

ENGLAND AND WALES / JUDGMENT

B5 Ltd v Yusuf Vural

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[2026] UKFTT 00012 (PC) REF/2024/0575 PROPERTY CHAMBER, LAND REGISTRATION FIRST-TIER TRIBUNAL LAND REGISTRATION ACT 2002 IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY OPTION AGREEMENT – unilateral notice – construction of agreement – implied terms BETWEEN B5 Ltd APPLICANT and YUSUF VURAL RESPONDENT Property Address: The Mud Club, Norfolk Street, Bognor Regis PO21 1ND Title Number: WSX180917 Sitting at: 10 Alfred Place On: 23rd September 2025 Applicant's Representation: Respondent's Representation: Amy Proferes (counsel, instructed by Bingham Mansfield) Simon Sinnatt (counsel, instructed by Bate Albon Solicitors) DECISION © Crown Copyright Cases referred to: Yewbelle Ltd v London Green Developments Ltd [2006] EWHC 3166 (Ch); [2007] EWCA Civ 475; [2008] 1 P&CR 17; [2007] 2 EGLR 152 Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900 R (Trafford) v Blackpool BC [2014] EWHC 85 (Admin); [2014] PTSR 989 Arnold v Britton [2015] UKSC 36; [2016] AC 1619 Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742 Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 Ali v Petroleum Co of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531 Sparks v Biden [2017] EWHC 1994 (Ch) TAQA Bratani Ltd v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm); [2020] 2 Lloyd's Rep Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd [2021] EWHC 3015 (Ch) Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers (USDAW) [2024] UKSC 28; [2025] 2 All ER 565

INTRODUCTION

1. The Respondent has the benefit of a unilateral notice entered against the Applicant's title. The notice was entered to protect an option agreement made between the parties. The Applicant has a long leasehold interest in the subject property, which previously contained a building known as the Beach Hotel. The Respondent ran a fish and chip shop from within that building. There was a fire and the building burned down in
2016. The effect of the option agreement was that the Applicant would construct a new building and offer the Respondent a protected business tenancy to run a restaurant business from within the new building. 2. In these proceedings, the Applicant contends that the option agreement has come to an end through an implied term of that agreement, to the effect that the Applicant would use all reasonable endeavours to obtain its head lessor's consent to reconstruction, including new restaurant premises. The dispute in this case is over whether such a term should be implied into the agreement and, if it should, whether the

Applicant has exhausted all reasonable endeavours. 3. Following referral to this Tribunal, directions were given and both parties prepared a Statement of Case and filed evidence. In the period shortly before the hearing, the Respondent made a number of requests to amend his Statement of Case. I refused those by my orders of 28th August 2025 (for reasons set out in that order) and 12th September 2025 (for reasons given that day during a telephone hearing). 4. At the hearing, the Applicant was represented by Miss Proferes, while the Respondent was represented by Mr Sinnatt. I am very grateful to both of them for their extremely helpful written and oral submissions. The hearing had initially been listed as a remote hearing to be conducted by the cloud video platform, but this was changed at a late stage to an in-person hearing. I wish to thank the parties for accommodating this change at short notice and the Tribunal staff for making the necessary arrangements. I also wish to record my gratitude to an interpreter who assisted the Respondent during the hearing. 5. In the remainder of this decision, I will seek to explain why I have decided that the current application to cancel the unilateral notice cannot succeed.¹ THE FACTS 6. The Tribunal heard witness evidence from Richard Brooks, a director of the Applicant company, and from the Respondent himself. 7. In my assessment, Mr Brooks was an honest witness who was trying to assist the Tribunal. His written evidence was, however, undermined in one respect in that he described some correspondence as saying something that it clearly did not. 8. The Respondent's witness statement was in English, as was the Statement of Case that he had signed. An interpreter had, however, been requested and provided for him for the hearing. That in itself is not necessarily unusual. There are often witnesses who can communicate in English as a second language, particularly when they have the time to carefully read and understand written English, but who prefer to give oral evidence with the assistance of a translator so as to ensure that they do not misunderstand any questions, and are not misunderstood in their answers, and also 1 In so doing, I bear in mind the Practice Direction issued by the Senior President of Tribunals on 'Reasons for decisions'. because the whole process of cross-examination can be stressful and the burden of having to do that in a second language might put the witness at a disadvantage. 9. That is not the position in this case though. The Applicant's oral evidence was that his Statement of Case and witness statement had both been prepared with his solicitor through a Turkish translator. The Applicant had given his account in Turkish and it had then been translated. No Turkish version had been provided. Although the Tribunal's procedural rules do not contain the detailed mandatory requirements for translated witness statements that can be found in CPR Part 24, it is standard practice (or, at the very least, good practice) for a translated statement to be accompanied by the original in whichever language it had been taken, and a certificate from a translator confirming the accuracy of the translation. That was not done in this case. The Respondent accepted that he did not know if what he had signed was the same as his Turkish language originals. 10. The situation got worse because when the Tribunal asked the Respondent if he could read English, he was only able to say that he knew the letters. There therefore was not any way in which could even verify the accuracy in the English language of his signed written evidence. 11. I should say at this stage that Mr Sinnatt was very careful not to divulge any privileged matters, but I got the

strong sense that his instructing solicitor did not agree with the account given by the Respondent about how his statements had been prepared. I, of course, cannot make any findings about that, but the Tribunal was left in a position where the Respondent's evidence was worthless. After some time for consideration, Mr Sinnatt pragmatically withdrew any reliance on the Respondent's witness statement and so I shall say no more about it.

12. Most of the relevant facts are uncontentious and so the absence of any usable witness evidence for the Respondent is not of great significance in setting out the factual background. It is my view that the facts, so far as relevant, can be summarised as follows. To the extent that this includes any facts that were in dispute, I make any necessary findings of fact by applying the civil standard of the balance of probabilities (sometimes expressed as whether something is more likely than not).
13. The building that contained the Respondent's restaurant was known variously as The Mud Club and The Beach Hotel. The land was owned by the local authority, Arun District Council. In 1993, Arun DC granted a lease to a Mr Keith Parker for a term of 125 years. The lease required the lessee to carry out development works in accordance with plans and specifications that were attached to the lease. It is worth noting at this stage that the permitted use was "as a licensed club with retail shop units and/or restaurants on the ground floor" (cl.3.18(a)) and that use for private residential purposes was specifically prohibited (cl.3.18(b)). I was told that the building consisted of restaurant premises on the ground floor and two floors of a nightclub above that. It did not include any residential element.
14. At some point, the lease was assigned to Beach House Developments Ltd. It is apparent that there was a deed of variation agreed in 1996 between Arun DC and Beach House Developments. Both parties were agreed that nothing turned on the terms of that variation.
15. In 1997, Beach House Developments granted a lease to the current Respondent for a term of 20 years from 25th March 1997. The demised premises was identified as being part of the ground floor of the building. This is what he used for his fish and chip restaurant for almost the next two decades.
16. By cl.7.2 of the underlease, the landlord covenanted to insure the demised premises and by cl.7.6.1, the landlord covenanted that if the premises were damaged or destroyed by an insured risk it would use all reasonable endeavours to obtain all planning permissions or other permits and consents that may be required by statute to enable it to rebuild and reinstate.² Further, by cl.7.6.2, the Landlord agreed, subject to various other provisions, that as soon as practicable after receiving the insurance money it would apply that money to rebuilding or reinstating the destroyed or damaged premises.
17. The Applicant company purchased the headlease in September 2016. In November 2016, a fire broke out and the building was severely damaged. The remainder of the 2 This was subject to a condition in cl.7.6.1.2 which is not relevant here. building was demolished. It is not necessary in these proceedings to make any findings about the cause of the fire, or even where it began. It is also not necessary to make any findings about the extent of the damage and whether the building had to be demolished or if it could have been reconstructed without that step. For present purposes, all that matters is that there was a fire and the building was demolished.
18. The term of the Respondent's tenancy would have expired in March 2017. He commenced proceedings

against the Applicant, seeking the grant of a new tenancy under Landlord and Tenant Act 1954, Pt 2. Those proceedings were given claim number D00CI546 and were settled by a consent order on 9th August 2018, which was approved by DJ Clarke.³ The terms of that order were agreed by the parties at court and plainly represented the result of detailed discussions between the parties and their representatives. The Respondent (as claimant in those proceedings) was represented there, as here, by Mr Sinnatt. The Applicant (as defendant) was not represented at that stage by Miss Proferes. He was, nonetheless, also represented by experienced counsel. The consent order, which incorporated heads of agreement, was not a lengthy document and so I shall set it out in full here. “1. Permission to the Defendant to amend the Defence in the form attached to the application to amend. “2. It is declared that the Claimant has jurisdiction to apply for a new lease. “3. These proceedings are stayed pending the parties entering into an option agreement giving the Claimant a right of first refusal in respect of redeveloped premises more particularly described in the heads of agreement entered into today. “4. The Defendant to pay the Claimant’s costs of £10,000.00 within 28 days. “HEADS OF AGREEMENT 3 The order itself was drawn up on 15th August 2018. “1. B5 Limited and Yusuf Vural shall enter into an option agreement (‘the Option’)⁴ in respect of restaurant premises to be constructed at and part of The Beach Hotel, The Esplanade, Bognor Regis, PO21 1NE (‘the Premises’) on the following basis by 4pm on 1st October 2018:

- (a) B5 Limited shall use all reasonable endeavors⁵ to obtain planning permission and construct a building (‘the Building’) at the site known as The Beach Hotel, The Esplanade, Bognor Regis, PO21 1NE (‘the Site’);
- (b) B5 Limited shall use all reasonable endeavors to include restaurant premises, being the Premises, in the design, application for planning permission and construction of the Building;
- (c) The Premises referred to in clause 1 (b) above shall have a frontage of no less than 50% of the frontage of The Beach Restaurant, The Esplanade, Bognor Regis, West Sussex, PO21 1NE, let to Mr. Vural by a lease between Beach House Development Limited (1) and Yusuf Vural (2) dated 18 April 1997 (‘the Existing Lease’);
- (d) The Premises referred to in clause 1 (b) above shall have an area of no less than 75% of the area demised under the Existing Lease (after the basement and area on the first floor have been excluded);
- (e) The frontage referred to in clause 1 (c) above shall be in a similar position to the frontage of the demise under the Existing lease and shall have no less amenity and aspect;
- (f) Upon the Premises being constructed B5 Limited shall offer Mr Yusuf Vural a tenancy of the same from a term of 20 years, at the then market rent, and protected under Part II of the Land and Tenant Act 1954 (‘the Lease’);

- (9) The Lease shall be on substantially the same terms as the Existing Lease, save for modernization and clarification of the terms. “2. If B5 Limited shall at any point sell, part with possession or otherwise transfer the Building and/or Site without having constructed the Building, they shall ensure that any purchaser enter into the option with Mr Yusuf Vural, and 4 The order as drawn included an underscore at this point instead of a closing parenthesis, but I have set out here what was plainly intended as it is easier to read that way. 5 The drafts prepared by the parties had included the correct spelling of this word. This mistake appears to have been inserted by the court when drawing up the order. I have retained the spelling used in the order as it is clear what was meant. that Mr Vural shall be entitled to register a restriction against the registered title of the Building and/or Site and/or unilateral notice. “3. B5 shall use all reasonable endeavors to obtain the consent of any mortgagee to this agreement. “4. Prior to the commencement of any works of construction on the Site B5 Limited shall grant Mr Yusuf Vural a licence and/or tenancy at will of the premises set out in the rider (‘the Licence Premises’) permitting him, his servants and/or agents to enter and occupy the Licence Premises for the purpose of a Mobile Takeaway food business, Mr Yusuf Vural being responsible for all services, utilities, permissions, and consents together with Insurance to enable the same and being responsible for constructing a new fence along the northern boundary of the Licence Premises (‘the Licence’). “5. No rent or other charge shall be levied by or payable to B5 Limited in respect of the Licence. “6. Mr Yusuf Vural waives any and all rights to any insurance monies received by B5 Limited in respect of the Existing Lease. “7. This agreement is subject to the Head Lessor agreeing to the reconstruction of the Premises, Arun District Council granting the necessary planning permission and the Head Lessor agreeing to the terms of any new underlease to Yusuf Vural. “This agreement is in full and final settlement of all and any claims and/or counterclaims arising whensoever and howsoever at the date hereof in respect of the Existing Lease whether included in claim no. D00CI546 or not. “For the avoidance of doubt, if the parties to this agreement are unable to agree the substantive terms of the Option Agreement, save for the terms stated above, the stay of claim no. D00CI546 shall be lifted and the entirety of this agreement shall cease to have effect. “Rider The front of the Site running from the south of the existing gates marked with crosses on the photograph attached.6” 19. As anticipated by the agreement embodied in the consent order, the parties subsequently entered into an option agreement dated 15th October 2019. The agreement is a lengthy document, as it included the existing underlease and the consent order as schedules. Even without those schedules, the agreement is too long to set out here in full.7 The following are the main points to take from the option agreement. 20. First, it is quite apparent that the option agreement was designed to give effect to the earlier agreement set out in the consent order. This is apparent from the recitals and from the incorporation of that order into the agreement by cl.12. 21. Secondly, cl.6.1 contained covenants made by the Applicant (as “Landlord”) with the Respondent (defined as the “Tenant”)8. “(a) To use all reasonable endeavours to obtain planning permission for a building at the Property;

- (b) Upon the grant of planning permission to use all reasonable endeavours to construct the Building including provision for a restaurant in the Building having a frontage of not less than 50% of the frontage of the premises demised by the Underlease and an area of not less than 75% of the area demised by the Underlease (after the basement and area on the first floor have been excluded) and the frontage as identified in the Rider to the Order shall be in a similar position to the frontage of the demise under the Underlease and shall have no less amenity and aspect; and 6 I have not included the photograph in this judgment as the copy that was in the bundle was not particularly clear, but it was not suggested that anything turned on this so far as the instant case was concerned. 7 I can confirm though that I read the agreement in full before the hearing in this case, and I have re-read it since then. 8 Clause 6.1 actually refers to covenants made with the “tenant”, using a lower case “t”, but there cannot be any doubt that this was meant to mean the Tenant as had previously been defined.
- (c) To use all reasonable endeavours to obtain the consent of Lloyds Bank plc as mortgagee of the Property or any successive or replacement mortgagee; and
- (d) To use all reasonable endeavours to secure the consent of the Head Lessor to the terms of the New Lease.” 22. Thirdly, as part of the process of giving effect to the consent order agreement, the Respondent was granted the “Option”, defined as being “the option to take the New Lease granted by the Landlord to the Tenant pursuant to the terms of this agreement”, which was to be triggered by the “Offer”, being “an offer by the Landlord to the Tenant to grant the Tenant the New Lease pursuant to the terms of this agreement such offer to be made within 10 Working Days of the date of issue of the Certificate of Practical Completion”. The certificate referred to there was to confirm that “the Building has been satisfactorily completed and the Restaurant is fit for occupation by the Tenant”. Once the Offer had been made, an Option Period of 21 Working Days began to run, during which time the Respondent, as Tenant, could exercise the Option by serving a notice on the Applicant. Detailed provision was then made as to the terms of the New Lease and how it was to be entered into. 23. Fourthly, cl.10.1 provided that “If the Option is not exercised in accordance with the terms of this agreement or lapses then immediately after the expiry of the Option Period, the Tenant shall remove all entries relating to the Option registered against the Landlord’s title to the Property”. 24. Finally, for present purposes, the agreement included an “entire agreement” clause at cl.12: “This agreement and the documents annexed to it constitute the whole agreement between the parties and supersede all previous discussions, correspondence, negotiations, arrangements, understandings and agreements between them relating to their subject matter”. 25. The Respondent subsequently applied for a unilateral notice to be entered against the Applicant’s title to protect his rights under the option agreement. It is that unilateral notice which the Applicant has sought to have removed. 26. The Applicant applied to the local planning authority in October 2019 for permission to develop the subject property, and some adjoining properties that the Applicant had acquired. The authority, which just so happens to be Arun DC (and so the Applicant’s landlord, but wearing a different hat), refused that application in June 2020. 27.

The Applicant submitted an amended planning application in October 2020, which was given reference number BR/244/20/PL. Arun DC gave permission for the second application in September 2021. The development for which permission was granted was described as “Redevelopment into 10 No. 2 and 3 bed apartments & 2 No. commercial units (A1 Retail or A3 Restaurant/Cafe)”.⁹ The significant feature of the proposed development is that it was to be mixed commercial and residential use, unlike the building that had burned down, which had been solely commercial. On the face of it, this would be contrary to the permitted use under the headlease, although it would of course be open to the landlord to waive or vary that part of the headlease. 28. I should note here planning condition 4, because the Respondent placed some reliance on it. “The ground floor commercial units shall be used as retail, cafe or restaurant within class E(a) and E(b) and for no other purpose (including any other purpose in Class E of the Schedule to the Town & Country Planning (Use Classes) (Amendment) (England) Regulations 2020 or any other Statutory Instrument revoking, re-enacting or amending these regulations). Reason: To enable the Local Planning Authority to maintain control in the interests of the amenities of surrounding residential properties & future residential occupiers of the building and in accordance with Arun Local Plan policies D DM1 and QE SP1.”²⁹ It can also be noted at this stage that although permission was given for redevelopment to include restaurant premises, there were further conditions attached to any use as a 9 In the usual fashion, the decision notice required the development to be begun within three years of the date of the decision. I did not hear any evidence about whether any works had been started or whether this permission had now lapsed, but there was no suggestion that, even if it had lapsed, the Applicant would not be able to obtain the grant of a similar permission in the future. restaurant, including a condition to obtain the further written approval of the local planning authority for the extractor fans etc.¹⁰

30. Mr Brooks said in his witness statement that the process of obtaining planning permission cost the Applicant company around £60,000. I accept that the total cost is likely to be a substantial sum. I do not think I need to make any finding about the precise cost. 31. Having obtained Arun DC’s permission, in its capacity as local planning authority, for the redevelopment of the property, the Applicant then sought Arun DC’s consent, this time in its capacity as landlord under the 1993 headlease.
32. Mr Brooks deals with this at paragraphs 22 and 23 of his witness statement: “22. B5L has asked Arun DC as Head Lessor to consent to redevelopment under the Planning Consent. But Arun DC has said it does not want redevelopment for mixed-use, only residential-use and a coherent redevelopment for the whole of the Site. I was told this by B5L’s conveyancing solicitor based on their direct contact with the Estates Department of Arun DC. “23. Arun DC confirmed in an email to B5L’s conveyancing solicitors, Gunner Cooke, on 13th May 2024 that it will not agree to any reconstruction of the Property that includes non-residential use”. 33. I have seen that email of 13th May 2024. It does not include the confirmation that Mr Brooks attributed to it. He accepted in his oral evidence that the email did not say that Arun DC were refusing to agree to any commercial element in the new building. Nor did any of the other emails which I was referred to say this. In his oral

evidence, Mr Brooks said that Arun DC did not want a mixed-use scheme and that he had been told this by “Molly” (meaning Molly Siggs, a Senior Associate at the Applicant’s solicitors who had sent and received several of the emails that I was shown). 10 See condition 18. 34. I am not satisfied that Arun DC has, in its capacity as landlord, said that it will not allow a mixed-use development or anything other than residential only. I accept that Mr Brooks genuinely thinks that this is what he has been told by Ms Siggs. In my judgment though it is significant that the Tribunal does not have any evidence from her, that Mr Brooks has previously either misdescribed or misunderstood email correspondence, and that the email correspondence when read as a whole does not show Arun DC making this objection. Without hearing from Ms Siggs or anyone from Arun DC, I cannot go as far as to find that Arun DC did not say this in some form or other. It is not necessary for this Tribunal to make a factual finding on that point. It is the Applicant that asserts this as a fact and must prove it, and the Applicant has failed in these proceedings to discharge the burden of satisfying me that it is more likely than not that Arun DC has raised this specific objection, rather than Mr Brooks having misunderstood something that Ms Siggs passed on to him, or (although I consider this less likely) Ms Siggs having misunderstood something that was said to her. 35. I do, however, accept the evidence of Mr Brooks that the Applicant company has derived no income from the property since 2018, but that it has been responsible for making payments towards a mortgage secured against the property. 36. There is one final factual issue to address, which is that the Applicant’s Statement of Case included the following at paragraph 33. “The Applicant understands that the Respondent is in his 60s and has resided in Turkey since 2019. It is inherently unlikely that he intends to carry out business from rebuilt premises. The Applicant believes that the Respondent seeks to use his legal rights in a way contrary to the intention of the 2018 Order and the Option Agreement, to exert a ‘ransom’ payment from the Applicant.” 37. The Respondent’s Statement of Case did not specifically deal with this point, although as it was pleaded, paragraph 33 steered clear of making any positive averments of fact (setting out instead what the Applicant “understands” and “believes”). I note that the amended Statement of Case, for which I refused permission, contended that paragraph 33 should be “disregarded” as the Respondent’s age and present residence were “irrelevant”.

38. Mr Brooks’s witness statement did not include anything that was relevant to this point. Given the difficulties with the Respondent’s witness evidence, he was not cross-examined about his intentions. The agreed list of issues included, as issue number 5, the question “Does Mr Vural genuinely intend to run a fish and chip shop at the Premises if they were able to be rebuilt?” I indicated at the pre-trial review that I was unsure why this was relevant. Although I was told by Miss Proferes that it was relevant to the other issues to be considered by the Tribunal, this did not feature in the Applicant’s skeleton argument for trial and was not addressed during oral submissions. Accordingly, despite this being an agreed issue, I remain unconvinced that it is relevant and I decline to make any finding on a point which is not the subject of any evidence whatsoever. While I must exercise caution not to hold the Respondent’s failure to produce any usable evidence against the Applicant (as the Applicant

is blameless in that regard), the important point remains that the Applicant did not lead any evidence that would allow me to make a positive finding about the Respondent's intentions. DISCUSSION & ANALYSIS 39. As I have already indicated, the parties helpfully agreed a list of issues, one of which I have addressed above. In my view, the remaining issues can conveniently be split up and summarised under two headings: (a) does the agreement contain implied terms that the Applicant will use all reasonable endeavours to obtain the landlord's consent to reconstruction of the premises and that the Applicant's obligation to grant the option will be discharged if the Applicant cannot obtain the landlord's consent? (b) if so, has the Applicant used all reasonable endeavours, without success, such that the Applicant's obligations have been discharged? 40. The first issue is primarily a question of the construction and interpretation of the agreement reached between the parties. The second issue, which only arises if the Applicant is right about the first issue, is primarily concerned with analysing what the Applicant has done to see if it passes an "all reasonable endeavours" test. 41. It is extremely important to note that Arun DC has not been a party to these proceedings. I mention this because it had appeared to me that aspects of the various amended Statements of Case that the Respondent put forward at an extremely late stage were potentially raising issues about the effect of the headlease between Arun DC and the Respondent and the reasonableness or otherwise of any decision to refuse consent that might have been made by that body. I also thought that, on occasion, some of the parties' written and oral submissions appeared to be at risk of inadvertently straying into matters that affected Arun DC. This would be problematic, because any decision that I make would not be binding on Arun DC. I make clear here that I intend to only address the issues between the present parties. I shall do that by turning now to consider whether the Applicant is correct that terms should be implied into the option agreement. Implied terms

42. While I provided above a very short summary of the terms that the Applicant says should be implied into the option agreement, it is helpful here to set out in full the implied terms that the Applicant relies on (taken from paragraph 23 of its Statement of Case). "a) The Applicant would use all reasonable endeavours to obtain Arun DC's agreement to the reconstruction of the Premises; "b) The grant of the Option is conditional upon:
- i) the grant of planning permission for development which included restaurant premises; and
 - ii) Arun DC's consent to reconstruction which included restaurant premises; "c) If after all reasonable endeavours had been used the permission and consent could not be obtained, the Applicant's remaining obligations under the Option Agreement would be discharged."
43. In her skeleton argument, Miss Proferes labelled a), b), and c), as "the Consent Term", "the Conditions Term", and "the Discharge Term", respectively. That is a convenient shorthand and so I shall adopt the same terminology. 44. The law on the construction of contracts and implying terms is now well-known and was not really the subject of any sustained difference between the parties. 45. So far as the principles of construction are concerned, I was referred to the discussion in *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm); [2020] 2 Lloyd's Rep 64, which in turn referred to several familiar cases decided at the highest level, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50;

[2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36; [2016] AC 1619; and, *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173. I do not think that it is necessary to set those principles out here, but I have kept them well in mind. 46. The parties also referred to several authorities on the implication of terms, again including statements of principle at the highest level in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742; and, *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers (USDAW)*

[2024] UKSC 28; [2025] 2 All ER 565 (as well as the decision of the Privy Council in *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531).¹¹ 47. There was no real dispute as to what the applicable principles were, rather than what the effect of them in this case was. Accordingly, the principles can be summarised fairly shortly, as follows.

- a. First, a term can only be implied if it is necessary to do so to make the contract work, either to give the contract business efficacy or because it was so obvious that it goes without saying. It is important that the concept of necessity is not watered down. It is not enough that the contract could be improved by the addition of an implied term (or terms). 11 I note in passing that the TAQA case also included a very helpful summary of the law on implied terms at [27]- [29], albeit that this was before Supreme Court's decision in *Tesco*.
- b. Secondly, it is a necessary but not a sufficient requirement that the term that a party seeks to have implied appears fair or is one that the court/tribunal considered that the parties would have agreed if it had been suggested to them.
- c. Thirdly, construing the words that the parties have used in their contract and implying terms into the contract both involve determining the scope and meaning of the contract, but they are different processes governed by different rules. In deciding whether or not to imply a term, the court/tribunal is deciding whether, objectively, the parties would have said something in their contract that they did not in fact say had the point occurred to them.
- d. Fourthly, no term may be implied into a contract if it is inconsistent with an express term.
- e. Fifthly, particular care is required when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties, because where an issue has been left unresolved, it is much more likely to be the result of choice rather than error. If there is a detailed and professionally drafted contract, there will be a strong inference that the parties gave careful consideration to all the terms, so it is more difficult to imply an additional term in. Of course, care must also be taken not to push this point too far, as the test for implying terms remains the same.
- f. Sixthly, it is normally necessary to construe the express words first, before being able to consider whether an implied term would be necessary and whether it would contradict an express term. 48. Having set out those principles, a few points can conveniently be addressed at this stage. 49. First, it was suggested by the Respondent at one point that the Tribunal did not have jurisdiction to "overturn, correct or disregard" the heads of terms

recorded in the consent order. This was not a point that was pressed by Mr Sinnatt. In my view, he was right not to do so, because the jurisdiction to construe and interpret an agreement is not limited to the forum within which that agreement was reached. 50. Secondly, it had also been suggested by the Respondent that, in effect, if the Applicant was right then the parties had not been able to agree the substantive terms of the option agreement. Again, Mr Sinnatt did not press this point and, again, I consider that he was right not to pursue it. The parties plainly reached a concluded final agreement. The issue before the Tribunal is whether it is necessary to imply in the various terms sought by the Applicant once the express terms of that agreement have been construed. This is the same exercise as for any other concluded contractual agreement. 51. Thirdly, Mr Sinnatt accepted that the inclusion of an “entire agreement” provision at clause 12 did not mean that it was impossible for any term to be implied into the agreement. He submitted though that the inclusion of an entire agreement clause is factor which counts against any terms being implied. He referred the Tribunal to the discussion on this point in *Chitty on Contracts* (which is to be found in the 36th edition at para.17-022 and n.108) and to *Sparks v Biden* [2017] EWHC 1994 (Ch). Based on those, I agree with Mr Sinnatt that an entire agreement clause is a factor against implying in the terms sought by the Applicant. I note, however, that [54] of *Sparks*, the High Court said that it was not a very strong factor on the facts of that case, and that the court did imply a clause into the relevant agreement. 52. Fourthly, Mr Sinnatt submitted that the fact that the landlord had refused permission for the development did not mean that the Applicant was entitled to use the benefit of hindsight to be put in a better position. Miss Proferes realistically accepted that this was correct, although disputed the suggestion that this is what the Applicant was trying to do in this case. 53. As I have indicated above, it is important to consider the express terms of the agreement so as to see if there is any gap that needs to be filled, bearing in mind the test of necessity, and if there is to check that any implied terms would not be inconsistent with any of the express terms. 54. In doing so, I remind myself that I should not be seeking to improve the agreement between the parties and that it is only if Consent, Conditions and Discharge Terms are necessary that this Tribunal can say that they should be implied into the agreement. I also accept Mr Sinnatt’s submission that the onus is on the Applicant to show that the agreement does not work without their proposed implied terms. 55. I also bear in mind that the agreement was negotiated between two parties who each had legal representatives and that it included the “entire agreement” provision at cl.12. Taken together these two factors are a strong indicator against the implication of any terms. 56. Returning to the express terms, there did not seem to be any substantial disagreement about what the express terms meant, save perhaps for cl.10.1, which the Applicant relied on. I shall consider that further below in the context of arguments for and against the Discharge Term. 57. The real question is whether the option agreement works without each of the Consent Term, the Conditions Term, and the Discharge Term, or whether it is necessary to imply each of them. 58. In his oral submissions Mr Sinnatt pointed, with some justification, to the Applicant’s own evidence. During the course of his cross-examination of Mr Brooks, he had put to him that at the time of entering into the agreement, it was not considered that Arun DC, as landlord, would

refuse reconstruction on the basis that they did not want the building to include commercial premises. Mr Brooks had said that he thought that this was right. Mr Sinnatt also put to him that the term that the Applicant is seeking to imply is that landlord could refuse consent because it does not want commercial premises, but that had not been in the parties' contemplation. Mr Brooks responded to this that he did not think that this would have been reasonable to contemplate at the time.

59. Mr Sinnatt submitted that this evidence “sank” the Applicant’s case, because its witness had said that he had not contemplated the notion that the local authority landlord would say “no” on the basis of refusing commercial use. Based on this, he submitted that it cannot be argued that it was obvious or goes without saying, because Mr Brooks did not think about it. 12 Although it might also be noted that solicitors acting for the Respondent wrote to HM Land Registry on 25 th June 2024 saying that they suspected that “the agreement was drafted on a ‘cut and paste’ basis”. 60. There is, of course, a need to be rather cautious with oral evidence given after the event about what the parties were thinking at the time. Such evidence tends to be self- serving. In this instance though, the evidence is the very opposite of self-serving and so there might seem to be a strong argument that Mr Brooks’s apparent concession does fatally undermine the Applicant’s arguments in this case. 61. In my judgment, however, the position is not quite so clear as that. First, even if it was not obvious that it went without saying, that is not the only gateway into the land of implied terms. As the authorities that I was referred to make clear, and as I have summarised above, the question is whether it is necessary to imply a term to make the contract work. Necessity can be established by reference to business efficacy,¹³ so long as the Tribunal is careful not to allow that requirement of necessity to be watered down. 62. Secondly, this line of questioning is based on a slight and subtle reformulation of the Consent Term and the Conditions Term. As formulated by the Applicant, those Terms are not dependent on the landlord refusing consent because of a desire to avoid any commercial premises. Instead, they are simply premised on the basis that the landlord’s consent would be required and therefore may be refused. 63. As it happens, it seems to me that even the first part of this may be put too high. I do not think that it can safely be said in these proceedings that the landlord’s consent would definitely be required for any reconstruction. But nor can it safely be said that the landlord’s consent is not required, and therefore cannot be withheld (because this would be irrelevant), for reconstruction. I am not prepared to reach that finding in these proceedings without having heard from the landlord, bearing in mind that Arun DC would not be bound by the Tribunal’s views in these proceedings about the meaning and effect of the headlease. 64. There is a further point here, which is that these parties could not have agreed, as part of the negotiations and contractual agreement between them, whether or not the landlord’s consent was required under the headlease. That could only be agreed with the landlord. 13 Although I recognise that in Ali it was said that usually the outcome of either approach will be the same. 65. It therefore seems to me that the most that can be said at the moment is that the landlord’s consent may be required. It also seems to me that had an officious bystander raised this possibility while the parties

were negotiating at the county court or while they were subsequently drafting the terms of the option agreement, the parties would have been bound to acknowledge that the landlord's consent might possibly be required. It was not in their gift to say otherwise. 66. In my judgment, had the officious bystander asked whether the Applicant would seek to obtain the landlord's consent if it was required, the only answer that the parties could possibly have given is "yes". This conclusion is not undermined by Mr Brooks's oral evidence, which was that it would not have been reasonably contemplated that the landlord would refuse consent on the grounds of not wanting any commercial element, but there must be many reasons for which a landlord might refuse consent. 67. The effect of this though is that I do not accept that the Applicant's current formulation of the Consent Term is quite correct, because that presupposes that the landlord's consent is required. As I have sought to explain, that may or may not be correct and it is not for this Tribunal to determine that question in the absence of the landlord. As I have said, it is my view that had the parties considered this expressly in their discussions, they would have been bound to agree that consent might be required. In those circumstances, I consider that the Consent Term can appropriately be rephrased as "The Applicant would use all reasonable endeavours to obtain Arun DC's agreement to the reconstruction of the Premises, if required" (additional words emphasised). 68. In my judgment, this is implicit within cl.6.1(b) of the option agreement, because using "all reasonable endeavours to construct the Building" must include using all reasonable endeavours to obtain the landlord's consent, should it be needed. It cannot have been considered that the Applicant should use all reasonable endeavours to construct a building that would be in breach of the lease, and so liable to forfeiture (or other remedies). 69. I also consider that, to the extent that it is not a necessary part of cl.6.1(b), the revised Consent Term would be implied to deal with cl.6.1(d), because it is my view that it is implicit in a requirement to "use all reasonable endeavours to secure the consent of the Head Lessor to the terms of the New Lease" that this includes securing the landlord's consent to any necessary pre-conditions to the grant of a new lease to the Respondent. 70. In my judgment, the revised Consent Term is necessary to make the option agreement work. It is, in my view, slightly surprising that the Respondent would resist the inclusion of this term because without this term, the option agreement that he has entered into is worthless to him to the extent that the landlord's consent for construction is required. Without such a term, the Applicant would not need to even approach the landlord for consent, no building would ever be completed, and there would be nothing to grant him a lease of. That would be absurd. It cannot have been what the parties would have intended. It is therefore necessary to imply in the revised Consent Term, both to give business efficacy to the agreement and because it is so obvious that it would go without saying.¹⁴ 71. Turning to the Conditions Term, the first point to note about this is that it includes two sub-terms, one relating to planning permission and the other to the landlord's consent. I am not convinced that, strictly speaking, the first part of this is something that the Tribunal needs to address in order to determine the referred matter, because planning permission has been obtained. 72. I shall therefore focus on the second part, which plainly does form part of the present dispute. 73. Although a different term to the Consent Term, this is clearly closely connected to it. In my

view, much of the same reasoning applies and so I can deal with this relatively shortly. It cannot have been intended that the Applicant would construct a building in breach of the terms of the headlease, nor could the parties have contemplated that the Applicant would be required to put itself in the position of breaching the headlease. 14 Recognising, again, that the outcome of both approaches will usually be the same: *Ali*, at [53]. 74. As with the Consent Term, it is my judgment that the Conditions Term is necessary to make the agreement work, both to give it business efficacy and through an application of the obviousness test, but that this is subject to the same modification. This means that the term to be implied should be “The grant of the Option is conditional upon ... Arun DC’s consent to reconstruction which included restaurant premises, if required” (additional words emphasised). This alteration therefore reflects the revised Consent Term. 75. I have omitted there the first sub-term, dealing with planning permission, so as to focus on the issue that is in dispute in the referred matter. My view though is that much the same logic would apply when considering the planning permission element of the Conditions Term, because the parties could not possibly have contemplated that the Applicant would be required by the agreement to construct a building in breach of planning law, with all of the consequences that might flow from that (both under planning law and potentially in respect of any breach of the headlease). It would be necessary to imply this term into the agreement to give it business efficacy, because two commercial parties can be presumed not to have intended a result which would risk putting one party in breach of planning law and the headlease at risk of forfeiture, and because it would be so obvious that it went without saying (for the same reasons).¹⁵ This would again be subject to a similar limitation (such as “if required”) because the parties were not in a position to address the Tribunal on whether there might be a form of reconstruction that did not require planning permission, and this Tribunal is therefore not in a position to reach a decided view on that question. 76. Next, I turn to the Discharge Term. This is different to the Consent Term and the Conditions Term, because the reasoning that supports the inclusion of those terms does not apply to the Discharge Term. While the Consent Term and the Conditions Term go pretty much hand-in-hand, the Applicant still needs to show that agreement including those two terms would not work properly unless the Discharge Term is also a term to be implied into the option agreement. 77. It is also worth noting that in many respects this is the key battle ground so far as implied terms are concerned, because it is only if the Discharge Term (or something ¹⁵ Again, see [53] of *Ali*. similar to it) is included that the Applicant can begin to argue that the option agreement has ended. Without the Discharge Term, the Consent Term and the Conditions Term do not assist the Applicant. Indeed, if anything, they are more favourable to the Respondent, because he would have the benefit of enforceable obligations requiring the Applicant to take action. 78. Both parties agreed that option agreements could be open-ended. The Respondent referred particularly to a passage in *Barnsley’s Land Options*, at para.2-148, to demonstrate this. The equivalent passage in the 8th edition is in identical terms, as follows (with references removed for ease of reading). “There is no reason why (subject always to the rule against perpetuities, if applicable) an option may not be open-ended and of indefinite duration. This outcome may come to pass either through the

deliberate use of language in an option agreement or because the parties failed to consider the question of the temporal extent of the option. It is not open to the court to limit the express words used. It is a fundamental principle that a term cannot be implied which is contrary to an express term. So if the agreement is drawn in very wide terms and imposes no express time limit on the exercise of the option, a shorter period will not be implied. Further, as a general rule, the courts will not readily imply a limitation on the duration of an option, for to do so would be to rewrite the parties' bargain." 79. It is also helpful to note the passage that comes immediately after the text quoted above: "Whether a time limit is to be implied and, if so, what that limit is will depend on the wording of the agreement construed in all the circumstances, the object being to establish the intention of the parties at the date of grant regarding the temporal extent of the option, this being objectively assessed. The test applicable to the implication of a time limit is the standard test applicable to the implication of terms into any contract. Accordingly, there is a high threshold before any term will be implied." 80. Taking those extracts from *Barnsley's Land Options* together, and considering the option agreement against all of the principles already identified, the key issue for the Tribunal is whether it is necessary, in order to make the agreement work, to imply a term bringing it to an end if the Applicant is unable to get any necessary permissions and consents, so it could not rebuild the building. 81. I had at one point thought that there was some force in the Respondent's reliance on cl.10.1. It is worth repeating that provision here for convenience. "If the Option is not exercised in accordance with the terms of this agreement or lapses then immediately after the expiry of the Option Period, the Tenant shall remove all entries relating to the Option registered against the Landlord's title to the Property" 82. The point made by Miss Proferes was that the words "or lapses" were different to "the Option is not exercised" and contemplates that the agreement can come to an end in some other way even if the express terms did not specify how that might be. That point did seem to me to be quite a powerful one. On reflection though I do not find any support for the Respondent's position in this clause. It is necessary to read the clause as a whole, which shows that the obligation imposed on the Respondent by cl.10.1 only applies "immediately after the expiry of the Option Period". It is obvious that the Option Period can only expire if it has begun, and then 21 working days have elapsed. The Option Period only begins with the Applicant making the Offer, and that can only be done after the building has been completed. In those circumstances, the precise reason behind including the words "or lapses" is somewhat elusive, but it seems to me that this does not assist the Respondent in showing that a term should be implied in that means that the option agreement can be brought to an end before building work has even begun, let alone completed and an Offer made.

83. Mr Sinnatt rightly pointed out that the circumstances surrounding the option agreement meant that there could be end dates in certain situations, aside from cl.10.1. 84. Clause 2 of the Option Agreement expressly states that the option is personal to the Respondent. Clause 1.12 of the Option Agreement provides for references to the Landlord to include a reference to the person entitled to the time being to the Property, but at cl.1.13 the agreement specifies

that references to the Tenant do not include a reference to its successors in title and assigns. The Option Agreement was thus personal to the Respondent. Without being too morbid, there was therefore a built-in “long-stop”, although one obviously hopes that this is many years in the future. 85. The agreement is also conditional on the Applicant have a leasehold interest that it can grant a new lease out of. The Applicant’s lease is for a term of 125 years from 29 th June 1993, and so it will end by effluxion of time on 28th June 2118, or just under a century from now. 86. In those circumstances, the Respondent submits that yet another way of bringing the agreement to an end is not needed and would not have been intended by the parties.

87. While there is some force in that point, it does seem me that the fact that option agreement does not set out the consequences of the Applicant’s lease coming to an end does suggest a gap in the parties’ agreement. In my judgment, they clearly did not contemplate it continuing that long. Realistically, it might be said that it would be next to impossible for the agreement to still be effective then anyway, given the point above about the agreement being personal to the Respondent. So, while this might demonstrate a bit of a gap in the agreement, I do not think that it particularly assists the Applicant here. 88. I was referred to an example of a time limit being implied in the case of *Yewbelle Ltd v London Green Developments Ltd* [2007] EWCA Civ 475; [2008] 1 P&CR 17;

- [2007] 2 EGLR 152. That case concerned an agreement to sell land, which included a tower that had been voted as one of the ugliest buildings in London. The buyer was not bound to complete the purchase until the seller had entered into an agreement with the local planning authority under Town and Country Planning Act, s.106, in a form that had been agreed between the parties (or in a substantially similar form). The seller was to use all reasonable endeavours to obtain the completed s.106 agreement. The seller was not able to secure a s.106 agreement with the local planning authority and, after a year, asked the buyer whether it would be prepared to complete without a s.106 agreement in place. If not, the seller intended to treat the agreement as at an end. The buyer said that the seller had not shown it had used all reasonable endeavours to obtain a s.106 agreement. 89. The seller contended that there was an implied term that when it had used all reasonable endeavours without success, the agreement came to an end automatically, unless the buyer had before that date waived the requirement to obtain a s.106 agreement. The seller also contended in the alternative, that in this situation, the seller would notify the buyer of the position and give the buyer the option to decide whether or not to waive the requirement, and that if the buyer did not waive the requirement then the seller would be entitled to rescind the contract. 90. The Court of Appeal upheld the trial judge’s decisions that there could not be an implied term of automatic termination, but that there was an implied term that the agreement would come to an end if the seller had used all reasonable endeavours to complete the s.106 agreement and had persisted in those endeavours for a reasonable time, had given the buyer an opportunity to complete the sale without any s.106 agreement and the buyer had chosen not to complete the sale. 91. Unsurprisingly, Miss Proferes relied on this case as showing that a termination clause

could be implied. At [50], Lloyd LJ had said this: “It seems to me that, in relation to a contract for the sale of this development site, with provision for the buyer to carry out an agreed form of development and to grant the seller a leaseback of part of the site, and where the land was itself the subject of leases which would have to be brought to an end in order to make the development possible, it cannot have been intended that an impasse could continue for an indefinite period which might be as much as 12 months, or even more, once it had become clear, after the exercise of all reasonable endeavours by the seller, that the necessary s.106 agreement could not be obtained.” 92. She submitted that no landlord would intend to grant an option for a new lease which would continue forever but could only be exercised subject to third party agreement, without also intending that if such agreement were impossible then the obligation to grant a new lease would fall away. Miss Proferes further argued that this would have the effect of leaving the landlord held to ransom by the beneficiary of the option. This would be commercially nonsensical. 93. On behalf of the Respondent, Mr Sinnatt submitted that the effect of the parties’ agreement was that the Respondent’s underlease continued through the operation of Landlord and Tenant Act 1954, Pt 2, and so the absence of an end date in the option agreement was understandable as the underlease was still continuing. He further submitted that the agreement would work without the Discharge Term, as there was nothing to say that the Applicant could not repeat the process of trying to get the landlord’s permission. Mr Sinnatt also argued that the Applicant could be required to keep applying for different planning permissions and the landlord’s approval, or could simply “sit tight” and wait for circumstances to change.

94. While I accept the Respondent’s argument that an option agreement can be open-ended, it is my judgment that in this case the parties cannot have intended that the option agreement would endure for the remainder of the Respondent’s life. That is particularly so when the agreement imposes obligations on the Applicant to use reasonable endeavours, and so it would potentially lead to the situation where, having used all reasonable endeavours without being able to secure any necessary permission and/or consent, the Applicant was contractually required to keep doing the same thing over and over again, without any reason to think that this would lead to a different result. Had an officious bystander asked whether this was what was intended, the answer would obviously be “no”. Similarly, an agreement that had this result cannot be said to work because it lacks business efficacy. 95. In saying this, I have not overlooked Mr Sinnatt’s argument that the Applicant should have gone back to Arun DC to point out the apparent logical inconsistency in their stance as landlord when compared with their position with their planning authority hat on. Whether or not that is something that the Applicant should be required to do would fall to be considered as part of the question of whether it had used its reasonable endeavours to secure the landlord’s permission, which is a different point. But once reasonable endeavours have been exhausted, it could not have been intended that those endeavours would need to be repeated, nor that the Applicant should have do something above and beyond reasonable endeavours. Therefore, either this is a step that would need to be taken before the Applicant

could show that it had used all reasonable endeavours, in which case the Discharge Term suggested by the Applicant would not be engaged, or it is simply not relevant. 96. I do not agree with the Respondent that the Applicant could simply “sit tight” and wait for circumstances to change. It is hard to see how such an approach would be consistent with an obligation to use reasonable endeavours. If the Respondent was suggesting that the Applicant could be expected to use all reasonable endeavours without success, and then simply wait for an unspecified period of time for some unspecified change of circumstances, then I cannot agree. This would not make any commercial sense from either party’s perspective.

97. Mr Sinnatt pointed, quite understandably, to the Court of Appeal’s endorsement in *Yewbelle* of the trial judge’s decision that there was no implied term providing for automatic termination: see [39]-[42] of the Court of Appeal’s decision. At [42], Lloyd LJ said as follows. “I have no doubt that the judge was right to reject the seller’s primary contention that the agreement came to an end automatically under an implied term, for the reasons he gave at [100]. I would not wish to add anything to the judge’s reasoning on that point.” 98. As the Court of Appeal therefore wholeheartedly adopted the reasoning of the trial judge below on this point, it is helpful to look at what was said. The decision of the High Court was given by Lewison J (as he then was): [2006] EWHC 3166 (Ch). While Lloyd LJ specifically referred to [100] in the passage quoted above, it is necessary to put that in the context of the paragraph that preceded it and so I shall set both [99] and

- [100] of Lewison J’s decision out here. “[99] If a term is implied in the manner that *Yewbelle* suggests as its primary case it would automatically discharge the contract in the event that the seller, despite compliance with its obligation, failed to secure the desired section 106 agreement. As I understood Mr Morgan’s submission the seller could decide for itself how long to keep trying to achieve the desired result; and provided that its decision was itself a reasonable one, it could not be impugned. Thus the implied term would also mean that the contract could be avoided at a time of the seller’s choosing, without prior warning to the buyer. Although Mr Morgan said that it behoved the buyer to keep himself informed about what was going on, he has no contractual means of doing so. Even if he does know what is actually going on, he has no means of knowing for how much longer the seller thinks it worthwhile to continue making efforts towards the desired objective. In addition, Mr Morgan said that any waiver would have to be made while the contract was still on foot; that is to say before the reasonable time had come to an end. In practice this would mean that the buyer would lose the ability to waive the contingent condition and yet insist on full performance of the seller’s promise. If the seller could not rely on his own failure to try for long enough as sufficient to discharge the contract, why should the buyer’s only chance to waive the condition arise before the seller had fully complied with his obligation? In my judgment such a term would be inconsistent with the overall shape of the agreement, and an unreasonable term to imply. “[100] This is, I think, sufficient to dispose of the argument in favour of an implied term in the primary way in which *Yewbelle* puts the case, since any implied term must be a fair and reasonable one. But in my judgment the suggested term

fails to pass either of the familiar tests for implication. Take obviousness first. If the parties had been asked at the moment of concluding the contract, whether the contract would automatically go off if the seller failed to obtain the desired section 106 agreement, I cannot see the buyer unhesitatingly saying 'Yes'. He might say that it would depend on what the differences were between the draft attached to the contract and the section 106 agreement on offer. If they were not, in his view, critical to success or failure of the development he might choose to complete and accept what was on offer. He might say that he was willing to complete and take his chance with the planning authority. He might say that although the seller had used reasonable endeavours, the use of greater endeavours would do the trick, and he would use them. He might say that he would submit a fresh planning application and appeal against its non-determination or refusal in the absence of agreement to LBM's terms. Many of the same points apply to the test of business efficacy. It must not be forgotten that the primary purpose of the contract was the sale of land, and the term implied must be such as to give business efficacy to that overall purpose." 99. It is important to note a key difference between the facts of this case and the Yewbelle case. In that case it was possible, as the learned judge explained, that the buyer would wish to continue with the purchase even without a s.106 agreement having been obtained. Here, it is simply inconceivable that the Respondent would want to pursue the grant of a lease of premises which had not been constructed and could not be built because any necessary consent could not be obtained. Unlike the situation in Yewbelle, where the buyer might have taken the view that the land still had sufficient value to make proceeding with the purchase worthwhile, a lease of premises that do not exist and might never be built is both pointless and worthless to the Respondent. In my judgment it is not unfair to him or unreasonable for there to be a Discharge Term that operates automatically without the need to give him the option of waiving any particular requirement. 100. It is therefore my view that it is necessary for there to be some implied term dealing with termination in the event that the Applicant has met its obligation to use reasonable endeavours, but without obtaining any necessary permissions and/or consents. Such a term is fair and reasonable, for the reasons set out above. It is also necessary to give the agreement business efficacy and so obvious that it goes without saying. 101. I would, again, modify the Discharge Term sought by the Applicant slightly. The parties were, understandably, not able to say whether there might have been some possible building design that would allow the Applicant to offer the Respondent his new lease, but which could be built without the need for planning permission. This could probably be thought to be rather unlikely, but I do not think that this Tribunal can rule it out entirely. More to the point, neither could the parties when negotiating this agreement. I have already expressed my view that it is, similarly, not possible to determine definitively whether or not the landlord's consent was required under the terms of the headlease, only that it might be. Based on this, it is my judgment that the Discharge Term should be modified to be: "If after all reasonable endeavours had been used any necessary permission and consent could not be obtained, the Applicant's remaining obligations under the Option Agreement would be discharged" (amendment emphasised). 102. I am satisfied though that in that slightly modified form the Discharge

Term is necessary, while still recognising the importance of not watering down the test of necessity and reminding myself of the various other important principles of the law of implied terms, which have been summarised above.

103. Before leaving this section, it is important to return to consider the effect of cl.12, which can be significant. Mr Sinnatt submitted that cl.12 would be sufficient to exclude the implication of any term by law. He may be right about that, but in this case the relevant terms would be implied as a matter of fact, as he recognised, and so cl.12 is not a definitive answer. I agree with him though that it is factor to be considered and I am prepared to assume that it is a strong factor against the implication of terms (unlike the position in Sparks). I have approached the assessment above on that basis.
104. The Respondent's opposition was not particularly based on an inconsistency with any of the express terms, rather than on the fact that the agreement set out how it was to expire after the Option Period had ended and it was not necessary to add in any other ways of bringing the agreement to an end. The Respondent relied on the entire agreement clause to show that this clause demonstrated that the parties had not intended any of the terms now sought by the Applicant, rather than to suggest that the implied terms would be inconsistent with clause cl.12 itself. For the reasons I have already given, I consider that the Consent Term, the Conditions Term, and the Discharge Term (all in their revised form), are each necessary to make the option agreement work and are not prohibited by cl.12. For the avoidance of doubt, I do not consider that any of the implied terms are inconsistent with an express term in the agreement. Reasonable endeavours
105. I repeat here that I am not concerned with the reasonableness of the landlord's refusal of consent.¹⁶ The question for this Tribunal is only whether the Applicant can show that it has used reasonable endeavours. In the parties' agreed list of issues, the point was put like this: "If the Option Agreement contains the said implied terms ... Has B5L used all reasonable endeavours to obtain Arun DC's consent to reconstruction for a use that would permit the use of the Premises (as rebuilt) as a fish and chip shop?"
106. The Respondent did not plead any specific case addressing this point, merely stating that he "noted" the Applicant's pleaded case on this point. The parties agreed at the hearing that this left a low hurdle or threshold for the Applicant to get over. Nonetheless, the Applicant does need to prove that it can do so.
107. In closing submissions, Mr Sinnatt suggested that reconstruction of what had burned down, without any alterations, may already be permitted under the lease. Miss Proferes argued to the contrary. It would not be right for me to express any view on this as Arun DC would not be bound by my construction of the headlease, and the point was raised quite late on in the course of submissions. I shall therefore assume for present purposes that Arun DC's consent as landlord is required, as seems to be envisaged by the framing of the agreed issue, quoted above.
108. The phrase "reasonable endeavours" has received much judicial consideration. I was referred by the parties to the Yewbelle case, already discussed above in the context of when a term can be implied, and to Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd [2021] EWHC 3015 (Ch). I have kept those well in mind. ¹⁶ I also note here the point raised by Miss Proferes that the landlord's reasons were irrelevant in any event. Again,

to the extent that this is a question of the landlord and tenant relationship between the Applicant and Arun DC, these proceedings are not the appropriate forum to rule on that issue as the landlord is not a party. This issue may also raise interesting points about the extent to which any decision to refuse consent was challengeable on public law grounds: see *R (Trafford) v Blackpool BC* [2014] EWHC 85 (Admin); [2014] PTSR 989. 109. I can clear one short point out of the way at this stage. Although the Respondent placed some significance in this regard on condition 4 of the planning permission, I do not think that this necessarily helps him. The point made by Mr Sinnatt is that condition 4 requires commercial use in the reconstructed building and that it could be inferred that the provision of retail, café or restaurant facilities was a prerequisite of planning consent being granted for any development at the property. That may end up being right but it does not follow automatically from condition 4. That condition was inserted by the local planning authority as part of a grant of permission for a proposed development which included commercial use and was designed to place controls on the future use of that part of the development. It does not mean that any development would have to include commercial use, but that once permission has been given for that development including commercial use, the use of that part of the development could not be changed. This could be readily explained as a condition to ensure that there was no change to other types of commercial use, but it does not mean that an application for solely residential use would be refused. 110. In my judgment, the Respondent is correct on his more substantive point, as advanced by Mr Sinnatt, which is that even if the Applicant did not have an entitlement under the headlease to rebuild exactly what was there before, it has not used its reasonable endeavours to obtain consent for a building to include restaurant premises, because it has not put this option to the landlord. In my judgment, this would be an obvious step to take. I acknowledge that the option agreement did not require the Applicant to reconstruct exactly what was there before, because it included potential alterations to the size of the Respondent's premises. The agreement did not, however, prevent the Applicant from attempting to rebuild an identical development, or even something very similar. 111. It is plain that the proposed development for which the Applicant obtained permission is different to the building that it had purchased, because it includes residential development, something which is expressly prohibited by the headlease. As I explained when dealing with the factual background, the Applicant has failed to prove that Arun DC has, in its capacity as landlord, refused to grant consent for rebuilding with any commercial use. The Applicant cannot therefore say that asking to rebuild an identical (or very similar) building would be futile, because that is not supported by the available evidence. 112. In those circumstances, the failure to seek consent for the rebuilding of what was there before (bearing in mind that this would not be contrary to the permitted use under the headlease) means that the Applicant cannot show that it has satisfied the Consent Term (either as original framed or in the modified version that is implied into the agreement as a result of this decision). On that basis, it is not necessary to consider further whether a requirement to use reasonable endeavours meant that the Applicant was bound to enter into a debate with Arun DC about the adequacy of their reasons or the logic behind them. 113. In my judgment, the application therefore fails on

this fairly short factual point.

CONCLUSION

114. For the reasons given above, the Chief Land Registrar will be directed to cancel the Applicant's application. 115. The Respondent has been successful in these proceedings. My preliminary view is that he should be entitled to his costs, subject perhaps to some reduction to reflect the fact that he lost on an issue which may be extremely significant in relation to any future dealings between these parties. The order that accompanies this decision will allow both parties to make written submissions on liability for costs in light of that provisional view. Dated this 5th December 2025 Judge Robert Brown BY ORDER OF THE TRIBUNAL 35

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