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Case No: PT-2022-000455

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 August 2023

Before :

MR SIMON GLEESON

- -

Between :

Warwickshire College	**Claimant**
- and -	
Malvern Hills District Council	**Defendant**

- -
- -

Galina Ward KC (instructed by **Eversheds Sutherland (Intl) LLP**) for the **Claimant**
James Hanham (instructed by **Bevan Brittan LLP**) for the **Defendant**

Hearing dates: 14 June 2023

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APPROVED JUDGMENT

Mr Simon Gleeson:

1. This case concerns the future of the building formerly occupied by Malvern Hills College. This college was established in 1886 as the Malvern School of Art, and relocated to its current building in 1928 as the Malvern Technical College and School of Art. That building (the "Property") was sold by the Defendant Malvern Hills District Council (the "Council") to Evesham and Malvern Hills College ("EMHC") in 2008 (the "Transfer") for £850,000. By clause 12.4 of the Transfer EMHC as Transferee covenanted with the Council as Transferor in the following terms:

> "The Transferee hereby covenants with the Transferor such that the burden of this covenant will be annexed to and run with the Property:
>
> 12.4.1 not to use the Property other than for a Further Education College and ancillary uses thereto without the prior written confirmation of the Transferor that the Transferor is satisfied either:
>
> 12.4.1.1 that the Learning and Skills Council (or any successor in function) has properly determined that there is no longer a functional need for a college in Malvern; or
>
> 12.4.1.2 the further and higher education and training provided at the Property immediately prior to such relocation as hereinafter mentioned (or education and training at least equivalent in variety quality and quantity) has been relocated to an alternative site within or adjacent to Malvern as previously approved in writing by the Transferor for that purpose (such approval not to be unreasonably withheld or delayed)"

This is referred to herein as the "Covenant".

2. EMHC and Warwickshire College merged in August 2016 to form the Claimant (the "College"), and ownership of the Property was therefore transferred to the College. Pursuant to that Transfer, the Council and the College entered into a

deed of covenant dated August 2016 whereby the College covenanted to observe and perform the covenants in the Transfer, including clause 12.4.

3. The College provides a variety of different types of courses at a variety of sites in the Malvern area. Two types of courses were provided at the Property: government funded courses for younger students and short courses for older students - predominantly retirees. The latter have always constituted the larger part of the activities at the Property, and account for the majority of the income from the Property. The College says that it has proved impossible to persuade those attending the latter type of course to pay fees consistent with the cost of providing those courses, and as a result the courses provided at the Property have been loss-making for some years. Prior to the Covid lockdown the running rate of losses was around £0.2m per annum on a turnover of £0.6m. The Property was closed in 2020, and the provision of funded courses for younger students has been transferred to another venue operated by the College (20 miles away from Malvern). The Property is currently empty and unused.

4. The College is left with a vacant but valuable asset. It therefore wishes to sell that asset in order to apply the proceeds to finance its educational activities on other sites and increase the provision of education services locally (as an educational charity, it can do nothing else with them). The Council has declined to provide the written confirmation required by 12.4.1, so no change of use can be effected, so as to facilitate a sale. It should be noted – although it is probably not relevant to the issues before me - that in the event of any such sale the Council would be entitled to 50% of the increase in value of the Property since

its initial transfer, so the Council's refusal to provide this confirmation is against its own economic interest.

5. The College has obtained a determination from the Education and Skills Funding Agency ("ESFA"), which it says is the functional successor to the Learning and Skills Council (the "LSC"). It says that the effect of that determination is that there is no functional requirement for a college in Malvern. The College therefore says that the Council is obliged to provide the written confirmation necessary to allow the Property to be sold. The Council says that it cannot do this for a number of reasons. Those reasons are that:

   i) It does not accept that the ESFA is the functional successor to the LSC;

   ii) It does not accept that the statement of the ESFA's conclusion which the College has obtained satisfies the requirement for a "Determination" for the purposes of the clause;

   iii) It is not satisfied that the determination made by the ESFA is properly made, on a variety of grounds; and

   iv) Even if it were satisfied on the previous three grounds, it says that there is nothing in the contract which obliges it to provide the confirmation, and the question of whether or not to provide such a confirmation is entirely within its discretion, which it can legitimately decide not to exercise.

6. I therefore think that there are four broad points which I have to decide:

   i) Is the ESFA a functional successor to the LSC?

ii) Does the ESFA determination constitute a Determination of the question of whether there is no longer a functional need for a college in Malvern?

iii) If it does, is the Council entitled to conclude that it was not properly arrived at?

iv) If the Council were satisfied on the three previous points, would it be under any contractual obligation to provide the prior written confirmation specified in the Covenant.

7. I note that both sides take pleading points on these issues. The College says that the Council's case up until trial has been simply that the ESFA is not a true successor to the LSC, and that the determination which it has made does not satisfy the requirements of the Covenant. It therefore says that the Council should not be allowed at this late stage to introduce the argument that, even if the determination is proper, it has a discretion to determine that it was not properly arrived at. Conversely, the Council says that the College's pleadings seek only a declaration that the determination was properly made, and do not address the question of what basis there might be for requiring it to grant the written confirmation.

8. I accept that pleading points of this kind cannot be simply dismissed. As Lewison LJ said in *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376 at [20],

> "It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case. We were told that by the time that skeleton arguments for trial were served each party would know what points were in issue. We do not regard that as sufficient.".

However, it seems to me that in this case neither side has been disadvantaged by the other's failure to set these points out in writing, and they were addressed before me by both sides in some detail. I am therefore happy to treat them as having been properly raised, and address them.

1. Is the ESFA a functional successor to the LSC?

9. The administrative structure of the provision of education services in the UK has been frequently reorganised, and the issue of identifying the successor to the LSC is not entirely straightforward.

10. The LSC was established by section 1 of the Learning and Skills Act 2000 ("the 2000 Act"). Its main functions under the 2000 Act were set out in sections 2 and 3. At the date of the Transfer s.2 provided as follows:

> "2. – Education and training for persons aged 16 to 19.
>
> (1) The Council must secure the provision of proper facilities for-
>
> (a) education (other than higher education) suitable to the requirements of persons who are above compulsory school age but have not attained the age of 19,
>
> (b) training suitable to the requirements of such persons,
>
> (c) organised leisure-time occupation connected with such education, and
>
> (d) organised leisure-time occupation connected with such training.
>
> (2) Facilities are proper if they are-
>
> (a) of a quantity sufficient to meet the needs of individuals, and
>
> (b) of a quality adequate to meet those needs."

11. "Higher education" in this context means education provided by means of a course of any description mentioned in Schedule 6 to the Education Reform Act

1988, which lists various types of course of first degree level and above. Compulsory school age is defined in section 8 of the Education Act 1996: essentially it runs from the school year in which a child turns 5 to the school leaving day in the year in which they turn 16.

12. At the date of the Transfer, s.3 provided as follows:

> " 3. – Education and training for persons over 19.
>
> (1) The Council must secure the provision of reasonable facilities for-
>
> (a) education (other than higher education) suitable to the requirements of persons who have attained the age of 19,
>
> (b) training suitable to the requirements of such persons,
>
> (c) organised leisure-time occupation connected with such education, and
>
> (d) organised leisure-time occupation connected with such training.
>
> (2) Facilities are reasonable if (taking account of the Council's resources) the facilities are of such a quantity and quality that the Council can reasonably be expected to secure their provision. "

13. The LSC's functions at the time of the Transfer were therefore:

i) Under section 2 of the 2000 Act to secure the provision of proper facilities for education (other than higher education) suitable to the requirements of persons who are above compulsory school age but have not attained the age of 19 ("the 16-19 duty"); and

ii) Under section 3 of the 2000 Act to secure the provision of reasonable facilities, taking into account the LSC's resources, for education (other than higher education) suitable to the requirements of persons who have attained the age of 19 ("the over-19 duty").

14. The LSC was dissolved by the Apprenticeships Skills, Children and Learning Act 2009 ("the 2009 Act"): see section 123. Section 60 of the 2009 Act established the Young People's Learning Agency for England ("the YLPA"). By section 61, the YLPA was subject to the 16-19 duty in similar terms to the former LSC:

> "61(1) The YLPA must secure the provision of financial resources to-
>
> (a) persons providing or proposing to provide suitable education or training to persons-
>
> (i) who are over compulsory school age but under 19, or
>
> (ii) who are aged 19 or over but under 25 and are subject to learning difficulty assessment;
>
> (b) …
>
> (c) local education authorities, for the purposes of their functions in relation to education or training within paragraph (a) or (b). "

15. Sections 60 to 80 of the 2009 Act were repealed by section 66 of the Education Act 2011. The YLPA was therefore abolished, and the responsibility for providing funding for 16-19 provision returned to the Secretary of State. The over-19 duty meanwhile was replaced by section 86 of the 2009 Act on the Chief Executive of Skills Funding ("the CESF"), an office established by section 81 of the 2009 Act. Following the abolition of the CESF by section 64 of the Deregulation Act 2015, the over-19 duty now rests with the Secretary of State for Education. Section 86 of the 2009 Act remains in force and is in the following terms:

> "(1)The Secretary of State must secure the provision of such facilities as the Secretary of State considers appropriate for

> (a) education suitable to the requirements of persons who are aged 19 or over, other than persons aged under 25 [for whom an EHC Plan is maintained]
>
> …..
>
> (c)training suitable to the requirements of persons within (a) and (b)
>
> (5)For the purposes of this section a reference to the provision of facilities for education or training (except so far as relating to facilities for persons subject to adult detention) includes a reference to the provision of facilities for organised leisure-time occupation in connection with education or (as the case may be) training.
>
> (6)For the purposes of this section—
>
> "education" includes full-time and part-time education;
>
> "training" includes—
>
> …
>
> (b) vocational, social, physical and recreational training;
>
> …
>
> (7) In this Part, "organised leisure-time occupation" means leisure-time occupation, in such organised cultural training and recreational activities as are suited to the requirements of persons who fall within subsection (1)(a) or (b), for any such persons who are able and willing to profit by facilities provided for that purpose."

16. The ESFA is an executive agency of the Department for Education established on 1 April 2017. As explained at §2.1 of the Framework Document underpinning its relationship with the Department at the time of the Determination, the ESFA enables the Secretary of State to comply with their general duty to promote the education of the people of England by

> "delivering the revenue funding for education and training for three to 19-year-olds (and higher needs students of 19 to 25), further education for those 19 years and older, and professional, technical and apprenticeship training."

17. The ESFA has a slightly narrower remit than the LSC. Whereas the LSC had obligations which went beyond the provision and control of funding (specifically, to widen participation in post-16 education and training), the ESFA is a purely funding body. As a result, it does not collect data on leisure educational provision, which it does not fund.

18. The Council argues that this difference in scope means that the ESFA is not, in fact, a "successor in function" to the LSC, because it has a narrower remit. In particular, it says that ESFA is not responsible for the further education for those over the age of 19 (except for certain special needs provision). The College says that this is to misunderstand the nature of the over-19 duty to which the LSC was subject, which was to ensure the provision of reasonable facilities, taking into account the LSC's resources. The relevant statutory responsibility for funding now rests with the Secretary of State, who acts through the ESFA. The ESFA therefore does have the same duty which the LSC had, to provide such facilities as it deems reasonable to provide taking into account the available resources. It has determined that the provision of leisure facilities does not merit the use of those resources. However the fact that it has decided not to devote resources to this activity does not mean that it does not have responsibility for that activity.

19. It seems to me that although the Council's points may go to the question of the adequacy of the determination made by ESFA (and are addressed in that context below) they do not, individually or collectively, provide any reasonable basis for concluding that the ESFA is not the functional successor to the LSC. The use of the term "successor in function" rather than simply "successor" in the

Covenant seems to me to have been used for the express purpose of signifying that such a successor might differ in some respects from the LSC itself, and that the test for successorship should be broad functionality rather than close analysis of remit.

20. Consequently I am satisfied that, for the purposes of this Covenant, the ESFA is the functional successor to the LSC.

2. Does the ESFA communication satisfy the Covenant's requirement for a determination as to whether there is a functional need for a college in Malvern?

21. A necessary condition for the Council giving written consent to the College was the making by the ESFA of a determination that there was no "functional need for a college in Malvern", and the making of such a determination is a necessary precondition to the Council's giving such consent. In this regard, I note that neither side has been able to attach any particular meaning to the term "functional" in this context, so I read "functional need" as meaning simply "need".

22. In 2021 the College approached ESFA to ask for such a determination. After inviting the Council to make representations and considering those representations, ESFA issued a determination (the "First Determination") on 15 June 2021. That determination concluded that:

> "The Education and Skills Funding Agency has undertaken a comprehensive review of the grant funded 16-19 provision in Malvern and the neighbouring areas. Its conclusion is that the ESFA is content that there is no functional need for a college site in Malvern to deliver ESFA funded 16-19 provision. Evidence demonstrates that this is being delivered by either alternative providers or Warwickshire College Group within a reasonable travel to learn distance."

23. The Council did not accept that this amounted to a determination that there was no functional need for a college in Malvern, and the College accepted that the First Determination expressly excluded consideration of provision for over-19s. It therefore asked the ESFA to provide a further determination addressing that issue.

24. A further determination (the "Second Determination") was provided on 20 December 2021 [127-132]. The conclusion in §7 of the First Determination is now at §6 of the Second Determination, whilst a new §7 reads as follows:

> "More widely, in relation to provision for learners aged 19 years and over, the ESFA does not collect comprehensive data on leisure provision that it does not fund and so we are unable to comment on demand and the degree to which it is met or not. The ESFA also does not consider the future need for adult provision it does not fund as a result of changing policy priorities or economic and employer demand."

25. The question therefore comes down to one of how and whether this Second Determination satisfies the requirement set out in the Covenant. This requires interpretation of the Covenant.

26. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173. The proper approach to contractual interpretation was set out by Lord Neuberger PSC in *Arnold v Britton* [2015] AC 1619 at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote

> Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

27. The position has recently been helpfully summarized by Carr LJ in *ABC Electrification Limited v Network Rail Infrastructure Limited* [2020] EWCA Civ 1645 at [18]-[19]

> "[18] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

28. There are two ambiguities which require to be addressed in the context of Clause 12.4.1.1 of the Covenant. One is as to the meaning of the word "college". The other is as to the scope and meaning of the term "determination".

The Meaning of "College"

29. The Clause opens with the requirement that the Council's consent is required for any use of the Property as anything other than "a Further Education College and ancillary uses". A Further Education College is defined for this purpose as being

> " "the provision of further and higher education and training as defined by section 90 of the Further and Higher Education Act 1992 open to all members of the public". "

For this purpose Higher Education means (broadly) first degree courses and above, and further education means vocational, social, physical and recreational training provided to those above the compulsory school age. However, by a quirk of drafting, the determination which the LSC is asked to make is not as to whether there is a functional need for a "Further Education College", but as to whether there is a functional need for a "college".

30. Mr Hanham, for the Council, argues that the use of a different term in this context must indicate a different meaning. In this regard he relies on the observations of Diplock LJ in *Prestcold (Central) v Minister of Labour* [1969] 1 WLR 89, where he said

> "The habit of a legal draftsman is to eschew synonyms. He uses the same words throughout the document to express the same thing or concept and consequently if he uses the different words the presumption is that he means a different thing or concept… a legal draftsman aims at uniformity in the structure of his draft. "

31. The problem with this argument was that Mr Hanham was unable to point to any indication as to what the term "college" should be read as meaning if it was not a shorthand reference to the previous defined term. He advanced the argument that the intention must have been to broaden the scope of the determination beyond Further Education Colleges, such that the finding must be that any sort of college of any kind must be no longer needed. However it seems to me to be highly unlikely that this was the intention of the parties, if only because the idea that they would have sought to significantly expand the scope of the determination to be made whilst at the same time leaving the scope of that determination entirely undefined seems to me to be positively perverse. I am therefore of the view that, pace Lord Diplock, in this particular case the word "college" must be read as a reference back to the defined term "Further Education College" used a few lines further up.

The meaning of "Determination"

32. In assessing the intention of the parties, it is important to remember that a contractual clause is not a literary construct – it is a piece of machinery, and it is intended to do a job. It is therefore sometimes helpful to consider the job which a particular provision was intended to do.

33. In this case, a helpful starting point is to consider what the clause does not say. It would have been entirely straightforward for the Clause to provide that the decision as to whether there was a functional need for a college in Malvern was to be made by the Council itself. However, the making of such a decision would have posed difficulties for the Council, since it arguably would not have the necessary information or expertise to be able to make any such determination

consistently with its obligations as a public authority. The Clause itself therefore devolves the decision to a body which does have that information and expertise: the LSC. The parties, being a local authority and a college proprietor, must have had knowledge of the LSC's functions and competencies, so I think it is entirely reasonable to assume that this provision would have been arrived at having regard to the nature of LSC.

34. I therefore agree with Ms. Ward KC, who appeared for the College, that the intention of the parties must have been to ensure that the Property continued to be used as a college for so long as there was a functional need as defined, and that this was to be determined by the body with statutory responsibility for the provision of 16-19 and over-19 education.

35. The College provided two forms of education; 16-19 education funded by the ESFA, and over-19 further education unfunded by the ESFA. The ESFA has made a determination as regards the provision of 16-19 education. The issues which arise therefore relate to the question of the provision of over-19 education.

36. It is common ground that the First Determination related only to the provision of 16-19 education. Upon receipt of this determination, the College requested a further determination addressing the over-19 position, pointing out that the ESFA was under a duty (by reference to s.86 Apprenticeship, Skills, Children and Learning Act 2009) to consider the question of "education and training for the over 19s.".

37. The outcome of this request was the delivery by the ESFA of the Second Determination accompanied by a covering letter. The determination itself

reiterated that since the ESFA does not collect comprehensive data on over-19 provision, it was not able to express a view on the point. However, this determination was accompanied by a covering letter which contained in this context the observation that "[ESFA] was satisfied that there is suitable alternative provision for funded learners aged 19 and over who recently attended Malvern Hills College".

38. I think that the Second Determination represented the outer limits of what the ESFA could have said on the point. The ESFA was under no legal obligation to deliver the determination, and could therefore only make any determination by reference to its pre-existing data. Also, as it quite reasonably said, it did not collect data on services which it did not fund. It therefore follows that any determination which the ESFA could have make in this context would have been at best a partial determination. The question is therefore whether a partial determination is sufficient for the purposes of the Covenant.

39. The College say that it is. Its starting point is that the over-19 duty to which the LSC was subject was to ensure the provision of reasonable facilities, taking into account the LSC's resources. The relevant statutory responsibility for funding now rests with the Secretary of State, who acts through the ESFA. The Secretary of State has determined that public funds should not be allocated to education provision for over-19s outside of the special educational need regime (save in relation to the separate statutory scheme for higher education). By not funding certain activities, the Secretary of State and the ESFA have implicitly determined that they are not functionally necessary.

40. The Council also points out that the ESFA's determination is on its face a determination as to current provision. It does not constitute a determination of the prospective needs of that cohort. It says – undoubtedly correctly – that the assessment concerned should address future needs as well as the current position. This is also something that the ESFA (or the LSC) would not have been able to address on a data-driven basis, and is therefore also missing from the determinations received.

41. The Second Determination received from the ESFA therefore performs part but not all of the function which the Covenant seems to require. I note in passing that it is not clear to me that the LSC, as it existed, would have been able to provide anything more comprehensive than the ESFA has provided – although the LSC had a statutory remit to encourage the provision of further education generally, I think it is unlikely that it would have been prepared to express a firm conclusion on services which it did not fund and in respect of which it did not collect comprehensive data. However, that is probably beside the point.

42. The Second Determination is therefore, at best, a partial determination. The question is simply whether that partial determination falls within the meaning of the term "determination" as used in the Covenant.

43. I think the solution to this problem lies in the words of the Covenant itself. It seems to me that the draftsman of the covenant foresaw exactly this possible issue, and dealt with it by providing that what was required was not just a determination, but a determination with which the Council was satisfied. There is no doubt that the ESFA has issued a determination. The answer to the question of whether a determination has been made is therefore a clear "yes". I do not

think that the fact that it applies to some but not all of the activities undertaken at the Property stops it being a "determination" at all – the question is as to whether it constitutes a satisfactory determination. The person charged with deciding whether the determination is satisfactory is the Council.

3. Is the Council entitled to conclude that the Determination (a) was not a satisfactory determination or (b) was not properly arrived at?

44. This is a matter of contractual interpretation. Where one party to a contract is given the power to exercise a discretion or form an opinion as to relevant facts, the courts seek to ensure that this power is not abused by implying a term as to the manner in which such power may be exercised, to the effect that the decision-making process must be lawful and rational in the public law sense, and the decision must be made rationally and in good faith and consistently with its contractual purpose. This principle was enunciated by Baroness Hale DPSC in *Braganza v BP Shipping Ltd* [2015] UKSC 17 at [18] – [31]. At para 30 she said

> "It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the *Wednesbury*[1] formulation in the rationality test"

45. It is clear to me that a term of this kind should be implied as regards the exercise of rights under this Covenant. As I have held, the effect of the drafting is to vest a discretion in the Council. This is clearly a case of a "contract term in which

[1] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223

one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts" (*Braganza* at [18]). This means that the right to make a determination remains with the Council, but it is the role of the Court to ensure that it is exercised rationally.

46. As Baroness Hale points out, there are two limbs to the *Wednesbury* test.

> "The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decisionmaker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former. (at [24])."

47. The Council is clear that it has decided that the determination was not satisfactory. There are two planks which it says would support this decision, either of which would be sufficient. The first is that it is not satisfied as to the scope of the decision. The second is that it is not satisfied as to the process by which it was arrived at.

48. Before addressing these two issues, it is necessary to deal first with a preliminary point which the Council raises. This is that the College can have no hope of challenging their decision on the basis of *Wednesbury* unreasonableness since it has no evidence about the decision-making process. It was also suggested in argument that the fact that the Council is a public authority, and therefore subject to the ordinary legal regime applicable to local authority decision-making, supported this argument.

49. I do not think that this is correct. I agree that this argument would have some force if the challenge which the College sought to bring were being brought as

a matter of administrative law. However, as Mr Hanham correctly submitted, the issue here is simply a question as to the interpretation of a contractual provision. Where a party to a contract purports to exercise a power of determination, and the contract is subject to the implied term which *Braganza* identifies, that party must show that it has exercised that power in accordance with the term which the law implies into the contract as regards the exercise of that power. It cannot simply say "we will tell you nothing about how we came to our decision; therefore you cannot challenge our decision". Once the rationality of the decision is put into question, the court must determine its rationality as best it can. Equally, I do not believe that the fact that a party to a contract is a public authority which is subject to the *Wednesbury* duty as an ordinary matter of public law is itself probative (or even persuasive) as regards the question of whether it has complied with the *Braganza* duty in a contract to which it is a party. There are two separate duties here, and they must be assessed separately.

(a) Was the determination a satisfactory determination?

50. The basis that the Council gives for its conclusion that the determination is not satisfactory is the ESFA's own observation that the scope of the determination which it could potentially make would in all cases be restricted to the provision of those services which the ESFA funds. It would be impossible for the ESFA to conclude that there was a requirement for the provision for any sort of service which it did not itself fund, since the scope of its review does not extend to the provision of such services. I suspect the same would also have been true of the LSC.

51. If this is correct, then the Council's position must be prima facie irrational, since it is saying that it would only prepared to be satisfied with a determination that the entity charged with the making of the determination is structurally unable to make. If the position were that the ESFA was able but unwilling to address the issue then the position might be different. However, since the ESFA say that the making of such a determination by them would be impossible, the Council's position that only such a determination would satisfy them cannot be rational. In this regard, I think it is important to note that the parties to the Covenant at the time when it was entered into were a district council and a further education college operator, both of whom can be assumed to be well-informed about precisely what the powers of the LSC to grant a determination would have been. I think that it would be irrational to conclude that what the Covenant requires would be something which, at the time it was entered into, would have been known to the parties to be undeliverable.

52. I therefore think that the Council cannot rationally conclude that the Second Determination given by the ESFA is not a satisfactory determination for the purposes of the Covenant. The question is therefore as to whether it can conclude that the fact that the determination was lacking in this way was such a significant defect that it can rationally conclude that it was not rationally arrived at.

(b) Was the determination properly arrived at?

53. The intellectual framework for this analysis is somewhat complex, since it involves what might be termed a "double-*Wednesbury*". The point here is that the ESFA is of course a public body subject to the ordinary requirement to act

in a way which is *Wednesbury*-rational. When the Council seeks to determine whether the ESFA's actions were "proper", it is asking whether the actions of the ESFA were *Wednesbury*-rational. However, because the Council is exercising a contractual discretion in making that determination, the effect of the *Braganza* implied term is that it must make that determination in a way which is itself *Wednesbury*-rational. Thus, the decision as to whether the ESFA's decision was *Wednesbury*-rational must itself be *Wednesbury*-rational.

54. The basis of the Council's argument that it is not satisfied that the ESFAs determination is proper is twofold – one argument relates to procedure, the other to substance. The procedural argument is based on the suggestion that the ESFA did not follow the *Wednesbury* requirements – specifically, that it did not take into account the submissions made by the Council, that it may not have followed correct procedures. The substantive argument is that the implied conclusion was irrational.

55. As regards procedure, the Council has set out, in correspondence and in submissions, the points which it claims the ESFA should have taken into account. These points are, of course, only relevant to the extent that they support the argument that demand for educational provision (either in the 16-19 range or the over-19 range) should be expected to increase significantly. These were summarized by Mr Hanham as follows:-

    1. That there were reasons why there had been historically low FE student numbers attending the Property. This is based on an allegation that this was the result of "poor marketing" by the College.

2. There were important factors in assessing the potential demand for FE provision in the future. In particular, as Mr Allison said in his e-mail to the ESFA,

> "the non-funded adult education courses encourage greater resilience professional development and the opening up of new opportunities for these adults… Students themselves attest to the life changing value of these courses in a professional and well-being capacity and that these arts-based courses are unique not only to Worcestershire but to the West Midlands. It seems inappropriate that these opportunities for lifelong learning should be withdrawn from our local population when we have seen such a strong track record at Malvern Hills College in respect of this aspect of adult skill development."

3. Any determination needed to take into account the aims identified in the "Skills for Jobs" white paper published by the Department of Education in January 2021. This paper identified the measures to be put in place to support the government's "Lifetimes Skills Guarantee" policy.

56. It seems to me that there is no substance in any of these points. As to the first, the underlying implication that the College was actively harming its own financial interests is one which should not be accepted without cogent evidence – of which there appears to be none. As to the second, it is not disputed that there may well be demand for the courses which the College provides – indeed, it is clear that there is. The question is as to whether there is a "need" – a term which appears to me to connote more than mere demand. Given that the ESFA has concluded the provision of such education does not merit the use of its resources, I cannot see how it would be possible for the ESFA to conclude that there is a positive need for such provision. As to the third, this paper was focused on the ideas of enabling all adults to achieve their first full advanced (Level 3) qualification, and to widen access to Level 4 and Level 5 qualifications of any

management entity – in particular a charity. It is not suggested that the College would or could offer these courses. This consideration therefore does not seem to be relevant to the issue.

57. As regards the Council's challenge to process, it says that it cannot be satisfied that the Determination of the ESFA has been properly arrived at until it has had the opportunity of considering the basis on which that determination was made. In particular, it says that it would need, before making any such determination, to see the "comprehensive review" which the ESFA says that it has undertaken, and to satisfy itself that the representations made to ESFA were properly considered.

58. This seems to me to be back to front. Where a public authority makes a determination, other public authorities are entitled to assume that that public authority has properly exercised its functions unless the facts indicate otherwise – *omnia praesumuntur rite esse acta*. I cannot see that the Council have the slightest grounds to suggest that the ESFA's comprehensive review was not properly undertaken, and it seems to me that the fact that the representations made by the Council were specifically addressed in paragraph 8 of the ESFA determination of December 2021 is reasonably clear evidence that these representations were indeed taken into account, and I am not aware of any other representations to the ESFA having been made.

59. I am therefore unable to find any ground on which the Council could have rationally concluded that there were procedural defects in the ESFA's determination.

60. That takes me to the Council's alternative position, which was that even if it was satisfied that the Determination was properly made, it was nonetheless entitled to reject the determination on the basis of its irrationality. I think that the best way to approach this is to take it as an argument that, if the effect of the Determination under the contract was to determine that there was no longer a functional need for a college in Malvern, that that conclusion was one which no rational decision-maker could have arrived at.

61. I do not think that it was open to the Council to reach such a conclusion. The historic record of the College pre-covid demonstrates beyond doubt that its continuation in its current form was not a viable option. Put simply – and brutally – the users of the college had in practice determined that its services were not necessary, since they were not prepared to pay enough for their courses to cover its operating costs. I entirely understand why, post-covid, the College transferred the provision of courses for 16-19 year olds to a different site. However, once that had been done, I cannot see – on the basis of the figures before me – any conceivable way in which the College could have continued to operate without a very significant annual financial subsidy. It is not suggested that there is any possibility that any person will be willing and able to offer such a subsidy. It does seem from the correspondence that all parties are, in principle, keen to see the College continuing to operate on its existing site. However, the figures provided by the College seem to make clear that this is financially unfeasible without substantial financial support, and the Council does not seem to dispute this.

62. I therefore do not think that there was any basis on which the Council could rationally have concluded that the Determination was unsupportable under *Wednesbury* principles.

63. Since I have held that the Council is, in this respect, subject to a Braganza duty, I think that it is required by that duty to accept that it should be satisfied that the Determination is properly made and covers the issue of the functional need for a College in Malvern.

4. Is the Council entitled to refuse to provide written confirmation?

64. The Covenant provides that the covenantor may not change use of the Property unless it receives a particular written confirmation from the Council. It says nothing about the Council being obliged to provide any such confirmation, and it is clear that the Council is under no explicit duty to do anything of the kind. The question here is therefore as to whether a provision obliging it to provide such confirmation is implied into the contract.

65. The positions of the parties on this question were reasonably clear – the College argues that it is a necessary implication of the way in which the covenant is drafted that if the Council are satisfied that a proper determination has been made, it must confirm that fact in writing to the covenantee; the Council argues that the absence of any such explicit requirement makes clear that the discretion vested in the Transferor is absolute.

66. This situation is in some respects an illustration of the point that Lord Hoffman made in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR that the process of implying terms into a contract was part of the exercise of the

construction, or interpretation, of the contract. In particular, he said (at para [21]) that "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?". As the Supreme Court pointed out in *Marks & Spencer v BNP Paribas SST Co (Jersey) Limited* [2015] UKSC 72, this was in some respects a dangerous observation, since it could be misinterpreted as a substantial widening of the test for the implication of terms into contracts. However, it is directly applicable to the circumstances of this particular case. The covenant must be interpreted in one way or another – either the Transferor has an absolute discretion, or it does not. It is in some respects irrelevant whether this question is answered by the implication of a term or by the construction of the existing language – in both cases the court will be ruling that the contract has a particular effect on a point as to which its language is *prima facie* silent. However, it is helpful in this regard to apply the test which is applied to implied terms, if only to ensure intellectual rigour. As Lord Neuberger observed in *Marks and Spencer*,

> "… in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting."

67. In this regard, I think it is helpful to apply what might be described as an "incompetent bystander" test. In *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ famously observed that a term would only be implied

> "…if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

68. The mirror of this test can be created by considering whether, if an incompetent bystander had suggested an express provision, the parties would testily suppress him with a common "don't be ridiculous – of course that is not what we mean".

69. In the context of this particular Covenant, the incompetent bystander is quite useful. Let us imagine that he first suggests that the Council simply has an absolute veto over the sale. This is the commercial equivalent of a provision to the effect that it can simply refuse consent regardless of the existence or otherwise of a determination – effectively rendering the determination redundant. In this case, the parties would almost certainly have suppressed him with a common "of course not". If that had been what they intended, it would have been a simple matter to say so. Conversely, we can imagine that our incompetent bystander suggests that what the parties mean is that the change can be made on receipt of the determination from the successor to the LSC without any involvement of the Council. I think the parties would react in the same way. There is a perfectly good reason for the parties to have included what is in effect a review power for the Council – they do not know who the successor in function might be, what its statutory or other objectives might be, or indeed whether it is even capable of making such a determination. The inclusion of the Council's discretion on these matters is an entirely sensible measure. However, if this is the logic behind the inclusion of the Council's review power, it necessarily implies that the Council's discretion is exhausted when the determination has been reviewed. If our bystander were to suggest to the parties

that what the clause should say was that the Council should have the power to review the determination, and to decide whether it was properly made, but that it should then have a separate, freestanding power to ignore the Determination and proceed as if it had never been received, I think that both parties would have been mystified. The whole purpose of the clause is to ensure that the relevant determination is made by a specialist public body with access to the available information. It is not an arbitration clause, but its effect is to vest the making of the decision in an independent third party, and clauses of this kind generally carry an implication that both sides will abide by that determination and act in accordance with it. I therefore do not believe that the intent of the parties was to grant the Council an absolute discretion to disregard a determination which it accepted was properly made. If that is correct, then it necessarily follows that, once that conclusion has been reached, then the relevant written confirmation should be given.