Neutral Citation Number: [2019] EWCA Civ 1864

Case No: A1/2017/3327

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN LEEDS TECHNOLOGY AND CONSTRUCTION COURT (QB)
HH JUDGE RAESIDE QC
D50LS041

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2019

Before:

LORD JUSTICE COULSON
and
LADY JUSTICE ROSE

- -

Between:

(1) Neil Farrar	**Appellants**
(2) Farrar Construction Ltd	
- and -	
(1) James Rylatt	**Respondent**
(2) Kevin Rylatt	
(3) JKR Property Developments Ltd	

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Ms Sarah Lawrenson (instructed by **Walker Morris**) for the **Appellants**
Mr Bruce Walker (instructed by **Addlestone Keane Solicitors**) for the **Respondents**

Hearing Date: 24th October 2019

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Approved Judgment

LORD JUSTICE COULSON:

1 Introduction and General Observations

1. At a trial in the TCC in Leeds in November 2017, the claimants (to whom I shall refer collectively as "the appellants") sought declarations against the defendants (to whom I shall refer collectively as "the respondents") in respect of two alleged profit share agreements arising out of two different developments in West Yorkshire: one known as Hazel Grove and the other as The Barns. In a judgment given *ex tempore* on 16 November 2017, almost immediately after the trial, HHJ Raeside QC ("the judge") rejected both claims.

2. The factual background and the issues that arose in respect of these two alleged agreements were very different. In relation to Hazel Grove, the alleged profit share was said to arise from an oral agreement made in or around March 2013, the terms of which (amongst other things) "were to create and evidence a trust in respect of Hazel Grove under the terms of which the legal owner or owners of Hazel Grove holds or hold Hazel Grove and the proceeds of sale thereof on trust for [the first and second respondents, whom the judge called "Jim" and "Kevin"], on the one hand, and [the first appellant, whom the judge called "Neil"], on the other, as the tenants-in-common of 50% each of the beneficial interest in Hazel Grove" (see paragraph 2.4 of the Particulars of Claim).

3. By contrast, the alleged profit share agreement in respect of The Barns arose out of a written but unsigned Heads of Terms ("HoT") document dated 4 November 2013 which provided (amongst many other things) that Jim and Kevin "will enter" into a joint venture partnership with Neil which involved a 50:50 split of the net proceeds. The HoT was expressly said to be "Subject to Contract and Without Prejudice", which I shall call "the Subject to Contract tag".

4. It is the appellants' case on appeal that, in respect of Hazel Grove, the judge failed to address the existence or otherwise of the oral agreement separately from the existence of the trust, and that his findings on the factual evidence generally were unclear, and did not appear to tally with his rejection of the appellants' case. As to The Barns, it is the appellants' case on appeal that the judge should have found that, despite the Subject to Contract tag, there was a binding profit share agreement as recorded in the HoT.

5. Somewhat surprisingly, the appellants went on to say that, if this court agreed with their criticisms of the judgment, it should reverse the judge's conclusions, and make positive declarations as to, for example, the existence of the oral contract for Hazel Grove and the binding nature of the HoT in respect of The Barns. As was made plain in the order granting permission to appeal, that would be a most unusual course for this court to adopt, when so much turned on the oral evidence. If the appellants' criticisms are sustained, the appropriate relief will be an order for a new trial.

6. During the course of argument, Ms Lawrenson for the appellants made a number of sustained criticisms of the judgment. Indeed, Mr Walker, for the respondents, was also unhappy with some aspects of it. I would agree with some of those criticisms. The judgment is not as clear as it might be on important issues of fact and law, and there are some passages which, even now, remain cryptic and unexplained. It has

meant that this court has spent rather too long dotting about the judgment, trying to piece together what the judge found and why. As Mr Walker properly conceded, a judgment should not present this sort of jigsaw puzzle.

7. By the same token, however, an appeal is not a form of gratuitous essay-marking exercise, in which points are awarded by the Court of Appeal for structure, grammar and style. This was a judgment given *ex tempore*, doubtless for sound reasons of speed and efficiency. However much it might be capable of hindsight improvement, what matters is whether the judgment contained proper answers to the critical issues which had been raised at the trial.

8. In addition, I consider that at least some of the appellants' criticisms of the judge have masked what was actually in issue at the trial itself, and therefore what the judge was being asked to decide. As we shall see, the skeleton argument in support of the appeal, and the appellants' oral arguments, often play down, if not ignore outright, the arguments which were advanced before the judge, in preference for new ways of putting the case. That is unhelpful and potentially misleading. Ultimately, this court has to reach a decision about the judge's treatment of the issues that were argued before him, not to embark on an exercise as to how he might have dealt with other matters which might have been (but which were not) clearly raised at the trial.

2 Hazel Grove / Facts and Issues

2.1 The Facts

9. Hazel Grove was a plot of land in Featherstone, near Pontefract in West Yorkshire, owned by a third party, with planning permission for a five bedroomed house. Jim and Kevin bought the plot for £50,000 in 2013.

10. It was common ground that they agreed to pay £100,000 for the house to be built at Hazel Grove. The identity of the intended builder was in dispute at trial (because the appellants said it was Neil, whilst the respondents said it was the second appellant, his construction company ("FCL")). That dispute was not resolved anywhere in the judgment. The £100,000, less £3,000 for costs incurred directly by Jim and Kevin, was paid.

11. The appellants alleged that there was a profit share agreement between Neil, on the one hand, and Jim and Kevin, on the other, and that this agreement was reached orally "in or around March 2013". The fact of this oral agreement was denied by the respondents. The existence or otherwise of this agreement was at the heart of the dispute in respect of Hazel Grove.

12. The building works at Hazel Grove were completed in early 2015. It was common ground that Neil was subsequently involved in the marketing of Hazel Grove. The appellants asked the judge to infer from this that he had an interest in the proceeds of sale. It appears that in April 2015, FCL made an application to register a restriction on Hazel Grove, claiming a beneficial interest therein. The application said that this beneficial interest arose because of an oral profit share agreement allegedly reached with FCL (not Neil) on 22 January 2013 (not March). Eventually, Hazel Grove was sold in September 2016 for £190,000, which was considerably less than the £250,000 which Neil had said to Jim and Kevin that he could obtain.

2.2 The Pleaded Issues

13. The appellants' case as to the oral agreement was set out in paragraph 2 of the Particulars of Claim. It is necessary to set that out in full:

> "2.0 By an oral agreement entered into at the premises of Farrar Construction Limited at Parkfield Farm, North Featherstone, in or around March 2013 between the First Claimant, on the one part, and the Rylatts, on the other, it was agreed as follows (the following terms being referred to hereafter as "the Hazel Grove Agreement"):
>
> 2.1. Hazel Grove would be purchased with funds provided by the Rylatts and registered in the names of the Rylatts. Pursuant to this term, Hazel Grove was so acquired by the Rylatts for a purchase price of £50,000 and registered in the name of the Rylatts in or around 22 April 2013.
>
> 2.2 The First Claimant would charge a fee of £100,000 to erect and complete a five-bedroomed house on Hazel Grove, being 7A Hazel Grove, Land Registry Title Number YY12139 ("the Hazel Grove House"), that fee to be payable by the Rylatts at the request of the First Claimant. To date, the First Claimant has expended £97,000 in the erection and completion of the Hazel Grove House.
>
> 2.3 Following completion of the Hazel Grove House, Hazel Grove would be sold on the open market.
>
> 2.4 Following the sale of Hazel Grove, any net profit arising from the sale would be split equally as between 50% to the First Claimant and 50% to the First Defendant and the Second Defendant. **For the avoidance of doubt, the terms of the Hazel Grove Agreement were to create and evidence a trust in respect of Hazel Grove under the terms of which the legal owner or owners of Hazel Grove holds or hold Hazel Grove and the proceeds of sale thereof on trust for the Rylatts, on the one hand, and the First Claimant, on the other, as the tenants-in-common of 50% each of the beneficial interest in Hazel Grove.**
>
> 2.5 The net profit arising on the sale of Hazel Grove would be the gross sale proceeds less (a) the purchase cost of Hazel Grove (£50,000), (b) build costs (£97,000 to date, but limited in any event to £100,000 irrespective of any costs in excess of that figure which would be borne the First Claimant) and (c) costs of sale.
>
> 2.6 Further, it was an express term of the Hazel Grove Agreement, alternatively a term implied so as to give the contract business efficacy, that the Rylatts would not refuse any reasonable offer

> for the Hazel Grove House in the circumstances of the market pertaining at the time of any such offer" (Emphasis supplied).

14. By reference to particular paragraphs in the defence, the thrust of the pleaded response was that: there was no agreement to share any profits (6.3 and 7.1); FCL "merely acted as builder" (7.2); the appellants had failed for various reasons to establish a beneficial interest (7.3 and 7.4); and the appellants had failed to plead the elements of a constructive trust (7.5).

15. At paragraph 3.1 of the Reply, the appellants said that it was their case that:

> "… the Hazel Grove Agreement **expressly created and evidenced a trust** in respect of Hazel Grove in the terms pleaded" (Emphasis supplied).

16. At paragraph 10 of the appellants' skeleton argument for the trial in November 2017, the assertion of the oral agreement was repeated. No detail was provided as to precisely when the agreement occurred, where the relevant discussion or discussions took place, who the parties were to the discussions, or any of the usual particulars which are required in order to establish an oral agreement. Although some of that information could be found in Neil's witness statement, that statement was couched in vague and passive terms. It was certainly not in the detailed terms of paragraph 2 of the Particulars of Claim (set out in paragraph 13 above). The witness statement made no mention of the alleged express trust.

17. In the respondents' skeleton argument for the trial, it was accepted that there was an agreement in early 2013 that the house would be built and that the sum to be paid was £100,000. The skeleton then identified at paragraphs 14, 15 and 16 disputes as to who was to carry out the building work, whether there was an outstanding payment, and whether there was to be a share of the profits. Paragraph 17 of the skeleton disputed the alleged trust and sought to make good a number of the points originally raised in the pleaded defence as to why the appellants' case was unsustainable in fact and law.

2.3 The Relevant Parts of The Judgment

18. The judge dealt with the evidence in respect of Hazel Grove shortly, between paragraphs 20 and 27 of his judgment. The heart of it is at paragraphs 23 – 25 as follows:

> "23 Accordingly, the evidence presented to the court by Neil singularly fails to support any claim for an express trust of Hazel Grove and on such limited documents as exist provides an increasingly less precise and confusing picture as to between who and when any such oral agreement was made.
>
> 24 Having seen Kevin and Neil give evidence the view I have formed, as set out above, is that I consider it extremely unlikely that either of them would understand what a trust on Hazel Grove means and, whilst I have formed the view that Neil knew full well what was going on as I set out above and, therefore, would appreciate what a trust on Hazel Grove would be, how it was

> created and how it could be enforced as he did on 22nd April 2015, that is a long cry from parties being ad idem.
>
> 25 I am quite satisfied on the evidence before this court that Neil has failed to prove any oral agreement to which he contends in respect of Hazel Grove and I dismiss this claim which fails *in limine."*

2.4 The Criticisms on Appeal

19. Although the grounds of appeal are put in a number of different ways, the essential points concerning Hazel Grove are straightforward. First, it is said that the judge failed to deal with the existence or otherwise of the oral agreement. In this respect, the submission is that the judge erred in focusing on the alleged trust rather than the oral agreement; that he wrongly conflated these two distinct issues. This point is encapsulated at paragraph 14 of Miss Lawrenson's skeleton argument for the purposes of the appeal:

> "Further, HHJ Raeside QC failed to give reasons or any adequate reasons for finding that there was no oral agreement as to the profit share, finding only that there had been no express agreement as to a trust [judgment/para 23]. It has always been the appellants' primary contention, as set out in paragraph 5 of this Skeleton Argument above, that the agreement was as to the split of the profits, as detailed above, with the trust as a secondary or further position."

20. Secondly, it is said that, in view of the judge's positive observations about Neil's evidence, and his criticisms of the respondents' evidence, there was no basis on which he could have properly rejected Neil's case as to the existence of the oral agreement. Thirdly, Ms Lawrenson submitted that, because Neil was involved in the post-completion marketing of Hazel Grove, the only plausible explanation for that was his interest in the profit to be made on the sale of the property.

Hazel Grove / Applicable Law

21. It will be clear from the summary set out above that the appellants' complaints concerning Hazel Grove relate to the judge's findings of fact. As was pointed out in the order granting permission to appeal, that amounts to a formidable hurdle for any appellant, the more so because this is an appeal from a specialist tribunal.

22. As Lewison LJ noted in *Fage UK Limited and another v Chabani Limited and another* [2014] EWCA Civ 5 at paragraph 114:

> "Appellate courts have been repeatedly warned by recent cases at the highest level not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

As he memorably pointed out later in the same passage, "the trial is not a dress rehearsal. It is the first and last night of the show."

23. Similar dicta can be found in *Henderson v Foxworth Investments Limited* [2014] UKSC 41 and *Grizzley Business Limited v Stena Drilling Limited* [2017] EWCA Civ 94 (at paragraphs 39 and 40 of the judgment of Longmore LJ). In the former at [67], Lord Reed gave examples of the limited circumstances when such interference by an appellate court was justified, namely when a critical finding of fact had no basis in the evidence, or was based on a demonstrable misunderstanding of, or failure to consider, relevant evidence.

24. In addition, there is a body of case law which emphasises the difficulty of appealing against findings of fact made in a specialist court like the TCC. The relevant authorities were gathered together for convenience at paragraphs 12-16 of my judgment in *Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited* [2018] EWCA Civ 2403.

25. Accordingly, for all practical purposes, in order to appeal successfully against the findings of fact made by a judge at first instance, an appellant has to show that there was no evidence to support the findings made, or there was a demonstrable misunderstanding of, or failure to consider, relevant evidence. If all the relevant evidence was considered by the judge then, even if the appellate court might have come to a different conclusion, an appeal against the trial judge's findings of fact will fail. That is why an appeal against a trial judge's findings of fact is such a high hurdle for an appellant to overcome.

4 Hazel Grove / Discussions and Conclusion

4.1 The Centrality of The Alleged Trust

26. As set out in those parts of the judgment cited in paragraph 18 above, the judge appeared to consider that the existence or otherwise of the oral agreement was inextricably linked to the alleged trust. I acknowledge that this is not entirely clear, because in [25] the judge refers to Neil's failure to prove the agreement, but [23] and [24] which precede it, are all about the trust. If an express agreement to create a trust could not be established, then the judge seems to have assumed that the alleged oral agreement must also fail.

27. On that reading of the judgment, the first issue for us is whether the judge was right to approach the evidence in that way. Ms Lawrenson says not, because the issue of the trust was always a secondary point. She accepts that this issue has now assumed considerable significance for the appellants because, as she very fairly accepted, the evidence in support of a trust "was very poor". It is not suggested that the judge was wrong to find that there was no express trust.

28. In my view, having set out the relevant parts of the pleadings and skeleton arguments in Section 2.2 of this Judgment, the judge can perhaps be forgiven for considering the two issues together. The appellants cannot now seek to escape their pleaded case (as highlighted in paragraphs 13 and 15 above), which made it clear that the alleged agreement "*expressly created and evidenced a trust…*". On that basis if, as the judge found, there was no evidence to support a claim for an express trust then, on the way

in which the case had been argued before him, it must have been tempting to conclude that, in consequence, there was no oral profit share agreement either.

29. But these were, at root, separate allegations. Moreover, on one view, the judge's findings in respect of the trust were a self-fulfilling prophecy because the sort of complex concepts pleaded in paragraph 2 of the Particulars of Claim were never likely to have been expressly agreed by these three laymen. They would not have understood what the terms meant, let alone reached agreement upon them. So there is force in Ms Lawrenson's submission that, notwithstanding the way in which the case was pleaded, the judge should have treated the existence of the oral agreement as a matter distinct from the trust, and explained in detail why he had concluded at [25] that there was no oral agreement.

30. I therefore turn to the alleged oral profit share agreement in respect of Hazel Grove. Was that made out in the evidence?

4.2 The Oral Evidence

31. The appellants say that the conclusion at [25] that there was no such agreement was contrary to the judge's own findings about the credibility of the individual witnesses of fact. As demonstrated below, I consider that that submission is based on a highly selective summary of the judge's judgment.

32. It is certainly right that, at [18], as Ms Lawrenson submitted, the judge described Neil as "a straightforward witness"; that "he gave the appearance of an honest witness with a clear view of what in fact happened at all material times"; and that "he was quite aware of what was going on in his business dealings with [the respondents]".

33. But what Ms Lawrenson omitted to note was that, even in [18], the judge described Neil as someone "who did his best to explain the facts as he recalled them, often in the face of contradictory evidence on the documents, which of necessity he had to accept". Moreover, at [23], the judge expressly found that Neil's evidence "provides an increasingly less precise and confusing picture as to between who and when any such oral agreement was made".

34. In other words, the judge did not consider Neil to be an entirely satisfactory or reliable witness and, on the specific issue of the alleged oral agreement in respect of Hazel Grove, his evidence was expressly said to be "less precise and confusing". That could not have been a sound basis for a finding that, on the balance of probabilities, an oral agreement was established, particularly as it was common ground that the alleged agreement in relation to Hazel Grove depended entirely on Neil's evidence. The only other witness of fact called by the appellants was Mr Beighton, FCL's former office manager, and the judge found at [18] that his evidence was "largely hearsay". That comment was not further explained in the judgment but, having looked at the relevant parts of Mr Beighton's cross-examination, I take the view that that finding was one that the judge was entitled to make.

35. The judge does not explain his potentially important finding that Neil's oral evidence often contradicted the contemporaneous documents. This was a particularly cryptic observation given that, in relation to Hazel Grove, there were no relevant documents

at all and that, in relation to The Barns, the arguments were not about differences of recollection or conflicting documents, but the legal effect of the written HoT.

36. Having heard counsel's submissions on appeal, it appears that what the judge had in mind was that, in relation to all of these projects, Neil referred to himself individually, and FCL as the relevant company, on an entirely interchangeable basis. He also inaccurately summarised the terms of the arrangements in relation to Ackerton Road, another project involving Jim and Kevin, as demonstrated by a contradictory witness statement he had served in other proceedings. It would have been better for everyone if the judge had made this plain.

37. Another unexplained observation made by the judge was his potentially important comment that Neil's evidence "provides an increasingly less precise and confusing picture as to between who and when" the alleged oral agreement was made. Again, having heard counsel's submissions, I am in no doubt to what that was a reference, and the judge should have made that clear.

38. As to dates, it appears that, when the appellants sought the restriction in relation to Hazel Grove, they said that the oral agreement was made on 22 January 2013. No explanation for that date, or the reason why it could be stated with such precision, was ever provided. By the time of the Particulars of Claim, that date of the agreement had moved to "in or around March 2013". Neil's later witness statement gave no date at all. That explains why the judge said that his case had become "increasingly less precise". The same was true of the terms of the alleged agreement. The Particulars of Claim, supported by a statement of truth, had made very detailed allegations as to the contents of the alleged oral agreement (see paragraph 13 above). Neil's witness statement, as noted above, was much vaguer.

39. Accordingly, it seems to me that, although he ought to have explained the reasons why he had reached the particular conclusions that he did, the judge's important reservations about Neil's evidence were fully justified. They are a major part of how and why, given that the evidential burden was on Neil to establish the oral agreement, that critical part of the appellants' case failed.

40. On that analysis, the judge's findings about Jim and Kevin's evidence are of little importance. Although the judge was critical of them individually, he did not suggest that they were dishonest or unreliable. He described Jim as "combative" [19] and Kevin as "remarkably unsure of the factual details" and "somewhat naïve and trusting" [19]. As with Neil, he found in respect of their evidence generally that he should not "take matters beyond what appears on the face of the relevant documents".

41. Such a situation is not uncommon. But it did not help the appellants' case, because nobody suggested that there was any contemporaneous document that evidenced, even obliquely, the alleged oral agreement on Hazel Grove. That position, allied with the judge's express criticisms of Neil's reliability at [18] and [23], inevitably meant that the appellants had failed to discharge the necessary burden of proof in relation to the existence of the oral agreement.

42. For completeness, and since it was a matter that was referred to in counsel's submissions, I should say something about the sum of £100,000 which was the amount agreed and paid for the building work at Hazel Grove. Ms Lawrenson

complained that the respondents had failed to enquire about or provide a breakdown of that figure and said that this failure showed that they must have known or accepted that the figure did not include profit. But in my view, that attack was misplaced.

43. The £100,000 figure was the appellants' figure. If, as they now maintain, that figure excluded any element for profit, then I would have expected the appellants to be able to make that assertion good. It is common for a builder who wishes to argue that his price did not include for a particular element of work (that might otherwise have been expected to have been included), to provide a breakdown of the price to demonstrate the exclusion of the item in question. But at no time did the appellants provide any evidence that supported the assertion that the £100,000 related to the cost of the works only, without any allowance for profit. That might be said to be another telling point against their case.

4.3 Involvement in Marketing

44. Finally, the appellants relied on Neil's involvement in the marketing of Hazel Grove and said that this could only be explained by his interest in a share of the profits. It is common ground that the documents generated by his involvement in the marketing made no reference to any such profit share agreement.

45. The difficulty with that submission, of course, is that there may have been many other reasons why Neil chose to involve himself in the marketing of Hazel Grove, not least because, at the same period, he was involved in the larger project in relation to The Barns with the respondents. Indeed, when this point was put to Jim and Kevin in cross-examination, they gave a number of explanations for Neil's involvement in the marketing, none of which assumed that there was any profit share agreement. One said (although it was rather mangled in the transcript) that Neil was using it as a "sprat to catch a mackerel". In some ways, the high point of the appellants' case was Kevin's evidence that if a particular price was achieved, they would buy Neil a drink or 'a butty' which the judge – rightly – called a throwaway remark [20]. There was simply nothing to support the assumption that Neil's marketing involvement showed that he had a pecuniary interest in the proceeds of sale.

46. On that basis, therefore, it might be said that the marketing evidence and documents were generally unhelpful to the appellants: the documents made no mention of the alleged profit share agreement (in circumstances where that might have been expected), and the evidence showed that there were plenty of plausible reasons why Neil was involved in the marketing of Hazel Grove that did not automatically mean that there was a profit share agreement.

4.4 Conclusions

47. For the reasons set out above, although I accept that the judgment on the Hazel Grove issues could have been more clearly expressed, I can find no basis on which to allow the appeal. The judge concentrated on the express trust because that was the principal issue raised by the appellants, but in any event he concluded that the existence of the entirely oral agreement had not been made out. The judge assessed the evidence and made findings of fact which he was entitled to make. For these reasons, if my lady agrees, I would dismiss the appeal on Hazel Grove.

5 The Barns / Facts and Issues

5.1 The HoT

48. In 2013, Neil owned a large barn and a smaller barn on another site in Featherstone, which was ripe for conversion. This project became known as The Barns.

49. In October 2013 there were some preliminary discussions between Neil and Jim and Kevin about the possible development of The Barns. Following those discussions, John Tate, a chartered surveyor brought in by Jim and Kevin to assist them, drew up the first draft HoT. At paragraph 7 of his witness statement, Mr Tate described his decision to prepare the HoT as being "in order to record the outline of the overall proposal".

50. On 29 October 2013 (wrongly identified by the judge as 4 November) there was a meeting between Neil and John Tate. Jim and Kevin were not present; they were in China and did not return until 6/7 November. The third respondent ("JKR") had not yet been incorporated. Following the meeting, John Tate produced a revised copy of the HoT dated 4 November. Mr Tate's witness statement does not suggest that this document was anything other than a further refinement of 'the outline of the overall proposal'. It was not suggested to him in cross-examination that, by producing this document, he was acting as the agent of the absent Jim and Kevin such as to bind them irrevocably to the terms set out in the HoT.

51. The HoT dated 4 November 2013 was not signed by anyone. It contained on its front page (as the first version had done) the Subject to Contract tag. It described Neil as "the vendor", and Jim and Kevin as "the purchaser".

52. The relevant parts of the HoT for the purposes of the appeal were clauses 1 – 7 as follows:

> 1. "Exchange of contracts no less than 4 weeks from receipt of documentation.
> 2. Addlestone Keane legal fees for the purchase, land registry title work and sales costs estimated at £4500+ VAT to be treated as a development cost.
> 3. The vendor will provide all details of all title documents, planning consents etc as required by the purchasing solicitor.
> 4. The vendor will arrange for the land currently used as storage of materials and stabling to be tidied up and all loose materials to be taken from site 2 months prior to completion of the development.
> 5. The purchasers will enter into a joint venture partnership with Neil Farrar to build and complete the development outlined in the BDL plans ref 671.6, 671.7, 671.8, 671.9 and the specifications for plots 1, 2, 3 and 4 attached. The specifications require more detail, to be provided by Farrar Construction. The nominated contractor appointed by the joint venture partnership will be Farrar Construction Ltd on a fixed price JCT contract in the sum of £300,000 to complete the project. This will include all statutory utilities costs and fees, Building Regulations and planning fees, drainage costs, professional fees, contamination reports, SAP and

sound tests, architects costs, engineers fees, EPCs and all other costs and fees incurred in the development.

6. K & J Rylatt will provide finance of £300,000 payable to Farrar Construction Ltd in stage payments throughout the development, stage payments to be monitored and authorised by Greenoak Development Consultancy. Payments will be authorised on a cost to complete basis, figures to be provided by Farrar Construction.
7. On completion of the development the net proceeds will be divided 50:50 between K & J Rylatt (25% each) and N Farrar. The net proceeds to be calculated as follows:
   Gross sales price
   Less Costs of Development = Net Proceeds
   The Costs of Development are:
   1. Land Cost at £360,000
   2. Build Cost at £300,000
   3. Authorised variations
   4. Legal costs Addlestone Keane estimated £4500
   5. Tim Dawson professional fees estimated £1500
   6. Greenoak Development Consultancy fees estimated £5-6000
   7. Sales agent fees if applicable
   8. Cost of furnishing and dressing sales house if applicable
   9. All professional fees and LABC fees
   10. Interest on capital payable to K & J Rylatt at a rate calculated daily at 7.5% of the capital introduced

   The contract should allow a minimum return to K & J Rylatt of £150,000 plus interest after development costs are deducted."

53. The HoT was e-mailed by Mr Tate to Neil whose response was simply to say "thank you". A week later, on 11 November 2013, JKR was incorporated.

54. FCL commenced work on The Barns on 1 March 2014 even though, at that time, the land was still owned by Neil. The conveyance for the sale of The Barns from Neil to JKR (not Jim and Kevin) took place on 28 March 2014 under two separate contracts with a total purchase price of £360,000.

55. Although works continued and invoices were issued, it appears that the detailed specification for the building work was not prepared until 21 May 2014. On 24 June, a JCT building contract, which incorporated that specification, was signed. Pursuant to that contract, JKR was the employer and FCL were the building contractors. The HoT was annexed to the JCT contract.

56. In July 2014 FCL issued their fifth invoice in respect of the building works and there was a dispute about it. Although the building works were due to be completed in November 2014, the judgment makes no mention of whether they were completed by FCL. However, at the appeal hearing, we were told that the works were eventually completed and that some, but not all, of the properties had since been sold. FCL made an application to register a restriction on The Barns on 22 April 2015.

5.2 The Pleaded Issues

57. The appellants' Particulars of Claim asserted the existence of a profit share agreement in respect of The Barns solely by reference to clauses 5-7 of the HoT (set out at paragraph 52 above). The pleading made no reference to the Subject to Contract tag.

58. The defence, however, relied expressly on the Subject to Contract tag at paragraph 11.1 to support the respondents' contention that this precluded the HoT being, or evidencing, a binding profit share agreement as at 4 November 2013. The defence went on to say at paragraph 11.2 that there was no subsequent profit share agreement in the terms of the HoT and that no later agreement was even alleged by the appellants. The defence also took a variety of points in relation to the identity of the various parties and the mismatch between the HoT and what happened subsequently. In particular it was noted that: i) although the HoT envisaged the purchase of the land by Jim and Kevin, the land was in fact purchased by JKR, which had not even been incorporated at the time of the HoT; ii) although the HoT envisaged that the profits would be made by Jim and Kevin, any such profits would in fact be made by JKR, and thus would not be Jim and Kevin's to distribute.

59. Surprisingly (particularly given the arguments relied on at the appeal by Ms Lawrenson), the appellants' pleaded Reply did not grapple with any of these points. Instead it merely reiterated that the HoT "evidences the agreement contended for". That was thoroughly unhelpful. Although it was clear that the Subject to Contract tag was a classic matter for the appellants to 'confess and avoid', there was no plea that, for example, the Subject to Contract tag applied to some parts of the HoT but not others, or that the tag fell away at a later date or on the happening of a later event, or that in some way the Subject to Contract tag was otherwise waived.

60. The appellants' stance – that all that mattered was the binding nature of the profit share element of the HoT as at 4 November 2013 – was firmly maintained in Ms Lawrenson's trial skeleton. Paragraph 19 of that document repeated the terms of the HoT set out above on the express basis that these terms were binding. That approach can be further seen in her trial skeleton:

    (a) In paragraph 24, which referred to the fact that the HoT was attached to the JCT contract and asserts that it made no sense for that to have happened "if such agreement had not already been agreed".

    (b) In paragraph 29, which referred to the written JCT contract as being "merely confirmation of the agreement already reached".

61. The potential difficulties created by the Subject to Contract tag were dealt with briefly in paragraph 30 of the trial skeleton; even then, the emphasis was again on the existence of a binding profit share agreement between the parties as at 4 November 2013. Even at this late date, there was no hint of any of the possible arguments noted in paragraph 59 above.

62. In the respondent's trial skeleton, Mr Walker set out twelve separate reasons why the HoT was neither a binding profit share agreement nor evidence of such a binding agreement. The first of those points was the Subject to Contract tag. He went on to note that there was no subsequent written profit share agreement, despite Neil's frequent requests for such an agreement to be drawn up.

5.3 The Relevant Parts of The Judgment

63. Having set out the facts and the parties' submissions at some length, the judge dealt with the resolution of the dispute about The Barns in relatively short order at paragraphs 50-55 as follows:

> "50. On reflection, I can deal relatively shortly with the central dispute in this case which is relevant to the three declarations sought by Neil, both the question of substantial facts and law.
>
> 51. The use of the words in the Heads of Terms in the document dated 4th November 2103 which was prepared by John Tate it may be unfortunate [sic]. Naturally, a lawyer or a judge reading those words would be inclined to think that it is a typical document used over many years in creating contracts to resolve disputes which is colloquially know as heads of agreement or, indeed, create future rights. There is an increasing line of authority both in this jurisdiction and otherwise since the important decision of *Pagnam v Feed Products Limited (supra) w*hich was considered and commented upon in *RTS v Molkerei (supra)* at paragraphs 47 and 48 and by way of other example in other jurisdictions see *R.I. International v Longstaff* [2014] S.G.C.A. 56 at paragraph 52 per Slattery J.
>
> 52. Equally, it is unfortunate that headings of this document prepared by John Tate include the words "and without prejudice", which when coupled with Heads of Terms would normally inform a court that this document was not intended to be made available as a disclosable document for the purposes of a trial.
>
> 53. What cannot be avoided in this Heads of Terms is the use of the words "subject to contract", not just because John Tate headed this document in this way but when read in substance (as the court is required to do viz. *Street v Mountford (supra)*) it is abundantly plain that in essence and in substance the Heads of Terms is fundamentally a sale of land contract and consequent development by means of a joint venture. In the absence of sales above the balance of Heads of Terms would simply not materialise. Thus, as a matter of law, applying those stringent provisions of section 2(3) of the Law of Property (Miscellaneous Provisions) Act 1989 such a contract is required to be signed and the Heads of Terms that were plainly not signed nor was there any intention leading up to or during the creation of such a document whereby Neil, Kevin or Jim was asked or invited to sign the Heads of Terms. Moreover, it is plain from the facts and documents emanating immediately after Heads of Terms that both parties engaged their solicitors in order that they could carry out the necessary conveyancing of The Barns. It was only some time later that

the parties put their minds to the building contract and that is to say when they should also have put their minds to a joint venture.

54. In this context it is important to appreciate what must have been fundamental and driving imperative on the part of Neil, namely to obtain money from the sale of The Barns to pay off his previous joint venture partner, Mr Leslie. It is, therefore, no accident that the Heads of Terms start with and defines the parties by reference to a contract for sale which is to be executed by means of conveyancing solicitors who were named in the agreement, and I am quite satisfied that when Neil received this document he fully appreciated that matter.

55. The only conclusion I can properly come to is that, whilst this document might appear to be heads of agreement and did contain the words "without prejudice", it would be misleading for this court to put emphasis on either of those two terms as opposed to the real substance of the express provision as to the terms set out of 4th November 2013. It was not an agreement to agree but it was an agreement for the sale of land rightly headed "subject to contract", and on that basis there can be no circumstances which could possibly make this an exceptional case under *RTS v Molkerei (supra)*, in particular paragraphs 47 and 56 cited above. This was the central basis of the skeleton argument and the closing on behalf of Neil which is sustainable.

5.4 The Criticisms on Appeal

64. Although there are a number of different grounds of appeal in relation to The Barns, they were largely variations on the same theme, based on what Ms Lawrenson said were the "mandatory words" of clauses 5-7 of the HoT. She said that, because there was nothing left to agree in respect of the profit share, the Subject to Contract tag should have been ignored because, as at 4 November 2013, the parties had intended to create legal relations and had reached a binding agreement in relation to profit share. Belatedly, an attempt was made to rely on the possible ways round the Subject to Contract tag, outlined in paragraph 59 above, despite the fact that these had not been pleaded and had not been argued at the trial. In particular, much more was made of the decision to append the HoT to the JCT contract.

6 The Barns / Applicable Law

65. The use of the 'Subject to Contract' tag is of particular application to agreements for the sale of land: see *Winn v Bull* [1877] 7 ChD 29. But it is of importance in all commercial contracts. Thus, in *Goodwood Investments Holdings Limited Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 Comm, a claim under a ship-building contract was found not to have been settled because the correspondence made it plain that such settlement was "subject to contract".

66. The stark consequences of acting under an agreement that was "subject to contract" are illustrated in *Regalian Properties PLC and another v London Docklands Development Corporation* [1995] 1WLR 212. In that case, contractors had carried out a good deal of work in the confident anticipation that a contract would eventuate. But for various reasons it did not and the claim (in restitution) for their preparatory costs and expenses was rejected. The judge found that, in the absence of special facts (which the judge explained by reference to a number of separate conditions which needed to be fulfilled) the deliberate use of the words "subject to contract" had the usual effect so that, in the event of no contract being entered into, any resultant loss must lie where it fell.

67. The only authority on this topic that Ms Lawrenson referred to the judge at trial was *RTS Flexible Systems Limited v Molkerei Alois Muller GmbH and Co KG (UK Production)* [2010] UKSC 14; [2010] I WLR 753. In that case, the draft contract contained words which were similar to the Subject to Contract tag used here. The Supreme Court held that, if matters had rested there, the draft would not have had any contractual force. But, as a result of the parties' subsequent conduct, the objective interpretation of the parties' words and conduct at formation, the fact that substantial works were carried out and paid for, and that thereafter, the basis for the work done was varied, the failure to formalise the contract did not prevent the formation of a binding contract.

68. *RTS Flexible Systems* was properly described by the judge as an exceptional case and one that turned on its own facts. One particular point of fact in that case was that a good deal of money had been paid and a considerable amount of work done so as to make it "unrealistic" (see Lord Clarke at [58]) to say there had not been a binding contract. Performance can be a critical factor in demonstrating that the parties intended to create legal relations (see the classic statement of Steyn LJ in *G.Percy Trentham v Archital Luxfer* [1993] 1 Lloyd's Rep 25 at 27, to which Lord Clarke referred). But the position is very different here. Building work was done on The Barns but that was paid for by JKR, and there is now no dispute about or under the building contract. No element of any profit share was paid to the appellants because their entitlement to any such profit has always been disputed. That is therefore a significant factual difference between this case and *RTS Flexible Systems.*

7 The Barns / Discussion and Conclusion

7.1 The Correct Approach

69. In my view, the correct approach to the question of whether or not there was a binding profit share agreement in respect of The Barns requires a consideration of the position agreement by agreement, and in chronological sequence. It would have been better if the judge had adopted that approach because, when analysed in this way, the answers to the issues are clear.

7.2 Was There A Binding Agreement of Any Sort On 4 November 2013?

70. Was there a binding agreement of any sort on the 4th November 2013 in the terms of the unsigned HoT? The answer is plainly No, for a variety of reasons.

7.2.1 The Land Sale

71. It is accepted that the HoT was not a binding contract in relation to the land sale. It is also accepted that this was because it was expressly subject to the Subject to Contract tag. There was no signed written agreement, contrary to section 2 of the Law of Property Act 1925, so the HoT could not be in law a binding contract for the sale of land. Furthermore, the identity of the purchaser changed over the next few months because the site was bought by JKR, not Jim or Kevin. There was therefore never a binding land sale agreement with Jim or Kevin.

7.2.2 The Building Contract

72. The HoT was not a binding contract in relation to the building element of The Barns. The HoT envisaged that a further contract would be drawn up, which is precisely what happened.

73. The building contract element of the HoT was covered by the Subject to Contract tag. As Mr Walker memorably put it, the HoT was not a curate's egg[1], with the Subject to Contract tag to be applied to some parts of the HoT but not to other parts. The tag applied to all of the terms because it was set out on the front of the HoT and nowhere was the tag disapplied to any of its terms.

74. Furthermore, the words of the HoT expressly anticipated that the parties would enter into a contract in the future. Clause 5 envisaged that there was to be a joint venture partnership, which partnership would then, as employer, enter into a building contract with the nominated building contractor, FCL. There was never a joint venture partnership.

75. The HoT also made plain that the parties were not yet ready to agree the terms of that building contract. Ms Lawrenson's whole case was based on her repeated assertion that nothing remained to be agreed as at 4th November 2013. But that is plainly wrong. Clause 5 itself stated that "the specifications require more detail, to be provided by [FCL]". And that is not a mere technicality. The content of the specification would dictate the quality of the work and therefore its costs. That would have, or at least could have, a direct bearing on any profit, and therefore any profit share.

76. Furthermore, the parties were not ready to agree binding legal obligations because, amongst other things, there was the possibility that the identity of the purchasers would change. This was first noted in Mr Tate's manuscript notes on the first version of the HoT, arising out of the meeting on 29 October, that Jim and Kevin might use "a new co" which of course became JKR. In this way, the HoT referred to three parties (Neil, Jim and Kevin), none of whom were parties to the eventual building contract.

77. For all those reasons, therefore, the HoT did not represent a binding building contract.

7.2.3 The Joint Venture / Profit Share Agreement

78. Having identified that the HoT did not and could not represent a binding land sale agreement, or a binding building contract, the final question is whether – despite that -

[1] An expression originating from the cartoon of the supercilious bishop and the nervous curate by du Maurier, first published in Punch in November 1895.

it represented a binding joint venture or profit share agreement. Perhaps unsurprisingly, the answer is the same.

79. First any such agreement was said to be Subject to Contract. The curate's egg point applies again: it is a nonsense to suggest that clauses 5-7 of the HoT were somehow exempt from the Subject to Contract tag, whilst everything else was covered by it. There is simply no basis for such a submission, either in the words of the HoT or anywhere else in the evidence.

80. Furthermore, there was a particular reason here why the Subject to Contact tag was used to cover all parts of the HoT. It could never have been a binding agreement between Neil and Jim and Kevin, because Jim and Kevin were in China at the relevant time. They were not parties to the discussions on 29 October or the drawing up of the new HoT on 4 November. The tag was used because, as Mr Tate explained in his witness statement, he was treating the HoT simply as an outline proposal. It cannot be argued that, in some way, Mr Tate was acting as the agent of Jim and Kevin, and entering into binding and significant legal obligations on their behalf when they were on the other side of the world. As already noted, that suggestion was not even put to him in cross examination.

81. Secondly, there is in any event the same difficulty about the identity of the parties as noted above. If this was a binding profit share agreement, it was between Neil, on the one hand, and Jim and Kevin, on the other. But Jim and Kevin did not buy the land and did not enter into the building contract. There was therefore nothing for them personally to share with Neil. In this way, there would have to have been some form of implied novation in favour of JKR but that was never pleaded or suggested. JKR was at all times a separate legal entity.

82. Thirdly, there is the language of the HoT itself. Ms Lawrenson said that the language of clauses 5 -7 was mandatory. I disagree. Instead the language anticipated a future event, namely "will enter" a joint venture partnership, and that the proceeds "will be" divided. What is more the language is plainly identifying what that future contract should contain: hence the reference at the end of clause 7 to "the contract should allow a minimum...".

83. Fourthly, there is the problem that the HoT envisaged, not a profit share agreement as such, but a formal joint venture partnership, with that partnership (as the employer) entering into the building contract with the nominated contractor. Such a partnership was never formalised, and the employer was instead JKR. So that part of the proposal simply never happened.

84. Finally, there is the conduct of the parties. In accordance with the expectation of a profit share agreement still to be formalised, once the project was up and running, Neil made repeated attempts (Mr Walker said there were 8 in total and Ms Lawrenson did not disagree) to get that profit share agreement drawn up. I refer by way of example to his email of 27 August 2014 ("I've asked on numerous occasions, when will the contract between us be ready to view and sign?"), and his email of 11 September 2014 ("I thought we had agreed that you're to instruct Sally Christie to finalise our profit sharing agreement?"). These requests show that, as far as Neil was concerned, the profit share agreement was outstanding and needed to be drawn up. So any consideration of post-agreement conduct, as per *RTS Flexible Systems* would also

lead to the conclusion that there was no binding profit sharing agreement as at 4th November 2013.

85. For all these reasons, I am quite satisfied that there was no profit share agreement between the parties as at 4 November 2013. The judge's finding to that effect, although not put in the terms which I have outlined, cannot be criticised. That is important because that was and remained the principal thrust of the appellants' case. Having rejected it, I then turn to see whether there is anything in the claim in respect of The Barns which can survive.

7.3 Was There A Subsequent Binding Profit Share Agreement?

86. From time to time in her submissions, Ms Lawrenson suggested that, if there was not a binding profit share agreement in November 2013, there was such an agreement thereafter. Two relevant events were identified: the sale of the land in March 2014, and the entering into of the JCT contract in May 2014.

87. There are a number of fundamental difficulties with these submissions. The first and most obvious is that that was not how the case was pleaded and it was not how it was put at trial. As I have demonstrated, at trial the emphasis throughout was on the alleged binding agreement as at 4 November 2013. Indeed, the judge correctly recorded at [42] that it was common ground that "there was no subsequent profit share agreement" (namely after 4 November 2013). And I have set out at paragraph 60 above the paragraphs in Ms Lawrenson's trial skeleton argument which made that very point.

88. But in any event, it is difficult to see how these events themselves could be said to give rise to a binding *profit share* agreement. Clearly the actual sale of land removed the Subject to Contract tag in relation to the land sale identified in clauses 1-4 of the HoT. But that does not assist with any alleged removal of the Subject to Contract tag in relation to clauses 5-7. And the same is true in relation to the agreement to the building contract in June.

89. There was no evidence that the parties regarded either of these events as somehow altering the legal relationship between them. At no stage was it asserted that, as a consequence of either the land sale or the entering into of the building contract, the Subject to Contract tag fell away completely, and/or that there was now a binding profit share agreement between FCL and JKR. On the contrary, as the judge found, Neil clearly envisaged that, as with the land sale and the building contract, a further formal profit share agreement would be drawn up: see paragraph 84 above.

7.4 The Relevance Of The Attachment Of The HoT In The JCT Contract

90. During her submissions before this court, Ms Lawrenson also suggested that the inclusion of the HoT as a document attached to the JCT contract was evidence that all relevant matters had now been agreed between the parties and that, in consequence of the decision to attach it, the Subject to Contract tag had fallen away in relation to the profit share agreement. I originally thought there was something in this argument, but on analysis, it faces fundamental difficulties.

91. First, this is not a case that the appellants have ever pleaded, and not a case they ran at trial. As noted at paragraph 60 above, not only did the appellants not say that its incorporation into the JCT contract meant that the profit share element of the HoT was no longer subject to contract, but they expressly said that its incorporation was irrelevant because an agreement to profit share "had already been agreed". On the appellants' case that was on 4 November 2013.

92. Secondly, it was never explained how the entering into of a building contract between FCL and JKR somehow created binding legal relations between the parties referred to in the HoT, namely Neil, on the one hand, and Jim and Kevin, on the other. How in law could the entering into of a building contract between FCL and JKR create legal relations and give rise to personal obligations as between Neil, Jim and Kevin? There was never an answer to that question.

93. In addition, there is the evidence that the judge heard about why the HoT was attached to the JCT in the first place. The judge said at [34] that Richard Doncaster, JKR's sole director, offered a "curious" explanation which the judge rightly did not accept, whilst Neil had no 'compelling' explanation for it. Counsel agreed that in truth Neil had no explanation for the attachment at all. Since the appellants' only real evidence came from Neil, his inability to ascribe any significance to the attaching of the HoT to the building contract again demonstrates that this latest submission – which assumes that the attachment was critical - is very much an afterthought. No-one suggested at trial that attaching the HoT to the building contract was intended to have any effect at all, much less that it created a binding agreement in the terms of the HoT.

94. If the appellants had wanted to say that, as an alternative case, the profit share element of the HoT became legally binding when the JCT contract (to which it was appended) was entered into, then they could easily have pleaded such a case, put in evidence to support it, and run the argument at the trial. None of that happened because that was emphatically not the appellants' case. In my view it is too late for this point to be taken now; in any event, to the extent that it was ever in play, the difficulties as to the identity of the parties and the absence of any evidence to support the suggestion that the attaching of the HoT was deliberate or significant, meant that, on the face of it, the new argument would have failed in any event.

7.5 Conclusions

95. For the reasons set out above, the appellants' primary case, that there was a binding agreement in respect of The Barns as at 4 November 2013, is hopeless for a variety of reasons. The subsequent suggestion that there was a binding profit share agreement either when the land was conveyed or the building contract was entered into was contrary to the appellants' pleaded case and not made out in the evidence. The new case that its inclusion as part of the JCT contract meant that the Subject to Contract tag finally fell away was not pleaded or argued below, could not get round the problem of the different parties, and was contrary to the evidence about the decision to attach it in any event.

96. Accordingly, if my lady agrees, I would also dismiss the appeal in relation to The Barns.

Lady Justice Rose

97. I agree.