

# I'm a supermarket, get me out of here!

Autumn 2015

Conditional contracts for the sale and purchase of land have been hitting the legal headlines recently. In the last edition of *Housebuilder*, we looked at the case of *British Overseas Bank Nominees Limited -v- Analytical Properties Limited* [2015] EWCA Civ 43, which was about satisfaction of a pre-completion condition.

Hot on the heels of that case, the High Court has tackled another conditional contract, in the high profile case *Sainsbury's Supermarkets Limited -v- Bristol Rovers (1883) Limited* [2015] EWHC 2002 (Ch). This time, the main issue was whether the buyer's obligation to use reasonable endeavours to obtain an acceptable planning permission survived the cut-off date, by which the parties were to satisfy the conditions.

In March 2011, Sainsbury's entered into conditional contract with Bristol Rovers for the purchase of Bristol Rovers' Memorial Ground. Sainsbury's intended to build a supermarket on it. The conditional contract was a complex document, containing five major conditions, including the obtaining of an acceptable planning permission for the Sainsbury's store, and the obtaining of an acceptable planning permission for Bristol Rovers' proposed new stadium.

The conditional contract provided that the parties must use their reasonable endeavours to obtain the planning permissions for the store and stadium, but if these (or other conditions) had not been satisfied by the 'cut-off date', then either party could terminate the contract. The cut-off date was one year after submission of the store planning application or the stadium planning application (whichever was the latest). However, it could be extended in certain circumstances, if, for example, an 'appeal' had been lodged prior to the cut-off date.

Sainsbury's duly submitted its planning application for development of the site as a supermarket. It obtained a planning permission, but with a restriction on delivery times that was unacceptable to it. The parties agreed that this was an onerous condition, and that the planning

permission was therefore not an acceptable store planning permission.

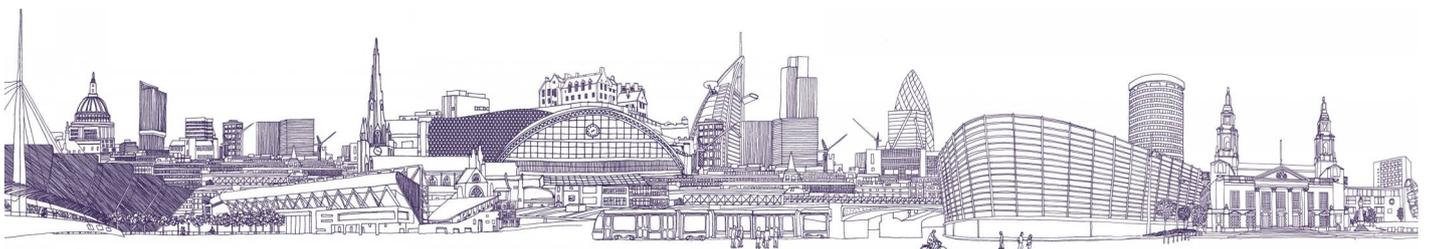
Sainsbury's then began to get cold feet, particularly as it realised that the store might not be as profitable as it first thought. The project was also facing increased local opposition, which culminated in a challenge to the planning permission by way of judicial review.

It did, however, try and vary the restriction on delivery times by way of an application under section 73 of the Town and Country Planning Act. This application appeared to be rather half hearted and badly timed, as it was submitted during the judicial review proceedings brought by the local action group. What's more, Sainsbury's did not bother lobbying local residents and businesses.

Unsurprisingly, Sainsbury's section 73 application was refused by the council. Sainsbury's therefore indicated to Bristol Rovers that it wished to terminate the contract. Bristol Rovers, however, had spent a substantial amount of money on its new stadium, and was therefore reluctant to allow Sainsbury's to get out of the deal. It therefore argued that Sainsbury's was in breach of contract, as it had failed to use all reasonable endeavours to obtain an acceptable store planning permission. This was on the basis that Sainsbury's section 73 application was badly-timed and half-hearted.

In response, Sainsbury's argued that it had used all reasonable endeavours to obtain an acceptable store planning permission. It also argued that the obligation to use all reasonable endeavours ended on the cut-off date, and since it made its section 73 application after the cut-off date, it could not be in breach in respect of that application.

At first glance, Sainsbury's 'cut-off date' argument appears to make commercial sense. The cut-off date triggers the parties' right to terminate, and so an obligation to continue to use reasonable endeavours to obtain an acceptable planning permission after this seems



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redundant. However, the High Court took the view that if the parties did not immediately terminate, and instead persevered with the application, then the obligation should continue, until either party terminated.

If you would like to discuss any of the issues raised in this update, please contact:



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