

## Options; be careful with your drafting!

**“Options present significant problems and tightly drafted option agreements are a necessity”**

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When negotiating an option to buy land, it is important to be careful with the drafting of the option agreement, in case you create unintended consequences.

A recent case illustrates how problems can arise if the wording of the agreement is not comprehensive. An option to buy land was granted by a landowner to a developer. The developer intended to apply for planning permission to develop the land and, if permission was granted, the developer was expected to exercise the option to purchase the land.

The option agreement required the developer to apply for planning permission for twenty apartments and gave it the right to buy the site for either £875,000 or £925,000, depending on the planners' decision as to whether overground or underground parking was allowed.

The developer paid £1 for the option, and the option was to last for six months. The term of the option was to be extended if the developer's planning application was refused and the developer appealed against the decision or if planning permission was granted on terms unacceptable to the developer. The problem was that in such circumstances the option ran until three months after the determination of the appeal against the planning decision, but it did not have a longstop termination date. The statutory limitation on options is 21 years.

The developer did not obtain planning permission and, shortly before the option agreement expired, it appealed.

The developer then asked the planning authority to put the appeal into abeyance, with the effect that the option was then left “live”.

More than a year later, the developer submitted various other planning applications for the same land, one of which was granted. It then tried to exercise its right to buy under the option and the landowner refused. The landowner argued that there was an implicit term in the agreement that the developer would use “best endeavours” to obtain planning permission; that this had not been done because the permission had not been pursued for a year.

The landowner lost.

“Options present significant problems and tightly drafted option agreements are a necessity,” says Andrew Renton. “One particular problem arises for landowners if the timing of receiving the option notice is outside the landowner's control. This can have tax consequences and an option ‘hanging’ over a site can cause problems if the landowner tries to refinance using the land as security. It is preferable for the developer to pay a realistic sum up front, as in practical terms that will concentrate the developer's mind on completing the deal.”

For further information about our Commercial Real Estate Team and services for landowners and developers, please contact Andrew Renton.