



Neutral Citation Number: [2024] EWHC 3286 (Ch)

Case No: PT-2023-000710

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**PROPERTY TRUST AND PROBATE LIST (ChD)**

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

Date: 19/12/2024

**Before :**

**MASTER BOWLES (SITTING IN RETIREMENT)**

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**Between :**

**Weston Homes PLC**

**Claimant**

**- and -**

**(1) Henley Developments 211 Limited**

**(2) Henley Property Investments (UK) LLP**

**Defendants**

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**Timothy Morshead KC** (instructed by **Nockolds Solicitors**) for the **Claimant**  
**Clifford Darton KC** (instructed by **Sherrards Solicitors LLP**) for the **Defendants**

Hearing date: 7<sup>th</sup> August 2024

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**MASTER BOWLES (SITTING IN RETIREMENT)**

## **Master Bowles (sitting in retirement)**

1. By a contract dated 21<sup>st</sup> June 2022 (the contract), the Claimant, Weston Homes PLC (Weston) agreed to purchase from the First Defendant, Henley Developments 211 Limited (Henley) freehold property at and known as RMA 2 and RMA 3 Market Centre, Alkerden Village, Ebbsfleet, Kent (the Property). The Second Defendant, Henley Property Investments (UK) LLP was the guarantor under the contract.
2. The purchase price agreed in respect of the Property, subject to adjustment pursuant to clause 25.1 of the contract, was £14,500,000 and the deposit agreed to be paid and paid under the contract was £870,000 to be held by Henley's solicitor as stakeholders.
3. In these proceedings, issued on 29 August 2023, Weston seeks the repayment of that deposit together with interest and costs and by application notice, dated 26 April 2024, seeks summary judgment in respect of that claim, pursuant to CPR 24.
4. The underlying basis of the claim and of the application for summary judgment is that, under the contract, provision was made, by clause 23.2 and clause 23.2.1, for either party to serve written notice on the other terminating the contract 'if the Compliance Date', as defined by the contract, 'had not occurred by the expiry of the Relevant Period', as defined by the contract. In that event and 'without prejudice to any right or remedy of any party in respect of any antecedent breach of (the) contract and to the rights of the Seller under clause 23.3' of the contract', the Seller should 'within 10 Business Days' of the termination of the contract repay the deposit to the buyer.
5. The only express limitation, in respect of a party's entitlement to serve written notice of termination under clause 23.2.1, as set out in clause 23.2 of the contract, was that notice could not be served after the occurrence of the Compliance Date, even if, as I read the clause, the Compliance Date had not occurred at the expiry of the Relevant Period. It was not open to a party, where the Compliance Date had, in fact, occurred, to terminate the contract, under clause 23.2.1, on the ground that the Compliance Date had only occurred after the end of the Relevant Period.
6. The Compliance Date, as defined by clause 1.1 of the contract, was, or would have been, the date when the various Conditions Precedent, themselves as defined in clause 1.1 of the contract, had been 'wholly fulfilled' and upon which the sale and purchase of the property would have become unconditional. One of those Conditions Precedent, the Planning Conditions Precedent, required that there be the grant of a Satisfactory Planning Permission, which, in its turn, as defined by clause 1 of the contract required the grant of a Planning Permission, pursuant to an Application, again as defined by clause 1 of the contract, namely an application, in agreed form, jointly by the purchaser and the seller, for the approval of matters reserved by the pre-existing outline planning consent granted by Ebbsfleet Development Corporation in March 2018.
7. The Relevant Period is defined by clause 1.1 of the contract, as the shorter of the period of 6 months from the Application Date, namely the date when an Application was submitted to the local planning authority, and the period between the Application Date and the Cut Off Date as defined under the contract; namely 31 December 2023. The 6 month period might, pursuant to clause 1.1 of the contract, be extended in certain circumstances, broadly to allow for planning appeals and the like; none of which are

applicable in the current case. In no case, however, could the extended date exceed the Cut Off Date.

8. It is common ground that an Application was submitted on 4 November 2022, with the consequence that, in this case, the Relevant Period expired on 4 June 2023. By that date, the Application had not been determined, with the result that no Satisfactory Planning Permission had been obtained, the Planning Conditions Precedent had not been satisfied, the Conditions Precedent to the contract becoming unconditional had, correspondingly, not been 'wholly fulfilled' and the Compliance Date, as defined in the contract, had not occurred.
9. In these circumstances, which are not, in themselves, factually in dispute, and, specifically, in the circumstance, provided for by clause 23.2.1 of the contract, namely the circumstance where the Compliance Date had not occurred prior to the expiry of the Relevant Period and where, pursuant to the language of the contract, either party was entitled to serve notice terminating the contract, on 13 June 2023, Weston served a notice of termination, pursuant to clause 23.2.1 of the contract, calling for the return of its deposit within 10 business days, as provided for by clause 23.2.2 of the contract. There is no suggestion and it has not been alleged that, at the date of that notice, the Compliance Date, although not achieved by 4 June 2023, had, by then, occurred, such as to debar Weston from serving notice under clause 23.2.1, on the basis explained in clause 5 of this judgment.
10. Weston, now, in these proceedings, seeks the repayment of its deposit.
11. In meeting Weston's claim, Henley relies upon paragraphs 1.1 and 1.2 of Schedule 1 of the contract and upon Weston's alleged breach of that provision.
12. Paragraph 1.1 of Schedule 1 of the contract provides that 'The Buyer will use all reasonably and commercially prudent endeavours to procure the fulfilment of the Planning Conditions Precedent at its own cost as soon as practicable...' Paragraph 1.1.2 of Schedule 1 obliged Weston to 'diligently pursue (the) Application' (i.e. the application for the required Planning Permission).
13. Henley's pleaded Defence asserts that Weston failed to comply with those provisions and that, had it done so, then the issues, which it asserts prevented the grant of the appropriate planning permission by the Relevant Date and, correspondingly, the occurrence of the Compliance Date, by the Relevant Date would not have arisen, or, if they had arisen, would have been resolved by the Relevant Date and, accordingly, that it is by reason of Weston's breach of contract that the Compliance date had not occurred prior to the Relevant Date.
14. In that circumstance, namely where it is Weston's default which has given rise to the factual situation which would otherwise entitle Weston to terminate the contract, pursuant to clause 23.2.1 of the contract, Henley avers that clause 23.2.1 must be construed so as to preclude, or prevent, Weston relying upon its own default to terminate the contract, or, put another way, that there should be implied into clause 23.2 of the contract an additional term, or provision, excluding a party's right to terminate, under clause 23.2.1, 'where the circumstances in clause 23.2.1 arise as a result of that party's breach of contract'.

15. Weston's answer to that plea is to contend, firstly, that it had fully complied with its obligations under paragraphs 1.1 and 1.2 of Schedule 1 of the contract and, therefore, that the circumstances giving rise to the availability of the right to terminate under clause 23.2.1 had not arisen by reason of its default, but, secondly and materially, in the context of this application, that, on its true construction, Weston's right to terminate under clause 23.2.1, was not, or would not have been precluded, even if the circumstances giving rise to the right to terminate had arisen from its default and, further, that there was no scope for any implication of a term, or provision, having that effect.
16. It was, necessarily, common ground that the factual question, as to whether it was Weston's default that was the cause of the Compliance Date not having occurred prior to the expiry of the Relevant Date, could not be resolved in the context of an application for summary disposal. Weston's case, however, is that the question of construction and/or implication can and should be resolved on this application and should be resolved in its favour.
17. In regard to jurisdiction, in respect of an application for summary disposal, it is, I think, well understood that where such an application turns upon a question of law, or construction and where, in the latter case, there is no dispute as to the factual matrix within which the contract was entered into, alternatively no realistic prospect that, at a trial, additional evidence bearing upon the factual matrix and upon the construction of the contract will be, or have become, available, then the court can and should resolve the matter in question. In those circumstances the resolution of the question of law or construction will determine whether, or not, the claim has a realistic prospect of success.
18. There is no suggestion, in this case, that new material bearing upon the relevant factual matrix would, or might, emerge at a trial, such as to render this application unsuitable for summary disposal. There was, however, some discussion as to the relevant factual matrix, within which clause 23.2.1 of the contract was to be construed and in the context of which any terms, or provisions, to be implied into that provision would fall to be determined.
19. In the context of a substantial and professionally negotiated and drawn written contract, such as the 56 page document which is the subject matter of this case, the primary factual matrix, in respect of any particular provision, will be the other provisions of the contract in question and the primary contextual enquiry will be as to the inter-relationship between those provisions and the provisions which the court is called upon to construe.
20. In this case, Henley asks the court to have regard to the fact that Henley's right, as seller to terminate the contract under clause 23.1 and 23.1.1 and to forfeit the buyer's deposit, on the grounds of breach of contract by the purchaser was constrained by the provision of that clause that limited the right to terminate, in the case of a breach by the buyer of its contract, which was remediable, to the situation, or circumstance, in which the seller had stipulated a reasonable period of time in which to remedy the breach and the buyer had failed to remedy the breach within that period.
21. Henley also asks the court to have regard to the fact that the broad scheme of the arrangements between itself and Weston, as set out in the Heads of Terms, dated 5 October 2021 and in the light of which the contract was negotiated, contemplated the

leaseback to Henley of the bulk of the commercial units within the overall proposed development and, correspondingly, that Henley, in its dealings with Weston, was, as it was put by Mr Rickwood, a director of Henley, in his written evidence, dated 30 July 2024, choosing a long term partner in relation to an important part of the overall development. The detail of those leaseback arrangements is set out in clause 17 and Schedule 4 of the contract.

22. Henley also places reliance upon condition 10.2 (a) of the Standard Commercial Property Conditions (third edition, 2018 revision), which were incorporated into the contract by clause 3.1 of the contract, ‘save to the extent that they were varied, or disapplied by, or (were) inconsistent with the terms of the contract’. Condition 10.2 provides, so far as is material, that ‘If either party rescinds the contract ... unless the rescission is as a result of the buyer’s breach of contract the deposit is to be repaid to the buyer with accrued interest’.
23. More generally, reliance is also placed upon the proposition that, in a contract for the sale of land, the deposit is provided as security for the buyer’s compliance with its contractual obligations.
24. All of these matters, one way and another and as elaborated and explained later in this judgment, are said by Henley either to undermine Weston’s contention that clause 23.2.1 was intended to enable, in the circumstances envisaged by that clause, the termination of the contract and the return to Weston of its deposit, notwithstanding that Weston might have been in breach of contract prior to serving notice of termination under that clause, or to support its contention that, whether as a matter of construction, or implication, termination pursuant to clause 23.2.1 must be treated as unavailable where the circumstances otherwise entitling termination of the contract, pursuant to that clause had arisen by the default of the party seeking that termination.
25. Weston’s contention is, in essence, straightforward. Its submission is that the application to this contract and, in particular, to the provisions of clause 23.2 and 23.2.1 of the usual and now well understood textual and contextual principles of construction established and explained by the Supreme Court in a run of relatively recent cases and, correspondingly, the application of usual and well understood principles relating to the implication of terms, again as recently re-emphasised in the Supreme Court, give rise to the clear conclusion that the objective intention of the parties was that clauses 23.2 and 23.2.1 should, in this instance and in the context of this contract, be construed in accordance with the plain language of the two provisions and without any alteration, or modification, of the literal meaning and effect of those provisions, by way of the insertion into those provisions of the implied term postulated and advanced by Henley.
26. More specifically, it is submitted by Mr Morshead KC, for Weston, that the case advanced by Henley, namely that, whether by construction, or implication, clauses 23.2 and 23.2.1 should be understood as precluding termination under clause 23.2.1, in circumstances where the facts which might otherwise entitle termination under that clause arise out of, or are brought about by, Weston’s default under the contract, is, as he put it in his skeleton argument, an invocation of what he called the ‘prevention principle’, whereby, in certain circumstances, the court will preclude a party to a contract from acting in such a way as to prevent, or put out of that party’s own power, that party’s ability to perform his agreed obligations under the contract.

27. On that basis, Mr Morshead's contention is that recent, or relatively recent authority in the Court of Appeal, in **Law Debenture Trust Corporation PLC v Ukraine [2019] QB 1121**, and in the Supreme Court, **Duvall v 11 to 13 Randolph Avenue Ltd [2020] AC 845**, establish that the 'prevention principle' is not a free-standing principle, but applies, when it applies, by the implication of an appropriate implied term, such a term being implied only if the implication can be justified on the familiar and usual bases restated by the Supreme Court, in **Marks & Spencer PLC v BNP Paribas [2016] AC 742**.
28. Mr Morshead's further contention is that, on the facts of this case and given what he submits to be the clear intention of the parties that clause 23.2.1 was to be construed and understood in accordance with the language that the parties had used, there is no scope for the implication of a term on **Marks & Spencer** principles, with the result, or consequence, that Weston had the right, under the contract and in the undisputed circumstance that the Compliance Date had not occurred before the Relevant Date, to terminate the contract by notice, pursuant to clauses 23.2 and 23.2.1 and to recover its deposit.
29. In response to Mr Morshead's submissions., Mr Darton KC, for Henley, denied that Henley's case turned on an invocation of the 'prevention principle' and submitted that clauses 23.2 and 23.2.1 of the contract must, as a matter of construction and absent clear contractual provision to the contrary, be construed, pursuant to what Mr Darton KC referred to as the 'Breach of Contract Principle', as being subject, as it is put in **Chitty on Contracts 35<sup>th</sup> Edition, at 16-115**, to the presumed intention of the parties to the contract that one of those parties should not be entitled to rely upon its own breach of contract in order to bring the contract to an end, or to otherwise secure a benefit.
30. His contention, accordingly, is that in this case, where Henley avers that Weston's ability to invoke the provisions of clauses 23.2 and 23.3.2 arises out of Weston's breach of contract and where, as Mr Darton submits, the contract provides no clear provisions to the contrary, Weston is precluded, on the true construction of the provisions in question, from relying on those provisions to terminate the contract and to recover its deposit.
31. The corollary of that submission, as acknowledged in argument by Mr Darton KC, is that, other than as a fall-back position, it was not his contention that Henley's case was dependent upon the implication of any term, or provision, amending, or modifying, clauses 23.2, or 23.2.1. The issue, he submits, is one of construction.
32. In the light of the parties' rival contentions, as outlined in the foregoing paragraphs, it seems to me that the necessary starting point is a determination as to whether, as posited by Mr Morshead KC, this is a case which falls to be determined under and by reference to the 'prevention principle', or whether, as posited by Mr Darton KC, the appropriate principle to be applied is the 'Breach of Contract Principle'. An a priori question, given certain of Mr Morshead's submissions in argument, is as to the continued existence of the principle relied upon by Mr Darton KC and as to whether any such principle is to be regarded as falling within the 'prevention principle', such that, by reason of the authorities cited in paragraph 27 of this judgment, the principle can only take effect by way of the implication of an appropriate term and then only when the usual principles applying to the implication of terms are satisfied.

33. I have no doubt about the continued existence of Mr Darton KC's so-called 'Breach of Contract Principle'. The principle, however described, is supported by the passage in the current (November 2023) edition of **Chitty**, referred to in paragraph 29 of this judgment, and by the foot-noted citations upon which the passage is based. It is supported, also, as I read it, by the judgment of the Court of Appeal, in **BDW Trading Ltd v JM Rowe (Investments) Ltd [2011] EWCA Civ 458**, at **paragraphs 28 to 35**, and by the authorities cited in that case; specifically the speech of Lord Diplock, in **Cheall v A.P.E.X. [1983] 2 AC 180**, at page **188**, and the judgment of Potter J (as he then was), in **Richco International v Alfred C Toepfer International [1991] 1 Lloyd's Reports 136**, at **page 144** (both also cited in support of the passage in **Chitty**). While there is some mention, in the relevant paragraphs in **BDW Trading**, of the implication of terms, it is quite clear from, in particular, **paragraph 31** of the judgment that the principle now relied upon by Mr Darton KC is a principle of construction.
34. That analysis of the principle has, recently, been confirmed by the decision of a strong Court of Appeal, in **King Crude Carriers SA v Ridgebury November LLC [2024] EWCA Civ. 719**, at **paragraph 84** of the judgment of Popplewell LJ, with which Nugee LJ and Falk LJ agreed. In that paragraph, Popplewell LJ adverted to the way that the maxim that a party should not be entitled to benefit from his own wrong had been, at least from early in the 18<sup>th</sup> century, applied in the contractual field as a principle of construction, surrendering, therefore, to a sufficiently expressed contrary intention.
35. The only contrary contention, as to the source, or basis, of the principle, which has been drawn to my attention is to be found in two paragraphs in the judgment of Proudman J, at first instance, in **Sainsbury's Supermarkets Ltd v Bristol Rovers (1883) Ltd [2015] EWHC 2002 Ch**, at **paragraphs 152 and 153**, where Proudman J treats the basis of the principle to be derived from cases such as **BDW** and **Cheall** as being that of a presumed implied term, to be presumed in the absence of a clear contrary intention.
36. With respect to Proudman J, that is an incorrect statement of the basis of the principle, placing it neither as a conventional implied term, nor as a rule of construction, and failing, also, to acknowledge the clear statements as to the source of the principle, as a rule of construction, as set out both in **BDW Trading** and in **Cheall**.
37. In the result and subject to the question next discussed, I am satisfied that the 'Breach of Contract Principle' exists as a rule, or presumption, of construction, capable, as further discussed later in this judgment, of being displaced in favour of a contrary contractual intention.
38. There remains the question, however, as to whether, as submitted by Mr Morshead KC and as foreshadowed in paragraph 32 of this judgment, Mr Darton KC's 'Breach of Contract' principle, whatever its prior provenance, as a separate and long standing principle of construction, is no longer to be so regarded and, instead, is to be treated as, in effect, an adjunct, or subset, of the 'prevention principle' and, in consequence, only available in circumstances where it can be given effect by way of the implication, upon usual principles, of an appropriate term.
39. I am not at all persuaded that the decisions in **Law Debenture Trust Company** and in **Duvall** have, or were intended to have that effect. The 'Breach of Contract Principle' and the authorities underwriting that principle are not touched upon, or discussed, in those judgments, let alone re-defined, or re-explained.

40. I agree with Mr Darton KC that **Law Debenture Trust Company** and **Duvall** and, indeed, the ‘prevention principle’ itself is addressing a different situation; namely the situation where the conduct of one party to a contract, not, in itself, explicitly precluded by the contract, is treated as implicitly precluded by the contract, to the extent that that conduct prevents the party in question from performing its agreed obligations, if and provided, as explained, in **Law Debenture Trust Company** and in **Duvall**, that implication can be justified, as it was not in those two cases, by the application of usual principles of implication. The two cases in question simply do not touch upon the way that contract law deals with the different situation addressed by the ‘Breach of Contract Principle’ and said to arise in this case, where, by reason of a breach of an existing and explicit breach of its contract, the party in breach is, subject to the application of the principle, enabled to take advantage of that party’s own breach to procure some contractual advantage under the other provisions of the contract. Mr Morshead KC suggested, in argument, that the most recent exposition of the principle, at **paragraph 84** in **King Crude**, was per incuriam the decisions in **Law Debenture Trust Company** and in **Duvall**. That was not so. Those cases did not touch upon the principle described in that paragraph and were, simply, irrelevant to the matters there under discussion.
41. The consequences of all of the foregoing is that I am satisfied, as set out in paragraph 37 of this judgment that the ‘Breach of Contract Principle’ has a continued existence, that, as set out in the previous paragraph it is a different principle to the ‘prevention principle’ and that it is the principle to be applied to the question of construction raised by this case.
42. The primary task of the court, in this case as in all cases where construction is the issue, is to seek to discern and to establish the objective intention of the parties to the contract, in this case as it related to clauses 23.2 and 23.2.1 of the contract, and, in particular, whether, objectively construed, those provisions were intended to be available to a party to the contract only if the circumstances giving rise to their availability arose otherwise from that party’s default.
43. In this regard, it was not submitted by Mr Darton KC that the presumption of construction upon which he relied operated as an exception to the rules, or principles, of construction which have been established and explained, in considerable detail and in a gamut of circumstances, by the House of Lords and the Supreme Court in recent years.
44. Mr Darton KC was right not to do so. Presumptions of construction, like ‘rules’ of construction, such as the eiusdem generis ‘rule’, or the contra proferentem ‘rule’, are no more than helpful tools designed to assist in the iterative process of determining the objective intention of the parties to a contract, in respect of a particular provision, or provisions, of a contract, and, as with any other tool of construction and, as acknowledged in the passage from **Chitty**, upon which reliance is placed, fall to be displaced if and to the extent that the particular provisions of a particular contract point to a contrary conclusion as to the meaning and effect to be given to the contract in question.
45. That this is the proper approach to be taken to a presumption of construction and to the particular presumption relied upon by Mr Darton KC, in this case, emerges clearly both from **BDW Trading** and from **Richeo**, as cited and approved in **BDW Trading**. In response to a submission by counsel, in that case, that ‘clear words’ are needed to rebut



the presumption, Patten LJ, at **paragraph 34**, explained that the reference to ‘clear words’, taken from the speech of Lord Diplock, in **Cheall**, had to be ‘read and considered in the light of the later authorities on the correct approach to the construction of documents and the implication of terms’ and cited, with approval, the formulation adopted by Potter J, as he then was, in **Richco**, at **page 144**, namely that, in applying the principle of construction set out in **Chitty**, that ‘as an exercise in construction the requirement of ‘clear express provisions to the contrary’ should not be read as meaning more than a clear contractual intention to be gathered from the express provisions of the contract’.

46. I add, parenthetically, that, in reading and understanding **BDW Trading** and, in particular the reference to the implication of terms, in **paragraph 34**, it is necessary to have regard to the context in which the judgment was given, as shown by the reference to Lord Hoffmann’s speech, in **Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10** at **paragraph 21**, which Patten LJ set out at **paragraph 36** of his judgment in **BDW Trading**. That passage, in **A-G of Belize**, reflected, as is, I think, well known, a view, developed by Lord Hoffmann, that the process of construction of documents and implication of terms was, in essence, a single process of construction, designed, as he put it, in **A-G of Belize**, to determine the answer to a single question; namely ‘what the instrument read as a whole against the relevant background would reasonably be understood to mean?’
47. It is, I think, in that context, that is to say as part of the extended process of construction, envisaged by Lord Hoffmann, and not in the traditional context of the circumstances in which terms are implied, as now explained by Lord Neuberger PSC, in **Marks & Spencer**, that the reference to the implication of terms appears in **paragraph 34** of **BDW Trading** and, as such, it does not seem to me to deflect, at all, the application of what I will call the developed approach to construction established in the modern authorities.
48. I derive the same conclusion from a consideration of the judgments of Popplewell LJ and Nugee LJ, in **King Crude**.
49. The issue in **King Crude** was different issue to the one with which I am concerned in this case. In that case the question was whether, in a case, where the liability of a party for a debt depended upon the conduct of the performance of that party of a particular term of a contract (in that case the opening of an account), that party’s non-performance of that obligation precluded the claim in debt and left the other party to its claim in contract. The court treated the question as one of construction of the contract and concluded that, subject to any sufficiently expressed contrary intention, or to any such intention to be implied from the circumstances, the presumed contractual intention of the parties, in circumstances where what I will call the defaulting party was under a contractual obligation not to do the thing which precluded the debt falling due, was that the effect of the breach of that obligation was that the defaulting party’s breach would not prevent the debt falling due.
50. In reaching that conclusion and in formulating the applicable principle in those terms, the court, as already set out in paragraph 34 of this judgment, drew, in **paragraph 84**, upon the approach adopted, in the contractual field, in giving effect to the maxim that a party should not be entitled to take advantage of its own wrong; namely that it was to be presumed as a matter of construction, but not of law, that a contracting party could

not take advantage of his own default, but that, it being a matter of construction, that presumption was subject to and could be displaced by a sufficiently clearly expressed contrary intention.

51. What is striking from the discussion and the judgments in **King Crude**, in particular **paragraphs 78 to 86** of the judgment of Popplewell LJ and **paragraphs 99 to 107** of the judgment of Nugee LJ, is the importance placed by the court in establishing a clear juridical principle for its decision and, having located that principle as being one of presumed contractual intention, in demonstrating that its decision was one which, as it is put in **paragraph 78** of the judgment of Popplewell LJ, gave effect to ‘established tenets of contract law’.
52. In that context, that is to say, in the context of establishing and applying a principle which accorded with established tenets of contract law, it is, I think, abundantly clear that the court had no intention of moving away from what are now very well established principles of construction, or of creating a special regime in respect of circumstances where the presumption upon which Mr Darton KC relies might be applicable. The presumption in question is, as already stated, simply one of the tools available to the court in testing and determining the objective intention of the parties in respect of their contract, or in respect of a particular provision, or provisions, of their contract.
53. Looked at generically, in isolation and without context, one can readily see that, as a starting point, the presumption that parties to a contracts are unlikely to intend, or to have agreed, that one or other of them be entitled, as in this case, to terminate the contract without penalty, or otherwise take an advantage under the contract, where that entitlement, or advantage arises from their own contractual default, is one that makes everyday good sense
54. The question, in this case, however, is whether, allowing, as I do, that the ‘Breach of Contract’ presumption applies at the outset, that presumption survives and has effect following a principled analysis of the relevant contractual provisions, in the context and within the framework of the contract entered into between Weston and Henley. If that is not the case and if, properly construed, clauses 23.2 and 23.2.1 take effect according to their literal language, then, subject to some consideration of Henley’s avowedly fall-back position, based upon a possible implied term, Weston will have made out its case.
55. The starting point, in respect of the construction of the relevant provisions, is the language of the provisions themselves. The contract in this case is a substantial and professionally prepared document, designed to give effect to a large-scale and complex transaction. In that context and where, as here, a contract has been carefully crafted by the parties, the meaning of a particular provision, as it would be understood by a reasonable reader, is, as explained by Lord Neuberger, in **Arnold v Britton [2015] AC 619** at **paragraph 17**, best to be found by the language used by the parties who drafted the provision in question.
56. In this case the language used by the parties is clear and entirely unequivocal and provides, straightforwardly, that either party to the contract may terminate the contract in the circumstance, existing in this case, that the Compliance Date had not occurred before the Relevant Date. The provision is not caveated, in any way, such as to preclude reliance if the reason for the Compliance Date not occurring before the Relevant Date is the default, under other provisions of the contract, of the party seeking to terminate

the contract. As such, taken literally, the relevant provisions are, in themselves, inconsistent with the presumption upon which Henley places reliance.

57. The question, then, given the clear and unequivocal language used, is whether there is anything to suggest to the reasonable person reading the provisions in question, in context, that the parties did not mean what they said and, in accordance with the presumption, intended, rather, to limit, contrary to its express terms, a party's right to terminate the contract pursuant to clause s 23.2 and 23.2.1, in circumstances where that right arises out of the party's own breach.
58. It does not seem to me, standing in the shoes of the reasonable person reading the contract, that that was what the parties intended. There are, as it seems to me, a number of indicators, such as to show that the parties did not intend to limit the applicability of clause 23.2.1 in circumstances when its availability arose from the default under the contract of the party seeking to rely on the clause in question, but, simply, intended, rather, that the provision should apply as written.
59. The first such indication is that contained in clause 23.2, itself, namely the provision that the exercise of the right to terminate the contract, pursuant to clause 23.2.1, as well as the other provisions of the contract to which clause 23.2 applies, is, as set out in paragraph 4 of this judgment, 'without prejudice to any right or remedy of any party in respect of any antecedent breach of (the) contract'.
60. The significance of that provision is not that it is, in itself, inconsistent with the presumption, or that the presumption could not operate alongside, or in tandem with, the provision. It could, for example, operate in circumstances where a party, not in breach, elected, rather than exercising rights of termination, in respect of breach, under clause 23.1.1, as discussed later in this judgment, to exercise the termination provisions of the contract, under clause 23.2.1, while reserving its right to bring subsequent proceedings, in respect of breaches by the party against which termination was sought. The significance, rather, is that, in the drafting of clause 23.2, thought was, evidently, given to the operation of the provision, in circumstances of potential breach of contract and, yet, the parties did not, as they could have done, limit the availability of termination under clause 23.2 to circumstances in which the party electing to terminate was not in breach. The implication arising from the foregoing is that the parties did not intend such a limitation to apply.
61. That intention seems to me to be confirmed by a consideration of another aspect of clause 23.2. That provision, as set out in paragraph 5 of this judgment, limits the circumstances in which notice can be given, pursuant to clause 23.2.1, to the situation where the Compliance Date has not occurred before the Relevant Date and where, at the date of the notice, that remains the case. The relevance of that limitation, for current purposes, is that it indicates that, in drawing up the contract and in determining the circumstances in which rights of termination under clause 23.2.1 might arise, the parties actively considered the limitations to be attached to those rights and yet elected not to include an exclusion, or limitation, upon those rights, in circumstances where the availability of those rights arose from the contractual default of the party purporting to exercise those rights. The implication, again, as it seems to me, is that this was an intended omission.

62. That view is reinforced when clauses 23.2 and 23.2.1 are viewed through the wider lens of the scheme of the contract and, in particular when contrasted with the alternative termination provisions set out in clause 23.1 of the contract, which provide for termination of the contract, at the behest of the seller, in the event of what may be summarised as specific failings of the buyer, or specific circumstances relating to the buyer (unremedied, or irremediable breach of contract; 23.1.1; potential insolvency in its various forms; 23.1.3 to 7; failing to pursue the planning requirements of the contract; 23.1.2 and 23.1.8). In any of those circumstances, the seller has the right to terminate the contract (without prejudice to its wider rights of action) and to retain the buyer's deposit.
63. In clear contrast, the grounds for termination, set out in clause 23.2 of the contract, including, therefore, termination, pursuant to clause 23.2.1, are not focussed, at all, upon the conduct or circumstances of the parties, or either of them, but, simply, upon the existence of the factual circumstances, grounding the rights of termination set out in the clause, reflecting, as it seems to me, an apparent intention to allow termination in any of those circumstances, without reference to the circumstances giving rise to the existence of the facts entitling termination, but with the parties and each of them having the protection, contained in clause 23.2, as already discussed, that the termination will not preclude, post-termination, the enforcement by an aggrieved party of any rights that it is claimed that it may have against the other, including, as contemplated by Henley's proposed Counterclaim, in this case, a claim for the loss and damage arising out of the creation by the other party of the circumstances giving rise to the early termination of the contract.
64. In this regard and while being fully aware of the caution which must attach to the application of an over-sophisticated linguistic analysis of a commercial document, such as the contract in this case, I find myself, in agreement with Mr Morshead KC, that the parties use of the passive voice, in describing the circumstances in which termination can take place, in, certainly, three of the four grounds for termination set out in clause 23.2, is, as he submitted, indicative of their intention that the right to terminate should arise, precisely as stated by the parties, if those circumstances came into existence and regardless of and without reference to the cause, or causes, giving rise to the existence of the right.
65. That this is the correct analysis of the parties' intentions seems to me to be confirmed, further, by a consideration of the contractual purpose which, in my view, underlies clause 23.2 of the contract and the rights to terminate the contract provided by the clause. That purpose is demonstrated by the 'fact situations' entitling buyer, or seller, to terminate under the clause, as outlined in paragraphs 66 to 70 of this judgment, all of which relate to situations, or circumstances, where the progress of the contract towards becoming unconditional has been delayed, or prevented, or where completion has either been delayed or can no longer be achieved.
66. Clause 23.2.1, read with the definition of the Relevant Period, is directed towards delay in securing the relevant planning permissions such as to satisfy the Planning Conditions Precedent.
67. Clause 23.2.2 is, likewise, so directed and deals with the situation, where, as provided for in Schedule 1 of the contract, leading Counsel has been asked to opine upon the merits of a planning appeal, or planning review and has concluded that the chances of

securing a Satisfactory Planning Permission, as required to satisfy the Planning Conditions Precedent, are less than 50% and where, pursuant to clause 3.5 of Schedule 1, notice has been given that the planning appeal, or review, will either not be instituted, or will be discontinued,

68. Clause 23.2.3 is directed towards delays in the completion of the purchase by Henley of the land, or some of the land, to be conveyed to Weston under the contract, and, in particular, to a delay in the completion of that purchase beyond 31 January 2024.
69. Clause 23.2.4 is directed towards the situation where Henley's contract for the purchase of the land to be conveyed on to Weston was terminated before the date for completion under that contract, being, also, in accordance with paragraph 6.1 of the contract, the completion date under the contract.
70. In the context of those provisions, it seems clear to me that the intended purpose of clause 23.2, was to ensure that, if, as demonstrated by the existence of one, or other, of the 'fact situations' set out in the clause, the parties' expected progress towards the contract becoming unconditional, or being completed, could no longer be achieved, or if that progress was seen as not being achievable within the time scales envisaged and provided for by the parties, then either the buyer, or the seller could bring the contract to an end, with the parties being returned, by the termination of the contract and the repayment of the deposit, to the status quo ante, but without prejudice to any rights that either party might have achieved during the lifetime of the contract.
71. In short, the intent of the provision, where the relevant 'fact situations' applied, was to enable the parties to make a clean break from the contract, rather than remaining bound by the terms of the contract, in circumstances where either the contract would not come to fruition, or where there was no clarity as to when the contract would either become unconditional, or complete.
72. Given that intent, or purpose, it seems to me, consistently with that purpose, that the parties' intention as to the scope of the provision was exactly as specified in the language they used, namely that, where the circumstances laid down in the various limbs of clause 23.2 were met, the buyer, or seller, could, without more, bring the contract to an end, and achieve a clean break from the contract.
73. The provision was not and, by its language, was not intended to focus upon the reasons why a particular 'fact situation' had arisen, but simply upon the fact of that situation, such as to enable a party, in one of the envisaged circumstances, to have the certainty that it could bring the contract to a swift conclusion.
74. In that context and given that intent, there is, as I see it, no scope for the application of the presumption relied upon by Mr Darton KC, or, put another way, the intention, of the parties, as derived from the contract, is such as to displace any application of the presumption. The application of the presumption, with the consequent requirement, in any case, to consider the reasons for, or causes of, a particular 'fact situation', far from allowing, as intended, the parties a clear and straightforward escape from the provisions of a contract, where the performance of the contract had either been frustrated, or unacceptably delayed, leaving questions of and liability for cause to subsequent determination, would, at least potentially, embroil the party seeking to escape the

contract in a debate as to whether its conduct was responsible for the existence of a particular ‘fact situation and, thus, negate the intention underlying clause 23.2.

75. In the result, I am satisfied that, in this case and for the reasons given, the presumption relied upon by Mr Darton is inapplicable, or is displaced by the clear words of the contract and the clear intentions of the parties, as conveyed both by the language they have used (or failed to use) and by an analysis of the scope and purposes of clause 23.2 and that, in consequence clauses 23.2 and 23.2.1 should be read and applied in accordance with the clear and plain language agreed by the parties.
76. In so saying, I have not disregarded the particular surrounding circumstances said by Henley to be relevant to construction, as identified in paragraphs 20 to 23 of this judgment. I am satisfied, however, that none of those matters modify the conclusions that I have reached.
77. The point advanced by Henley, in respect of the matters set out in paragraph 20 of this judgment, is that, given the limitations upon termination for breach set out in paragraph 23.1.1 of the contract, namely the requirement that, where remediable, time should be given to remedy, before terminating under the clause, that, in circumstances such as the present case, where the alleged breaches relate to planning matters, there would be no scope for termination for breach and for the buyer’s loss of deposit, prior to the date when, on Weston’s construction, termination could take place under clause 23.2.1.
78. That may well be true, in respect of some breaches. It does not, however, detract from my conclusions as to the intentions underlying clause 23.2. Clause 23.1 provides, as already explained, a mechanism for the seller to terminate, in respect of specified failings, including breach of contract, by the buyer. Clause 23.2 has, as already explained and discussed an entirely different purpose, namely to give either party an escape route from the contract in the relevant given circumstances. The fact that there is no complete dovetailing between one provision and the other is, given their different purposes, irrelevant; the more so where the seller’s rights arising out of any breach by the buyer are preserved, as they are, by the terms of clause 23.2.
79. The point advance by Henley, in respect of the matters set out in paragraph 21 of this judgment, namely that it was the common understanding of the parties, when the contract was entered into, that Henley was unlikely to wish to terminate the contract for breach, given, as it was put by Mr Rickwood, that Weston had been chosen by Henley as a long term partner in the development, similarly, does not detract from my conclusions as to intention. The parties agreed terms which either of them could rely upon, should certain circumstances arise. The fact that one of the parties might elect not to take advantage of those rights, or of potential rights of termination under clause 23.1, even if that probable election was known to the other party, does not evince, or establish, a joint intention of the parties to limit, or modify, the terms that they had agreed.
80. The reliance placed by Henley, as set out in paragraph 22 of this judgment, upon Condition 10.2 (a) of the Standard Commercial Property Conditions, as being inconsistent with Weston’s construction of clause 23.2 and, now, this court’s construction of that provision, is misplaced. As is clear from clause 3.1 of the contract, Condition 10.2 (a) is a provision dealing with rescission, rather than termination. More to the point, given the somewhat equivocal meaning of rescission sometimes to be

found in land contracts, it is incorporated into the contract only to the extent that it is not inconsistent with the provisions of the contract. In this case, even if, rescission is treated as embracing termination, the provision is inconsistent with the terms of the contract, as I have construed them, and, accordingly, is not incorporated into the contract.

81. The general point advanced by Henley, in paragraph 23, namely that a deposit is normally taken as an earnest of the buyer's performance of the contract is a perfectly good generic point. However, like all generic points it is, as in this case, displaced by particular circumstances.
82. The final construction argument advanced by Mr Darton KC is that, as he put it, the case is 'on all fours with' the decisions, in the **Sainsbury's Supermarket** litigation and should, therefore, follow those decisions.
83. I am not persuaded. It is trite law, but good law, that the construction, in one case, of a particular instrument, even if the instrument is in identical, or near identical terms, provides no guidance as to the construction of a different instrument, entered into in a different context. The task of the court is to construe the instrument before it, on its own terms and in its own context.
84. The detailed provisions of the contract, in the **Sainsbury's Supermarket** litigation, were not the subject of any detailed analysis before me. Given the principle just set out, that was quite right. What, however, is, in any event, clear, even from a cursory examination of the contract in that case, is that it was not in the same terms as the contract with which I am concerned, nor, necessarily, was it entered into in the same context. As such, it seems to me that the decisions, whether at first instance, or on appeal, provide no, or negligible guidance as to the proper construction of the instrument with which I am concerned.
85. In regard to legal principle, I have already commented, at paragraphs 35 and 36 of this judgment, as to what I will call the hybrid principle, neither construction, nor conventional implication, adopted by Proudman J, at first instance. In the Court of Appeal, (sub nom. **Bristol Rovers (1883) Ltd v Sainsbury Supermarkets Ltd [2016] EWCA Civ. 160**) there was no discussion, at all, either as to the source of the applicable principle, ostensibly applied by Proudman J. nor as to the construction of the contract, in the context of that principle.
86. Taken overall, I have not regarded the **Sainsbury's Supermarket** litigation as affording the court any assistance, nor as, in any way, disturbing my conclusions as to the true construction of clause 23.2 and 23.2.1, as set out in paragraph 75 of this judgment.
87. There remains to consider Mr Darton KC's fall-back position, as to the implication of a term, corresponding to and having the same effect as the construction which, by way of the presumption of construction discussed in this judgment, he has sought to advance in this case.
88. Given my findings on construction, there can be no basis for the implication of such a term. As is axiomatic, an implied term can supplement the terms of the contract either to provide business efficacy, or because it was always an obvious element in the overall

contractual arrangements. What an implied term cannot do is to modify, or alter, the express terms of the contract, as properly construed and, thereby, supplant those terms. That, in view of my conclusions as to the proper construction of the contract, in this case, is what the implication of any term along the lines suggested and pleaded, by Henley would do.

89. The necessary conclusion from all of the foregoing is that, as explained in paragraph 54 of this judgment, Weston has made out its case and is entitled, therefore, to the return of its deposit and to a judgment to that effect.