Neutral Citation Number: [2023] EWCA Civ 482

Case No: CA-2022-001313

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES BUSINESS LIST
JOANNE WICKS KC (sitting as a Deputy High Court Judge)
[2022] EWHC 1467 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE BIRSS

- -

Between :

PRETORIA ENERGY COMPANY (CHITTERING) LIMITED	**Appellant**
- and -	
BLANKNEY ESTATES LIMITED	**Respondent**

- -

JAMES PICKERING KC and SALLY ANNE BLACKMORE
(instructed by **Jackamans Solicitors**) for the **Appellant**
DOV OHRENSTEIN (instructed by **Roythornes Limited**) for the **Respondent**

Hearing dates : 27 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 09.05.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether the parties entered into a binding agreement for lease contained in clause 1 of Heads of Terms ("HoT") signed by the parties on 27 November 2013. Ms Joanne Wicks KC, sitting as a judge of the Business and Property Courts, held that they had not. Her judgment is at [2022] EWHC 1467.

Background facts

2. I can take the background facts from the judge's judgment.

3. In 2012, Blankney Estates Ltd ("Blankney") had some unused land at Heath Farm, Metheringham Heath, Lincolnshire, comprising a former flax factory and adjoining field, registered under title number LL302872 ("the site"). It was put in touch with Pretoria Energy Company (Chittering) Ltd ("Pretoria"), which was looking for a site for an anaerobic digestion plant (an "AD plant"). It was Pretoria's intention to develop three such plants: one, at Chittering, Cambridgeshire, for which planning permission was granted in 2012 and which was in the course of being constructed in 2013. A second opportunity was identified at Mepal, Cambridgeshire, for which planning permission was obtained in 2013. The Heath Farm site would have been the third.

4. Following some initial discussions, by email of 9 July 2013 Mr Ripley of Pretoria sent Tim Harper, Blankney's Farm Manager, a written proposal. This had five headings: "Lease"; "Contract Maize Growing"; "Digestate"; "Gas Supply" and "Energy Connection". These headings reflected the fact that, in addition to the grant of a lease of the site, the parties had been discussing various other commercial arrangements. "Contract Maize Growing" referred to a proposal that Blankney would grow maize to be sold to Pretoria as fuel for the AD plant. "Digestate" is an organic fertiliser, a by-product of the production of biogas through AD. The discussions included the prospect that Pretoria would supply solid and liquid digestate to Blankney from the AD plant. "Gas supply" related to the potential that Pretoria would supply electricity and/or biomethane generated by the AD plant to Blankney. Under the heading "Energy connection", Pretoria confirmed that it had energy connection sites available to it (for the supply of methane to the National Gas Grid) and was negotiating exact connection points and methods; it asked Blankney to assist and co-operate in regard to any wayleaves required. Under the heading "Lease", the proposal was for a rent of £150,000 per annum, based upon a "bare land site" and for a 25-year period.

5. It was common ground that Pretoria would be responsible for obtaining planning permission for the AD plant; and that Pretoria would also construct it. Mr Ripley, who gave evidence on behalf of Pretoria, explained in his witness statement that the rent of £150,000 per annum was what he regarded as "being at the top end of what it would be worth once the plant was constructed."

6. Further negotiations took place (which I do not need to recount); and the proposal went through a number of different drafts. The final (but undated) version was signed on 27 November 2013.

The HoT

7. The final document was described as "Heads of Terms of Proposed Agreement" and was stated to be "Subject to Full Planning Approval and appropriate consents and easements." It went on to say that the agreement:

> "… will consist of four constituent parts, the core element being the lease. The fourth element is available and negotiable for length of contract, delivery and pricing."

8. Clause 1, headed "Lease," provided:

> "This is based upon a bare land site, known as the Flax Factory.
>
> The lease term is for a period of 25 years. It is agreed that the lease will be outside of the 1954 act.
>
> The lease value is £150,000 per annum payable on quarter days with an annual review based on RPI.
>
> Both parties recognise that the lease will need to make suitable arrangements for rolling forward or decommissioning of the lessees' assets remaining on site at the termination date.
>
> The lease will be filed with the Land Registry and therefore will require the appropriate consents and easements."

9. Clause 2 provided for contract maize growing. Clause 3 provided for the supply of digestate; and clause 4 dealt with gas supply. It is common ground that these clauses were not intended to create legally enforceable obligations. Clause 4 did, however, provide (in part):

> "We would like to ask that Blankney will assist and cooperate in regards to any wayleaves required … We, Pretoria, are expecting to pay for an easement, the charge being waived or reduced if gas purchased by Blankney and at a discounted sale price."

10. The final clause, headed "Acceptance", provided:

> "These Heads of Terms of Agreement are agreed and signed on the understanding that the formal agreement will be drawn up within 1 month from planning consent being achieved and subject to the consents and easements being obtained. Furthermore, it is agreed that Blankney Estates and Pretoria Energy recognise that the arrangements being negotiated are exclusive to both parties until the 31st July 2014 and thereby

> agree not to enter into negotiations with third parties to the detriment of the terms contained herein."

11. It is common ground that this clause created a legally binding lock-out agreement. This, therefore, is an unusual case in which it is common ground that some parts of the same document created binding contractual obligations; but other parts did not.

12. The issue is whether clause 1 created a contractually binding agreement for lease.

Subsequent events

13. On 21 January 2014 Pretoria applied for planning permission. It had held off doing so until the HoT were signed. On 21 February 2014 Blankney granted Pretoria a licence over a neighbouring field for the growing, harvesting and carting away of single crop of maize. Pretoria also took a lease from another farmer of some 350 acres to be used for growing maize. Planning permission was granted on 11 June 2014. Thereafter, Blankney instructed solicitors to progress the drafting of a lease and also took steps to demolish the former flax factory. At some stage the planning authority objected to the demolition; and those works were temporarily halted.

14. Following the expiry of the exclusivity period, Mr Banks, one of Blankney's directors, emailed Pretoria with a view to replacing the lock-out agreement with a new one. But shortly thereafter Blankney lost confidence in Pretoria's commitment to the project and its ability to deliver it in a timely fashion. Despite Pretoria's protests to the contrary, the parties could not resolve their differences and on 24 November 2014 Blankney informed Pretoria that it had concluded arrangements with a third party.

The legal framework

15. The judge set out the general approach to the question whether parties have entered into a binding contract. She formulated the principle by reference to the judgment of Lord Clark in *RTS Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 at [45]:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

16. She went on to say at [26]:

> "The issues of contractual intention and of certainty, both of which are mentioned by Lord Clarke in this passage, give rise to two distinct questions: *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541; [2022] 1 P & CR 1 at [33]. Nevertheless, one issue may inform the other: the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding: *MacInnes v Gross* [2017] EWHC 46 at [77]. However, as the passage from *RTS* above indicates, it is in most cases for the parties to choose which terms they regard as essential for the formation of legally binding relations. They can agree to be bound contractually, even if there are further terms to be agreed between them: *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [32]."

17. She continued:

> "28. In a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it, and it is a heavy one: *Barbudev*, above, at [30]. Parties may expressly negative contractual intention, which they often do by using the phrase "subject to contract". But the use of such words is not essential: *Cheverny Consulting v Whitehead Mann Ltd* [2006] EWCA Civ 1303, [2007] 1 All ER (Comm) 124 at [42]. Nor is the label "heads of terms" conclusive: a document referred to as "heads of terms" may be intended to be a non-binding record of the broad principles of an agreement to be made in formal written documents subsequently negotiated, or may be intended, in whole or part, to be a binding contract governing the parties' relations until a more detailed agreement is drawn up, as in *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507, [2019] 2 All ER (Comm) 191 and *Mahmood v The Big Bus Company* [2021] EWHC 3395.
>
> 29. Where the parties intend to be contractually bound, the courts are reluctant to find an agreement is too vague to be enforced: *Wells v Devani* [2019] UKSC 4, [2020] AC 129 at [18]. The court may be able to imply terms to fill apparent gaps, particularly in commercial dealings between parties familiar with the trade in question or where the parties have acted in the belief that they have a binding contract: *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at [69]. I bear in mind that business people may record important agreements in a summary way: *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 at 503.
>
> 30. Contracts for the disposition of interests in land, including agreements for lease, are subject to the additional requirements of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. An agreement for a lease (other than short leases within

> s.54(2) of the Law of Property Act 1925) can be made only in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each; that document or those documents must be signed by or on behalf of each party to the contract."

18. I did not understand Mr Pickering KC, for Pretoria, to criticise these self-directions. His main complaint is that, although the judge set out the correct principles, she did not apply them correctly.

Preliminary drafts and negotiations

19. Mr Pickering took us at some length through the negotiations and preliminary drafts of the HoT before they came to be signed. Although he accepted that neither negotiations nor preliminary drafts were relevant in interpreting the final signed HoT, he said that he was relying on that material to show context. But in my judgment what we are concerned with is the legal effect of the final signed HoT. That depends on the interpretation of the document as it stands, and I do not consider that the parties' negotiating positions, or the preliminary drafts have any significant bearing on that question. The broad context is sufficiently summarised in what I have already said.

The significance of the requirement of a formal agreement

20. It is perfectly true that the HoT were not headed "subject to contract" which would have put it beyond doubt that the parties did not intend to be contractually bound by any part of the HoT. But since it is common ground that the parties did intend to be bound by the lock-out agreement, the omission of the phrase "subject to contract" is of less importance than it might have been. Mr Pickering contrasted the absence of the phrase "subject to contract" with the presence of the phrase "subject to planning permission". That phrase, he said, could only apply to the agreement for lease. Once planning permission had been granted, there was no impediment to a binding agreement for lease coming into existence.

21. Nevertheless, it is of considerable significance that the parties stipulated that a formal agreement should be drawn up. The significance of a requirement that a formal contract be drawn up was considered by the House of Lords in *Rossiter v Miller* (1878) 3 App Cas 124. In that case freehold land was offered for sale in lots on the basis of a plan and conditions for sale. One of those conditions required the purchaser, on completing his purchase, to execute a deed of covenant "embodying the above rules and stipulations." Mr Miller made an offer which was accepted. He subsequently regretted his offer and argued that the fact that a deed of covenant had to be executed meant that there was no binding contract. The House of Lords disagreed. Lord Cairns LC said at 1139:

> "… if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the

> present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made."

22. Lord Hatherley said at 1143 that the mere fact that the parties wished their agreement to be put into due form by a solicitor did not necessarily prevent a concluded contract from arising. But he went on to explain:

> "Both parties may desire that it shall be put into a formal shape by a solicitor who, in that case, will not be able to vary the agreement either on one side or the other, *but only to put into a more formal and professional shape the agreement which had been completely formed* with unity of purpose with reference to the sale and purchase by the two parties to the contract." (My emphasis)

23. Lord O'Hagan said at 1149:

> "We have had a great deal of ingenious reasoning, founded on the statement in Mr. White's letter of the 24th of April, that he had requested Messrs. Hart & Marten to forward "the agreement for purchase." It has been said that until the execution of that agreement the transaction was inchoate and not complete. *And, undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed.* But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made." (My emphasis)

24. Lord Blackburn said at 1151:

> "it is a necessary part of the Plaintiff's case to shew that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and *though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract.* The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But *as*

> *soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed*." (My emphasis)

25. What is envisaged, then, is that the formal contract will do no more than put into formal language that which the parties have already agreed. *Branca v Cobarro* [1947] 1 KB 854 is a similar case. The parties in that case agreed to sell the lease and goodwill of a mushroom farm. The written document stated that it was "a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herein stated is signed. Lord Greene MR said at 857:

> "The words "fully legalized agreement" I think, quite clearly mean what we generally call a formal agreement. It is an agreement which has got to embody "all the conditions herewith stated." No other conditions are to appear in that fully legalized agreement. The contents of that fully legalized agreement are described, namely, "all the conditions herewith stated" and *there would be no room, according to the true construction of this, for the addition of other terms or conditions*." (My emphasis)

26. *RTS Flexible Systems* (cited above) was a case in which it was common ground that, at least initially, the parties did enter into a binding contract. It was also another case in which the detailed terms of the contract had been agreed (see Lord Clarke's judgment at [61]), and the principal issue was whether a "subject to contract" condition had been waived.

27. In the case of an agreement, not to sell an existing estate, but to create an entirely new leasehold estate for 25 years, the reference to a formal agreement has added significance. In *Winn v Bull* (1877) 7 Ch D 29 Mr Bull agreed to take a lease of a house for 7 years. The agreement stated that it was made "subject to the preparation and approval of a formal contract". Sir George Jessel MR stressed the difference between a contract for the sale of land and a contract for lease. He said at 31:

> "When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the Plaintiff says in effect, "I agree to grant you a lease on certain terms, but subject to something else being approved." He does not say, "Nothing more shall be required beyond what I have already mentioned," but "something else is required" which is not expressed. That

> being so, the agreement is uncertain in its terms and consequently cannot be sustained."

28. As Morritt V-C put it in *Cheverny* (to which the judge referred) at [42]:

> "But the more complicated the subject matter the more likely the parties are to want to enshrine their contract in some written document to be prepared by their solicitors. This enables them to review all the terms before being committed to any of them. The commonest way of achieving this ability is to stipulate that the negotiations are 'subject to contract'. …But it is not essential that there should have been an express stipulation that the negotiations are to be 'subject to contract'."

29. In this case, the grant of a lease for 25 years of an AD plant which was yet to be built is undoubtedly at the "more complicated" end of the spectrum. Morritt V-C continued at [45]:

> "Obviously each case depends on its own facts but in my view where, as here, solicitors are involved on both sides, formal written agreements are to be produced and arrangements made for their execution the normal inference will be that the parties are not bound unless and until both of them sign the agreement."

30. Indeed, it is striking that when, some months after the HoT, a draft lease prepared by Pretoria's solicitors was mooted as the basis for the lease it ran to over 40 pages. The idea that that draft was merely embodying terms that had already been agreed is, in my judgment, untenable.

31. In *Mamidoil* (to which the judge referred and to which Mr Pickering took us) the statement of principle by Rix LJ at [69] clearly distinguishes between cases where no contract exists and cases where a contract does exist but is said to be incomplete. We are, of course, concerned with the question whether a binding contract for lease exists at all.

32. In addition, as I have said, it would have been inappropriate for the whole of the HoT to have been declared to be "subject to contract" because it was common ground that (at least) the lock out agreement *was* intended to be legally binding. I agree with the judge that this is not a strong point.

Conduct

33. Mr Pickering laid some stress on the fact that Pretoria had incurred expense in obtaining planning permission (which would enure for Blankney's benefit); and had held off making the application for planning permission until the HoT had been signed. The costs incurred in that exercise were of the order of £74,000. But as Mr Ohrenstein pointed out Pretoria had begun to incur the costs well before the HoT were signed. Indeed, an email from Mr Shaw (for Pretoria) to Mr Banks dated 14 November 2013 (and thus before the HoT were signed) said in terms that Mr Ripley "now has everything prepared for planning to be submitted". In addition, there was no

express obligation which obliged Pretoria to apply for planning permission. It is entirely plausible that a party to a putative contract undertakes expense in the reasonable expectation that agreement will be reached in due course.

The judge's main reasons

34. The judge relied on a number of principal matters in coming to her conclusion. First, she said that the existence of a binding contract for a 25 year lease was incompatible with the limited period of the lock-out agreement. That latter plainly contemplated that the parties would be free to negotiate with third parties after the expiry of that period. I agree. Mr Pickering goes so far as to say that the judge's conclusion was "irrational". He relies on what he asserts is the language of clause 1 of the HoT which the judge described as "redolent of agreement having been reached on the core terms" in contrast to the more tentative language used elsewhere. But that, with respect, does not begin to answer the substance of the judge's point. If there was a binding agreement for lease for 25 years, what was the point of the time-limited lock out agreement? The clear purport of the lock out agreement was that once it expired either party would be free to negotiate with others. Mr Pickering's answer to this question was that the lock out agreement should be confined to clauses 2, 3 and 4 of the HoT, which did not create binding legal obligations. But in the first place this assumes that the parties intended to be bound by clause 1 which is the very question to be decided. Second, "the arrangements being negotiated" is an entirely general phrase, and there is, in my judgment, nothing in the language or the context to confine its application to clause 2, 3 and 4 alone. On the contrary, clause 1 of the HoT, which deals with the lease, itself refers to "arrangements" for decommissioning the AD plant. As the judge rightly said, there were still many matters to be negotiated in relation to the proposed lease. They also included the question of an easement, as contemplated by clause 4, which is agreed not to have created a binding obligation. She added, again correctly, that the proposed lease was the part of the HoT that was "most in need of protection from negotiations with third parties". Mr Pickering also suggested that the lock-out clause could not apply to Pretoria. I do not agree. It would, for example, have prevented Pretoria, during the time covered by the lock out agreement, from seeking a better or cheaper site on which to construct the AD plant. I do not consider that Mr Pickering's answer is a plausible one.

35. Second, the judge said, the HoT envisaged that the lease would be contracted out of the Landlord and Tenant Act 1954. That process requires the intending landlord to give notice to the intending tenant and requires the intending tenant to make a declaration (or statutory declaration) that he has understood the consequences of contracting out. All this must be done before the tenant becomes contractually bound. Mr Pickering's first answer to this point is that the HoT were conditional on the grant of planning permission. Planning permission was not granted until June 2014. Accordingly, it was not until June 2014 that Pretoria became contractually bound. The first flaw in this argument, to my mind, is that it also assumes the answer to the very question that must be decided. In other words, it assumes that clause 1 of the HoT creates a valid agreement for lease, subject only to the grant of planning permission. The second flaw, to my mind, is that if there was a binding agreement, the implementation of which was suspended until the grant of planning permission, then neither party would have been free to withdraw until it were known that planning permission would not be granted. Mr Pickering confirmed during his oral submissions

that on his analysis Pretoria was not free to walk away following the signing of the HoT. In those circumstances, the tenant would have been contractually committed before the procedure for contracting out of the 1954 Act had been undertaken. The whole point of the procedure laid down for contracting out of the 1954 Act is to enable the intending tenant to walk away if the lack of security of tenure is unacceptable. Mr Pickering's second answer was that there was no evidence that the parties had turned their minds to the mechanics of contracting out of the 1954 Act. But the thought processes of the actual parties are not relevant to the objective appraisal of the HoT. In my judgment the express understanding that the lease would be contracted out of the Landlord and Tenant Act 1954 is another weighty pointer against the conclusion that a binding agreement had been reached, because to hold otherwise would frustrate one of the few provisions relating to the proposed lease that the parties had actually agreed. As Knox J put it in *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368, 377 (at a time when the court needed to approve an agreement to contract out of the 1954 Act):

> "… there is, in my judgment, implicit in a condition that the tenancy agreement negotiated between the parties should be subject to the making of a court order under section 38(4) of the Landlord and Tenant Act 1954, a term that unless and until the court order is obtained no legally binding grant or acceptance of the tenancy should be made."

36. Third, as the judge said, in the case of a 25 year commercial lease of an unusual property, there were a number of important terms that were left wholly in the air. Although the judge rejected the argument that the physical extent of the demise was too uncertain, she said at [36]:

> "However, it seems to me that there is a significant difference between the sale of an existing property and the creation of a new property interest in the form of a commercial lease. Terms may be readily implied into a contract for the former: in relation to the latter, it is much more difficult to know what the provisions of the lease – which the parties will have anticipated would run to many pages – must be, without express agreement. An AD plant is a relatively new form of technology and may give rise to different issues from other forms of commercial property (such as shops or offices) which are routinely the subject of leases. For example, the issue which the parties expressly "parked" in the HOT, namely the question whether the AD plant should stay or be removed at the end of the lease, was one of commercial importance and without an obvious single answer. Both parties recognised in the HoT that this was an issue which would need to be addressed, before the lease was granted, and in my view they did not intend to be bound until it had been resolved."

37. Again, I agree. But quite apart from the question whether the AD plant should stay or be removed, in the context of a 25 year lease, one would have expected the finalised lease to contain terms about the initial construction of the AD plant, repair, insurance, alienation, use, compliance with planning and environmental controls, alterations and

improvements, forfeiture on breach of covenant and so on. No terms dealing with any of those matters were contained in the HoT. As I have said, the draft lease which was to have formed the basis of a formal lease ran to more than 40 pages. Since a binding agreement can only be created if all the terms that the parties have expressly agreed are contained in the written contract, if the HoT did in fact create a binding agreement, either the lease would not contain any provision dealing with those matters or, alternatively, only such terms as satisfied the conditions for the implication of terms would be included. The more obvious inference is that the parties did not intend to be contractually bound by clause 1 of the HoT.

38. Although, as Mr Pickering submitted, the courts have been prepared to imply terms into contracts for the sale of land where the parties have agreed only the bare essentials, once again this argument assumes that the parties intended to be legally bound, whereas that is the question to be decided. In addition, the analogy between a sale of land and the grant of a lease was firmly rejected in *Harvey v Pratt* [1965] 1 WLR 1025. I agree with the judge that the grant of a 25 year commercial lease is a wholly different creature from the sale of freehold land, as Sir George Jessel MR said in *Winn v Bull*.

39. Those were the judge's principal reasons for concluding as she did; and I agree with all of them. It may be that if taken individually they could lead to a different conclusion but the cumulative weight of them is, in my judgment, overwhelming. She also referred to a number of other less significant textual features of the HoT to support her conclusion. But I consider that even without those features, the judge's conclusion was amply justified.

Essential terms

40. There is one additional point. It will be noted that in *RTS* Lord Clark said that the relevant question was whether the communications between the parties:

> "…[lead] objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded *or the law requires* as essential for the formation of legally binding relations." (Emphasis added)

41. So one question posed is: what terms does the law require as essential for the creation of a legally binding agreement for lease? A lease (or a term of years absolute) is one of two categories of legal estate recognised by the law. Right back to the beginnings of the common law, it has been a requirement of a valid lease that it has a certain beginning and a certain ending. Coke on Littleton put it this way at 45b:

> "["Terminus"] in the understanding of the law does not only signify the limits and limitation of time, but also the estate and interest that passes for that time."

42. Blackstone's Commentaries on the Laws of England, vol. II, says, at 143:

> "Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. and therefore this estate is frequently called a term, terminus,

> because its duration or continuance is bounded, limited and determined: for every such estate must have a certain beginning, and certain end."

43. These commentators are supported by authority both ancient and modern. In *Say v Smith* (1563) Plowd 269, 272 Brown J is reported as having said:

> "… every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it, and in the end of it: so that all these ought to be known at the commencement of the lease, and words in a lease, which don't make this appear, are but babble... And these three are in effect but one matter, shewing the certainty of the time for which the lessee shall have the land, and if any of these fail, it is not a good lease, for then there wants certainty."

44. All these statements were approved by the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body* [1992] AC 386.

45. Similarly, in the *Bishop of Bath's case* (1605) 6 Co Rep 34b the court held that:

> "… every lease for years ought to have a certain beginning, continuance and end."

46. In more modern times, in *Marshall v Berridge* (1881) 19 Ch D 233 the parties signed a written memorandum dated 29 June 1880 relating to a lease of ironworks. The memorandum incorporated by reference the terms of an earlier letter by which Mr Marshall agreed to take a lease for a maximum of 21 years, with a right to break the lease at intervals. He was also to have a rent free period of six months to enable him to carry out works. The question was whether it amounted to a binding agreement for lease. Sir George Jessel MR summarised the successful appellant's argument at 239:

> "That point is that it cannot be discovered within the four corners of the agreement from what time the lease is to begin. Of course if that is so the agreement cannot be enforced."

47. He went on to say at 240:

> "I should think that in every case where parties agree for a lease, say for thirty years, which by law must be an instrument of a solemn character and be carefully prepared, they contemplate its preparation as a condition precedent. But independently of that, in this case there is a provision, "a lease and counterpart containing all usual stipulations to be prepared and executed." … As I said before, the parties, when they enter into an agreement not operating as a present demise, intend a lease to be prepared which *primâ facie* will be dated on a subsequent day, and possession is not given by a prudent landlord until the lease is duly executed. On the one side it is not intended that the lessee shall have possession before the day

> when the lease is executed, nor, or the other, that the lessee is to pay rent without having possession."

48. He then rejected two possible commencement dates for the leasehold term (one being the date of the agreement and the other being the expiry of the rent free period).

49. Baggallay LJ said at 243:

> "… the case is to my mind disposed of by the fact that no time is limited in writing for the commencement of the term."

50. He referred with approval to an earlier decision of Sir William Grant who had held that there was no binding agreement for lease where the written document:

> "…merely specifies the rent and the number of years. It does not even specify the commencement of the lease."

51. He then considered, and rejected, the argument that the term should begin from the date of execution of the final document.

52. Lush LJ said at 244-5:

> "Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements. Now I fail to see from the documents in this case how any one can tell from what period the lease was to commence."

53. This principle was reaffirmed in the following century. In *Harvey v Pratt* the parties signed a document which provided:

> "This is to certify that Edwin Charles Pratt agrees to lease the property known as Broadway Service Station, including offices therein, at an inclusive annual rent of £2,125 per annum exclusive of rates for a period of 21 years with option to renew or purchase at the end of that period. And that Mr. Bernard Harvey has agreed to the above, stock and equipment to be purchased at agreed valuation. And that to seal this contract Edwin Charles Pratt has given and Bernard Harvey has accepted a cheque amounting to £100 to be deducted from the completion statement. (Signed) Edwin C. Pratt, B. C. Harvey."

54. It seems to me to be plain from the wording of that document ("to seal this contract") that the parties intended it to be immediately binding. Nevertheless, this court held unanimously that the document did not create a binding agreement for lease. Lord Denning MR said at 1026:

> "It has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence."

55. He went on to reject the argument that a term should be implied to the effect that the lease should begin within a reasonable time; and an alternative implication that the lease should begin on the date of the document. Davis LJ said at 1027:

> "In the case of a contract for the sale of freehold, the subject-matter is ascertained, namely, the land. In the case of an agreement for a lease, if the length of the term and the commencement of the term are not defined, then the subject of the agreement or contract is uncertain. Therefore, there is no agreement."

56. Russell LJ said:

> "Never has it before been suggested that in the case of an alleged contract to grant a lease such as this, where nothing whatever is said to indicate to what date the term is to commence, the law will imply that it will commence at the expiration of a reasonable time from the contract, although opportunity to make such a suggestion in reported cases has by no means been lacking. The alternative suggestion that here the start of the term should date from the agreement will not, it seems to me, stand with the reversal of *Jaques v Millar* by the Court of Appeal in *Marshall v Berridge.* The truth is that the parties must themselves define the subject-matter of their bargain, and a term of years can only be defined by indicating the commencement and the termination."

57. The time from which the term of a lease is to begin is, in my judgment, a term that the law regards as essential to the creation of a binding contract for lease. Thus, even where it is plain that the parties intended to enter into a binding contract for lease, if the time from which the lease is to begin is uncertain, the agreement is incomplete; and there is no binding contract. By the same token, if the start date for the term of the lease is uncertain, it is a very powerful objective indicator that the parties did not intend to be bound.

58. This was a point raised before the judge (although it is not clear what authorities she was shown), but it is not a point that she discussed in her judgment. This may be because she thought that the point was relevant only to the question whether a concluded agreement was sufficiently certain. But, as she rightly said, although the question of an intention to be bound and the completeness of the bargain are two separate questions, they do not exist in watertight compartments.

59. Although Mr Pickering raised a procedural objection to this point being taken, it was one that was squarely raised before the judge; it goes directly to the question whether the parties intended to be bound and it deals with ground 3 (2) of the grounds of

appeal which asserts that "all essential terms" had been agreed. I do not consider that the procedural objection is well founded.

Is the commencement date ascertainable in this case?

60. In some cases, where it is clear that the parties intended to be bound, it is possible to conclude "by reasonable inference from the language used" that the parties have agreed the date from which the term is to run. One such case is *Liverpool City Council v Walton Group plc* [2002] 1 EGLR 149 where Neuberger J considered a complex agreement for lease, with a detailed draft lease annexed, which provided that a lease for 999 years would be executed within six weeks of a decision notice. Under the terms of the draft lease the lessee was to construct a mixed development including 1.1 million square feet of retail space and additional leisure facilities and car parking. The project was one of regional and national importance. The lease was to be granted at a substantial premium and at no rent. Neuberger J held, following close consideration of the contract and the draft lease, that the term of the lease was to begin on the date of execution of the lease (even though that solution was rejected in both *Marshall v Berridge* and *Harvey v Pratt*). Referring to *Marshall v Berridge* and *Harvey v Pratt*, he said at [65]:

> "Finally, as I have already indicated, the facts in the two cases relied upon by the council, *Marshall* and *Harvey*, were very different from those in the present case. While it cannot be suggested that the principle described and applied in those cases does not apply to every agreement for lease, one must be careful of applying the principle blindly. In those cases, as here, no commencement date was specifically expressed. However, in those cases there was no provision indicating when the parties intended the lease to be granted, let alone the relatively complex commercial machinery that is present here."

61. It is important to note that in *Liverpool* Neuberger J was considering the position at a time when the contractual time for execution of the lease had not yet arisen. He was not considering what the position might be if the agreed completion date had passed without the lease having been executed. I find some of Neuberger J's reasoning not entirely easy to follow. He did not, for example, consider the possibility of a backdated term; and his dismissal of the suggestion that the tenant might be bound in equity on the principle of *Walsh v Lonsdale* (1882) 21 Ch D 9 on the basis that it was "rather quaint" is puzzling. Be that as it may, it was clear beyond doubt that in *Liverpool* the parties intended to be bound by a very detailed formal contract and a detailed agreement for lease annexed to it, and that is why Neuberger J laid such stress upon the court's unwillingness to hold what the parties plainly thought was a binding contract to be void for incompleteness or uncertainty. The only issue in *Liverpool* was whether the agreement for lease was too uncertain. The HoT in this case is a very different kind of document. Unlike *Liverpool*, the relevant part of the HoT is (to borrow Neuberger J's language at [48]) "a very short and simple agreement running only to a few lines".

62. Is it possible to deduce from the terms of the agreement, with reasonable certainty, when the term was intended to begin? In my judgment, the answer to this question is "no". In the present case, the final clause of the HoT provided for a formal agreement

to be drawn up within one month of planning permission having been achieved. It might have been argued that the contractual completion date was the agreed date on which the 25 year term was to begin. There is, of course, no impediment to the grant of a lease the term of which is expressed to run from a date prior to its execution. But although that was put to Mr Pickering a number of times during the course of his oral submissions, he disavowed it. His argument was that the 25 year term would begin on whatever date the lease happened to be executed, whether that was before or after the expiry of the one month period. I do not consider, contrary to Mr Pickering's submission, that that is what Neuberger J decided in *Liverpool*. If he did, then I respectfully disagree. The idea of a "rolling" 25 year term is the antithesis of certainty. As Mr Pickering acknowledged, Pretoria had no express obligation to apply for planning permission; and even if such an obligation were to be implied, there was no timetable for making such an application. If, therefore, the agreement for lease was contractually binding, but the lease would not come into effect until the date on which it was actually executed, Blankney's land might be sterilised indefinitely.

63. It is also of some interest to note that Mr Ripley's evidence was that the agreed rent was at the top end for a completed AD plant which Pretoria was to construct. It might well have been the case that the parties would have agreed that the full rent would not become payable until the plant had been constructed; and hence that the 25 year term would begin on practical completion of the AD plant. Alternatively, if clause 1 of the HoT was binding, subject only to the grant of planning permission, Pretoria would have become bound to take the lease once planning permission had been granted, and the 25 year term might have run from that date. That was an analogous solution canvassed by Neuberger J in *Liverpool*.

64. In addition, unlike *Liverpool*, this is not a case in which it is clear that the parties did intend to create a binding obligation to enter into a lease, and where the court is faced with the task of saving what the parties clearly understood to be a binding contract but which is alleged to be incomplete on very technical grounds. On the contrary, as I have said more than once, that is the very question to be decided. As the judge said, the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding. That, to my mind, is another reason for upholding the judge's conclusion.

Result

65. I would dismiss the appeal.

Lord Justice Arnold:

66. I agree.

Lord Justice Birss:

67. I also agree.