Neutral Citation Number: [2015] EWHC 2002 (Ch)

Case No: HC-2014-001796

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2015

Before :

MRS JUSTICE PROUDMAN

- -

Between :

SAINSBURY'S SUPERMARKETS LIMITED	**Claimant**
- and -	
BRISTOL ROVERS (1883) LIMITED	**Defendant**

- -
- -

Mark Wonnacott QC and Philip Sissons (instructed by **Dentons UKMEA LLP**) for the **Claimant**
David Matthias QC and George Mackenzie (instructed by **Burges Salmon LLP**) for the **Defendant**

Hearing dates: 15/18/19/20/21/and 22/05/15

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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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THE HON. MRS JUSTICE PROUDMAN

Mrs Justice Proudman :

1. This is an expedited trial of liability only to determine the status of a conditional contract dated 28 March 2011 (varied by a supplemental agreement dated 6 December 2011) for sale of the Memorial Stadium, Horfield, Bristol by the defendant ("the Club") to the claimant ("Sainsbury's"). The contract (comprising the original contract and a supplemental contract) is, where the context admits, compendiously described as "the Agreement" in this judgment and some relevant parts of it are annexed. Sainsbury's case is that it has lawfully terminated the Agreement for non-satisfaction of conditions precedent; the Club's case is that the Agreement is either still on foot or it has been terminated in breach of contract.

2. I have had the benefit of submissions from Mr Mark Wonnacott QC and Mr Philip Sissons on behalf of Sainsbury's and Mr David Matthias QC and Mr George Mackenzie on behalf of the Club, although oral submissions were made by leading counsel only. I heard oral evidence from Mr Christopher Templeman, Mr Ben Littman, Mr Tristan Hutton and Mr Nigel Mann for Sainsbury's and from Mr Toni Watola, Mr Steve Gosling, Mr Jim Tarzey, Mr Mark Curtis and Mr Spencer Wilson for the Club.

Background

3. The Club's ground is a sports stadium ("the Memorial Stadium") to the north of Bristol. In 2010, the Club wanted to move to a new stadium which it intended to build on the Frenchay campus of the University of the West of England ("UWE") and Sainsbury's was looking for a development site in Bristol for a new supermarket. The idea was therefore that Sainsbury's would buy the Memorial Stadium for £30m and would lease it back to the Club at a peppercorn rent while the Club built its new stadium. Once the Club moved to its new stadium, Sainsbury's would develop the Memorial Stadium as a supermarket. The terms of this deal had been agreed in principle by negotiation between Mr Jamie Baker, a development surveyor employed by Sainsbury's, and Mr Nick Higgs and Mr Toni Watola on behalf of the Club, and on 10 August 2010 Sainsbury's Investment Board (the committee of the management board with responsibility for approving any expenditure in excess of £1 million) approved the deal, again in principle.

4. On 28 March 2011 the Club and Sainsbury's entered into the Agreement. The Agreement in its original form contained five conditions precedent. The five conditions which had to be satisfied were, in broad outline:

(1) Sainsbury's had to obtain an Acceptable Store Planning Permission (as defined) to redevelop the Memorial Stadium as a supermarket (the Store Planning Condition);

(2) The Club had to obtain an Acceptable Stadium Planning Permission to build the new stadium at Frenchay (the Stadium Planning Condition). The Stadium Planning Condition is not in issue in these proceedings;

(3) The Club had to enter into an acceptable conditional development agreement with UWE for the construction of the new stadium at Frenchay, satisfying all the conditions in that development agreement so that it became unconditional (the Relocation Condition);

(4) The Club had to demonstrate that it had the financial means to carry out that development, so that Sainsbury's would either be sure that the Club was a satisfactory tenant, or avoid all the bad publicity of a forced eviction (the Funding Condition); and

(5) The Club had to enter into any necessary infrastructure agreements (e.g. with the highway authority) required for redevelopment of the Memorial Stadium as a supermarket, and for development of the new stadium at Frenchay (the Infrastructure Condition).

5. On 6 December 2011, the Club entered into a conditional agreement for the development of the stadium at Frenchay with UWE. On the same day, the Club entered into a supplemental agreement with Sainsbury's, varying the original contract between them. There were three important provisions:

(1) Another Condition was added to the Agreement (the Retention Condition) the broad effect of which was that the Club had to show that the cost of building the new stadium at Frenchay would not exceed money being made available from the purchase for that purpose.

(2) Sainsbury's confirmed that it "is reasonably satisfied that the Funding Condition is reasonably likely to be satisfied", and that Clause 3.2 of the Agreement (which gave Sainsbury's the right to terminate the agreement if it was not likely that the Funding Condition would be satisfied) was to be deleted.

(3) The "Long Stop Date" (the last date when the "Cut Off Date" could occur) was brought forward from 31 May 2015 to 14 December 2014.

6. By Clause 3.1 (a) of the Agreement it was agreed that if the conditions other than the Infrastructure Condition were not satisfied by the "Cut Off Date" then either party might terminate the Agreement by service of written notice to the other, whereupon the Agreement should determine on the date 20 working days after the date of service of the Termination Notice, unless all the Conditions were satisfied prior to termination.

7. On 4 May 2012 Sainsbury's submitted an application to the Local Planning Authority, Bristol City Council ("BCC"), for planning permission for a new store on the site of the Memorial Stadium. The application sought the ability for Sainsbury's to deliver to the store 24 hours a day, every day of the week.

8. The Agreement provided that a Planning Refusal included the grant of planning permission which was not an acceptable planning permission, that is to say an Acceptable Store Planning Permission which contained no Store Onerous Conditions. "Store Onerous Conditions" was defined to include any condition which had the effect of:

> "Restricting the delivery and despatch of goods to and from the Store to between the hours of 5 am to midnight on any day…"

9. There was some argument about whether the word "to" after "the Store" is otiose. Mr Matthias said that it is not, as the argument centres around whether the restriction is one about hours alone, or whether other matters such as loads are relevant. However, it appears to be Sainsbury's position that for present purposes the thrust of the restriction relates to hours alone and, importantly, that the second word "to" is indeed otiose on that basis. Mr Matthias said that because of the rogue second "to", the s.73 application (see below) made by the Club was for deliveries between 5 am and 00.01 am, thus ensuring that there was no restriction "to" those hours.

10. The evidence was that Sainsbury's operational requirements require it to be able to deliver goods two hours before the store opened. Thus it is vital for Sainsbury's that there should be no restriction on delivery hours between 5 am and 7 am, Monday to Friday. In answer to questions from the court, Sainsbury's witnesses said that the same did not apply in practice on Sundays and Bank Holidays, when the store was to open at 10 am.

11. Sainsbury's application was submitted in accordance with Sainsbury's obligation under [2.1] of Schedule 1 to the Agreement to submit a Store Planning Application within nine months of the later of the date of the Agreement or the Club entering into the agreement with UWE. Sainsbury's application was also submitted within two months of the Club's application for planning permission for its new stadium, as envisaged by the requirement of Clause 31.2 of the Agreement that the parties work together to ensure that their respective planning applications be submitted in close proximity to each other.

12. The planning application was prepared and submitted on behalf of Sainsbury's by White Young Green Environment Planning Transport Limited ("WYG"). Mr Hutton of WYG was responsible. Mr Mann, also of WYG, was the consultant in respect of acoustics and air quality aspects. Mr Littman had by this time taken over from Mr Baker as the individual at Sainsbury's responsible for the day-to-day conduct and progression of the project.

13. Although BCC granted planning permission (by resolution on 16 January 2013 and formally on 14 June 2013), Condition 11 of the permission limited deliveries to the store to a period between the hours of 6 am and 11 pm on weekdays and 9 am to 8 pm on Sundays and Bank Holidays, reflecting what Mr Hutton had earlier reported as being the likely outcome. After some argument, the Club agreed on 26 September 2013 that this was a Store Onerous Condition so that there was a deemed Planning Refusal for the purposes of the Agreement.

14. Between the resolution and the formal grant of planning permission, Sainsbury's planning consultants began to address the issue of the restriction on the proposed delivery hours in the draft consent. In April 2013, Mr John Whittaker of WYG had a conversation with a planning officer, Zoe Willcox. In his email of 5 April 2013 to Mr Littman, Mr Whittaker reported that Ms Willcox's view was that the best approach to obtaining an extension of the delivery hours would be to wait until the store became operational and the actual noise levels could be measured. Mr Littman replied that this approach was commercially unacceptable because Sainsbury's would then be irrevocably committed to the project and would be at risk of BCC refusing any extension of the hours. It appears to be common ground that this approach is indeed unacceptable.

15. In consideration of the Club's agreement that the restriction on deliveries to the store was a Store Onerous Condition, Sainsbury's agreed in September 2013 to pursue an application to vary Condition 11 by way of s.73 of the Town and Country Planning Act 1990 ("s.73"): "Determination of applications to develop land without compliance with conditions previously attached". Subject to the issue of whether this application was made "to" the Secretary of State and was therefore strictly an Appeal within the definition contained in the Agreement, this obligation overrode the provisions in [2.11] of Schedule 1 to the Agreement allowing Sainsbury's to pursue an Appeal in its absolute discretion unless Planning Counsel confirmed that such an Appeal had at least a 60% chance of success before the Long Stop Date.

16. In addition, BCC required that a Community Infrastructure Levy ("CIL") be paid. CIL enabled planning authorities to levy payments for investment in local infrastructure. CIL was anticipated by Schedule 5 to the Agreement, which provided in summary that Sainsbury's would only be liable for £500,000 of the total Planning Gain Liability (including CIL) levied by BCC and that either the Club would pay the balance or either side could serve a Termination Notice.

17. By this stage, Sainsbury's Investment Board had held a number of so-called "pipeline meetings", discussing this and other store developments. It is evident that the Return on Capital Employed ("ROCE") for the site was not "hitting hurdle" so that Sainsbury's would not make the originally anticipated profit on the store. Mr Littman said in his oral evidence,

> "The deal might not have stacked up financially for Sainsbury's any more but we had a contract, and so therefore Sainsbury's and I, as its agent, were bound by that contract."

He pointed out that Sainsbury's had been looking at ways to rectify the delivery hours condition since BCC's resolution in January 2013.

18. And Mr Templeman said in his oral evidence:

> "There's definitely been a change of economic circumstances, and what was originally conceived as a scheme no longer meets our financial hurdles, and therefore the board will not invest in building the store, and to the extent that there is an opportunity to terminate the contract, the board would have opted for us to take that decision."

19. Sainsbury's desire to terminate the Agreement if it lawfully could was plain from the summer of 2013. Indeed on 13 July 2013 Mr Neil Sachdev, a Property Director at Sainsbury's, wrote in an e-mail that "we don't want to do this now as economics have changed"; on 7 August 2013 he wrote that he "hopes the JR [see below] succeeds", and on 15 November 2013, Mr Daniel Cizek, a public affairs manager at Sainsbury's, said in an e-mail:

> "We have the TRASH JR excuse to fall back on. Can easily say the uncertainty it created made it impossible to commit to developing in the medium term."

20. Mr Templeman explained the email from Mr Sachdev away by saying that it expressed the writer's personal view, and both he and Mr Littman explained the context, but the emails are nevertheless telling. Although it did not apparently know about the emails the Club was becoming increasingly concerned about Sainsbury's attitude to the Agreement.

21. Sainsbury's made it clear that it would serve a Termination Notice if the Club did not agree to produce the balance of CIL. Sainsbury's was not prepared to pay any contribution to CIL above the threshold provided in the Agreement, despite attempts by Mr Watola to persuade it to do so. Following further discussions, the Club ultimately agreed to reduce the purchase price to meet the excess, and that decision was confirmed by a letter dated 8 August 2013 from its solicitors, Burges Salmon LLP ("Burges Salmon").

22. In October 2013 Mr Littman instructed WYG to prepare its s. 73 application. It is fundamental to Mr Matthias's case that the application was prepared in bad faith, in the hope and expectation that it would fail. It was prepared in the teeth of TRASHorfield's application for judicial review at a time, he says, when the political climate meant that it was bound to fail. There were 44 objections to it. Sainsbury's accepted that BCC did not want to be seen to make a finding on it so that the final decision was made by way of delegated refusal.

23. Mr Littman however insisted (as did the other witnesses from Sainsbury's) that,

> "There wasn't, from my perspective, a hope either way as to whether the Section 73 would be successful or indeed fail."

24. Mr Hutton and Mr Mann gave evidence. They both refused to accede to Mr Matthias's suggestion to them that Sainsbury's s.73 application was done "on the cheap", saying that they were given everything they asked for. Both were protective about WYG's Reports. It is plain that they did not regard Sainsbury's s. 73 application as in any way lacking save that Mr Hutton advised Sainsbury's to engage with and lobby local councillors which it did not do.

25. By decision notice dated 28 January 2014 BCC, through officers acting under delegated powers, refused Sainsbury's s.73 application.

26. No Termination Notice has in fact been served, perhaps because the Club threatened Sainsbury's with an injunction preventing it from doing so. Instead, the parties agreed that Sainsbury's would be deemed to have served a Termination Notice on the first day when it could lawfully have done so after 27 October 2014 when it said it was going to serve such a notice. The effect of service of a Termination Notice is that the Agreement is terminated 20 working days later, unless all the Conditions have been satisfied before the expiry of the 20 days. The Agreement incorporates the provisions for service in the Standard Conditions of Sale, in practice adding two days. Sainsbury's say that it would have served a Termination Notice on 29 October 2014. If that is correct, the relevant date when the Agreement would have terminated would be 26 November 2014. If on the other hand Sainsbury's was only entitled to serve a Termination Notice on the Long Stop Date (that is to say 14 December 2014), the relevant date would be 14 January 2015.

The issues

27. There is little doubt that the Agreement is tortuously, laboriously and in some respects badly, drafted. It makes any draftsman itch to have a try at it. However I have to decide what it means.

28. The issues are, in summary, whether one or more of the Conditions remained unsatisfied on the relevant Termination Date; whether they would have been satisfied but for some breach of contract by Sainsbury's; and what the consequences are in any event. This involves the following questions:

- When did the Cut Off Date occur?
- Was Sainsbury's obliged to continue trying to obtain an Acceptable Store Planning Permission after the Cut Off Date?
- Could Sainsbury's have done more to satisfy the Store Planning Permission (either before or after the Cut Off Date) and if so would the Store Planning Permission have been satisfied before the Termination Date?
- Would the other outstanding conditions have been satisfied before the Termination Date?

When did the Cut Off Date occur?

29. The Cut Off Date is defined in the first instance as the first anniversary of the last to be submitted of the Store Planning Application and the Stadium Planning Application, that is to say on 4 May 2013. However on 4 May 2013 Sainsbury's was still waiting for the formal decision and the Cut Off Date is extended in various circumstances, for example if Proceedings have been instituted. I therefore propose to consider whether the date was extended.

Appeal

30. First, Mr Wonnacott submitted that there was no "Appeal" within the definition because there was no application "to the Secretary of State" in accordance with s.73. S.73 applies to an application to the planning authority only.

31. The Secretary of State "may direct that the application must be referred to him" under s.76A, but this only applies to "Major Infrastructure Projects" of which it is common

ground that the Club's project to build a new stadium at Frenchay was one, but a new supermarket was not. The references to an "Appeal" apply equally to the seller's (i.e. the Club's) planning obligations under Schedule 2 as they do to the buyer's (i.e. Sainsbury's) planning obligations under Schedule 1, so that s.76A potentially applies.

32. However, the definition of a "Call-in" in the Agreement ("the direction by the Secretary of State that a Planning Application be referred to him for determination under Section 77 of the Planning Act") shows that the meaning of an application under s.73 must have some scope other than under (a), the Call-In.

33. The application is not "to" the Secretary of State in any case, but is "referred to" the Secretary of State by virtue of directions given under s. 77 (1). I asked the parties to explain how the matter comes before the Secretary of State for directions in the first place and I was referred to *The Town and Country Planning (Consultation) (England) Direction 2009*, regulations 9, 10 and 11.

34. I therefore have to decide whether, as Mr Matthias contends, the definition is simply wrong and the words "to the Secretary of State" in the definition of "Appeal" must be ignored or whether, as Mr Wonnacott contends, although the wording is technically inappropriate it must be given some meaning and cannot simply be ignored. The Secretary of State is referred to again in various places, most importantly in the definition of "Cut Off Date" at (iii) "unless within such period an Appeal shall have been lodged to [sic] the Secretary of State".

35. I cannot assume that the draftsman did not understand the procedure at all; for example, in the definition of "Judicial Review" he draws a proper distinction between applications arising from Acceptable Planning Permission or Planning Refusal by the Local Planning Authority on the one hand and by the Secretary of State on the other. Again, he was aware (see (a) of the definition of Cut Off Date) that a planning application was submitted to the local planning authority and not to the Secretary of State.

36. As there is some scope under s. 76A for an application other than a Call-In under s.77, and as I should try and give the words "to the Secretary of State" some meaning, I am not prepared to find that, as Mr Matthias contends, the words must simply be ignored. Tentatively, therefore, I decide that there is no Appeal in the strict sense where there is a mere application to the planning authority, BCC. However, that decision is irrelevant because that is not the way the parties approached the matter.

37. I therefore go on to consider the estoppel by convention argument. Mr Matthias says that it was assumed between the Club and Sainsbury's that the s.73 application which Sainsbury's made was indeed an Appeal for the purpose of the definition of "the Cut Off Date" so that Sainsbury's is estopped from denying that it was, on the basis that it would be unjust to allow either party to go back on the assumption: see *per* Lord Steyn in *Republic of India v. India Steamship Co Limited (The Indian Grace) (No 2)* [1998] AC 878 at 914-5 and see also Staughton LJ in the Court of Appeal at 890-891.

38. Mr Wonnacott however submits that the shared assumption was indeed such that if the s.73 application had been successful in varying Condition 11, Sainsbury's would have been estopped from denying that the planning permission was an Acceptable Store Planning Permission. However, he denies that there was any shared assumption, let

alone representation, that in the event that the s.73 application was *un*successful, Sainsbury's would be precluded from relying upon the strict provisions of the Agreement as to termination. Thus the shared assumption did not affect termination rights under the agreement. Mr Wonnacott submits that Sainsbury's never waived the right to rely on the delivery hours restriction in the Agreement.

39. The agreement between the parties is contained in or evidenced by a letter from Burges Salmon dated 26 September 2013 and the reply from Dentons LLP ("Dentons") dated 9 October 2013. The Agreement was varied in the respects referred to in the correspondence.

40. The reference in Burges Salmon's letter (at [2.3]) to "Your client will pursue a Section 73 Application in relation to Condition 11 without taking Counsel's advice as to the chances of success of that application" suggests that the parties believed and acted on the assumption that this would count as an Appeal and that the Appeal would be in time. I do not therefore think it is open to Sainsbury's to say that it was not an "Appeal" for all the purposes of the Agreement or that it was not brought in time.

41. Mr Wonnacott says that if a s.73 Application made to BCC had counted as an Appeal, that would have put it within Sainsbury's power to defer the happening of the Cut Off Date as long as it liked to the Long Stop Date. Sainsbury's could have just put in a succession of s.73 Applications, sterilising the site and the Cut Off Date would not have occurred. However such s.73 applications would not have been made in good faith, nor would they have satisfied the requirements of [2.11(a)] of Schedule 1 to the Agreement so that even on Mr Wonnacott's argument that the obligation of good faith only applied until the Cut Off Date, Sainsbury's could not in fact have pursued this course.

42. I therefore find that Sainsbury's s.73 application was an Appeal within the definition and, moreover, that it was brought in time.

43. There is however the further question whether any re-submission of the application under s.73 (after a withdrawal) counts as an Appeal within the definition. I note that it is the Club's pleaded case that it does: see [11], [14A] and [14B] of the Re-Re-Amended Particulars of Claim.

44. It seems to me that (pleading aside) it does, as it was the clear understanding in reliance upon which both parties conducted their affairs that any s.73 application would be an "Appeal", notwithstanding the reference to "to the Secretary of State". In other words, the parties acted on a shared (but in my above conclusion mistaken) assumption that an application pursuant to s.73 was an Appeal. It would be unjust and unconscionable for Sainsbury's to go back now on that shared assumption as it unknowingly encouraged the Club to assume that a s.73 application was an Appeal. That is notwithstanding that it is to the advantage of the Club to say that a s.73 application was an Appeal in relation to the application which it did make, but to its disadvantage to say that it was an Appeal in relation to the hypothetical re-submission. The Club cannot approbate and reprobate, especially as it is the Club's pleaded case that a re-submitted s.73 application would be an Appeal: see [81.2] of the Re-Re-Amended Defence and Counterclaim.

45. The question is whether Sainsbury's is estopped by convention not only from saying that a s.73 application was not an Appeal, but also that it gave up its entitlement in relation to *any* s.73 application to insist upon Planning Counsel opining that the

prospects of success were 60% or greater: see [11] of the Re-Re-Amended Particulars of Claim. That paragraph implies that the two matters go together in the sentence which reads,

> "…the Claimant offered through its solicitors to pursue an Appeal by way of an application pursuant to section 73 without first seeking the advice of Planning Counsel as to the prospects of such an Appeal succeeding, if the Defendant would agree that Condition 11 of the Original Permission constituted a Store Onerous Condition."

46. Whether the two matters go together or not is a matter of construction of the agreement contained in the correspondence between Burges Salmon and Dentons. It seems to me plain on the wording ("a s.73 application") that Sainsbury's only agreed to one s.73 application being made without resort to Planning Counsel.

Proceedings

47. On 25 July 2013, Mr Richard Buxton, a solicitor acting on behalf of a group called TRASHorfield (Traders and Residents Against Sainsbury's Horfield), sent a pre-action protocol letter to BCC, with copies to Sainsbury's and WYG, threatening the issue of a judicial review application against BCC's decision to grant Sainsbury's planning application. The judicial review application was issued on 4 September 2013, permission was given on 15 November 2013 and the application was ultimately dismissed by Hickinbottom J on 20 March 2014. There was no appeal; the latest date for appealing was 10 April 2014.

48. Sainsbury's did not become actively involved in the judicial review. Mr Littman said this was because, since the challenge was against the decision of BCC, it saw no particular advantage in doing so and because Mr Littman was lobbied by the local MP and was wary of involving Sainsbury's in political matters. Sainsbury's did, however, at the request of BCC, enter into an amended agreement under s.106 of the 1990 Act (amending the existing agreement of 14 June 2013 on 14 February 2014) specifically for the purpose of improving BCC's chances of successfully defending the judicial review application: "to strengthen [BCC's] defence against this challenge" - see an email from BCC's in-house solicitor dated 28 November 2013 which was copied to Burges Salmon. Mr Matthias said, however, that Sainsbury's non-involvement was symptomatic of its general attitude, although it does not appear that BCC or the Club, which did involve itself in resisting the application, specifically asked Sainsbury's to participate.

49. Mr Matthias says that these proceedings were Proceedings which affected the definition of "the Cut Off Date". Mr Wonnacott says that the definition of "Judicial Review" means what it says. It is (a) alone which is relevant. This defines the expression as:

> "an application for judicial review under Rule 53 of the Civil Procedure Rules:

(i) made by any third party arising from the grant of an Acceptable Planning Permission by the Local Planning Authority; or

(ii) arising from a Planning Refusal by the Local Planning Authority in relation to any Planning Application;"

50. Mr Wonnacott says that as third parties are only mentioned in (i), and there never has been an Acceptable Planning Permission, TRASHorfield's application can have no relevance. Mr Matthias's submission, he says, requires violence to be done to the wording of the definition. A third party can only make an application for Judicial Review where an Acceptable Planning Permission has been granted.

51. It is true that the definition of Judicial Review at (ii) does not mention "any third party", but third parties are not expressly excluded. Mr Matthias says that there is no sense in excluding third parties from (ii) when they are expressly included within (i) so that while only third parties would apply under (i), the draftsman's view was that anyone could apply under (ii) in circumstances such as the present. The third party would only know that planning permission had been given and the parties to the Agreement would need the extra time to consider their position when the dust of the proceedings brought by the third party had settled.

52. Mr Wonnacott says that his interpretation is supported by the extension of the Cut Off Date for "Proceedings", which contemplates that the Proceedings will either relate to, or will be to obtain, an Acceptable Planning Permission.

53. I agree that there would be no commercial purpose in extending time for the Cut Off Date in relation to proceedings which could not result in an Acceptable Planning Permission, in other words where the parties have already agreed that the planning permission was in fact a deemed Planning Refusal. In such circumstances there would be no dust to settle. I therefore agree with Mr Wonnacott.

54. However the question of construction as to whether a third party judicial review against a Planning Refusal is within the definition of Proceedings is unimportant in view of my finding below that Sainsbury's duties to act in good faith survived the Cut Off Date. The date for service of a Termination Notice cannot, because of the agreement to that effect, fall before 27 October 2014 in any event.

The Challenge Period

55. As I have said, the "Challenge Period" does not provide for what happens after a Planning Refusal. It is common ground that this is a mistake. Under the definition the Challenge Period is expressly "calculated from and including the relevant Permission Date", whereas the definition of the "Cut Off Date" says in (c) "the Challenge Period shall not have expired after the date of grant of a Planning Permission or the date of a Planning Refusal", and in (iii) "the expiry of the Challenge Period following the date of issue of a Planning Refusal", thus assuming that there can be a Challenge Period following the issue of a Planning Refusal. One therefore has to construe the Agreement according to what the parties must have had in mind.

56. Mr Matthias submits that the extension to the Cut Off Date where the challenge is by way of appeal is impliedly the six month period for appealing to the Secretary of State under s.78. This seems to me to be arbitrary and is difficult to fit with the fact that under (a) of the definition the time limit of three months and two weeks is said to apply to an application under s.73. Mr Wonnacott submits that the same Challenge Period would apply to a Planning Refusal as to an Acceptable Planning Permission, that is to say, three months and two weeks. I agree.

57. There is however also the question of whether it is necessary to imply into (i) of the definition of the Cut Off Date the words "or the Appeal is" after "the date on which such Proceedings are". Mr Matthias says this is unnecessary; Mr Wonnacott says one has to imply the words because of (iii). Again, I think Mr Wonnacott is correct, but, again, it does not matter because of my finding below that the duty of good faith survives the Cut Off Date.

Schedule 1 [2.8]; one or more than one application?

58. Mr Wonnacott says that the procedure prescribed by the Agreement provides for only one planning application by Sainsbury's, save in the circumstances where a second one is expressly provided for. He says that once the Cut Off Date had occurred, the Agreement gave both parties the right to serve a Termination Notice (for any reason at all) because there was nothing more that either of them could require the other to do. Thus anything that the parties chose to do after the Cut Off Date was a matter of choice, not obligation.

59. Mr Wonnacott submits that the obligations in the Agreement which Sainsbury's agreed to carry out in good faith are all set out in [2] of Schedule 1 to the Agreement, they are set out in strict chronological order and they all pre-date and lead up to the Cut Off Date.

60. Mr Matthias on the other hand says that the only significance of the Cut Off Date is that when it arises each party acquires the power to serve a Termination Notice, so that each party becomes liable to be served with a Termination Notice. There is no support for the proposition that the Cut Off Date has any additional contractual significance, in particular that it has the effect of extinguishing the obligations of good faith, mutual assistance or reasonable endeavours provided for in Clause 31. Clause 3.1 is concerned only with the effects of service of a lawful Termination Notice. If a party wished to terminate the Agreement after the Cut Off Date it could serve a Termination Notice but otherwise the Agreement, including the reasonable endeavours provision, continued.

61. I should say that two dates have been proffered by Mr Wonnacott for possible Termination Dates of the Agreement; 26 November 2014 and (on the assumption that the Long Stop Date is the Cut Off date) 14 January 2015. I assume the reason for taking the Cut Off Date as the Long Stop Date is in case I decide (and I have not done so) that the Challenge Period is the period of six months rather than three months and two weeks.

62. Mr Wonnacott's case is that Sainsbury's and the Club agreed that they would comply with their respective obligations in Schedules 1 to 4 of the Agreement and the Cut Off Date occurs when the obligations in Schedule 1 and Schedule 2 have been performed but Acceptable Store (or Stadium) Planning Permission has not been obtained. He says the Cut Off Date marks the point where a party has used reasonable endeavours to obtain an acceptable planning permission first time round and any Appeal has been exhausted. Thus, he argues at [91]-[92] of his closing submissions, the Cut Off Date is the cut-off point:

> "because there is nothing more which the party whose obligation it is to try and obtain that permission is required to do to try and achieve it under the contract.
>
> …So, once the Cut-Off Date had occurred, the contract gave each party the right to serve a Termination Notice for any reason or for no reason at all; precisely because there was nothing more that either of them could require the other to do, or compel the other to allow them to do, in order to achieve the satisfaction of that Planning Condition. There is no term to the contrary to be implied."

63. Thus it follows, he argues, that the obligations under [2.8] of Schedule 1 also came to an end after one application (subject to the express provision for another application) and one appeal.

64. The first thing that Sainsbury's was obliged to do, submitted Mr Wonnacott, was to submit a Store Planning Application within a set time frame, first obtaining the approval of the Club, and Sainsbury's complied with that obligation, about which no complaint is made. Mr Wonnacott stresses the singular definite article in "the Store Planning Application" in [2.2] and [2.4]. By [2.6] Sainsbury's was entitled to amend the application, or withdraw it and submit another one in the circumstances mentioned, informing the Club about any conditions likely to be attached to the planning permission. By [2.8], Sainsbury's was obliged to use all reasonable endeavours to procure an Acceptable Store Planning Permission and to supply a copy of any planning decision to the Club. Again, no complaint is made about the original application.

65. The question of an Appeal was one which, by [2.11], was within Sainsbury's absolute discretion unless Planning Counsel advised there was a better than 60% chance of success before the Long Stop Date. Having appealed, Sainsbury's would also have been entitled to submit another planning application whilst prosecuting the appeal, thus putting pressure on the local planning authority by appealing the decision to the Secretary of State and then saying that it would withdraw the appeal if it was given what it asked for in the alternative planning application.

66. Mr Matthias relies on *IBM v. Rockware Glass Limited* [1980] FSR 335, *Agroexport State Enterprise v. Compagnie Europeene De Cereales* [1974] 1 Ll Rep 499, *Yewbelle Limited v. London Green Developments Limited* [2007] EWCA Civ 475, *Berkeley Community Villages v. Pullen* [2007] EWHC 1330 (Ch) and *CPC Group Limited v. Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) and the review in the last case at [238]-[241] of authorities as to the meaning of good faith. He particularly relied on Vos J's statement at [246]:

> "Thus, it seems to me that the content of the obligation of utmost good faith in the [Sale and Purchase Agreement] was to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Developable Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties. I do not need, it seems to me, to decide whether this obligation could only be broken if QD or CPC acted in bad faith, but it might be hard to understand, as Lord Scott said in *Manifest Shipping* [*Co v. Uni-Polaris Shipping Co* [2003] 1 AC 469] how, without bad faith, there can be a breach of a "*duty of good faith, utmost or otherwise*."

And on Morgan J's statement in *Berkeley Community Villages* at [97]:

> "…I am able to construe…the Agreement as imposing on the Defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant."

The test is that enunciated by Buckley LJ in *Rockware* at p.343:

> "... what would an owner of the property with which we are concerned in this case, who is anxious to obtain planning permission, do to achieve that end? The formula which has been suggested and which would commend itself to me is that the plaintiffs as covenantors are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take ..."

67. In *Rockware*, Mr Sparrow, like Mr Wonnacott in the present case, contended that the arrangement of the wording was a strong indication that the obligation to use best (in this case reasonable) endeavours was restricted in time, that the plaintiff was not undertaking anything more than an application to the local Planning Authority and was not assuming an obligation to pursue the application for planning permission by way of an appeal to the Secretary of State. Buckley LJ said,

> "As regards this first point, it seems to me desirable at the outset to see exactly in what respect the purchaser was 'to use its best endeavours'. That was 'to obtain the same', and it is not in question between the parties that 'the same' means the planning permission. So the obligation was to use the purchaser's best endeavours to obtain the planning permission."

In the present case, the obligation contained in [2.8] is "to procure the grant

of an Acceptable Store Planning Permission."

Buckley LJ went on (at p.339):

> "I can feel no doubt that, in the absence of any context indicating the contrary, this should be understood to mean that the purchaser is to do all he reasonably can to ensure that the planning permission is granted. If it were refused by the Local Planning Authority, and if an appeal to the Secretary of State would have a reasonable chance of success, it could not, in my opinion, be said that he had 'used his best endeavours' to obtain the planning permission if he failed to appeal."

And (at 340) he rejected (as an "ingenious argument") Counsel's contention that:

> "... the fact that the 'best endeavour' obligation is sandwiched between a reference to making the application and one to withdraw the application indicates that the 'best endeavour' obligation is confined to a period ending with the decision of the Local Planning Authority, and that consequently it does not extend to considerations as to whether an appeal from the refusal of planning permission by the local planning authority should or should not be made."

68. Mr Wonnacott pointed out that each contract must be construed according to its own terms. In the present case instead of an overarching obligation to use best endeavours to obtain planning permission (as in *Rockware*) there is a highly detailed regime for the pursuit of the planning permission which says exactly what is to be done step by step.

69. However Mr Matthias says that the obligations did not cease as the only provision in the Agreement using the definition of the Cut Off Date is the definition of the Termination Date.

70. The question is whether the obligation under [2.8] of Schedule 1 to the Agreement to use all reasonable endeavours to procure the grant of an Acceptable Store Planning Permission subsisted only until the Cut Off Date or whether it continued. There is nothing in the language of the Agreement suggesting that the definition of the Cut Off Date has any contractual significance beyond its connection to the date on which the parties acquire the right to serve a Termination Notice under Clause 3.1 of the Agreement because either the Conditions have not been satisfied or provisions specifically entitling a party to terminate apply. (In this context I agree with Mr Matthias that the reference in the termination provisions of [3.1(b)(iv)] to [5] of Schedule 4 is simply a mistake for [6] of Schedule 4.) Thus [2.8] makes no reference to the Cut Off Date and there is nothing in it which suggests that Sainsbury's reasonable endeavours should be limited.

71. It seems to me that where a buyer obtains, as it did in this case, a contractual monopoly as to the conduct of a planning application, the obligation to use all reasonable endeavours is the *quid pro quo* for the surrender by the seller of all its rights to make planning applications itself.

72. If, instead of serving a Termination Notice under Clause 3.1, the parties elected to continue pursuing the objectives of the Agreement after the Cut Off Date, I find that the reasonable endeavours obligation would not be extinguished.

73. It therefore seems to me that until 20 days after the expiry of a Termination Notice, Sainsbury's remained bound by [2.8] to use "all reasonable endeavours" to procure the grant of an Acceptable Planning Permission. It was also bound by the obligation of good faith contained in Clause 31.1.

74. Having decided that there was an Appeal within the definition contained in the Agreement and that Sainsbury's s.73 application was not made too late to extend the Cut Off Date, the Cut Off Date must have occurred, as Mr Wonnacott argued, in the summer of 2014, but the significance of the precise date does not matter because of my decision that Sainsbury's obligations under the Agreement survived until after the Cut Off Date, namely until expiry of the Termination Notice.

Withdrawal and resubmission of the s.73 application

75. I go on to consider Mr Matthias's submission that [2.11] does not apply to Sainsbury's s.73 application. He starts with the submission that Sainsbury's was obliged by the agreement in correspondence between the parties to proceed on the assumption that the estoppel by convention prevented Sainsbury's from operating the "Counsel's Opinion" clause in a re-submitted application, a submission which I have already rejected.

76. He is then forced, because of his submission that Sainsbury's should have withdrawn its s.73 application and resubmitted it at a more propitious time, to say that resubmission was not an Appeal within [2.11], despite the use of the capital letter indicating that it was a defined term. He hangs this submission on the words "in which case [in fact the Agreement says "in which the case", but this is another error] the Buyer will give notice of Appeal within the time limits imposed or specified in the Planning Act", saying that as there are no such time limits for a s.73 application, Appeal in this context must mean an appeal in the strict sense, that is to say, under s.78 of the Act.

77. However although it is true that s.73 (as opposed to s. 78(4)) does not expressly specify any time limit, [2.11] is not confined to a time limit "specified" but extends to "time limits imposed or specified". An application under s.73 cannot be made after the expiry of the planning permission itself, so a time limit is imposed, although not expressly specified, by s.73. The phrase does not in fact say imposed "by", as opposed to "imposed…in", but the word "imposed" must have some meaning and that is what I ascribe to it.

78. Therefore I find that the definition of Appeal *is* imported into [2.11].

79. That being so, Sainsbury's were not obliged to bring a s.73 application or an appeal in the strict sense, other than the s.73 application which it did bring, and about which there was specific agreement, save on the advice of Planning Counsel.

Did Sainsbury's prosecute its s.73 application "with due diligence" and did it conduct its part in the Appeal Proceedings "in a good and efficient manner" within [2.11(c)] and [2.11(d)] of Schedule 1?

80. That is not the end of Mr Matthias's submissions, however. Even if he is wrong he says that Sainsbury's did not prosecute its s.73 application in accordance with [2.11], that is to say, it did not prosecute it "with due diligence" or "conduct its part in the Appeal proceedings in a good and efficient manner", or "keep the Club fully informed of all relevant information in respect of the Appeal".

81. This is the matter of fact, as opposed to the construction of the Agreement, I have to decide. The obligations imposed by [2.11(c) and (d)] apply to an application under s.73, and I have found that Sainsbury's was under the duty imposed by [2.8] to use "all reasonable endeavours" to procure the grant of an Acceptable Store Planning Permission until expiry of the Termination Notice. This duty extended to making such applications, subject to [2.11(a)], as were necessary.

82. The background to Sainsbury's s.73 application is as follows. BCC's decision to grant the original application had been controversial and was subject to local opposition. TRASHorfield had brought proceedings but Sainsbury's brought its s.73 application less than two weeks after permission was granted to bring the substantive judicial review proceedings. Thus the political will to extend delivery hours was always going to be low and unpalatable to BCC's elected members who would not wish to be perceived to be influenced by Sainsbury's during the currency of the TRASHorfield proceedings.

83. These concerns were expressed by WYG before the s.73 application was submitted. On 17 October 2013 Mr Hutton had advised Mr Littman by email that the success or otherwise of the "technically weak" s.73 application, would turn on ensuring that pressure was applied from within BCC. On the day before the application was submitted a WYG file note prepared by Mr Hutton and Mr Whittaker observed that there was "serious officer concern regarding extending delivery hours".

84. By January 15 2014 Mr Hutton recommended withdrawal of the application on the basis that a refusal would generate a risk of harming Sainsbury's chances of permission at a later date. Mr Matthias says that Sainsbury's should therefore have withdrawn and resubmitted it at a more convenient time. Mr Wonnacott says that withdrawing the application would itself have triggered the Cut Off Date but as I have found that Sainsbury's obligations extended beyond that date that fact is irrelevant.

85. So, asks Mr Matthias, what would a developer, acting reasonably, have done? He answers his rhetorical question with the answer that it would have (a) withdrawn the application to avoid a formal refusal; (b) resubmitted the application at a more politically receptive time, supplementing the technically weak acoustic report by proposing physical noise mitigation measures (as the 24A Report did- see below) as well as the delivery management measures; and (c) applied pressure on local councillors (and objectors) as it had been advised to do.

86. In addition, he submits that Sainsbury's should have told the Club that it knew before the formal notification that the s.73 application was going to be unsuccessful. If the Club had known of the communications between the Planning Officer, the Environmental Health Officer ("EHO") and Sainsbury's, the Club would itself have contacted the members of BCC and the objectors. Many of the local residents were supporters of the Club who were passionate about its relocation to a new stadium and the Club could have brought political pressure to bear. Sainsbury's witnesses say that

Mr Wotola and Mr Higgs probably knew that the s.73 application was going to fail and would have lobbied anyway.

87. Mr Littman was asked why he did not tell the Club about BCC's unfavourable attitude. He said that the Club knew about it as the Club had a number of contacts within BCC. However in his witness statement (at [56]), Mr Littman effectively admitted that he deliberately did not tell the Club that he knew that the s.73 application would fail when he said,

> "I did not share any information about the possible refusal of the section 73 application with the Club as relations had broken down following a meeting in November 2013 that I attended with James Hill of Adalta Real [Sainsbury's Chartered Surveyors] when Nick Higgs accused Sainsbury's of trying to pull out of the deal. I was also confident that they would have lobbied hard already and I did not see that there was anything else that they could achieve."

88. He went on (at [57]),

> "In a further conversation with Tristan Hutton, which must have been around 13 January, we agreed that Sainsbury's should not expend any monies in trying to submit further information to Bristol City Council as both the planning case officer and the EHO had told Nigel Mann and him that Sainsbury's providing further information would not result in either changing their stance."

89. The political climate once the TRASHorfield judicial review had been dismissed was much less sensitive than it was when Sainsbury's issued its s.73 application. It could therefore, says Mr Matthias, have brought an Appeal, having obtained different acoustic evidence, some five weeks after 2 April 2014.

90. Sainsbury's accept that after January 2014 no attempts were made to secure an Acceptable Store Planning Permission as it then contemplated termination of the Agreement by reliance on [2.11] of Schedule 1 to the Agreement, providing for Planning Counsel formally to advise on the merits of an Appeal. However if Sainsbury's had not brought its s.73 application when it did, it would have succeeded, as the Club in fact did.

91. As I have said, Sainsbury's had changed its mind and did not want to build a supermarket on the site. Mr Wonnacott contends that its personnel nevertheless abided by the Agreement, believing that Sainsbury's could sell elsewhere. Mr Matthias contends that instead it went through the motions in such a dilatory fashion that it did not prosecute its s.73 application with due diligence or in a good and efficient manner. He said in his closing oral submissions that:

> "One problem after another is being put in the way of any real progress being made to achieve an Acceptable Store Planning Permission."

92. On 26 November 2013 Mr Littman had a meeting with Mr Watola and Mr Higgs of the Club. Mr Higgs asked Mr Littman whether Sainsbury's was looking to get out of the Agreement as the Club was about to spend another £400,000 on the new stadium. Mr Littman categorically denied this on the basis that as Sainsbury's had spent a lot of money, it was committed to go ahead with the Agreement. He insisted in oral evidence that this was true, on the basis that Sainsbury's was contractually bound.

93. Sainsbury's made its s. 73 application on 27 November 2013, seeking to vary Condition 11 so as to allow deliveries to the store to take place between 5 am and midnight seven days a week.

94. On 17 October 2013 Mr Hutton advised Mr Littman as follows:

> "On the basis we have a relatively weak technical case the suggested mitigation measures will hopefully assist the EHO to be able to conclude differently this time round if pressure is applied from within BCC to approve the planning application."

95. Again, on 8 January 2014 Tom Selway, a Sainsbury's PR consultant, told WYG and Mr Littman about the high level of objection to the application, saying that "one friendly councillor has warned that this is heading for refusal." Mr Selway recommended as follows:

> "To avoid refusal, can I suggest we engage with local councillors/objectors."

96. Mr Littman did not in the event engage with local councillors or objectors. The view he expressed in oral evidence was that lobbying them was not going to make any substantial difference. He said that elected members rarely went against the officers' recommendations and it was obvious that the Planning Officer and the EHO were against extending the delivery hours. He said in cross-examination,

> "…ultimately it would have been my decision not to engage.
>
> Q. Why, because the risk of doing so might be to increase the prospect of the Section 73 application succeeding?
>
> A. No, I think it was on a couple of points…Discussion had been ongoing with…the planning case officer, and the Environmental Health Officer at the time, and, as I recall, they were saying that there wasn't really any more information we could submit that would enable them to approve the application. I think the Council had by that point decided that they were taking it as a delegated refusal, and with the history of all the communication with Zoe Willcox and others, there was clearly not an appetite within Bristol City council to approve this Section 73; and I think from my view, if a planning officer and an Environmental Health Officer says, "There really isn't anything more you can do to make me change my mind," then I think engaging with local councillors

> and residents, in my view at the time, clearly wasn't going to make any substantial difference."

97. On 9 January 2014 Mr Littman e-mailed his superior at Sainsbury's saying that the s.73 application was likely to be refused. Mr Templeman and Philip Bell-Brown of Sainsbury's then decided that if the application was refused that would be the "final nail in the coffin" for the project and Sainsbury's would, subject to legal advice, seek to withdraw from the Agreement.

98. On 10 January 2014 Mr Hutton reported that the Planning Officer was expecting an objection from the EHO. He also reported that "members do not support the planning application".

99. On the same day, Mr Mann e-mailed Mr Hutton about conversations he had had with the Planning Officer and EHO. He said that the EHO's main concern was that the WYG report in support of the s.73 application assumed that noise reduction would result from good management practices. The Planning Officer agreed but said that his biggest concern was the timing of the application and the mistrust this had generated.

100. On 15 January 2014 Mr Hutton updated Sainsbury's saying,

> "…we are headed for a delegated refusal…at this point we would usually advise consideration to be given to withdrawing the planning application…there is a potential risk of harming our chances of gaining planning permission for wider delivery hours at a later date following store opening if we have a refusal/appeal dismissal for the store."

101. It was however out of the question (as I have said) for Zoe Willcox's advice to be followed and for Sainsbury's to wait until the store was open before it applied for the longer delivery hours.

102. On 22 January 2014 Andrew Bedford of Dentons advised Sainsbury's that should the s.73 application be refused it would be entitled to terminate the Agreement and would not be obliged to take any further steps to pursue an Appeal. Sainsbury's says that this shows that it could not have been guilty of bad faith as it was relying on legal advice.

103. BCC refused the s.73 application (as I have said, on 28 January 2014) for the following reason:

> "The proposed variation…would result in hours of delivery that would have a detrimental impact on the amenity of both surrounding residents and future residents on the site. Furthermore, insufficient information has been submitted to demonstrate that the amenity of these residents will not be harmed by the proposed change. As such the proposal is contrary to Core Strategy BCS23 as it would fail to avoid adversely impacting upon the environmental amenity of the surrounding area by virtue of noise."

104. On the same day Mr Mann e-mailed Mr Littman to say that he understood the reference to "insufficient information" to relate to the legitimacy of relying on the quiet delivery scheme. Mr Hutton e-mailed the Planning Officer on 30 January 2014 to ask him to elaborate on the "insufficient information". Mr Hutton was aggrieved by this as he had asked BCC's officers what other information was required and had been told "nothing". Mr Hutton was told by Sainsbury's to forward this email to Mr Bedford at Dentons to ensure that the reason for terminating the Agreement was "rock solid".

105. On 7 February 2014 Sainsbury's Investment Board resolved to terminate the Agreement, taking the view that its duties under the Agreement to pursue an Acceptable Planning Permission had ended.

106. Although it was requested to do so by letter from Burges Salmon dated 26 February 2014, Sainsbury's refused to appeal BCC's refusal of the s.73 application. On 31 March 2014 Mr Watola asked Mr Littman if Sainsbury's would make a joint s.73 application with the Club, but again Sainsbury's refused.

107. On 27 March 2014 Hickinbottom J dismissed the TRASHorfield judicial review application and on 2 April 2014 TRASHorfield confirmed that it would not appeal this decision.

108. On 9 April 2014 Mr Watola asked Mr Littman for Sainsbury's consent to the Club making its own s.73 application. On numerous occasions between 9 April and 15 July 2014 Burges Salmon made requests to Sainsbury's to appeal, to make a s.73 application in its own name or to permit the Club to do so, on each occasion at the Club's expense. The Club itself could not make any planning application because of Schedule 1 [3.2] to the Agreement. On every occasion Sainsbury's refused the Club's requests, having been advised that its obligations had come to an end.

109. A request made by the Club on 23 June 2014 was of particular significance because by then the Club had received a report from Mr Gosling of 24 Acoustics ("24A") proposing various physical measures to attenuate the noise from the site in order to obviate the need to rely on the quiet delivery strategy proposed in the WYG Report. They were:

- A 2.3-2.7m acoustically absorbent barrier adjacent to 27 Filton Avenue and a 2.3m acoustically absorbent barrier adjacent to 33 Filton Avenue.
- A 0.6m increase in the barrier running along the boundary with the Filton Avenue properties.
- A 1.2m increase in the barrier long the boundary with Trubshaw Close.
- An extended access ramp tunnel with an internal absorptive lining
- An additional 2.4m barrier approaching the entrance to the tunnel.

110. [4.12] of the 24A Report explains that the WYG Reports had both in any event proposed the provision of the extended access ramp tunnel and absorptive lining. Mr

Wonnacott queried the usefulness of any of these measures in relation to the type of delivery lorry used by Sainsbury's.

111. On 23 June 2014 the Club wrote to Sainsbury's enclosing an opinion from counsel, Mr Douglas Edwards QC, giving his opinion that if the mitigation measures were relied upon rather than the quiet delivery strategy, an application to amend Condition 11 would have a greater than 60% chance of success. Mr Edwards did not however qualify as Planning Counsel within the definition of that term as he was not appointed by Sainsbury's. There was then heated correspondence between the parties but nothing came of it. Mindful of the approaching Long Stop Date and the need to secure an Acceptable Store Planning Permission before it so that the Unchallenged Date could occur before the Long Stop Date, the Club issued proceedings against Sainsbury's and filed an application for an injunction compelling Sainsbury's, at the Club's expense, to lodge a s.78 appeal and to consent to the Club making a fresh s.73 application to BCC. This claim was compromised; a Consent Order dated 22 July 2014 was agreed and made under which Sainsbury's undertook to bring a s.78 Appeal (subject to obtaining Planning Counsel's opinion in accordance with [2.11] of Schedule 1 to the Agreement). By the Consent Order Sainsbury's also gave the Club permission to make a fresh s.73 application as long as it made it in its own name and for the purposes only of paragraph 3.2(a) of Schedule 1 to the Agreement.

112. Mr Christopher Katkowski QC, Planning Counsel instructed by Sainsbury's, determined on 11 September 2014 that the prospects of succeeding on a s.78 Appeal without relying on the 24A Report, that is to say relying only on the second WYG Report, were less than 50% but the prospects of success relying on the 24A Report were 55%. Incidentally he also determined that if a condition of planning permission had the effect of imposing limitations on noise levels which could only be complied with at an additional cost in excess of £40,000, it would be a Store Onerous Condition even if the Club funded the costs of all additional measures. Accordingly Sainsbury's withdrew the s.78 appeal and Sainsbury's notified the Club of this on 20 September 2014.

113. On 12 November 2014 BCC resolved to accept the Club's s.73 application subject to satisfactory amendments to the s.106 Agreement, which were entered into on 4 December 2014. On that day BCC formally issued a fresh s.73 permission permitting any number of deliveries to be made to the proposed store between 5 am and 00.01 am.

114. Mr Matthias's real complaint is that the s.73 application should not have been made when it was. However he saw the difficulty with it. Leaving aside the pleading I would agree with it if it were not for the fact that the Club accepted the timing of the application and approved its contents. This appears from the letter of Burges Salmon dated 26 September 2013 to Mr Bedford of Dentons at [3], where it says,

> "As confirmed last week, our client agrees that the drafting of the Section 73 application should be progressed so this can be filed as soon as possible. However, as discussed, our client requires your client to provide us with the draft Section 73 application for approval prior to its submission to the Council."

And from the reply dated 9 October 2013,

> "We confirm that, prior to submission of the Section 73 Application, a draft of the application will be submitted to you for your client's prior approval (not to be unreasonably withheld or delayed).
>
> We confirm that our clients will submit a Section 73 Application within 10 working days of your client's approval to the form of such draft application. In this context, we also confirm that a draft of the Section 73 Application will be remitted to your client on or before 31 October 2013."

And in Mr Littman's witness statement, (at [51] and [52]) which paragraphs were not disputed,

> "51. I am aware that the Club first commented on and later approved the section 73 application before it was submitted to Bristol City Council. WYG were responsible for considering and inputting the amendments. I recall that the Club's comments were fairly minimal. I do not remember there being any particular issue they raised or something that WYG had to change drastically.
>
> 52. I was copied to an email from Tristan Hutton to Andrew Bedford of Dentons on 27 November 2013 which confirmed that the section 73 application had been submitted. I forwarded this email to Toni Watola on the same date. Unsurprisingly, given the Club's prior approval of the application, I did not receive any further comments from Mr Watola about the contents of the application."

115. As for the submission, which Mr Matthias has to make because of this correspondence, that Sainsbury's should have withdrawn the application and resubmitted it at a more propitious time, that is ruled out by [2.11] of Schedule 1 to the Agreement. I have found that this applied to applications under s.73 as well as appeals under s.78, save for the special rules which applied by agreement to Sainsbury's s.73 application.

116. A withdrawal and resubmission of the s.73 application at a more propitious time would have required the opinion of Planning Counsel that it had a 60% or more chance of success. Mr Matthias might say that as the Club's s.73 application did succeed such an opinion was bound to have been given. However that is not the case; Planning Counsel gave the s. 78 appeal a 55% chance of success, that is to say, he opined that it was more likely than not to succeed but did not say that its chances of success were as much as 60%.

117. I observe that the obligations in [2.11] apply only "in which case" and "in such case", in other words, where Planning Counsel's Opinion has been obtained. Although this does not apply to the first s.73 application, it does in my judgment apply to resubmissions of s. 73 applications. The correspondence makes it clear, as I have said, that Sainsbury's only agreed to make the one s.73 application without resort to Planning Counsel.

118. Mr Matthias complains in his skeleton argument (at [137]) that Sainsbury's,

> "relied upon the 'black letter' of one discrete provision within [the Agreement], namely para 2.11 of Schedule 1. This provision provides for the appointment of Planning Counsel to formally opine on the merits of an Appeal. The Claimant relied on this provision notwithstanding that as set out above, any developer anxious to secure an ASPP through all means at or placed at his disposal would have regarded it as reasonable to allow the Defendant to progress matters fully at its own cost and risk (a) without invoking the para. 2.11 mechanism and (b) irrespective of its outcome in any event."

119. The problem with this complaint however is that Sainsbury's was entitled to rely on the provision in [2.11(a)], no matter how reasonable it may have been for it not to do so. Mr Matthias says that everything hinges on the good faith provisions of Clause 31.1. which provides that the parties,

> "…agree to act in good faith in relation to their respective obligations in this Agreement and to assist the other in achieving on [sic] Acceptable Planning Permission for the Store Development and the Stadium Development."

But that does not mean that in order to act in good faith Sainsbury's was obliged to run counter to a specific provision of the Agreement.

120. I find that while Sainsbury's could and should have engaged with local councillors and objectors and kept the Club informed of the likely refusal of the s.73 application, there is no link between such engagement or information and the success of the application. I accept Mr Littman's evidence that the application would have failed in any event. The reason for this is because, as Mr Matthias submitted, it was brought at a politically inexpedient time.

121. I also find that an Acceptable Store Planning Permission could not have been obtained before the Termination Date because (i) the Club unequivocally assented to the timing and terms of the s.73 application and (ii) Planning Counsel did not approve an Appeal within [2.11] of Schedule 1.

122. Mr Wonnacott also submits that withdrawing the s.73 application would have been a breach of contract since withdrawing an appeal would have been the opposite of "prosecuting the Appeal with due diligence". In any event, he says that withdrawing the Appeal would have triggered the Cut Off Date immediately thus entitling Sainsbury's to serve a Termination Notice immediately. This seems to me to be an overly technical construction of the Agreement but I do not have to decide it in view of my decision below.

Were the Conditions satisfied before the Termination Date?

123. I have already determined that the Store Planning Condition was not satisfied and could not have been satisfied on the facts so that Sainsbury's claim must succeed.

124. In case I am wrong, however, I go on to consider the Club's other submissions. Mr Matthias asserts that everything hinged on obtaining an Acceptable Store Planning Condition. Such permission would have to have become unchallengeable on 26 November 2014.

125. Mr Matthias says that if Sainsbury's had acted in accordance with its contractual obligations (in the "no-breach world") Sainsbury's would have made a fresh application to BCC with more robust noise attenuation measures within 5 weeks of dismissal of the TRASHorfield application for judicial review and that would have been dealt within 3 months so that an Acceptable Store Planning Permission would have been in place by 7 August 2014. There would then need to be a further three months and two weeks for the Challenge Period to expire, taking the date up to 21 November 2014, within the period in which the Termination Date would expire.

126. However, Mr Wonnacott says that an Acceptable Store Planning Permission could not have been obtained in the time. Mr Watola accepted in evidence that in his view it would not have been appropriate to resubmit a s.73 application before the local elections which took place on 22 May 2014 and that the earliest date for resubmission would have been in June 2014. The first time the Club made an unconditional offer to fund a further s.73 application using a new acoustics report was on 23 June 2014. In the postulated no-breach world, he submitted,

- There would have to be at least one week for Sainsbury's to consider its position, take advice and accept the offer;
- It would take a further four weeks to lodge the application (the length of time taken by the Club when Sainsbury's gave its consent to the Club's application);
- It would have taken 15 weeks for BCC to decide (the length of time it actually took over the Club's application);
- There would then be a further three months and two weeks for the Challenge Period to expire;
- So that the Store Planning Condition would not have been satisfied until 24 February 2015.

127. On the assumption, however, that the Club's offer to fund a s.73 application was irrelevant, and that Sainsbury's should have lodged the application on Monday 2 June 2014, having obtained an acoustics report itself, the timetable is advanced by 28 days. That would still mean expiry of the period on 27 January 2015 which would be too late. Again, I am not satisfied that four weeks to lodge the application was required, bearing in mind the looming Termination Date. Thus permission could, according to Mr Matthias's timetable, have been obtained in three months by 2 September 2014. However that would still mean expiry of the period in December 2014 which would be too late.

128. If one observes this strict timetable it does seem that because of the concession made in evidence about the intervention of the local elections, an Acceptable Store Planning Permission (which would have been obtained since the Club's application was successful) could not have been obtained in time. The Unchallenged Date would have

fallen on 21 December 2014 which is after 26 November 2014, the date of termination of the Agreement, 20 working days after the assumed service of a Termination Notice on the Club on 29 October 2014.

129. However I am not sure that a strict timetable can be imposed hypothetically when the events did not in fact happen. Mr Watola did indeed concede that he would not have resubmitted a s.73 application before the local elections which took place on 22 May 2014 and that the earliest date for resubmission would have been in June 2014. However his evidence was that he would have followed the advice of Pegasus Planning Group Limited ("Pegasus") on this issue.

130. Mr Tarzey of Pegasus gave evidence. He said that while he would not want a s.73 application determined while there was an election pending, it would go out to consultation in its first four or five weeks so that nothing much would happen. Thus there would be nothing to stop an application being made immediately after TRASHorfield determined that it would not appeal, on or before, say, 7 May 2014. In that case, the s. 73 application would have been determined by BCC within 3 months and have become unchallengeable three months and two weeks later, namely by 21 November 2014. Thus an application made at any time before 11 May 2015 would have become unchallengeable before 26 November 2014.

131. As to the three month determination period, BCC resolved to grant planning permission on 12 November 2014 but only formally issued its grant on 4 December 2014. Mr Matthias says that the delay was attributable to the fact that Sainsbury's refused to cooperate in executing the necessary s.106 agreement so that the permission could be formally issued. Thus in the no-breach world, three months is the relevant period.

132. The legal burden is on Sainsbury's to show that it would have been unreasonable to lodge a s. 73 application just before an election: see *Agroexport* at 506-7. It cannot satisfy that burden.

133. Mr Matthias says that satisfaction of the Store Planning Condition would have meant that all the other conditions would have been satisfied.

134. I agree that the correct approach is to determine whether the Conditions would have been satisfied on or before 26 November 2014 if, but only if, Sainsbury's had acted in accordance with its contractual obligations. This is what counsel referred to as "the no breach world". It is not good enough to say that the Conditions would not have been met in the events that actually happened.

135. Mr Matthias submits that it is wrong to say that the Conditions were not satisfied: there was an obvious impediment to their satisfaction, namely that everything turned on Sainsbury's getting an Acceptable Store Planning Permission so that the Club's failure to meet the Conditions was a direct result of Sainsbury's own breaches of contract.

The Retention Condition

136. Clause 17.2 and 17.2.1 in the Schedule to the Supplemental Agreement provides,

> "As soon as reasonably practicable after the grant of an Acceptable Store Planning Permission and the grant of an Acceptable Stadium Planning Permission:
>
> …the Seller shall use all its reasonable endeavours to negotiate a Building Contract…with a view to finalising with as much certainty as possible the amount of the Building Contract Sum…"

"Building Contract Sum" is defined by Clause 17.1 as a "fixed price building contract".

137. The fact that the Retention Condition was not satisfied is in my judgment the result of there being no Acceptable Store Planning Permission in place. With a fixed price building contract the building contractor assumes the risk of additional expenditure and the developer is charged a premium for the assumption of this risk. However, where there is no start date, the builder cannot accurately forecast his likely costs. Thus the Club could only obtain a fixed price building contract once it could commit to a start date on the UWE site and it could only do that once it knew that Sainsbury's was definitely going to complete the sale of the site. Mr Bedford of Dentons acknowledged this in an email of 12 August 2011 where he said that the condition,

> "…is only capable of being determined after satisfaction of all the other Conditions being satisfied, and the Club having received tender prices or confirmation as to the fixed Building Contract Sum…"

138. On the assumption that the Retention exceeded the Capital Sum by more than £1m (see Clause 17.4.2I), the Club would have been entitled to serve written notice on Sainsbury's under Clause 17.4.3(b) electing to provide a separate source of finance or security in relation to the difference between the two. If the Club had served such a notice it would have frozen the right to serve a Termination Notice pending consideration of the adequacy of the finance or security, allowing the matter to be referred to an expert pursuant to Clause 26. Thus the question was whether the Club could have produced an objectively (see Clauses 17.4.3(b) and 17.4.8) reasonable degree of finance or security to cover the shortfall. In this connection,

- In a letter dated 12 December 2014 the Club's Board said that they were in a position to make available the sum of £1,125,750 to satisfy the Retention Condition made up as follows:
  - Pursuant to clause 17(4)(2)(b)(i) of the Agreement £500,000 on the Completion Date.
  - Pursuant to clause 17(4)(3)(b), up to £200,750 to cover the Shortfall, on the Completion Date.
  - Up to £425,000 to cover the Additional Development Costs when required to meet the Development Costs.
- Mr Higgs, by an Additional Finance Agreement dated 6 November 2011 was personally committed to providing £500,000 towards the Retention.

- The Football Stadia Improvement Fund had offered to make a contribution of £750,000 to the Club on the completion of the Agreement. Although this was not available for transfer to the Retention account, confirmation of its availability could have led to the release of capital elsewhere.
- The Club could have pre-let the gym space in the UWE stadium for a premium of approximately £750,000, and Heads of Terms had already been agreed with a company called Pure Gym.
- The Club had the stadium lease to offer as security for a loan.
- The Club had various income streams which could have been capitalised.

139. However, Mr Wonnacott says that the Retention Condition could never have been satisfied because the Club has numerous problems with it, as follows,

    - The Condition cannot be satisfied until the Retention has been agreed or determined: see the definition of the Retention Condition in the Schedule (Clause 17.4.1 and see also Clause 17.4.2) and there has been no agreement or determination.
    - The Retention exceeds the Capital Sum, not the other way round: see the letter from Burges Salmon dated 12 December 2014. Thus the condition could be satisfied pursuant to clause 17.4.5, but to engage that sub-clause, the Club has to offer security for the shortfall Defined in 17.4.3(a)(i)), but the Club has not done so.
    - The Condition is only satisfied when the security is actually effected or the finance deposited with Sainsbury's conveyancer, but Burges Salmon's letter said that nothing would be provided until completion. The Completion Date falls 20 working days after the last of the Conditions to be satisfied is satisfied. In any event Sainsbury's served a notice under [17.4.8].

140. However I am satisfied that in the no breach world the contract to build the Stadium would have been renegotiated (bearing in mind the fixed start date) so as to produce savings of some £170,000 as envisaged by Clause 17.4.2, in which case Sainsbury's as well as the Club would have had to contribute up to £500,000 towards the Retention.

141. I am also satisfied that in a no breach world the Club would not have taken the line that payments would only be made on the Completion Date.

The Funding Condition

142. The effect of the Retention Condition was to ensure that the Club would have sufficient distributable capital to meet the anticipated costs of the UWE Stadium. The definition of Financial Resource in the Funding Condition is wider than the definition of the Capital Sum in the Supplemental Agreement so that there are no circumstances in which the Retention Condition could be met but the Funding Condition would not.

143. However Mr Wonnacott says that the matter relied on by Sainsbury's is the failure to provide information about funding under [5.1] of the Funding Condition. The importance of this depends on which Cut-Off Date (and accordingly which Termination Date) is considered.

144. Taking, first, the Termination Date of 26 November 2014. I observe that the obligation to provide information is not the Funding Condition itself. Although Burges Salmon accepted that the information had been not been given (in their letter of 27 November 2014) and it is true that the failure to provide such information cannot be Sainsbury's fault, the fact that the Club "is insolvent" as alleged by Mr Wonnacott, is likely to be, if true (and Mr Matthias strongly disputes the fact), the result of not obtaining Acceptable Store Planning Permission.

145. The problem with the submission aligning the Termination Date with the Longstop Date is that Sainsbury's concedes that a valid notice under [4] was given on 12 December 2014 but, "the information required by para.5 still had not been given by 14/1/15." However, although [4] is not well drafted (it refers to "The Funding Condition is…the date", which cannot be right) it says unequivocally that,

> "The Funding Condition…shall be satisfied on…the date that the Seller shall give to the Buyer written notice that the Seller has sufficient Financial Resource to acquire and carry out and bring into use the Stadium Development on the Relocation Site."

146. Accordingly, (i) in the no breach world, I find that the Funding Condition would have been met on the same date as the Retention Condition and (ii) the Funding Condition has been satisfied before the second possible Termination Date as [5.1] is not independent of [4].

The Infrastructure Condition

147. Again, [1.4] makes it clear that there has to be an Acceptable Store Planning Permission before satisfaction of the Infrastructure Condition. If there had indeed been an Acceptable Store Planning Permission in place by 7 August 2014 all that would have been necessary would have been for Sainsbury's to execute the relevant s. 278 agreement (S.278 or s.38 of the Highways Act 1980), which it was bound to do after obtaining the Acceptable Store Planning Permission. The form of this agreement had already been agreed between Sainsbury's and BCC, save for the technical drawings and negotiation of the bond amount. But these matters could not have started until an Acceptable Store Planning Permission was in place indicating what highway works were needed.

148. The reason the Retention Condition and the Infrastructure Condition were unfulfilled on 26 November 2014 was owing (on this hypothesis) to Sainsbury's own breaches of contract which in any event precluded Sainsbury's from serving a Termination Notice at all.

149. The same applies to the Stadium Infrastructure Condition. Gloucestershire County Council, which was the highway authority for the planned UWE Stadium, was asking for the highway land to be dedicated as such under s.38 of the Highways Act 1980. Only UWE could do this. Thus, in order to make the Agreement unconditional the Club would undoubtedly have exercised its right to waive the condition under [8] of Schedule 7 to the Agreement before 26 November 2014, on the assumption that planning permission had been granted.

The Relocation Condition

150. This is satisfied when the last of the other Conditions Precedent is satisfied and in any event cannot be satisfied until the grant of an Acceptable Store Planning Permission.

Clause 3.1 of the Agreement

151. Does Sainsbury's have the right to terminate the Agreement even if, contrary to my primary findings, it was in breach of the Agreement, or does it not? Mr Wonnacott puts his case neatly in his closing submissions:

> "The right to terminate for non-satisfaction of a condition precedent is unconditional break: for the contract expressly provides that the right to terminate is 'without prejudice to the rights of any one party against the other for any antecedent breach' of the terms of the Agreement (cl.3.1). The only inquiry, on exercise of the break, is whether the Conditions have occurred or not; the remedy of the innocent party is in damages only."

Thus even if it had been Sainsbury's fault that all the remaining conditions remained unfulfilled, he submits that the Club's only remedy would have been in damages.

152. Mr Matthias says that Sainsbury's is precluded from relying on its own breach, in other words, it is precluded from exercising the contractual right to terminate the Agreement if that right has accrued as a result of its own breaches. This is an implied term of the contract: see *BDW Trading Limited v. JM Rowe (Investments) Limited* [2011] EWCA Civ 548 at [28]-[31], *New Zealand Shipping Co Limited v. Societe des Ateliers et Chantiers de France* [1919] AC1, *Cheall v. Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180 and *Alghussein Association v. Eton College* [1988] 1 WLR 587.

153. Such a term is to be implied unless there is a clear intention to the contrary; there is a presumption that the implied term forms part of the Agreement and the burden is on Sainsbury's to rebut that presumption.

154. He submits that the language of Clause 3.1 is concerned with the effects of service of the Termination Notice and not with the circumstances in which a party acquires the power to serve it. Thus the provision in clause 3.1 that "any termination shall be

without prejudice to the rights of any one party against the other for any antecedent breach of the terms of this Agreement" is a mere saving device preserving antecedent causes of action for breaches of contract in circumstances in which the contract is determined, e.g. for non-causative breaches. It has nothing to do with the implied term preventing termination of the contract where the Conditions are not met before the Cut Off Date (or the Termination Date) because of causative breaches.

155. The beneficial effect of such cases as *BDW Trading* would be nullified if Mr Wonnacott's submission were correct and I find for Mr Matthias on this point.

Conclusion

156. Accordingly I find that Sainsbury's must succeed because of the construction of Schedule 1 to the Agreement [2.11] which seems to me to be an insuperable barrier to the Club. If this is wrong (and I do not think it is), I find that the Club succeeds.

ANNEXE

SOME RELEVANT PROVISIONS OF THE AGREEMENT

[Definitions in Clause 1.2]

Acceptable Store Planning Permission" means a Store Planning Permission or any Planning Agreement entered into in relation thereto which:

(a) contains no Store Onerous Conditions; and

(b) is free of any condition or stipulation requiring the completion of a Planning Agreement on terms which include one or more Store Onerous Conditions.

"Appeal" means all or any of the following as the case may be namely:-

(a) a Call-In;

(b) an appeal to the Secretary of State in accordance with Section 78 of the Planning Act;

(c) an application to the Secretary of State in accordance with Section 73 of the Planning Act in respect of the grant of a Planning Permission which is not an Acceptable Planning Permission.

"Challenge Period" means the following periods each calculated from and including the relevant Permission Date:

(a) following the grant of an Acceptable Planning Permission by the Local Planning Authority (including after the determination of an application under section 73 of the Planning Act) the period of three months and two weeks; or

(b) following the grant of Acceptable Planning Permission by or on behalf of the Secretary of State the period of seven weeks.

"Cut Off Date" means the date being the first anniversary after the date of the last to be submitted of the Store Planning Application and the Stadium Planning Application unless on that date:

(a) a decision is awaited in respect of a Planning Application submitted to the Local Planning Authority prior to such date;
(b) an inquiry and/or decision are awaited in respect of a Planning Application submitted to the Local Planning Authority prior to such date; or
(c) the Challenge Period shall not have expired after the date of grant of a Planning Permission or the date of a Planning Refusal; or
(d) Proceedings have been instituted; or

….

then in which case such date shall be extended until the date 20 Working Days after the later of (as appropriate):

(i) the date on which such Proceedings are exhausted and an Acceptable Planning Permission is not granted or upheld; and

(ii) the Unchallenged Date occurring in respect of the relevant Planning Permission; and

(iii) the expiry of the Challenge Period following the date of issue of a Planning Refusal unless within such period an Appeal shall have been lodged to the Secretary of State or Proceedings shall have been instituted in which case it shall be the date referred to in paragraph (i) or (ii) (as appropriate) of this definition.

Provided that in any event such date shall not extend beyond the Long Stop Date

"Judicial Review" means all or any of the following:

(a) An application for judicial review under Rule 53 of the Civil Procedure Rules:

(i) made by any third party arising from the grant of an Acceptable Planning Permission by the Local Planning Authority; or

(ii) arising from a Planning Refusal by the Local Planning Authority in relation to any Planning Application;

(b) any application pursuant to Section 288 of the Planning Act arising from the grant of an Acceptable Planning Permission or any Planning Refusal by the Secretary of State.

"Long Stop Date" means 31 May 2015 [NB varied by clause 2.4 of the Supplemental Agreement dated 6 December 2011 to mean 14 December 2014]

"Planning Refusal" means a refusal of any Planning Application… or the grant of a Planning Permission (or any approval or individual consent comprised in or required as part of the Planning Permission) which is not an Acceptable Planning Permission.

"Proceedings" means any and all proceedings instituted before the court or other appropriate tribunal body or forum whatever in pursuance of a Judicial Review.

"Store Onerous Conditions" means any conditions of the Planning Permission affecting the Property or any terms of any related Planning Obligation which has the effect of:
….
(j) Imposing limitations on the noise levels emanating from the Store Development and/or the Property with which it would be impossible to comply or which could only be complied with at an additional cost in excess of £40,000.
…
3. Deliveries:

Restricting the delivery and despatch of goods to and from the Store to between the hours of 5.00 am to midnight on any day…

"Store Planning Application" means a planning application submitted by or on behalf of the Buyer for the Store Development in accordance with this Agreement.

"Store Planning Condition" means the Unchallenged Date occurring in respect of an Acceptable Store Planning Permission.

"Store Planning Permission" means a planning permission granted pursuant to a Store Planning Application.

"Termination Date" means the date of termination of this Agreement pursuant to Clause 3.

"Unchallenged Date" means the date of expiry of the Challenge Period in respect of an Acceptable Planning Permission unless prior to such date proceedings shall have been instituted in which case it will be the date on which Proceedings are exhausted and an Acceptable Planning Permission is granted and/or upheld.

"Unconditional Date" means the date on which the last of the Conditions to be satisfied is satisfied.

[Relevant operative provisions]

2.1 Completion is conditional on satisfaction of all of the Conditions prior to the Termination Date.

3 TERMINATION

3.1 If:

(a) the Conditions (other than the Infrastructure Condition) are not satisfied in accordance with this Agreement by the Cut-Off Date…

then either party…may terminate this Agreement by service of written notice to the other party whereupon this Agreement shall automatically cease and determine on the date 20 Working Days after the date of service of the Termination Notice (unless prior to such date all the Conditions shall be satisfied in accordance with the terms of this Agreement) provided that any such termination shall be without prejudice to the rights of any one party as against the other for any antecedent breach of the terms of this Agreement.

[The Store Planning Condition – Schedule 1]

1 STORE PLANNING CONDITION

The Store Planning Condition shall be deemed to be satisfied on the occurrence of the Unchallenged Date in respect of an Acceptable Store Planning Permission.

2 BUYER'S PLANNING OBLIGATIONS

2.1 The Buyer will at its own cost submit a Store Planning Application to the Local Planning Authority within 9 months of the later of:

(a) date of this Agreement and
(b) the date of exchange by the Seller of a Development Agreement.

2.2 Before any Store Planning Application is submitted to the Local Planning Authority by or on behalf of the Buyer the Buyer will submit a draft of the proposed Store Planning Application to the Seller (together with such of the supporting material as the Buyer shall be proposing to submit in accompaniment with the Store Planning Application as the Seller may reasonably request) for its approval that the Store Planning Application is consistent with the definition of the **"Store Development"** and is in a form and layout which (unless otherwise agreed by the Seller) is substantially in the form of the Layout Drawings annexed at Annexure 9.

2.8 The Buyer shall use all reasonable endeavours to procure the grant of an Acceptable Store Planning Permission as soon as reasonably possible and will within 10 Working Days after the Buyer receives a Planning Decision in respect of a Store Planning Application supply a copy to the Seller and the Seller's Conveyancer.

2.9 The Buyer must notify the Seller in writing within 20 Working Days of the date that they receive a copy of a Store Planning Permission whether it considers it to be an Acceptable Store Planning Permission and (if not) it shall supply a written statement with such notice as to why the Store Planning Permission is not an Acceptable Store Planning Permission.

2.11 The Buyer may in its absolute discretion pursue an Appeal against a Planning Refusal but shall be obliged to do so if:

(a) Planning Counsel confirms that such an Appeal has a 60% chance or greater of achieving an Acceptable Store Planning Permission on or before the Long Stop Date; and

(b) an Acceptable Stadium Planning Permission has been granted;

in which case the Buyer will give notice of Appeal within the time limits imposed or specified in the Planning Act and in such case:

(c) the Buyer will prosecute the Appeal with due diligence and will conduct its part in the Appeal proceedings in a good and efficient manner

(d) in prosecuting any Appeal the Buyer will keep the Seller fully informed of all relevant information in respect of the Appeal

(e) if the Buyer considers it appropriate the Buyer will submit a duplicate or alternative Store Planning Application not the subject of Appeal proceedings and the provisions of the schedule should apply to that duplicate or alternate Store Planning Application.

[The Funding Condition – Schedule 4]

1.1 **Financial Resource** means Internal Resource and Third Party Finance Resource

Internal Resource means equity or other financial resource available to the Seller (other than Third Party Finance resource)

Third Party Finance Resource means an offer of debt finance from a third party or third parties…

2. Waiver
The Funding Condition may be waived by the Buyer by service of written notice upon the Seller and if the Buyer shall serve such notice then the Funding Condition shall be deemed to be satisfied on the date of service of such notice and this Agreement shall be construed accordingly…

4. Satisfaction of Funding Condition
The Funding Condition is (and shall be satisfied on) the date that the seller shall give to the Buyer written notice that the Seller has sufficient Financial Resource to acquire and carry out and bring into use the Stadium Development on the Relocation Site.

5. Information
The Seller shall keep the Buyer fully informed of the Seller's endeavours to obtain and evidence to the Buyer that the Seller has sufficient Financial Resource and which shall include providing to the Buyer full details of the Financial resource available to it together with such information as the Buyer shall reasonably require in order to enable the Buyer to be reasonably satisfied that the Seller has sufficient Financial resource to acquire and carry out the Stadium Development on the Relocation Site in satisfaction of the Funding Condition

[The Infrastructure Condition – Schedule 7]

1.1 **Infrastructure Agreements** means an agreement entered into pursuant to Section 278 or Section 38 of the Highways Act 1980 or any other relevant legislation relating to highways or any agreement pursuant to the statutory requirements of the appropriate authority or utility company relating to the passage or transmission or gas water electricity foul and/or surface water drainage telecoms or other services as shall

be required in order to commence carry out complete or bring into use the Stadium Development and/or the Store Development (as appropriate) in accordance with an Acceptable Planning Permission and/or any relevant Planning Agreement.

1.2 **Infrastructure Condition** means the Stadium Infrastructure Condition and the Store Infrastructure Condition

1.4 **Store Infrastructure Condition** means the completion of all Infrastructure Agreements as are required to be completed in accordance with the Acceptable Store Planning Permission and/or any relevant Planning Agreement prior to commencement or bringing into use of the Store Development.

3 Infrastructure Condition

The Infrastructure Condition shall be satisfied upon the later of the Stadium Infrastructure Condition and the Store Infrastructure Condition to be satisfied.

7 Termination

If the Infrastructure Agreement Condition is not satisfied by the date 9 months after the Cut Off Date then either party may serve a Termination Notice on the other pursuant to clause 3 of this Agreement unless the Infrastructure Agreement Condition is satisfied prior to the service of the Termination Notice.

[The Retention Condition – Schedule to the Supplemental Agreement]

17.1 **Capital Sum** means (subject to clause 17.4.2 (b) (iv)) a sum equal to £29,950,333 minus the lesser of the Maximum Loan Amount and the aggregate amount required to repay and discharge the Loans on the Completion Date.

Retention means a sum equal to (A + B x 105%) + £3,5000,000 + S106 Costs where:

A = the Building Contract Sum as evidenced by the receipt of fixed price formal tenders or an agreed negotiated Building Contract Sum into which the Seller is either able (or there is significant reasonable expectation of the Seller being able) to enter into a Building Contract in consideration of that Building Contract Sum; and

B = the reasonable and proper fees payable to the employer's representative or the architect in connection with the monitoring of the Stadium Works and the Building Contract

Retention Condition means the Capital Sum being agreed or determined in accordance with this Clause 17 as being greater than the Retention.

17.4.1 The Retention Condition shall be satisfied upon the Buyer and the Seller agreeing (acting reasonably) or it otherwise being determined in accordance

with Clause 26 of this Agreement that the Capital Sum is greater than the Retention or as expressly provided in Clauses 17.4.3(a) or 17.4.5.

17.4.2 (b) Where it is agreed or determined (following a re-negotiation or a revision of the Building Contract Sum in accordance with Clause 17.4.2 (a)) that the Retention is greater than the Capital Sum but not more than £1,000,000 greater than the Capital Sum (the sum (up to a maximum of £1,000,000) by which the Retention exceeds the Capital Sum being referred to as **"the Excess"**) then the following provisions shall apply:

(i) the Seller shall procure that one or more of its directors shall pay to the Buyer's Conveyancer the Excess (up to a maximum of £500,000) (**"the Director's Payment")** on the Completion date; and

(ii) Insofar as the Excess is greater than £500,000 then the Buyer shall pay to the Buyer's Conveyancer the balance of the Excess (up to a maximum of £500,000) (**"the Buyer's Payment"**) on the Completion Date; and

(iii) any Director's Payment and/or Buyer's Payment as shall be paid to the Buyer's Conveyancer shall form part of the Retention and the Buyer hereby irrevocably instructs the Buyer's Conveyancer to hold such monies accordingly

The Retention Condition shall be deemed to have been satisfied on the date upon which the Retention is agreed or determined and for the purposes of the following clauses of this Clause 17 the Capital Sum shall be deemed to comprise the Capital Sum plus the aggregate amount of the Director's Payment and the Buyer's Payment and this Clause 17 shall thereafter be construed accordingly

(c) Where it shall be agreed or determined that the Retention is greater than a sum equal to the Capital Sum + £1,000,000 then the Seller shall not be obliged to procure that any one or more of its directors shall make the Director's Payment and the Buyer shall not be obliged to make the Buyer's Payment pursuant to Clause 17.4.2 (b) unless the Buyer or the Seller shall have served notice pursuant to Clause 17.4.3 (a) or (b) prior to the date of service of a Termination Notice in which case the provisions of Clause 17.4.2 (b) shall apply.

17.4.3 Where it shall be agreed or determined that the Retention shall be greater than the Capital Sum (following a renegotiation of the Building Contract Sum in accordance with Clause 17.4.2 (b) and taking into account the due payment of the Director's Payment and the Buyer's Payment then at any time prior to the service of a Termination Notice:

(a) the Buyer shall be entitled to serve written notice upon the Seller waiving the Retention Condition…

(b) the Seller shall have the right to serve written notice upon the Buyer electing to provide a separate source of finance and/or security in relation to the Shortfall and subject to such finance and/or security being offered

by the Seller being previously approved by the Buyer (such approval not to be unreasonably withheld or delayed) then the Retention Condition shall be deemed to be satisfied on the date upon which such finance is paid or such other security is effected pursuant to clause 17.4.5

17.4.8 If the Buyer shall confirm to the Seller pursuant to a notice served by the Seller pursuant to Clause 17.4.3 (b) that the offer of finance or other security is not reasonably acceptable to the Buyer then it shall in such notice specify reasons why it is not acceptable and following service of such notice either party may determine this Agreement at any time after the date 20 Working Days after the date of service of such notice by service of written notice upon the other in which case this Agreement will automatically cease and determine but without prejudice to any one party as against the other for antecedent breach of the terms of this Agreement.