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Legal Briefing

Ted Lowery considers a dispute over the heads of terms for an anaerobic digestion plant

Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd [2023] EWCA Civ 482

Before Lord Justices Lewison, Arnold and Birss

In the Court of Appeal

Judgment delivered 9 May 2023

The facts

Pretoria was looking to develop several anaerobic digestion plants in eastern England and during 2013 approached Blankney regarding a derelict factory site in Lincolnshire.

On 27 November 2013 Pretoria and Blankney executed a heads of terms document. Regarding the proposed lease of the site, clause 1 in the HoTs provided for an annual rent of £150k, a term of 25 years and the exclusion of the security of tenure arrangements within the Landlord and Tenant Act 1954. Clauses 2, 3 and 4 concerned the likely arrangements for the feed stock and gas supply to the plant. The HoTs stated that a formal agreement would be drawn up within one month of planning permission subject to confirmation of other consents and easements. The final clause in the HoTs confirmed a lock-out agreement along the lines that these arrangements would be exclusive to the parties until 31 July 2014.

The HoTs were not marked "subject to contract" in circumstances where Pretoria and Blankney agreed that at least some of the provisions, for example the lock-out agreement, were intended to be binding.

Pretoria secured planning permission on 11 June 2014 and Blankney's solicitors prepared a draft lease running to over 40 pages. During August 2014, the parties considered extending the lock-out agreement but thereafter, Blankney lost confidence in Pretoria and during November 2014, Blankney entered into alternative arrangements for the site with a third party.

Whilst it was common ground that clauses 2, 3 and 4 in the HoTs were not intended to create legally enforceable obligations, Pretoria maintained that clause 1 comprised a binding agreement for a lease. In a judgment dated 14 June 2022 the judge at first instance dismissed Pretoria's claim on the grounds that: (i) The existence of a binding contract for a 25 year lease was incompatible with the limited period of the lock-out agreement; (ii) Pretoria could not have become contractually bound to enter into the lease until completion of the procedures required for contracting out of the Landlord and Tenant Act 1954; and, (iii) For a 25 year commercial lease of an unusual property, several important terms had not been considered.

Pretoria appealed contending that the judge had correctly set out but irrationally applied the legal principles concerning whether or not the parties had entered into a binding contract.

The issue

Had the parties entered into a binding agreement for a lease?

The decision

Lord Justice Lewison considered it significant that the HoTs provided for a formal agreement to be drawn up for an entirely new leasehold interest: where the first draft of the lease was more than 40 pages long this was a not a case in which the subsequent formal contract would do no more than put into formal language that which the parties had already agreed to. It was also apparent that the HoTs left a number of important matters unaddressed, including terms particular to the specialist nature of the project concerning construction, insurance, planning and environmental compliance.

Lord Justice Lewison agreed with the first instance judge that the proposed 25-year lease was incompatible with a lock-out agreement lasting 8 months: had it been intended that the HoTs would create a binding agreement for a lease then a time limited lock-out agreement would have been unnecessary.

Lord Justice Lewison also agreed that the parties' agreement to contract out of the Landlord & Tenant Act 1954 was a significant factor militating against any finding that an enforceable agreement had been reached through clause 1: Pretoria could not have become contractually committed to contracting out before the procedures laid down by the 1954 Act had been completed.

Finally, where it was essential to the creation of a binding contract for a lease that the duration and a start date be specified, it was not possible to infer from the parties' conduct and exchanges that a commencement date for the lease of the site had been fixed: Pretoria was for example under no express obligation to apply for planning permission nor was any timetable for the same agreed.

Accordingly, the more obvious inference on the facts was that the parties did not intend to be contractually bound by clause 1 of the HoTs.

Commentary

In his leading judgment, Lord Justice Lewison reviewed the development of the Common Law in relation to the formation of binding agreements, referencing authorities dating back to 1563, 1605, 1877 and 1878. In this case, history did not assist Pretoria where the HoTs only scratched the surface of what would have been required for a binding contract.

Ted Lowery
June 2023