Development Land: Part 1

The focus of these notes is on two types of clause common to development land sales that can prove problematic both to landowners and developers: overage provisions and restrictive covenants.

OVERAGE PROVISIONS

Overage clauses are not an area to dabble in, but many people do. Overage clauses, often colloquially referred to as 'clawback' provisions, are designed to secure a further payment to the seller (usually by way of a percentage of the uplift on value) where the purchaser or their successors in title develop the land at a later date.

There are 3 issues common in dealing with this kind of provision:

- What constitutes development under the terms of the agreement?
- What should be the trigger for payment?
- How do you enforce?

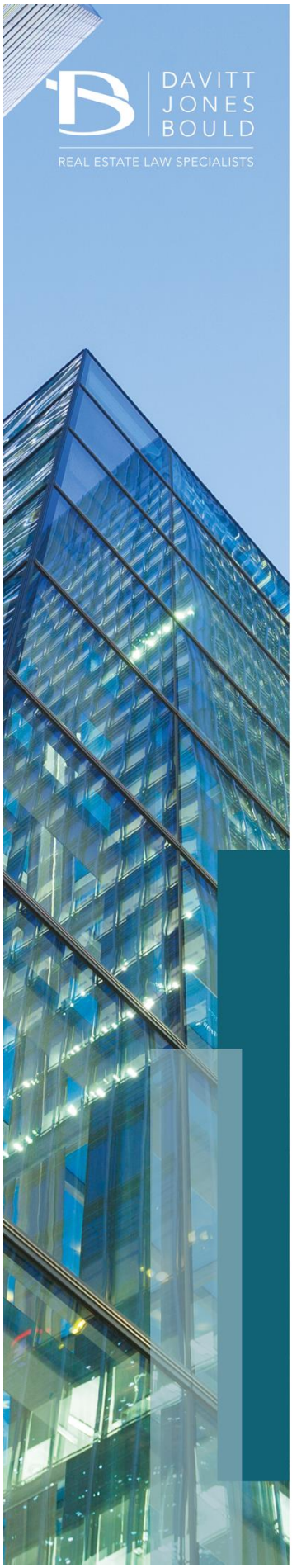
The interpretation of 'development' under the agreement

This may seem obvious but the recent case of ***Walker v Kenley [2008] EWHC*** serves as a warning to clearly specify the event that triggers the overage payment. Here overage was stated to be payable if 'residential flats' were built on the land. The buyer wanted to build holiday flats. The question for the High Court was whether holiday flats fell within the meaning of 'residential', thus triggering the overage payment. Quite surprisingly, it was held that the term 'residential flats' suggested a degree of permanence, i.e., residence as a dwelling, and that this did not include holiday homes. No money was therefore payable.

The trigger event

Typically, the trigger event in overage clauses will be the obtaining of planning permission. This is flawed because, just because the landowner has obtained planning permission, that doesn't mean they are going to implement it. Indeed, the start of the development may be years later. Overage is therefore better linked to the implementation of any planning consent.

But what about possible changes in planning law? For example, where there are changes in what constitutes permitted development (i.e. no planning permission is required) under the ***Town and Country Planning Act (Permitted Developments) Order 1995.*** Planning law is undergoing huge overhaul in England at the moment. As of this month, you can add 2 stories to your property without planning permission. And, as of 1st September, Use Classes A, B and C are all going to be subsumed within 1 class under new permitted development rules. It is therefore imperative to deal with permitted development in your clauses. It is suggested that there are going to be a lot of things that won't require planning permission within the next 4 years.



Another point to be wary of is the possibility of the buyer developing without obtaining the required planning permission. If the local authority decides not to serve an enforcement notice or is simply not aware that the development has taken place, it may still be possible for the landowner to realise the value even where there has been no formal grant of planning consent.

The alternative approach to linking overage payments to the grant or implementation of planning permission is to provide that when cash accrues to the landowner that will trigger the payment of overage. This, too, is not without its difficulties, however. In ***Renewal Leeds v Lowry Properties [2010] EWHC 2902***, no overage was payable until the last house was sold. 84 houses were built and 80 were sold but the developer deliberately left the last 4 houses unsold. The seller tried to buy the houses from the developer at market value in order to trigger the payment, but the developer refused to sell to them. The court implied a term that the developer should take all reasonable steps to sell and therefore the overage was payable.

In ***Sparks v Biden [2017] EWHC 1994 (Ch)*** a member of the public sold land to a local developer subject to an overage provision. The developer built the houses but didn't sell them. Instead they rented 7 of them out and then lived in the 8th one, planning to wait out the overage period and then sell after it had run out. The court stated that as there were no express provisions as to the time in which properties would be sold to trigger the overage payments, it should be implied that the person subject to the overage would endeavour to sell within a reasonable time. Overage was therefore payable.

Furthermore, in the recent case of ***Loxleigh v Dartford Borough Council [2019] EWHC 2063,*** overage was triggered by the obtaining of detailed planning permission. The Court decided that this meant that when reserved matters in relation to outline planning permission were agreed the payment was due.

Despite the above, in the light of the Supreme Court cases ***of Arnold v Britton [2015] UKSC 36*** and ***Marks & Spencer v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor [2015] UKSC 72*** where the courts held that implied terms would not be allowed to re-write express wording, it is suggested that the sensible option should always be not to rely on implied terms and that such matters should be expressed.

Enforcement

Between the original parties there will be a contract and the seller will be able to fully enforce the overage clause. The difficulty comes with third party purchasers. The burden of the clause cannot be contractually assigned to subsequent purchasers of the land, and so some form of property right which is binding on the purchaser will need to be created. The most common methods of doing this are: -

- By way of direct covenants and restrictions
- By way of a restrictive covenant on the land
- Ransom strips
- By the creation of an overage charge

Direct Covenants and Restrictions

A simple way to ensure the enforcement of an overage clause is to require any subsequent seller of the land to obtain direct covenants from the purchaser. This way each new purchaser enters into a direct covenant with the original seller or their successor and they too are therefore contractually bound. This can be backed up by registering a restriction at the Land Registry stating that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in the required form.

Restrictive Covenants

This is arguably the worst way to enforce an overage clause. Restrictive covenants are of dubious value for various reasons. There is no guarantee that the courts will award an injunction to prevent a breach and damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value any payment will be negligible. In the longer-term restrictive covenants can be discharged under ***Section 84 Law of Property Act 1925*** if they are considered obsolete or if they prevent the reasonable use and enjoyment of land. In the event of discharge, the Land Tribunal may award damages, but these are likely to be limited and certainly not in line with the overage payment.

Overage charges

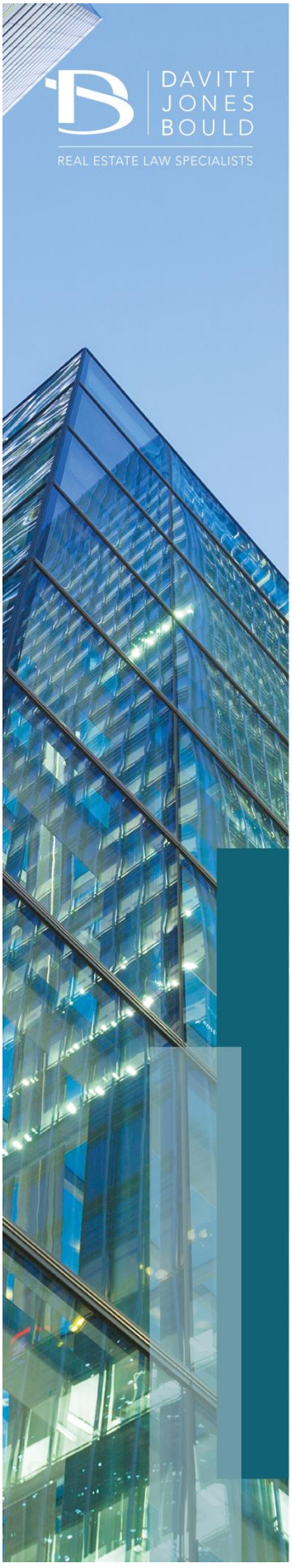
The best way to enforce an overage clause is by way of overage charge. A legal charge (or mortgage) is put on the property to secure the amount of the overage payment. Nothing occurs until the trigger event, e.g. the implementation of planning, occurs. The charge will then automatically secure the payment. If the landowner does not pay, the holder of the charge can sell the land and take payment out of the proceeds. He will have the same rights and remedies as any other mortgagee.

Whilst the overage owner will require priority of payment over other charges, subsequent mortgagees may be reluctant to accept an overage charge with priority. This may mean that overage charges are of less importance in relation to residential properties and properties where financing is required. Subject to this, legal charges have the benefit of enhanced remedies as the power of sale may automatically arise and become exercisable without the need to apply to court.

It should be noted that, in the case of ***Akasus v Farmar & Shirreff [2003] EWHC 1275***, a firm of solicitors who failed to include provisions allowing enforcement against third party purchasers were held to be negligent. The upshot of this is that if you don't discuss with your client the possibility of their being bound by an overage clause, you are negligent. It is therefore vital to think about future enforcement when drafting overage clauses.

Stamp Duty Land Tax

One final point to be made about overage clauses relates to the payment of SDLT on the purchase. A best estimate of the total consideration based on the contingent event occurring (i.e. grant or implementation of planning or development), no matter how remote, must be made and the tax calculated accordingly. When the triggering event actually occurs, a further return must then be made. Developers should be aware of this and accommodate any extra SDLT liability in their tendering process.



RESTRICTIVE COVENANTS

A seller may wish to impose restrictions on the future use of the land they are selling. In reality, though, restrictive covenants are of dubious value for various reasons. In court proceedings there is no guarantee that an injunction will be awarded to prevent a breach, and damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no comeback for the claimant. In the longer-term restrictive covenants can be discharged under section 84 Law of Property Act 1925 if they are considered obsolete or if they prevent the reasonable use and enjoyment of land. In event of discharge by the Lands Tribunal damages may be awarded, but again these are limited. Consequently, a lot of covenants aren't worth much as it's not worth arguing the case.

There are also problems with the interpretation of restrictive covenants. In ***City Inn (Jersey) Ltd v 10 Trinity Square Ltd [2008] EWCA Civ 156*** there was a restrictive covenant requiring the consent of the 'Transferor' of land to make alterations. The Court of Appeal confirmed that the 'Transferor' meant the original transferor and not any successor in title on the basis that, if successors were intended to obtain the benefit of restrictive covenants, then this should have been made clear in drafting.

A good faith provision in the contract will not necessarily help either. The Court of Appeal have recently confirmed in ***Sainsbury's Plc v Bristol Rovers Football Club [2016] EWCA Civ 160*** that a requirement to act in good faith will not override clear provisions of the contract. Neither does a good faith provision require you to act against your commercial best interests.

The conclusion to be made here is quite simply that when it comes to controlling and restricting the future use of land, an overage clause is a much better bet than restrictive covenants in so many ways. Overage may act either positively in that if additional value is received additional money will be given to the seller, or negatively, i.e. the purchaser will not develop. If an overage clause is present, a buyer will have to balance whatever they hope to make from the development against not only the cost of development, but also the overage cost and the payment of additional stamp duty. Together these may provide a more compelling deterrent than a restrictive covenant against building. The only qualification to be made is in the case of the sale of a house with a paddock. Here overage is completely inappropriate because subsequent buyers won't get a mortgage and the presence of an overage clause will effectively blight the land.

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