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IN THE HIGH COURT OF JUSTICE No. HC-2017-002801
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Neutral Citation Number: (2021) EWHC 3866 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 10 February 2021

Before:

HIS HONOUR JUDGE KRAMER
(Sitting as a Judge of the High Court)

B E T W E E N :

PERFORMANCE RETAIL (GENERAL PARTNER) LIMITED
THE GENERAL PARTNER FOR PERFORMANCE RETAIL LIMITED PARTNERSHIP AND
PERFORMANCE RETAIL (NOMINEE) LTD

Claimant

- and -

WAGAMAMA LIMITED Defendant

MS C. SHEA QC and MR K. LEES (instructed by Gowling WLG) appeared on behalf of the Claimant.

MR C. HEATHER QC (instructed by Charles Russell Speechlys) appeared on behalf of the Defendant.

J U D G M E N T
(Via Microsoft Teams)

Approved HHJ Kramer 8 March 2021

JUDGE KRAMER:

1 The claimant, Performance Retail (General Partner) Limited, is the freehold owner of a shopping centre known as Eastbourne Arndale Centre. They are represented in this case by Caroline Shea QC and Kester Lees of counsel. The claimant has been considering the development of an extension to the centre since 2009. The assets and the property of the claimant are managed by Legal & General Property Limited ("LGP") under a 2005 agreement. Also involved in the management of their real property assets is a company called Legal & General Investment Management Real Assets ("LGIMRA"), which is part of a group of companies under the Legal & General banner.

2 In 2012 planning permission was obtained for the development of a retail scheme by way of the extension. Negotiations with potential tenants followed. Some of these were categorised as "Anchor Tenants". Next, H&M and Cine-UK fell within this description. The recruitment of tenants was achieved by entering into conditional agreements for development and lease with prospective tenants which were to become unconditional on the happening of certain events. I shall refer to such an agreement as an 'ADL' , although I see the parties chose use the initials 'AFL'.

3 The defendant, which is represented by Christopher Heather QC, is a well-known restaurant chain which entered into such an agreement with the claimants on 18 December 2015. The agreement relates to Unit SU12, which is situated in the Phase Two Zone in the centre extension.

4 The dispute between the parties concerns the question as to whether the defendant's ADL became unconditional. The claimant's case is that this occurred on about 19 December 2016 by the provision of information to the defendant contained in the letter of that date.

The defendant's case is that the letter does not contain the information required by the ADL to render it unconditional and that, irrespective of the inadequacy of the information, the claimant has failed to prove that one of the conditions upon which it relies was fulfilled. The case turns upon the construction of the provisions in the ADL as to the circumstances in which it would become unconditional, and the terms of the letter dated 19 December 2016.

5 I have heard oral evidence from the claimants' witnesses, Andrew Rice, a specialist fund manager at LGIMRA, who is the senior asset manager responsible for the development of the centre, and Michael Barrie, a director of the claimant and its partner nominee company referred to in the title to the action.

6 The defendant proposed to call Rosemary Clay, a senior acquisition manager employed by the defendant, Steven Boyce, the defendant's property manager at the time of the ADL, and Thomas Trenchard, who became head of acquisitions for the defendant in March 2017. Ms Shea did not require that these witnesses be cross-examined on the basis that what they had to say as to the history of the defendant's involvement in the development was not in issue and their evidence as to their subjective beliefs concerning the letter of 19 December 2016 and what they did thereafter, though not accepted by the claimant, is not relevant to the exercise of construing the ADL and the terms of the letter.

7 I shall look at Mr Rice's evidence in more detail where it touches upon the fulfilment of specific conditions, but I will record at this stage that his evidence suffered from generalisations and assumptions as to what would have happened and seemed to be influenced by an attempt to recreate what he believes ought to have occurred so as to render the ADL unconditional. That is not intended to be a criticism of Mr Rice, since the events he was trying to recall happened four to five years ago. I have no doubt that he was an honest witness doing his best, but he was hampered in prompting his recollection by the

absence of notes of conversations, minutes of meetings and attendance notes. It follows that the absence of such documents also prevented the claimant from adducing details of conversations and meetings in documentary form.

8 Mr Barrie's evidence suffered from similar shortcomings. I did not find the evidence of either particularly helpful in the process of construction, but I will say at this stage that I was satisfied on the evidence of Mr Rice that the finance condition and site assembly condition, as to which see later, had been fulfilled by 19 December. That is to say the finance was in place and they had a compulsory purchase order which was satisfactory to the landlord at that stage.

9 As to the documents, I was provided with a bundle of approximately 5,800 pages broken down between multiple PDFs, none of which were bookmarked. This did not assist retrieval. The claimant had arranged for the documents to be managed by a professional agency and I was provided with a link to a webpage on which the bundle was held. The intention was that I could use the page to follow the bundle and that the document managers would put up on the screen any documents which would be shown to the court or a witness. This was not a success for two reasons. First, it took lengthy periods for the document managers to screenshare documents as they were called for. Secondly, without training, I found the online bundle very difficult to use.

10 I received an email towards the end of the week before the trial, indicating that training on the bundle would be available but that was not practical, given that I was engaged in another trial at the time. It seems to me that the use of document management technology will undoubtedly be useful in certain cases, but it does require the judge to be given a dry run well before the trial, unless they already have experience with the particular system, and probably provision of extra screens for the judge to view the documents. Whenever the

document managers succeeded in displaying a document on the screen, this being a case tried on MS Teams, the witness picture was reduced to a thumbnail at the bottom of the screen. I could not gain a good view of the witness and the document at the same time, although I was able to overcome this difficulty by finding the document within the various PDFs. This probably illustrates the importance of having rather more screens available. In any event, this was unlikely to be a case requiring the sophistication of online document managers, as of the 5,800 pages in the bundle, I was only referred to about 75 at the most; I think slightly fewer, which of course is fewer than one per cent of the documents provided.

The ADL

11 I do not propose to recite all of the relevant provisions of the ADL. I will do so in relation to the key provisions but summarise other relevant provisions where this becomes necessary, explaining some of the defined terms as they appear. The references to the landlord are to the claimant, but includes Performance Retail (Nominee) Ltd, and references to the tenant to the defendant. Clause 2 of the agreement is key. Clause 2.1 reads as follows:

> "The provisions of this agreement (other than those contained in clauses 1 (Definitions) this clause 2 (Agreement for Lease) 16 (Variations to the Lease Form) 18 (Alienation) 19 (Disputes) 20 (VAT) 21 (Termination on Tenant's Default) 22 (Notices) 23 (Variations to this Agreement) 24 (Non-Merger) 25 (Law and Jurisdiction) 26 (Legal Costs) 27 (Contracts) 28 (Confidentiality) and Schedules 2 to 6 (inclusive)) are entirely conditional upon the Satisfaction Date occurring."

12 Clause 1 of the agreement contains the definitions. Satisfaction date means the date upon which the relevant conditions are satisfied or waived in accordance with schedules 2 to 7 inclusive. The conditions are also identified. They are the site assembly condition, the highways and other RCO, meaning road closure order, condition, the pre-letting condition, the finance Condition, the possession condition and licencing condition, as defined in schedules 2, 3, 4, 5, 6 and 7.

13 Clause 2.3 provides:

> "If the Satisfaction Date has not occurred by the Conditions Long Stop Date then either the Landlord or the Tenant shall be entitled to determine this agreement by serving written notice to that effect upon the other at any time after the Conditions Long Stop Date (but not once the Satisfaction Date has occurred) and on service of such notice this agreement (save for clause 2.4) shall absolutely determine and shall be of no further effect and be at an end without any party having any liability whatsoever to the other(s)."

14 The Conditions Long Stop Date is defined as 30 December 2016. There is provision for postponement of the Condition Longstop Date further on in the schedules when one comes to look at road closure orders. I should have also read clause 2.2:

> "2.2 The Landlord and the Tenant will observe and perform the conditions and their respective obligations set out in Schedules 2 to 7 (inclusive) with regard to (amongst other things) satisfaction of the Conditions.
>
> 2.4 If this agreement is determined pursuant to clause 2.3 the Tenant shall at its own expense forthwith remove any notice or Land Charge entry registered in respect of this agreement.
>
> 2.5 The Landlord shall keep the Tenant regularly updated as to the satisfaction of the Conditions (save the Licencing Condition) and respond promptly and (save as regards any financial or commercially sensitive or commercial details) comprehensively to any request in writing from the Tenant as to the current position on the satisfaction of any Condition.
>
> 2.6 The Tenant shall keep the Landlord regularly updated as to the satisfaction of the Licencing Condition and respond promptly and (save as regards any financial or commercially sensitive or commercial details) comprehensively to any request in writing from the Landlord as to the current position on the satisfaction of the Licencing Condition.
>
> 2.7 Following the Satisfaction Date the Landlord will forthwith notify the Tenant that this agreement is now unconditional and the remaining provisions of this Agreement will apply.

> 2.8 Subject to the provisions of this clause 2 and the other provisions of this agreement the Landlord will grant and the Tenant shall accept the Lease 3."

15 The reference to the tenant keeping the landlord updated in relation to the licencing condition arises because the licencing condition was for the tenant to satisfy, whereas the other conditions were for the landlord to satisfy.

16 I turn to the schedules. I shall only quote from the relevant parts, starting with schedule 2, the site assembly condition:

> "1. The Site Assembly Condition shall be satisfied on the later of the date when the Landlord notifies the Tenant that:
>
> 1.1 it owns has acquired or has the benefit of unconditional agreements to acquire all Third Party Interests or
>
> 1.2 if earlier the date on which the Landlord indirectly or directly has the benefit of a Satisfactory CPO necessary in order to procure the acquisition of all Third Party Interests and the Landlord shall use its reasonable endeavours to satisfy the Site Assembly Condition but the Landlord shall not be obliged or required to do or omit to do anything that in the Landlord's reasonable opinion …"

There follows a list of influences which the landlord may take into account, such as it being against the commercial interests of the landlord or would adversely affect the timescale or costs of carrying out and completing the development. I do not need to read from all of those. Satisfactory CPO is again a defined term and that means a compulsory purchase order which is satisfactory to the landlord.

17 Paragraph 2 provides: *" The Landlord shall keep the Tenant reasonably informed of the progress of satisfying the Site Assembly Condition."* In 3.1 there is provision, which I shall summarise, that if on the Condition Long Stop Date, the landlord has challenged a compulsory purchase order or there are challenges from others, there is a provision for

postponing the happening of the Condition Long Stop Date, but that did not arise in this case.

18 Turning to schedule 3, paragraph 1 to schedule 3 defines the RCO Date as the date on which a road closure order is made and published by the Secretary of State. ‘Relevant Highways’ are defined as all public highways and they are marked on the plan. ‘Section 278 Agreements’, these are agreements under the Highways Act for works to be done, usually in connection with the provision of roads and the like, means all agreements in respect of or affecting the development.

19 Paragraph 2 of Schedule 3 provides:

> “Subject to paragraph 3 of this schedule the Highways and RCO Condition shall be satisfied upon either:
>
> 2.1 completion of all required S278 Agreements in forms satisfactory to the Landlord (acting reasonably) and which do not contain any Landlord's Onerous Condition and
>
> 2.2 all RCOs required by the Landlord in respect of the Relevant Highways in forms satisfactory to the Landlord (acting reasonably) having been obtained or
>
> 2.3 notification by the Landlord to the Tenant that it waives the Highways and RCO Condition.”

20 In paragraph 3, again, there is a provision for putting off the date on which an RCO condition will be treated as being satisfied. It is put back to a period of six weeks and a further five working days which have expired since the date of the RCO, if it is made under the Highways Act, three months if made under any other Act, and where there is any challenge to the validity of an RCO, it is put back to the date upon which the challenge has been dealt with.

21 Paragraph 4 to the schedule reads:

> "The Landlord shall use its reasonable endeavours to satisfy the Highways and RCO Condition but the Landlord shall not be obliged or required to do or omit to do anything that in the Landlord's reasonable opinion…"

Thereafter there is a list of various conditions which the landlord can take into account in forming its opinion.

22 At paragraph 5 it is stated

> "The Landlord shall keep the Tenant reasonably informed of the progress of satisfying the Highway and RCO Condition."

23 At paragraph 8 there is a provision concerning the Condition Long Stop Date which can be postponed if there is an inquiry in respect of an RCO and which has be held by the Secretary of State in respect of which the determination has not been issued or the relevant periods under paragraph 3 have not expired, notwithstanding that a satisfactory RCO has been obtained. In those situations, the Condition Long Stop Date shall be postponed to the earlier of the date when the Secretary of State's determination has been made, the relevant period referred to in paragraph 3, which relates to the time at which the RCO Condition can be regarded as satisfied, and finally, *"the date 36 months after the date of this Agreement,"* as a cut-off date for the longstop. What may constitute Landlord's Onerous Conditions are set out in Part 2 to that schedule, I do not need to read those.

24 Schedule 4 deals with the Pre-letting Condition. It provides:

> "1 In this schedule 4 the "Anchor Stores" means the Cinema [*that is Cine-UK*], MSU1 [*which is the unit where there is an ADL in relation to Next*] and MSU4 [*which is the H&M ADL*].
>
> 2. Preletting Condition is in the case of each of the Anchor Stores either:
>
> 2.1 the grant of a lease to a tenant for a term of not less than 10 years or

2.2 [*it becomes more complicated*] the exchange of an agreement with a tenant to grant such lease which is either unconditional or conditional only upon this agreement with the Tenant becoming unconditional or

2.3 a conditional agreement with a tenant to grant such lease becoming unconditional or conditional only upon this agreement with the Tenant becoming unconditional

3. The Preletting Condition shall be satisfied when:

3.1 the Landlord notifies the Tenant that leases of the Anchor Stores have been completed or agreements for lease have been exchanged and are or become unconditional or conditional only upon this agreement with the Tenant becoming unconditional to satisfy the Preletting Condition.

3.2 The Landlord notifies the Tenant that it waives the Preletting Condition.

4. The Landlord shall keep the Tenant reasonably informed of the progress of satisfying the Preletting Condition."

25 Schedule 5 concerns the finance condition. This reads:

"1 The Finance Condition shall be satisfied when either:

1.1 the Landlord notifies the Tenant it has fully sufficient funding from established sources in the market (whether by (in whole or in part(s)) debt, equity or otherwise) on terms which are commercially acceptable to the Landlord to enable the whole Development to be undertaken and completed in accordance with the provisions of this agreement; and

1.2 the Landlord notifies the Tenant that it waives the Finance Condition."

I should say that the "and" must be an "or". It must be a typographical error, because clearly the landlord would not be both notifying the tenant that it has got the funding and also stating at the same time that it is waiving the condition.

"2. The Landlord shall use its reasonable endeavours to satisfy the Finance Condition but the Landlord shall not be obliged or required to do or omit to do anything that in the Landlord's reasonable opinion…"

Again there is a list of factors which the landlord may take into account such as whether something it is required to do or omit is against its commercial interests.

26 Finally, the possession condition, at schedule 6. This provides that:

> "1. The Possession Condition shall be satisfied when either:
>
> 1.1 the Landlord notifies the Tenant it has achieved vacant possession of the Phase Two Zone [*the Phase Two Zone is where the units in which the defendant, Next and H&M were taking units*]; or
>
> 1.2 the Landlord notifies the Tenant that it waives this condition.
>
> 2. The Landlord shall use its reasonable endeavours to satisfy the Possession Condition but the Landlord shall not be obliged or required to do or omit to do anything that in the Landlord's reasonable opinion …"

The list of factors which may be taken into account under 2 is the same as those relating to the Finance Condition.

27 I do not need to refer to schedule 7; that is the licencing condition, which was the only condition to be satisfied by the defendant. It is accepted that it was satisfied and that notice was given of its satisfaction in advance of the Condition Long Stop Date..

28 Schedules 2 to 6 refer to the landlord giving the tenant notification or notifying the tenant of various matters. Clause 22 deals with the giving of notices but also the communication of information. Clause 22 provides at 22.1:

> "Any notice to be served on or communication to be sent to any party to this Agreement shall be in writing and shall be regarded as properly served or sent if served or sent to the persons and the addresses specified in clause 22.4 by either:
>
> 22.1.1 personal delivery, or
>
> 22.1.2 pre-paid registered or special delivery mail."

29 Then there is the word “or” which seems to be a typographical error because nothing seems to follow after the “or”. There is also another typographical error in that there is no clause 22.4, but looking at the rest of the clause, that must be a reference to clause 22.2.4.

30 Clause 22.2 states that:

> “Notices and communications shall be deemed to have been served or received as follows:
>
> 22.2.1 in the case of personal delivery on the date of delivery;
>
> 22.2.2 in the case of pre-paid registered or special delivery mail, on the second working day after the notice of communication is posted.”

31 Clause 22.2.4 provides for notice and communications to the tenants to be sent to the estate manager and the tenant at its registered office with copies sent to Charles Russell Speechlys LLP, the tenant’s solicitors.

32 The schedules reveal that there are differences in method as to the timing of the satisfaction of the conditions. The site assembly condition is satisfied when notice of two, alternative, states of affairs referred to in the schedule occur. There is no option for the landlord to waive the condition. The highways and RCO condition is satisfied upon the coming into being of the substantive condition or notices of waiver. There is no requirement to give notice of the former in order to establish a date when the former has been satisfied.

33 As regards the pre-letting, finance and possession conditions, the schedules dealing with each provide that the conditions are satisfied when notice is given of the attainment of the conditions or notice of its waiver. Further notable differences are that the landlord is under an obligation to use reasonable endeavours to satisfy all the conditions bar the pre-letting condition. There is also a requirement on the landlord to keep the tenant reasonably informed of the progress of satisfying all the conditions, bar the finance condition and the

possession condition, and an obligation on the landlord to provide information to regularly update the tenant as to the satisfaction of the conditions by virtue of clause 2.5 of the ADL.

34 Looking at the operation of the ADL more broadly, it is apparent that if the satisfaction date has not occurred by the Condition Long Stop Date, which is 30 December 2016, unless extended under the terms of the ADL, the landlord or the tenant is entitled to determine the ADL by serving written notice to that effect at any time after that date has passed provided the satisfaction date has not occurred.

35 The occurrence of the satisfaction date has a number of consequences apart from the agreement becoming unconditional. Subject to the provisions of the ADL, the parties become bound to enter into a twenty-year lease of Unit SU12 at an initial rent of £127,360 per annum subject to an adjustment for gross internal area in the form contained in annex 1 to the agreement. The landlord becomes obliged, as soon as reasonably possible after the satisfaction date, to supply to the tenant a programme for the landlord's works (clause 5.1) and to enter into a building contract (5.2) and as soon as practicable after the later of six months after the satisfaction of the conditions, the Phase One opening date or the date it achieves vacant possession of the Phase Two Zone, the landlord is to carry out and complete the landlord's retail and leisure works, as defined in the agreement, these being essentially the construction of the development and ancillary works necessary for the tenant to be able to outfit and ultimately use its unit. That is clause 4.

36 The landlord also comes under an obligation to procure that the practical completion date occurs by the target completion date; that is clause 5.3.1, and that the access date occurs by the target access date. Both target dates run twenty-eight months from the Satisfaction Date, although they can be extended (clause 1.1). The practical completion date is the date upon which the certifying officer under the contract certifies that there has been practical

completion of the landlord's works. The access date is when such officer is satisfied that the access conditions have been satisfied. There are a large number of access conditions. The effect of their being satisfied is that the tenant can have access to the unit and commence its works.

37 The timing of the access date is important. The tenant becomes liable to pay the equivalent of the rent by way of a licence fee and to pay the service charge and insurance rent from the access date. That is clause 13.1.7. Furthermore, under clause 5.5:

> "If the Access date has not occurred by the Construction Long Stop Date either party can terminate the agreement by written notice, providing the access date has not passed before provision of the notice."

38 The Construction Long Stop Date is forty-eight months after the satisfaction date, subject to the extension of that date permitted by paragraph 8 of schedule 3, the highways and RCO conditions, or such other date as the parties agree in writing. There are a number of other critical events in the fulfilment of the development, the timing of which originates from the happening of the Satisfaction Date, but it is not necessary to recite each one.

The undisputed history

39 By 18 December 2015, the date of the ADL agreement, which is the date of the ADL agreement between the claimant and the defendant, the claimant had already entered into similar, though not identical, ADLs with H&M, Cine-UK Limited and Next Group plc. In addition, on 10 February 2015, it entered into a CPO resources agreement with Eastbourne Borough Council enabling it to obtain the benefit of any CPO the council obtained over the site of development and, on 26 February 2015, obtained a CPO, though this was not confirmed by the Secretary of State until 29 February 2016, the notice appearing in the Eastbourne Herald for 15 March 2016. Nothing turns on the gazetting of the notice.

40 The defendant obtained its premises licence on 25 May 2016 and gave notice to the claimant by letter dated 19 July 2016, informing it that the licence had been obtained.

41 The long stop date in the Cine-UK ADL was 25 June 2016, at which time the similar conditions in that agreement had not been satisfied and the claimant was at risk that this tenant would serve notice of termination thereafter. There was a meeting of the Legal & General Investment committee on 13 December 2016. The committee was informed by Mr Whitehill, a senior fund manager with Legal & General, that they were close to signing the building contract with Kier and the joint venture with Nochu, a bank, which had agreed with the claimant's parent company to purchase 49.9 per cent of units in the claimant, which secured sufficient funding to enable the development to be constructed.

42 Mr Rice told the committee that the final stage was for board approval the following day and the transfer of funds. He also said that the scheme was largely de-risked, there was an approved CPO, and that the notices were to be served on all tenants confirming conditions had been satisfied. In evidence he said he did not distinguish between the conditions being satisfied by performance or the conditions being waived as he did not condescend to that level of detail.

43 The funding agreement and building contract were executed on 19 December 2016. On the same day, Gowling WLG, solicitors for the claimant, wrote a letter addressed to the defendant in the following terms. Having referred to the agreement dated 18 December 2015 and identifying the premises as SU12 Eastbourne Extension Centre, the letter reads:

> "We act for Performance Retail (General Partner) Limited the General Partner for Performance Retail Limited Partnership and Performance Retail (Nominee) Limited ('our Client'), the Landlord of the Premises under the terms of the Agreement for Lease.

> We hereby give you notice, on behalf of our Client, that the Conditions as defined in the Agreement for Lease, were satisfied on 19 December 2016 (the 'Satisfaction Date'). In accordance with clause 2.7 of the Agreement for Lease we give you notice, on behalf of our Client, that the Agreement for Lease is now unconditional and the remaining provisions of the Agreement for Lease will apply.
>
> Please acknowledge receipt of this Notice by signing, dating and returning to us the enclosed copy of the Notice in the prepaid self-addressed envelope provided."

44 A notice in the same form was sent to Charles Russell Speechlys in accordance with the notice provisions in the contract. The letter was sent by post but its receipt was not acknowledged. On the same day, Gowling wrote letters to H&M, Next and Cine-UK, stating that the conditions as defined in the agreement were satisfied on 19 December 2016 and that each respective agreement had become unconditional. The Cine-UK letter was hand delivered on 19 December but there is no direct evidence as to the date upon which the other letters were posted to the recipients. The defendant accepts that it had its letter by 21 December 2016.

45 On 9 June 2017, Charles Russell Speechlys, solicitors for the defendant, wrote to the claimant giving notice to determine the ADL under clause 2.3 , alleging that the satisfaction date had not been achieved by the Condition Long Stop Date, hence their entitlement to terminate, and they asserted that the ADL required some of the conditions to be made the subject of a specific notice. They made reference to schedules 2 to 5 and said that sufficient notice had not been given.

46 It is unnecessary to set out the chronology between 21 December 2016 and 9 June 2017 because neither side relies upon the defendant's behaviour as being of any assistance in determining whether the contract became unconditional, and the claimant does not rely upon any behaviour to found a claim based on acquiescence or some other form of estoppel.

47 The claim was issued on 22 September 2017. The claimant seeks declarations that the satisfaction date occurred on 19 December 2016, that the agreement became unconditional on 19 December 2016, and that the defendant's termination notice was ineffective to determine the agreement.

48 The defence denies that the contract became unconditional because the letter dated 19 December 2016 did not comply with the requirements of the ADL. The defendant also puts the claimant to proof of each condition which is said to have been fulfilled or the fact of waiver in relation to any that were not.

The parties' cases

49 The claimant's case is that the conditions defined in schedules 2, 3, 4, 5, 6 and 7 of the ADL were fully satisfied, in relation to their conditions, whether by performance or waiver, and by performance in relation to schedule 7. Ms Shea argues that the sending of the letter of 19 December was sufficient notice of performance or waiver.

50 The defendant's case is that the letter did not comply with the ADL because it did not notify the defendant of the relevant facts as to how the conditions had been performed or, where they had not, that such condition had been waived. It also argues that the pre-letting condition, which the claimant says was met, is not supported by the evidence because there is no evidence as to the date upon which the notices to the defendant, H&M and Next were posted, and even if they were posted on 19 December 2016, that could not have been effective to satisfy the pre-letting condition because on a proper analysis of each of those tenants' ADLs, they would only become unconditional if that was effected in a particular order. Accordingly, the notice of satisfaction was premature, as, on any view, if any of the

notices to the anchor tenants were effective to render their ADLs unconditional, that must have occurred after 19 December, after the defendant received theirs.

51 The defendant also argues that the claimant's pleaded case is that the agreement became unconditional on 19 December 2016, but that cannot be correct because deemed notification took place two days after posting, and furthermore, in the absence of evidence as to the date of posting, the claimant cannot say when those two days expired. It is convenient to deal with this last point at this stage to get it out of the way. In the context of this claim, the date of posting is not material provided the date was at least two days before the Condition Long Stop Date, which it undoubtedly was because the defendant had the notice on 21 December 2016. Mr Heather took me to the declarations sought to emphasise that I could not grant a declaration that the satisfaction date occurred on 19 December 2016 or that the agreement became unconditional on that date, where there was no evidence as to the date of service. The claimant also seeks, however, a declaration that the termination notice was ineffective. That is a declaration which would be open to the court to grant if I concluded that the letter of 19 December 2016 was sent in sufficient time and that it had the effect asserted by the claimant. In view of the defendant's evidence that it received the letter on 21 December 2016, there is nothing in this point, as whenever it was sent, it was received before the Condition Long Stop Date and well in advance of the date of notice of termination being sent.

52 Neither Ms Shea or Mr Heather sought to rely upon the oral evidence or the background history in the defendant's witness statements as an aid to construing the letter of 19 December 2016 or the ADL. Ms Shea objected to Mr Heather relying upon a part of Mr Boyce's evidence in which he had said that he recollected being aware, having received the notice, that the conditions required were very specific and he was not at all convinced that the claimant had done enough to meet its obligations. The basis of the objection was

that Ms Shea had indicated that she would not need to cross-examine the defendant's witnesses if the position was that their reaction to the receipt of the notice was not being relied upon as an aid to construction. Mr Heather seemed to be referring to this evidence for that purpose, she said.

53 In fact, he referred to the statements as evidence to support a finding that the defendant was concerned to see the detail as to how the conditions had been satisfied and, in order for me to draw an inference, that the defendant had a commercial interest in the detail. He put this forward in the face of Ms Shea's argument that the defendant had to prove that the defendant had a commercial interest in being informed as to which of the conditions had been met and which waived if I were to take them into account as part of the factual background against which to construe the ADL and notice.

54 It does seem to me that this evidence from Mr Boyce is an account of how he reacted to the notice, which is something which had been agreed would not be relied upon on the construction point. Accordingly, I do not give weight to this piece of evidence. In the event, for reasons which will become apparent, Mr Boyce's views as to what he thought should be in the notice are not important to the decision which I have to make.

55 Both Ms Shea and Mr Heather made more of what the evidence did not show than what it proved. Ms Shea asserted that it was for the defendant to prove that it had a commercial interest in the fulfilment of the conditions, and there was no such evidence. Mr Heather identified inaccuracies in the claimant's pleaded case as to the satisfaction of the highways condition and the finance condition, the fact that Mr Rice said that the inaccuracy in relation to the highway condition was due to an error of memory on his part, and Mr Heather points to the absences of detail and sweeping assertions in Mr Rice's answers to questions.

56 I do not need to detail all of these aspects of Mr Rice's evidence. Just one example would be his evidence concerning the information given to the defendant as to the compulsory purchase order. He said he was aware that the contract provided that the tenant was to be kept up to date as to the progress of the satisfaction of the conditions and there would have been communications through 'our' agents ongoing through the documentation stages. There were no emails relating to this. When asked what these discussions amounted to, he said it would have been discussed again at a point at which the claimant was requesting the defendant, among others, to extend the Condition Long Stop Date. When pressed, he said he had no evidence of any such communication about the long stop date, that is to say about the CPO in relation to the long stop date, and he was not aware of any. When shown three emails concerning extending the long stop date between himself and Ruvan Sangra, who he had asked to make the requests of Wagamama, he said he had assumed Ruvan had passed on information as to the progress of the CPO, but that was just a guess.

57 Mr Heather also pointed to the fact that Mr Rice was unable to produce the written authority he required from the claimant to give notice of satisfaction. He had no attendance notes, was unable to produce the minutes of the claimant's board approving the transaction, and that neither he nor a solicitor with whom he said he was communicating, Denise Sexton of Gowling, had any attendance notes relating to the instructions for the service of any notices under the schedules, nor indeed relating to the months of discussions about the conditions, their satisfaction and waiver, which he claimed to have been conducting with Ms Sexton from July onwards.

58 Mr Rice's witness statement is short on detail as to what he asked Ms Sexton to serve. He said that Gowling prepared notices to the defendant and the other tenants, notifying them that the ADLs were now unconditional and that once the funding agreement and building contract was signed, he notified Gowling that the notices could be served. He said he left

the content of the notices to the lawyers. In cross-examination, his recollection was that he asked Ms Sexton to give notice that the agreements were now unconditional but he said he would have discussed with her the fact that some conditions had been met and others waived.

59 Mr Heather said that the evidence of Mr Rice and Mr Barrie demonstrated that this was not a well-ordered development, indeed the lead-up to the service of the notices was quite chaotic. Mr Rice's evidence was that there was urgency, given the upcoming condition longstop date and the fact that one of the anchor tenants, Cine-UK, was well beyond its date in any event. Mr Heather says I should be astonished at the lack of relevant documentation. He accepted, however, my suggestion, or my observation, that however badly organised or documented this appeared, it did not go to the question as to the proper construction of the ADL and letter. Therefore, whilst I too am very surprised that, in what I am told is a £33 million development, the solicitor engaged to serve the notices to make the agreement become binding is unable to produce any attendance notes or correspondence to the client confirming instructions, that does not have any bearing on the issue for me to determine. It may explain why the letter was in the form that it was, but such an explanation is not relevant to the process of construction. The letter is what the letter is.

<u>The parties' arguments as to construction</u>

60 Ms Shea took me to a number of authorities. There is no dispute as to what they say. Both claimant and defendant relied upon *Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited* [1997] 2 WLR 945. That was a case in which the tenant under two leases for a terms of ten years, from and including 13 January 1992, was permitted by the lease to break the term by service of no less than six months' notice in writing on the landlord to expire on the third anniversary of the term commencement date. By letter dated

24 June 1994, the tenant gave notice to determine both leases on 12 January 1995, whereas for notice to be effective, it had to expire on the 13th. The House of Lords overturned the decision of the Court of Appeal by a majority, holding that the construction of the notices had to be approached objectively and the question was how a reasonable recipient would have understood them, bearing in mind the context. Given that the purpose of the notice was to inform the landlord of the tenant's decision to determine, a reasonable recipient with knowledge of the terms of a lease and the third anniversary date would have been in no doubt that the tenant wished to determine on 13 January 1995 but had wrongly described it as 12 January. Accordingly, the notices were effective.

61 I was taken to the speech of Lord Steyn at p.961 where he set out five provisions, four of which are relevant to this case. The first is that in that case, the contractual right to determine did not prescribe as an indispensable condition, for its effective exercise, that the notice must contain specific information. Ms Shea argues that the notices in question in the present case are such notices. Secondly, on the question is to how the landlord understood the notice (for that was a notice served on the landlord), he said:

> "The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene. The approach in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, which deals with the construction of commercial contracts, is by analogy of assistance in respect of unilateral notices such as those under consideration in the present case. Relying on the reasoning in Lord Wilberforce's speech in *Reardon Smith*, at 996D to 997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is *admissible* as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind. It follows that one cannot ignore that a

> reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases…
>
> (3) It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice…
>
> (4) There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete… Even if such notices under contractual rights reserved contain errors they may be valid if they are 'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate'… That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient…"

62 Mr Heather said I need look no further than *Mannai* but Ms Shea referred me to a number of further cases, many of which seemed to me to illustrate the propositions advanced by Lord Steyn. The first case to which I was referred was *Land v Sykes* [1992] 1 EGLR 1. In that case there was an argument as to the validity of a Case E notice to quit under the Agricultural Holdings Act 1986. The lease was of an agricultural tenancy over 291.24 acres. Subsequent to the lease, the landlord had conveyed a small strip of land, measuring 9 feet by 290 feet, by way of a gift. The Case E notice stated that the landlord required the tenant to deliver up possession of all the land held of her as tenant and named the farm of which the conveyed strip had formed part.

63 The case on uncertainty was that the notice lacked clarity at to the delivery up of which premises was sought. Was it the premises of the landlord excluding the strip or the premises compromising the lease, which included the strip? If it were the latter, the landlord would be acting outside her power and the tenant was being called upon to do that which she could not do. The judge at first instance was referred to early authority to the effect that the basic

principle was that a notice to quit must be clear and certain so as to bind the party who gives it, to enable the party to whom it is given to act upon at the time when it is given. It must not be ambiguous. He regarded that as a correct statement of the law but added that it was subject to the qualification that the reasonable tenant reading the notice is to be taken to have the knowledge of the surrounding facts and circumstances which the actual landlord and tenant enjoyed, and he agreed that in general the construction of the notice is an objective one but one must take account of the surrounding facts and circumstances that were common knowledge to the landlord and tenant.

64 Lord Justice Scott (as he then was) held that the notice was valid on the basis it would not be the least confusing to a reasonable tenant with knowledge that the landlord was not the owner of the strip. He added *obiter* that if the notice did communicate correct information to the recipient tenant, it was no business of the court or the requirement of the law to deprive a notice of validity by reference to what some hypothetical reasonable tenant might have thought the notice meant. If objectively construed in the light of the facts known, to both the landlord and the tenant, the meaning of the notice was clear, that was the end of the matter. That is the traditional view. If the tenant was not in fact confused, that would suffice. Other than this *obiter dicta* as to the law not stepping in where you have a notice which is objectively uncertain but the tenant themselves knows what it is all about, the decision in *Land v Sykes* is wholly consistent with Lord Steyn's propositions.

65 I was then referred to *Norwich Union Life Insurance Society v Sketchley plc* [1986] 2 EGLR 126. This was a first instance decision of Scott J. The case concerned the validity of a trigger notice for rent review. It was argued that if the terms of the notice were insufficiently unequivocal, the validity of the notice could not be assisted by evidence of the sense in which the author intended the document to be understood and which the recipient

understood it. Scott J rejected that as a correct statement of law. At p.10 of the report he said:

> "It is well established that where a contract is concerned, the terms of the contract are to be ascertained by an objective assessment of the meaning of the language, oral or written, used by the parties. The unexpressed and uncommunicated intentions of the parties cannot, even where by chance they coincide, alter the terms, objectively ascertained, of the contract they have made... But this well-established principle does not, in my view, apply to a notice. A notice is intended to give information. If a document has succeeded in imparting the requisite information to the recipient and was intended by its author to do so, it seems to me that it can properly be described as a notice in writing giving that information. That is the position in this case.."

66 Two paragraphs earlier in his judgment, however, Scott J had said:

> "A notice is intended to pass information. It is intended to be a communication. If the terms of a written document are capable, fairly read, of communicating the requisite information, are intended to communicate the requisite information and do in fact communicate the requisite information, it seems to me an extraordinary proposition that an equivocation in the language in which the notice is couched can entitle either party to deny the efficacy of the notice."

67 The reference to the notice *"fairly read, of communicating the requisite information"* is consistent with Lord Steyn's propositions, but the remainder of what is said is difficult to reconcile with what was said in the passage in *Mannai*, set out above, to which I have been referred, and it is notable that this case at first instance was not referred to in *Mannai*. Therefore, I propose to be guided by what was said in *Mannai*. Neither party has suggested that there is some gloss to be placed upon what Lord Steyn said, nor is it the case that there is evidence as to the defendant's knowledge of which conditions had been satisfied and which waived.

68 *Durham City Estates v Felicetti* [1990] 1 EGLR 143 was a case where there was an error in a notice of rent increase in that the amount of rent sought in figures was £100 more than the rent expressed in words. It was held nevertheless valid on the basis that the notice specified

the intended rent with sufficient clarity so that its recipients were not misled. The tenants receiving the notice were given a clear indication that there was a rent review coming at a time, which was not dated, but which they could ascertain quite easily by looking at their own copy of the lease. The landlord wanted them to pay the sum in words, which was the lower sum, as it was the words to which they would naturally go and regard the document as meaning that they had to pay the lower sum at least. That is to be found in the judgment of Croom-Johnson LJ at p.10. Again, it is an example of how what was said in *Mannai* works in practice: the notice had fulfilled its purpose.

69 Ms Shea also relied upon *Patel v Earlspring Properties Limited* [1991] 1 WLUK 281, as this was a case in which a tenant's rent counter notice was held to be valid notwithstanding that it did not contain all the information provided for in the lease. The clause dealing with the rent review provided that:

> "The tenant within 28 days after receipt of the rent notice may serve on the landlord a counternotice specifying the rent which the tenant is willing to pay from the relevant review date and calling upon the landlord to negotiate with the tenants the amount of rent to be paid."

The lease went on to say that if the tenant served a counternotice, the landlord and tenant were to consult together to reach agreement as to the amount of rent to be paid and in the absence of agreement, the rent was to be determined by an arbitrator.

70 The landlord served a notice to increase the rent to the sum of £14,250. The tenant responded within the stipulated period but, in his letter, while stating the turnover of the business was too insubstantial to meet the rent of £14,250 and asking the landlord to, and this is taken from the letter, *"kindly reconsider the rent figure"*, did not specify an alternative rent or call upon the landlord to negotiate. The Court of Appeal held that the counternotice was valid because, looking at the clause concerning rent review notices, it was

not a mandatory requirement that the tenant's notice specified a counter rent. What was done by the tenant was sufficient to indicate that he was not prepared to accept the rent proposed by the landlords, see *per* Woolf LJ (as he then was) at p.133. Unfortunately, it is difficult to discern from the report why it was thought that the specifying of the alternative rent was not a mandatory requirement. The reference in the judgment to there being a clearly sufficient indication that the tenant was not prepared to accept the proposed rent suggests that this was a case in which the purpose of the notice had been fulfilled, namely to alert the landlord to the fact that the rent was not agreed and so that the parties would have to go to the next stage of resolving the rent review, and information as to what rent the tenant was prepared to pay did not detract from the notice fulfilling that purpose.

71 Ms Shea also relies upon *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWCA Civ1401, a case concerning whether the right to extend an option had been validly exercised within the option period. This case probably does add a little something. Clause 9.1 of the agreement provided that a ten-year option could be extended for a further period of five years during the last year of the original option period. In order to extend the option, the purchaser had to give notice in writing to the vendors requiring the period to be extended by five years and upon the service of the notice, and payment of £20,000 to the intending vendor, the option agreement was to be treated as if it was for fifteen years. The notice of extension relied upon was from the intended purchaser's solicitors to the solicitors for the intended vendors and was given within the last year of the option. It stated:

> "We shall very shortly be placed in funds for the extension of the option for a further five years upon payment of £20,000 by Westbury *[that is the intended purchaser]* (clause 9.1 of the option agreement refers)."

It went on to ask the solicitors for their bank account details so as to organise a CHAPS transfer.

72 The vendor’s argument that the notice was invalid because it failed to state that the purchaser required the period to be extended was rejected both at first instance and on appeal. The trial judge, Henderson J (as he then was), held that the indispensable conditions were that the notice was in writing and be served upon the vendor’s solicitors:

> “…during the last year of the Option Period. Failure to comply with either of those conditions would have been fatal, because the notice would not have been a notice of the type stipulated by clause 9.1. But the provision that Westbury should by the notice ‘require [the option] period to be extended by 5 years’ is a stipulation of a different nature. It simply describes what it is that the notice must convey to the recipient, without prescribing any particular form of words or any particular details that must be included.”

That is what was said by Henderson J as it appears in paragraph 8 of the judgment of the court of appeal.

73 Applying the reasonable recipient test in accordance with *Mannai*, he held that the reasonable recipient of the letter would have understood it as requiring that the option period be extended by five years. When the case reached the Court of Appeal, in rejecting the argument by the vendor’s counsel that clause 9.1 made it an indispensable condition that the notice should contain specific information, Dyson LJ, as he then was, said, at para.15:

> “In my view, Lord Steyn's first proposition cannot sensibly be pressed into service as contended by Mr Reynolds *[counsel for the vendor]*. A typical case of an indispensable condition is where the contract states that the relevant notice shall be in writing and shall contain particular information. Some clauses may expressly say that the notice ‘shall only be valid if…’ Where express language of this kind does not appear in the clause, it will be a question of construction whether it is an indispensable condition for validity that the notice satisfies the requirements of the clause.”

74 I should say there are echoes in Ms Shea’s submission in this passage from the judgment. As to whether the notice was effective, Dyson LJ said at para.17:

> "The correct approach to the validity of the contractual notice is not now in doubt. It is that the notice should be in terms that are sufficiently clear to bring home to the reasonable recipient that the person giving the notice is exercising the relevant contractual rights."

75 At para.18 he said it was clear that "*the notice must clearly and unambiguously convey a decision to exercise the contractual right.*" I read this as meaning that it has to be clear to the reasonable recipient that the information required by the agreement has been provided.

76 The last of the cases to which I was referred was *Saxon Weald Homes Ltd v Chadwick* [2011] EWCA Civ 1202, where a notice converting an assured shorthold tenancy to an assured tenancy was sent to the tenant by mistake after the landlord had already sent the tenant a notice seeking possession under the assured shorthold tenancy agreement. The notice was held to be valid. It was clear and unambiguous. It was said to pass the *Mannai* test, albeit this was not a case where there was an error in the notice, the mistake being that the notice was sent at all. At para.20 of the judgment, Davis LJ said:

> "…a tenant ordinarily is not to be expected to enquire into, or think about, a landlord's reasons for serving an otherwise unambiguous notice in connection with a lease.

This serves to counter the argument that the reasonable recipient, given the background, namely the service of a notice seeking possession, could not have thought that the notice could have been intended to convert the shorthold tenancy into an assured tenancy.

77 I cannot see that this authority assists the claimant as the notice either conveyed the requisite information or it did not. It all turns upon what was the requisite information. What is clear from the authority is that the tenant is entitled to take the notice as it is and is not expected to look behind it or question whether it means what it says. If the tenant was left in such a position, it could hardly be said that the notice was clear and unambiguous to the reasonable recipient with the background knowledge shared by the landlord and tenant.

78 In order to determine what the notice must contain, I have to construe the operative terms of the ADL. At this stage, it is worthwhile setting out the court's approach to construction of contracts, as although it is closely analogous to the construction of a unilateral notice, it is directed at answering a different question, namely what would the informed observer have concluded was the objective intention of the parties. Albeit no one has thought it necessary for me to be referred to authority on the subject, I think it helpful just to refer to some recent authority where it is summarised.

79 Fairly recently Leggatt LJ, as he then was, in *Minera Las Bambas SA & Anor v Glencore Queensland Ltd & Ors* [2019] EWCA Civ 972 summarised the relevant principles at paragraph 20, where he said:

> "In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance."

80 It is also helpful to recall the following from the speech of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, at 913 at B-C where he said:

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against

> the relevant background would reasonably have been understood to mean."

The parties' submissions

81 Ms Shea argues that the notice to the tenant required by schedules 2 to 5 is limited to informing the tenant that the conditions have been satisfied. The tenant does not need to know whether the satisfaction is by performance, by which it is meant the condition having come into being, or waiver. In relation the site assembly condition, the tenant will be aware that has been performed because it knows, due its knowledge of the lease, that that is a condition which cannot be waived. A reasonable tenant would have at the forefront of their mind the question as to whether or not the agreement had become unconditional. The letter to the tenant of 19 December 2016 states that the conditions as defined in the agreement for the lease were satisfied at that date. This informs the tenant that the satisfaction date has occurred, thus the notice is clear and unambiguous and has fulfilled its purpose.

82 The claimant's argument is underpinned in two ways. First it is said that the contract was made conditional upon the conditions in the schedules for the benefit of the landlord. They protect the landlord from being placed at risk of having to build a development without the necessary land, access, funding and commitment from anchor tenants. The landlord has the discretion to take that risk by waiving certain of the conditions, albeit that it is accepted that this was not an unfettered discretion in view of the requirement to use reasonable endeavours to satisfy the conditions by performance. The tenant, in contrast, is only interested in whether the contract has become unconditional, for until then it is not bound. Ms Shea said that it is not open to me to find that the tenant had a commercial interest in the fulfilment of the condition without evidence from the tenant to this effect. She says it cannot be proved by what emerged in cross-examination from Mr Rice, who on the first day conceded that tenants did have an interest in the fulfilment of the conditions, but on the

second day of trial said he had thought about it overnight and he no longer held to that view. It was something that was sprung on him and it was legitimate for him to think it over.

83 The second foundation to the claimant's argument is that the provision of any detail as to how the conditions have been satisfied are not, on a proper construction of the ADL, indispensable requirements. Ms Shea points out that the schedules do not say in terms that the notices will not be valid unless they are contained in a particular form of words or contain specific information. She says this is a *Rennie*, or indeed a *Mannai* type case. Indeed, she relies upon *Patel* as supporting the assertion that even though the text of the schedule refers to the serving of notice of waiver or the happening of certain events, this is not a requirement that the information be contained in the notice, given that their purpose is solely to inform the tenant that the contract is no longer conditional.

84 Ms Shea argues that in so far as the tenant has an interest in the progress of the project towards development, this is catered for by clause 2.5 of the ADL which requires a landlord to regularly update the tenant as to the satisfaction of the conditions. There is nothing in the clause to indicate that a failure to provide the updates permits the tenant to avoid the consequences of the agreement becoming unconditional. Furthermore, in the light of that reason for notification, there is no scope for a requirement that the notices of satisfaction of condition referred to in the schedules do any more than that which is set out in the 19 December letter.

85 In relation to Mr Heather's argument that there is an absence of evidence as to the date of the service of this notice and the notice upon the other ADL tenants and the impact this has upon the fulfilment of the pre-letting condition, she says it is unnecessary to look at the detail of service or the sequence in which the ADL for the other anchor tenants was made unconditional, for if the claimant's case is correct, the 19 December letter covers the

situation whether the condition has been met by performance or waiver. She says that on that basis if, contrary to the claimant's case, performance of this condition was not achieved, there has been waiver by service of the notice, the effect of which is to inform the tenant that all conditions have either been performed or waived, save for those which cannot be waived, from which the tenant is to conclude that they must have been performed. If, on the other hand, the claimant's case is incorrect, it does not matter whether this condition was performed because the notice would not be adequate.

86 Mr Heather's starting point is to look at the words of the contract. He said this is a commercial contract, drafted by lawyers, and the textual requirements are very clear. Notices and communications have to be in writing by clause 22. As regards the site assembly conditions, schedule 2 provides that the condition shall be satisfied on the date when the landlord gives notice that it owns or has acquired, or the benefit of unconditional agreements to acquire, third party interests, or, if earlier, the date upon which the landlord indirectly or directly has the benefit of a satisfactory CPO. He points out that 'satisfactory' here is defined as satisfactory to the landlord. The tenant cannot know whether the CPO is satisfactory without information from the landlord to that effect.

87 Mr Heather says that there is significance in the fact that the Highways and RCO conditions can either be satisfied upon performance or notification by the landlord to the tenant that it waives the condition. Here it is stated that it is upon the notification of waiver that the condition is capable of having been satisfied. The fact that the notice is not required in relation to the performance of the condition, he says, is an indication that when the contract requires the giving notice in this schedule and the other schedules, it means notice of that which has occurred or notice of waiver. In relation to the finance condition, he points out that the requirements of the landlord to notify appear twice: *"The condition shall be satisfied when either the landlord notifies the tenant he has funding or,"* and there appears

to be a typographical error here where the word “and” has been added at the end of 1.1, which I pointed out is not logical, *“ when the landlord notifies the tenant that it waives the finance condition.”* So that is a reference to two different notices and you can only distinguish between the two of them by looking at what they are relating to, the obtaining of finance or waiver.

88 The possession condition also refers to two different types of notices, one notifying that the landlord has achieved vacant possession of the Phase Two Zone and the other notifying the tenant that it waives the condition. The same can be said of the pre-letting condition. None of the schedules say, and he makes this point, that the condition is satisfied when a notice is given stating that the conditions have been fulfilled or waived.

89 In response to the argument that the tenant only needs to know that the condition has been satisfied but not how it has occurred, he disputes the suggestion that the tenant has no commercial interest in the fulfilment of any of these conditions. He points to the fact that a number of the conditions require the landlord to use reasonable endeavours to see that they are satisfied, which he said must mean satisfied by performance; that is fulfilling the condition, not waiver. That is a recognition that the tenant has an interest in how and whether these conditions are satisfied, which is further supported by the requirement in clause 2.5 for the tenants to be regularly updated as to the satisfaction of the conditions.

90 Mr Heather relies upon the overall workings of the contract to demonstrate that the tenant has a commercial interest as to whether the conditions have been fulfilled or waived. For example, a development embarked upon by a landlord who has acquired all third party interests is likely to be less uncertain in its progress than one which the landlord has CPOs which it regards as satisfactory but still have to be processed by acquisition, arguments about purchase price or potential challenge. All that creates uncertainty as to what the

landlord will end up with. Similarly, if the highways and road closure order conditions are satisfied before the condition longstop date, the tenant is relieved of the worry that there may be delays or difficulty with access as these have been dealt with. The same considerations apply as to whether or not the anchor stores have been bound in. The very purpose of anchor stores are that they attract other tenants and it will be in the interest of the tenant to know whether these stores are bound to enter into the leases because these will make them more attractive.

91 As to the finance condition, the very fact that the landlord recognises it is at risk if it takes on the obligation of building without the finance in place, and indeed it is obviously a risk, presents a risk to the tenant that the development will either be substantially delayed or may not be possible at all. Finally, the fulfilment of the possession condition has a direct bearing upon the date upon which the landlord is obliged to enter into a building contract.

92 All the considerations have the knock-on effect as to when and if the development can be built, the date upon which the tenant is expected to become liable for the substantial rent by way of licence fee and other charges and to commence the tenant's work of outfitting its units. Mr Heather says that he does not have to prove that this tenant has a commercial interest in knowing whether the conditions have been satisfied by performance or waiver unless there was evidence that such concerns were made known to the claimant, and there is none, for unless they were made known to the claimant, they would not be relevant in construing the ADL.

93 This is not a case like *Mannai* where there is some error in the notice but it is nevertheless clear and unambiguous and achieves its purpose. The letter of 19 December is simply not the notice that is required under the schedules. Furthermore, the notice is far from clear in

that it does not distinguish between conditions which have been met by performance, and, if so, by what means, or waiver.

94 He has the argument about the pre-letting condition which has not been satisfied because the notices were premature. He argues that on a proper construction of the ADLs relating to Next, H&M and Wagamama, the first lease which had to be unconditional was Next, followed by H&M, and finally this tenant. Such analysis is academic, he says, as there is no evidence as to when notice was served on Next and H&M. Furthermore, if the letter to this tenant was ineffective, as a notice of waiver of any of the conditions, the same must be said of the letter to Cine-UK. For that ADL to become unconditional, four other ADLs have to become unconditional, or the landlord waive the pre-letting condition. As the terms of the Cine-UK notice are the same as those received by Wagamama, if it is correct in its argument concerning its own notice, the notice to Cine-UK was also ineffective as there is no evidence that the cinema, which was one of the anchor tenants, became unconditional prior to the Condition Long Stop Date, because the binding in of Cine-UK was attempted to be achieved by waiving the requirement to make four other ADLs unconditional.

Discussion and conclusion

95 It follows from Lord Steyn's first proposition in *Mannai*, as explained in *Rennie*, that the question as to whether the notice is required to contain particular information turns upon the construction of the ADL. I start by looking at the words of the agreement. This is a professionally and carefully drafted document. This factor should, and does, lead me to lend more weight to the words used in deciding what they mean.

96 On the face of it, and without adopting an over literal interpretation, it establishes that the date of the satisfaction of the site assembly condition is the later of the dates when the

landlord notifies the tenant of the condition under which it owns or has unconditional agreements to acquire third party interests, so it has power over the site, or that it has the benefit of an earlier CPO with which it is satisfied.

97 The wording contained within that schedule is an indication that this is specific information which is to be provided, rather than a coverall expression such as, "We have satisfied this condition." Such a conclusion is even stronger in relation to the highways and other road closure order conditions, for here the landlord need only give notice which establishes when the condition has been satisfied. If it waives the condition, the tenant will not know whether there are Section 278 Agreements and RCOs which are satisfactory to the landlord. It can only know that the condition is waived if it is told whether the condition is waived or not and it will only find that out if it is given notification of waiver by the landlord.

98 As regards the pre-letting, finance and possession conditions, they will be satisfied when notices of two different types of information are given, firstly, that the condition has been satisfied in the manner set out, or secondly that it has been waived. The fact that the provision is made for notices containing different information supports the proposition that notification under the schedules cannot be achieved by a letter in the terms of that of 19 December, and, as is apparent from the drafting of those schedules, certainly as regards the pre-letting, finance and possession conditions, the schedules do not say that satisfaction is "when a notice is served of," and then that is followed by waiver or performance. It says satisfied when the following happen: (1) service of notice of performance, or (2) service of notice of waiver. That suggests that these are two different notices which have to be served. That is what we see on the textual side.

99 There may be some inconsistency apparent between the definition of "satisfaction date" in clause 1.1 and the use of the word "satisfied" and indeed satisfying the schedules. The

satisfaction date is defined as "the date upon which the relevant conditions are satisfied or waived in accordance with schedules 2 to 7 inclusive." The schedules, however, refer in schedules 3, 4, 5 and 6 to the conditions being satisfied when "either notice of performance of the condition or they have been waived is given," and in the case of the highways and other RCO conditions, upon performance or notice of waiver. Accordingly, there is no a tension between the definition provision in the schedule. Satisfaction is on the date on which the relevant condition is satisfied or waived and the date of that occurrence is when the required notice is served in accordance with the schedules, or, in the case of the Highways and RCO condition, when, the conditions comes into being and the latest date under paragraph 3 has been passed, or there is notice of waiver. Reference in the definitions to the date the conditions are satisfied or waived in accordance with schedules 2 to 7 must mean the date of performance or notice of when performance has taken place provided for in those schedules. I use 'performance' in the sense of the requirement of the condition having eventuated.

100 The requirement to use reasonable endeavours to satisfy the condition in the schedules must relate to satisfaction by performance, and neither counsel disagree. No such requirement would be needed in relation to the giving of a notice of waiver. I say that just to reinforce that the reasonable endeavours must relate to performance.

101 Ms Shea's assertion that all a tenant is interested in is whether the agreement has become unconditional does not accord with the terms of clause 2 and the schedules. First, there is a provision for notifying the tenant that the agreement is unconditional, clause 2.7, which is distinct from the other provisions concerning notification in relation to conditions. If all the tenant was interested in was knowing that the agreement was unconditional, that could have been catered for by a notice under 2.7. The suggestion that clause 2.5 is the mechanism by which the tenant's interest in the performance of the conditions, if any, is recognised does

not bear a comparison of that clause with those in the schedule. Information concerning the conditions is to come in two forms under the schedule. First, there is the obligation upon the landlord to keep the tenant informed of the progress of satisfying all but the finance and possession conditions, thus progress towards satisfaction seems to be dealt with within the schedules. What then does clause 2.5 add? This requires that the tenant is updated as to the satisfaction of the conditions. This seems to me a timing issue directed at requiring the landlord to keep the tenant informed when the conditions, which can be performed, that is can eventuate, on diverse occasions, have indeed been satisfied. The requirement to give notice of waiver or performance of most of the conditions in the schedule has a separate purpose, where such notices are given they are treated as the date upon which the condition to which they relate has been satisfied.

102 If there was some ambiguity as to what the requirement as to notice in the schedules meant, I have to look at the wider context, bearing in mind that I should adopt the meaning which makes commercial common sense. I shall first deal with Ms Shea's argument that the tenant's only interest is in knowing whether the contract has become unconditional because the conditions in schedules 2 to 5 are included for the benefit of the landlord.

103 I accept that these conditions relieve the landlord of the commercial risk of being required to embark upon a £33 million development in circumstances where it has neither the land, finance, highway infrastructure and key tenants in place. The discretion to waive some of the conditions enables the landlord to take the risk of proceeding without the conditions having eventuated; clearly the landlord will be in the best position to know the extent of such risk. For example, in relation to the possession condition, Next and HMV were still in occupation of the Phase Two Zone at the time of the satisfaction date, but the landlord had agreements in place to recover possession at a convenient time.

104 It does not follow from the fact that the landlord needed the protection of the conditions that the tenant would be indifferent to knowing whether or not they would be fulfilled. I accept Mr Heather's argument that the lack of finance, access to land and ownership of land, even if a satisfactory CPO was in place, all have the propensity to delay or potentially derail the development. Similarly, it was in the interests of the tenants to know whether the anchor tenants were bound to take their leases, for they may generate custom. Businesses need to plan their resources and deployment of capital and thus any prospective tenant under this ADL would wish to be informed of any factors which could affect its planning process and as to the viability of the development into which it was entering.

105 Ms Shea says that it does not matter when the conditions were met or waived, for provided one or other occurred, the tenant was bound. She said the tenant had contracted for a situation in which it may well be bound to take a lease of a development which may ultimately not be built or which could be much delayed. The tenant's protection was that after the Construction Long Stop Date, forty-eight months after the satisfaction date, it has the opportunity to terminate the agreement or be under the risk that it was the landlord who terminated the agreement, for the agreements did not automatically come to an end on the passing of the this Long Stop Date.

106 If that really was the limit of the protection afforded to the tenant by the ADL, I agree with Mr Heather when he said that the conditions would be otiose. How would this agreement be different in terms of the tenants' interests if it was simply open to the landlord to fulfil this site assembly condition but thereafter be able to elect when the ADL would become unconditional. There is clear evidence within the agreement that the tenants did have an interest in whether or not the conditions were fulfilled, for the landlord is under an obligation to use reasonable endeavours to see that they are, in relation to the site assembly, highways and other RCO, finance and possession conditions. If these conditions were

solely for the landlord, one would not expect to see that it was obliged to use reasonable endeavours to bring them about.

107 Furthermore, there are the provisions under which the landlord shall keep the tenant informed of the progress of the satisfying conditions and keep them updated when they are satisfied. The claimant argues that there is no evidence that this tenant was concerned to see whether the conditions were satisfied or waived. This tenant's view is immaterial. Indeed, so was Mr Rice's attempt to express an opinion as to the tenant's interest in these matters. The question is whether, as a matter of business common sense, these are matters in which the objective hypothetical tenant would be interested. In view of the terms of clause 2 of the schedule concerning notification as to the progress and satisfaction of the conditions and the landlord's obligation to use reasonable endeavours to bring them about, coupled with the impact on the viability and progress of the development proceeding where the agreement is binding following the waiver of conditions, such a tenant clearly would be commercially concerned.

108 There is nothing in the factual background within the four corners of the agreement which should lead to a conclusion, other than the words of the schedules meaning what they say. Albeit the schedules do not say that a notice will not be valid unless it contains certain information, the very fact that the service of the notice containing specific information is put forward as a method of establishing when the conditions have been satisfied and that the schedule distinguishes between notices of condition fulfilment and notices of waiver, leads me to the conclusion that a proper construction of the schedules requires that for a notice to be valid, it must be a notice which identifies in what way the condition has been fulfilled, that is to say if it is a notice of waiver, that the condition is waived, and if it is a notice of fulfilment, to state the condition has been fulfilled.

109 Mr Heather argued for rather more detail to be in the notice, so that, for ,example the notice of site assembly had to state whether the landlord owned the land or had an unconditional agreement to acquire it. I do not have to go that far because the notice which was served does not even identify which of the alternatives were satisfied in relation to the other conditions, whether they were fulfilled or waived. In view of my observations, however, as to the business common sense of the schedule and the need for the tenant to know the basis upon which the agreement had become unconditional so that it had some insight as to how the development was likely to proceed, I take the view that the notices should identify which of the alternative methods of satisfaction have been achieved. For example, in the case of the site assembly condition, whether the landlord owns the land or has the benefit of an unconditional agreement to acquire it. Such information is even more important in relation to the pre-letting condition which can be fulfilled in three different ways.

110 In view of my conclusion as to the requirements for the notices under the ADL, the 19 December agreement is clearly inadequate to convey the requisite information. It does not fulfil its purpose. In those circumstances, given the timing of the termination notice, 9 June 2017, which after was the Condition Long Stop Date and the Satisfaction Date not having occurred, it was a valid notice to terminate, and the declaration sought by the claimant must be refused. Given this decision, I agree with Ms Shea's argument that there is no need to reach a conclusion as to the order in which the ADL agreements had to become unconditional or to determine the date of service of letters to Next and H&M or their consequence.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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