IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

2016 EWHC 404 (CH)

No.HC-2016-000078

Rolls Building

Monday, 22nd February 2016

Before:

MR. M H ROSEN QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

CITIZENM LND ST. PAUL'S PROPERTIES B.V.

Claimant

- and -

(1) CHIL LIMITED
(2) CITIZENM-CHIL ST. PAUL'S PROPERTIES L.P.
(3) CITIZENM-CHIL ST. PAUL'S PROPERTIES LIMITED

Defendants

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MR. S. SALZEDO QC and MR. M. BOLDING (instructed by CMS Cameron McKenna) appeared on behalf of the Claimant.

MR. P. JONES QC and MR. G. TILLEY (instructed by Boodle Hatfield LLP) appeared on behalf of the First Defendant.

JUDGMENT

(As approved by the Judge)

THE DEPUTY JUDGE:

(1) INTRODUCTION

1 This is the trial of certain preliminary issues ordered by Proudman J on 1 February 2016 to be heard as a matter of some considerable urgency. In the light of that urgency, I am giving this judgment *ex tempore*, having read and listened to the arguments with great care and reflected on them this afternoon. I have reached a clear conclusion, but the parties will please forgive me if in the circumstances I do not deal with every point that has been raised or referred to.

2 The order of Proudman J directed the determination of the following preliminary issues:-

(a) First, whether, by virtue of a particular provision in a certain Sale and Purchase Agreement ("SPA") and another provision in a Shareholders' Agreement ("SHA"), the Third Defendant, citizenM-CHIL St. Paul's Properties Ltd (referred to in this case as the General Partner or "GP") acting by its B Directors, had power on behalf of the Second Defendant, citizenM-CHIL St. Paul's Properties LP ("the Partnership") unilaterally to waive certain Conditions Precedent referred to in the SPA, including what was referred to and defined as the Funding Condition and the TfL Conditions in a certain Limited Partnership Agreement ("LPA").

(b) Next, whether a particular board resolution amounted to a waiver of one of those Conditions, as had been alleged by the Claimant citizenM LND St. Paul's Properties BV ("citizenM") but is no longer pursued.

(c) Next - and now the second issue before me - whether, in the light of the answers to those issues, a Waiver Notice dated 23 December 2015 was valid and effective to waive all Condition Precedents under the Sale and Purchase Agreement.

(d) Next, now the third issue before me, whether the First Defendant CHIL Ltd ("CHIL") is obliged to vote for a resolution set out in a Requisition Notice sent on 5 January 2016, in effect giving force to the alleged Waiver Notice.

(e) Last, whether the second and third of the issues now before me are affected by CHIL's claim that by serving the relevant Waiver Notice the GP was in breach of its duty to the Partnership, assuming that the GP did so act in breach of its duty to the Partnership for the purpose of this issue.

3 I have heard the arguments and read the evidence sought to be adduced in relation to the first three of these issues, which turn primarily, if not wholly, on the construction of the Agreements referred to in the first of the issues which I have mentioned.

4 The parties have been represented on the part of the Claimant citizenM by Mr. Simon Salzedo QC and Mr. Michael Bolding. The First Defendant CHIL has been represented by Mr. Philip Jones QC and Mr. Gareth Tilley, and I am very grateful to counsel and the solicitors in this case for their preparation and presentation of the matters which require now to be decided.

5 The proceedings in dispute between the parties concern essentially a Joint Venture between citizen and CHIL concerning the development of a hotel in central London which was to take place on land initially owned by CHIL but was to be operated by a member of the citizenM Group. The three Agreements to which I have referred, and other agreements which have not featured much in the argument before me, were all dated 19 July 2011. The SPA to which I have referred was an agreement by CHIL to grant a lease of the relevant property to the Partnership following satisfaction or waiver of certain Conditions Precedent. The issue between the parties which must be determined with some urgency, is whether or not the waiver allegedly effected by the B Directors of the GP by notice of 23 December last year was valid for that purpose.

6 CHIL for its part denies that it was valid by contending that the GP had no authority on behalf of the Partnership in circumstances where the Partnership was not entitled to waive the Conditions Precedents in order to obtain the purchase of the relevant land absent its following certain mechanisms set out in the LPA. CHIL has, in those circumstances, sought to terminate the Agreements under a provision to the effect that if certain essential events have not occurred by a longstop date of 31 December 2015, it was expressly entitled to do so.

(2) THE AGREEMENTS

7 In order to understand the issues which now have to be determined, I must set out various provisions of the SPA, SHA and LPA. In doing so in that order I do not suggest that that is any necessary order of priority as between them, although there was debate before me as to whether the matter was to be resolved solely by reference to the LPA on which CHIL principally relies, and whether or not the agreements were to be considered as one package constituting a single overall transaction or just a linked series of agreements in considering, for the purposes of construing the LPA, if and the extent and effect for which it would be permissible to refer to the SHA and the LPA as well.

8 So far first as the SPA is concerned, that provided that the obligations of sale and purchase were conditional upon the satisfaction of Conditions Precedent or the waiver of Conditions Precedent by the Buyer, that is the Partnership:"... *which the Buyer shall be entitled to do at anytime upon giving written notice to this effect to the Seller) in accordance with this Agreement ...* " (Schedule 1 and Clause 1.1 of the SPA).

9 Clause 1.2 of the SPA reads:

> *"If the Unconditional Date has not occurred on or before the Longstop Date [which was 31 December] that at any time thereafter (but not once the Unconditional Date has occurred) either the Seller or the Buyer may terminate this Agreement by serving notice in writing to that effect upon the other and upon service of such notice this Agreement shall terminate."*

10 The definitions of Conditions Precedent require reference both to Schedule 5 of the SPA but also to the LPA, to which I will turn in a moment. The Unconditional Date was:

> *"the earliest date on which all of the Conditions Precedent have been satisfied or otherwise have been waived by the Buyer in accordance with the provisions of"*

the LPA.

11 The Conditions Precedent included those to be referred to as the LPA CPs, which are at pp.125 and 129 of the bundle, but also the Agreement for Lease CPs which concerned three other conditions, not directly relevant to the construction arguments before me, although it is worth noting that those other three Conditions Precedent refer principally to the requirement for planning permission which, according to citizenM, was an absolutely key requirement for this project to proceed.

12 Secondly, as regards the SHA, leaving aside the definition of the key Conditions Precedent for the moment, that provided for the business and management of the Partnership in certain terms which are relied upon principally by citizen, in particular by dividing up what the GP's various activities were and who should be responsible for them. In particular the management of the GP's directors' activities were divided between A Directors who were nominated by CHIL, and B Directors who were nominated by citizen; and the shareholders of the GP were to procure and to use their best endeavours to achieve certain things.(to which I will come a little later0. There were provisions for deadlock and also

for reserved matters, which would not be dealt with by A or B Directors of the GP alone but would have to be dealt with by the board as a whole.

13 The key provision in the SHA relied upon by citizenM, is clause 6.8 which provided, in the context of other aspects of management of the GP, that the B Directors nominated by citizenM, should have absolute discretion in respect of any waiver of any conditions to the headlease completion, that is waiver of the conditions under the LPA; and the shareholders agreed that any such waiver should not require the approval of the whole board for the purposes of other clauses. The reserved matters included the amendment or termination of any of the agreements referred to in the Schedule, or the extension of any date for satisfaction or waiver of the conditions in the SPA or the waiver of any such conditions, but that was subject to Clause 6.8 with its reference to the B Directors' absolute discretion. There were other relevant provisions in this Agreement, including an entire agreement clause in Clause 15.2 (referred to later in this judgment).

14 Thirdly I turn to the LPA, which in distinction (as Mr. Jones on behalf of CHIL put it) with the SHA, dealt with the Partnership and authority on behalf of the Partnership as opposed to authority on behalf of the GP, which might or might not act as authorised on behalf of the Partnership. The LPA made it plain that the purpose of the Partnership was to acquire, develop, let and hold the relevant property as an investment.

15 The LPA contained in Clause 5 a number of provisions concerning the rights and duties of the GP. In particular:

(a) Clause 5.1 stated that:

"The General Partner shall have exclusive responsibility for the management and control of the business and affairs of the Partnership, and subject to the terms of this Agreement and the Shareholders' Agreement, shall have the power and authority to do all things necessary to carry out the purposes of the Partnership ..."

(b) Clause 5.2 contains restrictions on the Limited Partners, stating expressly that they

"... shall take no part in the operation of the Partnership or the management or control of its business and affairs, and shall have no right or authority to act for the Partnership or take any part in or in any way to interfere in the conduct and management of the Partnership or to vote on matters relating to the Partnership other than as provided in the

[relevant] Act [the 1907 Limited Partnerships Act] or as set out in this Agreement..."

(c) Clause 5.3 provided that without prejudice to the generality of Clause 5.1 and subject to the provisions of Clause 5.4

"... the General Partner shall have full power and authority, on behalf of the Partnership, subject to any relevant restrictions and provisions of this Agreement and so as to bind the Partnership: (I) to execute any document ... (ii) d) to enter into, make and perform such contracts and agreements ... and to do all such other acts or things as it may deem necessary and advisable for or as may be incidental to the conduct of the business of the Partnership;"

(d) Clause 5.4, which was referred to in Clause 5.3 provides for various restrictions on the GP, saying

"Notwithstanding anything in this Agreement to the contrary, the General Partner shall not do or be authorised to do any of the following: ..."

and then listing various acts, including the borrowing of money, other than in accordance with a specific provision.

(e) Clause 5.5 provided:

"The General Partner shall comply with all registration and other requirements of the [relevant] Act so as to ensure, so far as it is able, that the liability of the Limited Partners is and all times remains limited as provided in the Act."

16 On behalf of citizenM it was suggested that these provisions and others were consistent only with the GP being authorised to act on behalf of the Partnership as manager with a wide discretion of the sort also referred to in the SPA and the SHA. But on behalf of CHIL it was said that the GP's "exclusive responsibility" was subject to the terms of Clause 16 of the LPA and the schedules to which it referred.

17 Clause 16 stated that CHIL and citizenM agreed to comply with the obligations on their respective parts and the conditions set out in Schedules 2 and 3. These conditions dealt respectively with acts in relation to the so-called Funding Condition as defined in Schedule 4 and the TfL Conditions, as defined in Schedule 5:

(a) the Funding Condition was defined as:

"... a satisfactory offer to finance the costs of the Development which shall:- (a) include an offer for loan finance for at least 55% of the anticipated Total Development Costs"

and to be on certain other terms which were specified; and

(b) the TfL Conditions at were defined as:

"... such consents or approvals ... as are reasonably required under the provisions of ... the Superior Lease and/or appropriate legislation relating to the operational integrity and efficiency of the underground railway and/or the Satisfactory Planning Permissions to enable:- (a) the Development to be carried out above the railway line situated within tunnels beneath part of the Property [and enabling certain other matters]."

18 Schedule 2, which dealt with the Funding Condition, began by stating that citizenM should use all reasonable endeavours to satisfy the Funding Condition. That was entirely consistent with other provisions in the Agreements which made it clear that citizenM was responsible for finance, including Clause 6.6 of the SHA.

19 Schedule 2 also included provisions relating to communications between citizenM and CHIL as regards the procuring of development finance, and an agreement by CHIL on request to provide reasonable assistance to citizenM in seeking to procure the satisfaction of the Funding Condition. It concluded with para.5:

"CitizenM PropCo shall be entitled to waive the Funding Condition as a Condition Precedent under this Agreement PROVIDED THAT if citizenM PropCo does waive the Funding Condition in accordance with this Agreement then citizenM Financial Holding BV or a member of the citizenM Group shall provide financing for the Development to meet up to 55% of anticipated Total Development Costs on such terms and conditions that otherwise would satisfy the requirement of the Funding Condition and have been approved by Chil PROVIDED THAT Chil's approval shall be deemed to have been provided if not refused on reasonable grounds within 10 Business Days of receipt of request from citizenM PropCo to Chil for that approval."

20 There is no dispute before me but that those various conditions and provisos relating to citizenM's entitlement to waive the Funding Condition under that para.5 were not proceeded with, and so at the heart of the debate between the parties is whether or not that para.5 provided an exclusive route, the only

possible route, for a waiver on behalf of the Partnership by the B Directors of the GP of the Funding Condition. CHIL contends that Clause 5.1, with its cross-reference to the Schedule via Clause 16 of the LPA, and the Agreements as a whole, should be construed as meaning that the Funding Condition can only be waived if para.5 of Schedule 2 is complied with.

21 As regards the TfL Conditions, Schedule 3 began by stating that the parties (it being borne in mind that it is CHIL and citizenM who agreed to comply with the obligations on their respective parts in these Schedules under Clause 16):

> *"... shall use all reasonable endeavours to satisfy the TfL Conditions and without prejudice to the generality of the foregoing, Chil will provide the Development Manager with all plans, deeds, calculations and other documents as are in Chil's possession and reasonably required to satisfy the TfL Conditions."*

That again is consistent with other parts of the joint venture agreements, including Clause 3.2.3 of the SHA.

22 There followed in Schedule 3 subsequent paragraphs dealing with certain communications and dealings with Superior Landlords. Para 4 then provided that

> *"If the Parties agree (each in their absolute discretion) then the TfL Conditions can be waived so as to trigger the sale and purchase of the Property and grant of the lease but the Parties shall continue to use all reasonable endeavours to procure the satisfaction of the TfL Conditions notwithstanding such waiver."*

There was finally a provision for the determination by an independent third party of any disputes between citizenM and CHIL, who are the Parties for the purposes of this Schedule 3, as to whether or not the TfL Conditions have been satisfied.

23 Again, CHIL contends that, by virtue of Clause 5.1 and Clause 16 and Schedule 3, the only way in which the B Directors of the General Partner can be authorised on behalf of the Partnership to waive the TfL as a Condition Precedent to the sale and purchase is if the process in para.4 of Schedule 3 is complied with.

(3) PRINCIPLES

24 There was not a great deal of dispute between the parties as regards the relevant legal principles of contractual construction. They both began with the objective

of the court when interpreting a contract, as stated by Lord Hoffmann first in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912. The objective of the court is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

25 In the recent case of *Arnold v. Britton* [2015] UKSC 36; [2015] AC 1619 at paras 15-18, Lord Neuberger, stated by way of summary that a meaning of a contractual term must be assessed in the light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause in the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. Business common sense and surrounding circumstances:

> *"... should not be invoked to undervalue the importance of the language of the provision which is to be construed ... the less clear [the relevant words of the contract], the worse their drafting, the more ready the court can properly be to depart from their natural meaning. ... However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning."*

26 Both parties also relied on *Rainy Sky v. Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 at para 21 per Lord Clarke, to the effect that if a term of a contract is capable of bearing more than one meaning, the meaning which most accords with business common sense is to be preferred, subject to the more recent explanation in the *Arnold v. Britton* case. The parties also agreed on the principle that a term of a contract is to be read in the light of the contract as a whole; equally, all parts of a contract must, if possible, be given effect so that no parts of a carefully-drafted contract should, if possible, be treated as otiose, and that where two or more agreements are executed simultaneously or form part of a single transaction, the agreements are, as far as possible, to be read consistently with each other.

27 That, in my judgment, applies weather they are to be treated as one "package" or as merely linked agreements. As it happens, in this case the three Agreements to which I have referred deal with different aspects of the Joint Venture but they are to be treated as a package by which the owner of land and the party who wishes to finance and operate their proposed building on that land, engage together through the vehicle of a Limited Partnership and agree the responsibilities and authorities as between them in advancing the joint objective, namely the development and operation of that hotel.

28 Finally, as regards principles, an earlier agreement between the same parties may be used as an aid to interpretation of a later agreement, though not of course to allow evidence of previous negotiations, which has been excluded as admissible on construction questions for the last 50 years or more. A term is to be implied into a contract, according to *Marks and Spencer v. BNP Paribas* [2015] UKSC 72; [2015] 3 WLR 1843 at para 21 per Lord Neuberger, another recent authority, only if, amongst other things, the contract would lack commercial or practical coherence without such a term or if the parties would have said the term was so obvious that it went without saying. That draws attention to distinctions which one finds in many decided cases between questions of construction and questions of implication. Construction is a meaning, largely intrinsic, derived from language first and common sense secondly, in order to infer objectively, from the knowledge available to the parties in their situation, the meaning that the document would convey to a reasonable person, as opposed to implication, which may be necessary where the contract otherwise construed lacks commercial or practical coherence, especially when certain obvious matters would have gone without saying.

(4) SUBMISSIONS AND ANALYSIS

29 Without in any way diminishing from Mr. Jones' very forceful and comprehensive submissions on behalf of CHIL, he made to my mind in particular two key points (to which I have already, I think, referred). The first was that the LPA is to be read, from its language, in simplicity, as requiring that the relevant provisions in Schedule 2, para.5, and Schedule 3, para.4 were the only means by which the Partnership, and therefore the GP and its B Directors on behalf of the Partnership, could validly waive the Funding and TfL Conditions respectively.

30 Mr. Jones' submission was that:

(a) that was the clear meaning of Clause 5.1 in rendering the GP responsible for managing business subject to the other terms of the LPA, and any alternative would be absurd;

(b) this was because if the parties provided for a means by which they could essentially agree, or in the case of the Funding Condition predesignate an acceptable funding alternative, and that was not complied with, then it would be absurd to allow citizenM's nominee directors and the board of the GP to effect such a waiver without following those procedures, including consent;

(c) that would leave over no obligations to deal with questions of funding and the TfL requirements, and that it would essentially drive a coach and

horses through what the parties had negotiated by way of mechanism in the relevant Schedules.

31 Mr Jones' second main contention on behalf of CHIL was that reliance on the wide discretions provided for in the SPA and the SHA was inappropriate. In particular, the SPA had nothing to do with it; it was the GP's authority on behalf of the Partnership which would fall to be considered in deciding whether or not the Partnership had or had not waived the Condition Precedent, as it was entitled to do by serving written notice under Schedule 1, para.1 of the SPA. As far as Clause 6.8 of the SHA was concerned, the GP's B Directors' absolute discretion in respect of a waiver of a condition, was a matter solely concerned with their authorisation on behalf of the GP and not the GP's authorisation to serve a Waiver Notice valid on behalf of the Partnership, that is, the buyer under the SPA.

32 Those contentions were met by citizenM with a number of arguments as to correct construction. The first, and logically most important, point is that Schedules 2 and 3 of the LPA were permissive, that is, they were not exhaustive or exclusive as to how the buyer, the Partnership, could come validly to waive the Funding and TfL Conditions. I find the arguments in support of that proposition compelling, both on the basis of the language of the Agreements as a whole, including all the cross-references between them, and as a matter of common sense.

33 The requirements, both commercial and in terms of contractual obligations, to obtain funding and to satisfy TfL's requirements obviously lay behind the mechanisms in para.5 of Schedule 2 and para.4 of Schedule 3. However, the waiver by another means of the contractual Conditions Precedent for a completion of the SPA would not dispose of the ongoing roles, responsibilities and obligations of the parties as regards the obtaining of funding and consents as regards the underground railways, tunnels, access and the like.

34 In my judgment, there is no absurdity at all in citizenM's contention as to the relevant meaning of the Agreements. On the contrary, it is entirely consistent with their manifest purpose and the commercial objectives of the parties, and the manner in which the Agreements put various matters into the responsibility and authority of citizenM and its nominees on the GP's board. It is also consistent with the overall background as regards CHIL's sale of its property by way of its input into the Joint Venture, and citizenM's role and input as regards the provision of funding and operations.

35 To put citizenM at the mercy of a failure to proceed even to the stage of purchase, on the construction advocated on behalf of CHIL, would flout, in my judgment, the commercial sense of this Joint Venture and the bargain made and

expressed in the Agreements. And there is no reason to do so, because although the "routes" to waiver in those parts of the Schedules on which CHIL relies - para.5 of Schedule 2 and para.4 of Schedule 3 - are very specific, there is no reason to regard them as exhaustive. That would be contrary to other provisions as regards the role and powers of citizenM's nominees.

36 Indeed, it might well be inconsistent with the entire structure of the Limited Liability Partnership and its statutory legal character and incidents because (although the arguments were not particularly developed) it is well possible, and would make sense, for the limited partners citizenM and CHIL themselves (the "Parties" in clause 16 and schedules 2 and 3 of the LPA) as a matter of principle not to have a positive role in giving or withholding consent *ad hoc* to the important management and business decisions on behalf of the Partnership, for to do so would be inconsistent with the aim to ensure that they remained partners with limited liability only, both through the Agreements and also with the Limited Partnerships Act.

37 On behalf of CHIL, Mr. Jones sought to persuade me that its reading - for example and most importantly, requiring its agreement to a waiver of the TfL Condition under para. 4 of Schedule 3 and consent or refusal of consent under para.5 of the Funding Condition, would not carry with it a risk of involvement in the management, which would end their limited liability. But on what I heard, I was unsatisfied as to that line of argument.

38 The second main point in favour of citizen's arguments is that the provisions as regards the discretion (and exclusive discretion) of the nominee directors of the GP, read in the context of the Agreements as a whole, do not, in my judgment, restrict themselves to the attractive but technical distinction that Mr. Jones put forward as regards their authority on behalf of the GP and the conduct of the business of the Partnership. It seems to me that, where the structures make it plain at the level of GP who is to have the discretion to carry out certain acts on behalf of the GP, to divorce that and to put it in a vacuum away from the management of the Partnership and the authority on behalf of the Partnership, is highly unrealistic.

39 These Agreements were made together as a package to provide for the Joint Venture; and to restrict a responsibility and authority to a particular level of the structure only, and to suggest that the discretion given to citizenM's "B" Directors on the GP board was irrelevant to the question of what was authorised on behalf of the Partnership is, in my judgment, simply to ignore the commercial bargain as a whole, and the division of responsibility that would logically work its way up and down the structure. This necessarily included, at the point of delivering a notice, authority on behalf of the GP, but without isolating that, as I have said, in some hermetic seal insulated from authority on behalf of the

Partnership. That would leave the Partnership in a forced and false position. The Agreements as a whole are entirely contrary to that hard, technical distinction of determining the construction of the waiver provisions.

40 For those main reasons, I reject the two principal grounds put forward by CHIL in support of its contention. To reverse the order of the arguments I have analysed above, and stepping back and looking at the Agreements as a whole, I am satisfied that citizenM's construction is correct;: (a) the relevant provisions in the Schedules 2 and 3 of the LPA are, as it was put at one stage, permissive, providing for one possible method for a valid waiver to be effected, but not the only methods; and (b) the B Directors of the General Partner and citizen, through them and through its own obligations in the SHA and otherwise, do have the right to waive the Funding and the TfL Conditions without having gone through the Schedule 2, para.5 and Schedule 4, para.4 provisions.

41 Other matters were relied upon by way of background but, for the purposes of this *ex tempore* judgment, suffice it to say that they were neither determinative nor sufficient for me to set them out at great length.

(5) THE FACTUAL MATRIX ?

42 I would, however, deal with two elements of the so-called factual matrix, which were sought to be relied upon on behalf of citizenM. Those concern the earlier "Draft Heads of Terms" which they said supported their construction arguments (to be found in C2, exhibit NvLC/1, starting on p.5) which state among other things that:

> *"CitizenM ... can decide in its sole discretion that the Joint Venture waives the purchase conditions or long stop dates as described in the Purchase Agreement and complete the land acquisition."*

43 In attempting on behalf of citizenM to pray in aid what were called Draft Heads of Terms, Mr. Salzedo, elegantly and with some subtlety, stated that that could be relied on for two purposes: first, to show that since at one point the parties had agreed on that general provision, it would not be in any way absurd for citizenM to have control over waivers in the package of Agreements that were subsequently agreed as binding; and secondly, that the parties would have used express words to make it clear that the discretion or control of citizenM and its nominee directors was restricted to the methods in the Schedules to the LPA.

44 Whilst it may be that these Draft Heads of Terms did represent the then consensus and that indeed citizenM made some payment to CHIL when those Heads were decided upon and put before the lawyers to get on with drafting and other subsequent steps, it is necessary to have very considerable care in adopting

them as both admissible and of persuasive weight for any relevant purpose of construction before me, including, in my judgment, the specific areas of assistance for which Mr. Salzedo sought to rely upon them.

45 There was reference to the well-known principles of law (summarised in **Lewison on Interpretation of Contract**) regarding the distinction between pre-contractual negotiations and previous agreements, and also to various authorities in which it was suggested that previous agreements of various sorts were admissible as aids to construction.

46 For its part, CHIL relied first on the exclusion of possible reference to the Heads of Terms or even a previous contractually-binding agreement because of the entire agreement clause which was found in Clause 15.2 of the SHA which provides, amongst other things, that that:

> *"Agreement together with the documents referred to in Schedule 3 [that is, including the SPA and the LPA] embodies the entire understanding between the Parties and there are no promises, terms, conditions or obligations, oral or written, express or implied, other than those contained therein".*

47 In *Matchbet v Openbet Retail* [2013] EWHC 3067 (Ch), an unreported decision referred to in **Lewison**, Henderson J decided that certain Heads of Terms which had preceded an SDLA could not be relied upon, notwithstanding that there were previous agreements, because that particular entire agreement clause contractually excluded the earlier agreement from consideration. He stated in that case that the whole point of an entire agreement clause in the terms before him, or in similar terms, was that it was to ensure that the parties' rights and obligations are to be ascertained by reference to the single agreement which contains the clause.

48 There was no attempt before me to distinguish the clause in that case and the clause in this case and no need in the event for any great debate on this. I am not satisfied that in the present case that the Heads of Terms are admissible or that any weight should be attached to them as contended on behalf of citizenM, first, in the light of the entire agreement clause. I tend to agree with Henderson J's analysis and it certainly does not seem to me so plainly wrong that I should regard it as not binding on a Deputy High Court Judge in the present matter.

49 Secondly as to this, although the Draft Heads of Terms probably represented some consensus as at that time, they contemplated that there would have to be a deal more agreement and specificity to come. They were replete with matters in blank - matters yet to be agreed or matters yet even to be drafted. Mr. Salzedo stressed that citizenM did not rely on it as contractually binding, and submitted

that for his purposes a consensus as to a basis upon which to proceed onwards to a binding agreement is sufficient to distinguish between mere previous negotiations, which are inadmissible, and a previous agreement which, at least absent the entire agreement clause in this case, would or might be admissible.

50 But I am not satisfied that these Heads of Terms fall on the right side of that distinction or that that is the correct way to define the two alternatives - one, on established law, inadmissible previous negotiations, and one possibly admissible, were it not at least for the entire agreement clause, that is. a previous agreement. There are cases where drafts have been admitted and there are cases where construction, implication and rectification can become rather confused, but in this case it is not necessary for me to wrestle with those points - first, because I have already decided on the construction of the Agreements without the need for any (controversial) assistance from the Draft Heads of Terms, and, secondly, because even if they may be technically admissible (which I doubt in the light of the discussion which I have summarised), I consider that they would provide little assistance and possibly only a basis for further confusion, given that so much remained to be agreed or was changed subsequent to the Draft Heads of Terms - including the agreement of Schedules 2 and 3 in the LPA themselves, which are not to be found anywhere in the Draft Heads of Terms.

51 The second matter sought to be relied upon on behalf of citizenM as part of the other elements of factual matrix was the written evidence of Mr. Campagne. (I hope he will forgive me for referring to him simply as "Mr. Campagne"; his full name is Mr. Nicolaas van Lookeren Campagne. In a recent witness statement of 15 February 2016, he explained his position and various facts, and acts as one of the B Directors nominated by citizenM in relation to the General Partner. He does not only deal with subjective matters of what citizenM desired; he also deals with what was made clear to everyone involved as regards the important matters, including right to waive - that is para.4.6 - and the relative importance of a planning condition as opposed to funding and other matters which might be more easily solvable than the refusal of a planning permission and failure on appeal.

52 I am not satisfied that those facts would be of particular significance to the issues before me. Moreover, this evidence, it seems to me, even in an urgent matter, was served too late. The facts asserted were not pleaded. The parties had their opportunities in an urgent case to get their pleadings in order. There were two rounds of pleadings, and if a matter of this sort is relied upon as important to explain, by way of factual matrix, matters known to both parties and objectively relevant to a consideration of any ambiguity or difficulty of meaning on a construction point, then, in my judgment, they should be pleaded and notified well in advance of a witness statement which is dated the 15

February, and so only a bare week before this hearing. So for those reasons, I must reject the usefulness or admissibility of that evidence.

(6) CONCLUSIONS

53 For the reasons which I have attempted to summarise, I therefore find in favour of the Claimant citizenM and against the First Defendant CHIL in relation to the principal construction issues put before me. I would ask counsel in due course to draft the appropriate form of order for my approval; subject to corrections by them, I hope I have dealt with the key arguments as regards those issues.

54 For the purpose of clarity, I have *not* had to deal with any allegation of a breach - either breach of the TfL obligations on CHIL or, perhaps more significantly at this preliminary stage, the allegations of breach of duty by the service of the Waiver Notice, which is said to represent a breach of fiduciary duty by the GP to the Partnership - perhaps on grounds of good faith and/or the lack of objective justification for a waiver of the conditions which would otherwise prevent the Partnership from acquiring the land. (Nor, I would mention have I had any evidence of values, conflicts of interest or profit motives. It has been suggested in very general terms that with the increase in central London land values, it might be in CHIL's interest for the Partnership not to acquire this property so that it is free to resell it at a higher price. But none of that featured in my consideration of the construction points.)

55 What I have, so far left over from the issues directed to be heard at this preliminary trial by Proudman J, is whether or not, on the assumption that there was a breach by citizenM and its nominees as regards the service of the Waiver Notice purportedly on behalf of the Partnership, that breach would result in either the Waiver Notice being void or, alternatively, it's being voidable and, if voidable, subject to a possible mandatory injunction essentially quashing the Waiver Notice, reversing the Waiver Notice, so that it would be treated as invalid. If the parties wish to get on with that hypothetical issue as to the law which would apply regarding "void or voidable", and the possibility of an injunctive remedy if voidable, then probably we will have to do that tomorrow morning. Anyway, the above is my judgment thus far.

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Claim No. HC-2016-000078

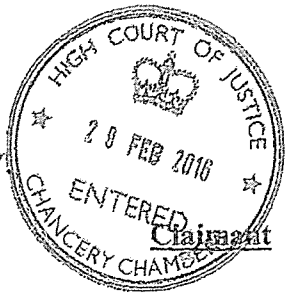
Before Mr Murray Rosen QC (sitting as a Deputy High Court Judge)

Dated 23 February 2016

B E T W E E N:

CITIZENM LND ST PAUL'S PROPERTIES B.V.

Claimant



- and -

(1) CHIL LIMITED

(2) CITIZENM-CHIL ST PAUL'S PROPERTIES L.P.

(3) CITIZENM-CHIL ST PAUL'S PROPERTIES LIMITED

Defendants

AND BY WAY OF COUNTERCLAIM

B E T W E E N:

CHIL LIMITED

- and -

(1) CITIZENM LND ST PAUL'S PROPERTIES B.V.

(3) CITIZENM-CHIL ST PAUL'S PROPERTIES LIMITED

ORDER

UPON the trial of the preliminary issues defined at paragraph 1 of the Order of Mrs Justice Proudman dated 1 February 2016 ("the Preliminary Issues");

AND UPON the Claimant amending its Reply to withdraw reliance on the Board Resolution referred to at paragraph 1(b) of the Preliminary Issues;

AND UPON hearing Leading Counsel for the Claimant and Leading Counsel for the First Defendant at a hearing on 22 and 23 February 2016;

IT IS ORDERED AND DECLARED THAT:

1. By virtue of paragraph 1.1 of Schedule 1 to the SPA and clause 6.8 of the SHA, the GP (acting by its B Directors) had power on behalf of the Partnership unilaterally to waive the Conditions Precedent as defined in the SPA, including the Funding Condition and the TfL Conditions as defined in the LPA.

2. Subject to paragraphs 69 to 70 and 73 to 76 of the Amended Defence and Counterclaim:

   (a) the Waiver Notice was valid and effective to waive all outstanding Conditions Precedent under the SPA; and

   (b) the First Defendant is obliged to vote in favour of the resolution set out in Annex 1 to the draft written resolution of the board of directors of the GP sent by the Claimant and agreed by the First Defendant on 27 January 2016.

3. The First Defendant's counterclaim at paragraphs 71 to 72 and Prayer (1) of the Amended Defence and Counterclaim is dismissed.

4. By 4pm on 8 March 2016, the First Defendant shall pay:

   (a) the Claimant's costs of the hearing on 22 and 23 February 2016, summarily assessed in the sum of £33,000; and

   (b) the Claimant's costs of, and thrown away by, the amendments to paragraphs 28 and 32 of the Defence and Counterclaim, summarily assessed in the sum of £26,000.

5. All other costs reserved.

6. The above paragraphs of this order constitute a final order. An appeal lies from it to the Court of Appeal. Permission to appeal is refused. A further application for permission to appeal may be made to the Court of Appeal.

IT IS FURTHER ORDERED BY CONSENT THAT:

7. The First Defendant has permission to rely on its Amended Defence and Counterclaim without further service, provided that paragraphs 1 to 4 in the prayer for relief shall be deleted.

8. This action shall be transferred to the High Court of Justice, Queen's Bench Division, the Technology and Construction Court in London pursuant to CPR rule 30.5, subject to the

approval of a judge of that court, and the Chancellor of the High Court. The Claimant shall file an application for such transfer with the Technology and Construction Court by 4.00pm on 4 March 2016.

9. This order shall be served by the Claimant on the First Defendant.

Service of this order

The court has provided a sealed copy of this order to the serving party:

CMS Cameron McKenna LLP at Cannon Place, 78 Cannon Street, London, EC4N 6AF, reference EMPI/LOPO/151805.00002.

Reasons for Allowing or Refusing Permission to Appeal
(including referral to the Court of Appeal)

The Judge must complete this form on allowing or refusing an application for permission to appeal at a hearing or trial.

Title of Case/Claim CITIZEN M LND ST PAUL'S ETC

Case/Claim N° HC-2016-000078

Heard/tried before (insert name of Judge) M-H. ROSEN QC

Date of hearing/trial 22 FEB. '16

Nature of hearing/trial

PRELIMINARY TRIAL OF CONSTRUCTION ISSUES

Result of hearing/trial

CLAIMANT SUCCEEDED - DECLARATIONS MADE ON CONSTRUCTION ISSUES

Claimant's Application for permission to appeal

☐ Allowed ☑ Refused

Brief reasons for decision to allow or refuse appeal (to be completed by Judge)

No Reasonable prospect of success - no specific grounds - DI wished to reargue all points

Judge's Signature [signature]

Note: The appellant must file a copy of this completed form at the appeal court with the appellant's notice when issuing the appeal.