Neutral Citation Number: [2018] EWHC 118 (Ch)

Case No: C30LS707

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

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

Date: 31/01/2018

Before:

MR JUSTICE NORRIS

- -

Between:

Gaia Ventures Limited	**Claimant**
- and -	
Abbeygate Helical (Leisure Plaza) Limited	**Defendant**

Mark Wonnacott QC and Harriet Holmes (instructed by **Metis Law**) for the **Claimant**
Piers Hill (instructed by **Geoffrey Leaver Solicitors**) for the **Defendant**

Hearing dates: 2-15 May 2017

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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 HONOURABLE MR JUSTICE NORRIS

Mr Justice Norris:

1. How hard do you have to work to make yourself liable to pay £1.4 million? The essential question for decision in this case is whether a developer used 'reasonable endeavours' to achieve 'as soon as reasonably practicable' the satisfaction of certain conditions upon the fulfilment of which the developer became obliged to make an overage payment of £1.4 million: and if it did not, then whether the overage payment or damages in lieu are payable.

2. I will begin with a description of the site and an identification of the key interests.

3. The site in question is at Elder Gate in Milton Keynes ("the Site"). It was almost square. Although this is not the precise orientation, it is convenient for the purposes of this judgment to say that to the north lay Avebury Boulevard, to the west lay Elder Gate, to the south lay another branch of Elder Gate and beyond it Childs Way, and to the east Grafton Gate.

4. Within the Site and adjacent to its northern and western boundaries was a large square structure called 'the Leisure Plaza' ("the Leisure Plaza"): the remainder of the Site (in an 'L' shape around the Leisure Plaza) was car parking and open space.

5. It is sufficient for the purposes of this judgment to say that by 2002:

    a) The land to the east of the Site was in the ownership of the Zurich insurance group and occupied by two retail stores (Argos and Toys'R'Us) ("the Zurich Land")); and

    b) Land to the south of the Site (adjacent to Elder Gate/Childs Way) was in the ownership of the Homes and Communities Agency ("HCA").

6. In 2002:

    a) The freehold in the Site was owned by the HCA:

    b) The HCA title to the Site was encumbered by a "claw-back" covenant in favour of Milton Keynes Borough Council ("the Council") that was protected by a restriction on the title:

    c) The freehold title to the Site was also encumbered by a lease ("the Superior Lease") originally granted to First Leisure Trading Limited in 1992.

    d) Out of the Superior Lease First Leisure had granted two underleases of part of the Leisure Plaza (which can together be called "the Ice Rink Lease") and this leasehold interest was vested in Planet Ice Limited ("Planet").

    e) The land demised by the Ice Rink Lease was used and occupied by Planet as a commercial ice rink and as the home of the MK Lightnings hockey team ("the Rink").

f) The remainder of the Leisure Plaza was occupied by premises built as a ten-pin bowling alley and a nightclub/restaurant.

g) Out of the Superior Lease First Leisure had also granted two underleases relating to electricity substations ("the Transformer Leases"). From one of the sub-stations ran cabling and electrical conduits which serviced the Zurich Land (and in respect of which the proprietor of the Zurich Land held appropriate service easements).

7. The Elder Gate Leisure Plaza was not a successful attraction. First Leisure had built the Rink as a "planning gain" in order that they could build and run nightclubs and other more profitable operations. They originally ran the Rink at a loss but then closed it as unviable. It was acquired in 2000 by Planet for about £750,000: and Planet then invested a very considerable sum in making the Rink more attractive. But Planet could do nothing to make the adjacent leisure facilities attractive and by 2003 both the ten-pin bowling alley and the nightclub/restaurant had closed. The Council began conducting a Feasibility Study. The whole area was plainly ripe for redevelopment.

8. Abbeygate Helical (Leisure Plaza) Limited ("Abbeygate") was an equal joint venture between Helical Bar PLC ("Helical") and Abbeygate Developments Limited ("Developments"). Its object was to acquire and to redevelop the Site and any necessary adjoining land. In May 2003 the Superior Lease was acquired by Abbeygate for £2m. To redevelop the Site Abbeygate then had to (a) buy the freehold of the Site or alter the Superior Lease to permit redevelopment and (b) buy in all interests derived out of the Superior Lease (including the Ice Rink Lease and the Transformer Leases).

9. By a Transfer dated 4 July 2003 Planet transferred to Abbeygate the Ice Rink Lease. Abbeygate paid an immediate premium of £1.525m and entered into an overage covenant. There was, at trial, a debate about whether the "purpose" of this overage covenant was to provide to Planet supplemental value if development was achieved, or whether it was to provide a relocation fund for the operators of the Rink if the redevelopment involved closure of the Rink. But in my judgment the "purpose" does not matter. Whatever the reason for entering the overage covenant (and each side may have had a different reason) it is the legal obligation itself ("the Overage Provision") which must be given effect.

10. By Clause 2.1 of the Overage Provision Abbeygate covenanted that it would not later than 10 working days after any "Trigger Date" pay to Planet the "Additional Payment". The "Additional Payment" was a fixed sum of £1.4m. This sum is what the case is about.

11. The "Trigger Date" was defined in Clause 1.1.15 of the Overage Provision in these terms: -

> *""Trigger Date" means…the Date of an Acceptable Planning Permission…"*

(There were other Trigger Dates specified but these are not material). There is one adjustment that might be made to the Trigger Date to which I refer below.

12. The expression "the Date of an Acceptable Planning Permission" was defined in Clause 1.1.6 of the Overage Provision to mean: -

> *"The date on which following the grant of an Acceptable Planning Permission is 3 months after the Grant Date without a Challenge being made or in the event of such a Challenge the date upon which such Challenge has been abandoned or lost or finally disposed of leaving in place an Acceptable Planning Permission in tact valid and of full effect."*

So the structure is that the "Trigger Date" will be a minimum of 3 months after the actual date on which planning permission is granted.

13. Of the defined expressions in that provision it is necessary to address only "an Acceptable Planning Permission". This key term was defined in clause 1.1.2 to mean:-

> *"A Planning Permission…which is granted on terms and subject to conditions which in the reasonable opinion of [Abbeygate] are acceptable and commercially viable".*

It is useful to call this "the Planning Condition".

14. By Clause 4.5 of the Overage Provision Abbeygate covenanted that it would "use its reasonable endeavours to obtain an Acceptable Planning Permission" having regard to current strategic and local planning policy and the advice of its consultants.

15. The payment obligation contained in the Overage Provision was subject to one proviso and one condition. The proviso was contained in the definition of the "Trigger Date" and said: -

> *"PROVIDED THAT no date more than 10 years after the date hereof will be a Trigger Date."*

The transfer containing the Overage Provision was dated 4 July 2003: so the Trigger Date had to fall before 4 July 2013. This longstop date is important in this case.

16. The condition was contained in Clause 3.1 of the Overage Provision and said that the obligation to pay the £1.4m was: -

> *"…conditional upon [a] [Abbeygate] having obtained a variation of the provisions of the registered leases and the Superior Lease to permit the use and development of the premises demised by the Superior Lease…for all purposes contemplated by the Acceptable Planning Permission or [b] alternatively the acquisition of any necessary interest in the Superior Lease or the registered leases so that the necessary variation is available to it or [c] the registered leases are merged in the Superior Lease and the Superior Lease is merged in the freehold"* [Integers [a] [b] and [c] are inserted and are not in the original].

In fact, as at the date the Overage Provision became binding Abbeygate had already acquired the Superior Lease: and by the Transfer containing the Overage Provision itself Abbeygate acquired the Ice Rink Lease. But the argument advanced by Planet assumed that this did not satisfy option [b] and that it was option [c] that required fulfilment. It is useful to refer to this as "the Assembly Condition" since it relates to the gathering in or variation of property interests in the Site as part of the development process. Option [c] employs the language of "merger". In strict law "merger" occurs where the tenant acquires the reversion or a third party acquires both lease and reversion. Read literally, what was contemplated by option [c] was that Abbeygate as holder of the Superior Lease would acquire the freehold from HCA: but what was contemplated in relation to leasehold interests derived out of the Superior Lease (if "merger" is read strictly) is less clear.

17. About the fulfilment of the Assembly Condition Clause 3.3 of the Overage Provision contained an obligation that Abbeygate would: -

> *"as soon as it considers strategically advisable (taking into account the requirement to obtain an Acceptable Planning Permission) commence and thereafter use reasonable endeavours to negotiate and agree with the parties entitled to the reversions…the variations contemplated by Clause 3.1 as soon as reasonably practicable".*

The party entitled to the reversion on the Superior Lease was the HCA. Abbeygate already owned the reversion on the Ice Rink Lease (and any replacement lease) and on the Transformer Leases because it had acquired the Superior Lease. So a literal reading of the phrase "...negotiate with the parties entitled to the reversions…." produces a curiosity: but the clause must clearly be given a sensible commercial meaning and "reversion" read (as it was common ground it should be read) as meaning "relevant property interest".

18. There is one further provision to be noted. This enabled the Trigger Date to be adjusted if the Assembly Condition had not been satisfied on the date when the Planning Condition was satisfied. Clause 3.2 of the Overage Provision provided:

> "*If on the Date of an Acceptable Planning Permission the condition set out in Clause 3.1 above [i.e. the Assembly Condition] has not been satisfied the Trigger Date will be postponed until 10 working days after satisfaction of the said condition…*"

But that was said to be subject to the proviso, to which I have already referred, that the Trigger Date could not be after the 10th anniversary of the Overage Provision.

19. The transfer by Planet to Abbeygate which contained the Overage Provision was made pursuant to an agreement which provided for Planet to have the option to lease back the Rink from Abbeygate. The commercial context of this was that the satisfaction of the Planning Condition and the Assembly Condition would each take some time, the Rink could not be left derelict pending the satisfaction of those conditions, and the reality was that the Council wanted a functioning ice rink (apart, of course, from when the building works were being undertaken). Planet exercised this option: I will call the resulting Planet tenancy "the Rink Leaseback". In the Rink

Leaseback Planet covenanted to keep the Rink open: and Abbeygate had the benefit of a break clause entitling it to determine Planet's interest at any time by three months' notice. The expectation was that Planet would be in pole position to obtain a new lease of the refurbished Rink once the development of the Site had been completed by Abbeygate.

20. In fact, towards the end of 2011 Planet itself encountered financial difficulties. In those difficulties it found itself unable to borrow from its bankers against the security of the Overage Payment. On 30 November 2011 in return for a payment of £200,000 Planet assigned the benefit of the Overage Provision to Gaia Ventures Limited (a Seychelles company) ("Gaia"). Gaia was a company partly in the ownership of Alexander Geffert ("Mr Geffert"), who had been a substantial shareholder in Planet. Mr Geffert and his partner had acquired Planet in early 2005 from its previous owners, one of whom was Mr Michael Petrouis ("Mr Petrouis"). Following that acquisition Mr Petrouis, although no longer an equity owner, stayed on to assist Mr Geffert with the running of Planet (whilst Mr Petrouis developed his own business in the same line).

21. When Planet encountered financial difficulties, and eventually went into administration, Mr Petrouis re-acquired Planet's businesses to run alongside his own. He took an assignment of the Rink Leaseback and he was the one who assumed pole position in negotiating with Abbeygate for a new lease of the Rink when refurbished. I will call the company through which he operated "Planet MK".

22. It is beyond dispute that at in late 2011 Abbeygate was considering how it might reduce or avoid the burden of its obligations under the Overage Provision. In an e-mail sent on 4 December 2011 (copied to Mr David Gwynne of Developments ("Mr Gwynne") and Mr Jack Pitman of Helical ("Mr Pitman")) Mr Clive Faine of Developments ("Mr Faine") informed Abbeygate's solicitors that they were negotiating (I think as between Developments and Helical) "... the "haircut" these guys [sc. Gaia and/or Planet MK] will have to accept either off the £1.4 million or off the spec of the refurbished ice rink". In subsequent internal correspondence within Abbeygate there are further references to "working on the building costs/the payment to Planet Ice" giving "between £1m and £2 m improvement in returns".

23. In this action Gaia sues Abbeygate for breach of the Overage Provision. Before addressing the precise allegations of breach, it is useful to set out in summary form what happened with the development proposals for the Site from 2003 and to identify certain key documents (drilling down to particular provisions where necessary).

24. Nothing happened in relation to the development of the Site for some while. A planning permission was applied for and granted in 2007: but nothing came of it. Then in December 2010 Abbeygate obtained planning permission to refurbish the Rink, to demolish the ten-pin bowling alley and its adjoining restaurant, and to construct a casino, some conference facilities, and a new retail unit to the south of the Rink. The size of the new retail unit meant that land in the ownership of HCA (in addition to HCA's reversion on the Site) and other land needed to be acquired. The conditions upon which the 2010 permission was granted restricted the casino building to Class D2 use or use as a casino. When it became clear that a casino license might not be available the scheme had to be rethought around a pure retail use (with the casino being treated in the alternative as three food retail units). But this would

require an amendment to the 2010 permission. This alteration was achieved by September 2011, and the development refocussed on a retail development (including a superstore) with the Rink providing the only leisure element.

25. By April 2012 Morrisons had been identified as the anchor tenant to occupy the proposed super-store (earlier negotiations with Sainsburys and with Tesco having broken down), and plans developed in accordance with the layout requirements of Morrisons (which required further amendment to the 2010 planning permission). So, from the developer's perspective in order to complete the development four matters would require attention:

    a) The revised planning permission;

    b) The necessary site assembly;

    c) The necessary letting agreements; and

    d) Sufficient funding.

26. On 9 November 2012 Abbeygate applied for (and on 8 February 2013 the Council granted) planning permission for minor material amendments to the existing 2010 permission (to reflect the Morrisons' layout) subject to conditions ("the February Permission"). Condition 1 of the February Permission was the entirely usual condition that the approved development should be carried out in accordance with identified plans. Drawing Q2/958/PL/0102P (revised on 14 November 2012) now showed the Rink as a standalone building with (to the east) two new retail units and some car parking up to the boundary of the Zurich Land: and, to the south, the new super-store, the footprint of which still fell outside the strict confines of the Site, but now utilised only additional land in the ownership of HCA. The February Permission had been granted in exercise of powers conferred by s.73 of the Town and Country Planning Act 1990 because the changes amounted to "minor material amendments" to the existing permission: but it was a fresh planning permission (see s.73(2)(a) of the 1990 Act). If it was an "Acceptable Planning Permission" the provisional Trigger Date would be 8 May 2013.

27. Meanwhile, on 31 October 2012 Abbeygate had entered into a contract with HCA for the purchase of the reversion on the Superior Lease and relevant additional land ("the HCA Agreement"). The obligation to buy and sell arose "on the Conditions being satisfied". The HCA Agreement contained a long stop date of 31 March 2013, so the Conditions had to be satisfied by that date if HCA was to be compelled to complete the HCA Agreement: though of course HCA could waive or alter the long stop date if it chose. There were three such "Conditions".

28. The first related to work contracted to be done to the Rink and was expressed in these terms: -

> "[HCA] being satisfied… that [Abbeygate] has supplied to [HCA] an Ice Specification which adequately defines and delineates in sufficient detail to [HCA's] reasonable satisfaction the Ice Refurbishment Works provided that [HCA] agreed that the Ice Specification annexed hereto satisfies this

> condition but for the avoidance of doubt [HCA's] approval… will be required to any material amendments or variations…"

29. The term "Ice Specification" meant detailed drawings, specifications, layout plans and so forth comprising or describing the Ice Refurbishment Works. These were the refurbishment works to the Rink set out in the Ice Specification. According to Abbeygate's pleaded case the Ice Specification comprised a written text and two plans of the Rink (for the lower and upper floors respectively). The drawings originally attached were numbered Q2/958/PL/0211 (revision B) and Q2/958/PL/0212 (revision B). (There were later revisions but these did not contain material differences for present purposes).

30. The second condition was referred to as "the Ice Condition". This meant the entering of:

> "A legally binding, non-assignable agreement for lease in a form acceptable to [Abbeygate] [and in such form as [HCA] shall approve in writing…] which is conditional only on this agreement becoming unconditional and [Abbeygate] obtaining any necessary planning permission for the Ice Refurbishment Works and on the buyer carrying out the Ice Refurbishment Works [such agreement for lease] to be made between [Abbeygate], [a prospective tenant for the [Rink] acceptable to Abbeygate and approved in writing by HCA] and [a guarantor acceptable to [Abbeygate] and approved in writing by [HCA]]…"

31. The third condition was called the "the Pre-Letting Condition". This was defined to mean the entering into by Abbeygate of a legally binding agreement to lease the super-store to Morrisons in accordance with Draft Heads of Terms which were annexed to the HCA agreement. This letting to Morrisons was a transaction upon which the success of the redevelopment of the Site heavily depended.

32. By way of commentary, the substantial object of these conditions was to enable HCA to be satisfied that the Council would be content that before the redevelopment started it was clear that when the redevelopment was completed there would be at the Elder Gate Leisure Plaza an appropriately refurbished Rink (complying with the Ice Specification) pre-let to an appropriate tenant (the Ice Condition) adjacent to a pre-let superstore (the Pre-Letting Condition).

33. So (subject to satisfaction or waiver of those Conditions) Abbeygate had acquired the land needed for the development detailed in the application which lead to the February Permission.

34. The agreement for lease between Abbeygate and Morrisons relating to the superstore was entered on 20 December 2012 ("the Morrisons Agreement"). By the joint effect of Clause 5 of Schedule 1 to the Morrisons Agreement, Abbeygate undertook to use all reasonable endeavours to procure the completion of the supermarket specified in the building documents. But this obligation itself only arose if the "Unconditional Date" had occurred. This was the date on which the last of six conditions were satisfied. It is necessary to note only 4 of these conditions: -

a) The "Land Condition Date" which was the date upon which the HCA Agreement became unconditional:

b) The "Pre-Let Condition Date", which was the entry by Abbeygate of an agreement (either unconditional or conditional only upon the Morrisons Agreement becoming unconditional) for a lease of the Rink to an unspecified tenant on terms acceptable to Abbeygate:

c) The "Planning Condition Satisfaction Date" which meant (in essence) the date on which Abbeygate obtained detailed planning permission for the building of the supermarket in accordance with building documents annexed to the Morrisons Agreement: and

d) The "Variation Date", which must mean the date on which the Variation Condition (within Schedule 5 to the Morrisons Agreement) was satisfied. The Variation Condition would be satisfied by the execution of a deed or binding agreement releasing the services easement over the Site which benefitted the Zurich Land (or varying it so that it was not exercisable over the land to be demised under the Morrisons Agreement). With this condition (as with the others) Abbeygate promised that it would use all reasonable endeavours to satisfy the condition "as soon as reasonably practicable" or "without unreasonable delay".

35. It will immediately be appreciated that Abbeygate had constructed a network of underconditioned agreements, and that it retained considerable influence over when and in what order those conditions were satisfied. By careful design on the part of Abbeygate none of its obligations to HCA or to Morrisons was conditional on it having available the necessary funding to discharge those purchase or building obligations. Mr Gwynne of Developments and Mr Pitman of Helical (the participants in Abbeygate) were confident that the conditions they had put in place could be so manipulated that Abbeygate would not expose itself to a liability to Morrisons to build the super-store before the funding was in place.

36. They set about achieving what was openly referred to by them and by Mr Faine of Developments as the "miracle" of back-to-back funding. This required the completion date of the Morrisons Agreement to be contemporaneous both with that of the HCA Agreement and with the on-sale of the development package to an institutional investor who would pay development funds up-front i.e. who would buy the Morrisons supermarket before it was built, would pay for the land on completion, and would pay the balance of the consideration for the completed development into an escrow account that could be drawn down to fund the building works themselves. To that end an approach was made to the managers of the Lime Property Fund managed by Aviva Investors Global Services Limited ("Aviva") which already had a portfolio of assets let on long leases to tenants with strong covenants, and which proved to be keenly interested in the Site.

37. The miracle was achieved, the detailed negotiations taking from 23 November 2012 until 26 February 2013. But it remained essential to manipulate the conditions in the Morrisons Agreement (and hence the HCA Agreement) to ensure that there was no

gap between the time for performance of Abbeygate's obligations and Abbeygate's access to funding.

38. In that regard Abbeygate had the power to influence the Land Condition Date (the date on which the HCA Agreement became unconditional). This involved the manipulation of satisfaction of the three conditions I have noted in paragraphs [28] to [31] inclusive above, relating to the Ice Specification, the Ice Condition and the Pre-Letting Condition (the last of which itself involving satisfaction of six conditions, amongst them the occurrence of the Variation Date, relating to the release of the services easement benefitting the Zurich Land). But Abbeygate's room for manoeuvre was limited by the obligations contained in the 2003 Overage Provision that Abbeygate had to use "reasonable endeavours" to achieve particular outcomes "*as soon as reasonably practicable*": and by the Long-stop date of 31 March 2013 in the HCA Agreement.

39. Abbeygate obtained the planning permission that would enable it to build the Morrisons super-store and to refurbish the Rink on 8 February 2013. The judicial review period during which the February Permission could be challenged expired on 8 May 2013. So (as I have noted above) the 8 May 2013 is potentially "the Date of an Acceptable Planning Permission" within clause 1.1.6 of the Overage Provision. But it was not a Trigger Date because as at that date the condition set out in clause 3.1 of the Overage Provision (namely that the registered leases were merged in the Superior Lease and the Superior Lease merged in the freehold) had not been satisfied. So the Trigger Date was postponed until 10 working days after satisfaction of that condition. Since the Trigger Date itself could not be later than 4 July 2013 the condition had to be satisfied by 20 June 2013. But everything happened after that date.

40. On 8 July 2013 Abbeygate completed its purchase of the land it had conditionally contracted to buy in the HCA Agreement. Of the three conditions that needed to be satisfied before HCA could be compelled to complete: -

    a) HCA had agreed a revised Ice Specification on 1 July 2013:

    b) Abbeygate and Planet MK had exchanged an unconditional agreement for the lease of the Rink on 8 July 2013: and

    c) The Pre-Letting Condition had already been satisfied by the entry of the Morrisons Agreement on 20 December 2012 (as is admitted in paragraph 16.3 of the Amended Defence). It was acknowledged by HCA on 4 July 2013 to have been so satisfied.

41. So apparently everything came together 4 days after the expiry of the 10-year longstop date provided for in the Overage Provision (4 July 2013), and Abbeygate did not have to pay Gaia its £1.4m overage. Abbeygate's attitude is: "Well, these things happen: and anyway, it was really your fault". Gaia's response is to claim in this action that Abbeygate "failed to use reasonable endeavours to complete the…. purchase [under the HCA Agreement]". Gaia focuses on the period between 8 February 2013 and 8 July 2013.

42. There are seven issues that must be determined to see whether Gaia is right:

(a) Was the permission granted on 8 February 2013 an "Acceptable Planning Permission" (so that 8 May 2013 became "the Date of an Acceptable Planning Permission")?

(b) Was the Assembly Condition (referred to above) satisfied at the Date?

(c) If not, what was required to satisfy the Assembly Condition?

(d) What do "reasonable endeavours" require in the context of the Overage Provision?

(e) What does "as soon as reasonably practicable" require in the context of the Overage Provision?

(f) Did Abbeygate use reasonable endeavours to satisfy the Assembly Condition as soon as reasonably practicable?

(g) If not, what loss was caused thereby?

43. Before addressing those issues, I will deal with the argument advanced by Abbeygate that any failure to achieve a Trigger Date before 4 July 2013 was the fault of Gaia. Mr Geffert of Gaia and Mr Petrouis of Planet MK were both cross-examined on the footing that they had between them designed a scheme to enable Planet MK to extract the maximum value from Abbeygate about the refurbishment of the Rink but had been caught out by a miscalculation of the Trigger Date. The alleged scheme involved Mr Geffert of Gaia permitting Mr Petrouis of Planet MK to delay the legal and architectural/planning negotiations with Abbeygate with a view to putting pressure on Abbeygate to agree a more generous specification for the Rink in order to meet its own deadlines with HCA (the original long-stop date under the HCA Agreement being 31 March 2013). The alleged object of this ploy was to secure the relevant agreement at the last moment yet in sufficient time for Gaia to collect its overage. I decisively reject this submission.

44. First, on 30 November 2011 Gaia paid £200,000 for the chance to receive an overage payment of £1.4m. Whatever the previous relationship between Mr Geffert, as part owner of, and Mr Petrouis, as project director for, Planet I do not consider it probable that Mr Geffert would have risked making his £200,000 investment worthless by risking a postponement of the Trigger Date. The payment of so large a sum indicated that he felt a degree of confidence (though the discount demonstrated that he recognised a degree of risk) that everything would come together before the Trigger Date. It is unreal to think that he would voluntarily have chosen to increase that risk in any degree whatsoever.

45. Second, I consider it improbable that Mr Petrouis would have risked his pole position to get a new lease of a refurbished Rink by deliberately exploiting some "blackmail" position in relation to Abbeygate. From the beginning of 2012 Planet MK had only a terminable interest in the Rink and was negotiating for an Agreement for Lease of the Rink. The agreement for the new lease contained a detailed specification of the

Building Works to be undertaken to the Rink (identifying what was to be done by Abbeygate's contractor for Abbeygate as landlord, and what was to be done by Abbeygate's contractor on behalf of Planet MK in relation to tenants' fixtures). Of course, Mr Petrouis, if asked for his input on the detailed building plans, might say he would prefer layout A over layout B. But before (as it was put) "over-negotiating his position" he had to bear in mind two things: -

a) He knew that he might not be the only potential tenant (because in his capacity as Finance Director on the National Governing Board of the ice hockey franchises he had become aware of a request for a reference by another potential tenant of the Rink).

b) All the changes under discussion were (as he described them) "incredibly minor"; he said, "I would not lose a deal like this for the sake of some paving stones", and that he would if necessary have paid for the changes himself.

46. Third, in his witness statement Mr Gwynne complained that Mr Petrouis would not instruct solicitors, and had sent an email saying "before we incur any more legal costs we should meet with maybe a legal bod to go through the structure". He relied on this as demonstrating Mr Petrouis' strategy of delay. But on examination the chain of events proved to be this: -

a) The draft Agreement for Lease was completed by Abbeygate's solicitors on 23 January 2013.

b) At 14:19 on 23 January 2013 Mr Faine told Mr Petrouis that the draft Agreement to Lease was on its way to Planet MK's solicitors: but that one of the key issues was going to be the financial strength of the tenant company and the guarantors because Planet MK was a member of a group which had been making acquisitions and it was not clear how the acquisitions had been structured and what impact this had on the guarantor.

c) At 14:26 on 23 January 2013 Mr Petrouis responded by saying that he fully understood that email, was happy to come to Mr Faine's offices if that was thought to be a good idea, and that "in the first instance before we incur any more legal costs we should maybe meet with a legal bod to go through the structure".

d) At 14:34 on 23 January 2013 Mr Faine responded by saying he did not understand this because *he* had suggested that the parties deal with the covenant first but that Mr Petrouis had said there was a need to get the lease moving, that it made no sense for Mr Petrouis to "sit on the draft documents" and "so let's get them agreed".

e) At 14:44 on 23 January 2013 Mr Petrouis responded "OK".

47. For the witness who desires to tell the whole truth it simply was not true to say that Mr Petrouis did not want to instruct solicitors to deal with the documents: and I am confident that the assertion was made to divert my attention from other matters.

48. In fact, when the process of agreeing the lease began it progressed rapidly. Abbeygate sent lease plans and specifications for the Rink (these being a general Scope of Works and two outline plans taken from Abbeygate's "employers' requirements" in the documentation it was negotiating with its building contractor as it then stood) and various other contract documents on 8 February 2013. The draft lease was agreed by Planet MK's solicitors with amendments on 14 February 2013 and the draft Agreement for Lease on the following day. Between 15 and 27 February 2013 these drafts were considered by Abbeygate's solicitors, and on 27 February 2013 revised documents were sent to Planet MK showing Abbeygate's "bottom line". Planet MK's solicitors said they would take instructions on 4 March: and this they did, being ready to send the responsive draft to Abbeygate. But at that point Abbeygate's solicitors proposed some extra revisions: and on 19 March 2013 Abbeygate requested yet further revisions (to accommodate the judicial review period following the grant of planning permission on 8 February 2013). Some small drafting amendments were made by Planet MK's solicitors on 20 March 2013: but the documents were otherwise agreed. Planet MK's solicitors did not receive any response to this final draft: and on 25 March 2013 emailed Abbeygate's solicitors to say: -

> "Further to these messages, I await hearing from you that the documents are now agreed. My client [Planet MK] is keen to exchange this week, but in order to do that I need to receive the engrossed agreement from you by Wednesday."

This still did not provoke a response: and Abbeygate's solicitors reverted to Mr Gwynne on 27 March 2013 to say that they were being chased by Planet MK's solicitors, and needed to know what to say. The solicitors were left by Abbeygate in the position of having to say "I am awaiting instructions" and of avoiding calls from Planet MK's solicitors. It is clear from the documents that Abbeygate did not wish to enter into any agreement with Planet MK until it had sorted out the services easement that benefitted the Zurich Land. Far from Planet MK having to be urged to exchange, it was Mr Faine who had to fend off Mr Petrouis with the promise that things might develop "which hopefully [would] lead to the unconditional exchange soonest". As Mr Gwynne acknowledged in cross-examination, all that held up exchange with Planet MK was the need to get the Zurich Land easement varied. Again, I am sure that the attempt to blame Planet MK for the delays was designed to divert my attention from other matters.

49. Fourth, in a similar way the evidence does not bear out the allegation that Mr Petrouis attempted to "over-negotiate" by obstructing the preparation of final drawings. As I have already indicated Planet MK was prepared to exchange the Agreement for Lease on 27 March 2013. In the form which the Agreement for Lease then stood it had annexed to it the general scope of works and some plans. These were in a form consistent with the HCA Agreement. The Outline Specification attached to the HCA Agreement itself identified the relevant drawings as the two external layout drawings showing the external configuration of the refurbished Rink, the Morrisons super-store and the other retail units "or such other plans as are substituted as planning approved drawings". The scope of works in the HCA Agreement and in the Agreement for Lease each provided for the partial demolition of the Rink and its reconstruction together with a provision of car parking, servicing access and escapeways and other ancillary work.

50. In the Agreement for Lease with Planet MK relating to the refurbished Rink Abbeygate promised to use reasonable endeavours to procure the carrying out of the necessary works in a good and workmanlike manner in accordance with "the Building Documents". This was the general specification, a number of identified drawings which had been prepared for planning purposes and showed the detailed internal layout and were contained on a CD, and a room data schedule (which was simply a single sheet listing the rooms). The Agreement for Lease, having referred to these items as constituting the "Building Documents" went on to say that they "may be amended or varied from time to time in accordance with the terms and conditions of this Agreement".

51. If the Agreement for Lease had been exchanged in that form and, for one reason or another, changes to the detailed specification were required then the party requesting the change would have been at risk of having to negotiate to achieve the change and face the financial consequences. Mr Petrouis gave evidence (which I accept) that he would have been prepared to run that risk to achieve the entry of the Agreement for Lease. So he was not delaying the exchange of contracts.

52. After 27 March 2013 there were alterations to that original specification and those original drawings. These were in part occasioned by requests from the building control officer and by minor discrepancies which came to light on a digital survey of the Site and the Rink. In part they were occasioned by the fact that Abbeygate had let it be known that the Rink was shortly to be demolished and would close for 15 months, which caused alarm to those managing the MK Lightnings hockey team and caused them and their fan base to take an immediate and active interest in the form of the refurbishment. Amongst other things this active interest led to a relocation of the changing rooms, which required the internal layout of the plans as currently approved by the Council to be altered. Another minor change was the creation of an extra room to serve as a skate shop, achieved by the division of the manager's office. There was also a need to relocate a gas storage cage. Finally, it also became apparent that the plans did not take account of some of the operational machinery required to run the rink and an access (and external ramp) had to be provided.

53. Asked if he would have accepted the Agreement for Lease without a change in the location of the gas storage cage being shown on the amended plans Mr Petrouis said "of course, yes"- his view being that nobody was going to get a drawing "100% sure" and that these changes were going to happen "whether you think you've got the most perfect pre-drawing…attached to a lease". Accused of "over-negotiating" for the building of the brick wall in the manager's office Mr Petrouis said: -

> "I never changed the rent, I never changed the term of the lease, I never even changed- I added guarantors. I put my own money in there and now we are talking about a brick wall for a shop. That was "brinkmanship"? I did really well there, didn't I?"

I agree with this sentiment. Planet MK made no attempt to "over-negotiate". It took whatever opportunity Abbeygate extended to create a workable Rink meeting the expectations of its users: but it would (if necessary) have been prepared to exchange the Agreement for Lease without those amendments and to rely upon the customary processes of post-contractual variation to address the issues which invariably arise.

54. I find that there was no scheme between Gaia and Planet MK to "blackmail" Abbeygate into enhancing the specification of the refurbished Rink, and that the fact that the Agreement for Lease with Planet MK was only exchanged on 8 July 2013 (outside the long stop date in the Overage Provision) was not caused by a miscalculation by Mr Geffert or Mr Petrouis of the Trigger Date. What held up the Agreement for Lease was the unwillingness of Abbeygate to enter into an unconditional agreement before it had sorted out the services easement relating to the Zurich Land.

55. Since Abbeygate does not have a "knockout" defence by blaming Gaia, I turn to a consideration of the issues.

Was the permission granted on 8 February 2013 an "Acceptable Planning Permission" (so that 8 May 2013 became "the Date of an Acceptable Planning Permission")?

56. It is somewhat surprising that this should be an issue. At a basic level the planning permission granted on 8 February 2013 gave Abbeygate exactly what it had asked for: and it is also the planning permission pursuant to which Abbeygate has in fact built the Morrisons super-store and the refurbished Rink, and out of which it has made so substantial a profit that it has decided not to implement that permission in full by building out the two further retail units for which it had permission. (In finding that the development has been built in accordance with the 8 February 2013 permission I do not overlook the fact that on 17 December 2013 Abbeygate applied for (and on 28 February 2014 was granted) permission to make some non-material amendments to the February Permission: this last application was made under s.96A of the 1990 Act, and did not amount to the grant of a new planning permission but only to a non-material amendment to the existing permission).

57. However, in a letter dated 9 July 2013 the solicitors for Abbeygate explained that the February Permission: -

> "is….not acceptable or commercially viable because the location of the units required the release of certain easements which have not been released."

By the time the Amended Defence came to be filed Abbeygate had expanded upon this to say that the February Permission was subject to "conditions" which were unacceptable to Abbeygate and that the permission "was therefore not commercially viable and was never implemented". The only condition referred to was Condition 1. Condition 1 required that the development should be carried out in accordance with the listed approved plans. The layout and positioning of the buildings on the approved plans "required the consent of Zurich Assurance Limited, Local Highway Authority, the Power Companies and the Gas Companies".

58. In my judgment neither the original nor any of the additional grounds is a good point. I hold that the February Permission was "an Acceptable Planning Permission" for the purposes of the Overage Provision.

59. Although the definition in clause 1.1.2 of the Overage Provision is somewhat curiously expressed it was treated in argument as meaning that if Abbeygate regarded the terms and conditions of the planning permission to be unacceptable or not commercially viable then that opinion had to be reasonable.

60. The relevant opinion had to be formed about the "terms and..conditions" of the planning permission itself (not about any other potential impediments to development). The only material condition was Condition 1. This required that the approved development should be carried out in accordance with the submitted (and identified) drawings and details (but subject, of course, to the implicit right to seek non-material amendments under s.96A of the 1990 Act). The plans and drawings were (without any alteration) those submitted by Abbeygate itself. Such a Condition is entirely usual, as Mr Steven Shaw (Abbeygate's architect) confirmed in evidence. Abbeygate could not reasonably hold the view that a usual condition relating to plans which it itself had submitted was a term or condition that was unacceptable.

61. I reject the submission that the fact that there were some outstanding property interests meant that the planning permission was granted on terms and subject to conditions that Abbeygate could reasonably regard as unacceptable.

a) The structure of the Overage Provision itself demonstrates that the Planning Condition and the Assembly Condition (which deals with property interests) are different. Clause 3.2 of the Overage Provision expressly contemplates that an Acceptable Planning Permission can exist before the necessary property interests have been assembled to exploit that permission by undertaking the development. If the Planning Condition itself requires all necessary property interest to be in hand then the Assembly Condition is redundant.

b) If the Transformer Leases are "registered leases" derived from the Superior Lease for the purposes of clause 3.1 of the Overage Provision then the need for them is specifically addressed in the Assembly Condition and they are not relevant to the acceptability of the planning permission.

c) The easements benefitting the Zurich Land (being derived from the freehold estate) were not specifically mentioned in the Overage Provision but do not relate to the terms and conditions of the planning permission. The existence of the easement might be a factor in assessing whether the planning permission was "commercially viable", but cannot be an unacceptable term or condition of the permission.

d) When it suited it, Abbeygate did not itself regard these title "defects" as rendering the planning permission something other than an "Acceptable Planning Permission".

e) The agreement between Abbeygate and Morrisons entered on 20 December 2012 contained the four conditions to which I have already referred, and to a planning condition. This planning condition also employed the concept of an "Acceptable Planning Permission", though this was defined differently from the term used in the Overage Provision. In the Morrisons agreement an "Acceptable Planning Permission" was one that was not subject to any "Onerous Conditions". This was also a defined term: but at the end of the definition there was a proviso which said that: -

> "Any conditions which are identical to or to the identical effect of the Current Planning Permission…shall not be Landlords Onerous Conditions"

The "Current Planning Permission" there referred to contained a Condition 1 in identical terms and referring to the self same drawings (which again located the Morrisons super-store over the route of the service easement benefitting the Zurich Land). I do not see how a planning permission in those terms can be an "Acceptable Planning Permission" for the purposes of persuading Morrisons to enter into a profitable lease with Abbeygate but not an "Acceptable Planning Permission" for the purpose of paying an overage charge to Gaia.

f) Likewise, in the same context when the conditionality of the Morrisons Agreement was being addressed in June 2013, Morrisons asked whether there were any planning agreements which required to be entered before the planning permission of 8 February 2013 could be implemented, and on 21 June 2013 Abbeygate confirmed that there were not. (This was no doubt because on 8 February 2013 Abbeygate had entered into a s.106 agreement with the Council under which the Council undertook (in schedule 4) the obligation to use all reasonable endeavours to assist Abbeygate to obtain all requisite consents and agreements to implement any highway works required by 8 February 2013 planning permission). In the light of that Morrisons agreed that the Planning Condition in its agreement with Abbeygate was satisfied. Thus, on 21 June 2013 and for the purpose of binding Morrisons to take a lease of the super-store the necessity for highway works did not render the planning permission "unacceptable". I do not see how those same works can render that same permission "unacceptable" for the purpose of resisting payment to Gaia under the Overage Provision.

62. I therefore reject the submission that Abbeygate could reasonably hold the opinion that the terms and conditions in the February Permission were "unacceptable".

63. I also reject the argument that Abbeygate could reasonably hold the opinion that the February Permission was "not commercially viable": and I am not satisfied that anyone at Abbeygate actually ever held any such opinion. No development is guaranteed of success: all that "commercial viability" requires is that the prospect of a profitable outcome is sufficient to justify incurring the risk of the investment to achieve that outcome. The commercial viability of a planning permission is assessed in the same way: "If we were to do what we have permission to do, is the prospect of a profitable outcome sufficient to justify the risk of investing in implementing the permission?" I do not think there was ever a time when Abbeygate would have answered that question in the negative. They had designed the scheme to be profitable and had sought planning permission for a scheme that they considered to be profitable. Of course, the measure of the profit might depend on the finance terms they would be able to negotiate with a funder, the letting terms they would be able to negotiate with the anchor tenant of the super-store, the terms they would be able to negotiate with the building contractor, the cost to them of obtaining the surrender of the Transformer Leases and a regrant of leases of substations elsewhere, and the cost

of relocating the route of the services easements serving the Zurich Land. These were all risks associated with the development project itself. But their existence did not make the February Permission of itself "not commercially viable". Commercial viability does not depend on an absence of risk, but on a balance between risk and reward.

64. I am sure that this is the way Abbeygate itself approached the matter, and that the present plea that the February Permission was "not commercially viable" is simply a legal construct designed to defeat Gaia's claim to payment.

65. These are the clues. Even before the grant of permission on 8 February 2013 the supermarket had been pre-sold to Morrisons on 20 December 2012. The pre-let super-store development was sold to Aviva on 26 February 2013 for £9.9 million, negotiations having commenced months earlier. (It would indeed be strange for Aviva to offer a "miraculous" back-to-back sale and funding arrangement for a development that could reasonably be regarded as "not commercially viable"). Planet MK wanted to contract to surrender the Ice Rink Leases and to take a new lease of the Rink and negotiations were very well advanced. Abbeygate's contractors were in touch with the utility companies who had the benefit of the Transformer Leases to discuss technical details. (Eventually the electricity company was to respond within days of being asked so to do, and to state in clear terms its acceptance of the principle that it would surrender the Transformer Leases and take a regrant at new locations. I have no doubt that they would have so stated if asked at any point). Abbeygate itself invested a further £622,000 in detailed site survey work from and after the 8 February 2013. On those facts it would not, in my judgment, be reasonable to hold the view that the planning permission of 8 February 2013 (containing as it did further permissions which Abbeygate decided not to exploit) was "not commercially viable".

66. I therefore hold that the 8 May 2013 was, for the purposes of the Overage Provision "the date of an Acceptable Planning Permission".

Was the Assembly Condition satisfied at that date?

67. I hold that no Trigger Date came into being upon the occurrence of the Date of an Acceptable Planning Permission because the Assembly Condition was not then satisfied.

68. As I have noted, clause 3.1 of the Overage Provision provided (at [b]) that the Assembly Condition would be satisfied by the acquisition of any necessary interest in "the Superior Lease or the registered leases" so that the necessary variation of the provisions of the registered leases and the Superior Lease to permit the use and development of the premises for all purposes contemplated by the Acceptable Planning Permission were available to Abbeygate. Although at the time when the Overage Provision took effect Abbeygate had acquired both the Superior Lease and the Ice Rink Lease it was not suggested by anyone in the course of this case that option [b] was satisfied. Option [c] was not then satisfied either.

If not, what was required to satisfy the Assembly Condition?

69. It was common ground that what was required in the instant case to satisfy the Assembly Condition is that "the registered leases" be "merged" in the Superior Lease,

and that the Superior Lease be merged in the freehold. This requires an identification of "the registered leases": and a determination of what is required for "merger".

70. Counsel for Gaia argued that "the registered leases" was a reference to the Ice Rink Lease alone (and not a reference also to the Transformer Leases). He made three points. First, that the Overage Provision is contained in a transfer of the Ice Rink Lease on Form TR1 ("Transfer of Whole of Registered Title(s)") and he argued that the term "registered leases" in the Overage Provision refers back to the "registered titles" which were the subject matter of the transfer. Second, that there is no mention of the Transformer Leases anywhere in the transfer to Abbeygate. Third, that the Assembly Condition envisages that the registered leases are to be "merged" in the Superior Lease i.e. that Abbeygate will acquire the relevant leasehold interest and then acquire the reversion expectant on it (in this case, the Superior Lease); this, he submitted, was commercially absurd.

71. Counsel for Abbeygate argued that "the registered leases" simply meant those leases which were registered against the title to the Superior Lease when Abbeygate acquired it and subject to which its title to the Superior Lease was registered: and these are the Rink Leaseback and the Transformer Leases (see the Schedule of Notice of Leases referred to in the Charge Register of Abbeygate's title). All were to be acquired and merged.

72. I hold that the term "registered leases" refers both to the Rink Leaseback and to the Transformer Leases. First, the words "the registered leases" naturally refer to such leases as are registered against the title to the Superior Lease, and not to some only of such encumbering interests. Second, "the registered leases" relevant to the satisfaction of the Assembly Condition were not the two leases making up the Ice Rink Lease that were acquired by Abbeygate under the transfer of 4 July 2003 but the new Rink Leaseback intended to be granted afresh. So, there is no necessary link between what was being transferred by the TR1 containing the Overage Provision and "the registered lease" that had in the future to be acquired. Third, I do not consider that the term "merger" was being used in a strictly technical sense in contra distinction to "surrender". At the time when the clause was drafted what was envisaged was that Abbeygate would buy in and combine the reversions and the leases: in fact, by the time that the transfer was signed and the Overage Provision took effect Abbeygate had already acquired the Superior Lease, so that it made sense to speak of "merger" of the freehold and the Superior Lease in a strictly technical way: but the combination of the other interests might have taken effect either by merger (strictly so called) or by surrender.

73. As to the process of "merger" itself, Counsel for Abbeygate argued that what was required was merger at law, and that meant the merger by the Land Registry of the relevant titles. This, of necessity, would require the actual removal of any restrictions on the title (and in the instant case, in particular, removal of the restriction on HCA's registered title which protected the "clawback" provision in favour of the Council). Abbeygate applied to HMLR to merge the titles on 6 August 2013 and the application was completed on 2 September 2013: that (according to this argument) is the date of merger of the Superior Lease and the freehold. The merger of the Transformer Leases was not completed at HMLR until 23 February 2015: that, according to this argument, is when the Assembly Condition was satisfied (and when, on this argument, Abbeygate did what they had promised to take reasonable steps to do as soon as

reasonably practicable after 4 July 2003). Counsel for Gaia argued that all that was required was merger in equity, i.e. the acquisition in equity of the relevant property interests putting the acquirer in a position, if it so intended, to merge those interests the one into the other.

74. I hold that what the Overage Provision requires is merger in equity. Abbeygate's contractual obligations relate to matters over which it has some influence or which fall to be undertaken according to a statutory timetable. The object of the Assembly Condition is to postpone the Trigger Date until such time as Abbeygate has acquired sufficient property interests (a) to facilitate a variation of the relevant property rights to permit the use and development of the Site for all purposes contemplated by the planning permission, or alternatively (b) to render that variation unnecessary because all relevant interests are "in hand". That latter position is achieved once Abbeygate is the owner in equity of all the relevant interests, enabling Abbeygate to compel their legal owners to concur in the alteration of the titles at HM Land Registry. This also reflects reality, is consistent with s.24 of the Land Registration Act 2002 and does not makes the parties' mutual rights dependent upon the administrative processes of an executive agency.

75. On 31 October 2012 Abbeygate entered into its agreement with the HCA to acquire the freehold in the Site and other relevant land. Gaia makes no complaint of anything that Abbeygate did or did not do before that date. As at 31 October 2012 Abbeygate was under the obligation assumed in 2003 to use reasonable endeavours to negotiate and agree with the parties entitled to the reversions immediately expectant on the registered leases the satisfaction of the Assembly Condition as soon as reasonably practicable (i.e. the facilitation of the alteration in the terms of subsisting interests to permit the use and development of the Site for all purposes contemplated by the planning permission, or the acquisition and combining of the relevant property interests to make such variation unnecessary). At trial it was common ground that this required Abbeygate to procure that the HCA Agreement became unconditional and the Transformer Leases were got in.

76. About the HCA Agreement this meant: -

a) The maintenance of the Ice Specification substantially in the form in which it was annexed to the HCA Agreement (non-material amendments or variations being ignored) or obtaining HCA's acceptance of any changes: and

b) The entry of a binding agreement for a lease of the Rink with a tenant acceptable to HCA and a guarantor acceptable to HCA.

As I have observed above, the Pre-Letting Condition contained in the HCA Agreement is admitted to have been satisfied by the entry of the Morrisons Agreement.

What do reasonable endeavours require in the context of the Overage Provision?

77. In the Overage Provision Abbeygate promised (in clause 3.3) that it would

> "as soon as it considers strategically advisable …. commence and thereafter use reasonable endeavours to negotiate and agree with the parties entitled to the reversions immediately expectant on the determination of the terms of the respective registered leases and the Superior Lease the variations contemplated by clause 3.1 as soon as reasonably practicable."

(The variations contemplated by clause 3.1 are what I have called "the Assembly Condition").

78. It is not easy to apply this provision according to its strict literal meaning. But as I have recorded in paragraph [69] above at trial it was common ground that as a matter of commercial reality this required (a) that "the registered leases" (which I have held to mean the Rink Leaseback and the Transformer Leases) should be merged (which I have held to mean "surrendered or merged in equity") with the Superior Lease and (b) that the Superior Lease be merged (which I have held to mean "merged in equity") with the freehold.

79. It is accepted by Abbeygate that it had become "strategically advisable" to commence the relevant negotiations by the end of October 2012. So, what did "reasonable endeavours" thereafter require?

80. The term "reasonable endeavours" is a descriptive phrase without any immutable content. Its application requires a judge to make a value judgment in the light of all the facts of the particular case, so that reference to other decided cases is of limited assistance. But I was assisted by being reminded of the decision of Mr Julian Flaux QC (as he then was) in Rhodia International Holdings Limited v Huntsman [2007] EWHC 292. In the course of it he pointed out that the content of the duty lies on a spectrum dependent upon the precise language used. He said at para [33]: -

> ".. There may be many reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours…"

81. What is undertaken is a positive obligation: a promise to use "reasonable endeavours" or to take "reasonable steps" is not to be read as equivalent to a promise to act "if and to the extent that it is in conformity with my proposed arrangements". This was an obligation to take reasonable steps. The question is whether the relevant step was feasible, and then whether in all the circumstances it was reasonable to take it (or unreasonable not to take it), balancing the risk of adverse consequences against the obligation to perform the promise. When assessing adverse consequences, the court is concerned to see whether the consequences of taking a particular step are on an objective view unreasonable and impractical. As Alghussein Establishment v Eton College (CA) *The Times* 16 February 1987 makes clear, something which merely affects the margin of a developer's profit would not in the ordinary course be taken into account in considering whether it is reasonably practicable for a developer to

commence or continue development at any time. (The appeal to the House of Lords in Alghussein was upon a different point).

82. I would add one gloss. Where a party undertakes to use "reasonable endeavours" to achieve an aim he implicitly undertakes not by his own actions to make that aim more difficult of achievement. This is an aspect of the general rule that where a contract is conditional neither party must do anything to prevent the occurrence of the condition: see *Chitty on Contracts* 32nd edition paragraph 2–162.

What does "as soon as reasonably practicable" require in the context of the Overage Provision?

83. Reasonable steps had to be taken to achieve the merger of the registered leases with the Superior Lease and to achieve the merger of the Superior Lease with the freehold. That was *the nature* of the obligation to be performed (as I have explained in the preceding paragraphs). This present requirement relates to *the time* for performance. The obligation is not to do it "when convenient" or "at the time best suited to Abbeygate"; but *as soon as* reasonably practicable.

Did Abbeygate use reasonable endeavours to satisfy the Assembly Condition as soon as reasonably practicable?

84. The Assembly Condition did not require Abbeygate to have a fully formed and entirely secure self-funded development project in place before the Trigger Date. It required only the gathering in of certain property interests. The only question is whether those property interests were gathered in as soon as reasonably practicable assuming only reasonable endeavours had to be expended.

85. For the Assembly Condition to be satisfied so as to produce a Trigger Date falling before the long stop date in the Overage Provision the conditions had to be satisfied on or before 20 June 2013. The HCA confirmed that it was satisfied with the Ice Specification on 1 July 2013. Confirmation that the Transformer Leases would be surrendered and a grant of new leases at a different location taken was given on 4 July 2013. A non-assignable binding agreement for a lease of the Rink to a tenant and supported by a guarantee both approved by HCA was entered on 8 July 2013. An agreement to vary the easements benefitting the Zurich Land was entered on 27 June 2013. Gaia says that if reasonable endeavours had been made to achieve these outcomes as soon as reasonably practicable they would each have been achieved before 20 June 2013.

86. Gaia argues that Abbeygate knew exactly what it was doing in running matters to this timetable which (a) was designed to let the Overage Provision lapse, and (b) was entirely governed by Abbeygate's financing requirements.

87. I find that Mr Gwynne, Mr Faine and Mr Pittman all knew exactly what they were doing when they arranged the speed at which, and order in which, matters were attended to between 31 October 2012 and 20 June 2013: and I hold that when the Court comes to take account of whether, on an objective basis, Abbeygate used reasonable endeavours to achieve a particular outcome as soon as reasonably practicable the Court is, when weighing Abbeygate's protestations that it did exert all

reasonable endeavours as soon as reasonably practicable, entitled to have in mind that knowledge.

88. In my judgement Mr Gwynne, Mr Faine and Mr Pitman knew that there was concern on the other side that Abbeygate might try to "chip" them, because Mr Petrouis expressed that concern at a meeting in early December 2011 about the refurbishment. According to his evidence Mr Petrouis (who was becoming concerned that Abbeygate was playing its cards very close to its chest in relation to the progress of the development) said to Mr Faine that "the lads" or "the boys" were becoming worried that Abbeygate was going "chip" them at the end of the deal: and that Mr Faine disavowed any such intention. Mr Faine denied that such an event had occurred; and Abbeygate's Counsel submitted that Mr Petrouis' supposed recollection was in effect built upon the adventitious disclosure of the "haircut" e-mail during the case. But having seen Mr Petrouis and having gained a little insight into the way he conducts business it seems to me that it is the very sort of thing he would say: and I consider he probably did say it. I consider that Mr Petrouis' comment influenced Abbeygate to seek to take advantage of any delay that might be engineered (without being blatant) or which otherwise occurred i.e. whenever possible to sit back and let events take their course, rather than positively to perform the obligation that Abbeygate had undertaken in 2003 to use reasonable endeavours to bring about a scenario as soon as reasonably practicable.

89. To summarise what was required for satisfaction of the Assembly Condition: -

(a) To achieve merger of the Superior Lease in the freehold Abbeygate had to become the equitable owner of the property interests which were the subject of the HCA Agreement; and this required (i) the maintenance of the Ice Specification in the form in which it was annexed to the HCA Agreement or the acceptance by HCA of any variations; and (ii) the exchange of a new lease of the Rink in a form and with a tenant acceptable to HCA;

(b) To achieve merger of the registered leases in the Superior Lease required: (i) the surrender of the Rink Leaseback; and (ii) the surrender of the Transformer Leases (which would involve agreement with the owners of the Zurich land for the variation of the services easements).

90. I deal first with the Ice Specification. The Ice Specification annexed to the HCA Agreement consisted of a brief narrative description of the refurbishment works to be undertaken to the Rink and two drawings. The HCA's agreement was needed only to *material* amendments or variations to this specification, and could be unreasonably withheld. So small alterations to comply with Building Regulations or other statutory requirements (e.g. the storage of gas canisters) would be part of routine amendment, could not be (and were not) objected to by HCA, and would not stand in the way of obtaining HCA approval to the Ice Specification before mid-June 2013.

91. But over and above these amendments and variations necessary to make the refurbishment works compliant, from November 2012 some changes of detail were

required by Planet MK as the intending incoming tenant. These were recorded in more detailed textual records and plans.

92. But as to that, an Ice Specification in a form consistent with the requirements of the HCA Agreement existed by 27 March 2013. Planet MK accepted it (for they were pushing for the exchange of the contracts of which it formed part). Abbeygate avoided exchange. During the 3-month period of delay thereby occasioned some minor changes to the layout of the Rink (which Mr Gwynne himself was later to describe as "finessing") were canvassed; some of these were going to be paid for by Planet MK, some were omissions, some were cost neutral, some were "design development" for which the documents already provided, some resulted from more accurate surveys and some had to be discussed with the building contractor. None of them was a "deal-breaker", because Planet MK would have signed up and run the risk of having to sort any necessary changes out afterwards. None raised a planning issue (and all were subsequently approved as minor amendments to the existing permission). None raised any concern with the HCA (which approved them within 3 days when eventually asked in late June 2013). As Abbeygate acknowledged in an internal e-mail on 22 May 2013 between Mr Gwynne and Mr Faine: -

> "The conditions in the agreement with the HCA have partially been met in that the Ice Specification *has been provided*, the Pre-let condition has been met in that the agreement with [Morrisons] has been exchanged and so at this point only the Ice condition [sc. exchanging with Planet MK] remains." [Emphasis supplied].

The Ice Specification was accordingly in place by 22 May 2013 (and could in my judgment have been in place significantly earlier). The fact that HCA only approved it on 1 July was because it had not been asked earlier. Had the HCA been asked to approve it shortly after 22 May 2013 it is highly probable that approval would have been given before mid-June 2013.

93. I deal next with the lease of the Rink, the "Ice Condition". As I have held above, Planet MK's solicitors were pressing for an exchange of agreements for the grant of a new lease of the Rink from 25 March 2013. But Abbeygate's solicitors were without instructions from Abbeygate and resorted to avoiding calls from Planet MK's solicitors in order to slow the process down. It is clear (from an e-mail of 15 April 2013 from Mr Faine) that what was causing Abbeygate to delay and stall was (a) a desire to provide for a period for judicial review of the planning decision (which would only end on 8 May 2013) and (b) quite separate negotiations with Zurich over the services easement arising from the proposed variation to the Transformer Leases. But this latter arrangement was significant not only because of site assembly but also because it featured as a condition precedent to getting access to funding under the Aviva funding agreements exchanged with Lime Properties on 26 February 2013, a restriction on freedom of manoeuvre introduced by Abbeygate itself in connection with its finance arrangements. What Abbeygate was seeking to do was to avoid committing itself to undertake works to the Rink (resulting from the entry of the agreement for Lease) before it had unconditional access to funds from Aviva.

94. I find and hold that reasonable endeavours were not made to attain satisfaction of the Ice Condition as soon as reasonably practicable. Exchange with Planet MK was

indeed deliberately delayed. In relation to the Ice Condition there was no inherent reason why it could not have been satisfied at the end of March 2013 or the beginning of April 2013. The failure to achieve exchange within that timeframe was caused by Abbeygate's desire to manipulate the conditions in its various agreements so as to secure that its building commitments aligned with its funding position. But Abbeygate cannot be heard to say "we have by our own act made it impracticable to do what was otherwise reasonably practicable": their promise was not to use reasonable endeavours to acquire the reversion on the Superior Lease "when convenient" or "when it suits our fund flows" but "as soon as reasonably practicable". If steps had been taken "as soon as reasonably practicable" the Ice Condition would have been satisfied well before mid-June 2013.

95. I deal next with the surrender of the Transformer Leases and the variation of the easements. From the creation of the plans to be submitted for planning approval it must have been known to Abbeygate that, for the development to proceed, it was essential to get in these interests. Once planning permission was obtained and Morrisons were pursued as the anchor tenant of the superstore it was assumed that these interests would be got in, for the agreement was to provide vacant possession. An agreement for lease with Morrisons was an essential pre-requisite to the release of funds by Aviva.

96. Yet from at least 6 November 2012 Abbeygate was conducting its affairs on the basis that it would seek to transfer the title to the Site to Aviva only in late July or early August 2013 i.e. after the last possible Trigger Date. Abbeygate's agents explained to Aviva (when dealing with the leasehold interests)

> "The Vendor's current interest is a Long Leasehold and conditional contracts have been exchanged to purchase the freehold. This contract will be unconditional by 31st March. However there are various restrictions on the Title that will have to be removed after that date and before the freehold can be transferred to the Purchaser, and this is expected to be in late July/August [2013]".

Why was it expected that Aviva could only be given a clean title in July or August 2013? In my judgment it was because this was the timetable to which Abbeygate had decided to work: and according to that timetable it would escape liability under the Overage Provision.

97. Abbeygate knew that the speed of this process was to a degree under its control. On 15 November 2012 Mr Gwynne wrote to Mr Pitman and Mr Faine (in the course of a consideration of the interrelationship between funding requirements and the process of satisfying the various interlocking conditions)

> "… these leases [sc. the Rink Leaseback and the Transformer Leases] need to be surrendered and all easements rights associated cancelled, so we are in control of the timing of this process to some degree… "

Later in the same message he addressed the easements relating to the Zürich Land noting:

> "We only have to use all reasonable endeavours to satisfy without unreasonable delay but we could influence the condition being satisfied_ either by playing the negotiations away from a benign deal so [Zurich] expect a large payment or factor in the costs of actually moving services…."

It is right to note that these observations were made about obligations to use reasonable endeavours to satisfy conditions without unreasonable delay which were contained in *the Morrisons agreement*: but there were of course almost identical obligations in the Overage Provision, of which Abbeygate was acutely aware and I have no doubt that the same thinking as is disclosed in this message was equally applied in relation to those. What is significant is that the focus is upon controlling the speed of the process to accommodate Abbeygate's (funding) needs without regards to any obligation to the beneficiary of the Overage Provision to take steps as soon as reasonably practicable.

98. This focus may be demonstrated from two documents. First an email which Abbeygate's solicitors sent to Aviva's solicitors on 16 November 2012 in these terms: -

> ".. You will note that there is a restriction in favour of Planet Ice Ltd which was to protect a potential payment to Planet Ice should my clients obtain planning permission to redevelop prior to the 3 July 2013…. You will… note from the Heads of Terms that there is mention of perfecting the title in July/ August and *this has been included to enable the merging of the leasehold interest once the period under the Planet Ice transfer for the payment has expired* ……" [Emphasis supplied].

To my mind that evidences not a prediction of a chapter of accidents that will have the happy outcome that the Overage Provision is rendered worthless, but rather a design that it should be if possible.

99. Second, on 4 December 2012 a "Draft Development Timeline and Critical Path" was circulated noting that the HCA Agreement was anticipated to become unconditional at the end of March 2013, and that the various leasehold interests would *be available for merger* in April 2013 but that they should not in fact *be merged* until August 2013. Although Mr Gwynne gave evidence that the postponement April to August took account of anticipated delays at HM Land Registry I do not accept that evidence and consider that this document shows what was (as early as November/December 2012) intended to occur, not what was anticipated would occur even if Abbeygate took all relevant steps as soon as reasonably practical.

100. (I should here note that the HCA Agreement had a longstop date for satisfaction of the conditions of 31 March 2013. But since HCA wanted the development to proceed, and in particular to align itself with the Council's desire for a functioning Rink (which had been a key requirement of any re-development since about 2002) Abbeygate could be confident of securing an extension. This they did, obtaining an extension until 31 May 2013. They could therefore safely plan for the interests to be available for merger in April 2013 but not to be merged until August 2013).

101. It was because of this strategy that the funding arrangement with Aviva made clear that "completion [was] to take place when the leasehold interest merged" but that there was "no obligation to do this until after 3 July" (to quote from an explanatory email from Abbeygate's solicitors of 21 January 2013). It was because a reference to 3 July 2013 was a bit obvious that the following exchange took place between Mr Gwynne (lower case) and Abbeygate's solicitor (upper case) by email on 12 February 2013:-

> "Clause 7.2 states… "after 3 July 2013"…. Whilst we all know what this is date is for, can we do without the reference and just rely on the prior knowledge of the fund that we will not action until after the date. The worry is that if there were to be any action about the other matter and this contract was discovered there could be the allegation that we have ensured the date was exceeded. WE HAVE ADDRESSED THIS NOW AND THE FUND HAVE AGREED. WE HAVE SET THE COMPLETION DATE AS 31 JULY 2013 AND AGREED TO APPLY TO MERGE THE TITLES BEFORE THE COMPLETION DATE AND IF WE DON'T GET IT DONE BY 31 JULY THEN THE COMPLETION DATE MOVES TO 5 WORKING DAYS AFTER THE REGISTRATION….."

102. To my mind this is a clear indication of a consciousness of the 3 July 2013 being an important date for liability under the Overage Provision, and of a wish for key events to occur at a time such that liability is not incurred. Having promised to do something "as soon as reasonably practicable" Abbeygate are approaching matters on the footing of how late they can safely leave them.

103. It was in July 2003 that Abbeygate made its promise to take reasonable steps to assemble the title as soon as reasonably practicable. So Abbeygate could have taken steps to acquire the Transformer Leases and secure the Zurich variation at any time. But complaint is only made of the period after 31 October 2012.

104. Acquiring the Transformer Leases and varying the Zurich services easement were not just "reasonable steps": they were necessary steps if Abbeygate was going to redevelop the Leisure Plaza in accordance with the planning permission for which it had chosen to apply. The only question is whether it took those steps as soon as reasonably practicable.

105. So far as the Transformer Leases are concerned, on 4 July 2013 Western Power Distribution agreed in principle to surrender the Transformer Leases after diversionary works were completed and to take new lease of the relocated transformers. It was not clear from the evidence at trial when the first approach was made to Western Power: the tenor of the e-mail of 4 July 2013 is that it is simply providing written confirmation of something that was well understood on the ground. My own reading has included an e-mail of 30 May 2013 from Western Power which indicates that that there is no technical difficulty (and which raises no legal opposition) and a "Key Milestones" document that suggests that the statutory diversion works were pencilled in to start on 10 June 2013: that material would confirm the impression given by the e-mail.

106. The necessary legal work had not been completed when (on 10 July 2013) Morrisons agreed to waive the requirement for the surrender of the Transformer leases and Aviva said it was willing to "take a view" and agree to that waiver to get the deal completed. That demonstrates how confident they were that that surrender of the Transformer Leases was a pure formality. It may be taken that prompt agreement to surrender would have been the attitude of the owner of the Transformer Leases whenever asked. If the request to surrender the Transformer Leases had been made as soon as reasonably practicable (and there is no reason why that should not have been in November 2012 following the entry of the HCA Agreement) it is highly probable that a specifically enforceable agreement for surrender and re-grant would have been made so that the Assembly Condition was satisfied well before 20 June 2013.

107. As to the services easement Abbeygate knew it was an issue to be addressed from no later than 2 July 2012 (when Morrisons raised it as an Enquiry before Contract with a specific enquiry whether Zurich had been approached). On 5 December 2012 Abbeygate's solicitors told Aviva that Abbeygate would enter a Deed of variation with Zurich concerning these rights. Yet Abbeygate did not make *any* approach Zurich until mid-February 2013 i.e. after it had completed its negotiations with Aviva and was on the verge of having its conditional funding in place. Then in the context of a conversation about another matter entirely Abbeygate's agent gave a general indication to Zurich's agent that they might need to speak about the Leisure Plaza re-development. This oblique contact was described by Abbeygate's solicitors as Abbeygate being

> "…in contact with their direct contacts at [Zurich] and proposals are being put to them. Nothing has been signed yet and some more detailed technical drawings of the replacement service routes need to be completed to finalise the papers. But it is in hand."

No doubt that is an accurate summary of what the position *should* have been if reasonable steps had been taken to achieve a variation as soon as reasonably practicable. But it was simply not an accurate description of the contact that had actually been made.

108. No contact at all was made with Zurich whilst Abbeygate sought legal advice about the consequences of altering the route of the services easement unilaterally. If that was the plan of action then that step could and should have been taken months (if not years) earlier by someone wishing to gather in these interests "as soon as reasonably practicable". Contact was only made in April 2013 but in such a way that (according to Zurich's solicitors on 1 May 2013) "it is still to be agreed how this situation will be resolved and documented". The work only really began in the second week of May 2013 and was completed by 27 June 2013.

109. The simple truth is that what lay behind this approach was not a desire to take steps as soon as reasonably practicable but a desire to leave things as late as possible to ensure that the Morrisons Agreement remained conditional until funds were released by Aviva. If matters had been driven by a desire to do things as soon as reasonably practicable it is highly probable that by mid-February a specifically enforceable agreement for a variation (and it is probable that a completed Deed of Variation) would have been in place.

110. For these reasons I find and hold that Abbeygate did not after 31 October 2012 make reasonable endeavours to achieve as soon as reasonably practicable the variations in the property interests contemplated by cl.3.1 of Overage Provision to be found in the Transfer of 4 July 2003. I further find and hold that if reasonable steps had been taken as soon as reasonably practicable all necessary property interests would have been in hand (in accordance with cl.3.1 of the Overage Provision) sufficiently before 20 June 2013 the Trigger Date would have fallen at a time that entitled Gaia to claim the overage payment. I therefore hold that Gaia is entitled to damages in the sum of £1.4 million.

111. It is agreed between the parties that in the light of this conclusion Gaia is entitled to interest at the rate of 2% p.a. compound with annual rests.

112. My provisional view on costs is that they should follow the event.

113. I intend to hand down this judgment at 10.00 am on 31 January 2018: and I do not expect the attendance of legal representatives. The parties should either agree that consequential matters can be dealt with at a telephone hearing: or should liaise with my clerk and Leeds Listing Office to fix a hearing.

114. I express my thanks to Counsel for leading me through a maze of detail and a mass of documents: and to those who prepared and co-operated in the preparation of the trial bundles.