



Neutral Citation Number: [2023] EWHC 990 (Ch)

Case No: PT-2022-LDS-000047

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY TRUSTS AND PROBATE LIST (ChD)

The Court House
Oxford Row
Leeds LS1 3BG

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

Between :

SHEFFIELD CITY COUNCIL

Claimant

- and -

(1) SCOTFIELD GROUP LIMITED

(2) CAMSTEAD LIMITED

Defendants

Mr Edward Francis (instructed by **Sheffield City Council**) for the **Claimant**
Mr Wilson Horne (instructed by **Ward Haddaway LLP**) for the **Defendants**

Hearing dates: 22 and 23 November 2022
Date draft circulated to the Parties 27 April 2023
Date handed down 15 May 2023

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on Monday 15 May 2023.

Her Honour Judge Kelly

1. This judgment follows the trial of the Claimant's Part 8 Claim and the Defendant's Counterclaim in respect of a contract dated 21 March 2019 ("the contract") for the sale of land at Hoyle Street, Sheffield ("the site") where the Claimant was the vendor and the First Defendant was the purchaser.
2. In its claim, the Claimant sought declarations and orders as follows:
 - (1) a declaration that the contract has been terminated and brought to an end by Notice of Termination dated 18 November 2021, pursuant to clause 29(a) of the contract;
 - (2) a declaration that the Claimant is entitled to forfeit and retain the deposit paid in respect of the contract consequent upon such termination under condition 10.2 of the Standard Commercial Property Conditions (3rd edition) as incorporated into the contract; and
 - (3) an order for the re-conveyance of land defined in the contract as "Property 2".
3. By its Amended Defence and Counterclaim, the Defendants jointly and severally seek an order for specific performance of the contract by completing the contract, transferring the site pursuant to the contract and naming the Second Defendant as transferee. If the court finds that the contract has in fact been properly terminated, the Defendants jointly and severally seek an order for the return of the deposit pursuant to section 49 of the Law of Property Act 1925 ("the 1925 Act").

Background

4. The contract for sale of the site is dated 21 March 2019 and entered into by the Claimant and First Defendant after negotiations which had commenced in late 2016. By early April 2017, agreement had been reached for a price of £2.565 million in respect of the site. Extensive negotiations followed resulting in detailed heads of terms and thereafter a draft contract.
5. Initially, the scheme proposed was for a mixed-use development comprising three blocks of student flats, two blocks of private residential flats and townhouses and nearly 8000 square feet of commercial or retail space. Thereafter, the First Defendant

proposed a revised scheme replacing the student accommodation so the development was solely residential flats with commercial and retail space. The final form of the contract, as it was entered into by the parties on 21 March 2019, was modified to reflect the revised scheme.

6. Having had difficulties with other developers in respect of previous land sales, the Claimant wished to ensure that the agreed development scheme for which the site was being sold would in fact be built. In the past, land sold, or the more valuable parts of land sold, had been simply sold on or an agreed development changed unilaterally by the developer after purchasing the land. As a result of these concerns, there were a number of drafts of terms passing between the Claimant and the First Defendant where the Claimant tried to ensure that it had more control over the development of land sold. Some of the draft terms were similar to, but not the same as, terms which were eventually agreed.
7. The relevant terms of the contract as agreed are set out below. In summary, it was a condition precedent that satisfactory planning permission would be granted for the development before the sale of the land. The contract became unconditional once such planning permission had been granted and the time for challenging such permission had expired. In the meantime, a small parcel of land known as Property 2 was transferred by the Claimant immediately for nominal consideration. If the contract was terminated, the First Defendant was obliged to re-convey Property 2 to the Claimant. The separate treatment of this land was necessary because that property was then occupied by a tenant with the benefit of protection under the Landlord and Tenant Act 1954. Ownership of Property 2 by the First Defendant was needed in order to terminate that tenancy, relying upon its intention to redevelop the site, and thus obtain vacant possession.
8. Planning permission for the site was granted to the First Defendant on 20 February 2020 and the First Defendant entered into a planning agreement with the Claimant as local planning authority on the same date. It is common ground that the contract became unconditional on or about 21 April 2020. Once the contract had become unconditional, other clauses in the contract came into operation in respect of the sale of the remainder of the site, Property 2 having already been conveyed.

9. Those provisions included an obligation that the First Defendant provide evidence of “the Building Contract”. Unusually, the term “the Building Contract” was not itself defined in the contract in the definition section although it is later defined in clause 14.3. Unfortunately, the parties do not agree as to what is meant by the Building Contract. After a number of enquiries were made by the Claimant of the First Defendant as to the position concerning the Building Contract, by email dated 4 March 2021, Martin Rapley of the First Defendant stated that it was the aim of the First Defendant to have “a contract signed with NMCN” by the end of July or beginning of August 2021. NMCN was a building contractor who had been involved in various building projects in Sheffield.
10. The First Defendant had been in discussions with NMCN about a building contract since around July 2018. Unfortunately, in June 2021, the First Defendant became aware that NMCN may have financial difficulties and it began looking for other building partners in place of NMCN. NMCN went into administration on 15 October 2021. The Claimant was unaware of the developments with NMCN at this time.
11. On 2 September 2021, the solicitor for the First Defendant informed the Claimant’s conveyancer by email that the “negotiations for the building contract are ongoing and well advanced and hopefully should come to a conclusion shortly so we can start working on the transfer”. As it had not been informed that a building contract had been concluded, the Claimant served a notice to rectify on the First Defendant on 7 October 2021, pursuant to clause 29, requiring remedy of an alleged breach of an implied obligation to enter into a building contract or to provide evidence of a building contract within a reasonable time after the unconditional date.
12. In response to that, by email dated 18 October 2021, the solicitor for the First Defendant sent an email to the Claimant with a dropbox link, stating that there were a large number of documents which made up the building contract and too many to email. The email acknowledged that there were a number of dates to update as the building contract was “negotiated over quite some period!”. After considering the documents, the Claimant was not satisfied that the documents provided evidence of a bone fide arm’s length building contract for the development and the First Defendant remained in breach.

13. On 18 November 2021, the Claimant served a notice on the First Defendant terminating the contract under clause 29(a). In its accompanying letter, the Claimant set out its assumptions which, it asserted if correct, permitted the Claimant to terminate the contract. The letter acknowledged that if the assumptions were wrong such that the Claimant was not entitled to terminate, the parties' primary obligations under the contract remained extant. The letter invited the First Defendant to say if it disputed any of the matters relied upon by the Claimant.
14. By letter dated 26 November 2021, in response to the Claimant's letter and notice of termination, the First Defendant asserted that the Claimant was not entitled to terminate the contract either at all or for the reasons set out in the notice of termination. The letter stated that "negotiations for the Building Contract had been ongoing for some time. On 18 October 2021, we forwarded to you by email, the documents which comprised the Building Contract and which had been agreed between Our Client and its building contractor and subcontractors". The letter asserted that there was no requirement to enter into the Building Contract. However, it did accept that the First Defendant was required "to provide evidence of the Building Contract within a reasonable period of time of the Long Stop Date". It was asserted that the documentation provided on 18 October 2021 was sufficient evidence of the Building Contract. No mention was made in this letter of Yelcon Limited, a subsidiary of the First Defendant.
15. In a later response dated 6 January 2022, the First Defendant asserted that, taking the natural meaning of the words of the contract, all that was required to be provided was evidence of a bone fide arm's length building contract, not necessarily the one which would be entered into by the First Defendant. The documents provided had in fact been negotiated with an independent contractor. The building contract provided was in effect a standard building contract, albeit that Yelcon Limited was now intended to be the main contractor.
16. On 20 January 2022, the First Defendant served a notice to complete on the Claimant. The Claimant then issued this claim. On 17 March 2022, the First Defendant assigned the benefit of the contract to the Second Defendant, a company wholly owned by Yelcon Limited. Further notices to complete were served by the Second Defendant on

the Claimant on 17 March 2022 and 4 April 2022. Thereafter, by order of District Judge Pema made on 2 September 2022, the Second Defendant was added to the proceedings.

17. Before the hearing, I had the benefit of reading the witness statements of Alan Seasman dated 4 February 2022 and Tammy Whitaker dated 27 May 2022 for the Claimant and Martin Rapley dated 4 March 2022 for the Defendant, together with the various documents to which I was taken during the course of the hearing and directed to in skeleton arguments
18. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as various documents within the trial bundle to which my attention was drawn, in addition to all those arguments before coming to my decision.

The Law

19. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.
20. The initial meaning of individual clauses in the contract is a matter of interpretation, the principles of which are well established. 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 mean using the language in the contract.
21. That meaning is assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions in the contract, the overall purpose of the clause and contract, the facts known or assumed by the parties at the time the contract was made, and taking account of commercial common sense, but disregarding subjective evidence of any party's intentions. Each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated (see *Arnold v Britton* [2015] AC 1619 and *Wood v Sureterm Direct Ltd* [2017] AC 1173).

22. As to terms to be implied into a contract, the Supreme Court considered the doctrine in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742. There must be satisfaction of a number of conditions before a term will be implied. The term contended for must be reasonable and equitable, must be necessary to give business efficacy to the contract, must be so obvious that it goes without saying and must be capable of clear expression, as well as not contradicting any express term of the contract.
23. In addition to those principles, Lord Neuberger added six comments to those general principles. He stated that the implication of the term was not critically dependent on proof of an actual intention of the parties. One is concerned with what reasonable people in the position of the parties at the time at which they were contracting would have intended. A term should not be implied to a detailed commercial contract merely because it is fair or the parties would have agreed it had it been suggested to them. Business necessity and obviousness can be alternatives in the sense that only one of them needs to be satisfied, even if often both of them would be satisfied. The need for business efficacy involves a value judgment. A more helpful way of putting the requirements may be that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.
24. Section 49 (2) of the Law of Property Act 1925 provides:
“Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit”.
25. The principles for the exercise of the court’s discretion include that deposit payable under contract for sale of land is provided as an earnest, or security, for performance of the purchaser’s obligations. They are usual features of conveyancing transactions and there should be certainty attaching to the consequences of paying a deposit. The starting point is that a deposit, paid as an earnest for performance, should not normally be ordered to be repaid where it has been validly forfeited by reason of a purchaser’s defaults. A vendor is entitled to retain the deposit without regard to any actual loss or the quantification of that loss. Equity does not regard that as a penalty. For the discretionary power to be exercised in favour of the defaulting purchaser,

there must be something special or exceptional to justify overriding the ordinary contractual expectations of the parties (see *Bidaisee v Sampath* (1995) 46 WIR 461, *Omar v El-Wakil* [2002] 2 P & CR 36 and *Midill (97PL) Ltd v Park Lane Estates Ltd* [2009] 1 WLR 2460).

The Issues

26. The parties broadly agree on the issues to be determined. The Claimant set out the issues as follows:

- (1) Should a term be implied into the contract to the effect that the First Defendant was obliged to enter into and/or to provide evidence of the Building Contract within a reasonable time of the contract having become unconditional?
- (2) Are the rights of termination under clause 29 of the contract exercisable only in the period before the contract becomes unconditional, or are they exercisable at any time before the contract is completed?
- (3) At the date of service of the notice to rectify breach on 7 October 2021:
 - (a) had a reasonable time to comply with the implied obligation passed;
and
 - (b) if so, was the First Defendant in breach of the implied obligation?
- (4) Did the First Defendant rectify that breach by provision of documents in the email dated 18 October 2021 from its solicitor, Mr Andrew Pliener?
- (5) Should the court exercise its discretionary power to order the repayment of the deposit paid by the First Defendant to the Claimant?
- (6) If the contract has not been validly terminated by the Claimant, has the time for completion arisen under the contract such that the court should make an order in favour of the First and/or Second Defendant for specific performance of the contract?

The Contract

27. Various terms were defined in clause 1.1 of the contract as follows:

“Completion Date: the date which is 30 Working Days after the Unconditional Date

Condition Precedent: the occurrence of the Satisfaction Date

Long Stop Date: the date calculated in accordance with clause 14.1 to clause 14.3 (inclusive).

Satisfaction Date: the latest of the following dates:

- a) the date on which it is established under this contract that Satisfactory Planning Permission has been granted;
- b) the next Working Day after the expiry of the Review Period (provided that no Third Party Application is commenced by such date);
- c) in the event that any Third Party Application is commenced, the next Working Day after the Final Determination Date

Satisfactory Planning Permission: a planning permission and planning agreement (if any) and Road Closure Order (if any) free from any Buyer's Unacceptable Condition (unless any Buyer's Unacceptable Condition is waived in accordance with this contract).

Unconditional Date: is the earlier of:

- a) the Satisfaction Date; and
- b) the date on which the Condition Precedent is waived in accordance with clause 2.3”

28. Clause 2 dealt with the Condition Precedent and provided that:

“2.1 Subject to clause 2.2, this contract comes into force on the date of this contract.
2.2 Save in respect of Property 2 clause 16 to clause 24 (inclusive) are conditional on the satisfaction (or waiver in accordance with clause 2.3) of the Condition Precedent and shall come into force on the Unconditional Date.
2.3 The Seller and the Buyer may only waive the Condition Precedent by agreement in writing.”

29. Clause 3 of the contract incorporated the Standard Commercial Property Conditions into the contract so far as they were not inconsistent with other clauses in the contract, or had not been modified or excluded by any of the other clauses in the contract.

30. Clause 4 dealt with the deposit. Clause 4.5 provided:

“In the event that the Condition Precedent is not satisfied the Seller may forfeit and keep the Deposit and any accrued interest on the Deposit”.

31. Clause 14 dealt with the Long Stop Date. It is not necessary to set out the whole of clause 14. In short, the contract could be terminated by either party under clause 15 if the unconditional date had not occurred by the Long Stop Date as defined in clause

14. That was 18 months after the date of the contract, but subject to extension (in circumstances as set out in clauses 14.2 and 14.3) up to a maximum of 30 months from the date of contract, that is 21 September 2021.

32. Clause 14.3 is specifically relevant to the dispute between the parties:

“If on the expiry of the Long Stop Date the Buyer shall not have provided evidence of a bone fide arm’s length construction contract (or contracts) for the construction of (subject to the Satisfactory Planning Permission) circa 415 private residential apartments (with ancillary commercial / retail units and associated infrastructure) on Blocks A, B, C and D (“the Building Contract”) the Long Stop Date shall be extended until such evidence is provided”.

33. Clause 14.4 provided:

“Notwithstanding the provisions of clause 14.1, clause 14.2 and clause 14.3, the Long Stop Date shall in no circumstances be later than 30 months from the date of this Contract and if at this date the contract has not become unconditional Property 2 shall be re-conveyed to the Seller for £1.00”.

34. Clause 24 dealt with completion. Completion in respect of Property 2 took place on the date of the contract. Completion in respect of the balance of the property would take place on the completion date defined as 30 days after the unconditional date. However, that was subject to clause 24.5 which provided:

“Notwithstanding any other provisions of this contract Completion shall not take place unless and until the Buyer has provided evidence of the Building Contract”.

35. Clause 25 required the buyer to carry out and complete the development and also to pay the sum of £500,000 into an escrow account, sums to be released from the escrow account on production of invoices in respect of work done on the development.

36. Clause 29 of the contract provided for termination in the event of the buyer’s insolvency or breach of contract. With regard to any alleged breach, the clause was as follows:

“Without affecting any other right or remedy available to it, the Seller may terminate this contract with immediate effect by giving notice to the Buyer if any of the following events occur:

(a) the Buyer is in substantial breach of any of its obligations in this contract and has failed to rectify the breach within a reasonable time after receiving notice to rectify from the Seller”.

37. Clause 30.2 deals with the consequences of termination. If the contract is terminated by either party under clause 15, or by the Claimant under clause 18.1(c) or clause 29, the contract is terminated with immediate effect from the date of the notice to terminate and neither party has any further rights or obligations save in respect of earlier breaches of the contract, the obligations on the parties provided by clause 30.1 and the obligation of the Defendant to re-convey Property 2 to the Claimant for consideration of £1.00.

The Position of the Parties and Findings

(1) Should a term be implied?

38. The Claimant’s case is that it is necessary to imply a term into the contract to give it business efficacy. That is required because once the contract had become unconditional on the grant of Satisfactory Planning Permission, there was an obligation imposed on both parties to complete the contract pursuant to clause 24. Although there was that obligation to complete, a difficulty arose because pursuant to clause 24.5, the time for completion was suspended unless and until the First Defendant had provided evidence of the Building Contract.

39. The contract became unconditional on or around 21 April 2020. The Long Stop Date under the contract was 21 September 2021. However, pursuant to clause 14.3, if on the expiry of the Long Stop Date, the First Defendant had not provided evidence of “a bone fide arm’s length construction contract (or contracts) for the construction of (subject to the satisfactory planning permission) circa 415 private residential apartments (with ancillary commercial/retail units and associated infrastructure) (“the building contract”) the Long Stop Date shall be extended until such evidence is provided”. No time limit was imposed by the contract for that provision to be complied with by the First Defendant and thus completion could be suspended indefinitely by the First Defendant if the First Defendant failed to provide evidence of the Building Contract.

40. The Claimant asserted that an implied obligation was capable of clear expression because the implied obligation would be to provide either evidence that it had entered into a Building Contract or, if not, evidence that it would enter into a Building Contract within a reasonable time after the contract became unconditional. In the absence of the implication of a term, the reality was that the contract would lack commercial or practical coherence as there was no obligation to require the First Defendant to take steps within a reasonable time which would trigger completion.
41. The Defendants asserted in the Amended Defence and Counterclaim at paragraph 13 that there was no need to imply a term and indeed the implication of any term would be unfair. It was asserted that any term would be inconsistent with the express terms of the contract. Clause 14.3 did not require the First Defendant to enter into a Building Contract. Indeed, it could not do so because one could never specify a start date. Clause 24 supplemented and complemented clause 14 in providing that completion shall not take place unless and until the First Defendant provided evidence of the Building Contract. As such, failure to comply with those provisions could never be classified as a substantial breach.
42. In any event, the First Defendant asserted that an amendment is not required by the implication of a term because the contract works without any term being implied and thus has commercial coherence - it is not necessary to imply a term. Any implied term would conflict with the express terms of the contract if correctly interpreted. It is difficult to see how a term could be implied which would require the First Defendant to enter into the Building Contract because it would not be known when the First Defendant would take possession of the site and how long it would take for the First Defendant to discharge any pre-commencement conditions imposed with the planning consent. That being the position, the First Defendant could only ever provide evidence about the steps it had taken to enter the Building Contract. The only term which could be implied was that the First Defendant must provide evidence that it had used reasonable endeavours to provide information of the steps it had taken to enter a building contract within a reasonable period of the unconditional date.
43. Mr Horne submitted that it was appropriate and proper to look at some of the background documents before the contract was ultimately entered in considering

whether clause 24.5 was solely for the benefit of the Claimant. He referred me to internal Council minutes from 2017 which noted that the sale of the site was conditional on the First Defendant securing planning permission and subject to a substantial start on the non-student element of the scheme having been made. The bond of £0.5 million would guarantee that substantial start.

44. He also referred me to the second Heads of Terms document to assert that the structure of the sale as set out meant clause 24.5 could only be for the benefit of the Claimant and therefore the Claimant could waive it. Some of the early drafts of the contract also included an obligation for the developer to have actually started work on the ground in order to satisfy the condition precedent. That condition was not acceptable to the First Defendant and was not in the contract.
45. Further, a programme of works would have to be put in place for a major development like this which includes some 400 apartments with a build cost of approximately £60 million. Pre-construction service agreements would have to be entered into with third parties and all of that work and the time it would take would feed into what was a reasonable time for the purposes of any term implied and whether it was necessary to imply a term. Further, there were some difficulties over access to the site via Queens Row which had been closed by the Claimant using a temporary closure order. That issue had not been resolved, so that also affected the possibility of entering into the Building Contract and whether a reasonable time had passed.
46. Mr Horne accepted that the contract as agreed and drafted was “not brilliant” but nonetheless, it had been professionally drafted. He also asserted that it worked as drafted, albeit with a minor amendment, and therefore no implied term was required.
47. Mr Horne argued that because it was not possible to put a start date into a building contract, it was not possible to provide evidence of the Building Contract. He also noted that there was conflict between the way clauses 14.3 and clause 14.4 were drafted. He accepted that there would have to be some rewording of clause 14.4 as it was drawn and agreed in order to make clause 14.3 and clause 14.4 work together. However, the contract as a whole had to be considered to see if it works cohesively before considering implying any terms.

48. The First Defendant also submitted that if clause 14.4 was either reworded or the reference to the Long Stop Date simply struck out, it was not necessary to imply a term. It was submitted that the intention could not have been that 30 months would be an unmoveable Long Stop Date given the work which had to be done before the First Defendant would be ready to complete. In any event, the notice to terminate was served after that date and so the Claimant must agree that was not the final date. The simplest way to make the contract work would be to say there was no Long Stop Date after the contract became unconditional.
49. In my judgment, it is both necessary and possible to imply a term in order to give the contract practical and commercial coherence. As the contract is drawn, I find that there is a lacuna. I find that any a reasonable person or people, in the position of the parties at the time they were contracting, would have said that it goes without saying that clause 24.5 (which suspends time for completion until evidence is provided of the Building Contract) carried with it a corresponding obligation on the part of the First Defendant to provide evidence of the Building Contract within a reasonable time after the contract became unconditional.
50. I accept the submission made by the Claimant that to find otherwise would result in commercial absurdity. If the First Defendant is right that the contract does not need any implied term, the words of the contract would allow for the First Defendant to avoid any further obligations under the contract simply by failing to provide any evidence of the Building Contract. Completion could be avoided for any reason at all convenient to the First Defendant. However, in that situation, the Claimant would remain bound by the contract in perpetuity and could neither force the First Defendant to complete by the service of any notice, nor could it end the contract such that it could sell the land to anybody else. If the reasonable person in the position of the parties at the time of entering the contract had considered this, in my judgment they would have agreed that it goes without saying that evidence of the Building Contract had to be provided within a reasonable time of the contract becoming unconditional.
51. I do not accept that the fact that any implied obligation requiring completion of an obligation within a reasonable time would cause any realistic difficulty. Courts frequently decide whether or not an obligation has been performed within a

reasonable time. There is often a dispute between the parties when they have agreed such an obligation about what is a reasonable time. The requirements to perform an obligation within a reasonable time by itself does not give rise to uncertainty in my judgment. The court is more than capable of deciding any dispute as to whether or not a reasonable time for performance has in fact passed when considering the circumstances of an individual case where the parties do not agree.

52. I do not accept the First Defendant's argument that it could not provide evidence of the Building Contract because a specific commencement date could not be given. Evidence of the contractor, the works agreed, the price, the specific terms and timescales agreed could all easily be provided if those matters were agreed. The First Defendant's argument is undermined by its own actions in any event as the Second Defendant has entered into what it asserts is the Building Contract with Yelcon Limited without having a start date.
53. Further, I do not accept the Defendants' argument that there is a solution in the contract which would avoid the necessity to imply a term because the Claimant could simply waive clause 24.5. I accept the argument made by the Claimant that the provision is as much for the Defendants' benefit, as it delays any obligation on the Defendants' part to complete until it had a building contract in place. The Defendants would then not have to pay over completion monies until it was ready and able to proceed with development of the site.
54. For all of the above reasons, I find it is necessary to imply a term into the contract that the First Defendant was obliged within a reasonable time after the contract became unconditional to provide evidence of the Building Contract which either had been or would be entered into for the development.

(2) When are the rights of termination under clause 29 exercisable?

55. In the Amended Defence and Counterclaim, the Defendants assert that the rights under clause 29 can only be exercised before the contract becomes unconditional and not thereafter.

56. The Defendant argued that termination under clause 29 could only be exercised before the contract became unconditional. The reason for this was because the consequences of termination as set out under clause 30 and other clauses of the contract appeared consistent with the contract not having reached the unconditional date.
57. The Claimant argued that there is nothing in the wording of clause 29 itself to indicate that the Claimant would only be able to terminate as a result of the Defendant's insolvency or breach before the contract became unconditional. It would have been very easy to insert the words "before the contract becomes unconditional" after the words "if any of the following events occur". Further, there is no sensible reason why the Claimant should be prevented from terminating the contract if the Defendant did become insolvent or entered into an insolvency process.
58. In my judgment, there is nothing in the wording of clause 29 or 30 which suggests to me that a notice of termination served under clause 29 could only be served before the unconditional date. I accept the arguments made by the Claimant in this regard and find that the rights of termination under clause 29 could be exercised both before and after the contract became unconditional.

(3) On 7 October 2021, had a reasonable time passed to comply with the implied obligation? If so, was the First Defendant in breach of the implied obligation? and (4) Has the First Defendant rectified that breach?

59. The Claimant argued that the chronology after the parties entered into the conditional contract for sale, which contract then became unconditional, could only support the proposition that a reasonable time had passed to comply with the implied obligation. The First Defendant began negotiations with NCMN in September 2019 and provided NCMN with a schedule of required services, as one would expect, for a development of this type. That was necessary before a building contract could be entered into.
60. By email dated 16 October 2019, Mr David White, surveyor with the Claimant, asked about progress with "supplying a bona fide build contract". By email dated 10 January 2020, the First Defendant's solicitor set out his understanding of the position and

stated specifically that the acquisition of the site was “conditional on... the entering into the Building Contract (clause 24.5)”. Whilst the Claimant acknowledged that that did not necessarily assist with the construction of the contract itself, it was illustrative and important because that was what the First Defendant’s legal team asserted that it understood the First Defendant’s obligations under the contract to be before the parties were in dispute.

61. By email dated 13 January 2020, Mr Stephen Holman of the First Defendant stated in an email to David White that the First Defendant was “fairly well advanced with our building contract negotiations however I believe it’s unlikely to be concluded before the end of March 2020”. In her evidence, Miss Whitaker set out that although the Claimant was prepared to remove the requirement for the Building Contract as a condition precedent (as was required by earlier drafts of the contract), it was not prepared to waive the requirement of provision of evidence of the Building Contract before completion so that it could ensure that the development scheme would proceed.
62. Around the time planning permission was granted and the contract became unconditional, an internal email from David White at the Claimant to Angela Glentworth noted that David White had spoken to Stephen Holman of the First Defendant. The First Defendant had informed the Claimant that it was struggling with finance and saw difficulties with the Building Contract but the First Defendant thought that would be sorted within about three months. Mr David White then noted that the clock would start running “on his getting us a bona fide build contract”. By email dated 24 August 2020, Mr David White started to ask the First Defendant for an update “and where you are with your supplying SCC with a building contract”. Mr White then chased for a response on several occasions over the next few days.
63. By email dated 2 September 2020, Stephen Holman informed David White that a building contract had been agreed with NMCN but the building contract could not be agreed until funding was finalised. Discussions with funders were continuing and the First Defendant thought those would be concluded in the next few months. He envisaged starting construction of the scheme in early 2021. In a separate email on the

same date, the First Defendant's solicitor Andrew Pliener confirmed that the First Defendant was moving ahead with the Building Contract.

64. On 29 January 2021, the Claimant asked again about whether the First Defendant could "now supply evidence of a bone fide arm's length construction contract". By email dated 8 March 2021, Mr David White sent a direct email to Mr Martin Rapley about the provision of evidence of a bona fide building contract because he had got nowhere chasing Stephen Holman for a response. That email followed an assertion by Martin Rapley in an email dated 4 March 2021 that "our aim is to get this site acquisition completed by the end of July / beginning of August, with a contract signed with NMCN".
65. By email dated 2 September 2021, the First Defendant's solicitor asserted that he was "aware the negotiations for the building contract are ongoing and well advanced and hopefully should come to a conclusion shortly so we can start working on the transfer". The email then said that the solicitor would liaise with his client "over the actual completion date and come back to you. It really depends on just getting the final bits and bobs sorted and the JCT Building Contract which one of my construction Partner's (*sic*) is finalising". That assertion was made in the context of the solicitor thinking that the Long Stop Date was 22 September 2021.
66. The Building Contract documents were still not forthcoming and on 7 October 2021, the Claimant served a notice to rectify breach. The notice asserted an implied obligation and alleged substantial breach because the First Defendant had not entered into a Building Contract or provided evidence of the Building Contract within a reasonable time after the contract became unconditional. The First Defendant was required to rectify the breach.
67. Although an email was sent by the First Defendant's solicitor in September, no mention was made that the First Defendant's intended contractor was no longer NMCN. In his witness statement, Mr Martin Rapley set out that he was aware by June 2021 that there would be no contract with NMCN because it was in financial difficulties. NMCN entered administration in October 2021. The First Defendant began approaching other builders. In the end, in July 2021, Mr Rapley said he had agreed that a subsidiary of the First Defendant, Yelcon Limited, would agree the

terms of the Building Contract as negotiated with NMCN. However, as it was a subsidiary company, Yelcon Limited would not actually sign a contract. No explanation was given as to why this was the position

68. By email dated 18 October 2021, the First Defendant's solicitor sent an email to the Claimant with a dropbox link from which the various documents asserted to be evidence of the Building Contract could be accessed. The Claimant asserts that the documents provided did not remedy the breach. No contractor was identified in the documentation, there was no information concerning the identity of any proposed contractor, there was no indication that there was an arm's length bona fide construction contractor. The documents provided were in effect documents based upon standard JCT contracts where the First Defendant had entered its own details, but no other details were set out on the documents.
69. The fact that Yelcon Limited would not sign a contract with the First Defendant only went to emphasise why the contract specified a bona fide arm's length contractor, that is an independent party as the building contractor. In any event, the documents provided did not provide evidence of a bona fide arm's length contract. The Claimant served a notice of termination on the First Defendant by notice dated 18 November 2021. It was April 2022 before the Claimant was served with the Building Contract which had in fact been signed and agreed between the Second Defendant and Yelcon Limited, after the Defendants had served two separate notices to complete on the Claimant.
70. The Defendants argued that the contract did not create any obligation on the First Defendant to enter into a building contract in any form. That had to be the correct interpretation because, as a matter of common sense, the First Defendant could not enter a building contract without specifying a start date. Further and in any event, as the contract provided for completion to be extended until the buyer had provided evidence of the building contract, failure to comply with that provision could never be classed as a substantial breach giving rise to a right to terminate the contract pursuant to clause 29.
71. As the clause at 14.3 only benefited the Claimant, the Claimant could choose to waive performance. Clause 25 requires £500,000 to be paid into the Claimant's solicitors

account, with sums only to be released back to the First Defendant in the event that it produced invoices for the carrying out of building work, to ensure that the property will be developed by the First Defendant. That provision is therefore consistent with clause 14.3 being capable of waiver by the Claimant. In addition, it was asserted that the Claimant could in any event have served a notice to complete on the First Defendant and, if that were not complied with, rescind the contract at common law.

72. In any event, the First Defendant argued that it was not in breach of the requirement to provide evidence as to a building contract. All it could ever do is provide information of the steps it had taken to enter a building contract within a reasonable period. That was done by the documentation sent by the email of the First Defendant solicitor on 18 October 2021. Further, it was asserted that what was a reasonable time for any obligation to be fulfilled had to take into account the difficulties encountered by the First Defendant with NMCN.
73. In his witness statement, Mr Martin Rapley set out the difficulties which the First Defendant had in entering a building contract. Documentation was provided on 18 October 2021. The detail concerning the identity of the contractor was provided by the First Defendant's solicitor in his letter of 6 January 2022. He said that the missing detail of the contractor on the contract documentation as Yelcon Limited was an oversight. The contract was not signed because Mr Rapley would not expect a contract to be signed until the First Defendant had completed its acquisition of the development site. In addition, as it was a subsidiary company, Yelcon Limited would not sign a contract with the First Defendant in any event and would only sign a contract with subcontractors.
74. Further, Mr Rapley asserted that Yelcon Limited was a bona fide building contractor in its own right as a result of that being acknowledged by the Claimant in heads of terms before the contract itself was entered into between the parties. In one document, it was stated "Yelcon Limited is deemed to be a reputable contractor for the residential accommodation". As a result of that statement, Mr Rapley asserted that it was contemplated by the parties that Yelcon Limited would be an appropriate contractor.

75. On 16 February 2022, the Second Defendant entered into a building contract with Yelcon Limited based on an amended JCT Design and Build Contract 2016 Edition. That contract was served on the Claimant on 28 April 2022.
76. In my judgment, when the Claimant's notice to remedy breach was served, the First Defendant was in breach of the implied term to provide evidence of the Building Contract which either had been or would be entered for the development within a reasonable time. I accept the submission made by Mr Francis that the failure to provide adequate evidence was a substantial breach for the purposes of clause 29(a). Clause 14.3 was, I accept, an important provision because it was crucial to enable the Claimant to establish the commitment to build the development.
77. As is plain from the chronology, the Claimant had been asking for evidence of the Building Contract from October 2019 until it served the notice to rectify breach two years later. The Claimant had continued to ask for evidence for over 12 months from the contract becoming unconditional on 21 April 2020. By the date of service of the notice to rectify, the Long Stop Date for the contract (on the understanding of the First Defendant's lawyers at the time) had passed.
78. Whilst I accept that the Long Stop Date is not relevant as to whether it was necessary for the First Defendant to provide the Building Contract, I do accept that it is a proper matter to consider when looking objectively at whether or not a reasonable period had in fact passed from the contract becoming unconditional. In my judgment, it plainly had. The parties had an original Long Stop Date of 30 months and that was what the First Defendant's solicitor (mistakenly) understood to be the time limit for completion. The notice to rectify was served after that date.
79. Further, the notice was given over 17 months after the contract became unconditional. Again, in my judgment, a more than reasonable time had passed to enable the First Defendant to provide evidence of the Building Contract. I do not accept that it is legitimate to take into account the difficulties encountered by the First Defendant in entering a contract with NMCN when that company had financial difficulties. That could not have been in the contemplation of the parties at the time they entered the contract. In any event, the First Defendant was aware that NMCN was in financial

difficulties by June 2021 at the latest. Despite the fact that the Defendants say they had chosen Yelcon Limited as the contractor, the Building Contract between the Second Defendant and Yelcon Limited was not provided until April 2022, having been signed on 16 February 2022.

80. Mr Horne submitted that as there was no cross-examination of Mr Rapley, I had to take his evidence at face value and there was no reason why I should not accept his evidence in its entirety. The difficulty I have with that submission is that if the Defendants had decided that Yelcon Limited would be the building contractor, before providing what it asserted was the Building Contract information on 18 October 2021, it is astonishing that Yelcon Limited is not mentioned anywhere. It is not mentioned on the unsigned contract documentation, nor in any email, nor in the correspondence from the First Defendant's solicitors until after the Claimant terminated the contract. Yelcon Limited was not even mentioned in the initial response by the First Defendant's solicitors to the termination notice.
81. The documentation provided in October 2021 could not be evidence of a contract intended to be entered into with NMCN as they had entered liquidation by the time the documentation was served. On the information provided to the Claimant by the First Defendant on 18 October 2021, the documentation provided could not be taken as evidence of an established intention to enter into a building contract with any other contractor because none had been identified, nor was one identifiable by the Claimant by any other means. Mr Rapley's own evidence makes it clear that as at 18 October 2021, there was no intention to enter into a contract at all between the First Defendant and Yelcon Limited, precisely because they were part of the same group of companies.
82. It is further surprising that there was no mention of Yelcon Limited at the time documentation was being provided in October 2021 given Mr Rapley's evidence that because it was a subsidiary, no contract would be signed between the First Defendant and Yelcon Limited. In the end, Yelcon Limited did sign a contract with another related company. I would have expected some explanation to have been given by or on behalf of the First Defendant in around October 2021 if it had by then been agreed that the building contractor would be Yelcon Limited. This is particularly so in

circumstances where, in September 2020, Stephen Holman had told David White that a building contract had been agreed with NMCN and the only hold-up was funding.

83. Mr Rapley's evidence does not sit happily with contemporaneous correspondence from the First Defendant solicitor in his letter dated 6 January 2022 which states at paragraph 1.2 under the heading "the building contract": "it is *now* intended that Yelcon Limited *will* take up the position of the main contractor as a bona fide construction company" (emphasis added) nor with the solicitors' previous letter which made no mention at all of Yelcon Limited. If it had already been agreed, some months earlier, that Yelcon Limited was to be the building contractor, the absence of reference to Yelcon Limited in the first letter and the wording of the second letter and the use of the future tense "will" is surprising and somewhat peculiar.
84. I do not accept that the documentation provided on 18 October 2021 provided evidence of a bona fide arm's length building contract. In my judgment, Yelcon Limited is not an arm's length contractor. It is a subsidiary of the First Defendant. Regardless of any agreement in heads of terms before the actual contract was entered, if the parties had intended to specify that Yelcon Limited would be treated as an arm's length independent contractor, that could have been specified in the contract as agreed. It was not.
85. Further, I do not accept that the Claimant could, in any event, have waived clause 14.3. In my judgment, that clause was also for the benefit of the First Defendant. The benefit to the First Defendant was that the First Defendant could delay providing evidence of the building contract. It had a reasonable time to find a suitable bona fide arm's length building contractor and reach agreement with that building contractor. It would not be forced to complete before it was ready to do so. I do not accept the point made on behalf of the First Defendant that the Claimant could simply have served a notice to complete and, if that were not complied with, rescind the contract. A notice to complete cannot be given until the obligation to complete has arisen. After implication of the term, the obligation to provide evidence of the building contract was one to do so only within a reasonable time. Without implying the term, I accept the submission made by Mr Francis that the Claimant could never have taken a step to

force completion if no adequate evidence of a building contract had been provided by the First Defendant as the contract was written.

(5) Should the court order repayment of the deposit?

86. The parties agreed that the issue of repayment of the deposit is governed by section 49 of the Law of Property Act 1925 and is a matter for the court's discretion. The Defendants argued that because clause 4.5 specifically set out that the Claimant could forfeit and keep the deposit if the condition precedent was not satisfied, together with any accrued interest, the court should exercise its discretion to return the deposit to the First Defendant. The deposit was an earnest only for performance of the condition precedent and the condition precedent had been satisfied.

87. Further, the Defendants argued that the Claimant would gain a windfall because the premises had planning permission. There were exceptional circumstances here because the First Defendant had spent £1.4 million in obtaining planning consent and the planning consent was still valid. Although the planning permission covered land which was not owned by the Claimant, the Claimant could compulsorily purchase that additional land to take advantage of the extant planning permission and pay First Defendant compensation.

88. The Claimant argued that the argument of the Defendants was flawed. There had to be a specific clause to enable forfeiture of the deposit in circumstances where the First Defendant did not satisfy the condition precedent. However, that did not mean that was the only circumstance where the deposit could be forfeit. That provision did not mean that the deposit was only an earnest for satisfaction of the condition precedent and not the contract as a whole. A specific clause was not needed for those purposes because that situation was covered by the general law.

89. The Claimant further argued that on the authorities, the fact that a vendor may obtain a windfall and gain land which is more valuable did not mean a deposit should be returned. The authorities were clear that the deposit would not ordinarily be ordered to be repaid in the absence of something special or exceptional to justify overriding the ordinary contractual expectations of the parties. Here, there was no such special or exceptional matter to justify ordering the Claimant to repay the deposit. In any event,

the Claimant would not be able to take the benefit of any enhancement of value because it did not own part of the site covered by the planning permission. The fact that the First Defendant had spent money in obtaining planning was exactly what one would expect in any development such as this. That did not justify treating the circumstances as exceptional.

90. In my judgment, the various facts and matters relied upon by the Defendants do not establish exceptional circumstances which would justify departure from the ordinary contractual expectations of parties. There is no evidence that the site has in fact increased in value. There is no evidence about timelines and the cost for any compulsory purchase of the additional land owned by the Defendants which would be required to enable the Claimant to take advantage of the current planning permission. A developer would expect to spend money on planning and other expenses to be able to develop the site. None of that is unusual. In those circumstances, I do not accept that it would be right to exercise my discretion to order the Claimant to return the deposit to the First Defendant.

(6) If the contract has not been terminated, should the court make an order for specific performance?

91. As will be clear from what is set out above, I find that the contract has been terminated. It is therefore not necessary to decide whether the court should make an order for specific performance.

Conclusion

92. For the reasons given above, I make declarations and orders as follows:

- (1) The contract has been terminated and brought to an end by Notice of Termination dated 18 November 2021, pursuant to clause 29(a) of the contract;
- (2) The Claimant is entitled to forfeit and retain the deposit paid in respect of the contract consequent upon such termination under condition 10.2 of the Standard Commercial Property Conditions (3rd edition) as incorporated into the contract; and
- (3) I order the re-conveyance of land defined in the contract as “Property 2” for consideration of £1.00.

93. I am grateful to counsel for their very able assistance in this matter.