FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 9
CA83/18

Lord President
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the cause

RAMOYLE DEVELOPMENTS LIMITED

Pursuer and Respondent

against

SCOTTISH BORDERS COUNCIL

Defender and Reclaimer

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

12 February 2020

[1] Ramoyle Developments Limited (Ramoyle) has brought an action seeking declarator that Scottish Borders Council (the Council) wrongfully rescinded missives of sale of property at Burgh Yard, Galashiels, and reparation for loss said to have been caused thereby. After a debate the commercial judge pronounced decree of declarator and gave the Council leave to reclaim (appeal) – see [2019] CSOH 1. At the hearing on the reclaiming motion the court was invited to quash the said interlocutor and dismiss the action.

The circumstances

[2] Ramoyle, a property developer, entered into missives for the purchase from the Council of land in Galashiels which it intended to regenerate by way of a mixed development of retail, hotel and housing. The missives were subject to certain suspensive conditions. Condition 2.2.2 required Ramoyle to have obtained planning permission, roads construction consent and all other necessary consents for the development. The dispute between the parties focusses upon condition 2.5.2, which provided 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 six months after the said date of purification or waiver. ... 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 six 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."

Ramoyle waived the condition contained within clause 2.2.4 by letter dated 22 May 2017. It was common ground that this meant that Ramoyle required to submit the application for planning consent to the local planning authority by 22 November 2017. The parties are in dispute as to whether this was achieved.

[3] The Council uses a web portal, operated by the Scottish Government, by which planning applications can be presented to planning authorities. On 20 November 2017 Mr Turnbull of Ramoyle used this online method. It produced a document headed "Scottish Borders Council, Newtown St Boswells, Melrose." It bears to be an online application form which members of the public are invited to complete. A unique reference number is stated as applying to the online form. One is told that an application number will be allocated once

the application is validated, something which will not happen "until all the necessary documentation has been submitted and the required fee has been paid." (In this regard the portal echoes the relevant regulations, see below.)

[4] The applicant requires to answer a series of questions, including as to the type of application, and provide a description of the proposal. Details must be given in relation to a number of matters, including site area, existing use, access and parking, and water supply and drainage requirements. Mr Turnbull "signed" a declaration "that this is an application to the planning authority as described in this form", and that the accompanying plans were provided as part of the application, the declaration date being 20 November 2017.
Mr Turnbull was informed that he would not be able to submit the application until he selected one of four possible payment methods. He was also told that the method of payment selected would be applied once he had submitted the application. Mr Turnbull chose to specify payment by way of cheque. The portal's fee calculator indicated that the fee would be £3,609, though this would be an approximation and subject to checking by the planning authority. The last sheet of the online application stated, amongst other things, that email notification was complete.

[5] At 16.48 on 20 November 2017 Mr Turnbull received email confirmation from the operator of the web portal (ePlanning.scot) that his application had been "successfully submitted", and that it would now be sent to Scottish Borders Council as the party responsible for processing and determining the application. On 22 November he received an email from Ms Caroline Law, an officer of the Council working in the department for planning and regulatory services, that she was in receipt of his application for planning permission in principle for the proposed mixed use development. Ms Law stated that this had been discussed with a planning officer who was asking for a supporting statement to be

provided. There was a query as to the appropriate fee, which Ms Law calculated at a figure some £800 below that indicated in the application.

[6] At 00.01 on 23 November 2017 the Council's chief legal officer faxed a formal letter to Ramoyle's solicitors stating that, as their clients had failed to submit a planning application in terms of condition 2.5.2, on behalf of and as authorised by the Council he was rescinding the missives concerning the sale and purchase of the subjects, holding the transaction to be at an end. (In due course the planning authority granted planning approval subject to certain conditions and completion of a section 75 agreement.)

Submissions for the Council in support of the reclaiming motion

[7] The declarator granted by the Lord Ordinary is challenged primarily on the basis that, in terms of regulation 14 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, which is headed "Validation Date", a planning application is "taken to have been made" when all the requirements of the preceding relevant regulations are met, and in particular the application is 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".

[8] Ramoyle sought planning permission in principle for the proposed development, therefore regulation 10 applies. Regulation 10(2) provides:

> "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."

Regulation 10(3) states:

> "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."

[9] It was submitted on behalf of the Council that unless and until a planning application was "made" in accordance with the relevant regulations, the planning authority could not process and determine the application. Ramoyle had failed to pay the fee payable under the Fees Regulations by 22 November 2017, see regulation 10(3)(g). It followed that as at the expiry of 22 November Ramoyle had not provided the planning authority with a complete application for planning consent which could be processed and determined. Accordingly the requirements of condition 2.5.2 had not been met and the Council was entitled to rescind the missives.

[10] It was acknowledged that condition 2.5.2 only required the purchasers to "lodge" or "submit" (both words meaning the same) the application for planning consent by the required date; however this should be interpreted in the context of the missives as a whole, most particularly clause 2.6, and in a manner which created certainty, clarity, and fulfilled the plain commercial purpose of the condition, said to be the receipt of a completed

application within the six month period, thus allowing processing and determination to take place. Clause 2.6 demonstrated that the parties envisaged that the planning authority would be in possession of such an application. In particular it recognised that if the application was undecided, refused or deemed to be refused, or if granted, granted on conditions which were not satisfactory to the purchasers, then the purchasers could amend the application or appeal to the Scottish Ministers. Unless the application was capable of being processed, clause 2.6 would have no operation. It was stressed that Ramoyle had six months in which to complete the necessary procedures. Any other approach would allow the purchaser to delay the obtaining of planning permission, and by making an incomplete application prevent the Council from rescinding the missives, thereby rendering the site sterile and undeveloped. Such would not accord with commercial common sense.

[11] The missives should be construed with the aforesaid planning regulations in mind, they being part of the relevant background to the bargain. Absent payment of the required fee, an application is not compliant with the regulations. Until the fee is paid the application has not been made and the authority cannot process it and determine whether to grant planning consent. The Lord Ordinary erroneously equiparated a statement generated by the online portal that the application had been successfully submitted with compliance with clause 2.5.2. An interaction with the planning portal is not the submission or lodging of an application with the planning authority. The Lord Ordinary failed to acknowledge that the planning portal made it clear that "applications cannot be validated until all the necessary documentation has been submitted and the required fee has been paid."

Submissions for Ramoyle

[12] Ramoyle supported the reasoning of the commercial judge, which is summarised

below. The parties used ordinary non-technical words ("lodge" – "submit") in condition 2.5.2. It did not require the application to be validated. Essentially the Council wants to rewrite the clause. Both parties would have known that the planning portal could be used. It enabled the separation of an application from payment of the fee. There was a submission receipt dated 20 November 2017. The lodging of the planning application was acknowledged on 22 November by an officer of the Council. There had been extensive pre-application discussions of the development, involving, amongst other things, a detailed planning brief. Once submitted, the application was swiftly granted. Commercial business people selected a simple and readily identifiable document – a planning application – and a clearly identifiable action as the key items in compliance. Even if the regulations are examined, an application is dealt with separately from all that must accompany it, including the fee.

The commercial judge's decision

[13] The commercial judge held that the successful submission of an application under the online system used by the planning authority satisfied the requirement to lodge or submit an application under condition 2.5.2. This was in accordance with the natural and ordinary meaning of the words used. It made commercial common sense in this digital age. The system provided that an application could be successfully submitted prior to payment of the fee by cheque. The 2013 Regulations referred to an application being "made", not submitted. It followed that the defenders were not entitled to rescind the missives.

Decision

[14] Condition 2.5.2 uses ordinary, non-technical words which anyone would readily

understand. Until the requisite fee is paid, a planning authority is under no obligation to process an application, but this does not mean that a planning application cannot be lodged or submitted before the fee is paid. If the Council had wished to require full compliance with the 2013 regulations, in the sense of provision of a validated application as per regulation 14 within the six months period, that could have been specified in the missives.

[15] In any event there is no real conflict between the condition and the regulations, nor between them and the online portal system. Regulation 10(2) sets the minimum requirements for an application for planning permission in principle. Those requirements were met in the material submitted on 20 November and acknowledged as received by Ms Law on 22 November. The regulations expressly distinguish between (a) an application for planning permission, and (b) the items and information with which the application must be "accompanied" (see regulation 10(3)), which include the fee payable under the Fees Regulations. Furthermore it is recognised that not everything needs to be achieved at the same time. A planning application meeting the requirements of the regulations, for example as per regulation 10(2), can be submitted to the planning authority, but the application will not be "taken to have been made" until the day when all that is required under the regulations is in the possession of the planning authority, this being the validation date – see regulation 14.

[16] All of this makes sense, in that it is important to have everything done before the planning authority is under a statutory duty to process and determine the application. Full compliance with the regulations identifies the date from which the timescales specified in the regulations commence. Clearly, whatever else, the fee needs to be paid before obligations are imposed upon the authority. So, if an application is submitted to a planning authority on a Monday, a necessary plan or other missing item of information on the

Wednesday, and the fee paid on the Friday, the application is complete and "taken to have been made" on the Friday, but it remains true that it was lodged (or submitted) on the Monday.

[17] As one would expect, the online portal system operated by the Scottish Government mirrors the structure and requirements of the regulations, including allowing an application to be submitted to a planning authority before payment of the fee calculated under the Fees Regulations. It expressly recognises that until then the application cannot be "validated".

[18] For all we know, perhaps the chief legal officer was not informed of the events of the previous days, but in any event, his letter, which was sent one minute after the expiry of the six months' deadline, was in error when it asserted that the applicants had failed to submit an application timeously. If there was any doubt as to whether it was sufficient to submit the online form, this was removed by the email on 22 November from Ms Law stating that she was in receipt of Ramoyle's application for planning permission in principle. The most that can be said is that, as at 22 November, the application had not been validated, and thus the planning authority was under no statutory duty to comply with the terms of regulations 17 and following. The problem for the Council is that condition 2.5.2 did not provide that the application must be both submitted and validated before the expiry of the deadline.

[19] It was contended that clause 2.6 (summarised earlier) demands that condition 2.5.2 be read in accordance with the Council's position; however there is nothing in that clause, nor elsewhere in the contract, which requires such a gloss upon its terms. It was said that any other approach would allow the condition to be met, and then matters stymied by a failure on the part of Ramoyle to pay the fee. If that was a real risk, it could have been addressed and dealt with in the parties' bargain. In any event, the missives contained a

longstop date by which planning permission required to be obtained, thus avoiding any possibility of indefinite sterilisation of the development potential of the site.

[20] For these reasons the reclaiming motion is refused. Ramoyle's damages claim remains outstanding, so the case will be remitted to the commercial court for further procedure.