Neutral Citation Number: [2020] EWCA Civ 1704

Case No: A3/2020/0890

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(Chancery Division)
His Honour Judge David Cooke
(sitting as a High Court Judge)
PT-2018-000577

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

Before :

LADY JUSTICE MACUR
LADY JUSTICE ASPLIN
and
MR JUSTICE MARCUS SMITH

- -

Between:

Fishbourne Developments Limited	**Appellant**
- and -	
Stephens	**Respondent**

- -
- -

Mr John Litton QC and **Mr James Neill** (instructed by **Fladgate Llp**) for the **Appellant**
Mr Julian Greenhill QC (instructed by **Irwin Mitchell**) for the **Respondent**

Hearing date: 1st December 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11.00 a.m. on Wednesday 16th December 2020.

Lady Justice Asplin:

1. This appeal is concerned with the proper construction of an option agreement for the purchase of Bethwines Farm which is dated 9 November 2002 and made between Mrs Myra Bailey and Mr Peter Saunders (the "2002 Option"). Mrs Bailey, who granted the 2002 Option, inherited her interest in the land to which the 2002 Option relates from her husband, Mr Roger Bailey. She died in 2014 and her interest has passed to her daughter, Mrs Anne Stephens, who is the Respondent to this appeal. Mr Saunders' interest as grantee under the 2002 Option was assigned to Serviced Land No 1 GP Ltd in 2006 and then to the Appellant, Fishbourne Developments Limited ("Fishbourne") in 2013.

2. The land which is the subject of the 2002 Option is near Chichester in West Sussex. It extends to approximately 117 acres. It is more precisely defined in the 2002 Option itself. I shall set out the definition below and refer to the farm by reference to the defined term in the 2002 Option which is the "Property".

3. The claim before HHJ David Cooke and this appeal turn on the proper meaning of the term "Planning Permission" in the 2002 Option. The term is of such importance because the exercise of the option is conditional upon the grantee (defined as the "Purchaser") obtaining a "Planning Permission". Fishbourne contend that a planning permission granted in July 2016, to erect a new pitched roof on an agricultural building at the Property, which has since expired, (the "Roof Permission") was a "Planning Permission" for the purposes of clause 3.5 of the 2002 Option and, therefore, was sufficient to trigger the process culminating in its right to acquire the entirety of the Property at a discount. On that basis, it served a notice on 22 May 2018 (the "Notice") confirming that a "Planning Permission" had been obtained and containing its proposals as to the Open Market Value of the Property and calculations of the Price. All of the terms to which I have referred are defined in the 2002 Agreement.

4. The validity of the Notice was disputed and a subsequent notice dated 20 June 2018 was served. The parties were unable to agree the Open Market Value for the Property. An expert (Mr Brogden) was appointed who made a determination on 14 November 2018 in the sum of £2,275,000. The parties then agreed a standstill agreement until the question of whether the Roof Permission was a "Planning Permission" within the meaning of the 2002 Option and whether, therefore, the Notice was valid, was determined.

5. This appeal has been expedited because the 2002 Option itself expires on 31 December 2020.

6. HHJ David Cooke, sitting as a High Court judge, decided, amongst other things, that: on a proper interpretation of the words "any development of the Property" contained in the definition of "Planning Permission" in clause 1.9 of the 2002 Option, a "Planning Permission" means a planning permission for development of the whole or substantially the whole of the Property by the erection of a new building or new buildings involving a change of use from agricultural use; and, accordingly, the Roof Permission was not Planning Permission with the meaning of the 2002 Option and the Notice was not a valid notice under clause 3.5 of the 2002 Option (see the judgment at [85] - [87]).

7. Fishbourne originally appealed the judge's decision on six grounds. The second ground is no longer pursued and the remaining five have been refined and distilled into the following three grounds. It is said that the judge erred in holding as he did in relation to the meaning of "development" within the definition of "Planning Permission" in the following respects:

   (i) He failed to take the natural and ordinary meaning of the term "planning permission . . . for any development" as his starting point, invoked commercial common sense as a reason for departing from the plain meaning of the words and focussed exclusively on the factual circumstances and, as a result, undervalued the importance of the language used;

   (ii) In reaching the conclusion that development of the Property in clause 1.9 means development of the whole or substantially the whole, the judge erred in construing "Planning Application" in clause 1.8 as indicating that multiple applications might be made for different parts of the Property in order to develop the whole, which was a departure for the plain and ordinary meaning of the words used; and if the judge was entitled to have regard to the commercial common sense of the arrangements, he erred in failing to consider that it would not (as a matter of practicality) have been possible to develop the whole of the Property as a result of physical constraints; and

   (iii) in the alternative to (i), if it was appropriate for the judge to have regard to the wider factual circumstances when construing clause 1.9, he erred in holding that the 2002 Option should be construed consistently with the earlier option agreements which had been entered into by Mrs Bailey's husband.

8. Mr Greenhill QC, on behalf of the Respondent, seeks to uphold the judge's decision. However, if we consider that the judge was wrong and that the 2002 Option is capable of being triggered by the grant of planning permission for development of only part of the Property, the Respondent's alternative case is that it must be interpreted only to entitle Fishbourne to purchase that part of the Property to which the planning permission relates and not the whole. This was referred to before the judge as "Interpretation C". It was not necessary for him to consider it and he declined to express any view upon it. See judgment at [88].

Background in more detail

9. As the grounds of appeal are, for the most part, rooted in the judge's treatment of the factual context surrounding the 2002 Option, it is important to set out the background in some detail. I take those details from the judgment.

10. Having met Mr Saunders socially in the late 1980s, Mrs Bailey's husband, Roger Bailey, asked Mr Saunders whether he thought that there might be potential for development of Bethwines Farm and Mr Saunders confirmed that although it might be difficult, it was possible. Accordingly, Mr Bailey agreed in 1990 and 1991 to grant Mr Saunders options for a ten-year period over

Bethwines Farm and two further plots which were nearby, known as the "Football Field" and "Flat Farm".

11. The earliest option agreement now available is dated 19 September 1991 and relates to Bethwines Farm. It was in the form of a letter from Mr Bailey to Mr Saunders. Mr Bailey agreed to grant an option "to purchase the freehold property situated and known as Bethwines Farm . . . comprising of approximately 100 acres at a price of 70% of current market value per developable acre". Mr Bailey went on to state that he confirmed: "[our] agreement that you should put in a planning application for housing on this land at your expense as soon as possible". The option was exercisable on one month's written notice and was stated to expire after nine years (the "1991 Option").

12. The amount of the option fee in the 1991 Option was left blank. However, in the option dated 23 March 1990 which related to Flat Farm (the "Flat Farm Option") and the option of 19 September 1991 over the Football Field (the "Football Field Option"), the fees were £100.

13. A supplemental agreement dated 16 June 1992 between the same parties, which was expressed to be supplemental to an option of 20 March 1990 in relation to Bethwines Farm, the Flat Farm Option and the Football Field Option, introduced a dispute resolution mechanism if the parties could not agree the current market value. It also states, amongst other things, that: "[T]he parties also acknowledge the fact that in order to obtain planning permission for speculative development on part of the land comprised in the above-mentioned agreements it will be necessary to provide some land for low cost social housing".

14. On 20 February 1997 the parties entered into another option agreement over Bethwines Farm in the same one-page letter format, save that it stated that the option fee was £100 and that it was to last until December 2011 (the "1997 Option"). There were further option agreements in relation to Flat Farm, the Football Field and an additional parcel of 6 ½ acres of land at Bethwines Farm, which were of the same date as the 1997 Option.

15. On 23 February 1999, the same parties entered into an agreement expressed to be "supplemental" to the 1997 Option and other options made on the same date in respect of other properties owned by Mr Bailey. This specified that "current market value per developable acre" meant "Open Market Value" which was defined, and made clear that the date on which the value was fixed could not be earlier than the grant of the Planning Permission. It defined "Open Market Value" as the value on a sale "with the benefit of a planning permission permitting the development of the relevant property for residential and ancillary relevant property purposes or such other purposes as are consistent with any allocation of the relevant property in the local plan or unitary plan… ("the Planning Permission")".

16. A further supplemental agreement was entered into on 5 February 2001, by which the option period for the 1997 Option and those over Flat Farm and Football Field was extended to the end of December 2020.

17. Mr Bailey died in January 2002 and Mrs Bailey entered into the 2002 Option on 9 November of that year. She also entered into options in relation to Flat Farm, the Football Field and the additional parcel of land at Bethwines Farm on the same date.

18. On 26 September 2014, a further supplemental agreement was entered into between Mrs Bailey, acting by Mrs Stephens as her attorney, and Mr Saunders. As the judge described at [33] of the judgment, it amended the 2002 options in relation to Flat Farm and the Football Field, reciting the fact that planning permission was about to be obtained for part of the land and providing for the option to be exercised over that part only, and to provide that reference to 70% of the Price be replaced with 61.25%.

19. Mrs Bailey died the next day, 27 September 2014.

20. As I have already mentioned, the planning permission on which Fishbourne relies was granted on 21 July 2016.

21. There is no dispute that the Property is adjacent to a railway line, that there are power lines crossing part of it and that there is gas main under it, the exact location of which is unknown to the parties before the court.

Relevant provisions of the 2002 Option

22. The relevant provisions of the 2002 Option are set out at [23] of the judgment. For ease of reference, I set them out here. Mrs Bailey was defined as the "Owner" and Mr Saunders as the "Purchaser." The recitals, where relevant, are as follows:

> "(A) The Purchaser entered into an option with Albert Roger Bailey [Mr Bailey] on 20th February 1997 and entered into a further supplemental agreement with Albert Roger Bailey on 23rd February 1999 in respect of the Property.
>
> . . .
>
> (D) Myra Joy Bailey [Mrs Bailey] has agreed to enter into this option to clarify the terms on which the Purchaser will be granted an option."

23. The "Option Fee" was £1. The other relevant terms are defined as follows:

> "1.3 "Open Market Value": means the price at which the sale of an interest in property might reasonably be expected to have been completed unconditionally for cash consideration on the Valuation Date assuming:
>
> . . .
>
> and having regard to all relevant facts and contingencies including in particular (but not exclusively):
>
> i. the physical characteristics of the Property;

> ii. the terms of all subsisting planning approvals (if any);
> iii. the terms of any subsisting Planning Agreement ("the Planning Agreement") meaning an agreement required by a Local Authority under Section 106 of the Town and Country Planning Act 1990 or Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 or Section 278 of the Highways Act 1980 or under any similar legislation in connection with the grant of the Planning Permission Approval or of any Planning Agreement reasonably required to facilitate the granting of the Planning Permission;
> iv. taking into account any consideration which is or might be payable to a third party for any facilities across or in respect of any other land outside the relevant property whether or not that other land is owned by the Purchaser;
> v. taking into account the cost of the provision diversion improvement or upgrading within or outside the relevant of any infrastructure ("Infrastructure") . . . required in order to implement any Planning Permission . . .
>
> 1.4 "the Option" the option to purchase the Property or any part thereof granted pursuant to clause 2.1 of this Agreement.
>
> . . .
>
> 1.8 "Planning Application" any planning application made by the Purchaser in respect of land which includes the Property or any part thereof to obtain the Planning Permission
>
> 1.9 "Planning Permission": means a planning permission granted by the Local Planning authority permitting any development of the Property.
>
> . . .
>
> 1.11 "the Property": the freehold land described in the First Schedule."

24. The Property was described in the First Schedule as: "All that freehold land known as land at Bethwines Farm Fishbourne Chichester West Sussex all which said property is more particularly described in the Conveyances and is for the purposes of identification only shown edged red on the attached plans".

25. The option is granted in the terms set out in clause 2.1:

> "2.1: In consideration of the Option Fee now paid by the Purchaser to the Owner . . . the owner grants to the Purchaser and it [*sic*] assigns an option to purchase the Property for an estate in fee simple in possession subject as hereinafter mentioned but otherwise free from encumbrances upon the terms set out below.
>
> . . ."

Unlike the 1997 and 1999 options, Clause 3.1 provides that the grantee/purchaser may submit a "Planning Application" to the Local Authority but is not obliged to do so. The trigger for the exercise of the option and the ultimate calculation of the price to be paid and the transfer of the Property is contained in clause 3.5. It is in the following terms:

> "3.5: If and when the Purchaser obtains a Planning Permission the Purchaser may serve written notice on the Owner or the Owner's Solicitors confirming the same such notice shall also contain the Purchaser's proposals as to the Open market [sic] Value of the Property and the calculation of the Price (the "Notice")."

Once the Price is determined pursuant to the mechanism in clauses 3.6 – 11, the option can be exercised in the manner set out at clause 4.1 and "the Owner shall sell and the Purchaser shall purchase the Property at the Price" upon the terms set out in the remainder of the clause which, where relevant, is as follows:-

> "4.1.1 title shall be deduced and commence with the Conveyances
>
> . . .
>
> 4.1.3 the Property shall be sold with vacant possession
>
> . . .
>
> 4.2: Completion of the purchase of the Property shall take place on the date two months from the date of exercise of the Option or earlier by arrangement between the parties."

Clause 5 is also relevant. It is as follows:

> "5: The Owner shall not during the currency of this Agreement grant or create any easements rights privileges or tenancies in respect of the Property nor make or authorise any planning application or appeal for planning permission for the development of or including the Property or any part or parts thereof (other than any such made by the Purchaser) and the Owner shall be responsible for terminating at its own expense all tenancies licences and agreements relating to the occupation or use of the whole or any part or parts of the Property if the Purchaser exercises the Option"

The judge's reasoning

26. Having set out passages from *Arnold v Britton* [2015] UKSC 36 at [14] and [15] and considered the factors which Lord Neuberger stated to be relevant when interpreting contracts, and having also set out the passage in the opinion of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [9] – [14], the judge concluded as follows:

> "43. I do not doubt that cases such as *Rainy Sky, Arnold* and *Wood* place a stronger emphasis than [*Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896] and perhaps *Chartbrook* on the language of the document as the starting point and, if that has an apparently clear meaning, the need for proper justification for departing from that meaning, which may be impossible to find if the words are sufficiently clear. But it is not the case in my judgment that *Arnold* or *Wood* has gone further than, or cast any doubt on, the way the relevant principles were expressed in *Rainy Sky*. In particular those cases accept and approve what was said in *Rainy Sky* about the need to evaluate as between different potential meanings of the contractual words used which of them is objectively more likely to have been intended by the parties, using all the tools available to the court including the surrounding facts as known to the parties, the commercial object of the contract and commercial common sense. Lord Hodge in *Wood* made clear that this was the case …"

27. With those principles in mind, the judge considered the rival submissions and concluded at [49] that "development" is not a term which only has one meaning and that "[e]ven if the context is clearly related to land, it is not the case . . . that anyone using that term is necessarily intending to refer to the definition in the Planning Acts. . . ." He went on:

> ". . . A lay person may or may not be aware of the statutory definition, and even if he is, may depending on the context intend a more limited meaning.
>
> 50. One dictionary definition of "development", which is also in my view commonly used in non-technical contexts, is the construction of new buildings, especially where there were none before. A reasonable objective observer may well therefore ask himself where the parties used the term with that in mind, or intended it to extend to lesser operations such as re-roofing."

28. As a result, the judge stated that it was necessary to examine all the surrounding circumstances to determine the proper construction and proceeded to do so. See [51] of the judgment. He concluded at [60]:

> "The process of construction is, as the authorities make clear, unitary; that is to say a matter of the court's overall conclusion taking into account all the potentially relevant considerations I

> approach it on the basis that I must construe the phrase 'any development of the Property' as a whole, rather than broken into two parts. . . Having performed that exercise, in my judgment the correct construction is that . . . Planning Permission as defined must be for development by new building of the whole, or substantially the whole, of Bethwines Farm."

29. The principal matters which led him to that conclusion were first, the factual context:

(i) The muddled course of events and overlapping provisions of the agreements which preceded the 2002 Option indicated that "all of the agreements are to be read in the light of each other. This is not a situation in which parties have replaced one comprehensive agreement with another . . ." (see [64] of the judgment);

(ii) The general poor quality of the drafting and muddled sequence of contractual obligations entitled the court to "place rather greater weight on the surrounding facts known to the parties than might otherwise be the case (see *Rainy Sky*)" (see [65] of the judgment);

(iii) "[T]he evidence of mutual intention to seek permission for housing [was] objectively available from the terms of the previous agreements and the conduct of Mr Saunders and those engaged to assist him . . ." (see [65]); and

(iv) The previous agreements required planning permission to be obtained for the whole of the land to which each option applied, rather than just part of it (see [70]); and the terms "planning permission" and "development" referred to obtaining permission for development by new, non-agricultural building, the whole purpose of the option agreements and the involvement of Mr Saunders having been to secure a change in authorised use in order that the land value should be increased (see [71] - [72]).

30. In this regard, the judge concluded at [72] that the "general nature of the sequence of agreements and their terms indicates that the arrangements were evolving, and not being radically changed and replaced by the 2002 Option", that this was supported by Recital (D) to the 2002 Option which provided that it was intended to "clarify" the terms on which the option would be granted and the fact that those agreements were not terminated and that accordingly, references to development in the 2002 Option should be construed consistently with the previous agreements.

31. The judge then turned to the provisions of the 2002 Option itself. He held that:

(i) the expression "any development of the Property" and the definition of "Planning Permission" must also be construed in the context of the other provisions of the 2002 Option and that clause 1.9 "is much better understood in the factual context, from which it is clear the parties envisaged that the planning authority might designate areas as suitable for housing." (see [75]);

(ii) the effect of clause 1.8 was not that permission to develop only one part of the land would suffice, but rather that "multiple applications might be made in respect of different parts of the land in order to obtain permission to develop all of it" (see [77]);

(iii) the fact that some clauses referred expressly to "part" of the Property, but others (including clause 1.9) did not, suggested that where a clause did not refer to "part", it was intended to refer to the whole Property (see [78]);

(iv) the dissonance between the clause 1.4 definition of "Option" which referred to "the Property or any part thereof" (emphasis added), and the operative clause 2.1, which refers only to "the Property" meant that the reference to a "part" in clause 1.4 "is best regarded as a drafting mistake", as other provisions, including clause 3.4 on surveys, clause 3.6 on determination of Open Market Value and clause 4.1 on the exercise of the Option all followed clause 2.1 in referring only to "the Property", and made no reference to "part thereof". See [79] - [80]; and

(v) accepted that any scheme of development would not involve every square metre of land being built upon, as land would likely be kept aside for gardens, parking and other open space ([82]), but that aside:

> "81. On the whole then, use of the term "the Property" is consistent with it meaning the whole of the land, and where provision is made applying to part only, that is expressly stated. That supports the interpretation that "development of the Property" means development of all of it. Such an interpretation maintains consistency with the general scheme of the preceding agreements, which for the reasons given above required permission for development of the whole of the land they applied to."

32. Lastly, the judge considered the commercial rationale behind the 2002 Option, and stated at [83] that "the court is entitled to have regard to the commercial common sense of the arrangements, and that when one does so it points strongly against the claimant's construction". In particular, the only commercial advantage to the Baileys came from:

> "84. … increase in the land value as a result of Mr Saunders having obtained planning permission for new development. A minor piece of building work while the land was still designated as agricultural would not achieve this, and it was not what the parties, from the objective evidence, can be seen to have envisaged either in 1990 or thereafter … The owner only realistically stands to benefit if the option holder has obtained a permission that increases the value of the land such that the 30% discount is outweighed."

He concluded, therefore, at [85] that:

> "i) "development" means development that includes new building involving a change of use from agricultural use, though not necessarily for housing, and
>
> ii) "development of the Property" means such development of the whole, or substantially the whole, of Bethwines Farm."

Legal Principles

33. The legal principles which apply to the interpretation of written contracts are very well known. The court's task when construing the 2002 Option is to ascertain the objective meaning of the words used by the parties in the context of the 2002 Option as a whole, taking into account the relevant factual background which would have been available to the parties, but excluding subjective evidence of the parties' intentions. The court must focus on the meaning of the relevant words in their documentary, factual and commercial context. If there is an ambiguity, or in other words, there are rival meanings, the court can give weight to the implications of the rival constructions by reaching a view as to which is more consistent with business common sense: *Arnold v Britton & Ors* [2015] AC 1619 per Lord Neuberger PSC at [14] – [23] and *Wood v Capita Insurance Services Limited* [2017] AC 1173: [2017] UKSC 24 per Lord Hodge JSC at [8] – [15] and *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50 per Lord Clarke at [21].

34. In particular, in *Wood v Capita*, Lord Hodge rejected the submission that there had been any change in approach in *Arnold v Britton* from that adopted in *Rainy Sky*. As it was submitted before the judge, that *Arnold v Britton* represented a change in judicial approach and a move away from factual matrix and towards the words used and it has been submitted before us that emphasis should be placed upon the ordinary and natural meaning of the words used, it is important to have Lord Hodge's analysis of the present state of the authorities and the nature of the task which must be undertaken when construing a contract in mind. He stated as follows:

> "8. In his written case counsel for Capita argued that the Court of Appeal had fallen into error because it had been influenced by a submission by Mr Wood's counsel that the decision of this court in *Arnold v Britton* [2015] AC 1619 had "rowed back" from the guidance on contractual interpretation which this court gave in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900. This, he submitted, had caused the Court of Appeal to place too much emphasis on the words of the SPA and to give insufficient weight to the factual matrix. He did not have the opportunity to develop this argument as the court stated that it did not accept the proposition that *Arnold* had altered the guidance given in *Rainy Sky*. The court invited him to present his case without having to refer to the well-known authorities on contractual interpretation, with which it was and is familiar.
>
> 9. It is not appropriate in this case to reformulate the guidance given in *Rainy Sky* and *Arnold*; the legal profession has sufficient

judicial statements of this nature. But it may assist if I explain briefly why I do not accept the proposition that *Arnold* involved a recalibration of the approach summarised in *Rainy Sky*.

10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [1998] 1 WLR Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.
>
> 14. On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing."

35. It is also helpful to keep in mind Lord Clarke's succinct approach to the language used at [21] in the *Rainy Sky* case. He stated:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the

> language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

Discussion and conclusions

36. What is the proper interpretation of a "Planning Permission" for the purposes of triggering the option under clause 3.5 of the 2002 Option? As I have already mentioned, "Planning Permission" is defined in clause 1.9 and means "a planning permission granted by the Local Planning authority permitting any development of the Property".

Meaning of "development" - section 55 Town and Country Planning Act 1990?

37. Mr Litton QC, who appears with Mr Neill on behalf of Fishbourne, says that the meaning of that term and of the phrase "any development of the Property" in clause 1.9 is clear from the natural and ordinary meaning of the words used. He emphasised in particular, that: the starting point is the words used; where the parties have used unambiguous language, the court should apply it; the court should be slow to reject the natural meaning of a provision simply because it appears to be an imprudent term; and reliance upon commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language used: (see *Arnold v Britton* at [17] and *Rainy Sky* at [23]). He says that the ordinary and natural meaning of the words are clear, there was no rival meaning and, therefore, business common sense was irrelevant.

38. With those principles in mind, Mr Litton submitted that the judge was wrong to isolate "development" from the context in which it appears in clauses 1.9 and 1.8 and that if one reads clause 1.9 as a whole, it is clear from the words used that it refers to development which is the subject of planning permission granted by the Local Authority and, therefore, that "development" has the meaning contemplated under section 55 Town and Country Planning Act 1990 (the "1990 Act") under which such permission would be granted. Section 55(1) is as follows:

> "Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

39. That sub-section is amplified by section 55(1A) which provides that "building operations" includes demolition of buildings, rebuilding, structural alterations or additions to buildings and other operations normally undertaken by a person carrying on business as a builder. Section 55(2) goes on at sub-clauses (a) to (g)

to set out operations or uses of land which are not to be taken to involve the development of land.

40. In my judgment, the judge was right to reject such a construction of the term "development" and to conclude as he did at [49] of the judgment that the term is capable of more than one meaning. It seems to me that the reasonable reader of clause 1.9 with all the relevant background available to the parties at the time, having read the clause in the context of the 2002 Option as a whole, would not conclude that the natural and ordinary meaning of word "development" in the context of that clause encompasses each and every one of the activities set out in the detailed provisions of section 55 of the 1990 Act. Such a reader would not have the breadth and technicality of section 55 in mind at all. He would have in mind that the land subject to the 2002 Option is a farm and approach the meaning of "development" in that context. The fact that reference is made in clause 1.9 to the grant of planning permission by the local planning authority, which would be within section 55, does not mean that the natural and ordinary meaning of "development" includes all or any of the activities outlined there. Although any development within the definition in clause 1.9 would require permission under section 55, it is a non sequitur to conclude that "development" encompasses all or any of the activities in section 55. It seems to me to be quite clear, therefore, that the judge was right to reject the submission that "development" in clause 1.9 of the 2002 Option has the meaning given to it in section 55 and to conclude that it has more than one meaning.

Unitary exercise

41. Mr Litton did not press the argument which appears in his written submissions, that the judge had failed to carry out the unitary exercise when construing the term "development" although he did make reference in his oral submissions to the importance of starting from the correct end of the telescope. It seems to me that there is nothing in this point. Lord Hodge's explanation of the process of interpretation makes clear that once one has read the language in dispute and the relevant parts of the contract which provide its context, it matters not whether the more detailed analysis which follows, begins with the "factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each" (*Wood v Capita* at [12]). It seems to me that it is quite clear that the judge conducted such an exercise.

Relevance of the case of Hallam Land

42. In relation to the meaning of "development", both Mr Litton and Mr Greenhill referred us to *Hallam Land Management Ltd v UK Coal Mining Ltd & Anr* [2002] EWCA Civ 982. Mr Litton urged us to distinguish it and Mr Greenhill, whilst accepting that we are not bound by it, submitted that it was highly persuasive. It was concerned with the interpretation of a conditional option agreement in similar terms to the 2002 Option. In that case, this court considered whether a planning application by the purchaser, Hallam, to build an office block covering 2.5 acres of the 45-acre plot constituted "a planning application or applications for the development of the Property". If it did, Hallam would be

able to exercise its option to purchase the entire property at a price to be calculated at £100,000 for each acre of the property over which planning permission had been granted, in other words, 2.5 acres, and thus £250,000.

43. The court considered, amongst other things, two issues which also arise in this case: first, whether the phrase "development of the property" would capture a permission to develop part of the property; and secondly, whether the word "development" should be construed in its broad, technical sense under the 1990 Act.

44. On the first issue, Rix LJ noted at [46] - [47] that "the Property" was defined in the option agreement as meaning the whole 45-acre site, and for it to mean "part of the Property" would run contrary to that definition. As to practical difficulties, the "whole of the property" could mean "substantially the whole"; in some cases a question might arise as to what precisely that meant, but it did not in circumstances where Hallam's permission extended only to 5% of the site. Moreover, the possibility that a planning application for development of the whole site would fail did not mean that the option agreement must contemplate a planning application for development of any part of the property. Further, Rix LJ stated at [51]: "The purchaser had paid only £5,000 for his option. He buys a mere spes for a small price. The agreement does not have to go out of its way to ensure him success."

45. On the second issue, as in this case, the grantee of the option argued that "development" had the meaning ascribed to it in section 55 of the 1990 Act, and thus that the planning permission it had obtained (which involved landscaping the 45-acre site, and thus "engineering" within the definition of "development" in the 1990 Act) met the threshold to trigger the option. The court disagreed.

46. Although there are obvious similarities between the *Hallam* case and this one and the approach of this court in relation to similar wording is of interest, I do not find other authorities which relate to different agreements, however similar, and which inevitably have different factual backgrounds, of much assistance when considering the construction of a particular clause or term in a different contract. Despite the similarity of the terms in *Hallam*, in my judgment, whilst it provides some guidance that this court came to similar conclusions to the judge in relation to similar terms, it is of no more assistance that that.

Commercial common sense

47. As I have already mentioned, I agree with the judge that the term "development" in clause 1.9 is capable of more than one meaning. Accordingly, the judge was required to weigh up the implications of rival meanings and apply commercial common sense. Mr Litton submitted that if commercial common sense was relevant, at all, the judge was wrong to conclude that Fishbourne's interpretation was contrary to common sense. He submitted that although the land would be sold at a 30% discount, the Owner would receive the price including an element of hope value "up front" and risk free.

48. In my judgment, however, if one considers clause 1.9 in the context of the 2002 Option as a whole, it is clear that Fishbourne's interpretation of "development"

makes little commercial sense. As Mr Greenhill QC, on behalf of Mrs Stephens, pointed out, if Fishbourne's interpretation is correct, Mr Saunders could have obtained the option for £1 and exercised it very shortly thereafter having obtained an inconsequential planning permission which neither changed the use of the Property nor increased its value. If the purchaser/grantee were entitled to do so, he would be able to purchase the whole of the Property at a 30% discount and keep it in his "land bank" until an opportunity arose to sell it at a substantial profit. The owner/grantor would have parted with the land for 70% of its market value without having gained any advantage whatsoever. I agree with Mr Greenhill that this does not make commercial common sense and that the inclusion of a 30% discount on the Open Market Value is indicative of an expectation that the purchaser/grantee would take steps to enhance the value of the land in order to be able to exercise the option. In other words, the planning permission which triggers the 2002 Option cannot be entirely inconsequential. If that were the case, there would be no reason to give a discount. In fact, there would be little point in granting an option at all and certainly no reason to include all of the detailed provisions which appear in the 2002 Option.

49. As Mr Greenhill pointed out, such an interpretation is consistent with the fact that the 2002 Option does not contain any "claw-back" or overage provisions enabling the owner/grantor to benefit if the land is subsequently sold or developed at a substantial profit, despite having been transferred at a low value under the option.

50. I agree with the judge, therefore, that if one interprets the term "development of the Property" in the context of both clause 1.9 and the 2002 Option as a whole, having taken account of the relevant factual matrix and business common sense, it means a development which includes new building and which involves a change of use from agricultural use.

The whole or part of the Property?

51. Does development of the Property in clause 1.9 mean development of the whole or substantially the whole rather than part of the Property? There are two main strands to Fishbourne's argument in this regard. The first is based upon the terms of the 2002 Option itself and clause 1.8 in particular, and the second turns on the physical constraints upon the use of the Property. I will address the physical constraints first and then turn back to the terms of the 2002 Option itself.

Physical constraints

52. It is said that it is a significant part of the relevant factual matrix that the whole of the land comprising the Property could not be developed because of the overhead electricity cables, the gas main and the railway line. These constraints on development, Mr Litton says, militate against a construction whereby the 2002 Option is exercisable only if planning permission for the development of the whole (or substantially the whole) of the Property has been obtained. In this regard, Mr Litton referred us to the determination of the Open Market Value of the Property undertaken by the independent expert, Mr Brogden, and relied

upon the fact that Mr Brogden had decided that only 46 acres of the Property had development potential within 10 to 20 years.

53. It is true that Mr Brogden mentioned that the Property was "affected by" the power lines and a gas main in his paragraphs under the heading "Site Characteristics". However, as Mr Greenhill points out, there is no further mention of physical constraints in the determination. In fact, it appears that Mr Brogden's reasoning was based on the potential for development in the medium to long term. He valued 46 acres on the basis of development within such a time frame and the remainder of the land on the basis of its agricultural value with a small element of long term development potential. See the determination at clauses 4.6, 5.5, 5.7, 5.8, 7.7 and 7.8. He made no reference to physical constraints when determining whether the land had development potential.

54. It does not appear that there is evidence that Mr Brogden considered that the features to which Mr Litton refers would restrict the area available for development at all. In addition, Mr Greenhill submitted that Fishbourne's own evidence ran contrary to the submission that the land was subject to physical constraints. He referred us to the evidence of Mr Margott, a director of Fishbourne. In his witness statement of 24 September 2019, Mr Margott referred to the "Local plan Examination-in-Public" which took place in the autumn of 2014. He stated that Fishbourne "were hopeful that the Site could yet be identified for development through the Local Plan Review, as the council were not meeting their full housing need and development of the Site and other similar sustainable locations along the east-west railway line to the west of the District were obvious, sustainable and constraint free locations". See paragraph 12 of his witness statement. In my judgment, such a general and unfocussed comment is of little assistance. In any event, it seems to me that there is nothing in this point. There was nothing before the judge and there is nothing before us to suggest that part of the relevant factual matrix was that part of the Property could not be developed.

Terms of the 2002 Option itself

55. What of the judge's interpretation of clauses 1.9 in the context of clause 1.8? In essence, Mr Litton says that clause 1.9 should be read with clause 1.8 which contains the definition of "Planning Application" and should be interpreted to mean that planning permission could be applied for and granted for the Property or "any part thereof" for the purposes of obtaining a Planning Permission for the purposes of clauses 1.9 and 3.5. He submits, therefore, that the judge's interpretation of clause 1.8 as indicating that multiple applications might be made for different parts of the Property in order to develop the whole was a departure from the plain and ordinary meaning of the words used and was mere artifice.

56. I disagree. If clause 1.9 is construed in the context of the 2002 Option as a whole, it seems to me that it is clear that "Planning Permission" in clause 1.9, and, therefore, a Planning Permission for the purposes of fulfilling the condition in clause 3.5, must relate to the whole or substantially the whole of the Property. Despite the use of the phrase "or any part thereof" in the definition of "Planning

Application" in clause 1.8, the term "Property" is used in clause 1.9 without qualification. It is clear from an examination of clauses 1.8 and 1.9, therefore, that the draftsman was capable of distinguishing between the property as a whole and part of it and did so. There are other examples throughout the 2002 Option both of the unqualified use of the term "Property" and to references to "any part thereof". Those references both in the unqualified and qualified versions make sense in the contexts in which they appear.

57. First, the Property is expressly defined in clause 1.11 and the First Schedule to the 2002 Option in a way which refers to the whole of Bethwines Farm. Secondly, the term is used accurately in the same way in recitals (A) and (C). Thirdly, clause 3.4 under which the Purchaser is authorised ". . . to enter the Property to carry out surveys, soil and environmental test[s] or other investigation[s] . . ." makes no reference to part of the Property and makes sense if it refers to the whole. Fourthly, Fishbourne itself seeks to construe the references to the "Property" in clauses 3.5 (the trigger for the option) and in clause 4.1 (the determination of the Open Market Value and the Price and ultimately, the purchase) as a reference to the whole rather than part of the Property. That is because the term makes sense in those contexts if it is construed as a reference to the whole or substantially the whole. Fifthly, such an interpretation is also consistent with the acceptance of the Open Market Value under clause 3.6 and the first of the matters to be taken into consideration when determining Open Market Value set out at clause 1.3(i). One is required to have regard to "the physical characteristics of the Property".

58. Sixthly, despite the use of the phrase "or any part thereof" in other provisions such as clause 5, it does not appear in clause 1.9. The use of the phrase in clause 5 makes sense in the context of that clause. A planning permission, a tenancy agreement, licence or agreement for the occupation or use of part of the Property would inevitably have consequences in relation to the efficacy of the 2002 Option.

59. The quality of the drafting of the 2002 Option as a whole is not sufficiently poor for one to assume that that the lack of any qualification of "Property" in clause 1.9 is just a mistake. For example, as Mr Greenhill points out, the use of "of" in the phrase "any development of the Property" in clause 1.9 is also consistent with a development of substantially the whole rather than any part of the Property. If the latter were the proper interpretation it would be more apt, perhaps, to have used the preposition "on".

60. I reach this conclusion despite the fact that it requires one to accept , as the judge did below (see [79] of his judgment), that the inclusion of the phrase "or any part thereof" in clause 1.4 which defines the "Option" as "the option to purchase the Property or any part thereof granted pursuant to clause 2.1 of this Agreement" is an error.

61. Seventhly, if Fishbourne's interpretation is correct and an inconsequential planning permission in relation to part of the Property is sufficient for the purposes of clause 1.9 as a result of reading down its wording by reference to

clause 1.8, a disconnect is created between the trigger for the option and its exercise under clauses 3.5 and 4.1 which refer to the whole of the Property.

62. Furthermore, I also disagree with Mr Litton's description of the judge's reasoning at [77] of his judgment as artifice. I agree with the judge that rather than constraining the definition of "Planning Permission", the breadth of the definition of "Planning Application" in clause 1.8 would enable multiple applications in respect of the different parts of the Property in order to enable the development of the whole. Such an interpretation is consistent with the reference to "planning approvals" in the plural at (ii) in the list of matters to be taken into consideration when determining Open Market Value. See clause 1.3.

Relevance of the previous agreements

63. It follows, therefore, that for all these reasons, it seems to me that the judge's interpretation of clause 1.9 is to be preferred and that the first two grounds of appeal must be dismissed. It also follows that it is not necessary to place any reliance upon the precise terms of the previous agreements between Mr Saunders and Mr Bailey in order to reach the proper interpretation of clause 1.9 and the 2002 Option as a whole.

64. For the sake of completeness, however, I should add that Mr Litton submitted that despite the terms of recital (D), the 2002 Option was not merely clarification of what had gone before. It contained a great deal of new material and was comprehensive and, accordingly, it was impermissible to look back to the earlier agreements as the judge had done. He referred us, in this regard, to *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co & Ors* [2001] CLC 1480, a case which was concerned with whether slip policies had been superseded by later insurance policy wording. Rix LJ, with whom Mummery and Peter Gibson LJJ agreed, considered the status and relevance of earlier contractual provisions in the following way:

> "81. . . . Where it is common ground that one contract has been intended to supersede an earlier contract, it must follow that the parties' contract must be found exclusively in the later contract. Thus the earlier contract cannot be used to add to, or modify, the later contract.
>
> 82. But does it follow that the earlier contract cannot even be looked at for the purposes of construing the later contract?
>
> 83. In principle, it would seem to me that it is always admissible to look at a prior *contract* as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to *supersede* the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be

> impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law.
>
> 84. Where, however, it is not even common ground that the later contract is intended to supersede the earlier contract, I do not see how it can ever be permissible to exclude reference to the earlier contract. I do not see how the relationship of the two contracts can be decided without considering both of them. In essence there are, it seems to me, three possibilities. Either the later contract is intended to supersede the earlier, in which case the above principles apply. Or, the later contract is intended to live together with the earlier contract, to the extent that that is possible, but where that is not possible it may well be proper to regard the later contract as superseding the earlier. Or the later contract is intended to be incorporated into the earlier contract, in which case it is prima facie the second contract which may have to give way to the first in the event of inconsistency. I doubt that it is in any event possible to be dogmatic about these matters."

65. It seems to me that given my conclusion about the interpretation of the 2002 Option without reference to the previous agreements, it is unnecessary to decide whether they had been wholly superseded. In any event, as Rix LJ pointed out, there is no rule of law to be applied and it is not possible to be dogmatic about these matters. The previous agreements are inevitably part of the relevant factual matrix of the 2002 Option.

Application for permission to rely upon transcript

66. Lastly, in this regard, Mr Greenhill made a late application for permission to rely upon an extract of the transcript from the trial before the judge which records Mr Westhorpe's cross-examination. Mr Westhorpe assisted Mr Saunders in relation to development and planning matters. The extract records Mr Westhorpe's explanation of why Mr Saunders had asked Mrs Bailey to execute the 2002 Option. It records, amongst other things, that "too many things were missing" from the previous agreements and that he and Mr Saunders were being told by consortium partners that they were put off from doing a deal with Mr Saunders because of the terse drafting of the 1997 Option and that they wanted everything in one place.

67. Mr Greenhill submitted that the evidence about what developers were saying was objective fact, forming part of the factual matrix of the 2002 Option rather than the subjective intent of a party to it and, therefore, could be relied upon in support of the contention that the earlier agreements had not been superseded entirely by the 2002 Option.

68. It seems to me that even if it were necessary to seek to rely upon the detail provisions of the previous agreements, the transcript would not take the matter forward. The transcript goes no further than the witness statements which were before the judge and is of no further assistance. In any event, as the judge concluded, quite rightly, the evidence was of the subjective intention of the parties. It is artificial to seek to characterise Mr Westhorpe's recollection of what developers may have said at the time as objective fact and to differentiate that from Mr Westhorpe's and Mr Saunders' motivations and subjective intentions when asking Mrs Bailey to enter into the 2002 Option. At best, it is the basis for Mr Saunder's subjective intention. In any event, it seems to me that even if it were admissible, the evidence is too general to assist in the question of whether the 2002 Option superseded the earlier agreements.

69. In all the circumstances, therefore, even if it were necessary to rely upon the details of the previous agreements in order to construe the 2002 Option, I would not have granted permission to rely upon it.

Conclusion

70. For all the reasons set out above, I would dismiss the appeal. It follows, therefore, that it is unnecessary to consider the Respondent's Notice and what became known as Interpretation C.

Mr Justice Marcus Smith:

71. I agree, and have nothing to add.

Lady Justice Macur:

72. I also agree.