

Is your overage secure?

March 2010

Particular care must be taken when drafting overage provisions in sale contracts. There are numerous potential pitfalls and the drafting of such clauses can be the subject of lengthy pre-contract negotiations.

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Do not let this effort be in vain by not seeking security for the overage payment. This is more important than ever in the current market considering the increasing number of individuals and businesses suffering financial difficulties. Even the largest corporate institutions cannot be relied upon to remain solvent in these unsettled times.

What’s the issue?

Without security, the obligation to pay overage is simply a personal contractual commitment on the part of the purchaser. The financial standing (both present and future) of the purchaser is being heavily relied upon.

In the event of the purchaser’s insolvency the vendor could find itself having to take action through the courts or wait in line as an unsecured creditor behind those with security, receiving only a fraction (if any) of its entitlement.

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How can overage be secured?

A simple contractual commitment is often supported by the registration of a restriction on the title to the land transferred. This prohibits any dealings with the land without the purchaser’s successors in title entering into a similar obligation to pay the overage, thereby creating a chain of covenants.

If possible, it is preferable to seek security for the payment from the purchaser in the form of a legal charge over the land. If the overage is not paid as agreed the vendor can appoint a receiver to sell the land and recover the overage from the sale proceeds. Specialist advice should be sought when taking such a charge to ensure that it will attach to sums of money which, at the time the charge is taken, may not be quantifiable.

There can be resistance from purchasers in providing a charge on the basis that a developer will often need debt finance for its development project and its funder will insist on a first ranking charge. A charge securing overage may well then need to fall into place behind a debt funder’s security (if the funder agrees to another charge being in place at all) and priority arrangements would need to be negotiated.

The charge can be registered against the title to the land at the Land Registry and also against a corporate purchaser at Companies House so as to bind any future liquidator of the purchaser.

There are other methods of securing overage payments but these do not tend to be as effective as the restriction and charge route.

It is useful to discuss security as early as possible in negotiations so as to smooth the way when it comes to drafting the

overage clause. It can be more difficult to obtain security for the payment if this is introduced for the first time at the drafting stage.

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