Neutral Citation Number: [2019] EWCA Civ 823

Case No: A3/2018/0390

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY
NORRIS J
[2018] EWHC 118 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE MALES

- -

Between :

GAIA VENTURES LIMITED	**Claimant/ Respondent**
- and -	
ABBEYGATE HELICAL (LEISURE PLAZA) LIMITED	**Defendant/ Appellant**

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- -

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

Hearing dates : 3 & 4 April 2019

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Approved Judgment

Lord Justice Patten :

1. This is an appeal from an order of Norris J requiring the defendant, Abbeygate Helical (Leisure Plaza) Limited ("Abbeygate"), to pay the sum of £1.4m plus interest to the claimant, Gaia Ventures Limited ("Gaia"), under the terms of an agreement entered into on 4 July 2003 as part of the transfer ("the 2003 Transfer") to Abbeygate of two registered leases (title numbers BM230584 and BM245732) of an ice rink and adjoining loading bay which form part of what is known as the Leisure Plaza in Milton Keynes.

2. The transferor and tenant under the two registered leases was a company called Planet Ice Limited ("Planet") which operated the ice rink ("the Ice Rink") as a commercial venture. The remainder of the Leisure Plaza consisted of a ten-pin bowling alley and a nightclub/restaurant. It was built on and occupied part of a larger site ("the Site") at Elder Gate in Milton Keynes the freehold of which was owned by the Homes and Communities Agency ("the HCA"). The freehold title was subject to a long lease ("the Superior Lease") of the Site that had been granted in 1992 to First Leisure Trading Limited ("First Leisure") and which contained covenants restricting any future development or reconstruction of the Site and the Leisure Plaza. Out of the Superior Lease First Leisure had granted four underleases. Two were the registered leasehold titles relating to the Ice Rink and the loading bay comprised in the 2003 Transfer ("the Ice Rink Leases"). The other two were underleases of electricity sub-stations ("the Transformer Leases") which were also registered titles. One of the sub-stations provided power to land to the east of the Site which was owned by the Zurich Insurance Group ("the Zurich Land") and occupied by two retail stores (Argos and Toys 'R' Us). The cabling connecting the Zurich Land to the sub-station was the subject of an express easement granted as part of the sale of the Zurich land in 1994 by HCA's predecessor in title, the Commission for the New Towns. The easement was along a defined route across the Site identified by reference to a plan.

3. The Leisure Plaza was not a commercial success and by 2003 both the bowling alley and the nightclub had closed. The Ice Rink continued to operate but was in need of major refurbishment. The local authority, Milton Keynes Borough Council ("the Council"), had carried out a feasibility study which confirmed that the Site required to be re-developed. But the Council (which was also the local planning authority) was keen to ensure that any re-development should produce as part of the scheme a refurbished and functioning ice rink.

4. Abbeygate was formed as a joint venture company between Helical Bar PLC and Abbeygate Developments Limited to acquire and re-develop the Site and any necessary adjoining land. In order to do this it was necessary either to acquire the freehold and the various leasehold interests so as to obtain a clear title or at least to acquire the Superior Lease and any relevant underleases and then agree variations of the terms of the Superior Lease which would permit the development to proceed.

5. On 30 May 2003 Abbeygate acquired the Superior Lease for the sum of £2m. On 4 July 2003 it entered into a contract with Planet Ice for the purchase of the two Ice Rink Leases for the sum of £1.525m. It was a term of the agreement that Abbeygate would at the option of Planet Ice grant a lease back of the Ice Rink and the loading bay so as to allow the Ice Rink to remain operational pending its refurbishment as part of the proposed development. The lease back option (which was exercised by Planet Ice) provided for the grant of a tenancy that was excluded by a court order from the

protection of Part II of the Landlord and Tenant Act 1954. It was terminable at any time on giving three months' notice in writing. Under clause 19 of the agreement the transfer of the Ice Rink Leases to Abbeygate was also to contain the overage provisions which were set out in Schedule 1 to the agreement.

6. Under clause 2.1 of the overage provisions Abbeygate covenanted to pay to Planet Ice the sum of £1.4m (defined as the Additional Payment) not later than 10 working days after any Trigger Date. So far as material, the relevant Trigger Date was defined in clause 1.1.15 as:

> "… the Date of an Acceptable Planning Permission… "

which, according to clause 1.1.6, meant:

> "The date which following the grant of an Acceptable Planning Permission is three 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 intact valid and of full effect."

7. An "Acceptable Planning Permission" was defined in clause 1.1.2 as:

> "a Planning Permission (granted by the local planning authority or the Secretary of State or an Inspector or where the context requires the outcome of any Challenge) which is granted on terms and subject to conditions which in the reasonable opinion of the Buyer are acceptable and commercially viable".

8. But the definition of "Trigger Date" in clause 1.1.15 was subject to a proviso that "no date more than ten years after the [date of the transfer] will be a Trigger Date". The longstop Trigger Date in the present case was therefore 4 July 2013.

9. Clause 4.5 of the overage provisions imposed on Abbeygate an obligation to:

> "… use its reasonable endeavours to obtain an Acceptable Planning Permission but such obligation shall have regard to the current strategic and local planning policy and the advice of its consultants including Planning Counsel of at least five years standing from time to time and it shall not be obliged to do so for the duration of any period after which it is advised that it does not have a greater than 60% prospect of success provided that nothing herein contained shall prevent the Buyer from submitting more than one Application."

10. The obligation was therefore expressly qualified so as to entitle Abbeygate to defer to local planning policy considerations and expert advice in determining how to progress the planning application. But the covenant to make the overage payment contained in clause 2.1 was also conditional on the provisions of clause 3. This provided:

> "3.1 The obligation to make the Additional Payment contained in clause 2 hereof is conditional upon the Buyer 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 and the Property for all purposes contemplated by the Acceptable Planning Permission or 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 the registered leases are merged in the Superior Lease and the Superior Lease is merged in the freehold.
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> 3.2 If on the Date of an Acceptable Planning Permission the condition set out in clause 3.1 above has not been satisfied the Trigger Date will be postponed until 10 working days after satisfaction of the said condition subject always to the proviso in clause 1.1.15 hereof.
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> 3.3 The Buyer shall as soon as it considers strategically advisable (taking into account the requirements to obtain an Acceptable Planning Permission) 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 registered leases and the Superior Lease the variations contemplated by clause 3.1 as soon as reasonably practicable.
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> 3.4 The Buyer shall notify the Seller as soon as reasonably practicable after the satisfaction of the condition in clause 3.1 and shall at the request of the Seller provide the Seller with details of the progress made in satisfying the said condition."

11. These provisions have given rise to a number of issues of construction. Clause 3.1 contains three alternative conditions at least one of which must be satisfied before the £1.4m becomes payable. Broken down they are (in the language of clause 3.1):

    (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 and the Property for all purposes contemplated by the Acceptable Planning Permission; or alternatively

    (b) the acquisition of any necessary interest in the Superior Lease or the registered leases so that:

        (i) the necessary variation is available to it; or

        (ii) the registered leases are merged in the Superior Lease and the Superior Lease is merged in the freehold.

12. Gaia's case as pleaded is that of the three conditions at least condition (b)(ii) was practicable and capable of being achieved by the longstop Trigger Date so it is in relation to that condition that the clause 3.3 obligation to use reasonable endeavours falls to be judged. Although clause 3.3 refers to the "variations contemplated by clause 3.1" the word "variations" appears only in conditions (a) and (b)(i). But Mr Hill for Abbeygate accepts, as he did at the trial, that this must be construed as a reference to all three conditions so that clause 3.3 applies to each of them. What is not, however, agreed is what is meant by "the registered leases" in clause 3.1 and whether the word "merged" in condition (b)(ii) contemplates the legal merger (and therefore the actual extinguishment of the leasehold titles) or whether the condition was satisfied, as the judge found, when Abbeygate acquired an enforceable equitable title to the relevant property interests so as to be able to procure the extinguishment of the leasehold titles.

13. Over and above all this is a major dispute about the content of the clause 3.3 obligation to use reasonable endeavours. Abbeygate contends that an obligation in these terms (by contrast perhaps to an obligation to use best endeavours) entitles the covenantor to have regard to its own commercial interests when deciding what steps to take to satisfy the clause 3.1 conditions. In the present case, the focus of this argument is on the financing of the development of the Site. Abbeygate contends that it was never able to fund the complete development of the Site out of its own resources and that it needed to secure finance from a third party investor which would be and was only available once there was planning permission for the development, the necessary property interests were available to be acquired and there was an enforceable agreement with an anchor tenant (in this case Morrisons) to take a lease of the superstore that was to be constructed on the Site as part of the development. That agreement required Abbeygate to enter into a contractual obligation to carry out the development which Abbeygate could only properly enter into if the funding was in place.

14. Although Abbeygate had acquired both the Superior Lease and the Ice Rink leases by July 2003 at its own expense and had entered into the overage provisions as a term of the 2003 Transfer, no real progress was made with the development for a number of years. An application for planning permission was made in 2007 and a planning permission was granted but the judge found that nothing came of it. In 2010 a further planning permission was granted for the demolition of the ten-pin bowling alley and adjacent restaurant and for the construction of a casino and new retail unit on the Site. But this could not be implemented due to difficulties about a casino licence and the development scheme was altered to a purely retail development with the exception of the refurbished Ice Rink.

15. At much the same time Planet encountered financial difficulties and on 30 November 2011 assigned the benefit of the overage provisions to the claimant, Gaia, in return for a payment of £200,000. Planet eventually went into administration and the lease back of the Ice Rink to Planet was assigned to a company set up by Mr Michael Petrouis who had at one time been a substantial shareholder in Planet.

16. By April 2012 Morrisons had been identified as the anchor tenant for the superstore within the proposed development but this necessitated a revised planning permission which was applied for on 9 November 2012 and granted on 8 February 2013. The revised scheme comprised the Ice Rink as a stand-alone unit together with two new retail units and car parking adjacent to the boundary with the Zurich Land. The superstore was to occupy the southwestern part of the Site together with some additional

land outside the Site but which also belonged to HCA. If this constituted an Acceptable Planning Permission within the meaning of the overage provisions in the 2003 Transfer then the Trigger Date (as defined by clause 1.1.6) was 8 May 2013.

17. On 31 October 2012 Abbeygate had contracted with HCA to purchase the freehold of the Site together with the additional land. The agreement ("the HCA Agreement") was subject to three conditions which had to be complied with by 31 March 2013 unless waived. These were:

    (1) "[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…". ("the Ice Specification Condition");

    (2) "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]]…". ("the Ice Condition"); and

    (3) The entering into of a legally binding agreement to lease the superstore on the Site to Morrisons in accordance with the Draft Heads of Terms scheduled to the HCA Agreement.

18. The Ice Specification referred to detailed drawings, specifications and layout plans setting out what were described in the second condition as the Ice Refurbishment works which Abbeygate was to carry out to the Ice Rink. Specifically this included two drawings (Q2/958/PL/0211 (revision B) and Q2/958/PL/0212 (revision B)) together with a written text.

19. Then on 20 December 2012 Abbeygate and Morrisons entered into an agreement for lease in respect of the superstore ("the Morrisons Agreement") under which Abbeygate contracted to use all reasonable endeavours to procure the completion of the superstore in accordance with the specification in the agreement. The Morrisons Agreement, like all the other relevant contracts, was made conditional on various matters, including:

    (1) the HCA Agreement becoming unconditional;

    (2) the entry by Abbeygate into an agreement for a lease of the Ice Rink (on terms acceptable to Abbeygate) which was either unconditional or was conditional only on the Morrisons Agreement becoming unconditional;

    (3) the obtaining by Abbeygate of detailed planning permission for the building of the superstore in accordance with the Morrisons Agreement; and

(4) the execution of a deed or binding agreement releasing the service easements in favour of the Zurich land or at least re-locating the route of the services so that the rights were not exercisable over the land to be demised to Morrisons.

20. As the judge pointed out, none of the obligations assumed by Abbeygate under the HCA Agreement and the Morrison Agreement was made conditional on Abbeygate obtaining the necessary funding for the development. The conditions for the purchase of the freehold from HCA and the grant of a lease of the superstore to Morrisons interlocked so that one was essentially conditional on the other. But both could be unlocked by Abbeygate obtaining a suitable planning permission for the development as a whole and coming to an agreement with Zurich for the variation of the service easements. Those were the only two elements in the contractual scheme which required the co-operation of an external third party. Subject to that, the fulfilment of the other conditions under the HCA Agreement and the Morrisons Agreement required HCA to approve the Ice Specification and Abbeygate to enter into the new Ice Rink lease. All of that was in the power of Abbeygate to procure once the necessary planning permission was in place.

21. But the interlocking conditions between the HCA Agreement and the Morrisons Agreement also provided Abbeygate with the opportunity to manipulate the conditions, as the judge put it, in order to ensure that Abbeygate had no liability to Morrisons to construct the development before it had secured the funding to do so. The judge made the following findings which are not challenged on this appeal:

> "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.
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> 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.
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> 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."

22. As mentioned earlier, Abbeygate was granted planning permission for the development on 8 February 2013 in a form which enabled the development to be carried out including the construction of the superstore and the refurbishment of the Ice Rink. Although disputed by Abbeygate at the trial, the judge found that this constituted an Acceptable Planning Permission for the purposes of the overage provisions and there is no appeal against that part of his judgment. It follows that 8 May 2013 was the "Date of an Acceptable Planning Permission" for the purposes of clause 1.1.6 of the overage provisions and therefore the Trigger Date as defined in clause 1.1.15. The only bar therefore to payment of the overage under clause 2.1 by 18 May 2013 was the satisfaction of the clause 3.1(b)(ii) condition in time to allow the Trigger Date to fall before 4 July 2013.

23. It is convenient therefore at this point to consider the issues raised by Gaia in its respondent's notice about the construction of the clause 3.1(b)(ii) condition.

24. The judge held that the registered leases included the Transformer leases both of which were registered titles and the lease back of the Ice Rink rather than the two existing Ice Rink leases. At the time of the 2003 Transfer Abbeygate had already acquired the Superior Lease and by the transfer itself would acquire the two Ice Rink leases. The term "registered leases" is not defined in the agreement between Abbeygate and Planet Ice. But the Ice Rink leases are referred to as "the Leases" which would have been an available and perhaps the most obvious defined term to use in Schedule 1 had the term "registered leases" been intended to refer only to the Ice Rink leases. On the other hand, it needs to be borne in mind that the provisions of Schedule 1 were drafted as a self-contained overage clause for insertion into the 2003 Transfer with its own set of defined terms. This is, I think, confirmed by the fact that although clause 2.1 refers to Abbeygate purchasing "the residue of the terms of years granted by the Leases", clause 19 which imposes the obligation to pay overage states that "on completion of the sale of the Property" the transfer will incorporate the provisions of Schedule 1. "Property" is defined in the agreement as the leasehold property "comprised in the Leases and registered at HM Land Registry" with the relevant title numbers. "Property" does appear in Schedule 1 in the provisions of clause 5 which require Abbeygate on a disposal of "the Property" to obtain a direct covenant from the purchaser to pay to Planet any sums due by way of overage. But the term "Leases" is not used independently in the Schedule. "Leases" would not of course have been an appropriate term to use if the draftsman had wanted to include the lease back of the Ice Rink.

25. The judge said:

> "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."

26. I think that the judge was wrong to regard the leaseback of the Ice Rink as within the definition of "registered leases" for the purposes of condition 3.1(b)(ii). Since the contract contemplated that the leaseback would be contracted out of the provisions of Part II of the 1954 Act and be terminable on three months' notice, no question of variation or merger would arise. Clause 3.1 is obviously directed to the Superior Lease and any other leases registered against the title which require to be varied or extinguished by a process of what is described as merger. In the case of the Superior Lease, merger could occur once Abbeygate had acquired the freehold reversion. But the "merger" of the registered leases in the Superior Lease (if read literally) contemplated the Superior Lease being acquired by the holder of the registered leases which in this case was never contemplated.

27. Mr Wonnacott QC relied on the reference to merger as supporting a construction of clause 3.1 that contemplated Abbeygate acquiring superior interests. In the case of the Transformer leases, their acquisition by Abbeygate (as tenant under the Superior Lease) would lead to a surrender of those interests but not a merger which can only occur when the tenant acquires the reversion immediately expectant on his own interest. But the difficulty about that argument is that it applies equally to the two Ice Rink leases which were being acquired under the 2003 Transfer. By then Abbeygate had already purchased the Superior Lease.

28. It seems to me that the more natural construction of clause 3.1 and one which is consistent with the purpose of being able to implement the Acceptable Planning Permission is to read "registered leases" as encompassing any registered leasehold titles that required to be bought in and cleared off the registered freehold title as an alternative to a variation of their terms under conditions 3.1(a) or 3.1(b)(i). If "registered leases" was intended to refer only to the Ice Rink leases then the draftsman would, I think, have

used the contractual definition of "Leases" to achieve that just as he used the definition of "Property" in clause 5 of Schedule 1. To this end I also agree with the judge that merger can include surrender and is not being used in its strict technical sense. The judge was therefore right in my view to regard the Transformer Leases as included within condition 3.1(b)(ii).

29. The requirements of condition 3.1(b)(ii) were not satisfied until after the longstop Trigger Date of 4 July 2013. Abbeygate completed its purchase of the freehold of the HCA land on 8 July 2013. In relation to the conditions under the HCA Agreement, the Ice Specification was agreed by HCA on 1 July 2013; Abbeygate entered into an unconditional agreement for lease of the Ice Rink with Planet on 8 July 2013; and Abbeygate accepts that the requirement for a legally binding agreement to lease the superstore to Morrisons was satisfied by the Morrisons Agreement which had been entered into on 20 December 2012. The negotiations with Western Power for the surrender of the Transformer Leases were still ongoing when on 10 July 2013 Morrisons agreed to waive the requirement that they be surrendered and the services to the Zurich land re-routed as a condition of its agreement to take a lease of the superstore. Eventually the Transformer Leases were surrendered but the merger of the registered titles at HM Land Registry was not completed until 23 February 2015.

30. Gaia accepts that the clause 3.1(b)(ii) condition was not therefore satisfied before the longstop Trigger Date so that the obligation to pay the overage sum of £1.4m under clause 2.1 did not arise. But its claim was that had Abbeygate used reasonable endeavours in accordance with clause 3.3 then the condition would have been satisfied in time. It therefore seeks payment of the £1.4m by way of damages for breach of contract.

31. The judge held that merger of the relevant titles contemplated by condition 3.1(b)(ii) included merger in equity in the sense of Abbeygate having become the owner in equity of all the relevant interests so as to be able to compel the legal owners to apply to HM Land Registry for the merger of the titles. It was common ground at the trial that there was no breach of clause 3.3 before 31 October 2012 when Abbeygate entered into the HCA Agreement. But thereafter Abbeygate was required to use reasonable endeavours to procure that the HCA Agreement became unconditional and to get in the Transformer Leases which were the only relevant leasehold interests it had yet to acquire.

32. The judge found that Abbeygate could if it so wished have obtained HCA's approval of the Ice Specification before mid-June 2013. Its consent was only required for material amendments or variations to the specification and Planet was keen to go ahead and exchange contracts for a new lease of the Ice Rink. There was a three month period of delay occasioned by minor changes to the layout but the judge found that these were not deal-breakers for Planet and did not give rise to planning issues or cause any concern to HCA. HCA only approved the Ice Specification on 1 July 2013 because it had not been asked to do so earlier.

33. As to the requirement for a legally binding new lease of the Ice Rink in a form approved by HCA (and subject only to Abbeygate carrying out the refurbishment works), the judge held that Planet was pressing for an exchange of contracts but that Abbeygate was keen to avoid entering into any commitment to carry out the works of refurbishment until it had secured the funding 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."

34. The third condition in the HCA Agreement which required Abbeygate to enter into a legally binding agreement to lease the superstore to Morrisons required Abbeygate, as I have explained, to obtain the variation or release of the service easements in respect of the Zurich land. This was the only condition in the Morrisons Agreement that would not be satisfied by Abbeygate entering into an agreement to lease the Ice Rink to Planet and having obtained the necessary planning permission for the development. Once the Morrisons Agreement became unconditional then so also of course did the HCA Agreement.

35. The judge found that the time taken to secure the surrender of the Transformer Leases and the variation of the service easements was directly attributable to an understanding on the part of Abbeygate that by adopting the timetable it had chosen to work to it would not only be able to secure the funding for the development but would also avoid the overage payment. In relation to the Transformer Leases, he found that an agreement for their surrender and re-grant could have been concluded before 20 June 2013:

> "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.
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> 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."

36. As to the service easements, the judge found that Abbeygate knew as early as 2 July 2012 that this was an issue which needed to be addressed because Morrisons had raised it as part of an Enquiry before Contract in relation to the Morrisons Agreement. But no approach was made to Zurich until mid-February 2013 after the negotiations for funding with Aviva were all but complete. Even then the contact with Zurich's agents was, in the words of the judge, oblique and it appears that Abbeygate sought legal advice as to whether they could alter the route of the services unilaterally without risking the possibility of an injunction. In the judge's view, these possibilities should have been investigated and dismissed much earlier leaving it open to Abbeygate to negotiate a deed of variation with Zurich whose consent would have been (and was) forthcoming. The reason for the delay was funding:

> "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."

37. The judge's findings that the delay in finalising the matters necessary to make the purchase of the freehold of the Site from HCA unconditional was due to a desire to line up the funding for the development is not in dispute. Indeed it is Abbeygate's case and its first ground of appeal that the judge was wrong to construe the obligation to use reasonable endeavours in clause 3.3 of the 2003 Transfer as excluding its ability to wait until the necessary finance was in place. But before I consider that issue I need to mention the other important aspect of the judge's findings about the reasons for the delay which has featured in the argument on the appeal.

38. Although the timetable adopted by Abbeygate was undoubtedly dictated by its concern to have the funding from Aviva in place before the HCA Agreement and the Morrisons Agreement became unconditional, the judge also found that Abbeygate appreciated that this could produce the additional advantage of avoiding liability to pay the overage to Gaia:

> "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.
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> 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 [to] "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."

39. The judge does not identify, and probably could not have done so, any specific periods of delay that were attributable to a desire to avoid the overage payment rather than to the need to have the Aviva finance in place. The findings I have quoted in relation to the surrender of the Transformer Leases, the variation of the service easements and the grant of the new Ice Rink leases were all based on the delay being attributable to finance. But the timetable which was adopted clearly owed much, on the judge's findings, to a conscious desire to avoid the overage payment and Abbeygate's case that it was entitled to have regard to the availability of funding and was not able to procure the funding earlier than it did has to be reviewed in the light of the judge's findings as to what may have motivated any apparent delay. The appeal therefore turns on whether, on the proper construction of clause 3.3, there was an objective justification for the time that was taken to satisfy the clause 3.1(b)(ii) conditions or whether, as the judge held, the necessary steps to achieve satisfaction of these conditions could reasonably have

been taken in time for the HCA Agreement to have been unconditional prior to 4 July 2013.

40. Clause 3.3 required Abbeygate after October 2012 to use reasonable endeavours to acquire the Transformer leases and the freehold of the Site as soon as reasonably practicable. On the question of what the use of "reasonable endeavours" required, the judge said:

> "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]: -
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> > ".. 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)."

41. Mr Hill, on behalf of Abbeygate, does not challenge the analysis of the reasonable endeavours obligation in *Rhodia* so far as it goes. As a statement of the distinction between that and an obligation to use best endeavours, it has the support of Lloyd LJ in *Sidhu v Sandhu* [2010] EWCA Civ 531 at [16]. But he does take issue with the judge on whether the obligation to take reasonable steps can take account of the financial impact on Abbeygate as developer at least in relation to the funding of the development. It would, he submits, he absurd to regard Abbeygate as under an obligation to take the steps necessary to make the HCA Agreement unconditional without yet having the funding for the development in place. The lease (or agreement to lease) to Morrisons of the superstore would require Abbeygate to construct the building as part of the development and therefore to incur significant expenditure which it would need to finance. All of this was an obvious and foreseeable part of the development at the time of the 2003 Transfer and it was not therefore objectively unreasonable for the timetable which Abbeygate adopted to have been one which accommodated this.

42. The *Alghussein Establishment* case which the judge relied on was concerned with an agreement for a lease which was entered into after permission had been granted for the development of the land. Clause 3(b) of the agreement provided that the tenant would "as soon as reasonably practicable following all necessary licences … use its best endeavours to commence and proceed diligently with the development in accordance with such licences … and complete the development". On completion the tenant was obliged to take the lease but this was subject to a proviso under which the tenant was obliged to take a lease of the property in its uncompleted state if by 29 September 1983 the development remained uncompleted due to the wilful default of the tenant.

43. By October 1984 the development had not commenced due to the very high rates of interest in the market. The tenant contended that this meant that it was not until then "reasonably practicable" to commence and complete the development but the Vice-Chancellor had held that what was reasonably practicable was confined to whether the development was technically feasible and did not include questions of profitability. His judgment was upheld by the Court of Appeal. Dillon LJ said:

> "The phrase "as soon as is reasonably practicable" is repeated later in Clause 3(b), but the later part of the clause is ill-drawn and the syntax is obscure. I take it however, that the words "as soon as is reasonably practicable" at the opening of Clause 3(b) are to be read as a general overriding phrase applying alike to the commencement and completion of the development. There is no doubt that, at all material times, the commencement and completion of the development has been practicable in the sense that there has been no engineering or construction difficulty, and all necessary consents and permissions have been available.
>
> There is no doubt also in my view -- and this is really common ground -- that in a general sense the appellants are not required to do anything unreasonable so as to complete the [development] earlier. For instance, they are not required to use arc lights and pay vast amounts of overtime in order to work the site round the clock, seven days a week, to finish the completion of the development sooner. Equally, they are not required to hire

> expensive equipment to start excavation a few days earlier when the site is deeply frostbound.
>
> Other such instances can be thought of where a measure of delay could be avoided at very high cost to the developers. Those are matters which affect the profit of the developers. From their point of view that is why to incur such costs would objectionable. Indeed, practically anything that happens may affect the profit of a developer. But as it seems to me these matters are outside the contemplation of this agreement because, as methods of working, they are on an objective view unreasonable and impracticable and not merely because they would affect the profit of the developer.
>
> The agreement does not guarantee to the developer any specified level of profit or even, in my view, a reasonable profit. The fact, therefore, that there are matters such as those I have mentioned, as to which it may be said that it would be unreasonable to expect the developer to bear such costs which would in fact so adversely affect his profit, does not mean that any matter which would affect his profit is a matter to be taken into account in considering whether it is reasonably practicable for him to commence or continue the development at any time. It does not mean that all financial matters have to be considered as matters of fact and degree."

44. It seems to me that this construction of clause 3(b) is heavily dependent on the particular wording used. The obligation is one to use best endeavours (not reasonable endeavours) to commence and proceed diligently with the development in accordance with "the licences and permissions obtained as soon as reasonably practicable after the grant of such consents". This supports the view that only technical rather than financial considerations should be relevant to determining when it was reasonably practicable to begin and complete the development. Clause 3.3 is more open-ended and requires Abbeygate only to use reasonable endeavours to achieve satisfaction of the clause 3.1(b)(ii) condition as soon as reasonably practicable. The judge said in [81] that *Alghussein* makes it clear that questions of profitability are ordinarily to be left out of account in determining what is reasonable for the developer to do. I think that is to state the matter too broadly. But in the present case the issue is not simply one of profitability. Abbeygate's case is that it was not possible to finance the development out of shareholders' funds and that external finance was always required in order to facilitate the development.

45. Ultimately, however, it is not necessary to express a final view about this because the judge has found that the steps taken by Abbeygate to make the HCA Agreement and the Morrisons Agreement conditional on each other and therefore on the variation of the service easements extended also to the funding arrangements themselves. As the judge explained in [93] quoted earlier, the restriction on access to funding was self-imposed. It was therefore open to the judge on the basis of these findings to conclude that even if access to funding would be a relevant and permissible consideration, Abbeygate could not rely on that in this case to show that it had used reasonable endeavours to satisfy the clause 3.1(b)(ii) conditions as soon as reasonably practicable.

46. I do not therefore accept Mr Hill's submission that on the judge's approach Abbeygate was required to act in a way that was described as commercially irresponsible by committing itself to a development which it could not fund. That was not in truth the position it was in. The judge has found that the timetable was manipulated to take the satisfaction of the necessary conditions in the HCA Agreement and the Morrisons Agreement beyond 4 July 2013. On any view, that was a breach of clause 3.3.

47. In these circumstances, the first ground of appeal fails. But, in the alternative, Abbeygate also contends that the judge was in any event wrong to find:

    (i) that there could have been a specifically enforceable agreement for the surrender and re-grant of the Transformer Leases before 20 June 2013 ("Ground 3");

    (ii) that approval by the HCA of the Ice Specification could have been obtained before mid-June 2013 ("Ground 4"); and

    (iii) that a specifically enforceable agreement for the variation of the service easements could reasonably have been obtained by mid-February 2013 ("Ground 5").

48. Before, however, turning to these specific grounds of appeal which are, of course, direct challenges to the judge's primary findings of fact, I need to address a prior issue of construction relating to clause 3.1 of the overage provisions which affects both Ground 3 and Ground 5 of the grounds of appeal. This concerns the meaning of the word "merged" in condition 3.1(b)(ii). Mr Hill accepts that "merged" should be read as including a surrender but he challenges the judge's view that it can include what the judge described as merger in equity: that is, the existence of specifically enforceable agreements by Abbeygate to acquire the Transformer Leases and the freehold of the Site so as to enable it to procure the merger of the relevant titles at HM Land Registry. Mr Hill submits that the words "are merged" contemplates the completion of the merger of titles in order for the condition to be satisfied. The judge said:

> "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."

49. Mr Hill says that this gives too much weight to the supposed purpose of the clause and effectively ignores the language used. The overage provisions were drafted by solicitors who should be taken to have chosen the words with care. The conditions should be strictly construed and complied with.

50. Although some of the recent decisions in the Supreme Court on the construction of contracts may appear to favour a more literal approach, the basic principles set out in Lord Hoffmann's speech in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 remain definitive. The words are to be given the meaning which the reasonable person, having all the relevant background knowledge available to the parties, would have understood them to have. This requires a consideration of the nature and purpose of the agreement and of its other terms. Although words are normally to be given their ordinary and natural meaning, that does not mandate an over-literal approach where it would conflict with the common sense of the agreement.

51. Mr Hill accepts, as I have said, that it would not be right to construe "merged" in its strict sense so as to differentiate it from surrender. But, for the same reason, the judge was right in my view to identify the critical point in time for the satisfaction of the condition as being when Abbeygate was in the position to direct the registered proprietors of the Transformer Leases and the freehold to join in an application to HM Land Registry for the cancellation of the leasehold titles. In the end, not much turns on this. As Mr Wonnacott pointed out and as Gaia has stated in its Respondent's notice, a successful application to cancel the leasehold titles would relate back to the date of the application and not to the date when the application was processed and registration completed: see Land Registration Act 2002 s.74(b). If the judge was right to conclude that there could have been enforceable agreements in place for the acquisition of the Transformer Leases and the freehold of the Site by about June 2013 then completion and the necessary application to merge the titles could have taken place before the longstop Trigger Date of 4 July 2013. One issue, touched on in the evidence which is said to have accounted for a delay in the application until 6 August 2013, was that the freehold title contained a restriction preventing the registration of any disposition of the freehold without the consent of the Council. This was not provided until 24 July 2013. But, as Gaia contends, the application for registration could still have been made prior to 4 July 2013 leaving the Land Registry to raise a requisition in respect of the restriction requiring consent to be given within a period of 20 business days or such longer period as the Registrar might allow. The consent would, we know, have been forthcoming and there could and would have been merger of the titles with effect from the date of the application.

52. Abbeygate's appeal must therefore fail unless it can persuade us to set aside the judge's findings of fact as to when the important component parts of the clause 3.1(b)(ii) condition could, with reasonable endeavours, have been put in place. As mentioned earlier, the appeal challenges the judge's findings in relation to the Transformer Leases; the approval of the Ice Specification; and the agreement for the variation of the service easements.

Ground 3: the Transformer Leases

53. The judge held in [110] that if reasonable endeavours had been taken all the relevant property interests would have been in hand before 20 June 2013. In relation to the Transformer Leases, there was an agreement in principle with Western Power for the

surrender of the existing leases and for a new lease of the re-located sub-stations on 4 July 2013 but the judge's assessment of the evidence including the e-mail traffic was that the agreement simply provided confirmation of what was already well understood and that there were no technical or legal difficulties involved in the surrender and re-grant. In the end, as I have mentioned, Morrisons waived the requirement that the surrender should take place prior to its own agreement for lease which the judge interpreted as a strong indication that the surrender was seen by all concerned as a pure formality. The relevant findings are in [106] of his judgment quoted at [35] above.

54. Mr Hill submits that the judge's assessment of the evidence ignores what Mr Gwynne, one of Abbeygate's directors, said in [136]-[137] of his witness statement. This was that although detailed discussions had taken place with Western Power about the relocation works from early 2013, no legal process, as he put it, could start until an order was formally placed with the company by BAM who were to be the contractors for the development. This, according to Mr Gwynne, could not take place until BAM received a formal letter of intent from Abbeygate which enabled it to raise payment of the sums which would become due on the placing of the order.

55. The rather technical procedure which Mr Gwynne describes was doubtless correct but his evidence in these paragraphs of his witness statement does not address the reason why this could not have been put in place much earlier. Mr Hill says that this was for the claimant to put to Mr Gwynne and it was not. He also drew our attention to the witness statement of Mr Pitman of Abbeygate who said that between March and June 2013 Helical Bar, the co-owner of Abbeygate, had agreed with Abbey Developments Limited that BAM should be authorised to spend up to £622,927 in advance of a formal building contract on matters such as application fees to utility providers and preparatory work connected with the re-location of services. Again, he says, it was not suggested that this could have been done significantly earlier than it in fact was. There was never, he submits, a specifically enforceable agreement to surrender the Transformer Leases at the time because everyone took the risk that Western Power's agreement in principle would be enough.

56. In my view, none of this provides the material to undermine the judge's conclusions about when the surrender of the Transformer Leases could reasonably have been achieved had Abbeygate used reasonable endeavours to bring that about. Mr Gwynne was asked a number of questions about the timing of the relocation works and whether they could have been carried out earlier in March and Mr Gwynne sought to explain why that had not occurred. But the judge's overall conclusion as set out in [96] of his judgment and the other passages I have quoted earlier was that Abbeygate was deliberately working to a timetable that was designed to avoid any conclusion of the Site assembly arrangements until after funding was in place and the longstop Trigger Date had passed. Mr Hill was candid in accepting that he could not and did not seek to challenge the judge's finding that there was a desire not to pay the overage. But, on the judge's findings, that permeated all the arrangements for the acquisition of the various property interests including the Transformer Leases.

Ground 4: the Ice Specification

57. The judge found at [92] that the Ice Specification was in place by 22 May 2013 and could have been in place significantly earlier. Even if HCA had not been asked to approve it until 22 May 2013 that approval would, he said, have been given before mid-

June 2013. They only reason why HCA did not approve it until 1 July 2013 was that its approval had not previously been requested.

58. Mr Hill says that these findings were not supported by the evidence. Mr Gwynne said in his witness statement that the Ice Specification called for multi-party discussions involving, for example, the incoming Ice Rink tenant and the local ice hockey team as well as the Council. BAM were not asked to carry out detailed site survey work until March 2013. There was also evidence from the architect, Mr Shaw, that, as a result of project meetings in March, changes had to be made to the specification and that it was not possible to get the lease drawings agreed before 28 June 2013. This evidence, he says, was not challenged. Abbeygate was entitled to be guided by its architect and even an obligation to use reasonable endeavours did not, he submits, require Abbeygate to accept an obligation to build the new rink without knowing that it could be delivered by its contractors in a form that was acceptable to users of the rink and to HCA.

59. Mr Wonnacott submitted that Mr Shaw in his witness statement was not dealing with the Ice Specification as such but with the drawings for the lease of the Ice Rink. He also took us on a detailed examination of the drawings with a view to demonstrating that they were in their final form by May 2013. In the end, all of this comes close to re-trying the case which is not the function of this Court. The judge heard the evidence and was able to draw inferences in the way he sets out in his judgment as to what motivated the timing of these matters. In my view, it would be wrong to consider Mr Shaw's evidence in a vacuum and so to detach it from the wider picture which the judge had about what governed the timetable. I am not persuaded that the judge had no evidential basis for the findings he made in [92] of his judgment.

Ground 5: the Service Easements

60. The difficulties created by the service easements to the Zurich land was identified very early on in 2012 by Morrisons but the view originally taken (and shared by Morrisons) was that this was a manageable risk. A decision was taken not to make a direct approach to Zurich in case they sought to extract some kind of ransom payment for their consent to a relocation of the service cables. Although the Morrisons Agreement entered into in December 2012 was made conditional on the existing easements being released, Morrisons were persuaded to waive the condition early in 2013 and were clearly never going to be difficult about this issue. The problem which occurred was that in March 2013 Aviva's solicitors insisted on a formal variation of the easements which, as the judge found, was introduced by Abbeygate itself as a restriction on the financing arrangements.

61. In these circumstances, this ground of appeal really stands or falls with the appeal on ground 1 concerning whether Abbeygate had used reasonable endeavours in producing a timetable which delayed completion of the site assembly conditions until after the longstop Trigger Date. It is not suggested that a variation of the service easements could not have been achieved much earlier (the judge said by February 2013) had Abbeygate wished to do so.

62. For these reasons, I would therefore dismiss the appeal.

Lord Justice Floyd :

63. I agree with both judgments.

Lord Justice Males :

64. I agree that this appeal must be dismissed for the reasons given by Patten LJ.

65. Reduced to its essentials, this is a case where Abbeygate undertook an obligation to use reasonable endeavours to achieve an outcome (obtaining a clear title to the land) as soon as reasonably practicable. However, on the judge's findings (which involved disbelieving Abbeygate's witnesses), it did not do so. On the contrary, it devoted its energies to ensuring that the outcome would *not* be achieved until after the date when it would escape liability to make the overage payment.

66. Although Abbeygate submitted that it was reasonable to delay until its funding for the development was in place, the judge's clear finding was that its delay was motivated by a desire to avoid the overage payment. Availability of funding and the obtaining of clear title were in any event closely related. The funding depended on the successful outcome of negotiations with the same parties with whom it was necessary to negotiate in order to obtain clear title to the land. There is no reason to suppose that funding for the development would not have been available once those negotiations had been brought to a successful conclusion and every reason to conclude that it would. Accordingly, Abbeygate's principal argument on the appeal, that it was entitled to take account of the availability of funding, is essentially a point which goes nowhere.

67. Those findings were sufficient for the judge to conclude, as he did, that Abbeygate was in breach of its obligation. Thereafter the issue was one of causation.

68. Abbeygate submitted that even if it had performed its obligation, the outcome could not have been achieved in time. Of course, nobody can say for certain what would have happened in a counter factual world where Abbeygate had been using reasonable endeavours in negotiations with third parties but, to the extent that there is a lack of evidence about this, that is a problem of Abbeygate's making. To say that the outcome could not have been achieved in time was always going to be an ambitious submission in circumstances where its witnesses had been disbelieved and, when it did finally get around to negotiating seriously with the relevant parties, there proved to be little or no difficulty in bringing those negotiations to a successful and prompt conclusion.

69. In those circumstances the judge was entitled to conclude that, if Abbeygate had used reasonable endeavours to achieve the relevant outcome as soon as practicable, it would have succeeded in doing so, and accordingly that Gaia had proved its case on causation.