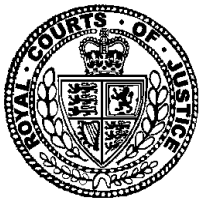

Neutral Citation Number: [2022] EWHC 65 (Ch)

Claim No: BL-2020-000636

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (Ch)

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

Date 14 January 2022

Before:

LANCE ASHWORTH QC
SITTING AS A DEPUTY HIGH COURT JUDGE

B E T W E E N:

RETIREMENT VILLAGES DEVELOPMENTS LIMITED

Claimant

v

PUNCH PARTNERSHIPS (PTL) LIMITED

Defendant

- -
- -

James McCreath (instructed by **Pinsent Masons LLP**) for the **Claimant**
Katherine Holland QC (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing dates: 22nd, 23rd & 24th November, 2021

- -

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

LANCE ASHWORTH QC

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Friday 14 January 2022.

Lance Ashworth QC:

Introduction

1. The Claimant, Retirement Villages Development Limited ("**RV**"), seeks a declaration that an option agreement between the Defendant, Punch Partnerships (PTL) Ltd ("**Punch**") and Hamlin Estates Limited (**"Hamlin"**) dated 6 September 2013 (**"the Option"**) which granted Hamlin an option in certain circumstances to acquire land (not the public house itself) at the Plough Public House, High Street, Elstree, WD6 3EU (**"the Property"**) continues in existence, that is to say that it has not ceased to be operative.

2. The Option was assigned by Hamlin to RV on 26 September 2019. There is no challenge to the validity of the assignment. RV's claim falls to be determined on the construction of the Option and in particular (but not exclusively) clause 4 thereof.

3. By way of counterclaim, Punch seeks rectification of clause 5.2 of the Option on the basis of common mistake. I am not asked to interpret what clause 5.2 of the Option means in its currently drafted form or would mean if rectification were to be granted.

4. Notwithstanding this, in my judgment it is appropriate to consider the rectification claim first as in order to interpret the Option, it is necessary to know what its full terms are. It would be wrong to interpret the Option on the basis that clause 5.2 as it appears in the Option is part of the Option, if I were thereafter to go on to find that clause 5.2 should be in the terms that Punch contends for, which might affect the interpretation of the Option as a whole.

5. Mr James McCreath has appeared on behalf of RV and Miss Katherine Holland QC on behalf of Punch. I am grateful to both counsel for the work put in and the clarity of their submissions, both oral and written. It is inevitable that I will not have addressed all of the arguments that each of them have advanced, but I have addressed those which I believe it is necessary to in order to decide this matter.

The Terms of the Option

6. The Option was granted for a fee of £1, for a period of 30 months, subject to extensions in certain defined circumstances. What those circumstances included lies at the heart of this dispute.

7. The Option can be exercised only once a *"Qualifying Planning Approval"* has been obtained in respect of the Property, and requires Punch to sell the Property for the sum of £2,610,000. Hamlin was subject to obligations to take steps to attempt to secure such a Qualifying Planning Approval, at its own cost. Punch is referred to as *"the Owner"* in the Option, and Hamlin as *"the Developer"*.

8. The key clauses are as follows:

> *"2.1 The following definitions apply throughout this agreement*
>
> | | |
> |---|---|
> | *"Option Expiry Date"* | *The dates when the Option expires in accordance with the provisions of clause 4* |

"Planning Considerations"	*(a) the requirements of the Local Planning Authority the County Council or highway authority or any public authority or undertaker or company or other like body and their officers representative and agents* *(b) good planning and development practice* *(c) the proper and reasonable advice of any planning consultants or Counsel or other expert* *(d) planning policy guidance issued by DCLG (or any other similar or substitute public or private body as appointed from time to time) current at the relevant time and/or* *(e) the anticipated market for the development proposed*
"Proposed Development"	*The development of a residential care facility pursuant to Use Classes C2 and/or C3 of the Town and Country Planning (Use Classes) Order 1987*
"Qualifying Planning Approval"	*A planning permission (and associated Planning Agreements) which authorises the Proposed Development on the Property and which is on conditions acceptable to the Developer acting reasonably and does not restrict or impede the use of the Owner's Retained Land as a public house. The Qualifying Planning Approval may therefore be either:-* *a detailed planning permission; or* *an Outline Planning Permission followed by written approval of all matters reserved under the Outline Planning Permission.*
"Specified Date"	*The date which is 30 months from Today*
"Today"	*The date of this Agreement*

"3.1 In consideration of the Developer paying an option fee of £1.00 (one pound) to the Owner … the Owner grants to the Developer the option to purchase the freehold estate in the Property on the terms of this Agreement and subject as mentioned in clause 7.2 but otherwise free from encumbrances."

*"**4. Option Expiry Dates***

"4.1 The Option expires at 5 pm on the End Date.

"4.2 The End Date shall be the latest of:-

4.2.1 the Specified Date;

4.2.2 such latest date as shall be determined in accordance with the remainder of this clause 4; or

4.2.3 such later date or dates as the Owner and the Developer may agree from time to time in writing"

"4.3 If twenty Working Days before the Specified Date the Developer has not received a Qualifying Planning Approval but is awaiting the result of: -

4.3.1 any planning application (including any application or resolution to grant called in by the Secretary of State) or appeal previously lodged by or on behalf of the Developer in accordance with the terms of this Agreement; or

4.3.2 any Planning Challenge;

THEN the End Date will be the date six weeks and 20 Working Days after the last of the following to occur:-

4.3.3 the Developer receives the result of such outstanding planning application or appeal;

4.3.4 the Developer receives the result of any planning application lodged before the determination of such outstanding planning appeal; or

4.3.5 the Developer receives the result of any appeal from an application under clause 4.3.1 or 4.3.4; or

4.3.6 The Planning Challenge concerned has been finally determined"

"4.4 If twenty Working Days before the Specified Date the local planning authority have not resolved to allocate the Property for development THEN the End Date will be the date six weeks and 20 Working Days after the last of the following to occur:-

4.4.1 the Developer receives the result of a planning application submitted following the local authority resolving to allocate the Property for development or subsequent appeal; or

4.4.2 the Developer receives the result of any such planning application lodged before the determination of such outstanding planning appeal; or

4.4.3 the Developer receives the result of any appeal from an application under clause 4.3.1 or 4.3.4; or

4.4.4 the Planning Challenge concerned has been finally determined"

*"**5. Planning Applications***

"5.1 The Developer will use all reasonable and commercially sensible endeavours to promote the Property through the planning process having due regard to the Planning Considerations with a view to obtaining a Qualifying Planning Approval at the earliest opportunity for the development of the whole or as much of the Property as is reasonably commercially viable;"

"5.2 The Developer will use reasonable endeavours having due regard to the Planning Considerations to submit an application for Qualifying Planning Approval within 18 months after Today and provide a copy of such application to the Owner."

9. Clause 6 provides for the Developer to serve a Notice of Exercise within 10 working days of the grant of a Qualifying Planning Approval. A deposit of 10% is then payable, and the Owner becomes obliged to sell and the Developer to purchase the freehold estate in the Property in accordance with clause 7.

10. Clause 7 sets out the conditions of any sale. Among other things, Completion is to happen three months after the Notice of Exercise.

11. Clause 8 restricts the Owner's ability to use or encumber the Property during the currency of the Option.

12. Clause 9 requires the Owner to permit the Developer access for various surveys.

13. Clause 10 sets out restrictions on disposals by the Owner of the freehold interest in the Property to any person other than the Developer and by clause 10.2 the Owner agrees to the Developer registering a Unilateral Notice at the Land Registry on the Owner's registered title for the Property in respect of the Option.

14. Under clause 16 if the Option determines, the Developer is required within 5 working days of the date of the determination to procure the cancellation of the Unilateral Notice.

15. Clause 17 sets out the circumstances in which the Owner may terminate the Option and in particular clause 17.1.5 provides that:

> *"17.1 The Owner shall be entitled to serve a Termination Notice on the Developer with immediate effect but without prejudice to any right or action of the Owner against the Developer in respect of any subsisting breach of covenant or obligation if:*
>
> *17.1.5 the Developer materially breaches any of its obligations of this Agreement but without prejudice to all other remedies available to the Owner in respect of this and other breaches in addition to or as an alternative right of termination)* (sic) *and has failed to rectify the breach as soon as reasonably practicable after having received written notice to rectify from the Owner."*

The Operation of the Clauses

16. The "Specified Date" was 6 March 2016. That date has long since passed. No later date was agreed between Hamlin and Punch under clause 4.2.3. So if the Option still continues, it has to be by virtue of clause 4.2.2. Clause 4.3 is not engaged because no planning application had been lodged by the Specified Date nor was an appeal awaited.

17. That, in turn leads on to clause 4.4 on the facts as they have turned out. It is common ground that (i) twenty Working Days before the Specified Date the local authority had not resolved to allocate the Property for development and (ii) that none of the events in clause 4.4.1 to 4.4.4 have yet happened.

18. As at the date hereof, the local authority has still not resolved to allocate the Property for development. No planning application has been made by either Hamlin or, since it took the assignment, RV.

The Rival Constructions

19. Starting with clause 5.2, Punch contends that the clause as it appears in the Option does not reflect the common intention and/or agreement of Punch and Hamlin that the submission of an application for Qualifying Planning Approval within 18 months was an absolute obligation. Punch says that there was a clear and obvious mistake in the drafting process and contends that the clause should be rectified to read (including the words Punch says should be deleted struck through):

> *"5.2 The Developer will ~~use reasonable endeavours having due regard to the Planning Considerations to~~ submit an application for Qualifying Planning Approval within 18 months after Today and provide a copy of such application to the Owner."*

20. RV says that this is not so. It denies that there was any common intention and/or agreement between Punch and Hamlin as asserted. There was no mistake; rather the wording of clause 5.2 in the Option is what Hamlin and Punch agreed to.

21. RV goes on to say that if they are wrong and clause 5.2 might otherwise fall to be rectified, it should not be because there has been acquiescence on the part of Punch and/or the doctrine of laches applies to extinguish any equity of rectification. In the alternative, it is said that given there is no allegation that rectification would make any practical difference to the position of the parties given that the 18 month deadline has long passed, rectification would serve no useful purpose and ought not to be ordered.

22. As to whether the Option continues in existence, RV relies on the express wording and say that given that (i) twenty Working Days before the Specified Date the local authority had not resolved to allocate the Property for development and (ii) that none of the events in clause 4.4.1 to 4.4.4 has yet happened, the plain construction of the Option is that it remains in place and will continue to do so until the Property is allocated for development and for some time thereafter until the last of the events in clauses 4.4.1 to 4.4.4 has occurred. RV says that there is no basis for going beyond the express wording of the Option.

23. Punch says that the Option cannot be construed according to its wording as that would lead, it says, to a commercially absurd result that the Property could be subject to the Option forever because if the local authority never allocated the Property for development, none of clauses 4.4.1 to 4.4.4 could ever occur, so the End Date would never be reached.

24. Accordingly, says Punch, as a matter of interpretation, clause 4 of the Option should be read as if the words "*pursuant to their current review of the Hertsmere Local Plan 2003*" appeared immediately after the words "*If twenty Working Days before the Specified Date the local planning authority have not resolved to allocate the Property for development*".

25. Further, Punch goes on to say that clause 4 of the Option should be read as if there was a clause 4.4.5 which says: "*the local authority resolves not to allocate the Property for development*". In closing, in response to a concern I expressed about whether a local authority would ever resolve not to allocate as opposed to not resolving to allocate a particular parcel of land, Miss Holland on behalf of Punch said that this might be better if it read: "*the local authority does not resolve to allocate the Property for development*".

26. Accordingly, on Punch's case, clause 4.4 should be construed as if it read (with the additional words underlined):

> *"4.4 If twenty Working Days before the Specified Date the local planning authority have not resolved to allocate the Property for development <u>pursuant to their current review of the Hertsmere Local Plan 2003</u> THEN the End Date will be the date six weeks and 20 Working Days after the last of the following to occur:-*

4.4.1 the Developer receives the result of a planning application submitted following the local authority resolving to allocate the Property for development or subsequent appeal;
4.4.2 the Developer receives the result of any such planning application lodged before the determination of such outstanding planning appeal; or
4.4.3 the Developer receives the result of any appeal from an application under clause 4.3.1 or 4.3.4; or
4.4.4 the Planning Challenge concerned has been finally determined; or
4.4.5 the local authority does not resolve to allocate the Property for development."

27. As an alternative to these being matters of pure interpretation, Punch contends that these terms are implied terms of the Option and seeks a declaration to that effect.

28. If these terms are incorporated, whether on the true construction of the Option or as implied terms, Punch says that the End Date under the Option was on 1 February 2017, being 6 weeks and 20 working days after 23 November 2016, the date on which the Property was not allocated for development in the Site Allocations and Development Management Policies Plan adopted on that day. Punch therefore says that the Option has lapsed.

The Witnesses

29. I heard live evidence on behalf of RV from:
(a) Nicholas Parkin, one of the directors of Hamlin and the person who negotiated the option with Punch;
(b) Paul Mourton, the managing partner of Lodders LLP, a firm of solicitors in Stratford-upon-Avon, who acted for Hamlin in the negotiation and drafting of the Option; and
(c) Andrew Mills, the Senior Development Manager employed by RV Services Ltd, who employ all personnel within the Retirement Villages group of companies, who was involved on behalf of RV in project feasibility work for the Property from December 2018.

30. As to Punch, I heard live evidence from:
(a) Robert Barnett, who used to be employed by Punch as an Estates Development Manager, and who had responsibility for the Property until January 2014, including in respect of the negotiation of the Option;
(b) Andrew Gregory, an Estates Manager for Star Pubs & Bars, the property portfolio manager of Punch, having previously been a Regional Valuation Surveyor at Punch, who took on responsibility for the Property between August 2017 and September 2019;
(c) Richard Tole, now the Agency Director at James A Baker, Chartered Surveyors, but formerly an Estates Development Manager for Punch, who took over responsibility for the Property in February 2014 until he moved in March 2018, but was thereafter intermittently involved with the Property; and
(d) Jane Fitzgerald, a solicitor employed by TLT LLP, who was employed in TLT's Real Estate department at the time the Option was drafted and who had principal conduct of the negotiation and drafting of the Option on behalf of Punch with support from her planning colleagues and transactional colleagues. Mrs Fitzgerald gave her evidence by video link due to personal circumstances making it difficult to travel to London for the trial.

31. I also received in evidence and read the witness statement of Phillipa Keogh on behalf of Punch. Ms Keogh used to be employed by James A Baker and acted in respect of the Property until November 2014. It was Ms Keogh with whom Mr Hamlin had the initial discussions and reached the Heads of Terms. Mr McCreath did not seek to challenge Ms Keogh's evidence.

32. The relevant events surrounding the negotiation of the Option took place over 8 years ago. This is one of those cases where greater assistance is to be found in the contemporaneous documents, than in recollections of the witnesses now, especially bearing in mind the observations of Leggatt LJ (as he then was) in *Gestmin SGMs Shah SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22]. All of the witnesses have been involved in plenty of other matters since 2013 and each was careful not to claim a crystal clear recollection in respect of all, or even most, matters in respect of the Option. Each was circumspect about what they could actually remember and what was a matter of reconstruction. By way of example, Mrs Fitzgerald said in her witness statement "*On the important matters of fact as detailed below, I did not recall them until my recollection was refreshed by referring to the documents listed in the appendix below shortly before I spoke with [Punch's solicitor] on 27/5/2021*" and in her oral evidence she candidly said that she would not know what she thought at the time, but could only go by what she had looked through on the file recently.

33. There were occasions where it was suggested to witnesses that what they "would have done" was not of assistance, rather what they did do was what was relevant and important. In my judgment this was unfair on the witnesses who were being asked to recall events which occurred many years ago. Where people involved in many transactions over a number of years are being asked about a particular transaction, which they would have no particular reason to recollect in great detail, it is of assistance to the court to understand what their usual practice in similar circumstances was, albeit that is no guarantee that such a practice was followed on this particular occasion.

34. In my judgment, each of the witnesses gave their evidence honestly and in a genuine attempt to assist the court as far as they could to determine what happened in relation to the Option. I reject the suggestion which was made in closing submissions by Miss Holland that Mr Parkin and Mr Mourton were lying to the court in particular in relation to their evidence about the "reasonable endeavours" clause. This was not put to the witnesses in those terms, something which in my judgment ought to have been done if the point was going to be made in closing, particularly given the professional standing of Mr Mourton. However, even if it had been put to them in express terms, I would not have found them to have been lying. They were doing their best in the circumstances set out above and while it is true that there were some inconsistencies in their evidence (as there were in the evidence of any witnesses), these were not as a result of deliberate lies.

35. Having said this, for the reasons set out below, the contemporaneous documents are of the greatest assistance in determining what happened in relation to the grant of the Option.

<u>The Applicable Law</u>

36. The parties had been directed to and had helpfully provided the court with an "agreed schedule of law". They agreed that:

(a) The principles governing the construction of contracts are as set out in *Wood v. Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13] and *Lukoil Asia Pacific Pte Ltd v. Ocean Tankers (Pte) Ltd (The Ocean Neptune)* [2018] EWHC 163 (Comm) at [8];
(b) The principles governing the implication of the terms are as set out in *BP Refinery (Westernport) Pty Ltd. v. Hastings Shire Council* (1977) AJLT 20 at 26 and *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 at [14]-[21]; and
(c) The test for common mistake rectification is as set out in *FSHC Group Holdings Ltd. v. GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361 at [176].

37. While it is tempting to say no more in light of that agreed schedule, for the avoidance of any doubt, I set out relatively briefly the relevant principles.

38. I take the following to be the relevant principles of contractual construction conveniently set out by Popplewell J (as he then was) in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (the "Ocean Neptune")* [2018] EWHC 163 (Comm) at [8], in which he reiterated that the Court's task in construing contractual documentation is "*to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement*". Having referred to the recent Supreme Court cases in which the principles of construction had been considered, Popplewell J held that in so doing the Court should apply the following principles:
(a) The Court must consider the language used and ascertain what a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time would have understood the parties to have meant;
(b) The contract must be considered as a whole and, depending on the nature, formality and quality of drafting of the contract, the Court will give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used;
(c) If there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other;
(d) The court is to approach interpretation as a unitary exercise. As such, the quality of the drafting of the clause is to be taken into account and recognition is to be given to the fact that a party may have agreed something which with hindsight did not serve his interest. Further, a unitary approach entails:

> "…an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

39. As noted by Popplewell J, the weight to be given to the wider context may depend on the nature, quality and formality of the drafting. This principle is derived from paragraph [10] of Lord Hodge's speech in *Wood v Capita* [2017] AC 1173. Lord Hodge went on at [13] to observe that some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals (albeit that even

in the case of a detailed professionally drawn contract there may be provisions which lack clarity so that the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type).

40. The Supreme Court in *Arnold v. Britton* [2015] AC 1619 at [16]-[18] stated that where the meaning of the words used in a written agreement is completely clear, particularly in a formally drafted legal document, there is no scope for "*purposive interpretation*" in pursuit of some commercial common sense result to which the parties might have agreed, but to which *ex hypothesi* they do not appear to have agreed by their words. Lord Neuberger PSC said that the Court was not justified in embarking on an exercise searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning of the words the parties have used.

41. Lord Clarke said in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 at [23], that when the parties have used unambiguous language, the Court must apply it, even if this leads to the "*most improbable commercial result*."

42. The textbook modern approach to interpretation of contracts is, in my judgment, exemplified by the recent Court of Appeal decision in *National Bank of Kazakhstan v Bank of New York Mellon* [2018] EWCA Civ 1390 at [39]-[72]. Hamblen LJ (as he then was) approached the construction of the contract by considering first the words of the contract to arrive at an initial view of what the text required and whether it was ambiguous, before going on to consider whether there was any justification for departing from that construction on the basis of contextual considerations and commercial sense.

43. It is clear, and is common ground between the parties, that evidence of the parties' negotiations or as to their subjective intentions is inadmissible for the purposes of construction.

44. However, Miss Holland relied on the principle that evidence as to the genesis and aim of a contract is admissible as an aid to construction. In *Merthyr (South Wales) Limited (FKA Blackstone (South Wales) Limited) v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526, Leggatt LJ (as he then was), with whom David Richards and Longmore LJJ agreed, addressed the issue of "genesis and aim" at paragraph [43] following. Having reviewed a number of authorities, Legatt LJ said at paragraphs [51]-[55]:

> "51. In my view, the relevant principles of law are clear in the light of the decision of the House of Lords in the *Chartbrook* case and can be summarised as follows.
>
> 52. It is established law that, as stated by Lord Wilberforce in *Prenn v Simmonds [1971] 1 WLR 1381, 1384-5*, previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract. No doubt was cast on that principle in the *Chartbrook* case and the passage from the judgment of Lord Wilberforce which includes this proposition was cited with approval in *Arnold v Britton [2015] UKSC 36; [2015] AC 1619*, para 15, and *Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173* , para 10. It is an approach which, as Lord Wilberforce noted, can be traced back at least to Lord Blackburn's judgment in *River Wear Commissioners v Adamson (1877) 2 App Cas 743, 763*, which emphasised the

> importance in construing written instruments of "seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view …"
>
> 53. The phrase "genesis and aim of the transaction" is a composite phrase taken by Lord Wilberforce from the judgment of Cardozo J in *Utica City National Bank v Gunn, 222 NY 204 (1918)* , a decision of the New York Court of Appeals, which Lord Wilberforce described as following "precisely the English line" and as a judgment which "combines classicism with intelligent realism": see *Prenn v Simmonds [1971] 1 WLR 1381, 1384F* . The approach followed by Cardozo J was, by considering the circumstances which led to the execution of the contract, to identify the purpose of the transaction and to construe the language used in the light of that purpose. Cardozo J concluded (at 208):
>
> > "To take the primary or strict meaning is to make the whole transaction futile. To take the secondary or loose meaning, is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice."
>
> 54. Lord Wilberforce clearly saw no conflict between this approach and the rule, reaffirmed in *Prenn v Simmonds*, that evidence of negotiations, or of the parties' intentions, ought not to be received. (It is equally clear that Lord Blackburn had seen no such conflict, as Lord Hope observed in the *Chartbrook* case at para 4.) What is not permissible, as the decision of the House of Lords in the *Chartbrook* case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense. The exclusion of such evidence was justified in the *Chartbrook* case, not on the ground that it will always or necessarily be irrelevant, but because of the costs and other practical disadvantages that would result from relaxing the rule and because the "safety devices" of rectification and estoppel will generally prevent the exclusionary rule from causing injustice.
>
> 55. I would accept that there may be borderline cases in which the line between referring to previous communications to identify the "genesis and aim of the transaction" and relying on such evidence to show what the parties intended a particular provision in a contract to mean may be hard to draw. The present case, however, is not one of them. In my view, it very well illustrates this distinction."

45. As to the implication of terms into a contract, the relevant principles (extracted from Lord Neuberger's judgment in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [18] – [21]) were summarised by Lord Hughes in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes

> to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

46. As to the test for common mistake rectification, this is as set out by Leggatt LJ (as he then was and with whom Rose LJ and Flaux LJ, as each respectively then was, joined) in *FSHC Group Holdings Ltd. v. GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361 at [176]:

> " … We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."

47. Mr McCreath submits (and I did not understand Miss Holland to dispute) that the Court has the power to refuse this equitable remedy even if these principles are satisfied if:
    (a) The party seeking rectification has been guilty of 'laches': that is delay coupled with some relevant prejudice to the other party (see for example *T&N Ltd v Royal & Sun Appliance Plc* [2003] EWHC 1016 (Ch) [2003] 2 All ER (Comm) 939, at [140]).
    (b) The party seeking rectification has acquiesced in the terms of the contract, meaning the non-exercise of a right in circumstances where it may reasonably be assumed it will never be exercised (see for example the formulation in *Transview Properties Ltd v City Site Properties Ltd* [2008] EWHC 1221 (Ch) at [149]).
    (c) It serves no practical purpose, for example if the contract is no longer capable of performance: *Snell's Equity*, para 16-025, *Hodge on Rectification*, 6-25 to 6-33.

<u>The Claim to Rectification</u>

48. This is not a case where it is alleged that the Option failed to give effect to a prior concluded contract. Rather, it is said by Punch that when Punch and Hamlin executed the Option, they had a common intention in respect of the obligation on Hamlin which was an absolute one to submit an application for Qualifying Approval within 18 months which, by mistake, the document did not accurately record. It is therefore necessary for Punch to show not only that it and Hamlin had the same actual intention with regard to the obligation, but also

that there was an "outward expression of accord" – meaning that, as a result of communication between them, they understood each other to share that intention.

49. If the obligation was an absolute one to submit the application within 18 months, as contended for by Punch, the time for doing so would have expired on 5 March 2015. Although it had initially been contended on behalf of Punch that the effect of no application having been submitted by this date meant that the Option had expired, in light of the witness statement of Mr Barnett, this was not pursued by Punch at trial (or for some time prior to trial). Rather, Miss Holland contended that the failure to submit such an application would allow Punch to exercise its rights to serve a termination notice under clause 17.1.5 of the Option (but not to terminate immediately) and/or to make time of the essence for an application to be made and/or to seek an order for specific performance of the obligation to submit an application.

50. These points were made to address the arguments advanced by Mr McCreath as to the grant of rectification serving no practical purpose, to which I will return in due course.

51. If there was a common intention and an outward expression of accord, the parties are agreed that, in particular because of the time that has passed and the candidness of the witnesses as to their lack of recollection on some points, it would be found (if at all) in the correspondence between Mr Mourton of Lodders and Mrs Fitzgerald of TLT, who were the individuals who negotiated the draft on behalf of the parties. The witnesses were taken through the correspondence in some detail in their evidence, as was I in the course of closing submissions.

52. It is noticeable that before Hamlin and Punch agreed that Hamlin should have an option, both Hamlin and Punch had done investigations into the likelihood of obtaining planning permission for this site. I will address the Hertsmere Local Plan below, but note at this point that this had been adopted in January 2013.

53. As far as Hamlin was concerned, it had had advice from (at least) Charles Robinson at Parkwood Holdings in an email of 23 May 2013. Mr Robinson stated that he was convinced that the site would come forward for development as some point in the relatively near future and that there remained an opportunity to secure that within the next 2 years through the site allocations DPD. But he said that if that was unsuccessful, there was an excellent chance it would come forward in the next Local Plan/Core Strategy Review in around 5 years time.

54. As to Punch, in the context of whether to do a deal with Hamlin, Ms Keogh produced a Disposal Report dated 21 June 2013 having taken advice from Shortland Horne, who had confirmed that the land was green belt and that the planning authority had said that there was no justification for development on the land. The Disposal Report identified that the land had been subject to a prior option, the purchaser intending to make an application for a dementia care home. There had been a pre-planning meeting with the council who confirmed that the land was green belt and for a number of reasons development would be opposed. That had led to the option holder surrendering its option in May 2013. It also recorded that other developers had spoken with the council and they were not willing to purchase the land as they believed there was no development angle for residential.

55. When asked about this in evidence, Mr Barnett said that his understanding was that it was clear that if someone made a planning application at that stage without lots of preparation it was going to be refused. Obtaining planning permission was certainly difficult, but looking at the land Punch assumed that "*at some point in the future*" planning permission would be achieved.

56. Although the Option was preceded by Heads of Terms on 1 July 2013 (erroneously dated 2012), which had been agreed between Mr Parkin and Ms Keogh, this did not say anything about when planning permission had to be applied for.

57. Mr Mourton said that he prepared the first draft of the Option based on a precedent in the Lodders' precedent file. He said that he took his client's instructions on the draft before sending it to Mrs Fitzgerald at TLT, which he did on 4 July 2013. That included a clause 5.2 in the following form: *"The Developer will use reasonable and commercially sensible endeavours having due regard to the Planning Considerations to submit an application for Qualifying Planning Approval as soon as reasonably practicable after Today."*

58. TLT's first comments on the draft, sent by Mrs Fitzgerald on 23 July 2013 while awaiting instructions, included an amendment to clause 5.2 to require such endeavours to be used to submit an application within 10 working days and to provide a copy of the application to Punch. While the timeframes were thus proposed to be significantly shortened, the principle of a qualified obligation having regard to the Planning Considerations rather than absolute obligation was not questioned.

59. Mr Mourton replied on 31 July 2013. As to clause 5.2, he removed the 10 working day requirement and replaced it with *"as soon as reasonably practicable*". He accepted the requirement for a copy of the application to be provided to Punch. But again, the qualified nature of the obligation remained.

60. Mrs Fitzgerald responded on 15 August 2013 by which time she had received instructions from her client. She said at numbered paragraph 2: *"We have amended clause 5.2 to 20 working days and trust this is sufficient, if not what timescales are your clients working towards?"* That amendment was indeed made in their travelling draft (her evidence was that part of the amendment was made by a planning colleague of Mrs Fitzgerald, but the 20 working days was her amendment). Again the qualified nature of the obligation remained unchanged.

61. On 22 August 2013 Mr Mourton wrote rejecting the shortening of the timeframe. His email included:

> *"…it seems that the overall tenor of this Agreement made between our respective clients is being lost in the detail of the Agreement; my client agreed an Option Agreement with your client for a thirty month period and yet your client is requiring mine to submit their planning application within the first four weeks of that period. Put simply, my client would like to be given the best opportunity of securing a consent and only wants to submit their application once they have been advised by their planning consultants that this is the most appropriate time to do so, as such they do not want to be tied into definitive timescales."*

62. Their travelling draft at this stage read:

> *"The Developer will use reasonable and commercially sensible endeavours having due regard to the Planning Considerations to submit an application for Qualifying Planning Approval as soon as reasonably possible after Today and provide a copy of such application to the Owner"*

63. Mrs Fitzgerald sought instructions from Mr Barnett at Punch on 27 August 2013 on 3 matters, the first 2 being clause 5.2 and the vacant possession clause 7.20 in the draft. As to the former, Mrs Fitzgerald said:

> *"The purchaser does not want to commit to a timescale for submitting its planning application to the Council, we would usually suggest 20 working days from exchange, but they are not prepared to commit to such a timescale and are not prepared to suggest one, so they simply want to use reasonable endeavours to submit the application. Is this something you are okay with?"*

64. Mr Barnett replied to Mrs Fitzgerald at 8.22 am on 28 August 2013. In response to the question on clause 5.2 he said: *"We need to have a timescale for them to submit an application or we risk the prospect of being locked into an agreement indefinitely. I don't like the words reasonable endeavours as this is open to interpretation."* He also responded on the vacant possession point raised by clause 7.20.

65. Mrs Fitzgerald's response to Mr Mourton's email was at 10.48 on 28 August 2013. When questioned about this in the course of his oral evidence, Mr Barnett accepted (when the differences between his reply to Mrs Fitzgerald and her response to Mr Mourton were drawn to his attention) that he must have had a conversation with Mrs Fitzgerald between the 2 emails, in which both clauses 5.2 and 7.20 were discussed. Mr Barnett agreed that in that conversation, they must have discussed the words "and commercially sensible" in clause 5.2 as they were deleted in the travelling draft sent by Mrs Fitzgerald to Mr Mourton that day. He also accepted that he must have instructed Mrs Fitzgerald to keep the words "*reasonable endeavours*" in clause 5.2, saying that "*I would have agreed with them if it's in the final draft*". In re-examination, when asked about whether it was a reasonable endeavours 18 month obligation or an 18 month obligation, Mr Barnett said that:

> *"It's reasonable endeavours in the option agreement. At the end of the day, we were hopeful that they would submit a planning application within the 18 months and, having it in the option agreement, that they would have acted on that basis."*

66. When Mrs Fitzgerald was cross-examined about this, she said that because she did not have any notes of that conversation, but assumed that she must have had a call between receiving Mr Barnett's email and responding to Mr Mourton because she would not have made up the six months timescale (as set out below) and she assumed that she must have discussed the nature of the obligation because she deleted the words "*and commercially sensible*" from the travelling draft, leaving in "*reasonable endeavours having due regard to the Planning Conditions*". The only reason for doubting such a conversation took place was that she did not remember it, although the only other explanation for the changes made to the travelling draft that was postulated was that she had made a mistake in leaving in the "*reasonable endeavours*" wording.

67. As I have said, at 10.48 on 28 August 2013, Mrs Fitzgerald sent Mr Mourton an email in which Mrs Fitzgerald commented on clause 5.2:

> *"My client insists that a timescale must be implemented for your client to submit their application as my client can not be tied into the agreement indefinitely without your client making some progress with the proposed planning application. We would therefore suggest a timescale of 6 months from exchange within which your client is to submit the application. Please ask your client to obtain the advice of its planning consultants now as to whether the timescale is sufficient. Surely your client wishes to progress the transaction sooner rather than later!"*

68. She attached the travelling draft making amendments (among others) to clause 5.2. She did *not* amend the obligation so as to make it absolute rather than qualified. The amended clause, with the strike through and underlining representing the changes from the previous draft, now read:

> *"The Developer will use reasonable ~~and commercially sensible~~ endeavours having due regard to the Planning Considerations to submit an application for Qualifying Planning Approval within 6 months ~~as soon as reasonably practicable~~ after Today and provide a copy of such application to the Owner."*

69. Mr Parkin was cross-examined about this, he said he did not remember seeing Mrs Fitzgerald's email of 23 August 2013, but was clear, because of conversations he had had with planning consultants about potential difficulties with the archaeological dig which might be necessary that fixed timescales as far as making a planning application were just not conceivable as far as he was concerned. He was adamant that he did not agree that the obligation to use reasonable endeavours should go from the draft or final agreement.

70. Mr Mourton responded to Mrs Fitzgerald on 29 August 2013 setting out the timing issues facing an application (including the need to do both an ecological survey and an archaeological dig before submitting an application), and concluded *"Based on the above, my client is happy to commit to submitting their application within 18 months of exchange, which I hope can be accepted."* He did not attach a travelling draft.

71. When Mr Parkin was cross-examined about the 18 month time period, he said he could not remember the conversations he had had with Mr Mourton which led to this email being sent. He initially appeared to accept that he had agreed to a specific period of 18 months in which a planning application would be made. However, he quickly qualified this by saying that he did not commit to it being an 18 month time period, but rather it was 18 months with an extension. Hamlin, he said, was to use its best (although the clause refers to reasonable) endeavours to apply for planning permission within 18 months and that he would never have agreed to a fixed time to apply for planning permission. He was clear that the obligation to use reasonable endeavours had not been removed as a qualification to the 18 month period. He said he definitely did not agree to it being removed from the Option.

72. In his witness statement, having referred to the uncertainties with this land caused by it being in the green belt, Mr Mourton said that, acting for a developer, he would never agree to an absolute obligation to make a planning application at a specific time come what may in those circumstances. He thought that the parties were agreeing a qualified obligation and he did not ever understand Punch's solicitors to be suggesting an absolute period.

73. When Mr Mourton was cross-examined about the discussion he had with Mr Parkin which led to the email of 29 August 2013, he said he did not need to, and did not, discuss the reasonable endeavours point with Mr Parkin. He did not need to discuss it as it had been in the first draft of the option and remained in every subsequent draft. The reference to his client being prepared to "*commit*" to an 18 month period was, he said, an attempt to compromise between what Punch wanted, namely 6 months and what Hamlin wanted. He said it was never intended to be an absolute time period and it was never raised throughout the negotiations that this should be an absolute obligation. He said that based on his experience it was industry standard to have a qualified obligation to put in a planning application, although he accepted that Ms Holland had been able to put before him 3 precedents from Practical Law Commercial Property Development precedents which contained absolute not qualified obligations.

74. Upon receipt of the 29 August 2013 email, Mrs Fitzgerald again sought instructions and Mr Barnett replied saying the proposal was acceptable. Mrs Fitzgerald marked up by hand her copy of the travelling draft, simply replacing the 6 with an 18 in the penultimate line. She did not make any alteration, even on her own copy, to the "*reasonable endeavours*" part of the clause. She responded to Mr Mourton on 5 September 2013 saying *"Your comments are noted and whilst my client believes the time period within which your client will submit the planning application is still excessive, in order to get the contract agreed, they are prepared to agree to 18 months. Please amend the contract in this regard."*

75. Mr Mourton amended the contract substituting a period of 18 months rather than 6, so that the final form of clause 5.2 was as executed on 6 September 2013, namely:

> *"The Developer will use reasonable endeavours having due regard to the Planning Considerations to submit an application for Qualifying Planning Approval within 18 months after Today and provide a copy of such application to the Owner"*

76. The evidence of Mr Parkin and Mr Mourton that this was not intended to be an absolute obligation is, in my judgment, entirely consistent with Mr Barnett's evidence that he must have instructed Mrs Fitzgerald to keep the words "reasonable endeavours" in clause 5.2 and that Punch was "*hopeful*" that Hamlin would submit a planning application within the 18 month period. Mr Barnett's evidence is, in my judgment, inconsistent with an absolute obligation. Mrs Fitzgerald's evidence that she must have discussed the nature of the obligation in the clause with Mr Barnett in order to take out the "*and commercially sensible*" words is also consistent with all parties' understanding that this was an obligation qualified by the use of reasonable endeavours having regard to the Planning Considerations. There is no evidence that Mrs Fitzgerald made a mistake in failing to delete these words or that she otherwise communicated to Mr Mourton on behalf of Hamlin that they should be deleted. Her actions in deleting the words "*and commercially sensible*" before "*endeavours*" are inconsistent with her having made any such mistake.

77. In my judgment, when they executed the document, the parties did not have a common intention that the words "*use reasonable endeavours to having due regard to the Planning Considerations*" should be deleted which, by mistake, the Option did not accurately record. To the contrary, on the basis of the evidence set out above, in my judgment the parties

intended that clause 5.2 should be in the terms in which it was in the executed Option. It also makes sense that any application for planning permission should have regard to the Planning Considerations; it would make no sense to ignore them.

78. Even if, contrary to my findings, the parties had the common intention that these words should be deleted, there was no "*outward expression of accord*" so that as a result of communication between them, the parties understood each other to share that intention. The email of 29 August 2013 from Mr Mourton which referred to Hamlin committing to an 18 month period was not something from which the parties could have understood each other to share the intention to delete the reasonable endeavours obligation.

79. Accordingly, in my judgment, the claim to rectification fails.

80. I note that while there was correspondence subsequently in early 2014 in which there was reference to needing to extend the Option period (which I will address further on the question of the interpretation of the Option), there was no correspondence in the run up to 5 March 2015 from Punch to Hamlin about there being an absolute obligation for a planning application to be submitted by 5 March 2015, or afterwards on the basis that one had not been put in. This would accord with Mr Barnett's evidence as to the obligation being one to use reasonable endeavours.

81. It follows that Mr McCreath's fallback arguments as to the Court refusing rectification as an equitable remedy do not arise. Had it been necessary to rule on them, I would have rejected them as, in my judgment, having regard to all of the correspondence and dealings which have occurred since March 2015, there has been no laches, nor can it be said that Punch is guilty of having not exercised the rights it would have had if it had been correct on rectification to enable Hamlin or its assignee, RV, reasonably to assume they would not be exercised. Further, I accept Ms Holland's submissions that rectification would have served a useful purpose, namely it would have allowed Punch to seek specific performance or to exercise its rights to give notice under the termination provisions of the Option.

Construction of the Option

82. The Property was land adjacent to a public house. It was in the green belt. It had at some stage been used as a pony sanctuary and been offered for sale on an unconditional basis in the past for the sum of £150,000, but no one had offered to purchase it.

83. The admissible background to the question of construction must include that the local planning authority, Hertsmere Borough Council, had adopted a Core Strategy document in January 2013. Although the evidence of Mr Mourton of Lodders and Mr Barnett of Punch was that they were both unaware of this Core Strategy, it is part of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time. Table 1 of that document set out the documents being prepared as part of the Local Plan, which in addition to the Core Strategy, included the "Site Allocations and Development Management Policies Plan" which was to provide site-specific allocations for a range of land uses with a policies map.

84. A further part of the admissible background is that the Property was in the part of Elstree in the green belt. Paragraph 3.14 of the Core Strategy addressed infilling, providing for a very limited amount of new housing, typically one or two dwellings in small gaps within

the built development of a village. A "development boundary" was proposed for, among others, the part of Elstree in the green belt, within which limited infilling would be considered. That boundary was to be defined as part of the Site Allocations DPD. Development outside that boundary would be considered contrary to the purposes of including land in the green belt and would be refused unless very special circumstances could be demonstrated. There was further commentary on the green belt at paragraph 5.7 of the Core Strategy.

85. It is clear from the Core Strategy that the Property was never going to be allocated for development pursuant to that document or the Site Allocations DPD for development as a residential care facility, notwithstanding Mr Robinson having said that there remained an opportunity to secure its allocation within that process. It might have been allocated for residential infilling if the development boundary extended to the Property (I was told in fact that it was not). But at paragraph 9.13, the Council committed to undertaking a partial review of the Core Strategy within 3 years of the adoption of the Development Plan Document. That may have led to a different outcome.

86. It was the evidence of both Mr Parkin and Mr Barnett that the Property was going to be developed at some point in the future. It was a case of when, not if. One can see why a reasonable person would have thought this when one looks at the photograph showing the lay of the land. It was also Mr Parkin's evidence that if anyone had put in a planning application for development of the Property in June 2013, it would have been refused. That is entirely consistent with the advice that both Hamlin and Punch were getting from their respective land advisers and with the contents of the Core Strategy document. In my judgment, this is part of the admissible background as a reasonable person would have understood advice from land advisers would reasonably have been available to the parties at the time of entering into the Option.

87. A further part of the admissible background, in my judgment, is the Heads of Terms document of 1 July 2013 (incorrectly dated 2012), which sets out a number of conditions to the offer which had been made by Hamlin including:

> "*11.3 The agreement to a 30 month option over the land, extendable if the "site allocation report" has yet to be adopted or we are awaiting the result of an application or appeal.*"

88. Although there was a lot of questioning of witnesses about what they understood and intended in various drafts of the Option, those matters are inadmissible and I do not take them into account.

89. Against that background, I turn to consider the words of the Option to arrive at an initial view of what the text requires and whether it is ambiguous, before going on to consider whether there is any justification for departing from that construction on the basis of contextual considerations and commercial sense.

90. It is important that the Option was a document carefully drafted by lawyers following negotiations over a period of weeks as set out above. The travelling draft went back and forth between the lawyers a number of times, giving plenty of scope for any issues about the drafting to have been addressed.

91. In my judgment, the natural and ordinary meaning of the words used in clause 4 is that the End Date has not yet occurred. The Specified Date of 6 March 2016 has long since passed. There has been no agreement between the parties in writing to extend the End Date. Therefore, under clause 4.2.2, the End Date is the latest date as shall be determined by the remainder of clause 4 of the Option. Given that (i) twenty Working Days before the Specified Date of 6 March 2016 (which would have been in February 2016) the local planning authority, Hertsmere Borough Council, had not resolved to allocate the Property for development and (ii) that it is common ground that none of the events in clause 4.4.1 to 4.4.4 has yet happened, the End Date, which is to be the date six weeks and twenty Working Days after the last of these to occur, has not been reached. Accordingly, on the natural and ordinary meaning of these words, the Option has not yet expired.

92. In my judgment, the wording is not ambiguous. It is not open to me to undertake an exercise in "*purposive interpretation*" in pursuit of some commercial common sense result to which the parties might have agreed, but to which *ex hypothesi* they do not appear to have agreed by their words. There is no justification for embarking on an exercise searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning of the words the parties have used.

93. Nonetheless, Ms Holland submits that the words lead to a commercially absurd result. Even if that were right, which I do not accept, if the language is unambiguous (as I have found), I am bound to apply those words. While in light of the authorities, I do not have to go beyond the natural and ordinary meaning of the words, in deference to her arguments, which she put forcefully but elegantly, I will address them.

94. The basis for Ms Holland saying it is commercially absurd is that against a background of only having paid £1.00 for the grant of the Option, the Property might never be allocated for development, in which case the Property would remain subject to the Option forever, which she says cannot have been intended. She submits that property transactions are all about certainty in terms of timing and the construction advanced by RV does not provide that. Rather for the payment of only £1.00, it ties up the Property for an indefinite period of time, during which it is subject to a number of restrictions including those in clause 8 as to what the owner can and cannot do with the Property in the meantime.

95. Alternatively it is said by Ms Holland it would be commercially absurd for an open ended option to be exercisable at a fixed price. If, for example, it takes 20 years for the Property to be allocated and in that time land values have gone up hugely, so that the Price in the Option of £2.61 million is much less than the value of the Property at that point 20 years later, that she says would be commercially absurd.

96. As to the former of these, it was possible at the date of the Option that the Property might never be allocated for development notwithstanding the belief of both parties that it would be developed at some point. It was also, however, possible that it might be allocated for development for residential purposes as part of the infilling policy under the Site Allocations DPD. That would have resulted, as Ms Holland accepted in argument, in the Option expiring without there ever being a Qualifying Planning Approval. In the meantime, Hamlin will have remained subject to the obligations in clause 5.1 of the Option to use all reasonable and commercially sensible endeavours to promote the Property through the planning process with a view to obtaining a Qualifying Planning Approval at

the earliest opportunity. This will have obliged Hamlin to have expended time, effort and money with no guarantee that it would ever achieve a Qualifying Planning Approval or would maintain the benefit of the Option until it obtained a Qualifying Planning Approval. Ms Holland relies on this as demonstrating that this construction is commercially absurd, as she says there cannot be perpetual obligations on the developer that it has always to be doing this.

97. I do not accept Ms Holland's submission that the natural words lead to a commercially absurd outcome. It may well be an unusual outcome that in certain events, the Property could remain subject to, and restricted by, the obligations in the Option in theory in perpetuity. In my judgment, however, those were not events which were in the parties' contemplation, nor that a reasonable person with all the background knowledge available to the parties would have had in his contemplation, as the background factual matrix was that it was anticipated that this Property would be allocated albeit almost certainly not in the then recently adopted Core Strategy. Hamlin took the risk of having to use all reasonable and commercially sensible endeavours to promote the Property with a view to obtaining a Qualifying Planning Permission and if the land is never allocated, it will (unless and until the parties come to some alternative agreement) remain subject to those obligations. If it (or now its assignee, RV) fails to comply with those obligations, Punch is left with remedies under the Option, in particular it would have the ability to exercise the termination provisions under clause 17.1.5 of the Option. Alternatively, Punch could seek an order for specific performance of the developer's obligations. It is not the case, in my judgment, that the Property will necessarily remain subject to the Option in perpetuity if it is never allocated for development.

98. As to the argument that the potentially open ended nature of the Option might lead to a result where the Price in the Option of £2.61 million is much less than the value of the Property at the time the Option is exercised, I do accept that the wording is favourable to the developer, but that does not make it commercially absurd or indeed unworkable. This, in my judgment, is simply the effect of the bargain the parties made. In so far as Punch is unhappy with this outcome, this is because it has agreed something which with hindsight does not serve its interests. Another way of putting this is the bargain that it made has turned out badly for it. It is no part of the Court's function to re-write a bad bargain.

99. Ms Holland further submitted that, when one takes into account the Heads of Terms as part of the background factual matrix to the Option, the genesis and aim of the Option was to create a 30-month option over the Property and that the extension purposes in clause 4.4 could never have been the actual commercial objective as regards the overall term of the Option. In my judgment, this is an impermissible crossing of the line between referring to previous communications to identify the "genesis and aim of the transaction" and relying on such evidence to show what the parties intended a particular provision in a contract to mean. The Heads of Terms show, in my judgment, the genesis and aim of the transaction was to create an Option over the Property in favour of Hamlin, exercisable at the price of £2.61 million, for an initial period of 30 months, but subject to extension. It cannot be used to say that it was only to be a 30 month option in the event of the Property not having been allocated for development. The terms of the Option were to be negotiated subsequently and they were in due course.

100. It follows from the above that I reject Ms Holland's submission that there is any need for construction by rectification by adding the additional wording to clause 4.4 and the new

sub-clause 4.4.5 (even if it read "*the local authority does not resolve to allocate the Property for development*" as Ms Holland contended it should to make it work) in order to construe this Option properly. In my judgment inserting the words, which would have the effect of bringing the Option to an end if the Property was not allocated pursuant to the review of the Hertsmere Local Plan 2003 which was ongoing in 2013, would rather be entirely contrary to the understanding that the Property was highly unlikely, or not going, to be allocated in that review, or at the very least to be allocated for development as a residential care facility.

101. In the course of the hearing, I was shown and Mr Parkin and Mr Mourton were taken to correspondence from early 2014 in which they were proceeding on the basis that the Option was only for 30 months and in which Punch was being asked to agree to an extension of this period. I do not need to set out that correspondence in detail here. Mr Parkin explained that he kept on his desk an aide memoire (which he produced) which listed a number of projects on a single piece of A4 paper. There was a column for notes. When he first engaged in this correspondence seeking an extension to the Option, he had worked simply from that aide memoire which in the column for notes said only "*Option EXCHANGED 6/9/2013 for 30 months ie to 6/3/2016*". He said he had not gone back to look at the Option itself. It was only after Punch said that it was not prepared to extend the Option or at least not without changing substantially the commercial terms that he and Mr Mourton went back to have a proper look at the Option. Having done so, on 18 March 2014 Mr Parkin wrote to Mr Tole of Punch saying that it was not necessary to extend the Option Agreement as it will continue until the Council allocate the site.

102. While Ms Holland put to both Mr Parkin and Mr Mourton that this was a case of building an argument after the event and was not what they really understood the Option to mean, she did not seek to say that this was an aid to construction of the Option as such. This is plainly correct, it was conduct many months after the Option was agreed and I accept Mr Parkin's evidence as to the use of the aide memoire and only subsequently going back to check the terms of the Option.

103. I also note the evidence of Mr Mills in paragraph 20 of his witness statement that in September 2021 RV secured an allocation of the Property in the latest draft local Hertsmere plan. The fact that this has been achieved is of no bearing on the interpretation of the Option and I mention it only to make clear that I have not taken this into account.

104. It follows from what I have said that in my judgment the Option agreement means what it says and, subject to the question of implied terms, the End Date under the Option has not yet been reached.

Implied Terms

105. Ms Holland says that if I reject her submissions as to construction, I should nonetheless hold that the words that she wishes to add to clause 4.4 and the new sub-clause 4.4.5 albeit so that it reads "*the local authority does not resolve to allocate the Property for development*" fall to be implied into the Option.

106. She says that the term is reasonable and equitable, it is necessary to give business efficacy or so obvious as to go without saying, it is capable of clear expression and it does not contradict an express term.

107. Mr McCreath on the other hand says that the Court should be very slow to imply a term into a detailed contract such as the Option, that even if there was some lacuna that is not alone enough for a term to be implied; rather Punch must show that there is a solution for the lacuna which is the only solution, and that the Court cannot imply a term that contradicts the express terms of the contract.

108. The first thing to note is that the terms which Ms Holland seeks to be implied are significant additions to the Option. In so far as her new clause 4.4.5 is concerned, I could discern and Ms Holland could offer no reason why it made sense or any need for the End Date to be a date 6 weeks and 20 Working Days after the local authority had not resolved to allocate the Property for development in the then current review of the local plan. If the Option was to end if the Property was not allocated for development pursuant to that review, it would seem to make much more sense for the Option to terminate immediately rather than a period sometime afterwards. Ms Holland's objective could be achieved much more simply by adding to clause 4.2 a sub-clause stating that the failure to allocate in the then current review of the local plan would be one possibility for the End Date.

109. However, more fundamentally, in my judgment the terms sought to be implied do not satisfy the requirements for implication. They are not reasonable and equitable in that they run contrary to the background factual matrix, which I have found above, that it was highly unlikely that this Property was going to be allocated for development in the then current review of the 2003 local plan. The effect of such an implication would be that Hamlin had to comply with its obligations under clause 5.1 of the Option in the almost certain knowledge that its time, effort and expenditure would be in vain.

110. Further, in my judgment these terms are not necessary to give business efficacy to the Option, nor are they so obvious as to go without saying. I remind myself that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated and that the concept of necessity must not be watered down. Ms Holland's submissions fall foul of both of these principles. The Option works perfectly well without needing to imply the terms Ms Holland urges upon me.

111. Further, in my judgment, as Mr McCreath submitted, even if the officious bystander were to scratch his head about the failure to deal with the possibility of the Option remaining in place in an environment of land value inflation, it cannot be said that this is the solution that would have been come up with. He submitted that there were at least 5 solutions, which were (1) telling the officious bystander to mind his own business, (2) adopting the proposal advanced by Ms Holland of going as far as the Site Allocation report but no further, (3) waiting for the review of the Core Strategy which had been promised within 3 years (a proposal advanced by Punch's solicitors in July 2014), (4) putting in a fixed long stop date (a proposal advanced by Punch's solicitors in 2019) or (5) allowing the Option to extend but including a mechanism for revaluing the Property and making the sum payable for exercising the Option that which an independent expert could determine (something suggested by Mr Tole of Punch in early 2014). In my judgment those submissions are well founded and go to demonstrate that the terms contended for are not necessary, nor ones that are so obvious as to go without saying.

112. The terms sought to be implied may be said not to be inconsistent with express terms in the Option, but in my judgment they do subvert the contractual scheme. As I have found above, the true construction of the Option is to allow it to continue until after the Property is allocated for development in the future and for the developer to have a meaningful chance to apply for planning permission. The effect of the implied terms is to the opposite, as I have set out above.

113. In the circumstances set out, in my judgment these terms do not meet the tests for implication and I hold that they were not implied into the Option.

Conclusion

114. For the reasons set out:
(a) Punch's claim to rectification of clause 5.2 fails;
(b) On the true construction of the Option, the End Date has not occurred;
(c) The terms which Punch sought to imply are not implied into the Option; and accordingly
(d) The Option remains in place.

115. I would ask the parties to draw up an order which reflects this judgment. If the parties cannot agree the terms of the order, including terms as to costs, I will consider submissions in writing in the first instance.