

RE: GOLDEV WOKING LIMITED LOAN FACILITY

OPINION

Introduction and summary of advice

1. I am advising Woking Borough Council (“WBC”) in relation to issues raised by the petition of Mr Jeremy Instone (“the Petition”), which by 25 May 2021 had received more than 100 signatures. Mr Instone is a local resident and member of the South Woking Action Group.
2. The broad issues raised by the Petition are whether Goldev Woking Limited (“GolDev”) is in material breach of its loan facility agreement with WBC and whether WBC should terminate the agreement accordingly.
3. In accordance with WBC’s constitution, on 17 June 2021 the Petition was considered by the Executive. Notwithstanding the advice of the Monitoring Officer that there was no material breach, it was resolved to appoint a task group to examine that advice in detail.
4. The GolDev Loan Agreement Task Group was duly appointed. Its terms of reference, approved on 1 November 2021, are in essence “to establish the facts of the matter and if a material breach has occurred”. I note that, at least read literally,

this does not include making any recommendation as to whether the loan facility agreement should be terminated, if there has been a material breach.

5. In summary, I agree with the advice of the Monitoring Officer that based on the evidence put forward GolDev is not in material breach of its obligations under the loan facility agreement.

Background

6. A brief summary of the relevant factual background is as follows.
7. In order to support proposals by GolDev to develop land owned by WBC around Woking FC stadium at Kingfield Road and Westfield Avenue and other land owned by WBC within the locality at Egley Road, on 30 January 2019 WBC entered into three agreements with GolDev: an agreement for lease, an implementation agreement and a loan facility agreement (“the Facility Agreement”).
8. The purpose of the Facility Agreement is to make a loan facility of £250m available to GolDev to develop the above land. WBC is to borrow money from the Public Works Loan Board for lending to GolDev and GolDev is to repay the loans with interest incorporating a margin of 2%. The loans are to be secured by a debenture and first legal charge.
9. The grant of the leases under the agreement for lease and utilisation of the loan facility are conditional upon among other matters the grant of a Satisfactory

Planning Permission (as defined in the agreement for lease) and the main substance of the implementation agreement is conditional upon the grant of the leases. Thus, the main substance of all three agreements is conditional upon the grant of a Satisfactory Planning Permission.

10. On 29 November 2019 GolDev applied for planning permission in respect of both sites. One of the objectors was South Woking Action Group. On 23 June 2020 WBC's Planning Committee refused permission. GolDev appealed to the Secretary of State. The inquiry has taken place, and I understand that the inspector's report is expected on 14 December 2021.
11. Meanwhile, GolDev has made a further application (or applications) for planning permission, which application is not supported by Woking FC. This further application has not yet been determined.
12. The material events on which the Petition was based are, first, a change in ownership. A substantial number of shares in GolDev was transferred in April 2020 and January 2021, so that currently GolDev Holdings Limited owns 100% of the shares.
13. As at the date of the Facility Agreement, 50% of the shares were owned by Charter House Property Limited and 50% were owned by GolDev Limited. It should be noted that GolDev Holdings Limited is itself a wholly owned subsidiary of GolDev Limited, so that the main substance of the change of ownership is that

Charter House Property Limited has ceased to own any shares. Insofar as relevant, Messrs Wayne Gold and Gerald Taylor are directors of all three group companies.

14. Secondly, on 16 February 2021 GolDev granted a debenture (“the Erith Debenture”) to Erith Holdings Limited (“Erith”) securing payments due to Erith under an investment agreement of the same date. I have not seen the investment agreement, but it is described in the Erith Debenture as relating to funding of pre-commencement costs for the development. In the usual way, the Erith Debenture grants fixed and floating charges over all of GolDev’s assets and also assigns them as security.

The terms of the Facility Agreement

15. The available electronic copies of the Facility Agreement are missing pages 10-13. My instructing solicitor has located a draft unsigned version of the missing pages. I am advising on the assumption that the content of these missing pages is the same in the signed Facility Agreement.
16. An overview of the main provisions of the Facility Agreement which are relevant is as follows. Clause 2.1 provides for WBC to make the £250m loan facility available to GolDev. Clause 3.1 provides that GolDev must apply all amounts borrowed by it under the facility towards the acquisition of the Properties under the agreement for lease and carrying out the development as anticipated under the implementation agreement and (in addition) towards Budget Costs and associated costs and fees.

17. The definition of Budget Cost at clause 1.1 provides that it shall include pre-planning and associated pre-works commencement costs. The related definition of Cost Budget provides that this is an itemised list of costs and expenses relating to the Project as approved by WBC from time to time under clause 16.3. The definition of Project is found in the agreement for lease at clause 1.1, and this makes clear that the costs of satisfying the conditions thereunder (including obtaining a Satisfactory Planning Permission) are in principle included in the costs of the Project.
18. However, there is no obligation on GolDev to supply a Cost Budget to WBC for approval until it submits its first Utilisation Request, in effect a request for an advance: see clause 16.3. (For simplicity's sake, I shall refer below to Utilisation Requests as requests for an advance and Utilisations as advances.)
19. Clauses 4.1 and 5.4 of the Facility Agreement provide that WBC is only obliged to "make its participation in each Loan available", in effect to make advances, once the conditions precedent in Schedule 1 have been satisfied. These include the execution of the Debenture and Legal Charge in the forms at appendices 1 and 2 and the grant of a Satisfactory Planning Permission.
20. Clause 4.2 further provides that WBC will only be obliged to make these advances if on the date of the request for an advance and the date of the advance there is no Event of Default and the proposed advance would not cause an Event of Default (see clause 19), and further, that the Repeating Representations are true (see clause 17).

21. Clause 5.2 makes provision for requests for an advance, including that they must be accompanied by evidence of the purpose of the advance. Further, pursuant to clause 15, GolDev is to supply financial information to WBC and to notify it in relation to any Event of Default. However, these obligations are not triggered until a loan is made under the Facility Agreement.

22. Clause 17 contains a number of representations stated to be made by GolDev on the date of the Facility Agreement and deemed to be repeated on the date of each request for an advance. These include a representation at 17.9(a) that there is no Event of Default and at 17.12 representations that the security conferred by the Legal Charge under the Facility Agreement is a first priority security interest and the assets subject to the Legal Charge are not subject to any prior charge. Given that there is no obligation to execute the Legal Charge until GolDev makes a request for an advance, it does not make any sense that the representations at 17.12 are made by GolDev prior to that point in time.

23. Clause 18 contains a number of contractual undertakings stated to be made by GolDev “from the date of this agreement for so long as any amount is outstanding ...” thereunder. These undertakings include at clause 18.3 an undertaking not to dispose of the Properties the subject of the agreement for lease, subject to exceptions.

24. They also include a “negative pledge” at clause 18.6 that GolDev will not cause or permit any of its assets to be used as Security, which is defined in broad terms at

clause 1.1 and would appear to include Quasi-Security within clause 18.6(b). However, the above obligation is subject to the exception in clause 18.6(c) in respect of “any Security that is released prior to the first Utilisation.”

25. Events of Default are defined at clause 19. These include at clause 19.1 a failure to pay any sum due on time (subject to narrow exceptions) and at clause 19.2 any other failure to comply with the Facility Agreement or the terms of the Debenture and Legal Charge, subject to a period of grace of 10 business days from WBC giving notice to GolDev.

26. In addition, under clause 19.9 Events of Default include any event or circumstance which has or is reasonably likely to have a Material Adverse Effect, defined at clause 1.1 to mean a material adverse effect on the ability of GolDev to perform its obligations or the enforceability of any Security or WBC’s rights and remedies in relation to the loans.

27. The consequences of a continuing Event of Default are set out at clause 19.12. In essence, WBC is entitled to cancel the lending facility and call in the loans immediately with interest.

28. Clause 20 prohibits the parties from assigning any of their rights, subject to exceptions. There is no restriction in respect of any change in ownership or transfer of shares in GolDev.

29. Clause 29 contains mutual obligations on the parties to cooperate in good faith to facilitate the proper performance of the Facility Agreement.

Legal analysis and conclusions

30. As to the transfers of GolDev's shares referred to at paragraphs 12-13 above, the Facility Agreement contains no restriction in respect of an assignment of shares in GolDev. There is nothing to indicate that these share transfers have had or are reasonably likely to have any effect on GolDev's ability to perform its obligations under the Facility Agreement.

31. As I have commented above, the net effect of the share transfers is that GolDev Limited has increased its ownership from 50% to 100%. Whilst GolDev Limited, as the sole shareholder, would have certain powers under GolDev's articles of association dated 30 April 2018, including the power to appoint directors, there is no evidence that it intends to exercise these in a manner that might detract from the proper performance of the Facility Agreement. Rather, as the sole shareholder, GolDev Limited has every incentive to ensure that GolDev complies with the terms of the Facility Agreement, in order to make a success of its only commercial venture, the development of the Properties.

32. As to the Erith Debenture, this is security executed in order to finance GolDev's pre-works commencement costs of the development. Finance will not be available under the Facility Agreement until after a Satisfactory Planning Permission has been obtained. Therefore, it is unsurprising that GolDev has had to find an

alternative source of finance for pre-works commencement costs for the time being. Nor is it surprising that such a lender demands security for its investment.

33. GolDev has not breached the negative pledge clause 18.6, because of the exception in clause 18.6(c) in respect of “any Security that is released prior to the first Utilisation.” Provided that GolDev procures the release of the Erith Debenture prior to the first advance (“Utilisation”) under the Facility Agreement, it will have complied with this obligation.

34. Nor is there any evidence that GolDev has by executing the Erith Debenture done something which has had or is reasonably likely to have a material adverse effect on the ability of GolDev to perform its obligations under the Facility Agreement, the Debenture or the Legal Charge. The substantial obligations under the Facility Agreement will be triggered (and the Debenture and Legal Charge will only be executed) if and when a Satisfactory Planning Permission has been granted. GolDev will then be entitled to submit a Cost Budget to WBC for approval and request the first advance under the Facility Agreement.

35. In principle it seems to me that GolDev will be entitled to include in the Cost Budget and the request for the first advance the costs up to that point financed by Erith, as pre-works commencement costs of the Project. Thus, the Erith Debenture may be regarded as a form of bridging loan, to be discharged by the main lending under the Facility Agreement and released prior to the execution of the Debenture and Legal Charge in accordance with standard conveyancing practice.

36. Even if I am wrong about the above, and for reasons that are not currently apparent to me GolDev will not be entitled to use the lending under the Facility Agreement to discharge the Erith Debenture, it would not be sensible for WBC to conclude that GolDev has thereby done something which has had or is reasonably likely to have a material adverse effect on the ability of GolDev to perform its obligations under the Facility Agreement, without first inquiring of GolDev how it intends to redeem the Erith Debenture.

37. Further, even if WBC then concluded based on GolDev's response that the Erith Debenture is reasonably likely to have a Material Adverse Effect within the terms of clause 19.9, there is at least a reasonable argument that WBC would be obliged to serve a default notice under clause 19.2(b), giving GolDev 10 working days to remedy the situation, before exercising any of its contractual remedies in respect of such Event of Default under clause 19.12. Whilst there is no express notice provision in clause 19.9, a court might conclude that this is implicit: see *Gesner Investments Ltd v Bombardier Inc* [2011] EWCA Civ 1118.

38. As I say, my primary view is that the circumstances in paragraphs 36 and 37 above do not arise on the facts (see paragraph 35 above).

Questions asked

39. For the reasons stated above, my answers to the questions asked in my instructions are as follows:

- 4.1 The events complained of have not had and nor are they likely to have a Material Adverse Effect so as to constitute an Event of Default under clause 19.9.
- 4.2 There not been a material breach of the Facility Agreement.
- 4.3 This does not arise.
- 4.4 There is no evidence before me that would indicate that it is realistic for WBC currently to seek to cancel or otherwise avoid the Facility Agreement.
- 4.5 My primary view is that there is nothing WBC needs to do to protect its position. However, WBC should check that it concurs with my advice at paragraph 35, and if it does not, make the inquiries of GolDev I have advised at paragraph 36 above.
- 4.6 If WBC refused to permit the drawing down of loans due under the Facility Agreement, WBC would be in breach of contract and thus exposed to a claim for damages for the loss of profits that GolDev stood to make from the development.

40. As ever, I would be pleased to advise further, in any format.

MATT HUTCHINGS QC

13 December 2021