

Case No: HC14F01071

Neutral Citation Number: [2014] EWHC 2442 (Ch)  
**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/07/2014

**Before :**

**THE HONOURABLE MR JUSTICE SALES**

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**Between :**

**Ruven Cohen**  
**- and -**  
**(1) Teseo Properties Limited**  
**(2) Francis Powell**  
**(3) Michael Proudlock**

**Claimant**

**Defendants**

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**Mark Warwick QC** (instructed by **Jeffrey Green Russell**) for the **Claimant**  
**David Holland QC** (instructed by **Taylor Wessing LLP**) for the **Defendants**

Hearing dates: 9/7/14  
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Judgment

## Mr Justice Sales :

### *Introduction*

1. This is the trial of a claim for a declaration that a contract for the sale of property at 136-144 Granville Road, London NW2 by the Claimant to the First Defendant (“Teseo”) made on 8 August 2013 (“the Contract”) has terminated, leaving the Claimant free to deal with the property as he chooses. Teseo counterclaims for specific performance of the Contract and the sale of the property to itself. If it fails in its claim for specific performance, Teseo claims to be relieved under section 49(2) of the Law of Property Act 1925 against forfeiture of the deposit it has paid.
2. The Second and Third Defendants are joined in the proceedings, since they were parties to the Contract as guarantors for Teseo. In fact, however, although the Claimant and Teseo each indicated that it claimed damages, neither of them sought to prove any loss at trial. The issues between them related solely to the question of who is entitled to the property and, if it is the Claimant, what should happen in relation to the deposit paid by Teseo.

### *Factual Background and the Contract Terms*

3. In about 2012/2013, Teseo had commenced a successful residential development of other property in the area and wished to put its experience to use in relation to other premises in the vicinity.
4. Teseo identified the Claimant’s property at 136-144 Granville Road as potentially suitable for residential development. Planning permission would be required to allow such development. Teseo proposed to purchase the property for £1.3 million on terms which made its obligation to complete the purchase conditional upon it being successful in obtaining satisfactory planning permission from the local planning authority.
5. The parties entered into the Contract, which was drawn up with terms to reflect the conditional basis of Teseo’s obligation to complete the purchase, covering various permutations which could arise in the course of an application for planning permission.
6. Clause 1 dealt with various matters relating to the interpretation of the Contract. It included the following definitions in clause 1.1:

“ ...

**Completion Date:** 28 days from the Effective Date. ...

**Deposit:** £50,000 (exclusive of VAT) and any sums payable by the Buyer pursuant to Clause 13.5. ...

**Effective Date:** is the date defined in clause 12...

**Extension of Time:** an extension to the Long Stop Completion Date requested by the Buyer pursuant to Clause 13.5 of not more than 6 months. ...

**Initial Payment:** the sum of £50,000 payable under clause 4 to be regarded as payment of the Deposit following the Effective Date

**Long Stop Date:** 6<sup>th</sup> January 2014 subject to an extension or extensions if requested by the Buyer pursuant to Clause 13.5 up to and including 9<sup>th</sup> June 2014...

**Termination Date:** a date as defined in clause 13..."

7. Clause 3 provided as follows:

**“3. CONDITIONAL EFFECT OF THIS AGREEMENT**

3.1 This agreement (other than this Clause 3 and Clauses 4 to 11 and such other clauses as are of interpretive effect only) is conditional upon:-

3.1.1 Firstly, the receipt by the Buyer of a Local Authority search result in respect of title number: MX377748 on or before 31<sup>st</sup> August 2013 which in the Buyer’s opinion does not reveal anything that adversely affects the Property **PROVIDED THAT** the Buyer will be entitled unilaterally on written notice to the Seller to waive this condition at any time up to 31<sup>st</sup> August 2013;

3.1.2 Secondly, the Effective Date occurring on or before the Long Stop Date **PROVIDED THAT** the Buyer will be entitled unilaterally on written notice to the Seller to call for completion on 15 Working days’ notice notwithstanding that the Effective Date has not occurred.

3.2 The Buyer will notify the Seller in writing that the local authority search referred to at clause 3.1.1 is acceptable to it within 3 Working Days of receipt.”

8. Clause 4 provided as follows:

**“4. INITIAL PAYMENT**

In return for the Seller entering into this contract, and at the same time as the contract is exchanged, the Buyer will pay the Seller the Initial Payment (such payment to be held by the Seller as stakeholder until satisfaction of the condition referred to in clause 3.1.1) by a solicitor’s client account cheque drawn on a Clearing Bank or by Direct Credit. The Seller will not be obliged to repay this sum to the Buyer under any circumstances save for in the event that the local authority search referred to in clause 3.1.1 is not satisfied.

In such circumstances, the Seller will repay the Initial Payment within 5 Working Days of request by the Buyer.”

9. Clause 6, entitled “Planning Application”, included the following provisions:

“6.1 On or before 10<sup>th</sup> September 2013, the Buyer will submit the Planning Application to the Council and will use reasonable endeavours to secure that the Council grants the Planning Permission free from Unacceptable Planning Conditions.

6.2 The Buyer shall provide a copy of the Planning Application submitted to the Council to the Seller within 3 working days of submission.

6.3 The Buyer will keep the Seller regularly informed as to progress of the Planning Application ...”

10. Clause 7 dealt with various matters relating to a possible planning appeal. It included the following provisions:

“7.2 If the Council does determine the Planning Application, the Buyer will, within 5 Working Days after receiving a copy of the determination, give a copy of it to the Seller. ...

7.5 Within 30 Working Days immediately following the expiry of the Appeal Notice Period, the Buyer will give written notice to the Seller confirming whether or not it intends to lodge with the Secretary of State an appeal against each condition identified in an Appeal Notice or serve notice to terminate the contract. ...

7.7 The Buyer will, within 5 Working Days after receiving it, give a copy of the Planning Appeal Decision to the Seller.

7.8 If the Planning Appeal Decision is to grant Planning Permission, the Buyer shall, before the expiry of 10 Working Days after the date that the Seller has received a copy of the Planning Appeal Decision from the Buyer under clause 7.7, give written notice to the Seller specifying [certain matters] ...

7.10 If the Buyer gives notice to the Seller under clause 7.8, the Buyer may at the same time or within 2 Working Days after the date of that notice, serve written notice on the Seller to terminate the contract. ...

7.12 The parties may agree to extend any time limit for giving any notice under this clause but in the absence of prior agreement, time will be of the essence of the contract.

7.13 In the event that the Planning Appeal Decision is to grant Planning Permission subject to a condition which has the

effect of the Unacceptable Planning Condition referred to in paragraph 1(i) of Schedule 1 and the Buyer serves notice upon the Seller pursuant to clause 7.8 then the Seller must within 5 Working Days of receipt of such notice serve written notice on the Buyer confirming...”

11. Clause 8, headed “Third Party Applications”, dealt with matters which would arise if planning permission was granted but was made the subject of a challenge by a third party.
12. As set out in clause 1.1, the Completion Date under the Contract was to be 28 days from the Effective Date. Thus, the Effective Date was to be the trigger for the parties’ obligation to complete the sale of the property 28 days later. Clause 12, headed “Effective Date”, provided as follows:

#### **“12. EFFECTIVE DATE**

12.1 Subject to clause 12.2, the Effective Date is the first to occur, if any, of the following dates:

(a) if the Council grants Planning Permission free of conditions, the next Working Day following the date that is 13 weeks following the date of the written decision letter (provided that no Third Party Application has commenced in respect of it in which case clause 12.1(e) shall apply);

(b) if the Council grants Planning Permission subject to one or more conditions, and no Appeal Notice is given by the Buyer, the next Working Day following the date that is 13 weeks following the date of the written decision letter (provided that no Third Party Application has commenced in respect of it in which case clause 12.1(e) shall apply);

(c) if following a Planning Appeal, the Planning Appeal Decision is to grant the Planning Permission subject to one or more conditions and those conditions are not determined to be Unacceptable Planning Conditions, the next Working Day following the date that is 13 weeks following the date of the Planning Appeal Decision letter (provided that no Third Party Application has commenced in respect of it in which case clause 12.1(e) shall apply);

(d) if the Planning Appeal Decision is referred to an Independent Surveyor pursuant to a notice given under clause 7.11, and the Independent Surveyor determines that none of the Referred Planning Conditions imposed in the Planning Permission are Unacceptable Planning Conditions, the next Working Day following later of:

(i) the date of the Independent Surveyor's written determination; or

(ii) the date that is six weeks following the date of the Planning Appeal Decision letter (provided that no Third Party Application has commenced in respect of it in which case clause 12.1(e) shall apply).

(e) In the event that a Third Party Application is made during the Review Period, the next Working Day following the date on which a Planning Permission or a Planning Appeal Decision (as the case may be) free from any Unacceptable Conditions is granted or upheld and that decision is no longer open to challenge by the issue of a further Third Party Application.

12.2 The Effective Date cannot occur after the Termination Date.”

13. The effect of clause 12.2 and clause 13 is that if the Termination Date comes before an Effective Date has occurred, the parties will not be under an obligation to complete the sale and purchase of the property. Clause 13 provides as follows:

**“13. TERMINATION**

13.1 Subject to clause 13.2, the Termination Date is the first to occur, if any, of the following dates:

(a) if following a Planning Appeal, the Planning Appeal Decision is to refuse Planning Permission and the Buyer does not wish to submit a new Planning Application, the date of the Planning Appeal Decision;

(b) if an Independent Surveyor has given a written decision under clause 9 that any Referred Planning Condition is an Unacceptable Planning Condition, the date of the Independent Surveyor's written determination;

(c) the Long Stop Date.

13.2 The Long Stop Date cannot be the Termination Date if

(a) the Buyer is awaiting a Planning Appeal Decision; or

(b) a Review Period in respect of a Planning Permission free from any Unacceptable Planning Conditions granted prior to the Long Stop Date has not expired; or

(c) the Buyer requests an Extension of Time pursuant to Clause 13.5; or

(d) any Third Party Application has not been Finally Determined in which case the Long Stop Date shall be extended to a date 20 Working Days following the date (as the case may be):

(i) six weeks following the date of issue of the Planning Appeal Decision letter (provided that no Third Party Application is commenced within such period, in which case clause 13.2(d)(iii) shall apply);

(ii) of expiry of the Review Period in respect of such Planning Permission (provided that no Third Party Application is commenced within such period, in which case clause 13.2(d)(iii) shall apply); or

(iii) any Third Party Application is Finally Determined.

(iv) on which the Extension of Time expires and no further Extension of Time has been requested.

13.3 The Termination Date shall not in any circumstances extend beyond 7<sup>th</sup> July 2014.

13.4 In the event of a Termination Date occurring:

(a) the contract is terminated with immediate effect as from the Termination Date except that the following clauses will remain in full force notwithstanding termination of the contract:

(i) the clauses from clause 1 to clause 4 inclusive;

(ii) Clause 10;

(iii) Clause 11;

(iv) Clause 26; and

(v) the clauses from clause 31 to clause 36 inclusive.

(b) neither party will have any further rights or obligations under the contract except that the termination of the contract will not affect either of the parties' rights in connection with any breach of this contract that occurred before the Termination Date.

13.5 In the event that the Effective Date has not occurred by 6<sup>th</sup> January 2014 then

13.5.1 The Buyer shall be entitled to an Extension of Time.

13.5.2 The Buyer shall inform the Seller each time that it requires an Extension of Time by written notice to the Seller specifying the length of the extension required.

13.5.3 A further Initial Payment of £8,333.33 will be payable by the Buyer to the Seller for each month of any Extension of Time. Such sum shall be paid by the Buyer in accordance with the provisions of clause 18 and shall be held by the Seller as a Deposit on that basis.”

14. Clause 18, headed “Deposit”, includes the following:

“18.1 The Initial Payment and any additional monies paid by the Buyer pursuant to Clause 13.5 shall be regarded as payment of the deposit. ...”

#### *The Dispute*

15. The issue between the parties arises primarily on the interpretation and intended effect of clause 13.5.
16. By 6 January 2014, Teseo had not yet obtained satisfactory planning permission in respect of the application for permission which it had submitted in 2013 in accordance with the Contract. None of the events set out in clause 12.1 had occurred by that date, so the Effective Date had not arrived. Nor had Teseo issued a unilateral notice under clause 3.1.2 requiring the Claimant to complete the sale of the property to it, notwithstanding that the Effective Date had not occurred.
17. Although in late 2013 Teseo intimated that it might seek an Extension of Time, neither before nor on 6 January 2014 did Teseo give the Claimant a written notice requiring the grant of an Extension of Time under clause 13.5. Teseo did not specify any period of extension which it wished to have, nor did it offer to pay the sum appropriate for such an extension.
18. The evidence is, however, that Teseo was actively pursuing its application for planning permission, remained hopeful that satisfactory permission would be granted and that it was in funds and ready, able and willing to pay for an appropriate Extension of Time.
19. The solicitor for the Claimant sent an email on 31 December 2013 to the solicitor for Teseo to ask for an update on Teseo’s application for planning permission and to inquire whether completion was likely to take place the following month. There was no response.
20. On 12 January 2014 he emailed again, noting that the Long Stop Date (6 January) had now passed without any request by Teseo for an Extension of Time, reserving the Claimant’s rights and seeking information regarding Teseo’s position regarding completion.



21. By email dated 13 January 2014 from Mr Proudlock for Teseo to the Claimant, Mr Proudlock stated that Teseo wished to extend the Contract and offered to commence making the agreed monthly payments, month by month.
22. However, by email dated 14 January 2014 from his solicitor, the Claimant declined to extend the Long Stop Date and stated that he regarded the Contract as terminated with immediate effect from 6 January 2014.
23. By email dated 15 January 2014, Teseo gave written notice requesting an Extension of Time and agreeing to pay the appropriate sum in relation to that extension. The Claimant refused to accept this as a valid notice having effect under clause 13.5 to extend the Long Stop Date and hence to postpone the Termination Date beyond 6 January 2014.
24. In February 2014, the local planning authority granted planning permission for residential development of the property. That permission, of course, relates to the property and is not personal to Teseo, even though it was granted on Teseo's application.
25. Teseo maintains that, on proper interpretation of the Contract, it was entitled to give notice as it did after 6 January 2014 (provided that was done on or before 9 June 2014, since the definition of Long Stop Date in clause 1.1 creates such a time limit) which would have the effect of extending the Long Stop Date under clause 13.2 and hence preventing the Termination Date from being 6 January 2014.
26. The Claimant, on the other hand, submits that on proper interpretation of the Contract Teseo was not entitled to give a notice *after* the Long Stop Date of 6 January 2014, as defined in clause 1.1, had passed. Once 6 January 2014 passed, as here, without any notice being given under clause 13.5, it was the Long Stop Date and hence became the Termination Date under clause 13.1.

### *Discussion*

#### *(i) The interpretation of clause 13.5*

27. Although the Contract seems to have been professionally drafted, the drafting is poor.
28. At two points (clause 7.11(a)(i) and clause 9.1(b)) necessary cross-references to other provisions were left out, and instead the text "Error! Reference source not found" appeared in bold type. No-one appears to have noticed or bothered about this.
29. The inter-relationship between important provisions is not clearly explained. For example, the relationship between clause 3.1.2 and the provisions governing termination of the Contract was left obscure (see below); the relationship between clause 13.1 and clause 13.2 is poorly explained (the plain intended effect is that if the Long Stop Date is extended, that later Long Stop Date can be the Termination Date; but the opening words of clause 13.2 say in terms that the Long Stop Date "cannot be the Termination Date" if events occur which give rise to an extended Long Stop Date); one has to gather from the definition of the Long Stop Date in clause 1.1 that there might be a time limit of 9 June 2014 on the ability of the Buyer to issue a request for an extension under clause 13.5, as it does not appear in clause 13.5 itself;

and the relationship between the critical provision in clause 13.5 and other terms in the Contract is difficult to determine – hence the disagreement which has arisen between the parties and the need for this litigation.

30. Mr Warwick QC for the Claimant pressed upon me, rightly in my view, the importance for the present case of the guidance on contractual interpretation given by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, at [14]-[30] per Lord Clarke JSC, and in particular his summary at [30] that “where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.” At [26], Lord Clarke cited with approval the following statement by Mance LJ (as he then was) in *Gan Insurance Co. Ltd v Tai Ping Insurance Co. Ltd* (No. 2) [2001] 2 All ER (Comm) 299 at [13]:

“... the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis.”

If the drafting of an agreement is generally poor, it will be harder to conclude on an objective approach that the parties really meant the literal meaning of the words they used to govern and override clear conflicting business common sense.

31. In relation to the interpretation of the Contract in the present case, therefore, I consider that it is particularly important to have regard to business common sense in drawing inferences as to the parties’ intentions expressed in the Contract, construed according to the usual objective approach. In my view, despite the best efforts of Mr Holland QC for Teseo to argue to the contrary, business common sense strongly favours the interpretation pressed by the Claimant.
32. In that regard, there are two highly significant features of the commercial context. First, it is clear from the Contract itself that the Long Stop Date of 6 January 2014, which would also be the Termination Date if an Effective Date did not occur by then, would be capable of extension, but only upon Teseo’s agreeing to pay a further sum as an addition to the Initial Payment. In other words, to allow for uncertainty in the planning process, Teseo would have the right to extend the life of the Contract, but would have to pay a price for the privilege.
33. The interpretation pressed by Teseo, however, would substantially undermine this feature of the commercial arrangement. If (as Teseo contends) Teseo could give notice to extend the Long Stop Date and the Contract after the initial Long Stop Date of 6 January 2014, then according to the express terms of the Contract it could hold off doing that until 9 June 2014. That is the effect of the definition of “Long Stop Date” in clause 1.1. I agree with Mr Holland that the words “up to and including 9<sup>th</sup> June 2014” in that definition apply to a request by the Buyer under clause 13.5, and do not provide an outer limit on the life of the Contract itself (not least, since that would conflict with clause 13.3). But this would mean that Teseo could in practice obtain the benefit of the Contract beyond 6 January 2014 up to 9 June 2014, before

having to make up its mind and pay any money to the Claimant. If the Claimant could not rely on 6 January 2014 (absent a request for extension received by then) as the relevant Long Stop Date and Termination Date and so walk away from the Contract at that point, he would continue to be bound by a floating obligation to sell the property to Teseo which Teseo might crystallise at any time up to 9 June 2014 by making an extension request under clause 13.5. In the interim, up to 9 June, the Claimant could not treat himself as free to sell the property to anyone else. This would allow Teseo to obtain in practice a lengthy extension of the Contract without incurring any obligation to make a payment, by waiting to see how the planning process might unfold down to 9 June 2014 and only deciding at that point whether it wished to make a request under clause 13.5. This would be strongly at odds with the commercial logic of the parties' bargain.

34. Secondly, it is clear that the parties wished to have a high degree of certainty as to when and in what circumstances they would remain bound under the Contract. They laid down an elaborate code under which the obligation to complete would be predicated upon an Effective Date occurring; they stipulated (clause 12.2) that the Effective Date could not occur after the Termination Date; and they set out detailed provisions in clause 13 to determine the Termination Date, along with the stipulation in clause 13.4 that the parties would be released from their main obligations with immediate effect as from the Termination Date. If the Termination Date passed, each party was to be able to treat themselves as free of those obligations without the need to give further notice or warning to the others. In particular, it appeared that the Claimant was to be free to sell the property to another.
35. Again, this feature of the bargain would be undermined if the interpretation of clause 13.5 pressed by Teseo were correct. On the face of it, if the original Long Stop Date of 6 January 2014 came and went without an extension of the Contract being in place, that would be the Termination Date (see clause 13.1) which would have the effects specified in clause 13.4. But, on Teseo's interpretation of clause 13.5, this would be an illusion, and the Contract could be revived with full effect if Teseo chose later (by 9 June 2014) to request an extension of the Contract. As a matter of pure legal theory, parties to an agreement could agree to create inchoate effects of this kind; but I consider that it is highly implausible to suppose that the parties to this Contract intended to undercut the apparent clear effect of clause 13.1 in this way. In the context of this Contract, the commercial objective of the parties under clause 13.1 was that they should with certainty know where they stood if one came to the end of the Long Stop Date of 6 January 2014 without any request for an Extension of Time (cf *Valentines Properties Ltd v Huntco Corporation Ltd* [2001] UKPC 14, [2001] 3 NZLR 305, at [16]).
36. I do not think that the use of the present tense in clause 13.2(c) ("the Buyer requests an Extension of Time ...") has great significance. The commercial logic of clause 13.1 is that the parties need to know whether the Long Stop Date occurs as the first of the range of possible Termination Dates set out in that provision, and hence takes effect as the Termination Date. The use of the present tense in clause 13.2(c) does not provide guidance whether the Claimant's or Teseo's interpretation of clause 13.5 is the correct one. It is capable of being consistent with either of them. It simply means that the original Long Stop Date of 6 January 2014 cannot take effect as such (and as the Termination Date) if the Buyer requests an Extension of Time in accordance with

the terms of the Contract, as properly construed (i.e. whether the request is made before, on or after 6 January 2014).

37. Against these considerations, Mr Holland emphasised that Teseo had to make a significant investment in putting together the application for planning permission and in handling the planning process and had to pay a considerable sum (£50,000) by way of Initial Payment and deposit. Therefore, he submitted, business common sense indicated that the parties intended that Teseo should have substantial protection for its interests under the Contract and should not be found to have forfeited these investments too readily.
38. In my view, these considerations are of considerably lesser weight than the factors reviewed above. Teseo was the party making and managing the planning application (albeit it had to provide updates to the Claimant under clause 6.3 and clause 7), and so was in a position to know the full circumstances in relation to that application by 6 January 2014 and to decide whether it wished to request an Extension of the Contract (and pay for that benefit) or not. It was readily open to it to protect its investment in this way. Moreover, clause 13.5 allowed Teseo to make successive requests for an Extension of Time, so it was able to proceed cautiously, step by step, only paying for such extensions as it thought from time to time to be worthwhile.
39. Mr Holland emphasised the language used in clause 13.5 in order to suggest that as a matter of its literal meaning it required a request for an Extension of Time to be made after 6 January 2014 - if the Effective Date "*has not occurred by 6<sup>th</sup> January 2014 then ... The Buyer shall be entitled to an Extension of Time*", "*The Buyer shall inform the Seller each time that it requires an Extension of Time*", and "*A further Initial Payment .. will be payable*". Given, as he submits, such a conflict between the clear language used in clause 13.5 and the business common sense relied on by the Claimant, this is a case in which the literal interpretation of clause 13.5 is so clear that the Court would be in error in failing to give effect to it.
40. Two points should be made about this. First, on a literal reading of the Contract, it is not necessary to conclude that a request under clause 13.5 could only be made *after* 6 January 2014. The literal meaning of the words used in the Contract is consistent with the possibility that a request for an Extension of Time could be made *on* 6 January 2014. Clause 13.5 provides that such a request can be made if the Effective Date has not occurred *by* 6 January 2014, which is a question which can be answered as 6 January begins. Clause 12.2 says that the Effective Date cannot occur *after* the Termination Date, which, if the Termination Date is given by the Long Stop Date as specified in clause 13.1(c), is 6 January 2014. Clause 3.1.2 confirms that the Effective Date can occur *on* the Long Stop Date. This allows for the possibility that something significant might happen *on* 6 January 2014 to postpone the Termination Date and allow for a later Effective Date. The relevant event which could have that effect *on* 6 January 2014 is the making of a request for an Extension of Time on that day.
41. Under clause 13.4(a), the Contract is terminated with immediate effect "*as from the Termination Date*", namely when the designated Termination Date comes to an end without a request for an Extension of Time. The language in clause 13.2(c) (the original Long Stop Date cannot be the Termination Date "*if ... the Buyer requests*" an Extension of Time) can be given sensible effect, as meaning that 6 January 2014 cannot be the Termination Date if on that date the Buyer requests an Extension of

Time. Interpreted in this way, Teseo would have the ability to make a request for an Extension during the life of the Contract and everyone would know where they stood before it expired in accordance with the Termination Date provision in clause 13.1. (I would add that I think that if Teseo had made a request for an Extension of Time before 6 January 2014 which it continued to maintain on 6 January, that would qualify as a valid request on 6 January and would have had the effect of extending the life of the Contract).

42. Thus, in my opinion, there is not the acute conflict between the literal interpretation of the Contract and business common sense which Mr Holland suggested. In fact, a sensible meaning can be given to clause 13.5, literally construed, while at the same time interpreting the Contract in accordance with business common sense to mean that if the Long Stop Date of 6 January 2014 comes and goes without a request for an Extension of Time, then it does indeed take effect as the Long Stop Date and Termination Date, and the Effective Date cannot occur thereafter. On this interpretation, the Claimant is in a position to succeed in his claim for a declaration that he is free from his obligation under the Contract to sell the property to Teseo, subject to a further argument of Teseo based on clause 3.1.2 (see below).
43. Secondly, and in any event, I consider that the business common sense to which I have referred is so strongly in favour of the Claimant's preferred interpretation (that a valid request for an Extension of Time cannot be made after 6 January 2014) that, had there been the conflict between the literal language of the Contract and the business common sense that the parties must have meant that the request should be made on or before 6 January 2014, I would still have concluded that the Claimant's preferred interpretation was the better one. In the context of a poorly drafted agreement such as this, the interpretation indicated by business common sense would have prevailed over a contrary literal interpretation.
44. In a further effort to overcome the argument of the Claimant based on business common sense, Mr Holland proposed terms to be implied into the Contract to try to soften the impact of that argument. The proposed alternatives put forward for an implied term are that the Buyer's ability to inform the Seller in writing that it requires an Extension of Time are qualified in either of the following ways: (i) the request must be made on a date on or after 6 January 2014 and within a reasonable time thereof; or (ii) the request must be made on a date on or after 6 January 2014 and within a reasonable time of the Seller asking whether an Extension of Time will be required.
45. As explained in *AG of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, at [21], the relevant question when considering whether a term should be implied into an agreement is: what would the instrument (here, the Contract) read as a whole against the relevant background, reasonably be understood to mean? See also, *Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2014] EWCA Civ 603, [20]-[28]. In answering that question, a term will only be implied if it is necessary that the agreement should contain such a term to achieve the parties' express agreement or their commercial objective: see *ibid.*, [26]-[28].
46. I do not accept that clause 13.5 is to be modified by either of the proposed implied qualifications. They are unnecessary to give proper commercial effect to the Contract, as explained above. They do not wholly eliminate the effect, contrary to business

common sense, that they would still allow Teseo an ability to extend the Contract for a period without paying for that extension, and such softening effect as they might have in that regard is bought at the price of introducing uncertainty of timing by means of a “reasonable time” standard into an agreement which sought to set out obligations by reference to clearly specified timetables, as illustrated by the terms set out above.

47. In my view, clause 13.5 cannot reasonably be taken to bear the meaning which Teseo seeks to give it by reference to these implied terms. The proper interpretation of clause 13.5 is as I have set out above.

(ii) *Teseo’s argument based on clause 3.1.2*

48. Teseo maintains a further argument, based on clause 3.1.2 of the Contract. Mr Holland submits that, even if Teseo loses on its argument based on clause 13.5, it remains entitled unilaterally on written notice to the Claimant to call for completion of the sale even though the Effective Date has not occurred, and now can never occur. He pointed out that clause 3 is a provision which is preserved as having full force notwithstanding termination of the Contract by virtue of clause 13.4(a)(i). When I asked him whether this meant that Teseo was entitled to call for completion of the sale under clause 3.1.2 at any time until the crack of doom, he accepted that it was not, but rather said that it was an entitlement to call for completion within a reasonable time after termination occurring.

49. In my judgment, this is an untenable interpretation of the Contract. In the context of clause 3, the proviso to clause 3.1.2 has an obvious meaning, namely that at any point before the Effective Date does occur, Teseo can unilaterally decide to call for completion of the sale and abandon the conditionality of the Contract, which was to protect it in relation to uncertainties arising from the planning process. In my view, the words “notwithstanding that the Effective Date has not occurred” are to be read as predicated on the assumption that it remains possible for the Effective Date *to* occur at some point in the future. Once the Termination Date has passed, however, that is no longer possible: see clause 12.2.

50. Any other interpretation would be contrary to all business common sense and the intended certainty that the parties apparently wished to have regarding their obligations for the future (or absence thereof) once the Termination Date has passed, as strongly indicated by the elaborate provisions the Contract contains to identify the Termination Date, the opening words of clause 13.4(a) (where a Termination Date occurs, “the contract is terminated with immediate effect ...”) and clause 13.4(b) (which, on a perfectly straightforward reading, appears to make very clear that where a Termination Date occurs the Claimant is to have no further obligation under the Contract). If clause 3.1.2 is construed in the way indicated above, it removes the apparent conflict between the effect of clause 13.4(a)(i) and clause 13.4(b). This is a case where business common sense points clearly in favour of a particular interpretation, even if at first blush it seems at odds with the language used.

51. I do not accept the implied qualification which Mr Holland sought to introduce to the proviso in clause 3.1.2. Applying the principles referred to above, it is unnecessary to give effect to the commercial bargain between the parties. It would in fact radically undermine that commercial bargain, by leaving the Seller (the Claimant) subject to

the basic obligation to sell the property according to an open-ended and uncertain “reasonable time” limit, in contrast to the indications in the Contract that the parties intended there to be a certain and precisely defined end point for that obligation.

52. The conclusion, therefore, from the discussion above is that the Claimant is free from any obligation to proceed with the sale of the property to Teseo and Teseo’s claim for specific performance is dismissed.

(iii) *The deposit: section 49(2) of the 1925 Act*

53. Section 49(2) provides:

“Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.”

54. Teseo has made the Initial Payment of £50,000. That is to be regarded as payment of the deposit: clause 18.1. The court has a discretion under section 49(2) to relieve Teseo against forfeiture of the deposit and to order its repayment.

55. In my judgment, it is not appropriate for the court to exercise this discretion in Teseo’s favour. In my view, the just and appropriate result is that the Claimant should be entitled to forfeit the entirety of the deposit paid.

56. In clause 4, the Contract makes clear express provision what should happen to the deposit (the Initial Payment) if the Contract did not proceed to completion because of the failure to obtain planning permission within the requisite time and Teseo did not give notice in proper time under clause 3.1.2 to call for completion notwithstanding such failure. By contrast with the position in relation to failure of the condition in clause 3.1.1 (local authority search results), clause 4 provides that the Seller will not be obliged to repay the Initial Payment in that situation. Clause 4 was part of the agreed distribution of risk and reward between the parties, whereby the Claimant was to be bound for a period to sell the property to Teseo if it acquired planning permission (or otherwise decided it wished to proceed) but had no certainty that the sale would proceed and wished to be paid to compensate him for foregoing other possible sale opportunities in the meantime.

57. The leading authority on the exercise of discretion under section 49(2) to which I was taken is *Midill (97PL) Ltd v Park Lane Estates Ltd* [2008] EWCA Civ 1227; [2009] 1 WLR 2460. In that case, after reviewing relevant authority, the Court of Appeal held that since a purchaser’s deposit is an earnest for the performance of the contract which, if the purchaser defaults, could be retained by the vendor without any regard to the question of actual loss or its amount, the court should not exercise its discretion under section 49(2) to return a deposit to a purchaser who had failed to complete, in the absence of something special or exceptional to justify overriding the ordinary contractual expectations of the parties. In that case, the Court upheld the decision of the judge at first instance in declining to exercise the discretion in favour of ordering repayment of any of the deposit.

58. In my judgment, there is nothing special or exceptional in the circumstances of the present case to justify ordering the Claimant to repay any part of the Initial Payment he has received. The Initial Payment was, like an ordinary deposit, an earnest of performance, and the parties must have understood that the ordinary approach to deposits, allowing for their forfeiture if a sale of land does not proceed, would be applicable. The parties expressly provided for this, in clause 4.
59. More than this, the Initial Payment also had the aspect of payment for an option right for Teseo. It paid the Initial Payment as the price to bind the Claimant for an uncertain period of time while it sought to obtain planning permission satisfactory to itself (with no obligation on itself to complete if such permission was not forthcoming) and for a unilateral right for Teseo to acquire the property in the meantime under clause 3.1.2.
60. There is no basis that I can see that would make it right for the court now to use its discretion under section 49(2) to undo the bargain which the parties entered into.
61. Mr Holland submitted that it was unfair to allow the Claimant to retain the Initial Payment when he was also going to have the benefit of the planning permission granted in respect of the property, improving its value, particularly in view of the fact that the application for that permission had been funded by Teseo. I do not agree.
62. Nothing which has occurred falls outside what was contemplated by the parties as a possible outcome when they made their agreement in clause 4. It was within their contemplation that Teseo would make an application for planning permission, that that application might not have been resolved by the relevant date in circumstances meaning that the Contract terminated, and that later on planning permission might nonetheless be granted in relation to the property. Further, it was in the nature of the bargain that the Claimant should be paid the Initial Payment as a price for the option-like features of the Contract, which he could keep if the sale did not in the event proceed. In my view, it would be contrary to justice for the Court to order repayment of any part of the Initial Payment when the Claimant has provided Teseo with the one-sided benefits which it sought for itself under the Contract and when the events which have occurred fall within the scope of contemplation of the parties when they made their bargain.

### *Conclusion*

63. I find that the Contract has terminated and that the Claimant is free to dispose of the property as he sees fit. Teseo's application for specific performance is dismissed. Teseo's application for repayment of the deposit or any part thereof in exercise of the Court's discretion under section 49(2) of the 1925 Act is also dismissed.