Neutral Citation Number: [2019] EWHC 1564 (Ch)

Case No: D30CF144

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch D)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 19 June 2019

Before :

HIS HONOUR JUDGE JARMAN QC

- -

Between :

JOHN THOMAS ABBERLEY **EILEEN ABBERLEY** **MARK THOMAS ABBERLEY**	**Claimants**
- and -	
DAVID JOHN ABBERLEY	**Defendant**

- -
- -

Mr Christopher Boardman (instructed by **Ince Gordon Dadds LPP**) for the **claimants**
Ms Catherine Taskis (instructed by **Burges Salmon LLP**) for the **defendant**

Hearing dates: 4 and 5 June 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. The parties in these proceedings are, respectively, husband, wife and their two sons. For ease of reference, but with respect, I shall refer to the sons individually by their given names. Until 2002 Mr and Mrs Abberley farmed in partnership with David at Hemley Hall Farm, Llanfihangel, Talyllyn, Brecon, Powys (the Farm). The Farm, then comprising some 163 acres, was gifted to Mr Abberley and David on trust for themselves and Mark in 1986 by Mr Abberley's mother. In 2002 there was a falling out and David left to farm elsewhere, taking some of the live and dead stock with him. The following year Mark became a partner with his parents. Their accountant was Terry Dewan. He and solicitors instructed by the parties made efforts to assist the parties to finalise matters between them, but without success. However, at a mediation which took place between them on 12 December 2011 before an experienced mediator and qualified solicitor, Alex Bevan, the parties agreed heads of terms. These were written out by Mr Bevan and signed by the parties' respective solicitors.

2. The essential issue for me to determine is whether the heads of terms constituted a binding contract between the parties, as the claimants say, or was intended merely to set out some matters agreed in principle as part of a process of arriving at a full and effective compromise, as the defendant says. Alternatively, the defendant says that if the heads of terms did constitute a contract, then such is unenforceable for want of compliance with the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

3. It will be helpful in due course to set out in this judgment the short heads of terms in full. Before I do so, it is necessary to say something more of the background. In addition to the Farm, about 51 acres of farmland was purchased in October 1988 from neighbouring farmers at Trewalter Farm. The land so purchased is known as the Trewalter Land. It was conveyed into the names of Mr Abberley and David as joint tenants on trust for David and Mark equally. It is separated from the farm by a disused railway track. Mr and Mrs Abberley purchased lengths of this track (the Track) between the farm and the Trewalter Land in 1976 and/or 1978.

4. The purchase of the Trewalter Landwas funded with a loan from the Agricultural Mortgage Corporation Plc (AMC). In September 1988 Mr and Mrs Abberley entered into a legal charge with AMC to repay the loan over 25 years in half yearly instalments. Two endowment policies were taken out in the names of Mr Abberley and David from which the repayments were made. The land charged was the Farm and small parcels of the Track.

5. In 2005 the parties through their respective solicitors jointly instructed valuers, Brightwells Ltd, to value the Farm and the Trewalter Land. The report is dated 22 February 2005. It valued the Farm, comprising the farmhouse outbuildings and land, at £875,000. It valued the Trewalter Land, identified as the land edged green as £250,000. There was a schedule attached showing the Ordnance Survey (OS) field numbers and acreage of the Farm, which by then totalled 176.95 acres of land. This included two fields to the north of the farm, 4346 at 11.28 acres and 3663 at 14.83 acres, with a combined acreage of 26.11. There were 5 fields on the Trewalter Land totalling 51.37 acres, including two fields at the northern end, 7322 at 14.50 acres and 6341 at 17.32 acres. These were roughly across the Track from fields 3663 and 4346.

6. This report also indicated that none of the land was then included in the development limits of the village of Llanfihangel Talyllyn, to which the farmhouse on the Farm was adjacent. However, it referred to an objection to the 2004 draft Unified Development Plan to include an area shown edged blue on an attached site plan, and to the possibility of an infill plot between the farmhouse and a property known as Hillcrest, shown edged yellow on the attached site plan. It valued these as £100,000 and £50,000 respectively on the basis of hope value of development in 10-15 years.

7. There were three A4 pages of plans attached to the report. The first was a copy of the OS plan for 2004 to a scale of 1:2500. The copy in the mediation bundle referred to below was not coloured, but the plot was shown in a thick black line, with the word "Blue" written in. There was no indication on it of the yellow plot, but the farmhouse and Hillcrest were shown on it and the infill between them clearly visible.

8. The second and third pages of plans were different parts of the same plan. This appears in part to be based upon a plan prepared by a previous valuer and taken from OS sheets and also a filed plan. These showed (as copied in the mediation bundle referred to below) the Farm and the Trewalter Land each edged in a thick black line, separated by the Track. In respect of the Trewalter Land, the word "Green" had been written with an arrow pointing to that Land. I shall refer to these two pages together as the Brightwells Plan.

9. In July 2005 Mr Abberley obtained a report from another valuer who valued the Farm as £785,000. The following year Mark obtained his own valuation from another valuer which put the value of the Farm as £800,000 and the Trewalter Land as £200,000. In the run up to the mediation, the latter valuer was asked to give such figures as in 2002, and by letter dated June 2011 gave those figures as £625,000 and £150,000 respectively.

10. By this time the claimants were represented by Hugh James Solicitors and Wiljo Salen had care and conduct on their behalf. David had for some time instructed Godwins Solicitors and Simon Margrave-Jones had care and conduct. Both these solicitors are very experienced in contentious litigation.

11. A bundle of documents was prepared by the solicitors for the mediation. This included partnership accounts in respect of the Farm from 2000 to 2003, prepared by Mr Dewan. These showed a modest net profit for the year end 2000 but small net losses in the three subsequent years. In the balance sheet for the year end 2002, the capital accounts of Mr and Mrs Abberley was shown as a total of £75,419 and that for David as £41,892. The following year the accounts (stamped draft in the bundle but subsequently adopted) showed Mark as a partner in place of David with a capital account of £5,080.

12. The bundle also contained copies of the valuations referred to above. There were then various letters and a credit agreement dealing with plant and machinery, an asset valuation and a bank analysis prepared by Mr Dewan for the financial year ending 2002. The final section contained copies of the various titled deeds and the AMC charge.

13. The mediation agreement was not signed by the parties until the morning of the mediation. Clause 1.3 provides:

> "Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, each of the parties."

14. All those present at the mediation gave written and oral evidence, save for Mr Margrave-Jones who gave neither. In addition, a short witness statement from Mrs Abberley was adduced without challenge, in which she says that she did not attend the mediation but was happy to let her husband and Mark deal with it on her behalf. Unsurprisingly after some seven years, witnesses had difficulty in recalling the detail of what occurred in the course of the day, which took place in the offices of Hugh James in Cardiff. This difficulty varied from witness to witness. Mr Bevan had little recall, whereas that of Mr Dewan was more detailed. Mr Salen fell somewhere between the two. Each of the parties had a room and Mr Bevan also had a room. The parties left it to their respective solicitors to do the negotiating and there was much toing and froing.

15. However, much of this detail is not relevant to the issues I have to determine. The principles governing such determination were not in dispute before me, and in essence they are as set out by Lord Clarke in *RTS Ltd v Molkerei Alois Muller Gmbh* [2010] 1WLR 753 at paragraph 45 as approved by the Supreme Court in *Wells v Devani* [2019] UKSC 4, as follows:

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

16. Once those principles are applied to the facts of this case, there is little dispute of relevant fact, the most substantial of which is whether there was a common understanding of the land to be transferred under the heads of terms. I shall return to these issues.

17. Accordingly, there is no dispute about the following events which took place at the mediation. It commenced about 10 am. During the morning, the negotiations focused upon what sum of money was due to David on the basis that he had retired from the partnership. However, at about lunchtime, it was indicated on his behalf that he would be prepared to take land instead of money. Specifically, he wanted the Trewalter Land. However, Mark did not want him to have all of this land. The AMC charge, taken to fund the purchase of the Trewalter Land, was secured on the Farm, although the repayment of the loan secured by it was due to be made in full within a couple of years. The discussion then turned to the possibility that David would receive half of

the Trewalter Land, and two fields from the Farm. The Brightwells Plan was used by the solicitors to identify the land and Mr Salen drew pencil marks on it to show which fields were being referred to. All of this land was being farmed as part of the Farm. By the time of the mediation, Mr and Mrs Abberley were in their seventies and Mr Abberley had undergone heart surgery, but the Farm and Trewalter Land was still being farmed with Mark being, at the least, heavily engaged in that activity. There was discussion about David granting a tenancy of the land to be transferred to him so as to allow such farming to continue.

18. The negotiations continued beyond 6pm when the mediation was expected to finish. They also included the question of a capital payment to Mark, the AMC mortgage, and the possibility of planning permission for dwellings on the building plots identified in the Brightwells valuation.

19. By about 8.30 Mr Bevan went into the parties' respective rooms one after the other and announced that a deal had been arrived at. As he often did, he typed out an agreement. As by now the office staff had left, he did so on Mr Salen's desktop computer. This took about an hour. However, before it could be printed, the draft disappeared from the screen and could not be retrieved. Subsequently, IT staff at the office have failed to retrieve the draft, which suggests that it may have been written on an external website, possibly involving a template.

20. Mr Bevan then wrote out the heads of terms in his own hand. All those present were invited into the room which he had been using, and when they were all there, he read out the heads of terms. He and the two solicitors then signed this written document. Everyone then shook hands, except David and Mark. By now it was after 10pm and everyone then left.

21. The heads of terms were headed as such and dated 12/12, and read as follows:

"1. David to receive freehold in own name

(a) Part of Hemley Hall coloured green

(b) Part of Trewalter coloured brown

2. David to transfer balance of Hemley Hall to John & Mark

3. FBT 25 years* over David's land (above) to include break clause after 15 years options to purchase every 5 years at a base figure of £7,500 per acre as may be varied by reference to the RICS Land Tracker Index as at the date of the exercise of the option

4. At the end of the FBT John & Mark shall transfer to David the brown land and the remaining Trewalter Land unless the option to purchase has been completed & David will transfer to Mark his remaining interest in Hemley Hall Land

5. * FBT terms in addition

- rental value £90/acre for first 5 years without review

6. The sum representing annual payment of capital otherwise payable pursuant to 3 & 5 shall be offset against the sum of £120k owing to Mark from David. The balance of that sum after said credit/offsets shall be payable by David within twenty eight days of the determination of the tenancy or offset against purchase price calculated in accordance with clause 3

7. Until AMC mortgage becomes redeemable on maturity of two endowments in David & John's names each shall pay the premiums on their respective policies & each shall pay ½ of the AMC mortgage interest

8. Overage clause re Hemley Hall pink edged land

 - 1/3 of excess over agricultural land value at time of disposal

 - Up to two plots for sister siblings to be excluded

 - 25 year term

 - Payable to Stephen Abberley

9. Right of way across railway track for access to David"

22. It will be apparent that clause 4 refers to a transfer to David at the end of the FBT land which in clause 1 it is provided he will receive freehold and is included in the land in respect of which by clause 3 he will grant a FBT. In my judgment it is clear that this is a slip which cannot of itself render the heads of terms uncertain. The scheme in clauses 1 and 3 is clear that David will receive the freehold of this land and then grant a FBT to include it.

23. There was no plan attached to the heads of terms. The only one used in the negotiations was the Brightwells Plan. Mr Salen in his oral evidence says he thinks he used sticking tape to stick the two sheets together and used a pencil to delineate upon it at the mediation the land to be transferred to David, there being no colour pens available. The plan with the pencil markings has since been lost. During his evidence, he used a pencil to draw on a copy of the Brightwells Plan the line that he had drawn at the mediation. This comprised field 7322 and the northern part of field 6341 on the Trewalter Land. It appeared to be agreed that at the time of the mediation, there was no boundary feature on the ground to show where the split of field 6341 was to be. However, it is clear that on the Brightwells Plan there was a line dissecting field 6341, probably the line of an old hedgerow referred to by Mr Abberley in cross-examination and it was along this line that Mr Salen says he drew his pencil line.

24. David accepts that there was a plan which his solicitors and Mr Bevan were referring to and which he saw in Mr Bevan's room when all gathered to hear the heads of terms read out. In his oral evidence he accepted that he, his father and brother (as they also agreed) knew which plots of land were referred to in the heads of terms. He said he did not quite understand why only half of the Trewalter Land was to be transferred to him, but he understood that the other half was to be made up by two fields from the Farm. When asked which these were he pointed to the fields to the north, namely

3663 and 4346. He said at the time he did not know the numbers but knew them by their names. The larger field was known as Llandyfaelog and the smaller known as the Bank field. The combined acreage of 26.11 gives him very slightly more than half of Trewalter Land.

25. At another point in cross-examination, he said that at the time he was not clear exactly what land was to be transferred to him under the heads of terms, and that he would have to sit down with maps to be clear. However, he accepts that he did not voice this at the time and has not done so since. In my judgment, this part of his evidence did not sit easily with other parts of his evidence set out above and is inconsistent with the evidence of his brother and father and Mr Salen. In my judgment, it is likely at the time that he did understand what was to be transferred to him was half of the Trewalter Land, namely field 7322 and half of field 6341, and the Farm fields 4346 and 3663. Accordingly, I resolve the only substantial dispute of fact in favour of the claimants.

26. On behalf of both parties, it is accepted that when applying the principles set out above, regard should be had to words and conduct after the mediation, although there is a difference as to how much weight should be attached. Mr Boardman, on behalf of the claimants, submits that limited weight should attach, whereas Ms Taskis for the defendant, submits that subsequent words and conduct should carry as much weight as what occurred at the mediation. In my judgment the preferable approach is to have regard to the probative value of each piece of subsequent evidence rather than to adopt a generic approach.

27. The next morning Mr Margrave-Jones emailed Mr Salen and copied in Mr Bevan and said this:

> “3 small points:-
>
> 1. We need to retire as at 2002
>
> 2. Need cross indemnities in respect of potential tax implications
>
> 3. Need to record that any rent review of the FBT is based on Trewalter rental”

28. Mr Salen sent several emails in reply later that day, also copying in Mr Bevan. He enclosed a copy of the heads of terms “as agreed.” He said that he would get IT to search again and asked which website the draft was on. He initially did not recall retirement being mentioned but later realised that it related to David’s retirement from the partnership and that he would record it. He said that his understanding regarding the rent review was that it would be based on Trewalter values for the Trewalter Land and on Farm values as to that land “but that it is likely that there will be no difference.”

29. On 14 December 2012, Mr Salen recorded a lengthy attendance note about the mediation and set out the heads of terms that were agreed. However, he included points which were not expressed in the heads of terms, such as the need for transfers, the grant of a tenancy and the need for cross indemnities. He said the latter was

discussed but not included in the hand written heads of terms, and that there was also not included in the hand written document that the date of retirement for David would be deemed to be April 2002. He repeated his understanding as to the rent review.

30. He also mentioned that Mr Abberley and Mark would provide a marked plan showing which of the 25.5 acres of the Trewalter Land were to go to David. He said in cross-examination that his intention was to produce a plan sufficient for Land Registry purposes. Mr Dewan became involved in this process and produced a plan with a yellow post-it note annotation in his handwriting, but Mr Salen thinks they must have been at cross purposes as this was not sufficient for his purposes.

31. On 9 January 2012, Mr Bevan emailed Mr Salen asking if things were finally agreed on the mediation "ie the last couple of items that arose the day after the mediation and the final wording." He asked for a copy of the final agreement. Mr Salen replied that he was awaiting marked plans from Mr Dewan to enable a final version to be put together and would forward it to Mr Margrave-Jones for agreement and at the same time copy it to him for confirmation that "you also agree it represents the final accord." Mr Salen attempted to draft such an agreement himself but found it too difficult.

32. On 24 January Mr Salen had a telephone discussion with Mr Margrave-Jones in which he confirmed that his commercial team had prepared a formal agreement which required copy leases etc and that he would send a copy to him and to Mr Bevan. It was agreed not to pay Mr Bevan until the final document had been resolved.

33. However, this was not done immediately and in June 2012 Mr Salen emailed Mr Margrave-Jones referring to the need for a formal deed setting out the terms agreed with the relevant conveyancing documentation attached. He said he had asked his commercial team to prepare the agreement which would cost about £1000 and asked if David would share the cost. It appears this agreement was sent shortly afterwards because by a further email between them on 5 July 2012 Mr Salen referred to the draft as including a confidentiality clause. Mr Margrave-Jones by letter dated 20 July 2012 informed Mr Salen that he had asked David to make an appointment to discuss all aspects arising out of the matter following the mediation. Mr Salen then went about assembling the title deeds of the various parcels of land.

34. On 18 September 2012 he emailed Mr Margrave-Jones chasing for a further response. He continued:

> "My clients are pressing and if the matter cannot be resolved by a freshly drawn deed then an action in compromise will be necessary which would, of course, defeat the whole point of the mediation agreement albeit that it will be considerably cheaper than the fully blown action."

35. No further response however was received despite chasing emails. On 15 May 2013 there was a telephone call between the solicitors in which Mr Margrave-Jones indicated that he had seen David recently who had brought in funds and that he had previously been without funds. Mr Salen repeated the need to get a formal agreement resolved and the conveyancing documentation sorted. Mr Margrave-Jones said he

would ask David for instructions by the end of May, failing which he would expect proceedings and that he had instructions to accept service.

36. Mr Margrave-Jones confirmed on 22 May that he had written to David for instructions, but no further response came at the end of May or by August 2013. By email on the 8th of that month Mr Salen said that David had failed to pay instalments under the endowment policies as agreed at the mediation. He said he would put in the DX copy conveyancing documents to facilitate completing the agreement reached at the mediation. These included transfers, a draft option agreement, a draft FBT and a draft deed of easement. There were some differences between the structure of these and what was contemplated in the heads of terms. Most notably, the transfers were drawn on the basis that the fields to be transferred to David were first to be transferred from David and his father to his father and brother before being transferred back to David, and the option agreement was a separate agreement rather than a clause in the FBT.

37. Mr Margrave-Jones did not reply until 19 September 2013 saying that David had instructed other solicitors and was saying that he did not sign or authorise the heads of terms. This was the first suggestion on behalf of David since the mediation that the heads of terms were not binding and was put on a basis which David no longer relies upon.

38. Instead, Ms Taskis on his behalf, relies heavily upon the references to a further agreement during the months following the mediation in submitting that the heads of terms do not amount to a binding contract. Mr Salen said that he thought it was sensible to attempt to agree a more formal agreement in circumstances where the typed draft had been lost and a hand written version was then produced in a somewhat hurried manner, but maintained that the default position was that the heads of terms were binding. The tenor of the subsequent correspondence in my judgment lends some support to this evidence.

39. The mere fact that a more formal document is envisaged does not of itself preclude the existence of a binding agreement. In *Von Hatzfield-Wildenburg v Alexander* [1912] 1 Ch 284, Parker J at 288-9 said:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract, contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract entering into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored."

40. As noted by Martin Chamberlain QC sitting as a judge of the High Court in *Edge Tools & Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170 (QB), that passage

was cited with approval by the Court of Appeal in *Immingham Storage Co. Ltd v Clear plc* [2011] EWCA Civ 89.

41. On any view the heads of terms contemplated further documentation such as transfers and a FBT, but on its face did not contemplate a further formal agreement. However, in circumstances where it had been somewhat hurriedly written out when the draft typed version had been lost, it was in my judgment not surprising, and indeed sensible, for Mr Salen and others to contemplate a more formal agreement. In my judgment, however, on the correspondence this was to attempt to agree the manner in which the heads of terms would, in the words of Parker J, go through. It is not a strong indication in my view that the heads of terms were not intended to be binding.

42. Ms Taskis further submits that there was no intention to create legal relations and that the heads of terms are so uncertain that no binding agreement can arise from them. On the facts of this case, she realistically accepts that these two issues are heavily bound up with one another. Given that the whole point of the mediation was to resolve the long running family dispute, and given that a written agreement was signed on behalf of the parties, as required by the mediation agreement for there to be a binding resolution, then if the heads of terms are sufficiently certain it is difficult to see how it can be said that the parties did not intend to enter into a legal relationship. In my judgment it is likely in these circumstances that they did.

43. It is the issue of whether the heads of terms are certain enough for a binding agreement which in my judgment is at the heart of this dispute. Ms Taskis submits that there are several ways in which the heads of terms are uncertain.

44. There was no dispute before me as to the legal principles relating to certainty of contractual terms. In *Wells v Devani*, Lord Kitchen, giving the lead judgment, cited Lord Wright in *G Scammel & Nephew Ltd v HC and JG Ouston* [1941] AC 251, 268, as follows:

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found"

45. Particular examples have been given in a number of cases. Vos J, as he then was, in *Westvilla Properties Ltd v Dow Properties Ltd* [2010] EWHC 30 (Ch), paragraphs 18-21, made a number of relevant points which for present purposes may be summarised as follows:

   a) Only if the court is driven to will it be held that a provision is void for uncertainty (per Megarry J in *Brown v Gould* [1972] 1 Ch 53 at 57-8);

b) The question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language to mean (Per Lord Hoffman in *Chartbrook v Persimmon Homes Ltd* [2009] 1 AC 1101 at paragraph 14);

c) Although a description of property may be vague, if it contains sufficient internal information to enable the property to be ascertained, parol evidence should be admissible for that purpose (see *Mordern College Trustees v Mayrick* [2006] EWHC 574).

46. With respect to agreements for leases, it is settled that the start date of the lease must be ascertainable, although this may be ascertained from surrounding circumstances. In *Liverpool City Council v Walton Group Plc* [2001] HC 00 05547, Neuberger J as he then was said at paragraph 47:

> "First, on the basis of common sense, principle, and authority, an agreement for a lease can be valid even though the start date is defined by reference to a future event, which may not occur, and if it does occur, the day on which it will occur is uncertain (see *Brilliant v Michaels* [1945] 1 All ER 121 at 125 per Evershed J)."

47. In the present case, Ms Taskis relies upon the uncertainties to show that no binding contract was intended or came into being.

48. The first uncertainty she relies upon is as to the extent of the land to be received by David under clause 1. In my judgment it is clear that the parties understood which land was to be transferred, notwithstanding the lack of a coloured plan at the point when the heads of terms were signed. The only room for doubt was in relation to the line along which field 6341 was to be divided. However, this is rendered reasonably certain by the line drawn by Mr Salen on the Brightwells Plan, which followed a line on the plan. David might not have seen the detail of this, but in my judgment it is likely that he was made aware of this detail. The fact that no uncertainty was voiced at the time of signing the heads of terms, or indeed in the months that followed, support this conclusion.

49. The second aspect of uncertainty is the commencement date and tenant of the FBT. In my judgment it is clear from clause 6 of the heads of terms and the provisions as to the offset of annual repayment of capital pursuant to clauses 3 and 4 thereof from the sum of £120,000 owing to Mark from David that Mark was intended to be the tenant and the person entitled to the option under those latter clauses. Further support for that is demonstrated by the fact that at the time that the heads of terms were signed Mr and Mrs Abberley were in their seventies. If further support were needed for this conclusion, both Mr Abberley and Mark say that the tenant was to be Mark, and it was not suggested on behalf of David then or since that there was to be any different tenant.

50. As for the commencement date, it is clear in my judgment that the FBT could not commence before the transfer to David in clause 1 and given that the FBT was to

ensure the continuation of farming of the land in conjunction with the Farm, it is reasonably certain that the FBT was to commence upon such transfer.

51. The option referred to in clause 3 of the heads of terms is also said to be uncertain. It is true that the mechanics were not there set out, but in my judgment, to adopt the words of Parker J, these amounted simply to the manner in which the option agreed will go through. The essentials were set out in the heads of terms.

52. The next aspect of uncertainty relied upon is in relation to the overage land. This was to be over land described as pink in the heads of terms, but no colour pens were available at the time. This clause is simply to provide David with a share of the development value of the plots on the Farm with hope value if and when that hope is realised over a 25 year term. The value of up to two such plots if taken by the sister siblings was to be excluded from any such payment. It is clear from the Brightwells valuation which plots had such hope value. In my judgment, whilst it remained sensible to attempt to agree the details of the overage provision, the essentials were sufficiently set out in the heads of terms.

53. Finally, it is said that there is uncertainty as to the extent and tenure of the right of way referred to the in the heads of terms. The Brightwells valuation refers to the Track owned by Mr Abberley. In fact it was owned by him and his wife, but in view of her evidence nothing turns on this. It was said in the valuation that it was used to access some field enclosures. As David was to receive the freehold of fields either side of the Track (subject to the FBT) in my judgment it was reasonably clear that he was also to receive the freehold of a right of way for agricultural purposes between his fields over the Track. It is only field 6341 of the Trewalter Land to be transferred to David which adjoins the Track and in my judgment it is likely that it is reasonably certain or ascertainable where across the Track that right of way is to run.

54. In my judgment therefore, the essentials of each of the heads of terms were set out in the signed document with sufficient certainty to be capable of amounting to a binding agreement. The fact that attempts were then made to agree further details, and that subsequent documentation submitted for agreement contained variations of how the heads of terms were to be put into effect, does not detract from that certainty.

55. However, Ms Taskis takes another point and that is that the heads of terms did not contain all of the terms agreed by the parties at the mediation. If that were the case, then they would not comply with the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which provides so far as relevant that a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have agreed in one document. Some of the heads deal with matters which do not involve the sale or other disposition of an interest in land, such as the overage clause, but the heads of terms comprise a composite transaction and as a whole must satisfy the statutory requirements (see *Godden v Merthyr Tydfil Housing Association (1997)* 74 P&CR D1).

56. The terms agreed not so incorporated are said in essence to be the three minor points raised by Mr Margrave-Jones on behalf of David the morning after the mediation. The contemporary email correspondence strongly suggests that these points were afterthoughts and that it was sensible to include the points in the formal

documentation. That in my judgment is the sense in which Mr Salen in cross examination accepted that these matters should have been in the heads of terms.

57. It is a distinct question however, whether these points were expressly agreed at the mediation. Unsurprisingly, memories varied as whether they were or not agreed over eight years ago. Mr Dewan recalled that the date of dissolution was expressly agreed. Mr Salen recalled discussion, but not express agreement. He referred to it as “a given.” Neither could recall agreement in relation to cross indemnities, and memories in relation to the rent review being based on the Trewalter Land differed. It may well be that some witnesses regarded discussion on these points as ending in agreement, but others did not, so that there was not a meeting of minds upon them. The same applies to discussion regarding rent review periods and mechanisms for determination. Having regard to the option review period in clause 3, and the reference to the first 5 years without review in clause 7, it is reasonably clear that what was intended was that rent reviews would take place every 5 years. There are likely to have been some discussion about the mechanism, but it is also likely that there was no meeting of minds as to the precise mechanism.

58. In my judgment in these circumstances, it is safer to rely upon the strong impression given in the contemporaneous emails that there was no express agreement on these points on the day of the mediation but consensus thereafter that it would be sensible to include them or some of them.

59. It follows in my judgment that on the balance of probabilities all terms agreed at the mediation were incorporated in the heads of terms, which thus complies with the statutory requirements.

60. The claimants are entitled to a declaration to that effect and enforcement of the agreement. I invite counsel to attempt to agree a form of wording for the order, failing which written submissions should be made within 14 days of handing down, or if counsel considers it necessary, a request for a further oral hearing should be made in that time.