Neutral Citation Number: [2023] EWHC 38 (TCC)

Claim No: HT-2022-MAN-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 13 January 2023

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

MULLBERRY HOMES LIMITED

Claimant

- and -

THE COUNCIL OF THE BOROUGH OF BARROW-IN-FURNESS

Defendant

- -
- -

Robert Sterling (instructed by **Mullberry Homes Limited, Legal Department)** for the Claimant
Wilson Horne (instructed by **Brown Barron Solicitors**) for the Defendant

Hearing dates: 12-15 December 2022

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on 13 January 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

HHJ CAWSON KC:

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Introduction

1. The principal question that arises for consideration in the present case is whether the Defendant, The Council of the Borough of Barrow-in-Furness ("**the Council**"), was entitled pursuant to clause 14 thereof, to determine by letter dated 18 June 2019, a contract dated 22 May 2018 and between the Council (1) and the Claimant, Mullberry Homes Ltd ("**Mullberry**"), (2) ("**the Contract**"), whereby the Council agreed to sell and Mullberry agreed to buy two plots of land on Flass Lane, Barrow-in-Furness (together "**the Property**"), conditional on the obtaining a satisfactory planning permission.

2. On 21 July 2021, Mullberry commenced proceedings against the Council in the High Court in the Business and Property Courts in Manchester (Claim No. BL-2021-MAN-000077) ("**the Mullberry Proceedings**"), seeking a declaration as to whether a verge ("**the Flass Lane Verge**") was included within the boundary of one of the plots of land, specific performance of the Contract (if necessary with an abatement in price) and/or damages for breach of contract and/or in lieu of specific performance.

3. Contemporaneously therewith, and apparently without knowledge of the proceedings commenced by Mullberry, on 30 July 2021, the Council commenced proceedings against Mullberry in the County Court at Preston (Claim No. H00PR955) ("**the Council Proceedings**"), seeking a declaration

that the Contract had been validly terminated pursuant to clause 14 thereof, and an order that Mullberry forthwith obtain the removal of a notice entered by Mullberry against the Council's title.

4. By Order dated 10 November 2021, the Council Proceedings were transferred to the Business and Property Courts in Manchester to be considered for case management together with the Mullberry Proceedings.

5. Subsequently, by Order dated 16 February 2022, HHJ Stephen Davies, sitting as a Judge of the High Court, gave directions in respect of the case management of both sets of proceedings, directing that the Mullberry Proceedings be treated as the lead claim, and that the two sets of proceedings be transferred to the Technology and Construction Court in the Business and Property Courts in Manchester for case management, and transferred also into the Shorter Trials Scheme (under CPR PD 57AB) for the trial of a number of preliminary issues, with me being designated as the judge for the purposes thereof.

6. The preliminary issues directed to be tried by the Order dated 16 February 2022 were the following:

> *"(1) Did the [Contract] include the Flass Lane Verge and/or the strip as defined and referred to in the statements of case in the claims?*
>
> *(2) Did the [Contract] include any implied terms, including those for which the Claimant contends at paragraph 5 of its particulars of claim in the lead claim?*
>
> *(3) Has the Defendant breached the [Contract]?*
>
> *(4) Has the Claimant breached the [Contract]?*
>
> *(5) What is the effect of any breaches, including what remedies are the parties entitled to?*
>
> *(6) Has the [Contract] been terminated, whereupon the notice registered against the title to the land, the subject matter of the [Contract], should be removed, or should the [Contract] be specifically performed?*
>
> *(7) For the avoidance of doubt, all issues as to the amount of abatement of purchase price, compensation and damages shall be the subject of a later trial."*

7. The preliminary issues were tried before me between 12 and 15 December 2022. This is my judgment in respect of them.

8. Mullberry was represented by Mr Robert Sterling Counsel, and the Council by Mr Wilson Horne of Counsel. I am grateful to them both for their helpful written and oral submissions.

Parties

9. Mullberry is a housebuilder and developer that has carried out a number of developments in and around Barrow-in-Furness, Cumbria. Its principal witness was Mr Derek Hugh Barnes ("**Mr Barnes**") who, although not a de jure director of Mullberry, describes himself as its *"owner"*.

10. The Council is the local authority for Barrow-in-Furness. In that capacity, it owns land including, at all relevant times, the land registered at HM Land Registry with title absolute under title number CU110510, of which the Property formed part. In addition to its other functions, the Council is the local planning authority for the area including the Property, in which capacity it exercises its statutory rights, powers, discretions and responsibilities as such.

Witnesses

11. Mullberry called as witnesses of fact Mr Barnes and Mr Allan Lloyd-Haydock ("**Mr Lloyd-Haydock**"). Mr Lloyd-Haydock is an architectural technician, employed by Mullberry until April 2021 but now engaged by Mullberry on a self-employed basis. He describes his job as being to complete and submit paperwork for planning permission applications made by Mullberry, but he accepted in evidence that he did not have expertise as such in planning policy and procedures.

12. Further, under compulsion of a witness summons and having served a witness summary in respect of his evidence, Mullberry also called as a witness Mr Stephen John Solsby ("**Mr Solsby**"), a civil engineer, who was employed by the Council as Assistant Director of Regeneration and Built Environment at all material times prior to 22 September 2019. Whilst this role involved oversight over a number of departments, Mr Solsby was clear in his evidence that he did not have any role as a planning officer with responsibility for decisions taken by the Council as a local planning authority.

13. The Council called the following witnesses of fact, namely:

    i) Mr David Joyce ("**Mr Joyce**"), who has at all relevant times been the Council's Commercial Estate Manager tasked with the identification and disposal of surplus land and property assets on behalf of the Council; and

    ii) Mr Jason Hipkiss ("**Mr Hipkiss**"), who has, at all relevant times been the Council's Head of Development Management, in which capacity he oversaw the response of the Council, as local planning authority, to the relevant applications for planning permission submitted by Mullberry in respect of the Property.

14. In addition, the parties called expert evidence as to planning practice, namely:

    i) Mr Rawdon Edward William Gascoigne ("**Mr Gascoigne**"), called on behalf of Mullberry; and

ii) Mr Alastair Skelton ("**Mr Skelton**"), called on behalf of the Council.

15. Mr Gascoigne produced a report dated 9 September 2022, and Mr Skelton produced a report also dated 9 September 2022. They subsequently produced a joint report dated 4 November 2022.

Assessment of the witnesses

16. This is not a case in which, in my judgment, any witness deliberately gave false evidence.

17. However, I bear in mind the much-repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15]-[22] with regard to the unreliability of memory, and his caution to place limited weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings in respect of such matters on inferences drawn from the documentary evidence and known or provable facts.

18. These observations have a resonance in the present case where we are concerned with events that took place some years ago, and where there is particular scope for witnesses to subconsciously recall events in a self-serving way. Nevertheless, I recognise that any findings that I am required to make must be made by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each.

19. Mr Barnes, who I understand to be now well in his 80s, came across as an experienced and seasoned builder and developer, but as someone who had little time for the niceties of planning policy or procedure. Nevertheless, he came across as a frank and honest witness doing his best to assist the Court, as did Mr Lloyd-Haydock.

20. The only real conflict of evidence in the case concerns Mr Barnes' evidence in paragraph 3 of his witness statement where, having referred to Mr Solsby, incorrectly, as the Council's Chief Planning Officer, he went on to say: *"I indicated to him on behalf of the Claimant Company that we would only be interested in the site if we could have the difference in housing density between the permitted density of the nearby Oakmere site of 50/60 houses and our pre-existing site at Ratings Village of 300 houses which worked out at 15 houses an acre therefore the housing density as stated in the Contract was fine. Mr Solsby accepted this density and confirmed that he would support any planning application with such housing density."*

21. Mr Solsby's evidence was to the effect that he could not recall any discussions, including any discussions concerning density, with Mr Barnes at the relevant time, or indeed at any time. I will return to consider this further in due course, but I consider it likely that in late 2017/early 2018, there was discussion between Mr Barnes and Mr Solsby in which Mr Barnes made clear that Mullberry would be looking to develop with the density of 15 houses per acre and that that was the only basis on which Mullberry was interested in the Property, and that Mr Solsby, in his capacity as Assistant Director of Regeneration and Built

Environment, was generally encouraging of Mullberry purchasing on this basis, hence the subsequent inclusion in the Contract of provisions relating to building to a density of 15 houses per acre, and making a planning application relating to a development of 98 dwellings or more on the Property (i.e. over the two sites). I consider this is likely to have led Mr Barnes to believe, rightly or wrongly, that the Council did not consider itself bound by planning briefs prepared in respect of the two sites, at least so far as density of development was concerned.

22. I note that a letter dated 3 April 2018 from the Council's Solicitors, Brown Barron, to Mr Joyce refers to *"recent conversations"* between Mr Barnes and the Council, and does so in the context of a letter received from Mullberry shortly prior thereto dated 29 March 2018 which set out Mullberry's ambition of achieving a density of development consistent with paragraph 3 of Mr Barnes' witness statement. In this context, and in the light of his own evidence, it is unlikely that such conversations were between Mr Barnes and Mr Joyce, and there is, as I see it, no other obvious person with whom Mr Barnes might have had the relevant *"recent discussions"* apart from Mr Solsby.

23. Mr Solsby did, in his evidence, come across as somewhat defensive, as perhaps one might have expected given the circumstances in which he was called to give evidence under compulsion. However, I did not find his evidence to be deliberately evasive, or that he was deliberately seeking to mislead the Court so far as discussions between himself and Mr Barnes concerned. Rather, I consider it more likely that he has subconsciously recalled events in a way more favourable to the Council than reflects the reality of the position by not recalling his discussions with Mr Barnes. Given the way that he has recalled his evidence, I consider that I must treat his evidence with a degree of caution.

24. I found Mr Joyce and Mr Hipkiss each to be honest witnesses doing their best to assist Court. I found Mr Hipkiss to be a particularly impressive witness in respect of the explanations that he gave concerning the relevant planning process.

25. I found both of the expert witnesses to be helpful and impressive witnesses despite the differences between them, which I will return to so far as necessary. I consider that the differences between them largely amounted to differences of professional opinion in respect of matters in which there was scope for reasonable difference of professional opinion, rather than differences relating to matters of principle in respect of which there was a clear answer.

The Contract

26. The subject matter of the Contract, namely *"the Property"*, was defined by clause 1.1 thereof as: *"the freehold property on Flass Lane, Barrow in Furness shown more particularly delineated in the red on the Plans and being part of the land registered at HM Land Registry with title absolute under title number CU110510."*

27. *"Plans"* were defined in the Contract as follows:

"Plans: *the two plans attached hereto and marked A and B.*

Plot A – the land shown edged red on the attached plan marked A

Plot B – the land shown edged red on the attached plan marked B."

28. Plot A has been referred to in the present proceedings as *"the Duchy Court Land"*, and Plot B has been referred to as *"the Allotments Land"*. I shall adopt these expressions in this judgment.

29. Pursuant to clause 16 of the Contract, the Council agreed to sell the Property to Mullberry for the sum of £1.9 million upon the terms of the Contract.

30. By clause 2.1 of the Contract, the Contract was expressed to come into force on the date thereof, but subject to clause 2.2 that provided that clauses 15 to 22 (inclusive) of the Contract were conditional upon the satisfaction (or waiver in accordance with clause 2.3 of the Contract) of the *"Condition Precedent"*, and would come into force on the *"Unconditional Date"*. Clause 2.3 of the Contract provided that the Council and Mullberry might only waive the Condition Precedent by agreement in writing.

31. By clause 14 of the Contract it was provided that: *"If the Unconditional Date has not occurred by the Long Stop Date either the [Council] or [Mullberry] may at any time after the Long Stop Date (but only before the Unconditional Date) give written notice to the other to determine the [Contract]."*

32. The Contract, at clause 1.1 thereof, included, so far as is relevant, the following definitions:

    i) *"Buyer's Unacceptable Condition"* as meaning: *"a Planning Requirement which in [Mullberry's] reasonable opinion:*

        (a) will or is likely to limit the occupation or use of the whole or any part of the Development to any designated person or occupier; or

        (b) will or is likely to cause the Planning Permission (once implemented) to be for a limited period only; or

        (c) will increase materially the cost of carrying out the cost of carrying out the Development [; or]

        (d) will result in a housing density of less than an average of 15 dwellings per acre".

    ii) *"Condition Precedent"* as meaning: *"the occurrence of the Satisfaction Date".*

    iii) *"Determining Authority"* as meaning: *"the local planning authority or other appropriate determining body or person"* – so far as relevant in the present case, the Council in its capacity as local planning authority.

iv) *"Development"* as meaning: *"the construction on the Property of 98 or more dwellings".*

v) *"Long Stop Date"* as meaning: *"31st May 2019".*

vi) *Planning Agreement"* as meaning: *"an agreement or unilateral undertaking under section 106 of the Town and Country Planning Act 1990 required to obtain Planning Permission".*

vii) *"Planning Application"* as meaning: *"an application for Planning Permission for the Development".*

viii) *"Planning Permission"* as meaning: *"detailed planning permission for the Development granted by a Determining Authority pursuant to a Planning Application".*

ix) *"Planning Requirement"* as meaning: *"any of the following:*

(a) a condition attached to a Planning Permission;

(b) a provision of a Planning Agreement."

x) *"Satisfaction Date"* as meaning: *"the latest of the following dates:*

(a) the date on which it is established under [the Contract] that a Satisfactory Planning Permission has been granted;

(b) the next Working Day after the expiry of the Review Period (provided that no Third Party Application is commenced by that date); and

(c) in the event that any Third Party Application is commenced, the next Working Day after the date on which:

(i) the Third Party Application is Finally Determined; and

(ii) a Satisfactory Planning Permission is finally granted or upheld whether after a reference back to the Determining Authority (sic);

so that any Satisfactory Planning Permission is no longer open to challenge in any way by the issue of further Third Party Applications".

xi) *"Satisfactory Planning Permission"* as meaning: *"a Planning Permission and Planning Agreement (if any) free from any Buyer's Unacceptable Condition (unless any Buyer's Unacceptable Condition is waived by [Mullberry] in accordance with [the Contract]".*

xii) *"Unconditional Date"* as meaning: *"the earlier of:*

(a) the Satisfaction Date; and

(b) the date on which the Condition Precedent is waived in accordance with clause 2.3".

33. The following further provisions of the Contract are relevant for present purposes:

i) By clause 3 of the Contract it was provided that the conditions in Part 1 of the Standard Commercial Property Conditions (Second Edition) ("**the Standard Conditions**") should be incorporated into the Contract so far as they applied to a sale by private treaty, related to freehold property, and were not inconsistent with other clauses in the Contract, but that Part 2 of the Standard Conditions should not be so incorporated into the Contract.

ii) By clause 5 of the Contract it was provided as follows:

"5.1 Within 12 weeks after the date of [the Contract], [Mullberry] shall submit the Planning Application to the Determining Authority and shall use all reasonable endeavours to obtain the grant of a Satisfactory Planning Permission as soon as reasonably possible.

5.2 If it appears necessary to obtain a Satisfactory Planning Permission, [Mullberry] may amend the Planning Application or withdraw and submit in substitution a revised Planning Application. Any such amendment, withdrawal and substitution shall be approved in writing by [the Council] (such approval not to be unreasonably withheld or delayed).

5.3 [Mullberry] may not agree to any extension of the statutory period for determination of the Planning Application without the prior written approval of [the Council] (such approval not to be unreasonably withheld or delayed)".

iii) By clause 8 of the Contract it was provided that Mullberry would keep the Council informed as to progress of the Planning Application, and any Planning Agreement, Planning Appeal or Third Party Application.

iv) By clause 12.1 of the Contract it was provided that Mullberry might waive its right to treat any Planning Requirement as a Buyer's Unacceptable Condition by giving notice to the Council on or before any of the dates specified therein.

v) By clause 24.1 of the Contract it was provided that Mullberry should *"use all reasonable endeavours to satisfy any conditions precedent to the Planning Permission without unreasonable delay, and shall commence the Development within three months of the discharge of any such conditions precedent, or if none within three months of the grant of*

the Planning Permission, and shall procure that the Development is completed without unreasonable delay."

vi) Further, clauses 24.2 and 24.3 of the Contract went on to provide that Mullberry should procure completion of construction of not less than 24 dwellings on the Property ready for occupation by 31 July 2021, and procure completion of the whole development by 31 December 2024.

vii) By clause 28 of the Contract it was provided that, without affecting any other right or remedy available to it, the Council might terminate the Contract by giving notice to Mullberry if any of the events set out in sub-clauses 28(a) to (n) occurred, which included Mullberry being in fundamental breach of any of its obligations in the Contract (sub-clause (a)) and Mullberry being in substantial breach of any of its obligations in the Contract and having failed to rectify the breach within a reasonable time after receiving notice to rectify from the Council (sub-clause (b)).

viii) By clause 29 of the Contract, it was provided that if either party gave notice to terminate the Contract under clause 14, or the Council gave notice to terminate the Contract under clause 28 then, amongst other things:

a) Pursuant to clause 29.1(a), but subject to clause 29.1(b), the Contract should be terminated with immediate effect from the date of the notice to terminate, and neither party should have any further rights or obligations under the contract save for the rights of either party *"in respect of any earlier breach of"* the Contract, and *"the obligations in the clauses referred to in clause 29.1(b)"*;

b) Pursuant to clause 29.1(b) it was provided that: *"Clause 29 and clause 11.4 shall continue in force notwithstanding termination of the Contract under clause 29.1(a)"*;

c) pursuant to clause 29.1(c) it was provided that within 15 Working Days after the termination, Mullberry should remove all entries relating to the Contract registered against the Council's title to the Property.

ix) By clause 30.1 of the Contract it was provided that the Contract constituted the whole agreement between the parties and superseded all previous discussions, correspondence, negotiations, arrangements, understandings and agreements between them relating to its subject matter.

x) By clause 30.2 of the Contract, Mullberry acknowledged that in entering into the Contract and any documents annexed to it, it did not rely on, and should have no remedies in respect of, any representation or warranty (whether made innocently or negligently) other than those set out in the Contract or a document annexed to it, or contained in written replies given to any written enquiries raised before the date of the Contract.

xi) By clause 30.4 of the Contract, it was provided that nothing (contained or implied) in the Contract should fetter the Council's statutory rights, powers, discretions or responsibilities as a local planning authority.

xii) By clause 30.5 it was provided that condition 9.1.1 of Part 1 of the Standard Conditions was varied so as to read: *"If any plan or statement in the contract, or in any written replies which the seller's conveyancer has given to any written enquiries raised by the buyer's conveyancer before the date of the contract, is or was misleading or inaccurate due to any error or omission, the remedies available are as follows."*

Background to the Contract

34. On 10 February 2015, the Council itself applied for outline planning permission to build 30 houses on the Duchy Court Land. Outline planning permission was granted on 30 July 2015.

35. On 26 June 2014, the Council had obtained a protected species survey in respect of the Duchy Court Land, but it only obtained an extended protected species survey as to the presence of protected species such as reptiles on 30 July 2015 after its application had been made and validated. This latter report identified, amongst other things, potential for foraging reptiles, especially slow-worm, on the north of the property at the location of cleared buildings, together with further potential for hibernating and foraging reptiles elsewhere on the property. The report recommended the following further survey in respect of reptiles: *"Prior to site clearance, a reptile scoping survey should be carried out around the area of the demolished buildings from the former smallholding. Reptiles are protected from killing and injuring by the Wildlife and Countryside Act 1981 (as amended). If required, presence/absence surveys should be carried out in April/May or in September when reptiles are most visible."*

36. During the course of 2016, the Council issued separate Design and Development Briefs ("**the D & D Briefs**") in respect of the Duchy Court Land and the Allotments Land.

37. The following matters referred to in the D & D Brief relating to the Duchy Court Land should be noted:

i) The Brief described its purpose as being to promote the Duchy Court Land as a high quality location for housing, setting out the characteristics of the site and surrounding area, and to provide guidance on how the Council wished to see the site developed.

ii) The Council's *"Vision"* as set out therein was described as including that building designs: "*were expected to reflect the arrangement and appearance of the varied types of traditional farm buildings typically found in "farmsteads" within and beyond the settlement edge."* Further detail was provided in respect thereof.

iii) It was stated that whilst the outline planning approval was for 30 units: *"approval consent for that number will only be forthcoming if it can be*

demonstrated that it can be achieved in full accordance with the brief without resulting in a cramped uniform form of development or one that is dominated by its access layout … It is expected that the site would support a range of 3 to 5 bedroom market houses with on curtilage parking located behind the building line."

iv) It was made clear that pre-planning application discussions would be *"an* ***essential part in developing the scheme prior to submission including with other key stakeholders****. The Council expects all issues to be resolved prior to the submission of any application",* and that: *"Achieving an improved quality on site is the fundamental purpose of the Brief."*

v) It was further made clear that certain prescribed documents would be needed to accompany the application for full planning permission including: *"Design & Access Statement"* and *"Habitat and Protected Species Survey"*.

38. The following matters referred to in the brief relating to the Allotments Land should be noted:

i) The purpose of the brief was described as being: *"to assist developers in their approach to the site and inform, guide and deliver a comprehensive and sustainable housing development that responds to the site's character and context. It is intended to provide a starting point for a high quality development that will help to lift the quality of design not just on this site but across the Borough"*.

ii) Further, the Brief was described as being a brief to produce a scheme for: *"full planning permission conceived for the whole site in a way which meets the principles and criteria set out in this document and leads to improved choice in the local housing market."*

iii) A *"preferred approach to the general character"* was *"suggested"* that included reference to: *"An informal development of approximately 26 no. one, one and a half and two storey dwellings arranged to address the surrounding land uses and environment. A standardised suburban layout is unlikely to be supported"*.

iv) Again, the Brief stated that pre-application discussions would be an important part in formulating scheme proposals with key stakeholders, and that the Council expected all issues to be resolved prior to the submission of an application: *"to help ensure that it tracks through the process efficiently."*

v) Documents were again specified as being required to accompany the application for full planning permission, including: *"Planning Statement"*, *"Design & Access Statement",* and *"Habitat and Protected Species Survey"*.

39. Later in 2016, the Council produced and issued sales particulars and tender documentation ("**the Sales Particulars**") in respect of the sale of the Duchy Court Land and the Allotments Land as *"Residential Development Opportunities"*. The Sales Particulars:

    i) Stated that the Council aimed to: *"realise a high quality bespoke housing scheme on the sites in what is an attractive area of the town close to public transport networks, a range of schools, sixth form college and neighbourhood supermarkets."*

    ii) Referred to the fact that the Duchy Court Land benefited from outline planning approval.

    iii) Required interested parties to note that: *"attention should be paid to the Development Brief the Council has produced"*, with a link being provided thereto.

    iv) Stated that the deadline for submission of offers was 12 noon on Friday, 11 November 2016.

    v) Under the heading *"Contractual obligations"*, stated, amongst other things, that:

        a) The purchaser would be required to exchange contract within six weeks of the draft contract being provided;

        b) Contracts were to be conditional on full planning consent being obtained for the development of the sites;

        c) The purchaser would be required to commence development on the sites within three months of obtaining full planning approvals; and

        d) No person in the employment of the Council had any authority to make any representation or warranty whatsoever in relation to the Property.

40. Another party referred to below (Oakmere Homes) did respond to this offer, but no sale ultimately proceeded.

41. On 13 February 2017, Mullberry made an offer of 2.25 million for: *"the land at Duchy Court"* and *"approx. 3 acre open field opposite Risedale Nursing Home"*. Nothing ultimately came of this offer.

42. In August 2017, the Council produced a *"Validation Checklist"* in respect of applications for full planning permission, setting out the documents and information that would be required on submitting an application for full planning permission in order for the Council to validate the application on submission. The list of local requirements included, amongst other things, a *"Biodiversity Survey and Report"*.

43. Neither the Duchy Court Land nor the Allotments Land having sold when marketed by the Council in 2016, the Council offered the Property for sale again in late 2017 using sales particulars in the same terms as the Sales Particulars, but specifying a closing date for bids of 13 November 2017.

44. In response thereto, Mullberry submitted a bid for both sites of £1.9 million.

45. The various bids submitted in response to the reissued Sales Particulars were considered by the Council's Executive Committee on 18 December 2017. Bids from four bidders were considered by the latter, which resolved to accept Mullberry's bid at the price of £1.9 million for the two sites.

46. I will deal with the contemporaneous documentation leading up to the entry into the Contract on 22 May 2018, before dealing with relevant oral evidence relating thereto.

47. On 5 January 2018, Brown Barron wrote to Mullberry's enclosing a number of documents relating to the sale including a draft contract. As I understand it this draft contract, which has not been produced, said nothing regarding density of development in the definition of *"Buyer's Unacceptable Condition"* or the definition of *"Development"*.

48. On 1 February 2018, Mullberry (by its Legal Department) returned an amended version of the draft contract to Brown Barron. Significantly, the amended version of the draft contract so returned included the following revisions that the Council subsequently accepted and agreed to:

    i) An entirely new sub-clause (d) within the definition of Buyer's Unacceptable Condition, so that the latter definition now extended to a Planning Requirement that: *"(d) will result in a housing density of less than an average of 15 dwellings per acre"*;

    ii) A revised definition of *"Development"* so that the latter referred to the construction on the Property of 98 or more dwellings. The definition as originally drafted contained either a blank, or referred to a lesser number of dwellings.

    iii) A revised clause 5.1 that referred to the Planning Application being submitted within 12, rather than 8 weeks after the date of the Contract.

49. On 16 February 2018, Mr John Swindell ("**Mr Swindell**") of Mullberry's Legal Department wrote to Brown Barron attaching two plans that it was proposed should be attached to the Contract and relevant transfers (TR1's). On 20 February 2018, by email timed at 9:40 AM, Brown Barron responded to the effect that the plans provided were not precise enough. It was Mr Joyce's evidence that he prepared the relevant Plan A and Plan B that were subsequently used for the purposes of the Contract, and that Plan B at least, relating to the Duchy Court Land, was based on the Council's registered title plan, but using an updated representation thereof as shown on Ordnance Survey maps maintained by the Council as a record of land ownership.

50. By email timed at 10:02 AM on 20 February 2018, Mr Swindell responded to Brown Barron saying that, in relation to the Allotments Land: *"there seems to be a ransom strip fronting to Flass Lane as the area to be transferred – to include the road entrance – does not come up flush with the publicly adopted highway – Flass Lane. … Please clarify and once done the Plans issue should be settled."*

51. By their response dated 23 February 2018, Brown Barron stated that the Council agreed that there was a narrow piece of land between the hedge and the pavement, but said that this was not within the Council's registered title and that it did not own this land. Consequently, it was said that the Council could not include this strip, i.e., the Flass Lane Verge, in the sale.

52. In the email dated 3 April 2018 referred to above from Brown Barron to Mr Joyce, Brown Barron referred to the letter dated 29 March 2018 received from Mullberry that had referred to *"recent conversations"* between Mr Barnes and the Council, and which also referred to Mullberry requiring a proviso that the housing density to be granted on each of the two parcels of land should be not less than the average housing density then currently permitted to be built between Mullberry's existing Flass Lane development and a site belonging to Oakmere Homes at Meadowlands, i.e., 15 houses per acre.

53. Brown Barron responded to Mullberry's letter dated 29 March 2018 by letter dated 25 April 2018 in which Brown Barrow stated that they had taken instructions and that, amongst other things, the Council was prepared to agree to:

    i) The definition of *"Buyer's Unacceptable Condition"* including the proviso that the housing density should be not lower than an average of 15 houses per acre; and

    ii) The definition of *"Development"* being the construction on the Property of 98 dwellings.

    However, the letter dated 25 April 2018 expressly stated that the Council made no representation that planning consent would be granted for such a number or such a density.

54. The Contract was then entered into on 22 May 2018.

55. During the course of his evidence, Mr Barnes referred to the Property initially being marketed by the Council, but to Mullberry not having put in a tender because of the D & D Briefs in relation thereto. His position was that the form of development proposed by the latter, in particular with the limited density proposed, was not economic, and simply did not reflect the sort of housing that people wanted to buy.

56. An offer was apparently accepted by the Council made by Oakmere Homes, but this sale did not proceed, resulting in the Property being re-marketed in late 2017 as referred to above, at which stage Mullberry made its bid.

57. In the course of his oral evidence, Mr Barnes explained the position, as he saw it, as follows:

> *"The Council initially tendered the site with this brief* [the D&D Briefs]. *They accepted an offer from a firm called Oakmere. We would not put in a tender for the land because of the planning brief. Hence when the Oakmere site didn't go ahead, they retendered it again and I made an offer for it subject to the density being half of the difference between our Flass Lane development, where there was about almost 300 houses, and Oakmere site up the road which is about half a mile away. That emerged at about 15 to the acre. That was the only reason we entered into the contract. It was a conditional contract on achieving a density of 15 to the acre. This planning brief is totally out of the window. It's nothing to do with our contract … We would not have bought the land and I don't think anyone else would buy that land with those criteria with that planning brief."*

58. Subsequently, and further to what Mr Barnes had said in paragraph 3 of his witness statement, Mr Barnes referred in the course of his oral evidence, to the planning committee and Mr Hipkiss's *"boss"*, who he identified as Mr Solsby, having agreed to the planning density of 15 homes per acre.

59. As further expanded upon in the course of his oral evidence, it was as a result of what he considered that he had agreed with Mr Solsby that Mullberry, to all intents and purposes, ignored the D&D Briefs in respect of the Property, and did not have further pre-planning application discussions with the Council of the kind envisaged by the D&D Briefs.

60. As referred to above, I consider it likely that there were discussions between Mr Barnes and Mr Solsby, and I consider that these would have been at some point prior to the sending of Mr Swindell's letter dated 29 March 2018 that had referred to *"recent conversations"* with the Council. I consider it likely that Mr Barnes did, in the course of those conversations make it clear to Mr Solsby that Mullberry only regarded the purchase and development of the Property as viable if at least the same average density as referred to in the letter dated 29 March 2018 could be achieved. I further consider it likely that Mr Solsby, with his responsibilities for regeneration etc. was generally encouraging to Mr Barnes in this ambition to develop to this sort of density in order to encourage Mullberry to proceed with the purchase of the Property, and therefore, when the issue was formally raised in correspondence, Mr Solsby was prepared to give, or to authorise the giving of instructions to Brown Barron regarding the revisions to the Contract referred to in the latter's letter dated 25 April 2018.

61. I consider it likely that it was on the basis of the discussions as between Mr Barnes and Mr Solsby, and the fact that the Council was prepared to agree to the revision of the terms of the Contract concerning density that had been proposed by Mullberry, that Mullberry did in fact, to all intents and purposes, ignore the D&D Briefs in subsequently submitting planning applications. However, I consider it unlikely that Mr Solsby went so far as to say to Mr Barnes that he would positively support *"any"* planning application, or that, objectively considered, Mr Solsby gave any indication that the Council's ordinary planning

procedures, including giving appropriate consideration to the D&D Briefs, would not be followed. To the contrary, I consider it significant that Brown Barron's letter dated 25 April 2018 made it clear that although the Council was prepared to enter into a contract which contain the provisions that it did so far as density was concerned, the Council was making no representation that planning consent for the relevant number of units, or the density provided for by the terms of the Contract, would be granted by the Council in its distinct capacity as local planning authority.

62. Further, I am satisfied that no officer of the Council exercising any planning function was party to the giving of any encouragement to Mullberry that planning permission permitting development to a density of 15 units per acre, or a total of 98 units or more on the Property as a whole would be granted.

63. Of further relevance in this context is clause 30.4 of the Contract that provided that nothing contained or implied in the Contract should fetter the Council's statutory rights, powers, discretions or responsibilities as a local planning authority.

64. There was some issue as to how much preliminary work with regard to preparation for the development of the Property was done by Mullberry prior to entering into the Contract. Paragraph 2.12 of Mr Gascoigne's report referred to Mullberry having worked on scheme design and development housing layout from 8 August 2017 until 28 June 2018. However, Mr Lloyd-Haydock's evidence was to the effect that nothing much beyond basic feasibility work was carried out prior to Mullberry entering into the Contract itself, and in particular that a detailed scheme was not worked up prior to the Contract because Mullberry had not wanted to risk a waste of costs if the Contract was never concluded.

65. There is one further relevant evidential matter, namely that Mr Barnes says that he was at the offices of Brown Barron when exchange of contracts took place, and that prior to exchange taking place, he asked Mr Chris Barron of Brown Barrow to confirm or otherwise whether the verges and any strips of land, if any, between the Allotments Land and Flass Lane was owned either by the Council or the County Council and maintained as such. Mr Barnes says that Mr Chris Barron confirmed that any such land would be maintained by the County Council, and that it was upon him so confirming, together with other assurances given, that Mullberry exchanged contracts.

66. Mr Chris Barron has not been called by the Council to give evidence, and I am prepared to accept Mr Barnes' evidence that a conversation along the above lines took place.

Events following entry into the Contract

67. Within the period of 12 weeks provided for by the Contract, which both experts agree was tight, on 9 August 2018, Mullberry submitted an application to the Council, in its capacity as local planning authority, for detailed planning permission to build 99 dwellings on the Duchy Court Land and the Allotments

Land, being a mix of detached and semi-detached houses ranging from 1 to 5 bedrooms. Further details are provided in Mullberry's Design Access Statement dated 10 August 2018, which includes a plan of the proposed development of the two sites showing a fairly traditional residential estate development layout, significantly different from the design and environment envisaged by the D&D Briefs. Further, the access to the Allotments Site is shown has being gained across the Flass Lane Strip, rather than using an existing access at the north of the Allotments Site.

68. It was Mr Lloyd-Haydock's evidence that the application, and the relevant supporting documentation, was put together by himself acting along with Mr Barnes, and without any input from a planning consultant.

69. On 22 August 2018, Mrs Pam Kayes ("**Mrs Kayes**"), a planning technician employed by the Council, emailed Mr Alistair Wilcock ("**Mr Wilcock**") (who I understand to be the sole de jure director of Mullberry) and Mr Lloyd-Haydock, to inform them that Mullberry's application for detailed planning permission could not be validated as complete due to some 10 reasons that were set out in the relevant email. These included deficiencies in the site location plan submitted, the absence of a transport assessment, the requirement for an *"extended phase 1 habitat survey"* and, at paragraph (10) a statement that: *"As the application relates to two separate sites with two separate accesses, two separate applications should be submitted. The site of Duchy Court would attract a fee based on 58 dwellings and the site off Flass Lane would attract a fee based on 41 dwellings. To avoid confusion, all documentation such as contamination reports etc should be specific to the application they relate to but in relation to the Transport Assessment will need to consider the traffic generated by both sides."*

70. The relevant email concluded by stating that once the required information been received and was considered complete, the application would be registered and the consultation procedure commenced accordingly. However, if not received within two weeks, the Council would assume that Mullberry did not wish to proceed with the application.

71. The experts were agreed that the Council, as local planning authority, was entitled to decline to validate Mullberry's application for planning permission by its email dated 22 August 2018, although the experts were not agreed that the Council was entitled, as it sought to do by paragraph (10) of the email dated 22 August 2018, to insist on separate applications for the two sites. Whilst Mr Skelton was of the opinion that the Council was entitled to so insist, Mr Gaskell disagreed that this was the case, in particular on the narrow basis said to have been identified in paragraph (10) of the email dated 22 August 2018 itself.

72. Mrs Kayes was engaged by the Council as a validation officer in respect of planning applications. Mr Hipkiss described this as an essentially tick box role, but that Ms Kayes would, as required, discuss issues raised by planning applications with other planning officials as part of the process of considering whether an application should be validated, and that it was likely that the

inclusion of paragraph (10) was based on discussion with one or more planning officers within the Council's planning team.

73. On 5 September 2018, Mr Wilcock emailed Mrs Kayes in order to confirm that reports were being obtained as required. No objection was taken regarding paragraph (10) of the email dated 22 August 2018.

74. On 10 September 2018, Mullberry obtained, through BEK Enviro, a Preliminary Ecological Appraisal of the two sites prepared by Dr Liz Neale of Ascerta ("**the Preliminary Ecological Appraisal**"). This recorded, at paragraph 5 thereof, amongst other things, that the Allotments Site was very low value to amphibians and reptiles due to the grazing regime, but that the habitats within the Duchy Court Land were more suited to reptiles and amphibians and that these endangered species *"could be present there"*. Further, in paragraph 6.2 thereof, reference was made to the Duchy Court Land having suitable habitat for reptiles, and to further work to be untaken in relation to protected species, including undertaking reptiles surveys. The conclusions at paragraph 7 thereof stated that it was considered that there would be very limited impact on the local ecology as a result of the proposals, provided the recommendations referred to were followed including: *"1. Establishing the presence or likely absence of reptiles at the Duchy Court site and determining appropriate mitigation to ensure no harm to reptiles present. Surveys can be done between April and September."*

75. On 13 September 2018, Mullberry obtained from BEK Enviro a Preliminary Risk Assessment in respect of contamination for the Allotments Land.

76. On 19 September 2018, Mr Hipkiss emailed Mullberry threatening to close the file on Mullberry's application for planning permission as the details required had not been provided. Mullberry responded the same day to the effect that the information required by the Council was being put together and would be provided.

77. On 21 September 2018, Mullberry sent to the Council, as local planning authority, the Preliminary Ecological Appraisal, and the Preliminary Risk Assessment. Further, on 24 September 2018, Mullberry sent to the Council a Transport Assessment.

78. On 30 November 2018, Brown Barron, on behalf of the Council, wrote to Mullberry referring to the fact that clause 5.1 of the Contract had required Mullberry to submit a planning application within twelve weeks of the date of the Contract, and required Mullberry to use all reasonable endeavours to obtain the grant of a satisfactory planning permission as soon as possible. Brown Barron asserted that as no planning application had been registered by the planning department, there appeared to be a fundamental breach of Mullberry's obligations under the Contract.

79. In response thereto, by email dated 4 December 2018, Mr Barnes explained that Mullberry had made a detailed planning application and had paid the requisite fee within the timescale provided for by the Contract. However, Mr Barnes identified that *"the planners"* wanted separate applications in respect of the two

sites, and required further information in respect of various matters that would be dealt with, some of which were outside Mullberry's control. He stated that he hoped that all matters would be resolved around 14 January 2019. It is to be noted that he did not, at this stage, seek to challenge the requirement for two separate applications.

80. Subsequently, in December 2018 and early January 2019, Mullberry obtained a Drainage Strategy and Assessment of Flood Risk in respect of the Allotments Land, an Archaeological Desk-Based Assessment in respect of the two sites, and an Arborical report in respect of the Duchy Court Land.

81. On 9 January 2019, or thereabouts, Mullberry submitted an application for detailed planning permission to build 58 houses on the Duchy Court Land, and a separate application for detailed planning permission to build 41 houses on the Allotments Land. The former application was supported, amongst other things, by the Preliminary Ecological Appraisal, and the earlier ecological reports obtained by the Council in respect of its application for outline planning permission made in 2015.

82. By a number of emails dated between 18 January 2019 and 25 January 2019, Mrs Kayes responded to the applications for detailed planning permission, raising validation issues and stating that the applications could not be validated as complete at present due to the reasons set out in those emails. The email dated 18 January 2019 responding to the Duchy Court Land application referred, amongst matters, at paragraph (4) thereof, to the species survey and habitat reports (as previously obtained by the Council) as being out of date and as appearing to be superseded by the Preliminary Ecological Appraisal. Mrs Kayes continued: *"Please can you clarify if this is your intention. On this basis the Ecological Appraisal identifies the need for further surveys (particularly in relation to badger, reptile, amphibians and invasive species)"*. It is to be noted that the Preliminary Ecological Appraisal, consistent with the earlier technological reports, had identified that the required further surveys in respect of reptiles could only be carried out between April and September as referred to in paragraph 74 above. In paragraph 9 of its Particulars of Claim in the Council Proceedings, the Council pleaded that this application for detailed planning permission in respect of the Duchy Court Land was rejected for validation primarily due to lack of an up-to-date and complete species survey and habitat survey, the point further being made that: *"At all material times [Mullberry] was aware of the need to pursue a planning application and that this local requirement should have been addressed by a survey carried out between April and September 2018."*

83. There then followed further correspondence with regard to validation issues. On 22 February 2019, an Arborical report and other reports were sent to the Council, with a landscape plan to follow. Mullberry enquired as to whether the landscape plan was the only matter outstanding. However, on 11 March 2019, Mrs Kayes emailed Mullberry with outstanding validation issues regarding the Allotments Land.

84. On 19 March 2019, Mullberry provided revised details in respect of the Allotments Land, but as a separate planning application.

85. On 27 March 2019, Mullberry submitted an updated landscape plan and, on 28 March 2019, provided revised details in respect of the Duchy Court Land (for 40 dwellings instead of 58) as a separate planning application.

86. By email dated 28 March 2019, the Council raised validation issues in respect of the further planning application in respect of the Allotments Land, and by email dated 1 April 2019 raised validation issues in respect of the further planning application in respect of the Duchy Court Land. The latter email noted, amongst other things, that the Preliminary Ecological Appraisal had identified the need for further surveys, particularly in relation to badger, reptile, amphibians and invasive species, and noted that the reptile survey would need to be conducted at the correct time of year in accordance with Natural England standing advice.

87. On 2 April 2019, Mullberry responded to the Council with regard to the validation issues raised in respect of the two sites, and also provided an amended drainage report for the Duchy Court Land. The response did not address the issue concerning the need for further ecological surveys in respect of the Duchy Court Land.

88. By 4 April 2019 the various validation issues in respect of the Allotments Land had been dealt with, and the relevant application was validated. However, in respect of the Duchy Court Land, there remained the issue of further ecological surveys. Apart from that and the need for a landscape plan taking account of the arboriculturist's report which was subsequently attended to, all else appeared to be in place in respect thereof. In an email dated 4 April 2019, Mr Lloyd-Haydock enquired as to what *"further information was required on the reptiles"*. Mrs Kayes replied the same day essentially repeating what had been said in the email dated 1 April 2018 concerning the Duchy Court Land, i.e. identifying the need for the further surveys, carried out at the correct time of year.

89. In paragraph 24 of his witness statement, Mr Hipkiss explained the Council's position, as local planning authority, at this stage so far as concerns the application in relation to the Allotments Land that had been validated. He referred to neighbour objections, and discussions between the Council and the Highway Authority about site access arrangement. He also referred to discussion with the relevant case officer, and to the Council forwarding a planning assessment to Mullberry that: *"raised issues seeking clarity on the design strategy that influenced the layout which did not match the design brief produced for the site, Plan policy objectives or guidance within the NPPF. Specific points related to the proposed layout lacking a play area, lacking Affordable housing, the scope of the landscaping was limited and showed no biodiversity net gain."* Mr Hipkiss also referred to the latter document having raised the issue that Mullberry had: *"not carried out any tangible community engagement before submission nor had they engaged with the Councils' (sic) pre-app service which would have highlighted the outstanding issues as matters*

that needed addressing." Mr Hipkiss stated that, at this point, the application in respect of the Allotments Land was not of a suitable standard to put before the Planning Committee with a positive recommendation.

90. In the course of being cross-examined, Mr Hipkiss said that he had not been party to any discussions regarding density of development on the two sites. I accept his evidence in this respect. Further, the question arose during the course of Mr Hipkiss's cross-examination as to Mr Barnes' evidence regarding what the latter considered to be the uneconomic and unviable nature of the lower density development anticipated by D&D Briefs, and as to Mullberry only being interested in purchasing the Property on the basis of being able to achieve a much higher density of development. As to this, Mr Hipkiss commented as follows:

> *"A. And I heard Mr Barnes yesterday say, "That's rubbish, we can't build to that". In Barrow, we are quite pro-development and I think had a discussion been opened whereby Mullberry would have come to the planning office and said, "We understand there's a development brief on the site but we can't meet that, we want to build at 15 to the acre", and I think there would have been an option somewhere, provided that Mullberry were able to come up with a high-quality scheme that kept most of the characteristic of the development brief, but at 15 to the hectare --*
> *Q. Acre.*
> *A. Oh, acre, sorry, yes -- then I'm sure that a solution could have been found to the issue. These things aren't set in stone, because obviously we want to see the sites developed.*
> *Q. So had it been a high-quality development, then 15 units to the acre might have been acceptable?*
> *A. Yes, depending on the layout and everything else."*

91. The planning assessment in respect of the Allotments Site was sent to Mullberry on 23 May 2019. Mullberry did not respond until 9 July 2019, after the Council sent a reminder on 7 June 2019. In its response dated 9 July 2019, Mullberry asked that the relevant application be held in abeyance whilst it took legal advice.

92. No further ecological surveys were provided in respect of the Duchy Court Land. As referred to above and as is common ground, the survey in respect of reptiles required by the Council could not have been begun until April 2019 at the earliest, and even then would have required to have been conducted over a number of weeks subject to climatic conditions.

93. The above explains the position in respect of the planning position, and of the Council as local planning authority. However, on 29 May 2019, Brown Barron wrote to Mr Joyce noting that the *"Long Stop Date"* in the Contract was 31 May 2019, and that if a Satisfactory Planning Permission had not been granted in

respect of the two sites by that date, then either party could serve written notice to determine the Contract. Brown Barron also noted that Mullberry appeared to be in breach of the terms of the Contract by failing to submit its planning application within 12 weeks of the date of the Contract. The relevant email concluded by suggesting that it would be: *"prudent for us to serve written notice promptly and for you then to negotiate further with Mullberry Homes, or indeed any other party."*

94. On 17 June 2019, Mr Solsby emailed Mr Joyce referring to discussions the previous week, and asking that he inform Mr Chris Barron that the Council had decided to terminate the Contract, and instruct the latter to write to Mullberry's Solicitors informing them of the Council's decision.

95. On 18 June 2019, Brown Barron wrote to Mullberry purporting to give notice pursuant to clause 14 of the Contract. An email of the same date from Mr Solsby to Mr Joyce refers to the former having taken a call Mr Barnes that morning and having informed him with regard to the Council's decision and that: *"whether he decides to pursue legal matters in relation to planning is another matter, there were certain threats in the telephone conversation"*.

96. Mullberry and the Council being unable to resolve their differences, the two sets of proceedings were commenced in July 2021 as referred to above.

The Flass Lane Verge

97. It is, I consider, convenient to begin by dealing with the first discrete preliminary issue as to whether the Contract included the Flass Lane Verge, before dealing with the other preliminary issues together.

98. The relevance of the first issue is that if the Flass Lane Verge did fall within the terms of the Contract, but the Council did not have title thereto, then reliance is placed by Mullberry upon clause 30.5 of the Contract, and the variation of condition 9.1.1 of the Standard Conditions provided for thereby, in support of a case that there is, in Plan B or a statement in the Contract, something that is misleading, or inaccurate, or that amounts to an error or omission giving rise to a remedy of the kind provided for by condition 9.1.1. This is relied upon in support of an argument that the Council, being in breach of the terms of the Contract, was not entitled to terminate the same and/or in support of a claim for specific performance with an abatement of price and/or damages.

99. In the course of submissions, Mr Sterling accepted, as he was bound to do, that it was necessary for Mullberry's case that the Contract, properly construed, included the Flass Lane Verge, cf. *Mustafa v Baptist Union Corporation Ltd* [1983] 1 EGLR 177, relied upon by Mr Sterling where the defendant could not make title to part of the property included within the contract because of an existing lease, and the claimant understood that he was acquiring the whole property, and claimed to be entitled to rescission, repayment of deposit with interest and damages.

100. An oddity of the present case is that despite the way that the case was put in submissions, Mullberry in fact pleaded in paragraph 8 of its Particulars of Claim in the Mullberry Proceedings that the Property as agreed to be sold included the whole of the Allotments Land up to and including and contiguous with the easterly edge of *"the strip"*, and that the Allotments Land did not include the Flass Lane Verge. Further, in the light of Mr Barnes's conversation with Mr Chris Barron shortly prior to exchange of contracts, Mullberry can hardly maintain that it believed that it was to purchase the Flass Lane Verge, relying upon what Mr Chris Barron said with regard to the Flass Lane Verge being maintained by the County Council.

101. However, whatever way the case is pleaded, the position is, as I see it, that the description of *"the Property"* in the Contract clearly did exclude the Flass Lane Verge. The Property is, within the definition thereof in clause 1.1 of the Contract, described as being *"more particularly delineated in red on the Plans"* i.e. on Plans A and B attached to the Contract. As Mr Joyce said in evidence, Plan B relating to the Allotments Land was prepared by reference to the relevant Ordnance Survey map, and it clearly shows the Flass Lane Strip as excluded from the land shown as delineated in red.

102. This is entirely consistent with the facts on the ground as shown on a number of photographs, where one can see a well established hedge running along the easterly edge of a verge on Flass Lane, and the westerly edge of the Allotments Land as shown on Plan B has clearly been delineated on Plan B so as to run along the line of this hedge, thus excluding the Flass Lane Verge.

103. Consequently, as to the first preliminary issue, I find that the Contract did not include the Flass Lane Verge or the strip referred to, and that the boundary ran along the line of the hedge that I have referred to.

104. Further, for the purposes of the third preliminary issue, namely whether the Council has breached the Contract, I find that there has been no breach of the Contract so far as the Flass Lane Verge and/or strip, and any question of inclusion thereof in the Contract is concerned because Mullberry's case essentially depended upon it having agreed to sell something (i.e. the Flass Lane Verge) that it did not have title to sell.

105. I would add that it forms no part of Mullberry's case, and nor could it, that Mr Chris Barron made any operative misrepresentation with regard to the ownership of the Flass Lane Verge, or as to who was responsible for maintaining the same, in the conversation with Mr Barnes that took place at Brown Barron's offices shortly prior to exchange of contracts, or that what was then said gives rise to any other claim or cause of action. This is, not least, because of the terms of clause 30.2 of the Contract.

The other preliminary issues

Mullberry's case

106. In its Particulars of Claim in the Mullberry Proceedings, Mullberry's case essentially rested upon an allegation that the Contract included the following implied terms alleged in paragraph 5 of its Particulars of Claim, namely:

i) Each of Mullberry and the Council agreed to do all that was necessary to be done on its part to ensure the performance of their bargain; and

ii) Neither party should do anything to put an end to the state of circumstances under which the Contract became operative.

107. On behalf of Mullberry, Mr Sterling argued that there is ample authority for an implied term that parties to a contract should cooperate to ensure the performance of their bargain – see *MacKay v Dick* (1881) 6 App. Cas. 251 at 263 per Lord Blackburn.

108. Mr Sterling relied upon the following further authorities as to when a term was to be implied, namely:

i) *BP Refinery (Westernport) Pty Limited v Shire of Hastings Council* (1977) 182 CLR 266, where at page 283, Lord Simon said:-

> *"… for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."*

ii) The now leading Supreme Court authority of *Marks & Spencer Plc v BNP Paribas Security Services Trust Company (Jersey) Limited* [2015] UKSC 72, [2016] AC 742, at paragraphs 14-21, and in particular what was said by Lord Neuberger at paragraph 21:

> "*Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal but the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."*

109. Paragraph 6 of the Particulars of Claim in the Mullberry Proceedings sets out the facts and matters relied upon by Mullberry as showing that the relevant terms contended for should be implied, namely: (a) the terms of the Contract; (b) what is said to be the common interest of Mullberry and the Council under the Contract and in securing the grant of a Satisfactory Planning Permission;

and (c) the surrounding circumstances. As to the surrounding circumstances the following are relied upon in particular: *"that [the Council] in its capacity as land-owner supported the construction on the Property of 98 or more dwellings, as did Steve Solsby, [the Council's] Assistant Director, who was privy to the negotiations leading to the 2018 contract for the construction of 98 or more dwellings; and that [the Council] itself drafted the 2018 contract and so as to include the definitions of "Development", "Planning Permission" and "Satisfactory Planning Permission", thereby underlining its support for the construction on the Property of 98 or more dwellings."*

110. It is then alleged that the Council acted in breach of the alleged terms as follows:

i) In its capacity as landowner failing to make written or other representations to the Determining Authority to support a Satisfactory Planning Permission in respect of either the original application for detailed planning permission made in August 2018, or the two applications subsequently made in January 2019 referred to above;

ii) In its capacity as landowner failing to make such representations to Mr Solsby; and

iii) Purporting to terminate the Contract by Brown Barron's letter dated 18 June 2019, and subsequently, on 4 October 2019, writing to enclose a cheque for £190,000 in respect of the deposit paid.

111. It is then Mullberry's case that, being in breach of contract, it was not open to the Council to give notice pursuant to clause 14 of the Contract purporting to terminate the same, and that Mullberry is therefore entitled to specific performance of the Contract and/or damages in addition to or in lieu of specific performance.

112. Although a case based upon the implied terms referred to above formed the basis of the Mullberry Proceedings, the focus of Mullberry case as advanced in Mr Sterling's Skeleton Argument prepared for trial, and in the course of submissions, was rather more upon a case based upon the Council having acted unlawfully as a matter of public law in declining to validate the applications made by Mullberry for planning permission.

113. From a pleading perspective, the genesis for this alternative case based on public law considerations was the way that the Council put its case in its Particulars of Claim in the Council Proceedings, and the Defence served by Mullberry in response thereto.

114. In its Particulars of Claim in the Council Proceedings, and in support of its claim that it was entitled to serve notice pursuant to clause 14 of the Contract, the Council included the following allegations, namely that:

i) It had reasonably refused *"in the Wednesbury reasonableness sense"* to validate the application for detailed planning permission submitted in August 2018 *"as national and local requirements had to be resolved*

before the application could be validly processed" – see paragraph 7; and

ii) As referred to above, that it had rejected for validation the application submitted in respect of the Duchy Court Land in January 2019 *"due to lack of an up-to-date and complete species survey and habitat survey"* – see paragraph 9".

115. In response to paragraph 7 of the Particulars of Claim, in paragraph 15 of its Defence, Mullberry alleged that the Council, as planning authority, had refused to validate the application submitted in August 2018 because, so it had informed Mullberry, it considered that there should be separate applications for the two sites. It was alleged that the *"imposition of separate applications"* was grossly unfair to Mullberry as it made the applications complex, protracted and more likely to be rejected and that, as a matter of law, the refusal or rejection and the imposition of separate applications were totally unreasonable and thereby a breach of contract.

116. So far as paragraph 9 of the Particulars of Claim is concerned, it was asserted in paragraph 17 of the Defence that it was common practice for a local planning authority to validate a planning application prior to completion of the species survey and habitat survey, and that such a step on the part of the Council as local planning authority: *"would in the circumstances have been appropriate"*.

117. Further, in paragraph 20 of its Defence, Mullberry pleaded that the Council had *"totally unreasonably insisted upon [Mullberry] making two applications"*, and in paragraph 21 of its Defence, Mullberry alleged that the Council had acted in breach of contract *"including"* the implied terms, suggesting that some further basis for alleging breach of contract other than relying on the implied terms was being asserted.

118. In his Skeleton Argument, and as developed in submissions, Mr Sterling advanced the case that Council had acted in breach of contract by:

i) The decision that it took on rejecting the planning application submitted in August 2018, and subsequently applied, that it would only accept separate applications for planning permission for each of the two sites;

ii) In January 2019, declining to validate the separate application in respect of the Duchy Court Land on the basis that it was not accompanied by an up-to-date and complete species/habitat survey.

119. So far as the relevant public law considerations are concerned, it is common ground between the parties that s. 62 of the Town and Country Planning Act 1990 (as amended) ("**the 1990 Act**"), relating to applications for planning permission or permission in principle, is of particular relevance.

120. Section 62 of the 1990 Act provides, so far as is relevant, as follows:

"62. ***Applications for planning permission or permission in principle***

(1) A development order may make provision as to applications for planning permission or permission in principle made to a local planning authority.

(2) Provision referred to in subsection (1) includes provision as to—

(a) the form and manner in which the application must be made;

(b) particulars of such matters as are to be included in the application;

(c) documents or other materials as are to accompany the application.

…

(3) The local planning authority may require that an application for planning permission must include:

(a) such particulars as they think necessary;

(b) such evidence in support of anything in or relating to the application as they think necessary.

(4) But a requirement under subsection (3) must not be inconsistent with provision made under subsection (1).

(4A) Also, a requirement under subsection (3) in respect of an application

(a) must be reasonable having regard, in particular, to the nature and scale of the proposed development; and

(b) may require particulars of, or evidence about, a matter only if it is reasonable to think that the matter will be a material consideration in the determination of the application."

121. The development order made pursuant to s. 62(1) of the 1990 Act is the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("**Development Order**"). I note that article 7(1) thereof provides that:

"7. (1) Subject to paragraphs (3) to (5), an application for planning have been permission must—

(a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);

(b) include the particulars specified or referred to in the form;

> *(c) except where the application is made pursuant to section 73 (determination of applications to develop land without conditions previously attached) or section 73A(2)(c) (planning permission for development already carried out) of the 1990 Act(1) or is an application of a kind referred to in article 20(1)(b) or (c), be accompanied, whether electronically or otherwise, by—*
>
> *(i) a plan which identifies the land to which the application relates;*
>
> *(ii) any other plans, drawings and information necessary to describe the development which is the subject of the application;*
>
> *(iii) except where the application is made by electronic communications or the local planning authority indicate that a lesser number is required, 3 copies of the form; and*
>
> *(iv) except where they are submitted by electronic communications or the local planning authority indicate that a lesser number is required, 3 copies of any plans, drawings and information accompanying the application."*

122. Mr Sterling submits that the requirement for a detailed species/habitat survey prior to validation is a matter required by the Council pursuant to s. 62(3) of the 1990 Act, which must be justifiable as necessary in accordance with s. 62(4A). He submits that it is not so justifiable because it is not reasonably necessary, having regard, in particular, to the nature and scale of the proposed development.

123. Further Mr Sterling advances the following submissions:

i) He submits that nowhere in Development Order, and in particular under paragraph 7 thereof, is there any reference to a requirement for separate applications being a validation matter.

ii) He submits that the validity of a validation requirement is susceptible to judicial review, relying upon *Newcastle-Upon-Tyne City Council v Secretary of State for Communities and Local Government* (2009) EWHC 3469 at paragraph 36.

iii) Applying the test or formulation of Lord Greene MR in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K.B.223 at 229-230, Mr Sterling recognises that it might seem that a Court can only interfere if the local planning authority's decision was so unreasonable that no reasonable authority could ever come to it. However, despite the test as so formulated, Mr Sterling submits that the appropriate *Wednesbury* test is whether the decision was one "*within the range of reasonable responses*", or, alternatively, made on the basis of a

material mistake or disregard of a material fact that renders the decision irrational or unreasonable. Mr Sterling places reliance on paragraphs 11-020, 11-021 and 11-051 of De Smith's Judicial Review, 8th Ed.

124. So far as the insistence on separate applications is concerned, Mullberry's case is, in essence, that there was no statutory basis for insisting on two separate applications, and that the Council therefore acted totally unreasonably in the *Wednesbury* sense in so insisting.

125. Further, it is said that the reason given in Mrs Kayes' email dated 22 August 2018, namely that the application related to two separate sites with two separate accesses was different from the explanation provided by Mr Hipkiss in paragraph 14 of his witness statement where he says: *"I recall several contemporary discussions between planning officers to consider that, in view of the lack of any physical relationship between the two sites, and the significant differences in characteristics which necessitated differing suites of supporting documents, the single application approach was not appropriate."* Mr Sterling submits that the fact of the suggested need of separate accesses being sufficient to justify separate applications in itself represents an unreasonably superficial approach as to how the Council, as local planning authority, in fact made its decision. In these circumstances, he submits that the Court is entitled to conclude that Ms Kayes' decision, as referred to in her email dated 22 August 2018, was not supported by substantial evidence and is therefore open to being impugned as irrational or perverse - see De Smith (supra) at paragraph 11-047. Mullberry's case is said to be supported by Mr Gascoigne's expert evidence.

126. Although not pleaded as such, the case as developed in respect of the planning application made in respect of the Duchy Court Land in January 2019 is that the Council acted unreasonably (in *Wednesbury* terms) and irrationally in insisting on an enhanced species and habitat survey going beyond the Provisional Ecological Appraisal prior to validating the application, and in doing so acted in breach of the Contract. No pleading point was taken by Mr Horne on behalf of the Council, and it was possible for the point to be satisfactorily dealt with at the trial of the preliminary issues.

127. The key points relied upon by Mr Sterling in support of Mullberry's case that the Council had acted unreasonably and irrationally in respect of a further species/habitat survey, were the following:

i) Mr Sterling pointed to the fact that in relation to the application for outline planning permission that had been made in respect of the Duchy Court Land by the Council in 2015, a second phase species/habitat report was not required at validation stage, and was only required once the application itself was being determined. Mr Sterling suggests that there is an inconsistency of approach.

ii) Mr Sterling points to "*Government guidance: Protected species and development advice for local planning authorities"* first published in October 2014 (and updated in January 2022), which talks in terms of appropriate surveys in respect of protected species being carried out

prior to the making of a decision about a planning application rather than at the validation stage. It is submitted that the Council ignored this Government guidance.

iii) It is submitted that the Council's approach serves to seriously hamper the ability and freedom of the public to apply for planning permission, particular bearing in mind the limited period of time during the year when a reptile survey can be carried out (between April and September). It is submitted that the consequence of the Council's approach is that if a report has not been obtained by September in any year, then an applicant for planning permission, where there is any question of the presence of reptiles, is effectively prevented from submitting an application until May or June after allowing time for a reptile survey to be carried out, at the earliest beginning in April. It is submitted that, in the circumstances, the only reasonable course can be to validate the application on the basis of a report such as the Provisional Ecological Appraisal, and to consider any further required reports during the course of the application, or alternatively by way of condition to any planning consent granted.

128. It is therefore Mullberry's case that the Council cannot rely upon its own unlawful conduct preventing or delaying Mullberry in its attempts to secure a Satisfactory Planning Permission, and that by its conduct it acted in breach of contract with the consequence that Mullberry is entitled to specific performance and to damages in addition to or in lieu of specific performance as an alternative to its claim that the Council is in breach of the alleged implied terms.

The Council's case

129. The Council's case is that there is no scope for implied terms of the kind contended for by Mullberry, although the Council realistically accepts that it is to be implied that it would do nothing to prevent fulfilment of the *"Condition Precedent"* provided for by the Contract, i.e., the occurrence of the *"Satisfaction Date"*. I understand Mr Horne to accept that dealing with a planning application in an unlawful manner as a result of being open to challenge on public law grounds could, on appropriate facts, be capable of falling foul of such an implied term. However, Mr Horne submits that the ability of the Council to trigger clause 14 of the Contract is not, as a matter of true construction of clauses 28 and 29 of the Contract, affected by any breach of the Contract on its part and that, in any event, the Council has not dealt with any relevant planning application in an unlawful manner.

130. So far as the question of the implied terms contended for by Mullberry is concerned, Mr Horne submits that the implication of terms is inconsistent with the provisions of clause 30 of the Contract, and in particular sub-clauses 30.1, 30.2 and 30.4 thereof. The latter provision, in particular, is said to be of importance given that it expressly provides that nothing in the Contract (express or implied) should fetter the Council's statutory rights, powers, discretions or responsibilities as a local planning authority. Sub-clauses 30.1 and 30.2 are relied upon as being inconsistent with Mullberry's reliance on background

circumstances, including any indications of support for Mullberry's density requirements given by the Council in its capacity as a landowner. Further reliance is placed by Mr Horne upon what was said in the relevant Sales Particulars regarding representations made by employees of the Council.

131. Further, Mr Horne submits that, properly construed, clause 5.1 of the Contract provides that all steps required to obtain a Satisfactory Planning Permission are for Mullberry to take, no obligation being placed upon the Council by the express terms of the Contract. He points to the fact that the sole express obligation imposed on the Council in relation to the satisfaction of the Condition Precedent is that it should enter into any Planning Agreement under clause 11.5, subject to two unusual conditions.

132. Mr Horne submits that the present facts fall well short of the circumstances in which it might now be appropriate to imply terms in the light of the guidance given by the Supreme Court in *Marks & Spencer Plc v BNP Parisbas* (Supra). Referring to Lord Neuberger's criteria identified at paragraph 21 therein, it is submitted on behalf of the Council that the circumstances fall well short of those in which it can properly be said that without the implication of the alleged implied terms, the Contract would lack commercial or practical coherence. The Council submits that the Contract is a detailed and carefully worded legal agreement that works perfectly well without the implication of the alleged terms, particularly given that fact that the Council is, as local planning authority, in any event required to consider any application for detailed planning permission in accordance with the statutory framework for doing so, and lawfully within that framework.

133. With regard to what Mr Horne submits is the ability of the Council to trigger clause 14 even if in breach of the terms of the Contract itself, express or implied, Mr Horne points, in particular, to the fact that clause 29.1(a) provides that if notice is given pursuant to clause 14, then the Contract determines with immediate effect, but expressly preserves the rights of <u>either</u> party in respect of <u>any</u> earlier breach of the Contract (my emphasis). This, Mr Horne submits, expressly recognises that the Council itself might be in breach of the terms of the Contract when it served a notice pursuant to clause 14. Mr Horne submits that there is nothing odd in this on the basis that the terms of the Contract were designed to ensure that the Contract could definitively be brought to an end by either party if the Condition Precedent had not been satisfied by the Long Stop Date.

134. So far as the challenge on public law grounds to the Council's decision to require a separate application in respect of each site is concerned, the Council's position is, in essence, as follows:

    i) As to the alleged absence of a statutory basis to decline to validate a joint application in respect of the two sites, Mr Horne submits that the local planning authority must have a power or discretion to require, at the validation stage, separate applications in respect of an application relating to separate sites, taking as an extreme example two or more plots of completely unrelated land, of a different nature, and in very different

parts of the local authority's area. If that is the case, then, so it is submitted, it must then be a question of degree with the relevant local planning authority having a degree of discretion as to when to require the making of separate applications, provided that the local planning authority has a rational and reasonable basis for requiring separate applications.

ii) In the present case, the Council had a rational and reasonable basis for requiring separate applications as referred to in paragraph 14 of Mr Hipkiss's witness statement, and as expanded upon during the course of his cross-examination. Whilst differing local planning authorities might take a different approach, it cannot, it is submitted, be said that the Council's approach was *Wednesbury* unreasonable in the sense of being outside the range of reasonable responses or irrational. Further, whilst the two experts might have come to a different view on the point, the Council's approach is supported by Mr Skelton.

iii) So far as the limited reasoning expressed in Mrs Kayes' email dated 22 August 2018 is concerned, with reference only being made to two separate sites with two separate accesses, it is submitted that it is wrong to focus on what was said in this email, particularly bearing in mind that there were a number of other grounds referred to in this email on the basis of which the experts are agreed that the Council was entitled to decline to validate the application for detailed planning permission. Mr Hipkiss's evidence was that Mrs Kayes' role as a validation officer was such that she is likely to have considered such an issue as separate applications with the relevant planning officer, and it was further his evidence that there were internal discussions with regard to the separate application issue. Thus, on proper analysis, any relevant decision of the Council to require separate applications was in fact based not simply on the question of access, but on the wider considerations identified by Mr Hipkiss in evidence.

iv) The point is further made that Mullberry did not challenge, as it could potentially have done at the relevant time if it had grounds for doing so, the insistence of the Council that separate applications be made, and Mullberry did subsequently go ahead and make separate applications in January 2019, only after it had obtained further reports and documentation in support of the relevant applications which were required before the same could be validated. On this basis, the relevant decision to require two applications having been made in August 2018 at a time when the Council had other good grounds to decline validation, no complaint or challenge having been made at that time, but rather Mullberry having subsequently gone along therewith and lodged separate applications, it cannot realistically be open to Mullberry to now complain that, by its decision, the Council acted unlawfully, and therefore in breach of contract so as to prevent the Condition Precedent provided for by the Contract from being fulfilled.

135. So far as the refusal to validate a planning application until such time as a detailed species/habitat report was obtained, in particular one including a survey in respect of the presence of reptiles, the Council's case is, in essence, as follows:

i) Such refusal has been objectively justified so it cannot properly be said that the Council's approach was *Wednesbury* unreasonable in the sense of being outside the range of reasonable responses or irrational, or otherwise subject to challenge on public law grounds.

ii) Mullberry had no proper basis for proceeding on the basis that requirements expressly contemplated by the D&D Brief, in particular concerning habitat and protected species surveys and the importance of pre-planning application discussions, would be regarded as irrelevant and something that did not require to be attended to.

iii) As explained by Mr Hipkiss in evidence, there was a clear rationale for requiring a detailed species/habitat survey dealing with the presence of reptiles at the validation stage given that the contents thereof would form a necessary part of the consultation process following the making of an application for detailed planning permission. In those circumstances, it was simply not sensible to allow such a report to be submitted once the application process was underway, particular bearing in mind that the relevant reptile survey could not be begun until, at the earliest, April 2019.

v) The Council relies upon the fact that its position is supported by Mr Skelton, and it submits that its position is not undermined merely by the fact that Mr Gascoigne has a different view on this issue, unless it can be shown Mr Skelton is clearly wrong, which it is submitted it cannot.

vi) The point is made that it was for Mullberry to anticipate the requirement for a detailed species/habitat report going beyond the Preliminary Ecology Assessment, and in practice to have obtained the same by September 2018, after which time there would have been no realistic opportunity to obtain a reptile survey in time to enable a Satisfactory Planning Permission to be obtained before the Long Stop Date of 31 May 2019.

vii) So far as the different approach of the Council on its own application for outline planning permission is concerned, it is submitted that an application for outline planning permission is of a different nature to an application for detailed planning permission, which does not anticipate development prior to the making of an application for detailed planning permission. Consequently, it is submitted that nothing is to be read into the fact that, in the case of outline planning permission, the Council was prepared to receive a more detailed species survey, including with regard to the presence of reptiles, after the application for outline planning permission had been validated and whilst the application was being considered.

viii) So far as the Government guidance is concerned, the point is made that the guidance is concerned with the process as a whole, and does not, in terms, talk about what might be required at the validation stage, as opposed to at a later stage of the process, with regard to a species/habitat report or survey dealing with the presence of reptiles which, as the guidance makes clear, requires to be based upon a survey carried out between April and September. Further, it is pointed out that Government guidance makes clear that a local planning authority should not usually, in granting planning permission, attach planning conditions that ask for surveys. The Council's case is that this reinforces the point that the relevant reptile survey required to be carried out by September 2018 in order for there to be any chance of a Satisfactory Planning Permission being obtained by the long stop date of 31 May 2019.

136. For the above reasons, it is the Council's case that it has not acted unlawfully, or in breach of the terms of the Contract, and thus, whatever the construction clause 14 of the Contract in the light of clause 29.1(a) thereof, it was entitled to give notice pursuant to clause 14 of the Contract because no Satisfactory Planning Permission had been obtained by 31 May 2019.

137. It is the Council's case that, if anything, it is Mullberry that was in breach of the terms of the Contract because it failed, pursuant to clause 5.1 of the Contract, to use all reasonable endeavours to obtain a Satisfactory Planning Permission as soon as reasonably possible.

Determination of other preliminary issues

Preliminary observations

138. I would make the preliminary observation that whilst Mullberry, through Mr Barnes, may have regarded the D&D Briefs as irrelevant as referred to in paragraphs 57 and 59 above, in the light of my findings in paragraphs 60 to 62 above, I do not consider that Mullberry had any proper basis for doing so, or for proceeding on any other basis than that the Council, in its capacity as local planning authority, would consider any application for detailed planning permission otherwise than by reference thereto. For this reason, I consider that the onus remained on Mullberry to make out a planning case for the development of the two sites to a density of the kind contemplated by Mullberry, in circumstances that were likely to require some degree of engagement with the Council, and to support any planning application with the documentation specified in the D&D Briefs, including appropriate habitat and protected species surveys. Had Mullberry sought to do so, then on the basis of Mr Solsby's and Mr Hipkiss's evidence, I consider that there is likely to have been constructive engagement between Mullberry and the Council (as local planning authority) that might have led to the grant of planning permission for the Property satisfactory to all parties.

139. The evidence discloses a tension within the Council between its position as local planning authority on the one hand required to follow proper planning procedures, and its position as a landowner and local authority wishing to see

the two sites developed, with Mullberry and its proposal to develop to a density of 15 units per acre appearing by late 2017/early 2918 to provide the best opportunity for the development of the Property. However, I consider it necessary to clearly distinguish between these two hats worn by the Council. As I have found, any encouragement that Mr Solsby might have provided as to Mullberry developing the two sites in the way that it wished to do so was provided otherwise than in a planning capacity, and as I have found, I do not consider that Mr Solsby went so far as to lead Mr Barnes to believe that he would support any planning application, or that he gave any indication that the Council's ordinary planning procedures, as a local planning authority, would not be followed with appropriate consideration being given to the D&D Briefs.

140. In this context, and as identified above, of further relevance is the fact that the terms of clause 30.4 of the Contract made clear that nothing contained or implied in the Contract should fetter the Council's statutory rights, powers, discretions or responsibilities as a local planning authority, and Brown Barron's letter dated 25 April 2018 expressly stated that the Council made no representation that planning consent would be granted for the density proposed by Mullberry.

141. Of further relevance, is the fact that clause 30.2 of the Contract, as well as the Sales Particulars that preceded the same, made clear that reliance could not be placed on any representations made by employees of the Council.

142. It is clear, and recognised by both of the experts, that the period of 12 weeks provided for the submission of an application for detailed planning permission was tight, in particular in the light of the somewhat limited preparatory steps taken by Mullberry prior to entering into the Contract. However, this is something that Mullberry freely agreed to, albeit perhaps believing, erroneously and in my judgment and without a proper basis for doing so, that the Council would take a rather less robust approach to the planning application than it in fact did take.

143. I have already noted that although Mr Barnes clearly has considerable experience of pursuing development opportunities, he is a practical builder and developer, rather than somebody holding planning expertise. Likewise Mr Lloyd-Haydock, although qualified as an architectural technician with an ability to put together the documentation to support a planning application, lacked planning expertise. This was, as I see it, demonstrated by the multiple deficiencies in the detailed planning application as submitted in August 2018 as identified in Mrs Kayes' email dated 22 August 2018. Both experts were agreed that the Council was entitled to decline to validate this application in the light of these deficiencies, although, as referred to above, they disagreed as to the Council's entitlement or otherwise to do so on the basis of requiring separate applications in respect of each site.

144. Of particular note for present purposes is the fact that although the Council's published requirements for the validation of an application for detailed planning permission specified, consistent with the Government guidance referred to above, that the application be accompanied by a biodiversity survey and report,

no such survey and report was submitted with the application made in August 2018, and no such report was produced until the Preliminary Ecological Appraisal was provided to the Council on 21 September 2018. As referred to above, the latter identified the need for, amongst other things, a reptile survey which could only be carried out between April and September in any year. To the extent that the Council was entitled to insist on such a survey before granting planning permission, even if not before validating an application for planning permission, the die was in a sense cast by the time that that report was served given the difficulty, if not impossibility, of obtaining a completed reptile survey in time for a planning application to be considered and determined before the Long Stop Date of 31 May 2019.

Implied Terms

145. As referred to above, it is Mullberry's case that the Contract included the following implied terms, namely:

i) Each of Mullberry and the Council agreed to do all that was necessary to be done on its part to ensure the performance of their bargain; and

ii) Neither party should do anything to put an end to the state of circumstances under which the Contract became operative.

146. The appropriate principles for the implication of contractual terms, consistent with the approach of the Supreme Court in *Marks and Spencer plc v BNP Parisbas* (supra), were helpfully summarised in *Yoo Design Services Ltd v Iliv Realty PTE Ltd* [2021] EWCA Civ 560, at paragraph 51, per Carr LJ, as follows:

"i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;

ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;

iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;

iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;

v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by

reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

147. I do not consider there to be any proper basis for implying into the Contract the terms contended for by Mullberry. This is because I do not consider that, the terms contended for are in fact necessary to give business efficacy thereto, and nor do I consider that the terms ought to be implied on the basis of obviousness.

148. As to the business efficacy test, I do not consider that it can properly be said that, without the term, the Contract would lack commercial or practical coherence.

149. Although there were challenging timing constraints so far as the making of the application for detailed planning permission was concerned as provided for by clause 5.1 of the Contract, the Contract, as I see it, works perfectly well without the implication of the terms alleged. As Clause 5.1 of the Contract itself demonstrates, the Contract essentially placed the onus upon Mullberry to get its act together by submitting the Planning Application within 12 weeks, and using all reasonable endeavours to obtain the grant of a Satisfactory Planning Permission. Having made such an application, Mullberry was entitled to expect, without the Contract having to so provide, that the Council would properly and lawfully deal with the Planning Application made in accordance with its statutory powers and discretions as local planning authority.

150. Further, I agree with Mr Horne that the terms sought to be implied are inconsistent with the express terms of the Contract, including clause 30.4, but also, as I see it, clauses 15.1, 30.1 and 30.2 thereof.

151. So far as the obviousness test is concerned, I do not consider that the implied terms alleged are so obvious that they go without saying, particularly in the light of the actual background circumstances as I have found them to be as above

against which any support offered by Mr Solsby, or by any other official of the Council in respect of Mullberry's development intentions has to be viewed.

152. A further legitimate criticism of the implied terms that are alleged is their somewhat generalised terms, which, as I see it, makes it unclear and uncertain what conduct on the part of the Council might have been required thereby. As pointed out by Carr LJ in *Yoo Design v Iliv Realty* (supra) at paragraph 51(iv), for the obviousness test to be satisfied, it must be obvious not only that the suggested terms ought to be implied, but precisely what the terms, which must be capable of clear expression, are.

153. In short, therefore, I reject the contention that the Contract includes the implied terms contended for by Mullberry.

154. Mr Horne accepted that the Contract was subject to an implied term that the Council would do nothing to prevent the fulfilment of the *"Condition Precedent"* provided for by the Contract, i.e. the occurrence of the *"Satisfaction Date"*. I consider that he was right to do so on the basis that this is consistent with a more general principle that parties are under an implied obligation not to prevent the fulfilment of a condition upon which a contract depends – see *Mackay v Dick* (1881) 6 App Cas 251 referred to by Mr Stirling, and Lewison, the Interpretation of Contracts, 7th Ed, at 16-40 referred to by Mr Horne.

155. However, if one accepts that the Contract was subject to this albeit more limited implied term, this must, as I see it, serve to undermine Mr Horne's argument that a consideration of clause 29.1(a) of the Contract leads to the conclusion that it was open to the Council to invoke the termination provision under clause 14 even if itself in breach of contract, at least in so far as each and every breach was concerned. Whilst a consideration of clause 29.1(a) might lead to the conclusion that certain breaches of contract on the part of the Council would not exclude the operation of clause 14 thereof, if the breach of contract were of such a nature as to prevent the fulfilment of the Condition Precedent, then it is difficult to see, on a proper interpretation of the relevant provisions of the Contract, that the latter could still permit the operation of clause 14 of the Contract notwithstanding that breach in question had served, in whole or in part, to prevent the Condition Precedent being fulfilled. In this respect, I note the principle that a contract will be interpreted so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong – see Lewison (supra) at 7.108.

156. Consequently, I reject Mr Horne's submission that clause 14 of the Contract is to be interpreted as being capable of application even if the Council is, itself, in breach of contract, at least where the breach of contract concerns a breach of the implied obligation not to prevent fulfilment of the Condition Precedent.

157. So far as this latter implied obligation is concerned, and whilst recognising the distinct functions of the Council as landowner on the one hand, and local planning authority on the other hand, I consider that the better view is that the Council would have acted in breach thereof if it, as local planning authority, dealt with the Planning Application required to be made pursuant to the Contract

in an unlawful manner in public law terms, in such a way as to prevent the fulfilment of the Condition Precedent.

158. It is therefore necessary to consider whether the Council did act unlawfully in the manner alleged by Mullberry.

The Council's handling of the planning applications

159. As identified above, Mullberry challenges the handling by the Council of the planning applications that it made on to bases, namely:

i) The Council's insistence from and after Mrs Kayes' email dated 22 August 2018 on the making of separate detailed planning applications in respect of each of the sites before it would validate any planning application;

ii) The Council's insistence upon the production of a survey with regard to reptiles and other species before it would validate any planning application in respect of the Duchy Court Land.

160. It is necessary to consider each of these in turn.

161. So far as the insistence on separate applications is concerned, I consider that Mr Horne must be right that there must be certain situations where it would be quite obviously inappropriate for one application to be made in respect of two or more sites, e.g. one green field site and one brown field site some distance apart within the local planning authority's area with very different planning proposals in respect of each, and other very differing planning considerations applying to each site. It seems to me obvious that a local planning authority could, in respect of such an application, decline to validate the same and require that two applications be made. If one accepts that that is the case, then it does seem to me that it must be open to a local planning authority, in the case of one application comprising two or more sites, to insist at the validation stage that there are separate applications in respect of each, so long as there are proper planning grounds for doing so, and the local planning authority reasonably believes that this is necessary to properly deal with the application – cf. ss. 62(3) and (4A) of the 1990 Act and what a local planning authority is entitled to require in support of a planning application.

162. In the present case I consider that the Council did have reasonable planning grounds for requiring the making of separate applications for detailed planning permission in respect of each of the Duchy Court Land and the Allotments Land as outlined by Mr Hipkiss in the course of his evidence. I refer to the explanation given in paragraph 14 of his witness statement as referred to above, and his response under cross-examination when the suggestion was put to him that the impression given thereby was that the need for separate applications was nothing to do with separate accesses, as had been suggested by Mrs Kayes in her email dated 22 August 2018. In response, Mr Hipkiss volunteered that separate accesses would have been one of the reasons why two applications were asked for, before going on to say: *"… It would be one of the reasons why*

we would be looking at two separate sites. But the main issue of course is the different characteristic of the site, which has been documented one has a recent planning history, is overgrown, it has evidence of being built on in the past, it has access to a metalled road which is also lit by streetlights. The other is an area of grazing land which has limited ecological value, no recent planning history. They're two separate sites."

163. I do not see the contradiction suggested by Mullberry between what Mrs Kayes said in her email dated 22 August 2022 and Mr Hipkiss's subsequent explanations. Mrs Kayes had referred to two separate sites with two separate accesses. The key point is that she had identified *"separate sites"*. I do not consider that too much ought to be read into the fact that, at that stage, the only further reference was to two separate accesses in circumstances where there plainly were other planning considerations that distinguished the two sites.

164. I found Mr Hipkiss to be an impressive witness, and I accept his evidence that there were other distinguishing planning considerations identified in respect of the two sites at the relevant time, and that that is the basis upon which the Council decided to require separate applications.

165. I take on board the fact that, prime facie, the Contract envisaged the making of one *"Planning Application"*, and that the requirement to make separate applications was capable (at least) of taking longer to achieve and of being more costly. However, I do not consider the approach taken by the Council to be unreasonable, particularly in the Wednesbury sense of being outside the range of reasonable responses, or to be irrational, or to have involved taking into account irrelevant matters.

166. Whilst I accept Mr Gascoigne's evidence that one single application might well have been satisfactory, and might have been accepted by other local planning authorities, I note Mr Skelton's evidence that requiring separate applications was the more appropriate course. The latter supports the conclusion that the Councils' approach was within the range of reasonable responses even if Mr Gascoigne was of a different view.

167. There is, as I see it, the further point that the Council had, as is accepted by the two experts, other good grounds to decline to validate the application made in August 2018, including the complete absence of an up to date biodiversity report. Mullberry did not contemporaneously challenge the approach taken by the Council, and thereafter proceeded to make separate applications in respect of the two sites. In these circumstances, even if the Council was not entitled to insist on the making of separate applications, it is difficult to see that its approach did in fact serve to prevent the fulfilment of the Condition Precedent, merely occasioning some limited delay in circumstances where other factors, including the absence of a biodiversity report, were in play in frustrating the fulfilment of the Condition Precedent.

168. In short, therefore, I do not consider that the Council's requirement of separate applications has given rise to any breach on the part of the Council of the limited

implied term that the Council would do nothing to prevent the fulfilment of the Condition Precedent.

169. The question then arises as to whether the Council was entitled to require Mullberry to support the application for detailed planning permission in respect of the Duchy Court Land submitted in January 2019 with a further biodiversity/ecological report including a survey in respect of presence of reptiles and other species.

170. As I see this issue, it essentially turns upon whether the Council was entitled to consider such a document to be evidence necessary for the purposes of s 62(3) of the 1990 Act, and whether the requirement for the provision of such a document at the validation stage was, for the purposes of s 62(4A)(a): *"reasonable having regard, in particular, to the nature and scale of the proposed development."*

171. The proposed development was a significant one proposed to be carried out on land on which various biodiversity issues had been identified, including the possible presence of reptiles, if not other endangered species. As referred to above, Mr Hipkiss explained in evidence the reason why the Council required the production of the further report to be addressed at the validation stage, rather than at a later stage, namely that whatever was revealed thereby was liable to play a significant part in the consultation process that would ordinarily be initiated following the validation of the application, thus making it undesirable and unsatisfactory on the present facts for this important issue only to be addressed at a later stage.

172. I regard this to be a reasonable and rational approach, falling within the range of reasonable responses. Again, whilst other local planning authorities might have taken a different view, the position of the Council is supported by the expert evidence of Mr Skelton, albeit that Mr Gascoigne comes to a different view. Again, I consider this to be a question of which there are a range of acceptable views, and that the approach taken by the Council fell within that range and that the Council was entitled to conclude that the further reptile survey was necessary at the validation stage.

173. I do not consider that the approach taken by the Council is undermined by the Government guidance that I have referred to. As I see it, this merely provides guidance that the relevant question should be addressed as part of the planning process, rather than by way of planning condition requiring the production of reports or surveys, without being prescriptive as to when, in that process, the matter might be addressed. In these circumstances, I consider that, in accordance with this guidance, it is open to a local planning authority to decide, on appropriate facts, that there should be a more detailed species survey in place at the validation stage.

174. I take on board the point that real practical difficulties are capable of being caused to developers given the limited period of time during the year in which surveys in respect of particular species, such as reptiles, can be carried out, in particular where the survey is required to be in place at the validation stage. On

appropriate facts, that might potentially make it unreasonable for the purposes of s. 62(4A) of the 1990 Act for the local planning authority to insist on such a survey at the validation stage. However, on the present facts, the D&D Brief in respect of the Duchy Court Land had flagged up biodiversity issues, the Council's own list of required documentation to support an application for detailed planning permission had required a biodiversity survey and report, and there had been the opportunity to obtain all required surveys and reports in the window between when the Contract was entered into on 22 May 2018, and September 2018.

175. In the circumstances, I do not consider that the decision of the Council to require a survey as to the presence of reptiles and other species before validating the application for planning permission submitted in respect of the Duchy Court Land in January 2019 to be open to challenge on public law grounds, a further consideration being that, by that stage, it was unlikely if not impossible that the appropriate survey could be obtained in time to enable a Satisfactory Planning Permission to be obtained prior to the Long Stop Date of 28 May 2019.

176. In short, I do not consider that the Council acted unlawfully in the way that it dealt with the planning applications submitted by Mullberry, and so I do not consider there to have been any breach of any implied term not to prevent fulfilment of the Condition Precedent, or the Council otherwise to have been in breach of contract.

Conclusion in respect the preliminary issues

177. My conclusions in respect of the preliminary issues that arise for determination are as follows.

Issue 1 - Did the Contract include the Flass Lane Verge and/or the strip as defined and referred to in the Statements of Case?

178. No.

Issue 2 - Did the Contract include any implied terms, including for which the Claimant contends at paragraph 5 of its Particulars of Claim in the Mullberry Proceedings?

179. The Contract did not include the implied terms contended for by the Claimant, although I find that it did include a more limited implied term that the Council would not do anything to prevent the fulfilment of the Condition Precedent.

Issue 3 - Has the Council breached the Contract?

180. I do not consider that the Council has breached the Contract.

Issue 4 – Has Mullberry breached the Contract?

181. It was suggested on behalf of the Council, that Mullberry had breached clause 5.1 of the Contract by failing to use all reasonable endeavours to obtain a grant of a Satisfactory Planning Permission. However, there is no pleaded allegation

to this effect, and no claim for damages based thereupon, and so I make no finding to that effect.

182. However, the Council does plead that pursuant to clause 29(c) of the Contract, Mullberry was required, within 15 Working Days after termination of the Contract, to remove all entries relating thereto registered against the Council's title to the Property. As referred to below, I do find that the Contract has been validly and effectively terminated by the Council, and was so terminated by Brown Barron's letter dated 18 June 2019. Mullberry did not remove entries that were registered against the Council's title, and therefore I consider that Mullberry is in breach of clause 29(c) of the Contract. Subject to further submissions, the Council may be entitled to damages in respect of this breach.

Issue 5 - What is the effect of any breaches, including what remedies are the parties entitled to?

183. The only breach established is that on the part of Mullberry referred to in paragraph 182 above, with the consequences that I have identified therein.

Issue 6 – Has the Contract been terminated, whereupon the notice registered against the title to the land the subject matter of the Contract should be removed, or should the Contract be specifically performed?

184. The Condition Precedent was never satisfied because the Satisfaction Date did not occur prior to the Long Stop Date of 31 May 2019. Consequently, the Unconditional Date had not occurred by the Long Stop Date of 31 May 2019, and the Council was thus entitled to give notice terminating the Contract pursuant to clause 14 thereof, unless there was some other reason preventing it from doing so. I have rejected Mullberry's case that because the Council was itself in breach of contract, and/or had unlawfully dealt with Mullberry's application for planning permission, it was not entitled to give notice pursuant to clause 14 of the Contract.

185. Consequently, I find that the Contract was validly and effectively terminated by the Council by Brown Barrow's letter dated 28 June 2019, and so Mullberry is not entitled to specific performance of the Contract, and the notice registered against the Property should be removed.

Consequential matters

186. This Judgment is handed down remotely by sending a copy thereof to the parties or their legal representatives, and providing a copy thereof to the National Archives. I adjourn any outstanding issues as to the form of order, costs, permission to appeal and any other consequential matters to be dealt with at a further short hearing to be held in the near future if agreement cannot be reached in respect thereof. I would invite the parties to consider whether the determination of the preliminary issues has resolved all the issues raised by the Mullberry Proceedings and the Council Proceedings, or whether further directions are required in respect thereof. I anticipate the former.