacked variety, whilst the Prince disliked its modernity and was looking for something more traditional.

The terms of the SPA

10. Paragraph 5(aa) of Schedule 4 to the SPA provided:-

“At any time [QD] may elect to pay [CPC] £68,500,000, and upon making such payment the obligations in this Schedule shall fall away ...”.

11. Paragraph 5(f) of Schedule 4 to the SPA provided:-

“(f) The Planning Application shall not be withdrawn unless:

(i) ... the Mayor has indicated that he intends to exercise his power to direct the City Council to refuse the Planning Application ... (a “Deemed Refusal”); and

(ii) the Planning Consultant recommends to [QD] and [CPC] jointly that a revised Planning Application stands a better chance of delivering a Planning Permission than the pursuit of an Appeal of the previous planning application”.

Issues

12. The main issues in this case are whether QD was entitled to withdraw the Planning Application on 12th June 2009, or whether the withdrawal constituted a breach of QD’s obligations, under the SPA, and, if so, what are the consequences of that breach. More technically, the following issues were raised.
13. **Issue 1: Indication issue:** Had the Mayor indicated by 12th June 2009 that he intended “*to exercise his power to direct the [WCC] to refuse the Planning Application*” within the meaning of paragraph 5(f)(i)?
14. **Issue 2: Recommendation issue:** Did Mr Bob Woodman’s (the “Planning Consultant” of DP9 under the SPA, and hereafter “Mr Woodman”) email of 12th June 2009 amount to a recommendation to CPC and QD jointly that a “*revised Planning Application stands a better chance of delivering a Planning Permission than the pursuit of an Appeal of the previous planning application*” within the meaning of paragraph 5(f)(ii)?
15. **Issue 3: Procurement issue:** If the Mayor gave an indication that complied with paragraph 5(f)(i), was that indication procured by QD in breach of (a) its duty of utmost good faith, and/or (b) its obligation not to do “*any act or thing*”

designed to or with the intention to avoid or reduce payment of any Deferred Consideration”?

16. **Issue 4: QD’s breach issue:** Was QD’s conduct in relation to the Planning Application, including its dealings with the Prince of Wales and its new outline strategy and the withdrawing of the Planning Application, a breach of its duty of utmost good faith, or of its obligation to “*use all reasonable but commercially prudent endeavours*”, or of its obligation not to do “*any act or thing designed to or with the intention to avoid or reduce payment of any Deferred Consideration*”?
17. **Issue 5: CPC breach issue:** Was CPC’s conduct between 22nd March and 12th June 2009 in breach of its duty of utmost good faith, whether by devising a strategy with the objective of manoeuvring QD into a position where it would become obliged to pay CPC more quickly, or otherwise?
18. **Issue 6: Repudiation issue:** Were any breaches by QD and/or CPC repudiatory? If so, was either party, or is either party now, entitled to accept that repudiation as having terminated or terminating the SPA?
19. **Issue 7: QD election issue:** Is an election under paragraph 5(aa) the only remaining available mode of contractual performance by QD and/or in the present circumstances is QD obliged to make payment to CPC?
20. **Issue 8: Remedies issue:** What if any declarations are CPC and/or QD entitled to, as a result of the findings/holdings on the above issues?
21. It has been CPC’s case that a crucial factual question is whether the withdrawal was precipitated by what the Emir is alleged to have said to the Prince of Wales on 11th May 2009. QD admits that the Emir disliked the scheme, but denies that there was any link between the discussions between the Emir and the Prince of Wales, on the one hand, and the withdrawal on the other.

Evidence

22. Some might have regarded this as a relatively simple dispute as to whether the conditions contained in paragraph 5(f) were satisfied or not. Instead each side has alleged bad faith against the other. Both these ‘bad faith’ cases are built on unsteady foundations. Both QD and CPC were faced with a very difficult position once the Prince of Wales intervened in the planning process in March 2009. His intervention was, no doubt, unexpected and unwelcome. And the effects were, I suspect, exacerbated by the inevitable publicity which followed, and by the continuing economic malaise affecting the market for upscale developments like Chelsea Barracks.
23. It is true that CPC personnel had a conflict between their interests and those of QD, but that conflict was because of QD’s political concerns, by which CPC

was unaffected. It is true that CPC tried to produce a situation in which it would be paid, though it rather misunderstood the machinery of the SPA that would produce such a payment. Yet, despite all this, I accept Mr Candy's basic thesis, namely that he wanted QD to make a decision, or to 'pick a lane' as he put it, as between withdrawal and pushing on with the Planning Application.

24. As for QD's alleged bad faith, it is important to distinguish between the quality of QD's evidence and the establishment of bad faith allegations. I have not been able to accept all of QD's evidence. In particular, I do not accept that Mr Al-Saad made all the decisions for QD on this project without regard to the views of Sheikh Hamad or the Emir. But QD's desire to protect Qatar's rulers does not lead inexorably, as CPC would like, to a determination that QD also acted in bad faith and in breach of its contractual obligations. QD was, in my judgment, far more circumspect in dealing with the views and, even the wishes, of the Emir and Sheikh Hamad than CPC's allegations would suggest.
25. I found Mr Candy a broadly truthful witness. On occasions, his conduct was undoubtedly commercially questionable, for example in preparing self serving documents, and in seeking to persuade Mr Woodman as to what view he should take without including QD in the conversations. But his answers in cross-examination were mostly disarmingly candid, and most importantly, he made no attempt to conceal his objective to obtain the Deferred Consideration for CPC as soon as possible.
26. Mr Candy and his team undoubtedly did devise a strategy by which they hoped to improve their chances of a payment whether under paragraph 5(aa) or by negotiation. But that was not a strategy that was intended to involve any breach of the SPA. Ironically, whatever strategy CPC followed seems to me to have had almost no impact on QD's actions.
27. Mr Al-Saad gave evidence with extreme care, but was, nonetheless, not a completely reliable witness. He was plainly motivated by a desire to keep both the Emir and Sheikh Hamad out of the picture.
28. Mr Ward was, save in one particular respect, a broadly reliable witness, and in many respects was refreshingly candid and straightforward. The one area in which, I think, Mr Ward told me something that was not true was in relation to the beginnings of the new outline proposal. I am quite sure that Mr Ward's change of tack on 14th May 2009 (from pursuing the Planning Application alone, to pursuing the new outline proposal, which involved suggesting making an application for outline planning permission instead) was precipitated by his conversation with Mr Al-Saad.
29. Mr Titchen was an almost completely truthful witness. Mr Woodman was accepted by both sides as a reliable witness, and I find that he was just that.

Findings

30. My findings on each of the 8 issues are as follows:-
31. **Issue 1: Indication issue:** The Mayor had not indicated by 12th June 2009 that he intended “*to exercise his power to direct the [WCC] to refuse the Planning Application*” within paragraph 5(f)(i).
32. **Issue 2: Recommendation issue:** Mr Bob Woodman’s (the “Planning Consultant” of DP9 under the SPA) email of 12th June 2009 did amount to a recommendation to CPC and QD jointly that a “*revised Planning Application stands a better chance of delivering a Planning Permission than the pursuit of an Appeal of the previous planning application*” within paragraph 5(f)(ii).
33. **Issue 3: Procurement issue:** If the Mayor had given an indication that complied with paragraph 5(f)(i) (which he did not), that indication would not have been procured by QD in breach of its duty of utmost good faith or its obligation not to do “*any act or thing designed to or with the intention to avoid or reduce payment of any Deferred Consideration*”.
34. **Issue 4: QD’s breach issue:** QD’s conduct in relation to the Planning Application, including its dealings with the Prince of Wales and its new outline strategy and the withdrawing of the Planning Application, was not a breach of its duty of utmost good faith, or of its obligation to “*use all reasonable but commercially prudent endeavours*”, or of its obligation not to do “*any act or thing designed to or with the intention to avoid or reduce payment of any Deferred Consideration*”.
35. **Issue 5: CPC breach issue:** CPC’s conduct between 22nd March and 12th June 2009 was not in breach of its duty of utmost good faith.
36. **Issue 6: Repudiation issue:** CPC’s alleged breaches of the SPA were not repudiatory. QD’s purported acceptance of the breach was repudiatory, but the repudiation has not been accepted and the SPA remains in full force and effect.
37. **Issue 7: QD election issue:** In the present circumstances, QD is not obliged under the SPA to make a payment of £68.5 million to CPC.
38. **Issue 8: Remedies issue:** I have made an award of damages in favour of CPC, because QD withdrew the Planning Application in breach of paragraph 5(f). The damages will be assessed as explained in the next section. I have also made the other orders summarised below.
39. QD was acting as best it could in a very difficult political situation, with the objective of securing the best possible planning permission in the shortest feasible time. It was making the best of a bad job. In doing so, it acted in breach of paragraph 5(f) by which it had agreed that the Planning Application

“shall not be withdrawn” unless paragraphs 5(f)(i) and (ii) were satisfied. It did not, however, by so doing fall foul of either clauses 7.1 or 7.3. QD was not withdrawing because it wanted to, or because it wanted to stop CPC getting its money. It was between a rock and a hard place, and was doing the best it could in difficult circumstances. QD’s political objectives were ultimately aligned with its commercial objectives, and indeed the objectives under the SPA, even though they might not have been.

Damages

40. This means that CPC would, in theory, be entitled to damages for QD’s breach of paragraph 5(f). But CPC has not claimed such damages in its Amended Particulars of Claim, preferring instead expressly to reserve its rights to seek further or other relief consequential on any declarations made by the Court.
41. If CPC were to seek damages, they would be at large, and would (as it seems to me subject to any further argument that the parties may seek to put forward) be determined by reference to the sum of money that would put CPC in the position it would have been in, had QD not breached paragraph 5(f): i.e. had QD not withdrawn the Planning Application, and had QD, instead, allowed the Planning Application to proceed after 12th June 2009.
42. The assessment of damages would, if ordered (and subject to further argument), be a comparison between:-
 - i) What would have been the position had QD continued with the Planning Application, and presumably appealed if that were necessary, and presumably battled against opposition from the Mayor and from the Prince of Wales, on the one hand; and
 - ii) What has happened and presumably what will happen now that the Planning Application has been withdrawn and the SPA remains in being, as I have found that it does, on the other hand.

Though possible, it would not be easy to undertake this comparison until the outcome of the actual planning process is known. But damages are to be assessed as at the date of breach, and the parties will be able to make submissions after judgment as to whether there should be an enquiry as to damages at all, and whether, if there is, it should proceed immediately or whether there should be a pause in the litigation.

Relief

43. The relief that I shall grant is as follows:-
 - i) A declaration that there has been no Deemed Refusal within the meaning of paragraph 5(f)(i) of Schedule 4 to the SPA.

- ii) A declaration that the Planning Consultant recommended within the meaning of paragraph 5(f)(ii) of Schedule 4 to the SPA that a revised Planning Application stood a better chance of delivering a Planning Permission than the pursuit of an Appeal of the previous planning application.
 - iii) A declaration that QD has acted in breach of paragraph 5(f) of Schedule 4 to the SPA by withdrawing or causing PBGL to withdraw the Planning Application on 12th June 2009.
 - iv) A declaration that QD was not entitled to accept CPC's alleged breaches of the SPA as a repudiation of the SPA bringing it to an end on 12th April 2010.
 - v) A declaration that the SPA remains in full force and effect.
 - vi) An Order that CPC's claims against QD for damages for breach clauses 7.1 and 7.3 of the SPA be dismissed.
 - vii) An Order that QD's claims for relief based on CPC's alleged breaches of clause 7.1 of the SPA be dismissed.
44. Had CPC sought it, I would have been prepared to order judgment in its favour for an enquiry as to the damages sustained by it as a result of QD's breach of paragraph 5(f) of Schedule 4 to the SPA in withdrawing the Planning Application on 12th June 2009 or causing the Planning Application so to be withdrawn by PBGL. It remains to be seen whether CPC seeks such an enquiry, which I will consider in the light of any further submissions that may be made.

Conclusions

45. The parties' suspicions of one another have turned out to be rather exaggerated, and to have had little or no effect on what actually happened. It would perhaps have been better if the parties had worked a little harder towards solving their mutual problems together, rather than resorting to immediate and somewhat intransigent positions in preparation for what I think they thought was going to be inevitable litigation. It may still not be too late. It would be commendable if the outcome of this judgment were that the parties, even at this late stage, started to work collaboratively together to achieve the best possible Planning Permission, as they had envisaged they would under the terms of the SPA.