Neutral Citation Number: [2016] EWHC 2944 (Ch)

Case No: HC-2015-002784
Appeal Reference No.: CH-2016-000035

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 23/11/2016

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

DOOBA DEVELOPMENTS LIMITED	**Appellant/ Claimant**
- and -	
McLAGAN INVESTMENTS LIMITED	**Respondent/ Defendant**

- -
- -

Mr Nicholas Dowding QC and Mr Adam Rosenthal (instructed by **Reed Smith LLP**) for the **Claimant**
Mr Timothy Dutton QC (instructed by **Eversheds LLP**) for the **Defendant**

Hearing date: 19 October 2016

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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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MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. The court is asked to construe a clause in an agreement which gives either party a power of rescission "*if all of the Conditions have not been discharged in accordance with this Schedule by the Longstop Date*". The issue is as follows: Does the power to rescind arise if any of the Conditions have not been discharged by that date or does it arise only if none of the Conditions has been discharged by that date? The issue arises on an appeal from the decision of Chief Master Marsh on 29th January 2016 granting summary judgment.

The facts

2. The evidence before the court is confined to a short and uncontroversial witness statement from the solicitor for the Defendant, McLagan Investments Ltd (referred to in the proceedings as "Asda"), and a longer witness statement from Mr David Hodgson on behalf of the Claimant, Dooba Developments Ltd ("Dooba"). Mr Nicholas Dowding QC, who appears with Mr Adam Rosenthal for Dooba, concedes that some of the more controversial passages in Mr Hodgson's statement cannnot be relied upon in this application. The remaining parts are either uncontroversial or, to the extent that they are in dispute, do not materially assist me in reaching a conclusion.

3. There is a large measure of common ground between the parties as to the facts which I am to assume for the purpose of this application. I can therefore summarise the facts quite shortly.

4. Dooba is the owner of land known as Vesuvius Works, Worksop ("the Property"). On 23rd July 2010 Dooba entered into a conditional agreement ("the Agreement") with Asda. Under the Agreement Dooba was to purchase the Property, upon which Dooba was to build a retail superstore together with cafeterias, restaurants and a petrol filling station. Dooba also agreed to construct an estate road linking the superstore to the highway (I shall refer to the entire development as "the Superstore"). Dooba had previously sought outline planning permission for the Superstore, which had been refused, and an appeal was pending at the date of the Agreement.

5. Clause 2.1 of the Agreement provides for the sale and purchase of the Property, subject to Schedule 4, with a headline price of £12 million. Clause 2.3 provides a date for completion by reference to the Unconditional Date, which is defined as "*the date upon which the last of the Conditions is to be discharged by satisfaction or waiver in accordance with the provisions of Schedule 4*". Schedule 5 provides for the construction of the Superstore by Dooba.

6. Schedule 4 is headed "*Planning and other Conditions*". The structure of the Schedule is as follows:

   i) Paragraph 1 defines the Conditions.

   ii) Paragraph 2 is headed "*Discharge of the Conditions*"; this paragraph includes the words which I have to construe.

iii) Paragraph 3 is headed "*Time Limits for the Conditions and Rescission*".

iv) Paragraph 4 is headed "*Discharging the Planning Condition*". I do not need to consider this paragraph.

v) Paragraph 5 is headed "*Notification of Onerous Conditions*". I do not need to consider this paragraph.

vi) Paragraph 6 is headed "*Discharge of the remaining Conditions*".

vii) Paragraph 7 is headed "*Waiver*".

7. Paragraph 1 defines the four Conditions to which the Agreement is subject. These are as follows:

i) The Planning Condition is the grant of Satisfactory Planning Permission. The definition refers to Outline Permission, Detailed Permission and 106 Detailed Permission (all of which are defined). Each party is given a qualified power to veto any Planning Permission which is not Satisfactory. The draftsman achieves this by defining as "*Satisfactory*" a planning permission which is free from any "*Onerous Conditions*" and any "*Dooba Conditions*". "*Dooba Conditions*" is defined (broadly speaking) as conditions to which Dooba could reasonably object. "*Onerous Conditions*" is defined (broadly speaking) as conditions to which Asda could reasonably object. The Planning Condition contains a provision extending time until the expiration of the six-week period under section 288 of the Town and Country Planning Act 1990 ("the Act") and the three-month period for seeking judicial review.

ii) The Planning Agreement Condition is the entering into of a planning agreement, subject to any veto in respect of Dooba Conditions and Asda Conditions. Once again time is extended by three months to allow for judicial review.

iii) The Highway Condition contains three sub-conditions:

a) that Dooba secure such additional land as is necessary to carry out the Highway Works, which comprise the construction of a new roundabout linking the estate road to the highway (In this context I should mention that clause 2.8 provides for a possible change in the location of the estate road. This indicates that the parties contemplated that Dooba might have to acquire additional land in order to fulfil the Highway Condition, the relevance of this being that it might cause delay);

b) that all necessary consents and approvals be obtained in order to carry out the Highway Works; and

c) that the date by which planning permission for the Highway Works may be implemented should be at least six months after the date by which the Agreement would otherwise have become unconditional.

The definition is subject to a proviso that the Highway Condition should not be discharged until three months after the date of the relevant Planning Agreement.

iv) The Pre-Start Condition is the satisfaction by Dooba of any conditions attached to the Outline Permission which have to be satisfied before other works could be commenced.

8. Given its importance, I shall set out the whole of paragraph 2 of Schedule 4, underlining the words which I have to construe:

> "**Discharge of the Conditions**
>
> 2.1 On the date on which all of the Conditions have been discharged by satisfaction or waiver in accordance with this Schedule the Unconditional Date will have been reached, this Agreement will become unconditional and the provisions of clause 2 and Schedule 5 [i.e. Dooba's obligation to build the Superstore] is to become operative.
>
> 2.2 If any of the Conditions have not been discharged by satisfaction by the date they are stipulated in this Agreement to be discharged by or *(sic)* waiver in accordance with this Schedule the party entitled to rescind this Agreement in accordance with the relevant paragraph of this Schedule may rescind this Agreement by giving to the other not less than ten working days notice to that effect where it does not expressly provide to the contrary in this Agreement.
>
> 2.3 Without prejudice to the provisions of paragraph 3 <u>if all of the Conditions have not been discharged in accordance with this Schedule by the Longstop Date</u>, then either Asda or Dooba may rescind this Agreement by giving to the other not less than ten working days written notice to that effect."

The Longstop Date is defined in clause 1 of the Agreement simply as 23rd July 2014.

9. Paragraph 3 is headed "*Time Limits for the Conditions and Rescission*". The structure of this paragraph is as follows:

i) Sub-paragraph 3.1 provides that either party may rescind under paragraph 2 if the Planning Condition has not been discharged by 23rd July 2013, subject to sub-paragraph 3.2.

ii) Sub-paragraph 3.2 provides for this date to be extended in certain events (including appeal and application for judicial review), provided that the event under paragraph 3.1 has happened by 23rd July 2013.

iii) Sub-paragraph 3.3 is of particular importance and I set it out in full:

> "If the Planning Condition has not been discharged by the Longstop Date then this Agreement is to become capable of rescission under paragraph 2 by either party."

iv) Sub-paragraph 3.4 says that either party may rescind under paragraph 2 if the Planning Agreement Condition has not been discharged within six months of the Discharge of the Planning Condition.

v) Sub-paragraph 3.5 says that either party may rescind under paragraph 2 if the Highway Condition has not been discharged within six months of the discharge of the Planning Condition.

vi) Sub-paragraph 3.6 says that either party may rescind under paragraph 2 if the Pre-Start Condition has not been discharged within six months of the grant of Outline Permission.

10. Paragraph 6 is headed "*Discharge of the remaining Conditions*":

i) Paragraph 6.1 provides:

> "Dooba shall use its reasonable endeavours to satisfy the Highway Condition and Planning Agreement Condition as soon as reasonably practicable following the date of this Agreement but shall not be obliged to (but may) enter into any Planning Agreement in connection with the discharge of either the Highway Condition or the Planning Agreement Condition before the discharge of the Planning Condition…"

ii) By sub-paragraph 6.2 Dooba covenants to use reasonable endeavours to satisfy the Pre-Start Condition as soon as reasonably practicable following the date of the Outline Permission.

iii) Sub-paragraph 6.3 is not relevant.

11. Paragraph 7 permits Dooba and Asda respectively to waive any Dooba Conditions and Asda Conditions.

12. That is all I need to refer to in the Agreement. There have been a number of important milestones in the history of the subsequent attempts to discharge the Conditions. Since these are both controversial and irrelevant to the issue I have to decide, I shall say nothing about them.

13. On 24th July 2014 (the day after the Longstop Date), Asda's solicitors served notice of rescission pursuant to paragraph 2.3 of Schedule 4. On 3rd July 2015 Dooba issued proceedings seeking (inter alia) a declaration that the notice of rescission was invalid as being premature. On 20th October 2015 Asda applied to the Master for summary judgment under CPR Part 24 seeking an order that the claim be dismissed.

The Master's judgment

14. There were two issues before the Master. The first was the issue of construction with which I am concerned. The second was whether the Highway Condition had been discharged before the date of the rescission notice. The Master answered the second

question in the negative and there is no appeal from that part of his decision. Accordingly, I must proceed on the basis that at least one of the Conditions (viz. the Highway Condition) had not been satisfied by the Longstop Date, but I have to assume that it is arguable that the remaining Conditions had been satisfied by that date. It is because the issue arises in this stark form that I have no need to consider any additional provisions of the Agreement which runs to nearly 70 pages.

15. Turning to the issue with which I am concerned, the Master accepted Asda's argument that it had validly rescinded under paragraph 2.3, since at least one of the Conditions had not been satisfied by the Longstop Date. The essence of the reasoning in his detailed judgment is as follows:

> "31. Stepping back from the detail of the drafting, and looking at the agreement at a relatively high level abstraction, it can be seen that:
>
> (i) The parties made provisions for a lengthy period between the date of the Agreement and the date described as the Longstop Date, namely 4 years.
>
> (ii) The process of obtaining planning consent, or at least attempting to do so, had been started prior to 23rd July 2010 and it would have been apparent to the parties prior into entering into the agreement that obtaining consent would not be a straightforward process.
>
> (iii) Both parties would have wished to have certainty about the maximum period the agreement would remain conditional and it would be natural to wish to specify a clear Longstop Date. It does not necessarily follow that the date they chose to apply to the definition Longstop Date was entirely final. However, it might be thought that if 23rd July 2014 was not to be final, the terms of the agreement would have made this clear.
>
> (iv) Although, as Mr Hodgson indicates, there was necessarily a degree to which the unfolding of events and the satisfaction of conditions might best be carried out sequentially, paragraph 3.1 strongly suggests to my mind that the parties thought the Planning Condition could be discharged by 23rd July 2013. Had that been achieved, there would have been an ample period to enable the Planning Agreement Condition and the Highway Condition to be discharged prior to the Longstop Date. There was indeed a margin of 3 months beyond the 6 months plus 3 months periods.
>
> (v) The extension of time in the event of one of the paragraph 3.2 events applying was intended to be the exception. To my mind, paragraph 3.3 is explained by the general words used at the end of paragraph 3.2 to calculate when

> rescission pursuant to paragraph 3.1 might become possible following the extended period. Without paragraph 3.3 the rescission date might have run on for a lengthy period. Put another way, what paragraph 3 is doing is to put a final date on the period for discharge of the planning conditions.

32. I accept Mr Dutton QCs opening submission that although it might appear at first sight to be surprising to use " all " as if it meant "any", it is linguistically feasible to do so. It seems to me that "all" can mean less than that the totality in an appropriate context. It does not necessarily mean "each and every one" or "the entire number of": it may mean some only. In paragraph 2.1 "all" has its more usual meaning, that every one of the conditions has been discharged. Clearly, it is surprising for the draftsman to have used the same word with a different meaning in paragraph 2.3 but I consider that is precisely what has happened when paragraph 2.3 is looked at in its overall context. Paragraph 2.3, as Mr Dutton QC submits, is the handmaiden to paragraph 3. The "any" in paragraph 2.2 is referring to the various possibilities for rescission to which paragraph 3 gives rise, namely rescission under paragraph 3.1, 3.4, 3.5 and 3.6. To my mind paragraph 2.3 is intended to achieve something different. Just as paragraph 2.1 explains how the Agreement will become unconditional and proceed to completion, paragraph 2.3 is intended to do the opposite, namely to provide clarity about the date upon which the agreement may be rescinded upon the expiry of 4 years from its commencement if any Condition has not been complied with. In the case of the Planning Condition, paragraph 2.3 duplicates the power to rescind under paragraph 3.3. I do not consider, however, that duplication makes it unlikely that was the intended effect because, even if not expressly given greater weight than the other Conditions, the Planning Condition was central to the Agreement becoming unconditional. There is no reason why the draftsman should not have wished to emphasise its importance in this way in paragraph 3.3, but at the same time to have specified in clear terms that the failure to discharge any condition by 23rd July 2014 could lead to rescission.

[There is no paragraph numbered 33.]

34. During the course of hearing I was at one point concerned about the opening words of paragraph 2.3 pursuant to which it is expressed to be without prejudice to the provisions of paragraph 3.3. Mr Dowding QC submitted that these words were intended to mean that paragraph 2.3 is not to prejudice paragraph 3. However, the expression "without prejudice to", an expression which is used by draftsmen in many different contexts, does not necessarily have that meaning. In the context

> of this agreement the words mean nothing more than the rights to rescind under paragraph 3 are not diminished by the overall right to rescind in paragraph 2.3. Thus, taking what Mr Dutton QC described as the paradigm situation of the Planning Condition being discharged prior to 23rd July 2013, the rights to rescind under paragraph 3 in relation to failure to discharge either the Planning Agreement Condition or the Highway Condition within 9 months thereafter would not be prejudiced by the general right to rescind under paragraph 2.3 once the Longstop date is reached.
>
> 35. Although paragraph 6.1 does not weigh heavily in the balance, it does point towards the parties having contemplated that the work leading to discharge of the Conditions did not necessarily need to be carried out in series even if discharge of the Planning Agreement Condition and the Highway Condition might have to await discharge of the Planning Condition. Paragraph 6.1 provided strong encouragement to the Claimant to satisfy the Highway Condition and the Planning Agreement Condition as soon as reasonably practicable following the date of the Agreement. It might be said that its terms are mainly exhortatory but, nevertheless, they are clear indicators of an approach which was not intended to be purely linear.
>
> 36. Whichever construction is adopted, the drafting can be seen to be less than perfect. That said, it is understandable that paragraph 2.3 was added as a "catch all" provision with a view to emphasising the importance of the Longstop Date even though it reduced the importance of paragraph 3.3. I do not accept Mr Dowding QC's characterisation of paragraph 3 as being predominant. Such an approach overlooks;
>
> (i) the importance of paragraph 2.1 in explaining how the Agreement was to become unconditional;
>
> (ii) the relationship between paragraph 2.2 and paragraph 3 as a whole. It is plainly that provision the draftsman had in mind in paragraph 3 when referring to "paragraph 2";
>
> (iii) the importance of the words "without prejudice to paragraph 3" in paragraph 2.3 which to my mind give independent life to paragraph 2.3."

16. The Master gave permission to appeal in relation to the construction of paragraph 2.3, stating that "*the first issue of construction has real prospects of success*".

The law

17. The only authority to which I was referred for the approach to construction is *Arnold v. Britton* [2015] AC 1619. As Lord Neuberger's judgment is so well known, I shall confine myself to setting out paragraph [15], but I also bear in mind the seven factors to which Lord Neuberger drew attention in paragraphs [16] to [23].

> "15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn [1971] 1 WLR 1381* , 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989* , 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251* , para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky [2011] 1 WLR 2900* , paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC."

18. Mr Dowding asks me to note in paragraphs [30] to [32] the deeply unattractive consequences of the literal interpretation which the Supreme Court nevertheless decided that it was bound to follow. He submits that this authority shows a shift in emphasis away from earlier decisions of the House of Lords and the Supreme Court which placed greater emphasis on a purposive construction. However, for the reasons which I will explain, I find it unnecessary to resolve that controversial issue.

19. I will consider the submissions of Dooba and Asda by reference to ever-increasing circles radiating from the words in dispute, as follows:

    i) The disputed clause;

    ii) Paragraph 2 as a whole;

    iii) The Agreement as a whole;

    iv) The overall purpose of the clause and the Agreement;

    v) The factual matrix; and

vi) Commercial common sense.

I will then reach my overall conclusion in the light of all of these matters.

The submissions and my analysis

The disputed clause

20. The clause states that the power to rescind arises "*if all of the Conditions have not been discharged in accordance with this Schedule by the Longstop Date"*. Dooba submits that the power to rescind does not arise unless all of the Conditions have been satisfied by that date. Asda submits that the power arises if any of the Conditions have not been satisfied by that date. In time-honoured fashion, each party suggests reversing the negative part of the clause. I do not find this helpful, since it begs the question: Which part of the clause is governed by the word "*not*"?

21. The subject of the clause is "*all of the Conditions*"; the characteristic which the subject is required to have is "*have not been discharged*". As a matter of strict Boolean logic, the relevant characteristic is a negative one, which must affect all of the Conditions in order to fall within the clause. Asda's construction depends on reading the clause as if it said "*if not all of the Conditions have been discharged*".

22. Mr Timothy Dutton QC, who appears for Asda, accepts that Dooba's construction is correct as a matter of strict logic but describes the approach which I have set out as being "*pedantic*". That epithet is doubtless regarded as derogatory in many circles, but perhaps not in the case of lawyers seeking to construe a formal agreement.

23. The correct meaning of a word or clause in English is, of course, governed by ordinary English usage rather than by strict rules of grammar or etymology. There are undoubtedly words whose normal meaning is not their etymologically correct meaning. One example is *decimate*, which in ordinary usage is now more likely to refer to the deaths of 90% than to the deaths of 10% of the population or group in question. Another example, suggested by Dooba, is the meaning of *hopefully*. A person who says that he will hopefully go to Birmingham is describing his expectation that he will be able to travel there, not his state of mind when undertaking the journey. In contrast to these examples, I agree with Asda that the formula "*if all … have not …*" is sometimes used to mean "*if not all … have*", but I do not accept that this has become its primary meaning.

24. Mr Dutton illustrated Asda's contention by citing judgments of two very distinguished Chancery judges, one of whom is now in the Court of Appeal. It is clear from the context that these judges used "*if all … have not*" to mean "*if not all … have*". He even referred to a statute which uses it in that sense. Section 27(4)(c) of the Coal Mining Subsidence Act 1991, dealing with crop loss payments, states that:

> "There shall be disregarded … [,] if all reasonable steps have not been taken to protect them, any crops grown in a greenhouse affected by the damage."

25. It is clear from the context that such crops are to be disregarded if *any* reasonable steps have not been taken to protect them. Whilst I commend the diligence of Asda's legal team in unearthing these examples, I cannot draw any conclusion from them, save that the occasional grammatical infelicity may be found even among judges of this Division and Parliamentary draftsmen. I have not, of course, been told how many examples there are of judges or statutes using the correct formula. I therefore conclude that either meaning is perfectly possible, but that the meaning for which Dooba contends is the one which is grammatically correct.

26. Asda seeks to derive support from the reference in paragraph 2.3 to the Longstop Date. I agree that this term plainly indicates *a* terminal date, but I do not agree that it necessarily refers to the only terminal date. It is perfectly possible to have two sets of dates, one for each set of rescission provisions. Indeed, paragraph 3 suggests that Asda's construction is wrong, since under that self-contained code it is only the Planning Condition which is subject to the Longstop Date.

27. There is a further reason why I reject Asda's submission as to the significance of the Longstop Date. I have already noted that a planning permission is defined as Satisfactory if it is free from Dooba Conditions and Onerous Conditions. It might have been thought more accurate to refer to Dooba Conditions and *Asda* Conditions and to describe both as *Onerous*, but that is not how the draftsman has proceeded. Given that the term *"Onerous*" has been used to cover only one of the two kinds of onerous conditions, I cannot conclude that the *Longstop Date* was intended to show that there could only be one terminal date.

Paragraph 2 as a whole

28. Sub-paragraph 2.1 of Schedule 4 provides for the Agreement to become unconditional when "*all*" of the Conditions have been discharged. This is a straightforward sub-paragraph to construe, since the word "*not*" does not appear. It is clear in sub-paragraph 2.1 that "*all*" means all.

29. Sub-paragraphs 2.2 and 2.3 operate as provisos to sub-paragraph 2.1. Sub-paragraph 2.2 provides for rescission if "*any*" of the Conditions have not been discharged by the date stipulated in the Agreement. The reference to a Condition not being discharged by the date stipulated in the Agreement is plainly a reference to paragraph 3. Paragraph 3 states *when* the power to rescind arises in relation to each Condition; paragraph 2.2 states *how* it is to be exercised (viz. by giving 10 days' written notice). Paragraph 2.3 is an alternative complete code which includes both the *when* and the *how.* Accordingly sub-paragraph 2.2 is a necessary adjunct to paragraph 3 but not to sub-paragraph 2.3. Further, paragraph 3.1 expressly refers back to paragraph 2. Since sub-paragraph 3.1 refers to a power to rescind after 23rd July 2013, the reference in sub-paragraph 3.1 to paragraph 2 can only be to sub-paragraph 2.2, not 2.3.

30. Sub-paragraph 2.2 says "*any*", whilst sub-paragraph 2.3 says "*all*". Dooba submits that the difference in language is deliberate. The draftsman uses the formula "*if any … have not been discharged*" to create a power to rescind where at least one Condition remains undischarged. This is synonymous with "*if not all … have been discharged*". I agree that this feature is striking, firstly because the two sub-

paragraphs are immediately adjacent provisions occurring in the same paragraph, and secondly because they indicate that the draftsman knew the correct formula which avoids any ambiguity.

31. Asda's answer is that sub-paragraph 2.2 looks to what happens if the deadline under paragraph 3 for satisfying each Condition has passed, and hence at each Condition individually, whilst sub-paragraph 2.3 looks to the state of affairs at the Longstop Date and asks whether all the Conditions have been satisfied. I agree with Mr Dutton's submission that this explains the use of "*any*" in sub-paragraph 2.2, but I do not find this to be a convincing reason why the term "*all*" in sub-paragraph 3.3 should also mean "*any*".

32. One would expect any well-drafted conditional agreement to provide either a date by which the conditions have to be satisfied or a date after which either party is entitled to rescind. However, Schedule 4 has not one, but two, separate provisions to this effect. One is to be found in sub-paragraph 2.3, the other in sub-paragraph 2.2 and paragraph 3.

33. In theory there is no reason why an agreement should not confer two separate powers, even if they cover much the same ground. The consequence is that the person who has the benefit of these powers may choose which one to rely on. Nevertheless it is undoubtedly unusual and might well be thought to be unnecessary. On the evidence before the court, it is not open to me to conclude that either of these powers was included in error; I simply have to do the best I can on the assumption that both were intended to be included.

34. However, although there might be justification in having two similar provisions, there is no justification in having two which cover exactly the same ground. Hence, if there are two ways of construing a clause, the court leans in favour of the construction which results in there being no such duplication.

35. Sub-paragraph 2.3 opens with the words: "*without prejudice to the provisions of paragraph 3*". This formula usually occurs where two clauses are in conflict and it is necessary to state which one is to prevail. If clause A is without prejudice to the provisions of clause B, this means that A must be given a reduced meaning to the extent necessary to give B its full meaning. However, there is no need to create any such hierarchy unless the provisions in question conflict with one another. In the present case, sub-paragraph 2.3 and paragraph 3 each confer a separate power of rescission. Hence there is no conflict between them. The most that can be said is that one power might be so wide-ranging as to make the other power redundant. To put it another way, the phrase "*without prejudice to the provisions of paragraph 3*" would only serve a purpose if paragraph 3 was restrictive (i.e. no rescission before these dates) and not enabling. As it is, I consider that the phrase is meaningless in the context of this Agreement. By the same token I reject Dooba's submission that paragraph 3 is intended to be "*contractually pre-eminent*".

36. Asda submits that sub-paragraph 2.3 is the mirror image of sub-paragraph 2.1. I do not agree. As I have said, I regard each of sub-paragraphs 2.2 and 2.3 as provisos to sub-paragraph 2.1 which overlap to a considerable extent.

Schedule 4 as a whole

37. Paragraph 3 provides an intelligible and self-contained regime for determining when the power to rescind arises. It deals with each of the four Conditions in turn, providing a power to rescind if the Condition in question is not satisfied by an ascertainable date.

38. Sub-paragraph 3.1 refers to rescission under paragraph 2, meaning sub-paragraph 2.2 (see paragraph 29 above).

39. The draftsman clearly envisaged that a planning decision might be made before 23rd July 2013 but that the extended period of time provided by sub-paragraph 3.2 might not have expired by the Longstop Date. In that event, sub-paragraph 3.3 gives either party power to rescind after the Longstop Date of 23rd July 2014. However, the draftsman also envisaged that there might be no grounds for extension under paragraph 3.2, in which case the Planning Condition would be discharged before the Longstop Date.

40. Sub-paragraphs 3.4 and 3.5 provide that either party may rescind if the Planning Agreement Condition or the Highway Condition has not been discharged within six months after the discharge of the Planning Condition. The reference to the discharge of the Planning Condition is clearly a reference back to sub-paragraphs 3.1 and 3.2. However, the Longstop Date does not apply to sub-paragraphs 3.4 and 3.5.

41. Sub-paragraph 3.6 provides that either party may rescind if the Pre-Start Condition has not been satisfied within six months of Outline Permission.

42. There is a disagreement of fact between the parties, which I need not (and cannot) resolve, as to whether it was thought likely at the date of the Agreement that the different Conditions would be satisfied in any particular order. However, what is clear is that this Agreement provides for different possible permutations. The Planning Agreement Condition and the Highway Condition will not be satisfied until six months after satisfaction of the Planning Condition, but the earliest date for rescission in respect of the Planning Condition might come first, as a result of the Longstop Date.

43. In a straightforward case, one would expect a planning agreement to be signed on the same day as planning permission is granted, but it is clear that the planning and highway issues in relation to the Property were very complex. I am satisfied that it is impossible to conclude at this stage that the Agreement is predicated on the Conditions being satisfied in any particular order. I therefore reject Dooba's arguments which were based on the parties having envisaged a particular sequence in which the Conditions would be satisfied. It follows that I derive no help from sub-paragraph 6.1.

44. Each party makes valid submissions about the weakness of the other party's case regarding the interaction between sub-paragraphs 2.3 and 3.3. The effect of sub-paragraph 3.3 is that either party is able to rescind for failure to discharge the Planning Condition by the Longstop Date, if the power to rescind has not arisen earlier under sub-paragraphs 3.1 and 3.2:

i) According to Dooba, the power to rescind under sub-paragraph 2.3 arises only if none of the Conditions has been discharged by the Longstop Date. If so, sub-paragraphs 2.3 and 3.3 cover exactly the same ground and one of them is redundant (or, as Mr Dutton puts it, sub-paragraph 2.3 is inoperable).

ii) According to Asda, the power to rescind under sub-paragraph 2.3 arises if any one or more of the Conditions remains undischarged at the Longstop Date. If so, sub-paragraph 3.3 is redundant, because it is one sub-set of the sets which comprise the possible bases for rescission under sub-paragraph 2.3.

45. Each party makes a valiant attempt to show why the redundancy which arises on its construction of sub-paragraph 2.3 is less problematic than the redundancy which arises on the other party's construction. In particular, Mr Dutton submits that Dooba's construction is worse than Asda's, because it results in sub-paragraph 2.3 being inoperable on every permutation, and is therefore less likely to have been intended by the draftsman. I do not accept this submission. I acknowledge that the process of construction requires the court to suspend its disbelief by assuming, if possible, that every word and every phrase has been inserted for a reason. Nevertheless, I find it impossible to presume that the draftsman is more likely to have intended to say the same thing twice than to have intended to create a provision which would never be operable. Both suggestions are equally unattractive. As Dr Johnson reputedly said: "*There is no settling the point of precedency between a louse and a flea.*"

The overall purpose of the clause and the Agreement

46. The overall purpose of the Agreement is to provide for Asda to acquire the Property containing the Superstore. This is clearly dependent upon satisfaction of the four Conditions. If the Conditions are not satisfied, there must obviously come a time at which the Agreement comes to an end, either automatically or pursuant to the exercise of one or more powers to rescind. The purpose of paragraphs 2 and 3 of Schedule 4 is to say when those powers arise and how they are to be exercised. There is nothing in the overall purposes of sub-paragraph 2.3 or of the Agreement as a whole which makes one party's construction more consistent with those purposes than the other party's construction.

The factual matrix

47. The very limited evidence which I have taken into account does not create any significant factual matrix outside the Agreement itself.

Commercial common sense.

48. Given the overall purpose of the Agreement, it is obvious that the Property will be useless to Asda unless all the Conditions have been fulfilled. Had sub-paragraph 2.3 stood alone, without sub-paragraph 2.2 and without paragraph 3, there would have been a strong ground for a purposive construction that would result in the Agreement being terminable if any of the Conditions had not been discharged by the Longstop Date. However, since there is a workable alternative regime under sub-paragraph 2.2 and paragraph 3, there is no such imperative in this case. Asda very fairly accepted that Dooba's construction was not commercially absurd.

Conclusion

49. Like the Master, I regard the merits of the rival contentions as finely balanced. This inevitably means that factors which appear relatively unimportant are likely to be the ones that tip the balance. This might create the impression that the tipping factors have a disproportionate importance, but it is merely a reflection of how evenly balanced the arguments are.

50. The three factors which the Master regarded as most significant are the Longstop Date, the likely sequence in which the Conditions would be discharged and the construction of sub-paragraph 3.3. I have explained in my judgment why I do not attach the same weight as the Master did to these and to the other factors mentioned in paragraphs 31 to 36 of his judgment.

51. As construction is an iterative process, I need to review the conclusions I have reached under each heading before I reach my overall conclusion:

    i) The literal meaning of the clause "*if all the Conditions have not been discharged*" is that contended for by Dooba. The power to rescind under sub-paragraph 2.3 arises only if none of the Conditions has been discharged by the Longstop Date.

    ii) This is supported by the contrast with the formula "*if <u>any</u> of the Conditions have not been discharged*" in sub-paragraph 2.2.

    iii) Sub-paragraph 2.3 does not sit happily with the alternative regime for rescission under sub-paragraph 2.2 and paragraph 3. Neither party is able to provide a satisfactory explanation for this. Accordingly the rival arguments cancel one another out.

    iv) Given the existence of this alternative regime, there is no assistance to be found by looking at the overall purpose of the Agreement or at commercial common sense.

52. In respectful disagreement with the Master, I therefore conclude that Asda was not entitled to rescind on 24th July 2014 unless all of the Conditions remained undischarged on that date. It has been established that the Highway Condition remained undischarged on that date, but there is a triable issue as to the remaining

Conditions. Accordingly, this is not an appropriate case for summary judgment dismissing the Claim. I therefore allow this appeal.