Neutral Citation Number: [2021] EWHC 3015 (Ch)

Case No: PT-2018-000933

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

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 11/11/2021

Before:

MR HUGH SIMS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between:

BROOKE HOMES (BICESTER) LIMITED **Claimant**

- and –

(1) PORTFOLIO PROPERTY PARTNERS LIMITED **Defendants**
(2) P3 ECO (BICESTER) HIMLEY LIMITED
(3) DESIMAN LIMITED
(4) DESIMAN 2 LIMITED
(5) CFJL PROPERTY PARTNERS LIMITED

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MICHAEL JEFFERIS (instructed by **HA Law**) for the **Claimant**
KIRK REYNOLDS QC and **JULIA PETRENKO** (instructed by **Underwood Solicitors LLP**) for the **Defendants**

Hearing dates: 6, 7, 8, 11, 12, 13, 14, 15 and 18 October 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties and/or their representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11 November 2021 at 10:30 AM.

Mr Hugh Sims QC:

INTRODUCTION

1. Land to the North-West of Bicester, in Oxfordshire, was designated for the building of a zero-carbon "eco-town" in 2009. Four eco-towns were then announced by the UK government, but Bicester is the sole survivor of that concept, and much of it is still yet to be built.

2. The overall master plan for North-West Bicester, drawn up by Farrells Architects, included the development on some 1,000 acres of land of c. 6000 units of zero-carbon homes, with a mix of affordable housing, infrastructure, schools and leisure facilities. The North-West Bicester site was the largest single strategic site allocated in the adopted Cherwell District Council ("CDC" or "the Council") local plan, and central to its housing targets being met.

3. One part of the land has been developed as part of the "Exemplar" phase, now called Elmsbrook, built by a developer called A2 Dominion ("A2D"). This claim arises out of the proposed development of another part of the land, including land at Himley Farm, which is yet to be built, though it was the focus of a joint venture involving some of the parties to this litigation.

4. The claim is for an order for specific performance of a contract for the sale of as much as 500 acres of land, or in any event for c. 100 acres of land, and/or for declaratory relief that a "*Pallant v Morgan* equity", or constructive trust, arises over certain of the land, and/or for equitable compensation, or a claim for damages, in excess of £500 million, in lieu of an order for specific performance and/or by reason of alleged breaches of contract and/or misrepresentation.

5. I shall now trace out some of the more relevant parts of the background to the claim. These facts are, uncontroversial, or substantially so. Any significant disputes of fact are addressed later in this judgment, when I analyse the issues.

THE BACKGROUND FACTS

6. Stephen Nardelli, an entrepreneur, caused the First Defendant company, Portfolio Property Partners Limited ("PPP"), to be set up on 22 June 2009, with a view to collecting in a portfolio of the land for development for the eco-town. It was envisaged it would be a parent company for the "P3 Group" and other companies were set up, including the Second Defendant, P3 Eco (Bicester) Himley Limited ("P3 Eco"), which was incorporated on 31 August 2010. In the event whilst described as a group, PPP was not a shareholder in the "subsidiaries", such as P3 Eco, though they were controlled by the same directors. Mr Nardelli is the principal shareholder in, and a director of, PPP, and he is also a director and shareholder in P3 Eco. Whilst not strictly a group,

where I refer to the P3 Group below that should be taken to include references to PPP and P3 Eco so far as the context requires. References to the P3 parties below is to both the first and second defendants. I should also add that the parties referred in their evidence, and in submissions, to P3 as shorthand for some or all of the P3 Group, PPP and P3 Eco. As a result on occasion below references, quotations or summaries which refer to P3 also include references to PPP and/or P3 Eco, though I shall endeavour to maintain the distinction in this judgment.

7. Mr Nardelli began the process of gathering in the land portfolio for development, after incorporation of PPP and P3 Eco, by approaches to the local landowners. The land in question is predominantly agricultural land, owned by various farming families. One of the options which was secured in relation to the Exemplar Site was with the Phipps family. There are two other options which concern the land relating to this dispute.

8. The first of those is identified in an option agreement entered into on 3 November 2010 between the following parties: (1) Rosemary Louise Henson; (2) Julian Francis and Catharine Rachel Murfitt; and (3) P3 Eco ("the Murfitt Henson Option"). This covered about 220 acres of freehold land with registered title at HM Land Registry under two title numbers: ON245151, being land at Himley Farm, Chesterton, Bicester, and ON245153, being land lying to the West of Howes Lane, Bicester. This was subsequently varied on more than one occasion, including to extend the first exercise option date until 6 months after grant of planning permission. The option price for the first option was £150,000 per acre. It was also subsequently recognised as including an option over title ON318263, known as land at Himley Barns, Chesterton, Bicester, though this did not appear in the original text.

9. On 2 November 2011 P3 Eco, but not PPP, entered into an Amendment and Restatement Agreement with a developer, A2D, and various other parties. As recorded in that agreement A2D was the selected registered provider for the provision of affordable housing in the project, as defined in that agreement, and as provider of private sale plots in the Exemplar site, and having an option to provide up to 10 per cent of other private sale units.

10. On 29 October 2014 a further option agreement was made between (1) Philippa Maria Aline Pain and Georgina Maria Pain and (2) PPP ("the Pains' Option"). This is the second option which is relevant to this claim, and covered about 30 acres of freehold land with registered title at the Land Registry under title number ON237022, being land at Middleton Stoney, Bicester. This provided for an option period of 4 years, a deposit of £2m to be paid within 28 days of confirmation of a resolution to grant, and a price of £5m (or 80% of a market price to be determined in accordance with a formula). On a pro rata basis (and assuming a 30 acre site) this was £166,666 per acre, so a little more expensive than the Murfitt Henson Option, which no doubt reflected the more advanced progression of the project by this time.

11. The P3 parties then held options to purchase some 250 acres, part of the land which is in issue in this case. Having secured rights to acquire some of the land over which the eco-town was to be built, the P3 parties needed to obtain outline planning consent. This required them and the Council (and Oxfordshire County

Council) to agree, and enter into, a section 106 agreement (under the Town and Country Planning Act 1990). On 31 December 2014, the P3 parties applied for outline planning consent for development of 227 acres of the land comprised in the Murfitt Henson and Pains Options (application no. 14/02121/OUT). This sought permission for development to provide up to 1,700 residential dwellings (Class C3), a retirement village (Class C2), flexible commercial floorspace (Classes A1, A2, A3, A4, A5, B1, C1 and D1), social and community facilities (Class D1), land to accommodate one energy centre and land to accommodate one new primary school (up to 2FE) (Class D1). Such development was to include provision of strategic landscape, provision of new vehicular, cycle and pedestrian access routes, infrastructure and other operations (including demolition of farm buildings on Middleton Stoney Road). The entirety of the 227 acres was referred to in the planning application as the proposed "Himley Village". I shall refer to it as that below, albeit noting it has yet to be built.

12. Having started the planning application process the P3 Group was also interested in finding a developer who would be suitable for the project, and which could develop the land. This is where the Claimant comes in.

13. John Holleran has worked for many years in the utilities sector and set up the Holleran group of companies, a utilities and groundworks contractor, operating in that sector. By 2004 he had started Brooke Homes Limited ("BHL"). He set up BHL in order to capitalise on their position as a utility contractor, as various utility providers were keen to sell land. Land was purchased by Mr Holleran, via his corporate vehicles, at Deal and later Chatham, both in Kent, as a result of these connections. Mr Holleran had set up Brooke Homes Developments Limited ("BHDL" or "Brooke") for the acquisition of the land at Chatham, a former Southern Water depot. This had planning permission for 110 residential units and BHDL intended to develop the site in accordance with a planning permission using a modular housing concept. The Brooke companies had acquired BOPAS accreditation for modular housing and had an association with Adston, who constructed modular housing units in Ireland. They had a factory facility in Ashford, Kent. A third party identified that Brooke/Mr Holleran might be a suitable developer on the project at Himley Village, with modular housing being compatible with the eco-town concept, and made the introduction to the P3 Group/Mr Nardelli in or about early 2015.

14. A meeting was held between those parties, attended by, amongst others, Mr Holleran, Mr James Costello and Mr Paddy Doyle, on the Brooke side, and by Mr Nardelli and Graham Johnson, on the P3 Group side, at which they discussed the possibility of Brooke purchasing land at Himley Village and developing the site using modular building techniques. At or shortly after this meeting it was also discussed that Brooke might set up a modular house building factory at Bicester and that the P3 Group would assist in locating a suitable site for this. After Mr Holleran had concluded he was interested in the proposition he set up Brooke Homes (Bicester) Limited, the Claimant company ("BHB" or "Brooke"). Brooke were interested in acquiring private development lands at the Bicester site to facilitate a large scale residential opportunity over the coming years, and the P3 Group viewed them as a good match for the project and would help to obtain planning permission. It was also explained at this

meeting or shortly after that the affordable element of the housing, 30% of the 1700 units, would be located elsewhere on the Himley Village site. At about this time the P3 Group was moving away from a relationship with A2D as the social housing provider to Rent Plus.

15. On 16 April 2015, BHB and the P3 Group entered into a contract entitled "Heads of Agreement", (referred to in the evidence as "the Agreement", "the Heads" or the "HoA"). At the same time, though in a separate document, the same parties entered into an exclusivity agreement ("the Exclusivity Agreement" or the "EA"). In broad outline here it was agreed, subject to the grant of planning permission and certain other conditions, that BHB would purchase private residential development land at Himley Village from the P3 Group. The initial private residential development land purchase was intended to comprise 100 acres, sold at a price of £800,000 per acre, with the intention of further options being acquired and granted over a further 400 acres, or 500 acres in all ("the Property"). The parties contemplated they would quickly enter into a conditional sale agreement ("CSA"), for the initial 100 acres, and agreed a deposit of £4 million (or 5% of the purchase price) would be payable when they did. They also agreed that an immediate non-refundable deposit would be made immediately in the sum of £250,000, which was duly paid by BHB. As Mr Nardelli put it in his evidence this deposit bought them the opportunity to be involved in a flagship opportunity. Due to this substantial up-front payment, and to protect its position BHB, required a period of exclusivity, which was agreed as being to 20 working days after the planning application had been determined, or the entry into the CSA, whichever was earlier.

16. Negotiations in relation to the CSA took longer than expected and following discussions between Mr Nardelli and Mr Holleran it was agreed BHB would begin to make further payments to the P3 Group in the meantime ("the Pre-Payment"), to assist with furthering the project, securing further options over further lands, and to help pay for planning, architectural and other fees and expenses of the P3 Group. To protect the Pre-Payment a further short written agreement was entered into by the parties on 20 July 2015, entitled "Heads of Agreement Addendum" (referred to as "the Addendum" for short). This provided, amongst other things, that in the event the CSA was not entered into by 31 December 2016, or if entered into did not become unconditional by that same date, then the Pre-Payment would be repaid without deduction or offset to BHB within 5 working days of demand, or in accordance with the terms of the CSA if applicable. From July 2015 to December 2017, inclusive, payments totalling £1.55 million were made under the Addendum. These were in addition to the deposit of £250,000, such that overall a total of £1.8 million has been paid by or at the direction of BHB to the P3 Group.

17. The Heads of Agreement, the Exclusivity Agreement and the Addendum were viewed by the parties as forming part of one overall agreement, though they are referred to in the pleadings, and in the evidence, on occasion as the "Three Agreements" or "the Agreements".

18. Negotiations to conclude the CSA continued during the latter part of 2015 and 2016. However a fresh problem emerged in that A2D was showing as having a potential interest over the Murfitt Henson land via a unilateral notice. This

generated much debate between the parties and the conveyancers. Also during 2015 and 2016 there were discussions with other landowners to secure options, including the Gammond and Malins families, though these subsequently lapsed. In addition by 2016 it became apparent that it would be necessary for BHB to acquire not simply the private residential land but also the affordable housing land, since the local planning authority required this to be interspersed through the site, rather than be held in separate blocks, as originally contemplated under the Heads of Agreement. This was agreed by the parties, and suitable amendments made in the CSA as then drafted. In addition during this time efforts were made to locate a factory site for BHB, and a pre-application submission was made to CDC. In the event the factory site concept did not proceed.

19. At the end of 2016 PPP negotiated a variation to the Pains Option, no doubt having in mind that the resolution to grant might soon trigger the need to find £2 million, and agreed to pay an initial immediate deposit of £100,000 on 19 December 2016 and £1.9 million within 28 days of confirmation of grant of planning permission (as opposed to resolution to grant).

20. On 16 March 2017 CDC resolved to grant outline planning permission, subject to a section 106 agreement. This was for 1,700 units, 30% of which were affordable. Of the overall site the subject of this application, 106 acres (net) were for residential development, of which c. 84.4 acres for private and 21.6 acres for social/affordable housing. The CSA had still not been concluded by this time, though the parties and their solicitors remained engaged in negotiations, and BHB and its agents remained involved in funding the P3 Group via the Pre-Payment. BHB also incurred time and expense in contributing to the venture, and in particular to assist move the planning application forward to the position where the section 106 agreement was agreed, and an outline grant obtained.

21. On 23 March 2017 Mr Nardelli, and his fellow directors in PPP and P3 Eco, caused a new company to be set up, with the same directors, namely the Fifth Defendant company, CFJL Property Partners Limited ("CFJL"). On 31st May 2017, CFJL entered a conditional contract with Rosemary Louise Henson and Julian and Catharine Murfitt for the sale to CFJL of part of the Property in 3 phases ("the CFJL Agreement"). There were later written supplemental agreements between these parties (made on 7 March 2018 and 22 June 2020). BHB only came to learn about CFJL sometime later, in 2018. The CFJL Agreement enables a purchase of the land from Murfitt Henson at a significantly lower price than the Murfitt Henson Option (about half in relation to some of the land). The Murfitt Henson Option was also varied, by a supplemental agreement, entered into on 31 May 2017, on the same day as the CFJL Agreement. By this agreement P3 Eco agreed with Murfitt Henson that the rights under the Murfitt Henson Option would be subordinated to that of CFJL: under clause 4.1 it provided that so long as the CFJL Agreement was in force P3 Eco would not exercise the option in the Murfitt Henson Option.

22. The parties had still not reached a concluded CSA by the end of 2017. Further conveyancing issues had emerged in 2017, including that out of title ON245153 the land in ON318263 had been created, after the date of the Murfitt Henson

Option, but ON318263 was not referred to in the Option. This point was tidied up to the mutual satisfaction of the parties. But the issues and concerns in relation to A2D's rights also rumbled on.

23. In or about October 2017 the P3 parties mentioned to BHB that they had begun having discussions with Legal and General ("L&G") in relation to the sale of the land, though they advised BHB that this would not adversely affect BHB. BHB still wished to enter into the CSA, but they did not object to there being discussions with L&G at this stage, as it potentially would provide them with a return.

24. By the Autumn of 2017 BHB had secured the interest of Octopus in funding the proposed purchase by BHB from the P3 parties. Steps were also taken at this time to simplify the contract down, removing reference to options over the additional 400 acres and seeking to accelerate the purchase of the initial c. 100 acres, in particular phase 1 of that initial proposed purchase. This contemplated an unconditional sale of part of that land, of c. 51 acres, yielding c. 31 acres for residential development (sufficient for 500 units, or phase 1), split into 28.82 for private and 6.35 acres for social and affordable, at a purchase price of just over £22 million. The P3 parties have subsequently contended that by December 2017 BHB had withdrawn from the transaction as contemplated in the Three Agreements, such that they were free to negotiate elsewhere, though this is denied by BHB.

25. On 7 March 2018, Catherine Murfitt transferred 10 acres of the land in title ON318263 to CFJL, for the sum of £1million, under the CFJL Agreement. On the same day this land was transferred by CFJL to P3 Eco, for the higher sum of £1.5million, and charged by P3 Eco to the Third Defendant, Desiman Limited ("Desiman"), who funded this acquisition via a facility agreement of the same date. The total loan from Desiman to P3 Eco at this time was a short term loan of c. £2.3m, some of which was used for this transaction. The 10 acre parcel of land subsequently became registered under title number ON339648. BHB did not become aware of this transaction until after the event. Mr Nardelli and the P3 parties sought to reassure BHB that this transaction would not adversely affect their position or rights, and that this was commercial land. Steps were also being taken to try to finalise the section 106 agreement during early to mid 2018, and by this time the parties considered they were not far off securing a completed section 106, though in the event that did not come until much later.

26. By mid 2018 the relationship between BHB and the P3 Group had become very strained. Each have subsequently come to blame each other for their failure to conclude the CSA. The P3 Group had continued with their discussions with another potential purchaser, L&G, and BHB was increasingly concerned about this, and what they perceived to be non-action on the part of P3 Group and their conveyancing solicitor. BHB sought comfort from the P3 Group in relation to their concerns, and sought to reassert their rights under the Three Agreements. Some verbal assurances were given, but a formal comfort letter was not signed off by any of the P3 parties. BHB complain that the P3 parties acted in a repudiatory manner in the period September 2018 to November 2018, which repudiation BHB did not accept.

27. In the meantime the P3 parties were required to negotiate an extension of their facilities with Desiman. Desiman agreed on 16 October 2018 to grant an increase to the facility to £2.63m and extended it to 8 April 2019. This was costly finance for the P3 parties but they were by now in a precarious position. Two of the directors of the P3 parties, namely Mr Nardelli and Mr Johnson, had to agree to capped personal guarantees in support of the existing security.

28. BHB issued these proceedings on 11 December 2018, initially against the P3 parties only, and complained that they were in breach of contract for the sale of property to BHB. They sought various relief, in addition to a claim for damages for breach of contract, including: injunctions to restrain the P3 parties, from taking any steps whatsoever towards disposing or actually disposing or granting any interest in any part of the Property other than to BHB, and to prohibit the exercise or amendment of the section 106 agreement; a declaration that the P3 Group's interest in the Property was subject to a trust or equity in favour of BHB to give effect to the Three Agreements and/or prevent the P3 parties from dealing with a third party in relation to the Property; further or in the alternative an enquiry as to what sums should be paid by the P3 parties by way of equitable compensation; further or in the alternative an order for specific performance.

29. Also in December 2018, applications were made on behalf of BHB to register unilateral notices ("UNs") on the titles to the Property and these were registered on 19 December 2018 on title numbers ON339648, ON25153, ON318263, ON245151 and ON237022. Those UNs give notice of a pending land action and refer to these proceedings.

30. A defence was entered by the P3 parties, on 6 February 2019, in which the claim was denied. Some initial disclosure was given at this time, though full disclosure and directions was yet to come.

31. In the meantime the P3 parties required a further extension on their facilities with Desiman, which was agreed to by Desiman on 8 March 2019. Mr Nardelli and Mr Johnson's guarantee cap was increased to £500,000. The total facility by this time was £2.83 million. A further extension had to be agreed with Desiman on 4 July 2019 and in return for continuing support from Desiman the P3 parties agreed to a £1 million sale fee upon completion of the first sale of the 10 acre parcel of land or part thereof (title no ON339648). On 3 October 2019 Desiman agreed with the P3 parties that they would assist in funding the Pains land purchase, which would cost £5 million, and had negotiated a sale fee of the higher of £2.5 million or 25% of the sale price of the Pains land (less the s.106 contributions attributable to it). This meant an increase in the facility to £8.37 million was granted.

32. Directions were given in these proceedings on 2 September 2019, including for disclosure, but before disclosure occurred, in or about October 2019 Mr Nardelli of the P3 parties approached Mr Holleran of BHB to see if a settlement could be reached. Mr Nardelli explained to Mr Holleran that the P3 Group was in advanced negotiations with a confidential third-party developer (it subsequently became clear this was Countryside Properties (UK) Limited ("Countryside")) for the sale of parts of the Property and wished to enter into a settlement which

enabled that sale to proceed. He also explained that the P3 Group were worried that time on the Pains Option was running out.

33. As a result of those negotiations the parties duly reached a settlement which was recorded in a Tomlin Order made on 22 November 2019. The terms of the Tomlin Order provided that if the payments due to be made by the P3 parties under it, which involved 3 payments (the first two being £3 million each and the third for £6 million, a total of £12 million), were not paid by their due date then BHB could apply for the stay to be lifted and proceedings would recommence. That is what transpired: no payments were made by P3 under the Tomlin Order. However, at least viewed from BHB's perspective, they anticipated receiving payment of the first payment of £3m from P3 by no later than 6 weeks and 3 working days after the grant of planning permission, which was then anticipated as being imminent, or a long stop date of 6 months from the date of the Tomlin Order. BHB contend certain assurances were made to them in relation to the P3 parties' ability to pay. The Tomlin Order also included an undertaking on the part of the P3 parties to keep BHB fully informed in relation to the grant of planning permission and the sale of the Property.

34. The Pains' Option was subsequently exercised by PPP and, on 6 January 2020, the land in Title ON273022 was transferred to PPP for £5 million, and charged by it to Desiman. This purchase was funded by Desiman, in accordance with the facility agreement made on 3 October 2019.

35. On 30 January 2020 a section 106 agreement was executed and outline planning permission was granted in relation to Himley Village. This was a trigger point for various matters, including the Tomlin Order payments. However the anticipated sale with Countryside did not complete and the P3 parties failed to make the first payment to BHB, due by 17 March 2020. BHB caused the stay on the proceedings to be lifted and fresh directions were given by order made on 6 May 2020. The parties continued to have negotiations in the meantime both in relation to the claim and also in relation to wider and further potential joint venture in relation to the development at Bicester. An issue arose as to the extent to which those communications should remain privileged, though in the event such a contention was withdrawn, and the parties agreed that all such material was admissible before me at trial, subject to submissions as to its relevance and weight.

36. The time for purchase of the Murfitt Henson Option was by now looming, since the first exercise option date was 6 months after grant of planning permission. Mr Nardelli did not seek to secure an extension under this Option because CFJL had the benefit of the CFJL Agreement. The CFJL Agreement had in the meantime been varied, by a first supplemental agreement in March 2018, which provided that the total purchase price for the land would be £15 million, payable as to four million for phase 1. By a supplemental agreement on 22 June 2020 Mr Nardelli had negotiated a further extension on phase 1 of that agreement to 26 August 2020. He had not secured any formal extension beyond that. This put CFJL in a precarious position, and also the P3 parties and Mr Nardelli and Mr Johnson, given their obligations to Desiman and the claim brought by BHB.

37. Desiman concluded it was in their own commercial interests to support the exercise of the Murfitt Henson Option. On 23 October 2021 they entered into a further facility agreement with the P3 parties which recorded that funds drawn down by that time stood at £9,547,887.14. They agreed to extend the date for repayment to 23 April 2021. Interest on these sums was recorded as running at c. £143,000 per month. Further security was also recorded as being granted.

38. On 23 October 2020, Rosemary Louise Henson transferred part of title ON245151 to CFJL and Catherine Murfitt transferred part of title ON318623 to CFJL, and a contract was entered into between CFJL and the Fourth Defendant, Desiman 2 Limited, ("Desiman 2"). Under this contract CFJL contracted to transfer these two parcels of land to Desiman 2 on the following terms, amongst others, namely: (1) The land sold comprised 59 acres; (2) the sale price was £4 million (£67,796 per acre); (3) there was also an option in the agreement for CFJL to buy the land back from Desiman 2 within 5 months and 2 weeks of completion at the price of £19,047,238.23, subject to the Claimant's UNs being removed or a deed of priority entered into. The sum of £19,047,238.23 was the calculation by Desiman of the total sum due to it by way of lending and fees, not just from CFJL but also from the P3 parties. This contract was completed the same day, on 23 October 2020, and the land was transferred by CFJL to Desiman 2 for £4 million, and is now registered in the name of Desiman 2 under Title Number ON360325. On its face this is something of a curious transaction.

39. Desiman and Desiman 2 were referred to collectively in the evidence and submissions as the Desiman parties. I shall also adopt that definition in this judgment.

40. By 2020 the P3 Group were proposing a sale of parts of ON ON237022 (the Pains land, c. 30 acres), ON339648 (the 10 acres) and ON360325 (the 59 acres)) to Countryside. Draft heads of terms towards the end of 2019 suggested this was a purchase price for a 500 unit price development at £50 million, less the section 106 costs. By 2021 the proposed price for this land was reduced to £26 million, based on, amongst other things, Countryside taking on responsibility for all section 106 costs, up to a cap of c. £16.2m. This consideration figure has since been increased to £27.5 million. The precise parcels of land which are intended to be sold in this proposed contract is not identified in the latest draft of the contract in evidence (dated 2 September 2021 and marked v16.1). In the oral evidence of Mr Lindley, the Defendants' expert valuer, it was confirmed that the amount of land in contemplation was to enable 500 units to be built. Subsequent to that oral evidence a plan has now been provided which shows, consistently with the oral evidence of Mr Lindley, that what is in contemplation is effectively phase 1, or land sufficient to enable 500 units to be built, and totals some c. 50 acres. Whether or not the proposed sale to Countryside is market value is disputed. BHB contend for a market valuation of £39 million in relation to this first phase, based on the expert evidence of Mr Hewetson. The Defendants have not adduced any expert evidence as to the market value of the proposed sale to Countryside, but contend the contemplated sale is an ordinary arms-length transaction. For their part they have adduced expert evidence from Mr Lindley who has opined that a scheme involving a sale of 1,190 units would only be worth £39 million.

41. In 2020 BHB gave notice of an intention to amend its claim. Permission to amend was eventually given by order made on 4 June 2021, in relation to Amended Particulars of Claim dated 8 June 2021. This introduced new allegations against the P3 parties, including alleged misrepresentations by the P3 parties, acting by Mr Nardelli, in relation to the Tomlin Order. It also joined the fifth defendant, CFJL, alleging, amongst other things, that it was under the control of the P3 Group, and a mere agent or nominee for the P3 parties.

42. The Amended Particulars of Claim also involved the joinder of the Desiman parties and includes allegations complaining that Desiman has also been involved in improper collusive conduct with the P3 parties and CFJL, to the detriment of BHB, and has incited a breach of contract by the P3 parties.

43. By a schedule of loss dated 7 May 2021 BHB sets out its losses under two main heads, being (i) loss arising by reason of the failure to realise the value of the Property (defined as comprising all of the 500 acres), which is claimed in the sum of £47,556,495 in relation to the initial 100 acres, and in the sum of £106,744,782 in relation to the additional 400 acres, and (ii) loss of profit, arising by reason of the failure to acquire, develop and sell the Property, put in the sum of £464,034,954. There is also a claim for consequential losses which is not quantified. Finally, there is also a suggestion in the schedule of loss that BHB "*reserve their entitlement to recover a minimum sum of not less than £12m agreed to be paid to them by the Defendants in accordance with the terms of the Tomlin Order agreement together with any further losses accruing in the event of the failure of the Defendants to comply with their obligations under the Tomlin Order in respect of the transfer of the additional 400 acres*".

THE ISSUES

44. By way of distillation from the statements of case, by the conclusion of trial the parties had agreed the following list of issues for me to determine (subject to some further minor textual amendments made by me, and a re-ordering of the last two issues):

    1. What were the P3 parties' obligations under the Heads of Agreement, Exclusivity Agreement and Addendum Agreement ("the Agreements")?

    2. Are the Agreements still valid and binding? In particular:

        (1) Did BHB withdraw from the transaction in or around December 2017 and, if so, were the P3 parties released from any contractual restrictions relating to entering into dispositions after this date?

        (2) Alternatively to (1), did the Exclusivity Period expire 20 working days after the determination of the planning application (consent having been granted on 30 January 2020) and, if so, were the P3 parties released from any contractual restrictions relating to entering into dispositions after this date?

(3) Alternatively to (1) and (2), is the Exclusivity Agreement still alive for the reasons pleaded in paragraph 22G of the Amended Particulars of Claim?

3. Is and was CFJL at all material times under the effective control of PPP or P3 Eco?

4. Did the P3 parties breach the Agreements? In particular did the P3 parties:

   (1) fail to take all reasonable endeavours and fail to move forward with good faith throughout the period of the Agreements?

   (2) negotiate with third parties for the sale or lease of any parts of the property subject to the Agreements ("the Property") and, if so, were such negotiations with the knowledge and consent of BHB?

   (3) sell or charge any parts of the Property to third parties in breach of the Agreements and, if so, what is the consequence of this and/or

   (4) act in a manner amounting to repudiatory breaches by their two emails of 24 September 2018, letter of 21/26 November 2018 and/or oral statements made on 22 November 2018?

5. If the P3 parties have breached the Agreements, (i) in what way (ii) did any such breach cause BHB any damage and (iii) what is the measure of any damage?

6. What, if any, trust affects the Property or estoppel or equity has arisen in favour of BHB and what is the effect of the same?

7. Did the Defendants collude together "to steal a march on the Court" and try to avoid BHB obtaining specific performance or another proprietary remedy as alleged in paragraph 22F of the Amended Particulars of Claim and paragraph 22H of the Amended Reply?

8. Did Desiman incite a breach of the agreements between BHB and the P3 parties?

9. Is the proposed sale to Countryside a sale at an undervalue? [Note: BHB sees this as an issue but the Defendants do not].

10. As to the claim for misrepresentation:

    (1) Did the P3 parties make any of the representations alleged in paragraph 22A of the Amended Particulars of Claim to BHB?
    (2) Were any of those representations false?
    (3) If so, did any such false representation induce BHB to enter into the Tomlin Order?
    (4) If so, did the representation cause any loss and, if so, what is the quantum of the loss?

11. Is BHB entitled to the relief claimed in the Amended Particulars of Claim against the Defendants by way of injunction, declaration, enquiry as to equitable compensation, Specific Performance of the Agreements and damages?

45. Issues 3 and 7 as set out in that list may conveniently be taken together, and I will take them after issue 6.

THE WITNESSES AND OTHER RELEVANT PERSONS

46. The trial was conducted using the Microsoft Teams video platform. The technology worked effectively during the course of oral evidence, with only the occasional technical glitch which did not substantially impede the progress of trial. I should second here the observations of Mr John Kimbell QC in *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) at [20]. There are practical advantages to conducting a trial via a video platform, which enables the judge to see the documents, the witness and notes all in close proximity and at the same time. I will set out in this section of my judgment my overall impressions of the witnesses of fact I heard, and the approach I have taken to making findings of fact. I will deal with the expert evidence separately below.

47. So far as fact finding is concerned, I remind myself of the guidance provided in *Martin v Kogan* [2019] EWCA Civ 1645 at [88]. All of the evidence is to be considered, though it will usually be appropriate, especially in cases which relate to events some time ago, as here, to start the judicial enquiry with a consideration of the contemporaneous documents, where available, and evidence on which undoubted or probable reliance can be placed. The fallibility of human memory is well established and there is a particular risk in cases, such as this one, that more recent events colour how a witness recalls more historic events. In short, the oral evidence is best assessed against the documents and natural or probable inferences from them. The manner in which oral testimony is given also has its role to play, though the role played by the demeanour of the witness when giving evidence tends to be overstated.

48. The four main witnesses of fact called by BHB were its directors or agents. I shall start by considering them, before considering the other witnesses called by BHB.

49. James Costello is a director and its Chief Finance Officer. He had the most detailed grip on the facts on BHB's side and was involved in most of the main discussions between BHB and the P3 parties. He gave his evidence in a frank and open manner and I conclude he was doing his best to assist the court. His oral evidence did not diverge significantly from his witness statement, or from the contemporaneous documents. A criticism of him by the P3 parties was that he had a tendency to send emails shortly after meetings which overstated what had been agreed by the parties. I do not consider this was the case, certainly in relation to the events early in the relationship between the parties. There is some risk that his evidence was coloured by the jaundiced view he had of the P3 parties, and Mr Nardelli in particular, by 2018, and him seeking to put "words in their mouths" by this date when he was sending emails. However he gave them an opportunity to say when they disagreed with his email summaries and,

by and large, they did not. Therefore, where there is any conflict of fact between him and the P3 parties' witnesses I generally prefer his evidence. Where there are exceptions to that I identify them.

50. John Holleran is also a director of BHB and was its principal shareholder and person in control of it. He left much of the detail to Mr Costello, and others, but he was the principal decision maker. He was involved in some of the key discussions with Mr Nardelli and for the main part they had a good rapport. He gave his evidence in a frank, open and uncomplicated manner. He gave suitable clarification on one significant point, which might be said to be a concession read against the pleaded case of BHB. I have no hesitation in generally preferring his evidence over that of Mr Nardelli, where there is any conflict of fact between them, though the difference between them had narrowed following the conclusion of oral evidence.

51. The third witness for BHB was Montgomery Ives, who worked for BHB from 2015 to date and had responsibility for planning and technical development issues. Mr Ives had developed significant experience in the construction sector over a number of years, in the USA and Ireland. He had been working for Brooke/Mr Holleran from 2015 in the UK. His role was initially focussed on a site in Chatham, but soon his time was taken up, predominantly, on seeking to develop the Himley venture with the P3 Group. There were some aspects of his oral evidence which were a development on his witness statement, which needs to be treated with some caution, though his evidence was largely uncontroversial, and I have no reason not to accept it generally.

52. The fourth main witness for BHB was Paddy Doyle, another director. His witness statement concentrated on communications which followed the failed Tomlin Order, and this is of less central importance than the evidence of Mr Costello and Mr Holleran. I consider he was doing his best to assist the court. His oral evidence also provided some corroboration to their evidence, and assisted me in my conclusions on any disputes of fact where I have, by and large, preferred the evidence of BHB.

53. Turning to third party witnesses, or agents, BHB also called Derek Cunnington, a director of Dekra Holdings Limited ("Dekra"), which also entered into an agreement with the P3 Group concerning part of the land at Himley Village. Some caution is required in relation to his evidence because he/Dekra have issued proceedings against the P3 parties in Birmingham District Registry, which proceedings have yet to be determined. In the event the principal challenge to his evidence from Mr Reynolds QC, acting with Ms Petrenko for the Defendants, was as to the doubtful relevance or assistance his evidence was likely to be to the facts in issue. I have already indicated during the course of trial that I substantially accept those submissions, since much of his evidence was taken up with an attempt to provide similar fact evidence concerning the way Mr Cunnington/Dekra has also allegedly been treated by the P3 Group or to discredit the P3 parties. I cannot begin to form a view on the accuracy or otherwise of those allegations within this trial. His evidence was of some limited relevance however in that he provided evidence that the P3 parties had agreed to enter into a joint venture agreement with him on 19 August 2014 which included an intention to develop 5 acres of land at Himley and over the same

land as fell within the Agreements made with BHB. Beyond this, I place no weight on his evidence.

54. BHB also called Neil Winter, a partner in Stitt & Co. He was the conveyancing solicitor who worked for BHB in the latter part of 2017 (in succession to Anna Zatouroff, who left the firm) and into 2018. I found his evidence to be careful and reliable, consistent with the contemporaneous documentation, and I have no hesitation in accepting it where it added to the contemporaneous documents. Stitt & Co took over the conveyancing file, on behalf of BHB, from Gary Wainwright, formerly of McMillan Williams.

55. Finally, BHB also called Raymond St John Murphy and his son, Dominic St John Murphy, of HA Law, the solicitors acting for BHB in these proceedings. The reason why they were called was because BHB's case concerning the Tomlin Order involved them becoming a witness to certain potentially contentious factual disputes in relation to what was said in the run up to it, and after it failed. Ultimately, I did not find their evidence added significantly to the documents and where they gave oral evidence of communications with their client it was not backed up by contemporaneous file notes. Raymond St John Murphy, in particular, found it difficult to resist the temptation to advocate his client's case in the witness box, which I did not find helpful. His evidence was also inconsistent in certain respects with that of Mr Holleran, and I prefer the evidence of Mr Holleran where there was a conflict.

56. I turn now to the witnesses called by the P3 parties and CFJL. The first to be called was the conveyancing solicitor who worked for them, David Marsden. He was first instructed by the P3 parties in 2012. He was working with the firm Matthew Arnold Baldwin at that time. In January 2016 he joined Veale Wasbrough Vizard LLP ("VWV") and he continued to act for the P3 parties from VWV after that time, and also came to work for CFJL. He candidly accepted in his oral evidence that his clients' instructions required him at times to not disclose matters to third parties and, in 2018, to cease to move the joint venture forward with BHB. That made his position more uncomfortable. Given the time he worked for the P3 parties he is likely, in my judgment, to have lost some objectivity. He also, at times, sought to advocate his client's case, albeit some of the questions tended to conflate him with his client and so I make some allowance for this. I think it is important, nevertheless, when assessing his evidence, to recognise those limitations placed on him.

57. The P3 parties had three directors and called two of them. The first to be called was Graham Johnson. He is a very experienced businessman and property developer. For many years he had a close professional and personal relationship with Sir Terry Farrell, one of the world's leading master planning architects. Together with Farrells what became the P3 Group were able to put together a consortium to prepare proposals for presentation to CDC to assist them submit a successful bid for the eco-town located in North-West Bicester. Mr Johnson was central to those efforts for the P3 parties. Whilst cognisant of his duties of collective responsibility, Mr Johnson focused on the master-planning aspects of the venture at Himley and Mr Nardelli focused on securing the required land from the local landowners as well as being the main communication point with funders. I also conclude that Mr Nardelli played more of the lead role in

communications with BHB and Mr Holleran, though on many occasions Mr Johnson was a witness to those events too. Mr Johnson liaised more with the architects, Penoyre & Prasad, led by Sunand Prasad, former president of RIBA, the planning consultants, Turley, and the planning authorities, together with Mr Ives of BHB.

58. On the whole I found Mr Johnson's evidence to be careful and accurate, though he was inclined at times to give answers directed at drawing to the court's attention the weaknesses in BHB's case, or the financial difficulties which Mr Holleran came to suffer personally and in relation to BHDL, rather than concentrating on giving an answer to the question. This made it more difficult for me to assess his evidence. His evidence was influenced to some degree by the breakdown in relations with BHB. I have also concluded he was at times swept up with, and along, by the charm and plans of Mr Nardelli, or played a secondary role to Mr Nardelli, and was not always an entirely successful brake when a brake was required. I also conclude, for the reasons considered further below, he allowed his personal and family financial interests in the P3 parties, and in the setting up of CFJL, which included a partner of his as a shareholder, to prevail over pre-existing contractual obligations to BHB.

59. Mr Johnson was contacted about the North-West Bicester site by Ian Inshaw, a co-director of the P3 parties. Mr Inshaw was not called to give evidence. He is a former army officer, and had (in 2008) recently retired as the Commander in charge of the Bicester Garrison. This was the centre of the logistics for the army and of significant military importance. His finance director at the Bicester Garrison was Barry Wood, who by then was the leader of CDC. Thus, although Mr Inshaw played an important early role in matters concerning the P3 Group, and Himley, he seems to have played less of a role in the matters relating to this case. I note he was not drawn into giving any personal guarantees, for example. I conclude, out of the board of directors of the P3 parties, comprising of Mr Johnson, Mr Inshaw and Mr Nardelli, that the principal decision maker was Mr Nardelli, followed next by Mr Johnson.

60. Mr Nardelli was the third witness called for the P3 parties, and CFJL, and the main protagonist on their side. I have already described his role above. He was described by another witness, Paul Fellows of Desiman, as being "very persuasive and reassuring" in his communications. I agree with that description, but I do not think that equates with reliability in this instance. Save where corroborated by the contemporaneous documents I was not satisfied I could safely rely on the oral evidence of Mr Nardelli. I say so for seven main reasons. The first is that other of the witnesses called by the Defendants, including Mr Fellows and Mr Smith, concluded he had been less than frank with them when it suited him. I accept their evidence in that respect. Secondly, he admitted he kept matters relating to CFJL, and its contract with the Murfitt Henson in 2017, deliberately hidden from BHB because of his/the P3 parties' financial interests in doing so. Thirdly, I conclude he had the tendency to tell a party what they want to hear, or what will advance the interests of the P3 parties, and the project at Himley, which he passionately believes in, having invested over 12 years into it. Transparency and accuracy took second place to this in my judgment. Fourthly, I conclude that not only did he keep matters hidden from BHB but

that he was also willing to lie to keep matters hidden. I refer in this respect to my findings in paragraphs 196-199 below. Fifthly, his evidence was contradicted by a number of the BHB witnesses, who I prefer generally, and whose evidence was not the subject of any substantial or successful challenge. Sixthly, like Mr Johnson, I think he allowed his personal and family financial interests in the P3 parties, and in the setting of CFJL, which included family members as shareholders, to prevail over pre-existing contractual obligations to BHB. Seventh, his witness statement was influenced in my judgment by the breakdown in relations between the parties. To his partial credit he accepted some of his more severe criticisms of BHB could not stand when giving oral evidence and under cross examination.

61. The Desiman parties called two witnesses. The first was Paul Fellows, one of two directors, alongside Marc Atkinson, and the person who was in principal charge of the lending relationship with the P3 parties. Desiman is an unusual lender, and not just a lender. It is a property investment company, residential landlord and private non-regulated lender. Desiman lend only for commercial property related ventures, providing mainly short term bridging or mezzanine finance, and has now been lending for 15 years. Since 2017 its main focus has been to carry out more lending, though it retains a residential property portfolio. Mr Fellows has a background as an estate agent, and often makes judgments on investments without formal valuation evidence or input. This make up and approach by Desiman, in my judgment, substantially explains the less than conventional approach taken by Desiman to the lending advanced in this case. So far as Mr Fellows' oral evidence was concerned, at times he was prone to make speeches in what he considered would be supportive of Desiman's case, and he did not (without some judicial interruption) give a short and straight answer when one ought to have been forthcoming. So I think his evidence needs to be approached with some care. Overall however I am satisfied that he was doing what he considered was in the best commercial interests of Desiman, he tended to leave matters of detail to Mr Smith, and once this is understood his actions and evidence are readily understood.

62. It is an unusual feature of this case that all the parties called their solicitors to give evidence. Desiman called Mark Smith, a solicitor who works for Underwood Solicitors LLP. They were acting for Desiman and Desiman 2 during 2017 to 2021 and, again somewhat unusually, are now acting for all the Defendants. The Defendants have signed a conflict waiver to enable Underwoods and counsel to act for them all. Desiman has taken the unorthodox approach of funding the litigation and has even gone so far as to advance a funding line to the P3 parties to help them defend the claim, negotiate a settlement with BHB, as well as advancing a personal loan to Mr Nardelli. As Mr Smith put it in his oral evidence, they are now "*in deep*" in relation to the land at Himley. Mr Smith was, like the other conveyancing solicitors (Mr Winter and Mr Marsden), careful in the evidence he gave. He was at times very quick to seize on the opportunity to argue Desiman's case, and sometimes slow to provide direct answers to question from Mr Jefferis, acting on behalf of BHB. Generally speaking I conclude he was doing his best to answer questions accurately and to assist the court. I think more caution is required as regards the evidence he gave as to his recall of advice he gave to his client in 2018-2020,

for the simple reason that he kept no file notes. I do not consider there is anything suspicious about this, since the relationship was a longstanding one and this was not a client who expected detailed notes or reports. But it does mean I need to be cautious about what he says he now recalls, given he has been involved in numerous discussions since then, and given the vagaries of memory.

THE ISSUES: ANALYSIS AND CONCLUSIONS ON THE ISSUES

Issue 1: What were the P3 parties' obligations under the Agreements?

Introduction

63. I started this judgment by referring to the fact that it concerned a joint venture in relation to the land at Himley. Whilst a joint venture is a frequently used business vehicle it is not recognised in English law as a distinct legal concept or term of art: see, for example, *Cullen Investments Ltd and ors v Brown and ors* [2017] EWHC 1586 (Ch) at [257]; *Ross River Ltd and anr v Waveley Commercial Ltd and ors* [2013] EWCA Civ 910; [2014] 1 BCLC 545 at [34] per Lloyd LJ. The term "joint venture" is, therefore, little more than a short-hand for a specific commercial project or activity pursued by two or more participants. It begs the question rather than answering it. Answers are to be found by considering the legal structures and obligations and duties arising from those. In this instance that is to be found in the contractual arrangements. Whilst the parties referred to themselves on occasions as "partners", or forming part of a "consortium", it forms no part of BHB's case that there was a partnership falling within the scope of the Partnership Act 1890 and no joint corporate vehicles were used.

64. I will therefore proceed to consider the express and implied terms of the Agreements. I will then go on to consider the meaning and effect of the contractual terms, and duties arising, focussing in particular on areas relevant to the subsequent issues, and where there are differences between the parties. I do so bearing in mind the principles of contractual interpretation which were usefully summarised by Andrew Burrows QC sitting as a Deputy High Court Judge (as he then was) in *Palliser Limited v Fate Limited (In liquidation) & Others* [2019] EWHC 43 (QB) at [11] as follows:

"Ultimately the question that I here need to resolve is a question of contractual interpretation. I should therefore briefly set out the correct modern approach in English law to contractual interpretation (see also my summary of the law in Harry Greenhouse v Paysafe Financial Services Ltd [2018] EWHC 3296 (Comm) at [11]). The court must ascertain the meaning of the words used by applying an objective and contextual approach. The court must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. Important cases recognising the modern approach include Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 , HL, especially at 912-913 (per Lord Hoffmann giving the

leading speech), and Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 . The Supreme Court in Arnold v Britton [2015] UKSC 36, [2015] AC 1619 , clarified that the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. In Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 , at [14], Lord Hodge, with whom the other Supreme Court Justices agreed, said that there was no inconsistency between the approach in Rainy Sky and that in Arnold v Britton : 'On the approach to contractual interpretation, Rainy Sky and Arnold were saying the same thing.'"

The Heads of Agreement

65. Starting with the Heads of Agreement, it has pagination and headings next to certain paragraphs, but it does not have clause or paragraph numbers. It is a document which was initially drafted by the parties, rather than the lawyers, with Mr Costello of BHB doing much of the drafting work, though lawyers had some input on it at the latter stages.

66. The parties were defined as "*P3 Group of Companies (P3) and Brooke Homes (Bicester) Ltd (BHB) or their respective nominees*". It was agreed at trial that notwithstanding the somewhat loose definition of the P3 Group, both of the P3 parties were intended to be a party to the Heads of Agreement, and all the Agreements. Thus references to "P3" in the Agreements include references to both the P3 parties.

67. After setting out the background to the Agreement on page 1, some of which I have already recorded above, and before going on to refer to the Heads at the bottom of page 1, it was recorded that "*BHB wish to acquire sufficient private development lands which will facilitate a large scale, multi-year residential development opportunity for BHB over the coming years*". It was implicit, though not expressly stated in the Heads of Agreement, that the P3 Group had sufficient option rights secured over the c. 227 acres of land in respect of which a planning application had already been made. It was contemplated that these option rights would be exercised, after planning permission had been granted, so as to deliver 100 acres of private residential development land for BHB to develop. The P3 parties did not contemplate they would hold the land for themselves, but instead the Heads of Agreement implicitly contemplated that they would pass it on, most likely on a back-to-back basis, to BHB. It is possible they might have taken on an agency role in this respect, should matters have progressed as contemplated and a conditional sale contract entered into.

68. Near the bottom of page 1 of the Agreement the following headings were identified and text followed:

*"**Title**: Title will be good and marketable title.*

***Agreement**: Subject to satisfaction of certain conditions set out under 'Land Acquisition', BHB or their nominee will purchase private residential development land shown coloured pink and blue on the attached plan marked*

592-SK-030 with Outline Planning Consent from P3. The initial private residential development land purchase will comprise 100 acres.

***Future Options**: P3 agree to grant BHB options over further land in tranches of 50 acres up to a maximum of 400 acres of additional private residential development lands that they secure, subject to P3 securing and attaining outline planning consent on said lands. The additional 400 acres covered by this agreement will be from the lands hatched brown on the attached plan marked Cherwell Local Plan SA*

The total private residential lands forming part of this Agreement is therefore 500 acres."

69. I interpose to note that the plan marked 592-SK-030 identifies the land which is covered by the two options I have referred to above and the 227 acres which were the subject of the planning application already submitted. Having thus identified the main features of the Agreement on page 1, page 2 went on to set out further agreed terms as follows (I have omitted certain details where irrelevant to this dispute):

"***Mutual Benefit**: The transaction will be structured in a manner which will most effectively achieve the desired commercial and financial outcome for both parties.*

***Compliance**: [omitted]*

***Land Acquisition**: BHB will enter into a conditional sale agreement with P3 to purchase an initial 100 acres subject only to: i. the consent being granted for the outline planning application submitted on 31 December 2014, and ii. P3 using their reasonable endeavours to assist in providing suitable facilities for BHB as detailed in 'Facility Requirement'.*

These lands will be acquired in 3 tranches: 25 acres on obtaining of outline consent, 25 acres 12 months thereafter and 50 acres after a further 12 months (24 months post completion of acquisition of initial tranche).

Payments in line with the "Land Cost" (see below) will be made on the date of transfer of ownership of each tranche of land. Scope will exist for BHB to accelerate the acquisition of said lands if necessary during the period.

Exchange of contracts for the conditional sale agreement will be treated as consideration for the granting of the options outlined in the 'Future Options' paragraph above.

The future options outlined in the relevant section above will be granted as soon as possible after exchange of contracts for the initial 100 acres, and may be exercised by BHB on attainment of outline planning consent, which P3 agree to seek in a proactive and transparent manner.

***Residential Density:** The Agreement and Future Options are on the basis of a minimum density of 14.1 private residential units to the acre.*

Land Cost*: The parties agree the following land costs for private development lands: - £800,000 per acre for the first 100 acres - £1m per acre for the remaining 400 acres*

Overage*: The parties also agree to the following Overage provisions*."

70. I should mention here that the first 25 acre tranche of the initial 100 acres represented about 350 private residential units at a density of 14.1. If a ratio of 70:30 split between private and affordable is applied then this would be accompanied by c.6 or so acres for affordable and 150 affordable units. Thus the first phase of the initial 100 acres equates to about 500 units in total. Turning back to the Heads of Agreement, the following text is then stated on page 3, and to the top of page 4:

"First 100 Acres

In addition to the land cost per acre outlined in the previous section, an overage will be paid consisting of the higher of the increase in the Halifax HPI from date of acquisition of first 25 acres, or a 20% overage on sales over and above an average £241 psf on residential units built on this 100 acres.

Additional Lands

[omitted]

Affordable Housing: *P3 will be responsible for the provision of land necessary for social housing provision from land other than the land subject to this agreement. P3 already has established relationships with social and affordable housing associations and other providers.*

Disbursement of Cost: *BHB will pay £250,000 on signing heads of terms such sum to be non refundable. The balance of £3,750,000 will be paid on exchange of contracts of the conditional sale agreement, representing a 5% deposit on the initial 100 acres*

P3 will be responsible for securing necessary outline planning consents. BHB will be responsible for securing all necessary detailed or reserved matters consents.

If any of the conditional provisions of the contract for sale are not satisfied for whatever reasons, BHB shall be entitled to the refund of the balance of the deposit paid on exchange but not the payment made on the date hereof

For the avoidance of doubt the exchange of contracts on the conditional sale agreement will be treated as consideration for and the obligation to grant of the Future Options on the remaining lands in accordance with the "Land Acquisition" paragraph above

Section 106*: BHB acknowledge that P3 are still in negotiation with the local council pertaining to the level of Section 106 contribution required throughout the development.*

BHB agree to cover the cost of any Section 106 applicable to the whole 500 acre acquisition, over and above any gross overage payable to P3 (see Overage section below [sic]*). This is on the basis that Section 106 will not exceed £10,000 per residential unit. In the event that the Section 106 liability exceeds £10,000 per unit the parties agree to share such excess costs equally"*

71. It is worth pausing there to note that the considerable costs associated with the section 106 agreement, and liability, was anticipated as potentially requiring financial contributions by both sides. This reflects this was contemplated as being a joint venture, but as appears above, and below, it was catered for contractually.

72. At the top of page 4 of Agreement the responsibilities in relation to site services was stated in the following terms:

*"**Site Services:** P3 to be responsible for the provision of infrastructure and services including energy to the boundary of all lands being acquired by BHB. P3 will also facilitate all necessary connections. BHB will be responsible for all site specific infrastructure and services.*

BHB commit to covering the cost of services up to a level of £2,000 per residential unit. Any excess over and above this level will be covered by P3, given their position where they could exercise some level of control in negotiating with the relevant service providers."

73. There is potential scope for debate as to where the boundary was contemplated as being drawn in this respect, but I conclude that the parties contemplated this as addressing the initial 100 acres of private residential land, covered by the Murfitt Henson and Pains Options and the subject of the planning application, since there was no certainty involved in relation to what further land might be acquired beyond this. This still left some questions to be resolved as to where within that land the private residential land would be, but the bargain the parties struck is that P3 would be responsible for the infrastructure and services up to the boundary of the land to be acquired, with BHB responsible for the services and infrastructure within that land. It also provided that P3 would be liable for the cost of services within the land transferred if the cost to BHB was in excess of £2,000 per residential unit. Whilst this probably was intended to exclude site specific infrastructure, such as cul de sac roads, it did nevertheless provide some benefit to BHB by way of a cap.

74. Again the numbers involved in this respect are substantial. It also required co-operation between the parties.

75. I turn back to the express terms of the Heads of Agreement. After setting out certain provisions in relation to "Anticipated Demand" and "Design Considerations", page 4 of the Agreement stated as follows:

"Facility Requirement: *P3 agree to use reasonable endeavours to identify a site on commercially acceptable terms a suitable facility for the manufacture/fabrication of housing pods located either on site (but not within the curtilage of the land subject to the conditional sale agreement or the Option*

agreement referred to herein) or within close proximity of the site centre with suitable access to the site. The initial requirement is for 75,000 to 100,000 square feet under roof, rising to 200,000 square feet, with a similar hard surface requirement throughout.

***Legal Enforcement**: Given the considerable expense being incurred by all parties and in the interest of timely completion, the terms of this document will be considered binding to both parties.*

***Representation**: [omitted]*

***Good faith**: Each party shall act in good faith throughout the period of this Agreement."*

76. Page 5 then went on to conclude the Heads of Agreement by stating as follows:

*"**Agreement**: The parties shall use all reasonable endeavours to enter into a final binding Agreement which captures legally these Heads of Agreement acting in good faith towards each other by 31st March, 2015.*

***Governing law**: These heads of agreement shall be governed by the laws of England & Wales."*

77. Given that the Agreement was executed by both parties on 16 April 2015 it is clear that the date of 31 March 2015 is an obvious error. The drafting of heads of terms had started from late February/early March 2015, and what became the Heads of Agreement had gone through a number of iterations such that this date was passed without the error being spotted. It is therefore common ground that the Heads of Agreement is to be interpreted, as a matter of constructional implication, as requiring the deletion of "*by 31st March, 2015*". This begs the question, what was the duration of the obligation to use all reasonable endeavours to finalise matters, acting in good faith? It was accepted by the P3 parties at trial that the requirement to use "all reasonable endeavours" and act in "good faith" to enter into a final binding agreement was a continuing obligation, subject to such objective still being reasonably obtainable, and subject to the provisions of the Exclusivity Agreement. In closing submissions they also submitted that the duration of the obligation was for a reasonable period of time, which they submitted was by the end of 2017. BHB's submissions in this respect also focussed on the Exclusivity Agreement, though they suggested that this did not place any limits on the obligations under the Heads of Agreement, which they suggested were unlimited in time. I will therefore turn to consider the Exclusivity Agreement now, also noting it was executed on the same date.

The Exclusivity Agreement

78. On page 1 of the Exclusivity Agreement certain material terms are defined, including the "Property" which is defined by reference to the land at Himley Village as described in the Heads of Agreement. The parties were also defined similarly to the Heads, and there was no suggestion at trial they were any different from the Heads notwithstanding the loose terminology used. The

"Transaction" was defined as being "*The conditional sale agreement and the option agreements as described in the annexed Heads of Agreement*", the "Deposit" as being the £250,0000, and the "*Exclusivity Period*" as being "*From 14 April 2015 to 20 working days after the Planning Application is determined or the parties entering into the Transaction, whichever date is the earlier*". It is common ground that whilst the "Planning Application" is not a defined term this was a reference to consent being granted for the outline planning application submitted on 31 December 2014.

79. The "Owner" is not defined on this page, but it is apparent that the remainder of this agreement identified P3 as the "Owner". The second page contained the following clauses under the heading "*1 Owner's obligations*", though it is clear it also contains obligations on the part of BHB:

"1.1 P3 acknowledges receipt of the Deposit.

1.2 In consideration of the Deposit paid by BHB to P3 it is agreed that:

1.2.1 during the Exclusivity Period P3 will not in relation to any residential property:

1.2.1.1 market the Property;

1.2.1.2 invite entertain or accept subject to contract an offer for the purchase or lease of the Property from any third party;

1.2.1.3 sell or lease or enter into an agreement to sell or lease in respect of the Property to any third party;

1.2.1.4 instruct its solicitors to submit a draft contract for sale or agreement for lease in respect of the Property to solicitors acting for any third party;

1.2.1.5 enter into a contract for any disposition or development of the Property nor grant any right of pre-emption over it

1.2.1.6 otherwise negotiate with any third party for the sale or lease of the Property to any other third party

unless BHB withdraws from the Transaction or unless this agreement otherwise comes to an end.

1.2.2 in return for the exclusivity granted to BHB by P3 by this agreement BHB will not: approach directly or indirectly the registered owners or occupiers of any of the properties within the land that is the subject of this Agreement and detailed in the annexed Heads of Agreement

1.3 If BHB serves a notice requiring completion of the Transaction on P3 ("Notice To Complete") within the Exclusivity Period, P3 shall enter into the Transaction.

1.4 In the event that the Transaction proceeds to binding legal completion P3 will allow credit to BHB for the amount of the Deposit by way of set off of such liabilities as maybe or become due from BHB in relation to the Transaction."

80. Then, under the heading "2 *Deposit*" it stated as follows (note, the drafting does not contain a clause 2.1):

"*In the event that BHB does not serve Notice To Complete on P3 during the Exclusivity Period the parties hereto agree that:*

2.2 P3 shall be entitled to retain the Deposit absolutely by way of agreed compensation and liquidated damages.

2.3 The liability of BHB shall be limited to the amount of the Deposit.

2.4 The parties shall have no further obligations to each other arising from the terms of this Agreement or in relation to the Transaction and BHB shall procure that all documentation relating to the Transaction in the hands of its solicitors or other legal representatives are forthwith returned to the solicitors for P3 on written demand made at any time thereafter."

Heads of Agreement revisited – duration of reasonable endeavours & good faith

81. Having regard to the express terms of the Exclusivity Agreement, I conclude that the parties objectively intended that the requirement to use "*all reasonable endeavours"* to enter into a final binding agreement, in the Heads of Agreement, continued at least until the end of the Exclusivity Period, but not beyond that. Clause 2.4 provides that if no Notice to Complete has been served during the Exclusivity Period then the parties are to have no further obligations to each other "*arising from the terms of this Agreement or in relation to the Transaction*". I conclude the reference to "*the Agreement*" in the Exclusivity Agreement was intended to encompass the Agreement as defined in the Heads of Agreement too, but even if I am wrong about that, given it clearly refers to obligations ceasing in relation to the "*Transaction*" this effectively cuts across the possibility that the parties had continuing obligations under the Heads of Agreement even if the Exclusivity Period had come to an end, if the "*Transaction*" had not been entered into. Since the parties never entered into the "*Transaction*" as defined in the Exclusivity Agreement, the period for cessation of any continuing obligations in both the Heads of Agreement and Exclusivity Agreement was, I conclude, defined as being up to 20 working days after the 31 December 2014 planning application was determined, unless the parties had already successfully achieved the particular intended result, or the result had become impossible by reason of some insuperable obstacle. That conclusion includes the reasonable endeavours and good faith obligations. In my judgment it would be inconsistent with those express terms and illogical to imply a term that the obligations under the Heads of Agreement expired at an earlier point in time. If I am wrong about that however, and a term were to be implied that the obligations should continue for a reasonable period of time, then what was reasonable in that respect, assessed at the time, is in my judgment no different from the Exclusivity Period. Similarly it makes no commercial sense for the Heads of Agreement obligations to continue beyond this time. These

conclusions are subject to any arguments as to withdrawal, subject to arguments as to whether or not reasonable endeavours had been exhausted, and subject to arguments arising in relation to the effect of the Tomlin Order, and representations made in relation to the same.

82. As to the first of those two potential qualifications, whether that end date is further qualified by such objective being reasonably obtainable, as contended for by P3, I note at the end of clause 1.2.1 in the Exclusivity Agreement, the restrictions on P3's activities in relation to the Property are defined to be continuing ones "*unless BHB withdraws from the Transaction or unless this agreement otherwise comes to an end"*. I conclude therefore that since the parties intended that the restrictions on P3 continued unless BHB withdrew from the Transaction, or the Agreement otherwise had terminated, that the parties must also have intended that the "all reasonable endeavours" obligations, and other obligations in the Heads of Agreement, should similarly be demarcated and they are unlikely to have concluded there should have been an earlier date in relation to the Heads of Agreement, if the question had been posed to them at the time. Again in my judgment it makes no objective or commercial sense for a different period to apply. It is likely however that the debate between "reasonably obtainable", withdrawal, and whether reasonable endeavours have been exhausted is largely academic.

83. The question of whether or not it may be said BHB had withdrawn from the "Transaction" by the end of 2017, as contended for by the P3 parties, is a matter I will proceed to consider under issue 2. The questions relating to the impact of the Tomlin Order and events relating to that are also considered there.

The Addendum

84. I should now briefly consider the third of the Agreements, namely the Addendum. This was executed by the parties a little later, on 20 July 2015. It contained four material clauses, as follows (the drafting omits a clause 2):

"*1. In order to facilitate P3 in acquiring land that will be subject of the Heads and the Future Option agreements referred to therein BHB have agreed that they will provide this payment to assist with this ("the Pre-Payment").*

3. The parties are in the process of agreeing terms for a conditional sale agreement ("the CSA"). The Pre-Payment shall form part of the Purchase Price referred to in the CSA and shall reduce the amount payable on exchange of contracts and shall be deductible from the Purchase Price on completion.

4. In the event that the CSA is not entered into by 31 December 2016 or if entered into does not become unconditional by that same date then the Pre-payment shall be repaid without deduction or offset to BHB within 5 working days of demand or in accordance with the terms of the CSA if applicable

5. This Addendum shall be attached to the Heads as an amendment thereto."

85. This provided BHB with contractual protection in the event that the conditional sale agreement ("CSA"), intended to form the first and main part of the

"Transaction", was not entered into by 31 December 2016. In this event, at its election and demand, BHB would be entitled to repayment from P3 within 5 working days. This is not a remedy which BHB has pursued in these proceedings, because it continues to wish to acquire the development land at Himley Village. Indeed it positively asserts it has already acquired an equitable interest in it, including based on a *Pallant v Morgan* equity based on, amongst other things, the contention this is a failed joint venture. I should also add that the mere fact that BHB could demand the money back after this date does not mean that the P3 parties were released from their continuing obligations under the Agreements if P3 did not do so. I should also add that in my judgment the date of 31 December 2016 does not represent the end date for the parties obligations under the Heads of Agreement either, for reasons which I have already stated above. Nor did either party submit it was at trial.

Summary

86. Overall, it is clear the Agreements included certain legally binding obligations. The most significant obligations of BHB and the P3 parties, for present purposes, may be summarised as follows:

   i) to use all reasonable endeavours to enter into a final binding Agreement which captured the Heads of Agreement, including the entry into a conditional sale agreement for the initial 100 acres, and to continue those efforts during the Exclusivity Period, subject to arguments as to exhaustion or withdrawal;

   ii) acting in that respect, and more generally in relation to the Agreements, and throughout their duration, in good faith towards each other; and

   iii) the contemplated transaction (which included both entry into the initial CSA and further options over additional land) would be structured in a manner which most effectively achieved the desired commercial and financial outcome for both parties, for their mutual benefit; and

   iv) to abide by the restrictions set out in the Exclusivity Agreement during the Exclusivity Period; and

   v) for P3 to repay BHB the Pre-Payments (save for the initial Deposit of £250,000) after 31 December 2016, if BHB elected to ask for the money back.

Enforceable contract for sale of land?

87. It is also clear, in my judgment, that the Agreements, short of later binding variations, fell short of being an enforceable contract for the sale of land, whether in relation the overall 500 acres or in relation to the initial 100 acres. This is for a number of reasons.

88. First, whilst the Heads of Agreement was in some respects expressed in emphatic terms, ultimately the central obligation of the parties was to use all reasonable endeavours to enter, in the future, into a final binding agreement and

that BHB would, in the future, enter into a conditional sale agreement with P3 to purchase an initial 100 acres. The Heads of Agreement already sufficiently identified certain terms, since it contained details as to the price to be paid and other significant detail, such that the court might have been able to assist in the enforcement of the contract to enter into such an agreement, but the Heads of Agreement were not themselves such a contract.

89. Second, so far as the total 500 acres contemplated as being the Property under the Heads of Agreement, P3 did not hold options over the full extent of this land, as was known to BHB at the time. It only held option rights over a lesser amount of land, of approximately 250 acres. I find this was known at the time, and it is reflected in the structure of the Heads of Agreement.

90. Third, turning back to the initial 100 acres, it was envisaged that BHB would enter into a conditional sale agreement with P3 to purchase an initial 100 acres subject only two conditions, namely: i. the consent being granted for the outline planning application submitted on 31 December 2014, and ii. P3 using their reasonable endeavours to assist in providing suitable facilities for BHB as detailed in 'Facility Requirement'. As for the second condition this is a condition in favour of BHB which it could waive, if it so desired, but in any event it is not contended that P3 failed to discharge this obligation. As for the first condition this had occurred by January 2020. Accordingly the two preconditions to entry into the CSA to purchase the initial 100 acres are, now, no impediment. But the initial 100 acres were intended to be for private residential land, or market value housing. It has transpired that the planning application, due to the relative densities of private land, affordable housing, open spaces and other uses, only yields a lesser acreage for private residential development, of about 84 acres. The parties mutually agreed to this change, but it is nevertheless a change from the Heads. Moreover, it became apparent to the parties that idea that P3 would separately be responsible for the provision of affordable housing would not work, because the planning authority required affordable housing to be mixed in with the private units, referred to in evidence as "pepper potting". Again the parties agreed to this change, and agreed a price for the sale of the affordable land to BHB, but it was a change from the Heads.

91. Fourth, the Agreements did not define which of the Himley Village land would form part of the 100 acres. It is submitted by the P3 parties that it is a necessary precondition to an enforceable sale of land that specific property is identified for sale. Without that there can be no enforceable contract. P3 rely upon an analogy to be drawn from the law relating to chattels. It is not possible to create a trust over a specific number of tangible goods which are comprised in a larger quantity of the same tangible goods, unless the specific goods are identified and segregated. Thus for, example, they submit a settlor cannot create a trust of 4 out of 20 cases of Ch Latour 1990 Wine or 20 out of his flock of 100 sheep. They refer to *Underhill and Hayton* on the Law Relating to Trusts and Trustees (19th Edition) at paragraph 8.14, citing *Re London Wine Company (Shippers) Ltd* [1986] PCC 121). For this reason also, they submitted, the Agreements could not and did not give rise to a "trust arising in favour of a purchaser under a contract to purchase the land".

92. I accept that submission, though it does not mean that I conclude that the Heads of Agreement did not contain a sufficiently certain identification of an interest in land which could be worked out in the future, or worked through by the Court. A purchase of 100 acres for private residential land was to be purchased within a defined piece of land, under the initial contemplated conditional sale, and this could result in a sufficiently certain interest in land being identified which could be the subject of protection in equity. As to the need for sufficient certainty in this respect, this is also the test applied in the context of proprietary estoppel: see the observations of Lord Scott in *Yeoman's Row Management Ltd v Cobbe* [2008] 1 WLR 1752 at [19] and [20]. It seems likely to me the test should not be substantially different for a contract for the sale of land, though this point is capable of further debate, as it might be argued the test should be less strict for constructive trusts; see *Herbert v Doyle* [2010] EWCA 1095 at [91] per Morgan J. I note here that when the parties came to draft the CSA they contemplated a mechanism (identified in many of the drafts as being clause 28) whereby the land would be marked on plans and that this would be provisional and subject to change, with any dispute resolved via a dispute resolution mechanism. This reinforces my view that the identification of land would not present a problem if both parties acted in good faith and discharged their reasonable endeavours obligations. The land values across the whole did not vary significantly.

93. I also consider that in relation to what might be called the "process" aspects of the Heads of Agreement, requiring the parties to use reasonable endeavours to capture the terms into a legally binding CSA, the court could and should also recognise an implied term that the P3 parties (as the seller) would identify the specific land within a reasonable time and failing which the court could be asked to do so (cf. the approach taken by the Court in *Herbert v Doyle* above at [71] & [72] per Arden LJ (as she then was)). But none of that takes away from the fact that the Agreements as they then stood had not travelled that journey.

94. Fifth, there is also a problem for BHB, should it rely on a variation to the Agreements, as it has to do so to arrive at a workable development scheme. This is because of the terms of section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that:

(1) 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 expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

95. It is clear that section 2(1) prevents BHB from being able to ask the court to enforce a variation of the Heads of Agreement since that would require the court to look at not just the Heads of Agreement, but other documents where other ad hoc agreements have been reached, or which records ad hoc oral agreements as to variations. Thus the varied agreement which is sought to be enforced would not be incorporated in one signed document and would all foul of section 2(1). That does not mean, however, that BHB cannot rely on a constructive trust. Section 2(5) of the same Act provides that nothing in section 2 affects the creation or operation of resulting, implied or constructive trusts. This leaves open the door to a constructive trust based on a *Pallant v Morgan* equity. Whether such an equity or trust arises here is considered further under issue 6 below.

Further consideration of the content of 3 of the main contractual obligations

96. Before turning to issue 2, I shall consider further here the content of the three of the five main contractual obligations I have summarised in paragraph 86 above.

All reasonable endeavours

97. First, so far as the obligation to use all reasonable endeavours to enter into a final binding Agreement which captured the Heads of Agreement, it might be said that there are three types of endeavours clauses. The first is simply to use reasonable endeavours, which might mean if one reasonable path is taken then the obligation is discharged. The second is to us all reasonable endeavours. This is normally interpreted as requiring all reasonable paths or actions to be exhausted. In this respect it may be said there is little difference with such a clause and duty to use best endeavours: see *Overseas Buyers v Granadex* [1980] 2 Lloyd's Rep 608 at 613; and *Rhodia International v Huntsman International* [2007] EWHC 292 at [33] and [59] per Flaux J (as he then was). Some best endeavours clauses might however be said to require, depending on their context, the sacrifice of some commercial interests on the part of the party, whereas an obligation to use all reasonable endeavours is probably less likely to do so: see *Yewbelle Ltd v London Green Developments* [2007] EWCA Civ 475, [2008] 1 P & CR 279, [2007] 23 EG 164 (CS) at [29], and per Vos J (as he then was) in *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) at [252]. Ultimately however, even these categorisations do not tell the whole story, since the precise requirement will depend on the precise wording and context in which that wording arises. So even with "all reasonable endeavour clauses" some subordination of commercial interests may be required (cf. the approach taken at first instance in *Jet2.com Limited v Blackpool Airport Limited* [2011] EWHC 1529, which was approved by the majority of the CA: see [2012] EWCA Civ 417). The mutual benefit clause in this case has some bearing in this context.

98. Fleshing out some of the content of the duty further here, active endeavour is required on the part of the parties where all reasonable endeavours are required: passivity or inactivity is likely to be construed as a potential breach. And if a reasonable course is identified by the claimant then the defendant can be required to explain why it was not required to do so.

99. The case law I have referred to above also makes clear that the question whether the taking of a particular path is a reasonable endeavour is subject to assessment by the court of whether it would have had a significant or substantial chance of achieving the desired result (see *Yewbelle* above at [32]). This is effectively the same as a real prospect test in my judgment. On the other side, one insuperable obstacle to achieving the desired result may discharge a party from using reasonable endeavours (*Yewbelle* above at [103]).

100. The object or result which these obligations were directed to achieving gives rise to a more difficult issue in this case, which is that the desired result is to capture the Heads of Agreement into a new agreement, including in particular a CSA. It might have been argued this constituted an unenforceable agreement to agree (see *May and Butcher v The King* [1934] 2 KB 17 and *Walford v Miles* [1992] 2 AC 128), though Mr Reynolds did not advance such a submission on behalf of the Defendants, and they accepted that the reasonable endeavours and good faith obligations contained in the Agreements were enforceable. No doubt they had in mind, when making that concession, to the principles set out in Rix LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76, in which it is emphasised that in commercial dealings where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out. The courts will assist the parties to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. I believe that principle is reflected in the approach taken by Arden LJ in *Herbert v Doyle* referred to in [82] above. Cases such as *Petromec Inc v Petroleo Brasileiro SA Petrobas* (No 3) [2005] EWCA Civ 891, [2006] 1 Lloyds Rep 121 at [115]-[121] show that the courts will now be willing to recognise an obligation to negotiate on some matter using reasonable endeavours, or in good faith, where it is found in a binding agreement.

Good faith

101. Second, so far as the duty to act in good faith towards each other, Vos J suggested in *CPC Group Ltd v Qatari Diar Real Estate Investment Company* above at [246] that this required, in the context of the contract in that case, a requirement to "*adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Developable Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties. I do not need, it seems to me, to decide whether this obligation could* only *be broken if QD or CPC acted in bad faith, but it might be hard to understand, as Lord Scott said in Manifest Shipping Co v Uni-Polaris Shipping Co [2003] 1 AC 469] how, without bad faith, there can be a breach of a 'duty of good faith, utmost or otherwise'.*" What "bad faith" means in this context may require some further consideration. It probably does not require dishonesty. Like reasonable endeavour clauses, the precise nature of the obligation takes its colour from the rest of the terms of the agreement.

102. The modern prevailing view is that good faith clauses do contemplate a duty to act honestly, but something short of dishonesty may also suffice. So in *Sheikh*

Al Nehayan v Kent [2018] EWHC 333 (Comm) Leggatt J (as he then was) stated at [175] that:

> *".....In Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50, para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the* caveat *that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people"*

103. More recently in *Alan Bates & ors v Post Office Ltd* [2019] EWHC 606 (QB) at [711] Fraser J summarised a duty of good faith as meaning that "*the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest*." This has also been endorsed by Teare J in *New Balance Athletics, Inc v The Liverpool Football Club and Athletic Grounds Ltd* [2019] EWHC 2837 (Comm) at [44]. the existence of the duty was common ground. As to its content, Teare J referred to the analysis of Fraser J in said at [44].

104. In summary, absent any substantial contra-indications elsewhere in the contract, and they do not exist in this case, the duty of good faith may be said to require four things:

    i) A duty to act honestly, judged by reference to reasonable and honest people;

    ii) The observance of reasonable commercial standards of fair dealing;

    iii) Fidelity or faithfulness to the common purpose, or contractual purpose; and

    iv) More generally to act consistently with the justified expectations of the parties.

105. In my judgment this fourth element provides a similar role to the implication of terms, and as a gap filler, and where one party might suggest a variation from what the Heads of Agreement stated. Both parties accepted at trial that, for example, a change of circumstances might require some adjustment to the Heads of Agreement, but this would not result in the obligations ceasing.

Mutual benefit

106. The third express contractual obligation to consider further here is that the contemplated transaction would be structured in a manner which most effectively achieved the desired commercial and financial outcome for both parties, for their mutual benefit**.** In my judgment this clause does not go so far as to require one or other party to ignore their own commercial interests, but it does require that they have regard also to the other party's commercial interests, to mutual benefit, and also the overall desired outcome. In my judgment this also has some significance in the context of any proposed modifications, adjustments or variations to the terms set out in the Heads of Agreement. If the counter-party requests a reasonable variation which is of no, or no substantial detriment, to the other party, but can clearly be seen to be of benefit to other party, and to achieving the desired commercial and financial outcome for both parties, for mutual benefit, then the parties were expecting each other to agree to the same. This also informs, in this case, the assessment of whether or not all reasonable endeavours or good faith obligations have been discharged. It also informs, in my judgment, the question of whether or not a party is to be viewed as having withdrawn from the contemplated transaction, or it had come to an end.

107. I shall now consider the temporal question raised by issue 2.

Issue 2: Are the Agreements still valid and binding?

108. The question of whether the Heads of Agreement, /the Exclusivity Agreement and the Addendum Agreement, ("the Agreements") are still valid and binding is critical to whether or not there is a contract which can be specifically performed. It does not necessarily conclude the question of whether or not an equity or constructive trust arises, but also has some bearing on that issue.

Sub-issue (1) – withdrawal

109. The first question is did BHB withdraw from the transaction in or around December 2017 and, if so, were the P3 parties released from any contractual restrictions relating to entering into dispositions after this date? My conclusion on this issue is that BHB did not withdraw from the transaction in or around December 2017, within the meaning of clause 1.2.1 of the Exclusivity Agreement, and so the P3 parties were not released from their obligations under the Agreements, including the restrictions under the Exclusivity Agreement. I have arrived at that conclusion for a number of reasons.

110. I note that clause 1.2.1 of the Exclusivity Agreement provides for a period of exclusivity up to the time BHB withdraws or the agreement otherwise comes to an end. Thus the type of withdrawal which the parties had in contemplation was one which brought the agreement to an end, or was effectively repudiatory. It did not include, in my judgment, the scenario where a variation was suggested by BHB to the transaction, even a substantial one, as long as it was a variation which might reasonably be said to fall within the joint venture the parties were embarked on together. If the P3 parties considered the variation was objectionable and wholly outside any reasonable request for variations, the P3 parties were in judgment under an obligation, by way of necessary or obvious implication, to put BHB on notice that by such a proposal the P3 parties intended

to treat BHB as withdrawing, and give BHB a reasonable period of time to agree to withdraw their request for such a variation. Otherwise any proposed variation by a counter-party would have triggered an ability on P3's part to walk free of the restrictions set out in the Exclusivity Agreement. BHB would have paid the Deposit of £250,000 for nothing. This is not workable as a concept. So in my judgment some form of notification and a reasonable period to recant is required. This notification simply did not happen. But even if I am wrong in my interpretation of clause 1.2.1 in this respect, and no such notice was required, I consider the P3 parties' case falls down on the facts.

111. There is no contemporaneous assertion of withdrawal and refusal by BHB to carry on negotiating a final agreement. Instead the P3 parties' case in this respect relies on the submission that BHB intended to withdraw from the CSA as contemplated in the Heads of Agreement because the transaction which the parties contemplated entering into by December 2017 was a wholly different one from that set out in the Heads of Agreement. They point to there being 21 versions of the CSA which had passed between the parties over a 2 year period before then and the fact that on 5 December 2017 Mr Winter, the conveyancer for BHB, emailed Mr Marsden, for P3, saying he had been informed that "*it had been agreed with your client that the nature of the transaction was to change from an exchange of contracts conditional upon obtaining planning (as currently drawn) to an exchange of contracts for the site but with a simultaneous completion of the Phase 1 Land, notwithstanding negotiations over the 106 agreement/planning permission are still ongoing*". The fact that what was being proposed was now a "*brand new stand-alone contract*", in the words of Mr Winter in his email of 21 December 2017, shows, P3 submits, that BHB had withdrawn from the transaction as set out in the Agreements.

112. In my judgment the email of 5 December 2017 I have quoted from above shows the seeds of destruction of this line of argument, since it refers to a prior agreement between the parties to change the transaction which they would seek to accelerate, not a withdrawal by BHB from it. This was an acceleration of part of the transaction which the parties seem to have appreciated was in their mutual interest, and consistent with their obligations under the Heads of Agreement, not inconsistent with it.

113. Indeed the way Mr Marsden put in an earlier exchange between him and Mr Winter, sent on 2 November 2017, was that their respective clients had agreed to "*restrict this contract to the initial 100 acres or so*". It was also contemplated that the obligations would be varied so that the section 106 obligations would fall on BHB and in return there would no overage provisions. I do not doubt these represented substantial variations from what had originally been contemplated in the Heads of Agreement, but they were not attempts by BHB to withdraw from the overall bargain. They are no less substantial than the parties' agreement that the land transfer would include land designated for affordable housing, not just land which had permission for private residential units. The parties had agreed substantial amendments, too, in relation to the amount of private residential land which would be transferred, down from 100 acres to 84.4 acres. The P3 parties did not submit that the fact that when the parties had agreed to these variations BHB had withdrawn from the Heads of

Agreement. They accepted the proposition that a mere suggestion of some types of variation would not constitute withdrawal, but suggested what happened in December 2017 was different. I disagree. Whilst on 21 December 2017 Mr Winter sent a "*brand new stand-alone contract*" for Phase 1, because Mr Marsden had failed to send it to him, or in a satisfactory form, in his evidence, it is also to be noted that he also sent at the same time a revised Phase 2 and 3 contract. This showed, in my judgment, that this communication cannot reasonably be interpreted as an intention to withdraw or a withdrawal.

114. I also note that at no time did the P3 parties expressly communicate to BHB that P3 were treating BHB as having withdrawn from the Agreements by being willing to pursue negotiations in relation to the proposed more restricted transaction as they had in contemplation from the end of 2017. BHB by its agents sought to progress matters. An example is the chaser email from Mr Winter on 15 February 2018 who recorded he had received no response from Mr Marsden to his chaser email of 31 January 2018. Mr Costello sent an email to Mr Nardelli and Mr Johnson on 29 March 2018 at 15:21 when he reiterated the view of BHB that whilst much time had passed since the signing of the Heads of Agreement BHB wished to make it clear that they still viewed them as "*very much in force*." There was no contemporaneous rejection of this assertion by either of Mr Johnson or Mr Nardelli. A few months later, when BHB became aware that no apparent progress was being made on the negotiation of this simplified contract, by mid 2018, they expressly stated that they would revert back to the initial terms. This was communicated by Mr Costello in an email from him to Mr Nardelli and Mr Johnson on 3 July 2018. In his oral evidence Mr Johnson complained that in this email Mr Costello was seeking to position himself on better commercial terms in relation to the overage provisions. When taken to the email later in his oral evidence Mr Johnson acknowledged that Mr Costello had not in fact sought to negotiate the overage provisions, but nevertheless he sought to emphasise that he had sought to alter other matters in favour of BHB, such as the section 106 liabilities and the provisions in relation to site infrastructure and services. Mr Johnson used those factors to support the lack of response by the P3 parties to this email, but whatever the rights and wrongs of those assertions, in my judgment this evidence undermines the contention that BHB had withdrawn from the transaction as referred to in the Agreements.

115. By this time the P3 parties were in discussions with L&G. The parties' exchanges in relation to L&G, and whether the Agreements were viewed by the parties as still being in force or not at this time is relevant to the question of withdrawal. On 12 September 2018 Mr Costello, Mr Holleran and Mr Doyle on the BHB met with Mr Nardelli and Mr Johnson to discuss matters. Mr Costello recorded his recollection of this meeting in the following terms:

"We discussed the project, our relationship, the support we had given and continued to give, our grievances and their assurances (all verbal) that everything would be okay, that they wouldn't circumvent us, that we were all in it together etc. I asked would they sign a letter of comfort to this effect. Steve Nardelli said that they didn't have a problem in principle signing such a letter but that it would be complex to draft and that we should concentrate on the

matters at hand first (the project), as switching our focus to drafting such a document would take away from what we were trying to achieve. This response seemed evasive and largely true to form. As the meeting progressed, I wrote up the text of a short letter of comfort. As we approached the end of the meeting, I read out what I had drafted and they acknowledged that it sounded reasonable and committed to reviewing it and getting back to us the following day, asking me to type it up and e-mail it to them which I did. A sightly amended version was emailed subsequently."

116. In his oral evidence Mr Johnson accepted that a comfort letter had been referred to and drawn up largely as described by Mr Costello above and that the P3 parties had given an indication this was acceptable in principle. Mr Nardelli suggested in his oral evidence that this was not so and he would have objected to the notion at the meeting. I prefer the evidence of Mr Costello, supported by the oral evidence of Mr Johnson, in this respect over that of Mr Nardelli and find that what is recorded by Mr Costello is substantially correct. I do however accept the evidence of Mr Johnson that the precise terms of what would be agreed was subject to further discussion with lawyers. As such it cannot be said those indications amounted to a binding agreement. But again, however, they are destructive of the notion that the parties contemplated that BHB had already withdrawn and the Exclusivity Period had ended.

117. I also note that the last of the Pre-Payment payments made by or at the direction of BHB was on 1 December 2017. By this time a total of £1.8m had been paid by or at the direction of BHB. Both sides sought to rely on this factor in support of their contentions as to withdrawal. P3 submitted it was consistent with the notion that BHB had withdrawn at the end of December. BHB submitted it was most convenient for P3 to identify the end of December 2017, after they had secured payments from BHB to the tune of £1.8 million. It seems to me that the P3 parties' submissions would have had more force if coupled with evidence of a contemporaneous request for and rejection by BHB of further payments. It was not suggested to me there was any such evidence, or more importantly suggested to the witnesses for BHB. However it must also be remembered that there was no obligation on the part of BHB to make such payments, so even this would not have been of much greater assistance to the P3 parties. Instead, the absence of any requests for payments from this date, or payments being made, is more indicative of a decision by P3 that they wished to move the project forward with other parties. Clear evidence of withdrawal would, of course, been if BHB demanded back the Pre-Payment, but it never did so.

118. The suggestion that a new deal by BHB fundamentally changed the position, as submitted by the P3 parties, is an overstatement in my judgment, but in any event begs the question rather than answering it. It did not communicate to the P3 parties that BHB was no longer interested into entering into a CSA which captured the terms set out in the Heads of Agreement, but instead indicated they wished to accelerate one particular aspect of the Heads, which suggestion the P3 parties agreed to explore. The mere fact that this represented a substantially different bargain, a contract which was going to proceed in relation to part of the land before planning permission was granted, is also nothing to the point, for the reasons I have set out above. It should be noted on this latter point that

planning permission had substantially progressed by the end of 2017. There still remained substantial uncertainty as regards the drafting of the section 106, but a resolution to grant had been obtained. Certainly by 2018 the contemporaneous exchanges between the parties, and with third parties, showed they considered concluding the section 106 agreement, and securing outline planning, was not so far away, even though their predictions in that respect were misplaced.

119. The P3 parties also refer to and rely on the fact that, as set out in Mr Marsden's witness statement, he was apprehensive as to the ability of Brooke to raise sufficient funds from Octopus prior to outline planning. They rely on exchanges which show that they were concerned that the section 106 was not sufficiently advanced to support a binding offer of lending from Octopus. I do not consider this supports their case on withdrawal by BHB. At its highest it might be said to show that the P3 parties had their doubts that the new more restricted contract would fly, but it was certainly not coupled with any contemporaneous communication by the P3 parties to BHB to the effect that it was being viewed by the P3 parties as tantamount to a withdrawal from the obligations under the Heads of Agreement. All of BHB's witnesses firmly rejected the notion that anybody considered that by seeking to negotiate a more restricted contract focused on phase 1, with accelerated provisions, constituted a withdrawal from the Heads of Agreement. I accept that evidence.

120. I reject the submission of the P3 parties, therefore, that the effect of a proposal by BHB of a new, more restrictive, contract was that the obligations in the Heads of Agreement were spent. I also reject the submission that the restrictions relating to dispositions contained in the Exclusivity Agreement ceased to apply in December 2017.

121. This concept of withdrawal in December 2017, by BHB, does not feature until after the lawyers became involved in the litigation process, or in anticipation of litigation. It has all the hall marks of an after the event construct. That is not to say a careful lawyer might properly identify conduct which did amount to a withdrawal even if that label was not used or recognised by the parties, but it becomes more difficult to sustain. In my judgment the conduct of the parties and the written and oral exchanges between them do not sustain it.

122. Before concluding on this sub-issue there is one additional matter I should refer to. It shows that Mr Nardelli, even after proceedings were issued, did not appear to be placing any significant reliance on the idea that BHB had by their conduct withdrawn from the Agreements in December 2017. In an email from Mr Nardelli to Mr Fellows, of Desiman, on 7 February 2019 he sought to explain to Mr Fellows why the P3 parties considered that BHB's claim was "entirely mischievous" and "presented at the last minute as a spoiler to extract some additional financial benefit and probably in the mistaken belief that we have already entered into third party land contracts." I shall return to that assertion later in this judgment, but he then went on to say that the claim was based on "agreements which expired in December 2016". This line of defence had been pleaded in the Defence (paragraph 7(1)) as a "longstop" date by which time the CSA should have been entered. In their written opening the P3 parties did not pursue the contention that the Agreements had expired in December 2016,

instead nailing their colours to the December 2017 mast. That remained their position in closing. I conclude they were right not to pursue an earlier date as the Addendum provides an option for BHB to seek the repayment of its money after December 2016, but does not cause the Agreements to have expired by that date, even more so in circumstances where no repayments were sought. But it is illuminating, in my judgment, that Mr Nardelli in his email to Mr Fellows does not refer to BHB having withdrawn in December 2017.

Sub-issue (2) – Exclusivity Period expiring 20 working days after planning consent?

123. Alternatively to (1), I am asked to determine did the Exclusivity Period expire 20 working days after the determination of the planning application (consent having been granted on 30 January 2020) and, if so, were the P3 parties released from any contractual restrictions relating to entering into dispositions after this date?

124. As stated in paragraphs 81-82 above, I conclude, that, subject to the qualifications I mentioned there, that the Exclusivity Period expired 20 working days after the 31 December 2014 planning application was determined, which happened on 30 January 2020.

125. The first potential qualification to that, concerning alleged withdrawal by BHB, I have disposed of under sub-issue (1) above. The second potential qualification to it is whether or not reasonable endeavours had been exhausted before this date. I have concluded they had not been before December 2017, for substantially the same reasons as already set out in relation to the issue of withdrawal, above. The conclusion I have reached in relation to periods after that date is that it was the P3 parties, not BHB, who had decided they no longer intended to abide by the Agreements. I explain why this is so under issue 3 below. So far as the final additional qualification I have mentioned above, namely arguments arising in relation to the effect of the Tomlin Order and representations made in relation to the same, I shall now consider this point.

Sub-issue (3) – the Tomlin Order representations and other matters

126. Reliance on representations in relation to the Tomlin Order and other matters relied on in support of the contention that by BHB that the Exclusivity Agreement, and the Heads of Agreement, are still alive are collected together in paragraph 22G of the Amended Particulars of Claim.

127. The first point relied on is that "*It was orally agreed between the parties in August 2018 that any delays would not adversely impact on the Claimant and that the Defendants would stand over the Three Agreements and the Defendants would not circumvent them. This was confirmed by an email dated 17th August 2018 sent by James Costello, acting for the Claimant to Stephen Nardelli, acting for the Defendants*."

128. Coupled with this it is pleaded that "*The Claimant reasonably relied upon the Defendants' repeated assurances, in oral discussions between the parties, in August 2018, that the contractual relations between the Claimant and Defendants would advance in tandem with any negotiations between the*

Defendants and Legal and General ("L & G") and if the L & G negotiations were not concluded by 22nd August 2018, then the Defendants would deal only with the Claimant. The Claimant was in a position to complete its purchase by 22nd August 2018."

129. The email of 17 August 2018 from Mr Costello to Mr Nardelli sent at 18:57 does indeed refer to recent meetings between the parties, that BHB were agreeing to tolerate ongoing negotiations with L&G on a limited basis and for a limited time, and in the meantime that BHB "*took comfort from your repeated assurances that we will not in any way be adversely impacted, that you and P3 will stand over all our Agreements and that you will not in any way attempt to circumvent us*." This shows that BHB still viewed the Agreements as being very much alive at this time and in my judgment supports the conclusion that Mr Nardelli in particular had sought to reassure them that the P3 parties accepted they would continue to honour them. In other words, BHB's agreement to a relaxation or waiver of certain of the restrictions should be viewed as temporary only and limited to L&G only for this short period of time. But it does not support the submission that the Exclusivity Period endured beyond the period agreed in the Exclusivity Agreement.

130. BHB go on to plead that "*In September 2018, the Claimant also reasonably relied on the Defendants' agreement to provide a letter of comfort, as pleaded in paragraphs 14 and 15 above*".

131. I have already made findings in relation to the comfort letter in paragraphs 115 and 116 above. Nothing said in the comfort letter indicates an agreement by the P3 parties that the obligations set out in Exclusivity Agreement would be extended indefinitely. It does not support the contention that the Heads of Agreement and Exclusivity Agreement are "still alive" today.

132. Of potentially greater force is the next contention made by BHB, when it pleads that "*The Defendants induced the Claimant to enter the Tomlin Order dated 22nd November 2019, give the Cherwell and Oxford Councils priority over the Claimant and allow the Defendants further time to comply with the Tomlin Order by the Defendants representing that, if the payments provided for in the Schedule were not made and these proceedings re-started, then the Claimant's rights would be "stood over", in the sense that the Claimant would not be prejudiced by the passage of time, amounting to a standstill agreement*."

133. They go on to assert that "*Similar assurances, to deal only with the Claimant, if a deal was not struck with a third party very promptly, were given by the Defendants to the Claimant before the date of the Tomlin and even after January 2020*" and conclude by asserting that "*The Claimant will assert that the Exclusivity Period was extended, by reason of the matters pleaded above, to a date after the trial herein*".

134. This requires an examination of the evidence relied on by BHB in relation to the negotiations concerning the Tomlin Order. This is provided, mainly, by Mr Holleran on BHB's part and Mr Nardelli, on the P3 parties' side.

135. Concentrating first on Mr Holleran's evidence, his witness statement stated as follows in relation to discussions at a meeting with Mr Nardelli at a hotel on Marylebone High Street towards the end of October 2018:

"94. A[t] the meeting Mr Nardelli said he wanted to meeting [sic] with me to try and get the dispute with us settled. He said P3 were worried that their options were running out on the Paines [sic] land and that if this happened we would all lose out. He said he needed £7m. I told him we had the money available to exercise the option from Lend Invest and all we required was for him to complete the sale of the land to us.

"95. He complained we had cost him millions by our court case and the unilateral notices. I said he had brought this on himself. He started with a settlement offer of a straight cash payment of £6m for us to drop our claim and release the unilateral notices. He said he had organised funding from a body called Desiman. They had agreed to lend him the money he needed to exercise the option on the Paines [sic] land and that he did not need any help from Land Invest. He said that his funder would not advance any money unless the unilateral notices were released. He also said he had an offer to purchase the land from a large developer but that they would not go ahead with the purchase until the unilateral notices had been released.

96. I told him that his offer was not sufficient. Over the next couple of days we had several telephone conversations in an attempt to agree a settlement figure. He increased his offer to £10m and I countered with £15m until we finally agreed a figure of £12m. He said he would aim to get me a £1m advance payment by Christmas.

97. At the time Mr Nardelli did not disclose the identity of the developer who wanted to buy the land. We subsequently discovered in the marketplace that this was Countryside. Steve never admitted or denied this was the case.

98. These terms were agreed with Steve direct. We shook hands and agreed if for whatever reason the payments were not forthcoming from a sale he had standby funds ready and would always stand over our deal which would not be prejudiced by delay. He assured me he would only ever deal with us in relation to the land and would make sure our unilateral notices remained in place to secure our position until we were paid. He said he would instruct his solicitor to document these terms in a Tomlin Order. I had never heard of this expression before."

136. The key passage in this evidence is therefore that stated in paragraph 98 and the suggestion that Mr Nardelli has assured Mr Holleran that the P3 parties "*would always stand over our deal which would not be prejudiced by delay*".

137. However, when questioned on this matter in oral evidence, Mr Holleran stated that the deal he was referring to here was the Tomlin Order deal, not the rights under the Agreements. He also explained that Mr Nardelli assured him that they would not "mess us about", that they "really wanted to perform". None of this amounted to support of the pleaded case that the rights under the Agreements would be stood over to trial, in a manner akin to a standstill agreement. The

more prosaic truth is, I find, that no-one considered at the time the issue of the time trigger for termination of the Exclusivity Period. I have reached that conclusion for a number of reasons. First and foremost is that this is what Mr Holleran confirmed in his oral evidence. Secondly, this was also confirmed by Mr Nardelli in his oral evidence, and he was the main human counter-party to those discussions. Thirdly, I agree with the contention of the P3 parties that if such a matter had been discussed and agreed and reported to the solicitors you would have expected it to be recorded in the terms of the Tomlin Order. It was not. Fourthly, I reject the evidence of Raymond St John Murphy, of HA Law, that Mr Holleran told him words to this effect. No file notes were produced to support such an assertion, and it is inconsistent with the oral evidence of Mr Holleran. Unfortunately I consider Raymond St John Murphy was in a position of conflict when he gave this evidence. This is because whether or not this assurance was mentioned by Mr Holleran to him, it might be thought the question of what might happen to any important time limits elapsing in a Tomlin Order which might subsequently be revived is a matter which required some forethought, and a clear position recorded in this respect in the Tomlin Order. Nothing was mentioned about it in the Tomlin Order.

138. This really marks the end of BHB's case on this sub-issue, since this assurance was the foundation on which the claim of some form of estoppel or otherwise was based. Other witnesses who repeated substantially the same phrases did so in circumstances where they were not the key parties to the discussions.

139. There is one further matter, however, which needs consideration, which is whether or not, irrespective of what was said by the parties before the Tomlin Order was entered into, that it was implicit that BHB would not be prejudiced by any delay whilst BHB waited to see if the P3 parties would perform its terms. This is not part of BHB's pleaded case, but was included in their closing submissions without objection. Given this, and the oral evidence of Mr Nardelli that this was a "fair assumption", I believe I should consider it. I should also consider it because it overlaps with BHB's contention that in reality all that was happening here was that the Tomlin Order was simply a ruse to "string them along" and after time had elapsed to then renege on the terms of the Tomlin Order strengthened by the lapse of time in the meantime. That would be a truly Machiavellian plan, but I do not blame BHB for suspecting it may be so, given other surreptitious conduct on the part of the P3 parties and the formation and use of CFJL. Ultimately, however, I do not conclude this was the plan of Mr Nardelli or the P3 parties "all along". I find that this point as regards a suspension for a more limited period of time, based on an implied term, is correct to a point, but it does not assist BHB to take their case to a point where it can be concluded the Agreements remain alive to trial.

140. The first point I note in this respect is that the grant of planning permission on 30 January 2020 is a very public matter which could not be hidden from view. Moreover, Mr Johnson of the P3 parties notified BHB of the grant promptly.

141. Secondly, BHB had 20 working days after the planning permission before the Exclusivity Period elapsed. This is effectively 4 weeks. Of course at this time the parties had reached agreement on terms which meant that the proceedings

were stayed. Temporarily the rights under the litigation, based on the Agreements, were suspended.

142. Thirdly, it seems to be in these circumstances that it would be right to conclude that the running of time under the Agreements were also suspended during the time of the Tomlin Order and until such time as the proceedings were restored. I conclude this is so not by reason of any representations but because it seems to me this is a necessary implication into the terms of the Tomlin Order, which did not expressly address the point. I consider it is a term which if put to the parties at the time they would readily have agreed to as an obvious term to agree. It was also necessary in order for it to be workable.

143. Fourthly, however, this only takes BHB so far. The Tomlin Order resulted in a suspension of the litigation and rights from 22 November 2019 to 6 May 2020, when the first order was made lifting the stay. There is then the question of whether or not the Exclusivity Period would run out 20 working days after that, or whether it would be suspended for the full period of the stay, that is a period of 6 months and 14 days. I conclude the latter. This would postpone the Exclusivity Period to some point in November 2020. The problem for BHB is however at no time during that time has BHB served on the P3 parties a "Notice to Complete". This is defined in clause 1.3 of the Exclusivity Agreement as a notice requiring "completion of the Transaction on P3", the "Transaction" being the conditional sale agreement and further options contemplated in the Heads.

144. Fifthly, I have given consideration as to whether or not it might be contended that the claim form and supporting particulars of claim might be said to constitute a "Notice to Complete". If this is so then the argument about an extension of time beyond the Tomlin Order, or after 30 January 2020, is in any event a non-point, because proceedings were issued and particulars of claim served in 2018. However this runs into the same problem as BHB's claim for specific performance, which is that their complaint is that P3 have not undertaken reasonable endeavours in good faith to enable a conditional sale agreement to be concluded on which a notice to complete could be served.

Overall conclusion on Issue 2

145. My overall conclusion on issue 2 therefore is that the Heads of Agreement, /the Exclusivity Agreement and the Addendum Agreement are no longer "live" in the temporal sense, such that there is no longer a contract which can be ordered to be specifically performed. As I have noted above, this does not necessarily conclude the question of whether or not an equity or constructive trust arises, a matter I consider under issue 6. It also does not conclude the issue of whether or not the P3 parties breached the Agreements before they came to an end. I will now turn to the breach issues.

Issue 4: Did the P3 parties breach the Agreements?

146. On the question of whether the P3 parties breached the Agreements, the parties have broken that issue down under four main headings. I shall seek to address the issues under those headings, though at times it is convenient to deal with some issues which cross-over the different sub-issues because they occurred at

the same time. Accordingly, I will generally try to consider matters in chronological order, as the events are better understood in this way.

Sub-issue (1): Did the P3 parties fail to take all reasonable endeavours and fail to move forward with good faith throughout the period of the Agreements?

Introduction

147. BHB complain that the P3 parties failed to advance negotiations towards completion in relation, in particular, to the CSA for the initial 100 acres (which was later revised down, to 84.4 acres). They contend that Mr Marsden initially drew up a contract that bore little relationship to the Heads of Agreement and the subsequent discussions between the parties, was loosely drafted and based on an inappropriate standard template. They complain that despite repeated pressure from BHB the P3 parties failed to cause Mr Marsden to draw up a revised, and appropriate, draft conditional contract (which they had said he would draw up). They contend that the P3 parties rejected the draft contract prepared by BHB's conveyancing solicitors, which reflected what was in the Three Agreements and further matters that had been agreed at meetings between the parties. They complain that the P3 parties would agree to attend meetings and then cancel at the last minute. They complain that to this day the P3 parties have not provided comprehensive disclosure pertaining to a historic A2 Dominion interest in the lands. And a central complaint is that they failed to produce a red line plan of the part of the land which they would sell to BHB from the 237 acres which was the subject of the Himley Village outline planning application.

148. For their part the P3 parties deny these allegations. By way of overview points they draw attention to the fact that whilst various issues did come up in the period May 2015 to December 2017, neither BHB nor its conveyancers made any complaints about a lack of good faith or a failure to use reasonable endeavours during this time. In support of that as Appendix B to their written opening they set out an analysis of the exchanges between the conveyancers during this period.

149. I have concluded, having reviewed the contemporaneous exchanges between the solicitors, that I should reject the contention that there was a breach because Mr Marsden is alleged, initially, to have drawn up a contract that bore little relationship to the Heads of Agreement, and the subsequent discussions between the parties, was loosely drafted, and based on an inappropriate standard template. Even if it might be contended Mr Marsden's drafting was inadequate in places, or did not always accurately record what was discussed, this does not or does not necessarily equate to a lack of reasonable endeavours or good faith on the part of the P3 parties. I have no doubt there could be criticisms of the drafting of the conveyancers on both sides, but I have seen no strong evidence to suggest that in the period up to 2017 the conveyancers were doing anything other than their best, faced with a number of difficulties, changes and challenges in moving the project forward. I consider the position changed by no later than the start of 2018, and by this time it is clear that the P3 parties were not using all reasonable endeavours or acting in good faith, and this did affect the conveyancing discussions, or lack of them. I shall explain why further below.

150. BHB's main complaints relate to (1) the alleged lack of a red line plan (2) the title numbers of the land subject to the Murfitt Henson Option and (3) the issue relating to a potential interest in the land by A2 Dominion. These are considered by me in turn below under those headings. I also consider however that the negotiations involving third parties, which is considered under sub-issue (2) below, may also be said to constitute a breach of the duties of good faith on the P3 parties' part. I shall however address those points under sub-issue (2) alongside the allegations concerning breaches of the Exclusivity Agreement.

The lack of a red line plan

151. BHB's complaint relating to an alleged lack of plan is in judgment not made out up to 2017, but in my judgment the lack of a production of a plan in late 2017 or in any event by early 2018 was a breach of the duties of good faith and to use all reasonable endeavours on the part of the P3 parties. I conclude this is so for 7 main reasons.

152. The first is that there is some justification in the contention by the P3 parties that until planning consent was granted, P3 did not know exactly what land within Himley Village was going to be permitted to be used for private residential development and could not therefore provide a definitive 'red-line' plan identifying the land which might be sold to Brooke. However this was not an insurmountable problem and Mr Marsden identified a reasonable solution, through the introduction of clause 28 into the draft CSA, which, at least as initially drafted, contemplated provisional demarcation of the lands to be transferred, but with the potential for this to be varied, using an expert surveyor to resolve any dispute in this respect. The first version of the CSA which was sent by Mr Marsden to Mr Wainright, the conveyancing solicitor initially acting for BHB, on 22 May 2015 included an early version of clause 28 which provided, in summary, that once planning permission had been granted the parties would meet to review and revise the Plans relating to each phase.

153. Secondly, the parties got very close to agreeing a CSA at various states during the period 2015 to 2017. By way of example by 14 October 2015 v6 had been produced and in a covering email from Mr Marsden to Mr Wainwright Mr Marsden indicated that Mr Wainwright's amendments were accepted. That said, the position in relation to the precise area of land remained somewhat fluid in the drafting and by this time Mr Marsden was indicating that in relation to the 100 acres some of it may need to come from other land. From the end of 2015 into the middle of 2016 there was little activity between the conveyancers, but I see no suggestion that this was due to the P3 parties dragging their heels during this time. Indeed Mr Marsden appears to have picked up the baton on 5 August 2016 to seek to recommence the negotiations, having by this time moved firm. The parties again appear to have been close to reaching agreement towards the end of 2016. At this time BHB changed its instructions from Mr Wainwright to a new firm, Stitt & Co. The solicitor involved on BHB's part then became Anna Zatouroff.

154. Thirdly, the issue of a plan was raised by Ms Zatouroff, and Mr Marsden explained (in an email sent on 1 March 2017) that "*Plans 3,4 and 5 are to denote the phasing of the purchase. Again, at the time of first drafting the contract it*

was envisaged that rough, approximate plans would be able to be prepared before we got to exchange that would then be finalised in accordance with Clause 28. The situation now is that it is still not possible for these plans to be prepared and therefore the phasing plans will need to be agreed at a later date. I have amended Clause 28 accordingly and the amended draft is attached". Attached to this email was version 13 of the CSA, which included the amended clause 28, which had now been amended to refer to the plans 3,4 and 5 being prepared after the grant of planning permission. In his oral evidence Mr Marsden accepted that, even in later iterations of the contract where the machinery and definition of the "Property" had moved on somewhat, there was nothing to stop the P3 parties from identifying the overall parcel of land to be transferred as part of the initial land transfer, even if the three phases within that might require some adjustment. The fact is however the P3 parties never did produce such a plan showing the overall land to be transferred as part of the CSA documentation at any time, and nor did they at any time produce any provisional phasing maps. Mr Costello chased for the documents in his email of 2 January 2018 noting that having the "transfer deeds and (compliant) plans referred to" were crucial for funders. According to Mr Costello, following various chasing and meetings at which Mr Johnson and Mr Nardelli cited various reasons why matters needed to be delayed, Mr Johnson produced an indicative version of a potential red-line drawing on 31 January 2018, but this was heavily flawed (it was not scaled) and the P3 parties never got to the stage of instructing their solicitor to offer up a certain parcel of land with a draft contract which could be signed off. It was Mr Costello's evidence that funders required this basic step for funding to progress. I accept that evidence and nothing was produced which could satisfy funders. Most funders would require the land over which they wish to acquire security to be identified with some precision, or sufficient certainty. I conclude that by the end of 2017 the identification and provision of plans which identified the land to be sold and annexed to the CSA was a course which could reasonably have been adopted. There is no adequate explanation from the P3 parties, in my judgment, as to why they were not produced. Whilst not strictly speaking necessary for my conclusion as to a breach of the requirement to make all reasonable, or best, efforts, I conclude that the P3 parties had various "plates" to keep spinning and that it probably suited them to keep the identification of the parcels of land somewhat vague, bearing in mind the pre-existing contract with Dekra, which contained a small parcel of land within the same area, and also the potential for some argument with A2D. In this respect I also consider they were not acting transparently, or in good faith.

155. Fourthly, by the time of the simplified, and restricted, contract was in contemplation, at the end of 2017, and into early 2018, there could be no conceivable reasonable excuse for the failure to identify the land to be transferred. Indeed the frustration and concern on BHB's part is manifest in exchanges in early 2018. Mr Winter gave evidence that throughout January and February 2018 he received no substantive communications from Mr Marsden. I accept that evidence. At about this time there were conference calls involving Octopus and Mr Marsden attended one of them and much to BHB's consternation suggested he had not started working on certain land transfers and was not engaged on the matter. Mr Marsden gave oral evidence confirming that

by early 2018 he had been told by the P3 parties to not focus on progressing matters with BHB. On 26 March 2018 Mr Winter sent an email to Mr Marsden complaining that the lack of a substantive response was "*puzzling/disconcerting/confidence-sapping*". On 27 March 2018 the parties were due to meet in London but the P3 parties pulled out at the last minute. On 28 March 2018 Mr Marsden sent an email to Mr Winter in which he stated "*The grant of planning permission is just a few weeks away and it would not make sense to sell part of the land at a substantial discount on the basis that planning permission has not yet been granted*". In my judgment this email discloses the true thinking within the P3 parties at this time. They no longer wished to be bound by the Agreements for commercial reasons. In my judgment this was not a decision they could properly make, unilaterally. They remained bound by the obligations set out in the Agreements at this time. By this time they were not acting with fidelity, or faithfulness to the common purpose contemplated by the Heads of Agreement. I bear in mind in making this finding the allegations relating to CFJL, and the further email exchanges between Mr Costello and Mr Nardelli on 28 March 2018, which I consider further under sub-issue (3) below.

156. Fifthly, after further pressure from BHB it would appear that Mr Marsden was at least instructed to write to Mr Winter to indicate that the P3 parties were still willing to negotiate in good faith. In particular in an email sent by Mr Marsden on 11 April 2018 he referred to the fact that he understood that the clients had agreed terms on the immediate sale of the Himley Village phase 1 land for 500 residential units, comprising 24.823 acres of private and 6.35 acres of social and affordable land (plus associated non-developable land, which judging by other emails in early 2018 would take the overall parcel of land to c 51 acres in all). The agreed sale price of £22,080,900 was recorded. He went on to say "*Our clients have agreed the site areas involved comprising part of Murfitt/Henson option land and part of the Pains option land. Detailed plans can now be prepared.*" This suggestion notwithstanding, detailed plans to enable the sale contract to be finalised were never prepared by the P3 parties. Mr Winter confirmed that the failure to attend to such basic property matters such as the plan and the necessary transfer forms were matters which could and should have been progressed. In my judgment the requirement to use all reasonable endeavours and act in good faith required this, and the failure was a breach.

157. Sixthly, the two main justifications provided by the P3 parties for not doing so was based on the contention that Octopus would not have advanced funds to enable this restricted transaction to proceed without outline planning having been granted, and it made sense for them to focus their efforts on securing that. In my judgment these do not provide any sufficient justification. So far as Octopus is concerned, whilst Mr Winter was originally under the impression that Octopus would require a section 106 agreement in settled form, as he communicated in his email of 11 April 2018, by 19 April 2018 it had been confirmed by Ludo Mackenzie, Octopus Head of Commercial Property, that this was incorrect and that their assumption was that the section 106 would not be signed prior to drawdown. I might add this is consistent with the credit approved heads of terms document issued by Octopus on 1 December 2017 which contained no such condition. Mr Mackenzie did confirm that they would need to see the draft section 106 and that this permitted the development or disposal

of phase 1 in isolation. Mr Johnson confirmed in his evidence that by early 2017 the P3 parties had secured a concession that 500 units could be built before the road was completed. His oral evidence was to the same effect, that the section 106 draft, at least by 2018, did not prevent development of phase 1 in isolation. By mid July 2018 both parties had done a lot more work with CDC and Oxfordshire County Council to progress the detailed drafting of the section 106, with schedules and appendices, and on 16 July 2018 Mr Johnson circulated a revised draft section 106 to Mr Costello. That ought to have facilitated progress on securing funding from Octopus. However the property matters, the plans and the transfer deeds, had not been attended to. They should have been, if the P3 parties had been using all reasonable endeavours. It would have been to the mutual benefit of the parties and achieved the desired outcome of a sale of the first of the three tranches. In my judgment it was not open to them to just focus on the section 106 alone.

158. Seventh, and as a more general point not just linked to the question of plans, it is clear that by the middle of 2018 the P3 parties' preference was to move discussions forward with L&G, and others. My findings in that respect are addressed under sub-issue (2) below and should be read as supporting my findings as breach in relation to the plans issue from 2018 and onwards.

Title numbers

159. BHB make a complaint relating to alleged confusion as to the title numbers of the properties falling within the Murfitt Henson Option. This refers to the position in relation to title number ON318263. The second schedule to the Murfitt Henson Option originally referred to title numbers ON245151 and ON245153, and not title ON318263. This issue was raised on behalf of BHB by Mr Wainwright in June 2015 and Mr Marsden subsequently made enquiries. On 11 November 2015 Mr Marsden emailed Mr Wainwright attaching the Official Copy Entry for title number ON318263. Shown on the title register was a unilateral notice which referred to the Murfitt Henson Option. Mr Marsden explained, this land was subject to the Murfitt Henson option.

160. This issue was then raised again by Ms Zatouroff on 3 March 2017. Mr Marsden replied on the same day explaining that this was the result of some intra family transfers, and that the title was subject to the option. The matter was ultimately corrected by a later supplemental agreement with the Murfitt Henson owners, dated 31 May 2017.

161. I do not consider this demonstrates any breach of good faith or lack of reasonable endeavours on the part of the P3 parties.

A2 Dominion Rights

162. The final main complaint raised by BHB under sub-issue (1) concerns the position in relation to A2D. In or around September 2016, BHB raised the issue of whether A2D, who were referred to on the title to the Murfitt Henson land, had any rights over the land. On 7 September 2016 Mr Marsden emailed Mr Nardelli explaining, amongst other things that, "A2 were not a party to the option". This message was passed on to Mr Costello. The Heads of Agreement

provided that land for private residential development would be transferred to BHB (subject to the CSA being agreed) and that P3 would provide social and affordable housing from other land. However by about 2016, or in any event by 2017, I find that the parties had come to realise it would be mutually beneficially for BHB to acquire land for the purposes of social and affordable housing as well, since this would be best promote their joint venture.

163. On 24 October 2016 BHB's conveyancer, Mr Wainwright, sent version 9 of the CSA to Mr Marsden which contained his suggested way forward. This version contained, amongst other things, a new "Buyer's Unacceptable Condition" and a revised definition of "Property". In essence, this version of the CSA provided for an either/or scenario for BHB's benefit. The new "Buyer's Unacceptable Condition" referred to the situation where A2D claimed to exercise any alleged rights relating to the land. In this scenario, if BHB wanted to, it did not have to proceed with the acquisition of the private land. If A2D did not claim and exercise any such rights, then BHB could acquire both private and social land.

164. Although this proposed amendment did not reflect the terms captured in the Heads of Agreement, the P3 parties were willing to consider this suggestion. On 26 October 2016 Mr Marsden emailed Mr Wainwright version 10 of the CSA (which made minor amendments only, and which accepted the changes made in version 9). Mr Marsden said, in his covering email, "looks like we are nearly there". On 10 November 2016 Mr Wainwright emailed Mr Marsden asking further questions in relation to A2D. Mr Marsden replied on 25 November 2016 setting out further detail on the relationship between the P3 parties and A2D.

165. As a result of BHB raising this issue, the P3 parties obtained legal advice as to the position with A2D. Mr Marsden explained in an email sent on 14 July 2017, the agreement between the P3 parties and A2 had been terminated and that the P3 parties had written to A2D to confirm the same. Accordingly, Mr Marsden suggested that references to A2D could be removed from the CSA.

166. Mr Marsden reiterated the P3 parties' position in an email sent on 29 August 2017 when he explained that "*on the basis of legal advice provided by my firm and two QC's my clients consider that the Agreement between the parties has been renunciated on the basis that, since in or around the summer of 2015, by the A2D companies' words and conduct, they have demonstrated their intention not to perform or be bound by their obligations in the Agreement. Accordingly, the P3 companies are entitled to treat the Agreement as discharged and have treated themselves as discharged from it so that no party is bound by its terms*". Mr Marsden further stated in that email, there was a confidentiality clause in the agreement with A2D and the P3 parties could not therefore give the same to BHB.

167. In these circumstances the P3 parties submitted that they took all reasonable steps in relation to the A2D issue given, in particular, that the Heads of Agreement envisaged that BHB would, subject to being able to agree the CSA, acquire rights in relation to *private* residential land only, and that the P3 parties would provide "the land necessary for social housing" from land other than the land subject to this agreement.

168. In my judgment those submissions are largely well made. The A2D issue became a bigger issue after the parties had agreed that BHB would also acquire the land for social and affordable housing. However it was still a potential issue even in relation to the private residential land, because, depending on how much development work had gone on elsewhere, A2D might still have a right to seek to develop some of the private residential units too. In addition, once the parties had agreed that the social and affordable housing would be the responsibility of BHB, not P3, it acquired greater significance. I consider however that the P3 parties put forward reasonable proposals to try to resolve these difficulties, in good faith. I also consider that the new fee earners at Stitt & Co, namely Ms Zatouroff and then Mr Winter, were entitled to raise fresh enquiries in this respect, and Mr Marsden did not suggest that it was unreasonable for them to do so when giving oral evidence. It seems to me there were further reasonable courses available to the P3 parties in relation to this point, when it became clear that BHB's conveyancers, in 2017, remained concerned about the extent of A2D's rights. Permission could have been sought from A2D for a release in relation to any confidentiality provisions and written advice could have been sought and provided. Ultimately however in my judgment these points were not the ultimate sticking point so far as moving matters forward, particularly in 2017 and 2018. By this time I conclude BHB were willing to move forward on the basis of the assurances and drafting suggested by P3, somewhat reluctantly and with some justified loss of confidence on the part of Mr Costello and Mr Murphy. Mr Holleran's perspective on the A2D issue was, however, it was eventually resolved to his satisfaction. In my judgment the A2D issue shows one of the reasons why the conveyancing process took as long as it did, and I think there was a failure to exercise all reasonable endeavours to a limited degree in the latter part of 2017. But I do not consider it has any great significance in isolation. As I have indicated above, however, it was likely to be one of the factors which discouraged the P3 parties from putting forward a final red line plan which they were willing to commit to.

Sub-issue (2): Did the P3 parties negotiate with third parties for the sale or lease of any parts of the property subject to the Agreements ("the Property") and, if so, were such negotiations with the knowledge and consent of BHB?

Introduction

169. The particular part of the Agreements which this sub-issue is concerned is clause 1.2.1 of the Exclusivity Agreement which provided restrictions on the P3 parties during the Exclusivity Period, which ran until 2020. The particular restrictions which are relevant are the prohibitions on: inviting or entertaining offers from third parties (under clause 1.2.1.2); entering into a contract for any disposition or development or the grant of any pre-emption rights (clause 1.2.1.5); and otherwise negotiating with any third party for a sale to any other third party (clause 1.2.1.6).

170. In particular BHB alleges that the P3 parties breached the Exclusivity Agreement by negotiating with third parties. The two parties which BHB have identified, in particular, are Legal & General ("L&G"), and Countryside. The complaint is focussing in particular on the conduct in relation to L&G in 2018.

They also make a similar complaint in relation to the P3 parties' negotiations with Countryside, in 2019 and 2020 and ongoing.

171. The P3 parties submit that this allegation is without substance, as even if there was a breach, the carrying out of negotiations with a third party has not caused BHB any loss. In any case, they submit that BHB knew of and assisted with P3's negotiations with L&G, at least in 2017 when BHB provided a valuation they had obtained to assist the P3 parties with their negotiations with L&G.

172. They further submit, as a result of BHB's withdrawal from the transaction and/or the grant of planning permission, the obligations in the Exclusivity Agreement are spent and P3 are thus entitled to negotiate and dispose of the land as they see fit.

Conclusions and reasoning

173. In my judgment the conduct of the P3 parties in relation to their negotiations with L&G in 2018 was a breach of the Exclusivity Agreement, and in particular clauses 1.2.1.2 and/or 1.2.1.6. I also consider it was a breach of their duty of good faith. It formed no part of the common purpose contemplated under the Heads of Agreement that the P3 parties could negotiate with third parties. I shall explain why as follows.

174. In or around October 2017 the P3 parties advised BHB of their discussions with L&G pertaining to a potential sale at Bicester. They told BHB that they would not be adversely impacted by any deal with L&G and that their position would be protected and they asked BHB for assistance in the framing of a pitch to L&G. This BHB did by providing the P3 parties with projected financial information, including a desktop valuation in relation to the potential value of the first tranche of the initial purchase (namely 500 units), which included anticipated sales values, build prices, profitability and so on (broken down by phase). This desktop valuation was from Mr Hewetson of Matthews & Goodman, the expert instructed on behalf of BHB in this case. He gave a valuation at this time of £37m, reflecting a value of £1.2m per across 31 acres. In his covering email of 20 November 2017 Mr Costello described this as being a very "rich" figure and set out a number of reasons. In his oral evidence Mr Costello said he did so because he did not want to encourage the P3 parties to think the land was too valuable as it then stood. I find that this is likely to be so. Mr Hewetson similarly rejected the notion that his valuation was rich.

175. Those discussions had continued into 2018 and by this time BHB were becoming more concerned. This concern built during 2018, partly fuelled by concerns in relation to the use of CFJL, which I consider further under sub-issue (3) below. In their evidence the witnesses for P3 were keen to emphasise that at this time Mr Holleran was suffering from personal financial difficulties, as was BHDL, and because of this he was happy for negotiations with L&G to take precedence over BHB. Mr Nardelli and Mr Johnson referred to a meeting with Mr Holleran in mid July 2018 when this was agreed. Mr Holleran accepted he was suffering financial difficulties at this time and that problems had emerged on the Chatham project. Adston presented a bankruptcy petition against Mr Holleran on 9 August 2018 and a bankruptcy order was eventually made on this

petition on 26 February 2019, though it was later annulled. On 2 October 2019 BHDL entered into a company voluntary arrangement ("CVA"). This CVA was caused in part by the problems on the Chatham project and the dispute with Adston, which problems had started earlier, and in 2018. All of this meant that Mr Holleran was inclined to allow the discussions with L&G to continue for some time, on the understanding that it would not prejudice BHB's position. It is also clear BHB only agreed to this waiver of their rights for a limited period of time and on certain terms. Thus in an email on 17 August 2018 from Mr Costello to Mr Nardelli, copying in, amongst other things, Mr Johnson and Mr Holleran, stated as follows:

"We had, at one of our last meetings agreed to finalise the Contract for the sale of the land at Himley Farm from you to us in tandem with your ongoing negotiations with Legal & General re a possible sale to them. We had agreed that were Legal & General to come forward with a suitable offer in a timely manner, this would take precedence and we would then sit down to discuss a carve us, ensuring that neither of us were adversely affected.

When we met on Wednesday we cited that this hadn't happened - there being no engagement from your lawyers, despite several chasers on the contract. From both us and our lawyers.

You advised on Wednesday that the actual L&G offer (with firm pricing etc.) has been promised and was expected by you before the end of this week, at the latest (them actually having said you would have it Wednesday morning). This is against the backdrop of it going before their Board next Wednesday. We agreed that next Wednesday, 22 August should also represents the long stop with them.

Given the tight timeline we have agreed to defer finalisation of the Sale Contract outlined above (P3/Brooke at Himley) for the few days to see how L&G pans out."

176. I find the contents of this email to be accurate. Mr Nardelli gave something of a non-committal response to this by his email of 20 August 2018, simply stating they were concentrating on L&G and that they expected a formal offer on 29 August 2018. On 4 September 2018 Mr Costello sent an email to Mr Johnson asking for further information as regards the L&G offer and suggested the need for a meeting to discuss. A meeting was organised for 12 September 2018. I have already referred to the discussions which took place at that meeting on 12 September 2018 and set out certain findings in relation to it at paragraphs 115 and 116 in the context of the issue of withdrawal. It is worth recording here the detail of the comfort letter which was sent by Mr Costello after the meeting, as an attachment to an email of 12 September 2018 sent to Mr Nardelli and Mr Johnson at 16:50:

"I write to confirm that we (Portfolio Property Partners Limited, P3 Eco (Bicester) Himley Limited and any associated parties) are in discussion with Legal & General (L&G) pertaining to the sale of lands at Himley Farm, Bicester to L&G.

We acknowledge and stand over the terms of our existing Agreements with Brooke Homes (Bicester) Limited (Brooke Homes), including the Heads of Terms and Exclusivity Agreement, both dated April 2015. Furthermore we confirm that Brooke Homes will not in any way be circumvented by any L&G deal, should it ultimately go ahead. In this regard any Agreement with L&G will only be finalised once agreed with Brooke Homes.

We agree to a longstop date of 14 September 2018 for receipt of Heads of Terms from L&G.

We confirm that we are in negotiations with no other party and confirm our agreement not to enter any such negotiations without the agreement of Brooke Homes.

Should the L&G deal not proceed to Heads of Terms by the long stop date we will immediately engage with Brooke Homes to complete the final agreement with Brooke Homes.

Both Section 106 and any L&G Agreement will be reviewed collectively (P3 & Brooke) and will not be signed off prior to agreement between us."

177. In his oral evidence Mr Johnson accepted that at this time the P3 parties had indicated to BHB that the P3 parties would agree to share some of the profits flowing from the deal with L&G with BHB, but nothing precise was agreed. I conclude that is an accurate summary of what was said. Clearly BHB needed some protection in the circumstances and the comfort letter was a way of BHB seeking to achieve that. As I have already found above, Mr Johnson gave reassuring indications that this ought to be agreeable in principle, but the P3 parties ultimately dragged their heels on agreeing to sign up to anything formal. Before this time Mr Holleran trusted Mr Nardelli and Mr Johnson. Mr Costello and Mr Doyle had started to lose faith before this time, but the connection between Mr Holleran and Mr Nardelli was a strong one. However by this time Mr Holleran "*started to smell a rat*". Mr Costello continued to chase for confirmation that the comfort letter would be signed.

178. By an email dated 24 September 2018, timed at 16:03, Mr Nardelli of the P3 parties wrote to Mr Costello in the following equivocal terms:

"As you know we continue to have discussions with Legal and General and have just had confirmation of a meeting with them tomorrow. We will be in a better position to consider then where matters stand and should meet you again as soon as we can this week".

179. By a further email on the 24 September 2018, timed at 16:45, Mr Johnson of the P3 parties stated:

"For the avoidance of doubt I did not say that the comfort letter had been agreed as drafted. I simply said that Steve was discussing it with our lawyer and we would write. As it happens Legal and General confirmed a meeting for tomorrow after we had spoken and it seemed sensible to wait until after that before discussing our position. We are very happy to meet you later this week

as soon as we can but wish to place on record that there is no legal contract between us".

180. In my judgment those communications show in clear terms that if there had any waiver or indulgence by BHB it was a time limited one which had been withdrawn by 14 September 2018 absent formal confirmation of comfort from the P3 parties which was not forthcoming. The P3 parties continued to negotiate with L&G without the consent of BHB in breach of the Exclusivity Agreement.

181. These communications were also a repudiation of the Agreements – by stating that there was "no legal contract between us". BHB did not accept that repudiation, but it was still a breach. Again, in my judgment the P3 parties had unilaterally decided it was in their best commercial interests to seek to depart from the Agreements, negotiate with L&G, and not be restricted by the Exclusivity Agreement. On 3 December 2018 Mr Nardelli provided to Mr Fellows, of Desiman, the current heads of terms with L&G. He summarised them as follows:

"You will see the minimum guaranteed price is £45M, potentially rising to in excess of £60M with overage, and a payment on signing of at least £4.5M.

This was scheduled to be signed by the end of November, but last week A2 Dominion withdraw from providing the infrastructure funding and discussions are now taking place between the Councils and government with L&G and ourselves to deal with it. This is well advanced over the last couple of weeks and delivery will be speeded up as a result.

It has delayed completing our deal with L&G until early in the New Year which is why we may need some additional back-up funding if possible."

182. The communications between the P3 parties and Desiman show that those negotiations continued during the early part of 2019 too. The P3 parties had no right to continue with those negotiations with L&G during the latter part of 2018 and into early 2019. This constituted a breach of the Exclusivity restrictions and also a breach of the duty of the duties to use all reasonable endeavours and act in good faith.

183. The negotiations with L&G appear to have ceased some time in 2019. The P3 witnesses suggested this was because of the litigation. It is not possible from the documents to confirm this is so and I make no findings in this respect. In any event from 2019 negotiations with Countryside commenced, until such time as the Tomlin Order was entered into on 22 November 2019. This, again, constituted a breach of the Exclusivity restrictions, and also a breach of the duties to use all reasonable endeavours and act in good faith. I do not consider it can be said that during the time when the Tomlin Order was in force, from 22 November 2019 to 6 May 2020, that it was a breach to enter into negotiations with Countryside during that period, since during that time the parties had agreed that this could take place. But insofar as it continued from 6 May 2020 until November 2020, and whilst I doubt anything turns on it, I conclude that again this constituted a breach of the Exclusivity restrictions, and also a breach of the duties to use all reasonable endeavours and act in good faith.

184. I should also address here certain apparent attempts by the P3 parties during this time to offer to conclude a CSA with BHB on the basis of the Heads of Agreement after proceedings were issued. They rely in particular on the fact that following issue of the present proceedings on 12 December 2018, on 14 December 2018 Mr Marsden of VWV re-sent to BHB version 6 of the draft CSA, as previously circulated on 14th October 2015 and offered to enter into the same. BHB did not accept this and in its Reply to the Defence at paragraph 21 it referred to the fact that it referred to the incorrect deposit, the absence of any accompanying redline map, the wrong acreage per phase, purporting to suggest that it would be for 100 acres of net developable private land despite only 84.4 acres being available, and noted the absence of any reference to site services or social and affordable lands.

185. On 29 July 2019 VWV sent to HA Law, now acting for BHB, a further version of the CSA and offered to enter into the same. The P3 parties submit that this version took into account some of the comments made in BHB's Reply, including amending the "Property" clause to refer to acres of land for development of both private housing and social housing. This revised draft does contain a reduced deposit sum of £3,375,920, caused by the fact that the acreage had changed from 100 acres to 84.4 acres. It does not however contain any indication that there would be a transfer of the social and affordable land. The covering letter wrongly suggests, in my judgment, that the parties could ignore the commercial and practical reasons why they both had agreed to variations from the Heads of Agreement, including on this topic. Unfortunately the positions of the parties had by this time become somewhat entrenched by the litigation.

186. Similarly, it seems to me that the response by HA Law sent to VWV on 12 August 2019, attaching a further version of the CSA which they said that BHB would enter into also has an air of unreality about it. This version contained several changes from the previous version including changing the definition of "Property" such that P3 was required to sell 100 acres of land for private residential development subject to a minimum dentistry of 14.1 units to the acre, and for P3 to provide the social and affordable housing from other land. BHB's own witnesses, including in particular Mr Costello, confirmed this would not work. Again, in my judgment, litigation had clouded the position by this time.

187. What I draw from this is that if the position is viewed from August 2019 onwards then it is mainly the presence of the lock-out restrictions which, if honoured, would have drawn the parties back into negotiations. This would most likely have been focussed, at least initially, on a narrow purchase to permit the development of phase 1 of the initial conditional sale agreement (i.e. for 500 units), or, possibly, a buy-out, in a similar fashion to what in fact was agreed in the Tomlin Order, albeit that such Tomlin Order was drafted on a suspensory only basis.

188. As for the question of whether or not these breaches are all irrelevant, because they have not caused BHB any loss, I will return to consider that under issue 5 below.

Sub-issue (3): Did the P3 parties sell or charge any parts of the Property to third parties in breach of the Agreements and, if so, what is the consequence of this?

Introduction

189. BHB's complaints in this respect relate to four different transactions: (i) the entry into the CFJL Agreement on 31 May 2017 and the supplemental agreement entered into in relation to the Murfitt Henson Option on the same date; (ii) transfer of the 10 acres of land on 7 March 2018 which was transferred to CFJL and then on to P3 Eco, which was charged to Desiman; (iii) transfer of the Pains Option land on 6 January 2020 to PPP, again charged to Desiman; and (iv) the acquisition of the additional Murfitt Henson land on 23 October 2020, with title being transferred into the name of Desiman 2.

190. The principal clauses relied on by BHB in this respect under the Exclusivity Agreement are the restrictions on the P3 parties entering into a contract for any disposition or development or the grant of the Property or any pre-emption rights (clause 1.2.1.5); and otherwise negotiating with any third party for a sale of the Property to any other third party (clause 1.2.1.6). In addition the duty to act in good faith under the Heads of Agreement is of relevance in this context.

191. The P3 parties submit that they did not sell or charge any part of the land prior to December 2017. Further and in any case, they submit that on a true construction of clause 1.2 of the Exclusivity Agreement, the P3 parties were not prohibited from granting charges over the land or any part thereof. Neither, they submit, did the grant of any such charge cause any loss to BHB, as it would not have prevented P3 from selling the land to BHB (if it had proved possible to agree the CSA). So far as the question of causation and losses I will return to the question further under issue 4 below, but in my judgment the P3 parties were in breach of the Agreements in relation to transactions (i)-(iv) identified above. I shall now explain my reasons for those conclusions.

(i) 31 May 2017 transaction involving the Murfitt Henson, CFJL and the P3 parties

192. The CFJL Agreement contained a conditional contract for the sale of land which formed part of the Property which was the subject of the Agreements. It was an agreement between the Murfitt Henson families and CFJL and so ostensibly, viewed on its own, this could not be said to constitute a breach by the P3 parties. On the same day a supplemental agreement was entered into in relation to the Murfitt Henson Option. This was an agreement which was entered into by P3 Eco and it provided in clause 4.1 that: "*The parties hereto agree that so long as the CFJL Agreement is in full force and effect that the Buyer shall not exercise the option in accordance with clause 4.1 of the Original Agreement*." Without this subordination clause the Murfitt Henson families could not have entered into the CFJL Agreement.

193. In the negotiations which led to those agreements being entered into Mr Nardelli, acting on behalf of P3 Eco, had to negotiate with the Murfitt Hensons and those negotiations involved a sale to CFJL, which was a third party. I conclude therefore this was a breach of clause 1.2.1.6. The significance or otherwise of this breach may be said to be mitigated if CFJL was acting solely

as a nominee or agent for the P3 parties, or by reason of the arrangements between them it may turn out that BHB is not in fact prejudiced by this. I will consider that question under issue 3 and 7 below. If I am wrong, however, and the negotiations and this transaction did not constitute a breach of clause 1.2.1.6, it is clear to me that it was also a breach of the duty of good faith for P3 parties to have entered into these negotiations, by Mr Nardelli, without the consent of BHB. Mr Nardelli stated in his evidence that he did not wish to tell BHB for fear it would cause a renegotiation of terms with BHB, because the CFJL Agreement provided for much more financially advantageous terms for the purchase from the Murfitt Hensons. Whether or not that is the full extent of the story, I shall return to under issues 3 and 7 below, but even taking this at face value, this was not a decision he could take without BHB's consent. He had caused the P3 parties to enter into the Agreements pursuant to which it was agreed that the parties would pursue a joint venture for the sale of land by the P3 parties to BHB and it formed no part of that agreement that a third-party company could be introduced, without the consent of BHB. Whether or not the CFJL Agreement should be treated by the court as an effective introduction of a genuine third-party actor is considered further under issues 3 and 7 below.

(ii) transfer of 10 acres on 7 March 2018

194. The transfer of the 10 acres of land on 7 March 2018 from the Murfitt Henson families involved a back to back transfer to CFJL and then on to P3 Eco, which land was charged to Desiman. BHB complain that both the transfer and the charging of the property constituted a breach of the Agreements, without their consent.

195. Mr Nardelli stated that this was not a breach of the Agreements because this was commercial land and so was never going to form part of a sale to BHB. In my judgment this is not the whole truth and does not provide a defence to this breach allegation.

196. Mr Nardelli sought to contend, when justifying the dealings involving the 10 acres without the permission of BHB, that "*the 17 acres strip at the front of the site has always been allocated in our plans for commercial land and is a requirement of CDC*". In his email to Desiman on 6 December 2017 he stated, when seeking to encourage Desiman to lend on the security of this land, that it was "*held under option and zoned for residential development in first phase which on the basis described above will have a minimum sales value of £8m*". I had initially thought this was another example of Mr Nardelli playing fast and loose with the truth, but in fairness to Mr Nardelli it would appear that there may have been some change in the land which was being offered to Desiman for security between December 2017 and February 2018 (as indicated by an email of 5 February 2018 from Mr Marsden to Mr Smith). I think this only takes Mr Nardelli so far, however, as even he accepted that in the planning application the 10 acres eventually settled on was only predominantly commercial, and not wholly so. Mr Johnson, in response to the complaint from BHB that at least part of this land was residential, suggested in paragraph 113 of his first statement that BHB could not argue this because they had not entered into a CSA. In my judgment this is not an attractive point for the P3 parties to make, given my conclusions above as to why ultimately a CSA could not be

concluded. Mr Nardelli may have sought to justify the position on the basis it was mainly or likely to be designated as commercial land, but this is in circumstances where he was not being fully transparent with BHB. In any event this point does not assist the P3 parties since they agreed in the Exclusivity Period to restrictions which covered private residential land. I find that at least part of the 10 acres was likely to involve some private residential land, or in any event it could do so. A comparison between the width of the 10 acre land as identified in the plan attached to the transfer made on 7 March 2018 and the phase plans annexed to Mr Hewetson's expert report shows the former is larger than the latter, and thus suggests not all of the 10 acres was likely to be for commercial development and a significant portion of it was or was likely to be designated for private residential development. These actions on the part of the P3 parties involved a breach of clauses 1.2.1.5 and/or 1.2.1.6, since it involved the P3 parties in a contract for any disposition of part of the residential development land and also involved the P3 parties negotiating with a third party (the Murfitt Hensons) for a sale of the Property to any other third party (CFJL). The fact that CFJL transferred this parcel of land on to P3 Eco does not mean it was not a breach.

197. I also conclude that the circumstances relating to CFJL demonstrate a lack of good faith on the part of the P3 parties and are inconsistent with reasonable commercial standards of fair dealing. I also consider that in this respect Mr Nardelli was acting dishonestly, judged by reference to reasonable and honest people. First, the first transaction involving CFJL, on 7 March 2018, was not in my judgment viewed by Mr Nardelli as wholly commercial land. I repeat what I have said in the paragraph immediately above in that respect. Secondly, Mr Nardelli did not advise or permit Mr Marsden to advise BHB of the use of CFJL until after 7 March 2018. Thirdly, in a telephone call between Mr Costello and Mr Nardelli on 27 March 2018 Mr Nardelli sought to reassure Mr Costello by telling him certain matters which were set out by Mr Costello, by way of summary, in an email of 28 March 2018 at 12:27pm sent by Mr Costello to Mr Nardelli, copying in Mr Johnson, Mr Holleran, Mr Doyle and Mr Ives. Save for one matter (which suggested that Mr Nardelli told Mr Costello that Underwood solicitors were only acting in relation to the sale of the commercial lands for the farmers, whereas I conclude Mr Nardelli did tell Mr Costello that they were acting for the lender not the farmer), I conclude that what is summarised in this email accurately reflects the gist of what was said by Mr Nardelli. It stated as follows:

"*I'm most disappointed by this response. When we spoke late yesterday evening you promised that you would send an email confirming everything you said in the call, namely: - the CFJL Property Partners is a P3 Eco entity, despite revised shareholding - lands acquired and being acquired by this vehicle are limited to the commercial lands at Himley - no other lands are being acquired by you or any associated entity (other than via the pre existing options, backed into our agreement, that we are familiar with) - this transaction in no way impinges the transaction being completed between you/P3 and Brooke Homes - you are being, and have been entirely honest with us throughout on this process - Underwood solicitors are only acting in relation to the sale of the commercial lands, for the farmers - Clarity on all of the above will be evident from land*

registry filings over the next week or two - none of these actions on your part are designed to adversely affect us - No sale will take place on the commercial land without having full consideration of all S 106 requirements, to ensure our collective position on the residential lands is protected

Unless I hear to the contrary from you before the close today I will take the synopsis above as an accurate reflection of the call and the current position. It reiterated the assurances Graham gave me when we spoke earlier in the afternoon. Again, please come back to me Graham if any of this is incorrect."

198. Mr Nardelli responded to this email on 28 March 2018, copying in the same people, at 12:54 stating: "*Your assumptions are in essence correct, for clarity, CFJL is an independent company controlled by us as directors and Underwoods acted for the lender not the farmer*."

199. Mr Nardelli was compelled to accept in his oral evidence that some of the matters listed out by Mr Costello were not correct and his email in answer was also misleading. The question of whether or not he was correct to suggest to Mr Costello that CFJL was a "*P3 Eco entity, despite revised shareholding*" and what Mr Nardelli meant by "*CFJL is an independent company controlled by us as directors*" is a matter I will consider further under issues 3 and 7 below. However, as Mr Nardelli accepted in his evidence, the suggestion that lands acquired and being acquired by CFJL are limited to the commercial lands at Himley was not correct, and nor was the suggestion that no other lands were being acquired other than via the pre-existing options, backed into the Heads of Agreement. The CFJL Agreement entered into in May 2017, taken together the variation of the Murfitt Henson Option at the same time, showed this was untrue, though this document was not disclosed until the litigation process, some time in 2020. Unfortunately I conclude that BHB's plea for honesty and transparency was met with yet further secrecy and dishonesty on the part of Mr Nardelli. Mr Johnson was copied in on this email traffic and did not say anything to correct it.

200. I also reject the submission that the Exclusivity Agreement did not prohibit the P3 parties from charging the land. In my judgment clause 1.2.1.5 which contains a prohibition on the P3 parties entering into a "contract for any disposition" of the land is wide enough to include a prohibition on any charges being granted in support of lending, without the consent of BHB.

201. In the context of transactions concerning land the word "disposition" is commonly understood to have a wide meaning. It typically and ordinarily simply refers to the grant of some interest in the property in question. This is reflected also in statutory definitions, such as the Law of Property Act ("LPA") 1925. Section 205(1)(ii) of LPA 1925 contains the following general definitions: ""Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning". This supports my conclusion that a

"disposition" as set out in the Exclusivity Agreement is wide enough to include a charge.

202. The P3 parties cited no authority in support of the proposition that the word "disposition" should have a different meaning to this in the Exclusivity Agreement. Instead, whilst they recognised that the word "disposition" may be wide enough to include a "charge" they sought to draw my attention to the fact that clause 1.2.1.5 is focussed on preventing "a contract for any disposition" and not the grant of a charge which may or may not be a contract. I recognise it is possible for a charge to be by way of a deed, without it being described as a "contract", but this point does not assist the P3 parties in my judgment, because the facility documentation in this instance did constitute a contract for loans secured by charges. In my judgment the objective of clause 1.2.1 was to ensure that should the P3 parties wish to do anything to the land in question which involved third parties acquiring rights in relation to it, or over it, they needed to consult BHB first. Further, even if I am wrong on my reading of the correct interpretation of clause 1.2.1, I consider that it was an aspect of the duty of good faith that the P3 parties should at least disclose those matters to BHB. Whether or not it can be said there is any causative loss to BHB in relation to the charge alone is another matter, and one I consider further below.

(iii) transfer of Pains Option land on 6 January 2020

203. The transfer of the Pains Option land on 6 January 2020 to PPP, again charged to Desiman, is a little more complicated, since it occurred at a time when the Tomlin Order had been entered into. The P3 parties' witnesses stated that BHB knew that the Pains land needed to be acquired and were given the option of funding this themselves.

204. Mr Holleran's evidence in this respect, part of which I have already referred to in paragraph 135 above, was to the effect that he knew that the Pains land needed to be bought but that he had indicated BHB had a funding line from Lend Invest which could be used by BHB to buy this land. The offer from Lend Invest was dated 11 June 2019 and would deliver a net amount to BHB of just over £5.5m, ostensibly sufficient to purchase the Pains land at £5m (there may be some debate as to how much of the Himley Village land was required as security for this; on one reading of the offer letter it may have required all of the land to form part of Himley Village, on another reading it was not, and this point was not explored in oral evidence with Mr Holleran). Mr Nardelli's reaction to this, according to Mr Holleran, was that P3 did not need support from Mr Holleran in this respect because of the proposed sale to the then unidentified third party developer (now known to be Countryside). I accept the evidence of Mr Holleran in this respect.

205. The way the Tomlin Order was due to work was that the UNs which BHB had lodged over the titles, including the Pains land, were not to be released until at least payment 1 (of £3 million) had been made to BHB (though BHB had agreed to permit the section 106 agreement to have priority). This payment event had not occurred. Thus whilst the parties had agreed to settle, I conclude that BHB was only agreeing to the relaxation of its rights and assertions in relation to the land on receipt of payment which was not forthcoming. Clearly if a contract had

been proposed which would have released money to BHB then either it might have been said it had consented, and the UNs could be released, or it would have been likely to give its consent. But absent that consent I find that the P3 parties were at risk should they fail to make the first payment of £3m, as indeed occurred.

206. For substantially the same reasons, therefore, as identified in relation to (ii) above, I conclude that the actions on the part of the P3 parties in relation to the Pains Option land involved a breach of clause 1.2.1.5 since it involved the P3 parties in a contract for a disposition of part of the residential development land.

(iv) transfer of additional Murfitt Henson land on 23 October 2020

207. The fourth transaction involved was the acquisition of the additional Murfitt Henson land on 23 October 2020, with title being transferred into the name of Desiman 2.

208. For substantially the same reasons as identified in relation to (ii) above this was a breach of the Exclusivity Agreement, since it involved the P3 parties in negotiating with a third party (the Murfitt Hensons) for a sale of the Property to any other third party (Desiman 2).

209. I shall come back to the true nature of this transaction, and whether or not Desiman 2 can properly be viewed as an absolute owner of this land, or whether it is in substance to be viewed as holding it effectively as security, and subject to an equity of redemption, under issues 3 and 7 below.

Sub-issue (4): Did the P3 parties act in a manner amounting to repudiatory breaches by their two emails of 24 September 2018, letter of 21/26 November 2018 and/or oral statements made on 22 November 2018?

Introduction and emails of 24 September 2018

210. I have already found, in paragraphs 178-181 above that the two emails of 24 September 2018 amounted to repudiatory breaches of the Agreements. In addition to this BHB rely on communications during November 2018. I shall briefly address those here.

November 2018 communications

211. The first are exchanges which took place on 21 November 2018. By a letter of that date BHB set out various background matters and complaints and sought an undertaking from the P3 parties that they would honour the Agreements and would not enter into any contract with L&G or any other party without their prior written consent. In reply to this, on the same date, Mr Nardelli repeated the assertion that when it became clear that BHB would not proceed to exchange in accordance with the Agreements that they came to a natural end at that point. For reasons already set out above that was not correct and I conclude this exchange also amounted to a repudiatory breach. A meeting was also held on 22 November 2018 which was explored in oral evidence where Mr Nardelli stated that there was no ongoing contract and he also, say BHB, threatened the

P3 parties that if they pursued the legal route then he would wind up the P3 parties and let the land revert to the farmers. Mr Nardelli in his evidence acknowledged he may have referred to those possible outcomes, not by way of threat but because they were possible outcomes if the matter was litigated. Again in my judgment this conduct, and indeed the continuing conduct of the P3 parties until 2020, when the Exclusivity Period elapsed, did constitute ongoing breaches of the Agreements.

Issue 5: If the P3 parties have breached the Agreements, (i) in what way (ii) did any such breach cause BHB any damage and (iii) what is the measure of any damage?

(i) Categories of breaches found

212. I have already addressed above the way in which the P3 parties breached the Agreements. I have found that there were breaches of the positive obligations on the P3 parties in the period from 2018 to 2020 as set out in the Heads of Agreement, and in particular the obligations to use all reasonable endeavours and to negotiate in good faith to translate the Heads of Agreement into a conditional sale contract. I have not made any findings, and I do not make any findings that the P3 parties were in breach of their wider obligations under the Heads of Agreement, such as to assist in locating a suitable factory site or to secure further options beyond the initial contemplated 100 acres. The former was discontinued as an allegation, before trial, and the latter was not pursued as an allegation at trial, and was not put to the witnesses. At trial BHB's case very much focussed on the complaint in relation to the conditional sale agreement. I conclude therefore that the extent of any claim for damages must be limited to at most the initial 100 acres.

213. Furthermore, as the parties themselves agreed during the course of their negotiations, acting reasonably, the true extent of the land which would be pursued initially related to 84.4 acres, or 1170 private residential units. In addition, the only aspect of that which could be pursued without the satisfaction of a Grampian condition, which requires further infrastructure work to be conducted by third parties outside the Himley Village land (which has still not be undertaken, even to date), was the initial 500 units, equating to c. 31 acres of private residential units (of c.350 units) and 6.35 acres for the affordable units. Taken together with other greenspace/corridor land a larger area of land was in contemplation (of c.50 or 51 acres), but the development land numbers are the numbers the parties focussed on for the purposes of ascertaining land value, and potential profit to be made from the development. This became the focus of the parties' negotiations towards the end of 2017 and resulted in the suggestion, at the end of 2017, of a narrower initial contract focussed on the first 500 units. In my judgment this reflected, to a large extent, and with the possible exception of the failure to provide plans starting a little earlier, and putting to one side the breaches in relation to CFJL which in my judgment fall into a different conceptual category, both parties discharging their duties to negotiate and act in good faith.

214. I have also found breaches of which might be described as the negative obligations on the P3 parties, and in particular breaches of the Exclusivity

Agreement and the restrictions contained in that document. In my judgment this requires a different focus, because the question is more directed at what would have happened if these restrictions had been honoured. In my judgment this is likely to have had a two-fold effect. The first was to draw the parties back to the negotiating process in relation to the narrower sale I have described above. The second possibility is it would have encouraged the parties to explore a financial settlement to be paid to BHB for the P3 parties to be released from their obligations, as indeed happened in 2019 in relation to the Tomlin Order.

(ii) Causation

Principles – loss of chance?

215. A preliminary question arises in relation to causation which is whether or not the balance of probabilities test should apply, or a different test based on this case being viewed as a loss of opportunity/chance case, in which case the question is whether a real and substantial chance of some benefit has been lost. The P3 parties submitted that it was the former and that BHB must establish on the balance of probabilities that but for the breach it would have entered into a conditional sale agreement on terms which were financially advantageous to it. BHB initially advanced its case on the basis that no discount should be applied to its claim however when the question was raised by me in trial as to whether or not the claim should be viewed instead as being a lost opportunity BHB conceded this might be so and it advanced its submissions in closing on both bases. The P3 parties maintained their position in closing that the matter should be assessed on a balance of probabilities basis, but assisted me by providing further relevant case law and commentary on the matter. I shall now briefly consider the same.

216. There is little direct authority on the question of whether or not a claim for breach of reasonable endeavours, or similar obligation, to enter into an agreement in the future arrangement of some sort is to be assessed on the basis of a balance of probability basis or loss of chance basis because historically the law has treated such an agreement or term as being unenforceable for reasons I have already mentioned above. Longmore LJ noted in *Jet2.Com Ltd v Blackpool Airport.Ltd* [2012] EWCA Civ 417 at [65] that assessing damages for breach of a reasonable endeavours obligation could be "*problematical*." Trietel, *The Law of Contract*, 15th Ed, suggests at 2-100, footnote 508, that damages might be awarded on the basis of a loss of chance and refer in support of this suggestion to *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891; [2006] 1 Lloyd's Rep. 161 at [118] per Longmore LJ; and *Walford v Miles* (1991) 62 P & CR 410 at 423 (Bingham LJ (dissenting). *Walford v Miles* was in fact a case of a negative obligation, not a positive one, but the obligation under consideration in *Petromec* was a positive one. Longmore LJ emphasised in *Petromec* at [118] that the courts normally can and do find ways to assess losses, even in problematical cases, stating as follows: "*No doubt there could be argument in the present case as to whether, if negotiations did not proceed (but should have proceeded) in good faith, they would have embraced an uplift and whether, in that event, the uplift would have been in any particular amount, but it is not uncommon for courts to have to assess, by way of calculating damages, whether a claim against a third party*

was good or not and for how much it might have been settled. Any exercise in relation to uplift would raise similar (but not insurmountable) problems." When assessing damages by reference to the conduct of third parties the courts will typically resort to the loss of chance approach. The law is tolerant of imprecision, and when assessing economic loss that loss should be measured or estimated as accurately or reliably as the nature of the case permits: see *One Step (Support) Ltd v Morris-Garner and another* [2019] AC 649 at [95](8).

217. A "loss of chance" approach was adopted in the context of breach of an agreement not to negotiate, in *Dandara Holdings Ltd v Co-operative Retail Services Ltd* [2004] EWHC 1476 (Ch). This case concerned a claim that the defendant, "CRS" for short, had breached an exclusivity agreement and claimed damages on the basis that if that agreement had been honoured then the parties would have entered into a contract on beneficial terms to the claimant. At [14] Lloyd J (as he then was) accepted a loss of chance approach as being the correct one and analysed the matter as follows:

"*Cases where the damages claimed are for the loss of a chance of a benefit start before Chaplin v. Hicks [1911] 2 KB 786, but that is as far as I need to go back. There has been a good deal of development of the cases recently, and Counsel cited to me Allied Maples Group Ltd v. Simmons & Simmons [1995] 1 WLR 1602 and also Coudert Brothers v. Normans Bay Ltd [2004] EWCA Civ 215. In most cases, including those two recent cases, a loss of chance case depends on assessing the likely hypothetical act of a third party. In the present case it depends on the hypothetical act of CRS or CWS. In that respect this case is like Chaplin v. Hicks rather than those recent cases, in that what the Claimant complains of is that it was deprived, by CRS' breach, of the chance of entering into an agreement with CRS itself (or its successor, CWS). Likewise, Miss Chaplin complained of being kept out, in breach of contract, of a competition among 50 people, to 12 of whom the Defendant was committed to offering a contract. It could not be said for certain that he would have offered her a contract, if she had been able to take part, but she lost the chance that he would have done so. That does not seem to me to alter the principle, namely that the Claimant must show that, as a result of the Defendant's breach, it has lost a real or substantial, not merely a speculative, chance of gaining the benefit in question. Here the benefit is said to be that of entering into a contract to buy Sandbrook Park at £15.25 million, being less than its market value, so that the Claimant would have been able to make a profit on it by resale.*"

218. In my judgment the restriction in that case is similar to the restrictions contained in the Exclusivity Agreement in this case, which supports a loss of chance approach being taken in this case.

219. In opposition to this the P3 parties cited the decision of Andrew Burrows QC in *Palliser Limited v Fate Limited (In liquidation) & Others* [2019] EWHC 43 (QB). This case concerned a claim in damages for damage caused by the negligence of one of the defendants, Fate. Fate entered liquidation and the claim was pursued against the insurers under the Third Parties (Rights Against Insurers) Act 2010. Palliser's claim for loss of profits failed, but by way of *obiter dicta* the following was said at [27], and this is relied on by the P3 parties in this case:

"Before looking at the evidence, I should make clear the relevant standard of proof that, as a matter of law, I am required to apply. This was not in dispute between the parties. The burden of proof lies on the claimant and, even though this issue goes to quantum rather than liability, the test that the claimant must satisfy can be referred to as the 'all or nothing balance of probabilities' test. Although when assessing damages resting on hypothetical events, damages can be awarded that are proportionate to the chances – one might call these 'damages for loss of a chance' or, synonymously, 'damages for the chances of loss' – such proportionate damages are inappropriate where the uncertainty is as to what the claimant (in contrast to a third party) would have hypothetically done. The correct picture of the law on proof in relation to damages is therefore that where the uncertainty is as to past fact, the 'all or nothing balance of probabilities' test applies. Where the uncertainty is as to the future, proportionate damages are appropriate. Where the uncertainty is as to hypothetical events, the correct test to be applied depends on the nature of the uncertainty: if it is uncertainty as to what the claimant would have done, the all or nothing balance of probabilities test applies; if it is as to what a third party would have done, damages are assessed proportionately according to the chances. For that general distinction between past fact and future or hypothetical events, see Mallett v McMonagle [1970] AC 166 at 176 (per Lord Dilock). That there is a contrast between the test applicable to what hypothetically the claimant would have done and what hypothetically a third party would have done emerges from cases such as Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602 , CA, and 4 Eng Ltd v Harper [2008] EWHC 915 (Ch), [2009] Ch 91 , at [41] - [92]. In the Court of Appeal in Gregg v Scott [2002] EWCA Civ 1471, [2003] Lloyd's Rep Med 105 (affirmed without discussing this point at [2005] UKHL 2, [2005] 2 AC 176), Mance LJ, as he then was, said at [71]: '[T]he rationale of the distinction … must, I would think, be the pragmatic consideration that a claimant may be expected to adduce persuasive evidence about his own conduct (even though hypothetical), whereas proof of a third party's hypothetical conduct may often be more difficult to adduce.' There is also a very helpful passage in J Edelman, McGregor on Damages (20th edn, 2017) at para 10-062 (the same wording was in the previous edition written by the late Harvey McGregor, McGregor on Damages (19th edn, 2014) at para 10-060): 'While at first glance it may seem somewhat strange to have different tests applicable to hypothetical acts of the claimant and hypothetical acts of third parties, it can be seen to make sense, with nothing at all arbitrary about it and with no need to bring in public policy to justify it. For a claimant can hardly claim for the loss of the chance that he himself might have acted in a particular way; he must show that he would have; it cannot surely be enough for a claimant to say that there was a chance that he would have so acted. The onus is on a claimant to prove his case and he therefore must be able to show how he would in fact have behaved. There is no such onus on third parties.'

In this case, the essential uncertainty on quantum that I am faced with is as to what the claimant, Palliser, would hypothetically have done had there been no fire at 228 York Rd. The 'all or nothing balance of probabilities' test therefore applies."

220. This provides no substantial support for the submission that the balance of probabilities test should apply in this case. It was a case where the uncertainty on quantum rested on what the claimant would have done, and was not considering obligations similar to those under consideration in this case where the uncertainty concerned more than simply the claimant's actions. The uncertainty arising in this case does not just depend on what BHB would have done, but also on what the P3 parties would have done, what the option holders would have done, and what third party funders would have done. What the extract does emphasise, however, is that where a claimant can adduce evidence as to what it would have done the court will expect it do so and will assess matters on the balance of probability basis, but beyond and outside that the courts will be willing to adopt the matter more pragmatically and flexibly. Generally speaking where the assessment requires consideration of a combination of a claimant and a third party's actions it should be assessed on a loss of chance basis: see *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 at [20].

221. I conclude, therefore, in the circumstances that the correct approach to take in this case is to assess matters on a loss of opportunity basis, since the assessment requires consideration of not just what the claimant would have done, or indeed what the defendant would have done, but also what third parties would have done. This means that the question is focussed on whether or not BHB has suffered a loss of chance of securing a conditional sale agreement on beneficial terms. Nevertheless, I will also make findings as regards what I consider the most likely outcome to be in that respect too.

Causation - findings

222. Turning, therefore, with those principles in mind, to my findings of fact on causation, I have already noted in paragraph 187 above, that if the breaches are viewed from August 2019 onwards then it is the presence of the lock-out restrictions in the Exclusivity Agreement which, if honoured, would have drawn the parties into negotiations which would most likely have been focussed on a narrow purchase to permit the development of phase 1 of the initial conditional sale agreement (i.e. for 500 units), or possibly a buy-out, in a similar fashion to what in fact was agreed in the Tomlin Order. I conclude the phase 1 sale was still most likely at this stage, but I think the parties would have also explored a negotiated release. My reasons for this substantially overlap with those set out when considering breaches from the start of 2018, which I set out below.

223. The breaches in this case, however, took place from the start of 2018, if the CFJL breaches are to be put to one side for present purposes. They involved breaches of both the positive obligations of negotiating using all reasonable endeavours and in good faith, as contained in the Heads of Agreement, and the negative obligations contained in the Exclusivity Agreement. In my judgment, viewed from the start of 2018, it is likely that the parties would have successfully concluded a conditional sale contract at least on a narrow basis, by reference to the phase 1 development i.e. for 500 units. It is possible that it would have included provision for involvement by BHB in relation to a wider scheme, but whether it did so and on what terms is much more speculative. I will concentrate therefore in this judgment on the 500 unit, phase 1, aspect. I

deal with what remained of the initial 84.4 acres of contemplated private residential development separately in paragraph 278 below. In percentage terms I assess the prospect of a narrow contract on phase 1 for 500 units being achieved, and being acquired by BHB as a developer, as being 60%. I arrive at the above conclusions for the following reasons:

224. First, as I have already noted at paragraph 157 above, BHB had secured credit approved heads of terms from Octopus on 1 December 2017 which contained no requirement that the section 106 agreement be signed and which would, if it had completed, have enabled a sale of phase 1 land to BHB without any conditions. On the contrary, it was a special condition of those terms that a section 106 would not be signed. This was reinforced and reiterated by Ludo Mackenzie, Octopus Head of Commercial Property, on 11 April 2018.

225. Secondly, as also noted in the same paragraph above, the draft section 106 agreement then in contemplation, and as in fact subsequently drafted, permitted the development or disposal of phase 1 in isolation. As such whilst I do not doubt that Octopus and their lawyers wished to see as much as possible, and a section 106 in a state as advanced as much as possible, it seems most likely to me that if the P3 parties had shared with Octopus and BHB the most recent section 106 drafting, and communications with CDC and Oxfordshire County Council, those would have reassured Octopus that phase 1 could proceed in isolation.

226. Thirdly, I note that other third party offers also appear to have contemplated that such a phase 1 contract could proceed at that time. By way of example, in the offer letter from TWG to BHB dated 17 January 2018, TWG made a proposal for the purchase of phase 1 at a price of an initial sum of £33m for a 500 unit scheme, with an overage also on offer on top. An offer of a similar sort of order was made towards the end of 2017 and into early 2018 by the Sanctuary Group.

227. Fourthly, even if Octopus had decided to only offer a lesser sum until the section 106 agreement had been obtained, or make the release of certain funds conditional on that, such that the contract between BHB and the P3 parties was also conditional to some degree then there is no reason why the P3 parties would and should not have agreed to that, as long as it delivered sufficient sums to gather in the land required under the Murfitt Henson Options and Pains Options. There was plenty of equity to do so by that time, given the increase in value of the land. We now know such a conditionality was met, in January 2020, when the section 106 agreement was granted, and in my judgment both parties knew that there was a good prospect of obtaining the section 106 agreement on this scheme which enabled a build out of phase 1 alone from 2018.

228. Fifthly, it is possible that on the table for discussion, as in the case of L&G, would have been a potential buy-out of BHB's rights, but I accept the evidence of Mr Costello and Mr Holleran that BHB's primary desire was to acquire the land for development by BHB. This remained the position in 2018 notwithstanding the problems they had suffered on the project at Chatham with Adston and its impact on Mr Holleran and BHDL. They were not restricted to building out the project at Himley Village with Adston or using a modular method.

229. Sixthly, in December 2017 Mr Nardelli's view as communicated to Desiman (as referred to in an email of 6 December 2017 between the broker and Desiman) was that the residential land was worth in the region of £1 million per acre. This meant that the price agreed with BHB of £800,000 per acre would, in his view, likely deliver a profit to BHB on the basis of land value as it then stood, alone, but he was also motivated by being able to move the overall project forward. If he knew that he was bound, until after the section 106 agreement had been granted, to continue negotiations in good faith with BHB, and also could not have negotiations with any other third parties, he would have concluded that an agreement should be concluded with BHB as quickly as possibly, albeit on the best terms reasonably available. That is because the Murfitt Henson and Pains Options were all going to have trigger dates associated with the grant of planning. Putting it simply, the P3 parties could not afford to wait and jeopardise those valuable rights, or lose them.

230. Seventhly, it is not insignificant that the contract negotiations with Countryside, which commenced from 2019, were also on the basis of a phase 1 contract. So too the more recent offer from Vistry, dated 14 June 2021.

231. Eighth, whilst Octopus appear to be the front runner, there were also other funders who were willing to lend, albeit possibly on a short term basis and with higher rates of interest, and possibly in relation to a smaller contract. One example is the offer from Lend Invest, which was not subject to any conditionality. Another example is Desiman. The short point is that the value in the land the ability to secure the land under the Options was a valuable right against which funding was likely to be possible in some shape or form.

232. Ninth, even if BHB ultimately decided not to build out for itself, it recognised that it was likely to be in its best interests to secure and complete a contract with the P3 parties on the basis of the Heads of Agreement, subject to such reasonable adjustments and variations as had already been negotiated and potentially subject to further ones. It could have sold on the rights for a profit even if it had not acquired any profit from developing the land. Indeed the value in the Heads of Agreement contract, and the fact that the parties had ended up closer to planning consent being granted, was a reason why Mr Nardelli and Mr Johnson felt that they wished to escape from the Heads of Agreement.

233. Tenth, there is likely to have been no difficulty in exercising sufficient of the options under the Murfitt Henson and Pains Options so as to secure the land to enable such a contract to be concluded. They were willing and had honoured their contracts. Indeed it may be said that their honour extended beyond the strict wording of such contracts, and it is notable they did not seek to take advantage of any informal extensions requested by Mr Nardelli. He had a good relationship with them. And as noted above, I conclude funding would have likely be in place either from Octopus, or other lenders.

234. I turn now to consider the question of the CFJL related breaches, which occurred in 2017, and the allegations of breach associated with the land being charged to Desiman, which occurred in 2018 through to 2020.

235. So far as the CFJL breaches are concerned, as I have found above, I conclude that the P3 parties should have disclosed to BHB that they intended to enter into further negotiations with the Murfitt Henson families if that involved a third party company. The question arises what would have happened if they had done so. The potential saving to the P3 parties in doing so was to secure a c. £75k per acre reduction on the acquisition price, but it also required, potentially, some further payments to be made, up front. As it happens some of the Pre-Payment made by BHB was used, I find, for enabling at least some of the additional up front monies required to be paid to the Murfitt Henson families under the CFJL Agreement. The coincidence between the payments made by BHB to the P3 parties in that respect is striking and the P3 parties did not adduce any evidence to rebut the inference that the money had been used for this purpose. It would appear that at least £200,000, and possibly more, was paid by BHB to the P3 parties to facilitate the CFJL Agreement, without its knowledge. It seems likely to me in these circumstances that BHB would have required some benefit to come to them in return.

236. On the other hand it is also possible that the P3 parties might have been able to simply negotiate better rights with the Murffit Henson families by way of variation to the existing Option and to do so in such a way that it would not involve a breach of the Exclusivity Agreement. I remind myself of the principle that damages are to be assessed by reference to the principle that the defendant can ordinarily be expected to choose the compliant contractual route which costs them the least. I also remind myself that under the Addendum BHB had some contractual protection in relation to payments made to the P3 parties.

237. In my judgment the most likely outcome is that CFJL would not have been used at all, and instead BHB would have provided the support it did, together with any third party lending which would have been disclosed to it. Whether or not this was secured by and following a transfer to BHB, or via an arrangement with the P3 parties, does not affect the matter for causation purposes. However I think it is likely that BHB would have secured some further interest in the land at Himley Village, probably on the basis that part of the land would be viewed as being purchased and owned by them. Overall, therefore, I consider that this is a further factor in support of the conclusion that the parties would have travelled further down the joint venture than they did, and probably earlier than might otherwise have been the case, rather than significantly altering the question of causation and losses beyond that I have already set out above. I also bear in mind, when deciding that ultimately these breaches do not affect the causation and loss findings I have already made to any substantial degree, the other findings I have made under issues 3 and 7 below.

238. Similarly, in relation to the question of the back-to-back transfer in relation to the 10 acres (held by P3 Eco), and the charges to Desiman in relation to the 10 acres and the Pains land, I consider those constituted breaches of the Agreements, but I do not consider they caused BHB to suffer any independent losses. BHB is not a party to those agreements. If BHB had a proprietary claim, and if Desiman had priority, then a loss would have been suffered by BHB. But, for reasons I explain under issues 6 and 10 below, I do not consider BHB have a proprietary claim, or are entitled to a claim for specific performance, or a

finding of a constructive trust. BHB contend that they might have advanced the money, or perhaps would have been able to identify a lender who would have been willing to lend at better rates. If that is so, then it is possible the P3 parties might have lost out. In my judgment the significance of these breaches is more that if the P3 parties had abided by the Agreements then this is likely to have reinforced the parties down the path of a sale to BHB on the lines and for the reasons I have already identified above.

239. The same applies in relation to the transfer to Desiman 2. I do not consider this transaction has caused BHB to suffer an independent actionable loss for substantially the same reasons.

(iii) Measure of damages and quantification

Preliminary point 1 - Negotiating damages?

240. Before considering the measure of loss and quantification based on the causation approach I have identified above, I should mention one other possible approach to measuring and assessing losses in this case, which is whether not the loss in this instance might be best assessed by reference not to a loss of chance of a contract for conditional sale of land being concluded on beneficial terms to BHB but on a "negotiating damages" basis. This was the subject of some considerable discussion in *One Step (Support) Ltd v Morris-Garner and another* above. It is not uncommon where there is a restriction which prevents a person from being able to deal with land, without the consent of another person, that the court will conclude that one possible method for quantifying damages is by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. In closing submissions BHB submitted this was one approach open to me and invited me to make such findings if I considered it appropriate to do so, by way of a "*minimum*" sum. By contrast the P3 parties submitted that this approach was not open to BHB because it was not a case which had been advanced by BHB, at least until closing. I note in passing that in paragraph 43 above that BHB had reserved their right to seek to recover "*a minimum sum of not less than £12m agreed to be paid to them*" under the Tomlin Order. However, it was not being advanced in the manner I have identified, and plainly an order to enforce the Tomlin Order is no longer possible, given its terms and the fact that BHB elected to lift the stay. I need to consider carefully, therefore, whether it would be fair for BHB to be permitted to run this point now, and I have regard in this respect to the recent guidance from the Court of Appeal in *Satyam Enterprises Ltd v Burton* [2019] EWHC 2584 (Ch) at [35]-[36].

241. Mr Reynolds submitted that I could not properly draw an equivalence between the negotiation which took place in relation to the Tomlin Order and the hypothetical negotiation exercise which is in contemplation in relation to a breach of the Exclusivity Agreement. He submitted that the negotiation there was because the P3 parties felt compelled to negotiate due to the presence of the UNs on the titles, and to compromise the very substantial damages claim being advanced. He submitted this was very different from the position of assessing a hypothetical negotiation and that the parties had not adduced evidence as to what their respective positions would have been in such a negotiation. I accept

the submission that it cannot be assumed that there is necessarily an equivalence between the two, but I struggle to see how the factors which are likely to be relevant to the assessment of a hypothetical negotiation whereby the rights of the BHB are being bought out is any different from the factors which the court is required to consider when assessing damages by reference to either a loss of chance basis or the likelihood of the parties concluding a conditional sale agreement. The fact that the parties themselves contemplated a potential "carve-up" in relation to L&G was of course a feature of the evidence and it seems to me I cannot properly consider what the most likely outcome would be without considering the possibility that a negotiation by way of release may have occurred. Nevertheless I accept that it is possible the parties might have wished to adduce further evidence, including, potentially expert evidence on the valuation of what the hypothetical bargain might have been, if a claim for negotiating damages had been made in BHB's particulars of claim. Having that in mind, I will approach the matter cautiously. I consider it would only be appropriate to assess damages on this basis if I concluded that it was the most likely outcome on the hypothetical counterfactual I need to consider, which is not the same as the actual events which occurred. I do not conclude it is, so the point does not arise. I should state however that if I had concluded that a carve-out, whereby BHB would have agreed to the release of its rights for a monetary sum, then I would have concluded it would only be appropriate to make findings on liability and I would have given the P3 parties, and BHB, the opportunity to submit evidence to show what they contend that negotiation figure would be, and for there to be a further hearing on quantum to decide that matter.

Preliminary point 2 – the limitations of the expert evidence adduced

242. I should also mention here that I did explore with the parties in closing submissions whether either side wished me to adjourn the question of quantum, to permit further evidence to be adduced on quantum issues in relation to, in particular, the question of site servicing costs. I raised the question of whether what was in fact required was a quantity survey report supported by a construction analysis. I also noted in closing the expert valuation evidence which was adduced had some unsatisfactory features, and did not provide me with much reliable evidence on site servicing costs of this site. Both sides recognised that the experts had in some respects struggled to provide evidence which would assist the court on certain key areas, including site servicing costs, but nevertheless neither side wished to have an adjournment, and both asked me to do the best I could with the material I had in front of me. I will now do so. I shall now turn to identify some of the key features of the expert valuation evidence and where that evidence assists, or not, as the case may be.

The expert evidence

243. BHB called valuation expert evidence from Mr James Hewetson of Matthews & Goodman. He is an experienced chartered surveyor with over 40 years in practice. He had inspected the site in December 2017 and also again in June 2021. He provided valuations as at September 2018 and June 2021, though he also confirmed in his oral evidence that the development land values at Bicester had remained more or less static since 2017. As he provided valuations in 2017 I will start with those when analysing his evidence. I simply note here however

that Mr Hewetson's valuations concentrated on phase 1 – the first 500 units, and valued this aspect at £39 million. He also was of the opinion that the build out profit on phase 1 amounted to £36 million. The P3 parties called Mr Thomas Lindley of Savills. He is also an experienced chartered surveyor. He provided valuations as at December 2017, February 2021 and as at May 2021. He did not offer any valuation for the phase 1 scheme, but instead provided a valuation of 84.4 private residential acres, the pared back version of the initial 100 acre contract contemplated under the Heads of Agreement, which translated into valuations in 2021 of £39.2 million or £27.5 million in December 2017 in relation to scheme for 1,190 units. The essential difference between those figures was because he made a deduction in 2017 for the uncertainties associated with the planning process at that time. Whilst I do not doubt that both experts were doing their best to assist the court on matters they were instructed on, this short summary shows that the experts were passing like ships in the night. The court did not get the benefit of two opinions on the same thing. In addition, for reasons which became apparent, there were substantial uncertainties in the opinions they offered and in key respects they were making assumptions which were outside their field of expertise, based on information from others. This makes the quantum assessment task necessarily more imprecise than it might otherwise have been. As I have noted above, both parties have indicated they are content for me to pursue this approach.

244. I shall approach my assessment of the expert evidence by reviewing the evidence of Mr Hewetson first, interposing where relevant, any salient evidence of Mr Lindley. I will then conclude by considering again the evidence of Mr Lindley. I take this approach because it was only Mr Hewetson who provided a valuation of the initial 500 units. That does not mean I should ignore what Mr Lindley has to say, but it is necessarily less helpful to the task at hand.

245. The first report produced by Mr Hewetson was a desktop exercise, dated 17 August 2017. The land he was being asked to value was described as "*Phase One… comprises 500 units, of which 350 are for the private sector and 150 for Intermediate tenure, on a developable land area of 12.55 hectares (31 acres)*". He considered in this report various comparables, and he also carried out a gross development value appraisal. He concluded on the basis of that appraisal that the 350 private sector houses would sell at £370 sq ft, with the affordable housing at lesser sums. Pausing there I note that on the question of the value of affordable housing to a developer Mr Hewetson's evidence was that this was frequently viewed as being simply a cost item, which would not generate any profit for the developer. Mr Lindley agreed with that, though he considered more recently some profit was capable of being made on social and affordable housing. On balance I find that this point is likely to have been viewed as broadly profit neutral at the time and does not require adjustment to the figures. Turning back to the first report of Mr Hewetson, and his appraisal, he projected an overall revenue of £183 million. Against that various deductions had to be made, and he ended up at a residual site valuation of £37 million, allowing for developer's profit of 20% on private sales only at £25.9 million. I set out the appraisal table below:

Item	Factor	Amount
Sales Revenue		
350 Private Sector Houses	£370 per sq ft	£154,293,700,
105 Affordable Rent Flats and Houses	65% of market Value	£ 19,227,360
45 Shared Equity Flats and Houses	55% of Market Value	£ 9,647,040
Total		**£183,168,100**
Build Cost	£140 psf base build	£ 79,171,400
Contingency	5.0%	£ 3,958,570
Site Servicing	£15,000 per unit	£ 7,500,000
CIL/Section 106	£10,000 per unit	£ 5,000,000
Development Monitoring Fees	7.0%	£ 6,344,098
Acquisition Costs	6.5%	£ 2,401,354
Finance	7.0%	£ 10,269,340
Sales agents and legal fees	1.7% (Private Sales)	£ 2,622,993
Marketing Budget	2.0% (Private sales)	£ 3,085,874
Developer's Profit	20% (Private Sales Only)	£ 25,870,570
Residual Site Value		£ **36,943,902** £ **37,000,000**

246. The two particular cost figures which are worth keeping track of are the site servicing costs, which Mr Hewetson estimated at £15,000 per unit, or £7.5 million in total, and the section 106 costs of £10,000 per unit or £5 million. In relation to the former costs, in particular, Mr Hewetson indicated he was guided by what his client, BHB, had told him about their forecast site servicing costs. I note this is reflected in his earlier analysis, in August 2017, which had been shared with the P3 parties.

247. Following an inspection of the site Mr Hewetson produced a further valuation report of the market value of the phase 1, 500 unit scheme, in December 2017. In this report he provided a market value opinion of £40 million. He looked at comparable evidence and also carried out a development appraisal. His figure for the overall gross development value, at £183,168,100 remained unchanged. In this report he concentrated on a comparative method, and concluded a market value per plot of £80,000 equating to £1.29 million per acre, which delivered the headline valuation, though noted that a slightly adjusted appraisal came in at £36.5 million, which was used as a check.

248. Thirdly, he then produced the report for these proceedings, the headline figures of which I have already summarised. The acreages in the different valuations vary to some degree, but the valuation process relating to 500 units remains constant. Much of the report is built on the earlier reports mentioned above. He again considers comparable evidence, and reaches similar conclusions. However, Mr Hewetson also considers in this report current offers for phase 1.

249. There were three offers Mr Hewetson considered, though he only appears to have placed any substantial reliance on two of them. In particular he took into account, in particular, an offer from Vistry on 5 October 2020, and a detailed revised offer as set out in a letter of 14 June 2021. This confirmed an offer for the 500 unit development at a net purchase price of £39 million. It assumed a section 106 contribution of just under £10 million based on an overall assumed section 106 cost at £32 million. It is not clear what figure they have provided for in relation to site servicing. Mr Hewetson concluded that this was a very detailed letter and provides the strongest support out of the offers for the price of £39 million.

250. The second offer Mr Hewetson considered was in relation to an offer from Countryside. He was somewhat impeded in advancing his opinion in this respect by the fact that the draft contract he had been provided indicated, in the latest draft, an offer of £27.5 million, but without any plan. That plan was only produced after his evidence had been given, and on the face of it appears to show a proposed sale relating solely to the phase 1 land, though not all the schedules or appendices are provided, and some of the clauses referred to in the definition of property are not contained in the draft. So it is not entirely easy to work out whether or not the offer may involve, similar to the TWG offer, some element of separate overage or other transfer of value associated with other later transfers (or, precisely, where the section 106 contributions would fall; see paragraph 40 above in this respect). Mr Hewetson went on to note, however, that the amount assumed for section 106 contributions was very high compared with Vistry, with a difference of about some £6 million. On closer inspection of the Vistry offer in oral evidence Mr Lindley identified what he considered was a likely error in the Vistry offer in relation to the section 106 costs, because it is now known the section 106 costs total c. £45 million, not £32.5 million as assumed by Vistry. An adjustment on this basis would bring the offer down to £34 million.

251. Before stating his conclusions, at paragraph 9.5, Mr Hewetson summarises his valuation methodology, and he reiterates that in arriving at his opinion, of what he now describes in his report as the "Market Selling Value", he has had regard to the offers he referred to earlier in his report, with support from land sales (i.e. a comparative approach) and the results of his residual appraisals (original and as updated). He was criticised for this approach by Mr Reynolds, on the basis that the least valuation methodology is likely to be offers, though it was not suggested they could never be taken into account. In my judgment there is some justification in this criticism, though in reality Mr Hewetson's opinion can clearly be seen to have been based, originally, on a comparable and residual valuation approach. I agree however that care needs to be taken in relation to how much reliance can be placed on the Vistry or Countryside offers for two main reasons. First, they are not consummated bargains. Secondly, they do not contain all the information relating to the bargain which might be relevant to their assessment. In my judgment some of the difference between the Vistry and Countryside offers may be explicable on the basis of different assumptions as regards section 106 costs, though I cannot discount the possibility that where these costs actually fall may not be entirely visible, or that there may be other relevant factors not known to me.

252. Mr Hewetson was also criticised for valuing the phase 1 land on the basis of the "Market Selling Value" and he was asked in questions in oral evidence and in advance of trial what he meant by this. In the clarification he gave in his letter of 30 July 2021 he explained that this description was intended to reflect his assumption that the buyer was a developer, as opposed to the price paid by someone in the position of a master developer, who might take on the project and build out part of it and then sell it on, having made a profit, to a developer. Whilst I agree the label is unconventional, I accept the oral evidence of Mr Hewetson that it did not ultimately affect his view of market value and a developer was most likely to pay the highest price for the land. I accept that evidence. This demonstrated another significant difference between the expert evidence of Mr Hewetson and Mr Lindley. Mr Lindley assumed, due to the scale of the project, that the buyer would be a master developer who would obtain reserved matters consent and install all infrastructure necessary in order to sell serviced parcels to housebuilders and other housing developers. The difficulty with this is two-fold. First, it is valuing a different scheme from the 500 units. Secondly, it does not reflect the valuation exercise which I need to concentrate on, which is the likely shape of the narrow phase 1 contract as negotiated by the parties having regard to what is in the Heads of Agreement, and seeking to capture the same in the Heads of Agreement, save where otherwise varied.

253. Before turning to the statement of agreed and not agreed matters by the experts ("the Joint Statement") I should consider further the report and evidence of Mr Lindley. I have already noted the limitations on which his evidence assists the task I have to perform. However I should consider here two aspects of his opinion which have particular relevance, alongside the points which were put to Mr Hewetson in this respect.

254. The first is site servicing. In Mr Lindley's opinion the site servicing costs were much higher, per unit, than Mr Hewetson. His figure was £40,000 per unit, whereas Mr Hewetson's was £15,000 per plot. Mr Lindley readily accepted this was a "very high level assessment". It turned out it was based on his discussions with other colleagues in relation to other sites. However the details in that respect had not been shared with Mr Hewetson in advance of their joint discussions and could not really be explored at trial. Mr Lindley accepted that a more precise analysis would require the input of a quantity surveying expert.

255. On the other hand, Mr Hewetson accepted in his evidence that his figure was substantially based on what BHB confirmed was a reasonable figure, though he also stated he conducted some online research and based on this concluded there was a potentially wide margin of between £10,000 per plot and £30,000 per plot. Some caution needs to be taken before accepting the figure of £15,000 per plot given it is based on evidence and information from one party. I do note however four factors in this respect which may be said to support the notion the figures are not unreliable. The first is the origin of the figure pre-dates the litigation, and indeed the breakdown in relations, and goes back to the August 2017 report. Secondly, Mr Hewetson has not blindly accepted the figures, and has sense checked them against other online information. Even when Mr Hewetson was taken to the email from Mr Costello which described this valuation as "rich" he disagreed and said he stood by it. He concluded that Mr Costello was

positioning itself so as to not encourage the P3 parties to think the site was too valuable. I have already indicated that Mr Costello said much the same thing and I accept that evidence. Thirdly, I note that Mr Holleran gave some evidence as regards the input of BHB when it came to assisting in relation to the section 106 agreement and site servicing matters. His background and expertise is of course in groundworks and utilities.

256. In particular in paragraph 70 of his statement he stated as follows, which evidence I accept:

"*We assisted them in relation to negotiation of the Section 106 Agreement. We also assisted with infrastructure issues, in particular we identified that the proposed district heating main was not suitable. We involved Vince Colby of VCB Consultants. He was a renewable energy consultant. We also organised assistance with Brookfield Infrastructure Services who assisted them with delivery of the district heating and infrastructure and we helped them renegotiate with Vince Colby and Manly. We also secured a connection for SSC Electricity to provide electricity connections and sub-stations, secured connections for them with Thames Water for sewage and water which were required for delivery of the first 500 units*."

257. BHB has therefore some expertise in this respect. Indeed it has already apparently provided some of that expertise for the benefit of what they hoped would be a mutually beneficial venture, though that is not relevant to the quantification question I am considering now and I do not take it into account.

258. The fourth factor is that the site infrastructure in this respect, at least in relation to phase 1, does not appear to be overly complex. The land is gently sloping agricultural land and it is anticipated there would be one main spine road dissecting the parcels which would form part of phase 1. The other costs and other community asset costs are all reasonably ascertainable and capable of being checked. In these circumstances, whilst caution is required, I do not think Mr Heweston can be criticised for placing some reliance on the figures provided by BHB. Of significance is also to consider what the bargain was as between BHB and the P3 parties under the Heads of Agreement. Both experts concluded that the position in relation to site servicing as contained in the Heads was more beneficial to BHB than the position they had considered in their expert reports, and by a substantial sum, though neither were able to say by how much.

259. It is also apparent that assumptions made in relation to site servicing was what pulled Mr Lindley away, and down from the comparables evidence considered. That comparable evidence, if an average is taken of them all, indicates a figure of £1.524m per acre for serviced land values to the plot boundary and with spine roads laid out. There was some potential ambiguity in the oral evidence of Mr Lindley as to precisely what this meant and which spine roads, though I conclude that, at least in relation to phase 1, there was only likely to be one spine road of any relevance. But Mr Lindley concluded no safe reliance could be placed on these figures because they related to much smaller sites than the present.

260. Summing up on this issue therefore, neither of the expert valuers were able to give any precise evidence on this point, but their evidence was that the cost of servicing could have been as much as £10,000 to £40,000 per unit (or plot) depending on where the line was drawn and how much infrastructure (in particular spine roads) work and servicing work was required within or outside the boundary. Mr Lindley's evidence was that the cost of servicing would be £40,000 per plot by comparison with other large sites and translated onto a scheme involving 1,190 units, though he considered the cost to BHB would have been less than this according to the Heads of Agreement, though he was not able to put a figure on it. Mr Hewetson's evidence was that his research indicated £10,000 to £30,000 per plot. The split of site servicing costs as contemplated in the Heads of Agreement was, even on Mr Lindley's evidence, more favourable to BHB. An adjustment down to the upper end of Mr Hewetson's range, for example, would mean a saving to BHB of £10,000 per plot, which on 1,190 units is £11.9 million. In my judgment I should accept Mr Hewetson's figure of £15,000 per plot (or £7.5 million in total) for site servicing costs for the contemplated development under phase 1.

261. As for the second matter arising from Mr Lindley's evidence which requires further consideration, that concerns the section 106 costs. His evidence was that this worked out at about £32k per unit for the first 500 units and then a smaller amount of £24k per unit for the remaining units. Mr Hewetson acknowledged that the site servicing costs might be higher than he had originally considered. He allowed for a higher figure, which equated to £10.5 million for the 500 units, which equates to about £21k per unit.

262. Again in this respect some regard must also be had to the contractual bargain contemplated by the Heads of Agreement. In particular the material part provided as follows:

"BHB agree to cover the cost of any Section 106 applicable ... This is on the basis that Section 106 will not exceed £10,000 per residential unit. In the event that the Section 106 liability exceeds £10,000 per unit the parties agree to share such excess costs equally"

263. To put this in financial context, the planning application was for 1700 units of which 70% would be private, or 1,190 units. If the section 106 liability was £10,000 per unit, then this equated to £11.9 million cost to BHB. Whilst it came much later, the section 106 agreement dated 30 January 2020 in fact provided for a total cost of £45 million odd. Whilst that figure was not known, the parties clearly contemplated the section 106 liabilities of a development within the eco-town were likely to be potentially of that order, though no doubt they both hoped to secure a lower figure. If the section 106 figure of £45 million is spread over 1700 units that would mean £26,470 per plot (ignoring indexation). That means an additional £16,470 per unit to share, or c. £8,000 each. Over 1,190 units that is an additional £9.95 million each, or, viewed against the total cost which would otherwise fall onto the landowner, a saving to BHB of some £9.95 million. In these circumstances it seems to me that Mr Hewetson's assessment of the section 106 costs judged by reference to an open market purchaser is substantially less favourable than the Heads of Agreement terms. BHB would have been looking at about £18k per unit (or £9m), not £21k per unit (or

£10.5m), as assumed by Mr Hewetson in the Joint Statement. This would represent a saving to BHB compared to an open market purchaser of about £1.5 million.

264. The updated opinions of Mr Hewetson, in the Joint Statement of Mr Hewetson and Mr Lindley dated 11 October 2021, did not substantially change. This was lodged during the course of trial, and did not really move the experts any closer to each other, and nor did their oral evidence. This is because they were valuing different things on different bases, and at different times.

265. Mr Hewetson did however provide an updated opinion on the profit which he considers BHB would have made on phase 1 based on the Agreements in the Joint Statement. This indicated an updated total profit calculation of £36,195,328. It assumed a purchase land cost of £800k per acre for private land and £350k per acre for affordable land. It also assumes a site servicing cost of £7.5 million based on £15k per plot and an increased section 106 cost of £10.5 million.

My conclusions

266. I conclude, having regard to all of the above, that if the question is what the market value is of the 500 unit scheme on the open market, without reference to the Heads of Agreement, then the market value is best assessed by starting with a gross development value appraisal basis. That is informed by consideration of comparables, but I find the comparables of less assistance since none were truly comparable to the site in question, either in relation to its size or the requirement for zero-carbon homes. The offers are useful as a cross-check, though I do not consider they should be used as anything more than that. I conclude therefore it is best to start with Mr Hewetson's first appraisal, in 2017, which yields a residual site valuation of £37 million. This then needs to be adjusted to allow for higher section 106 costs, from £5 million to £10.5 million. This reduces the valuation down to £31.5 million. I make no deduction or change for the site servicing costs for the reasons given above.

267. Next, I consider that against the comparable evidence, which, if an average is taken would indicate a figure of £1,524,000. Care needs to be taken with averages, but I note that the closest parcel of land and probably the best comparable is the first identified on the list of comparables, namely a sale to CALA on July 2018 for £26m for 16.96 acres, or an average of £1.54 million per acre. So it seems to me the average is a fair figure to take, at a slightly lower figure of £1.524 million per acre. If this is adjusted to reflect an acquisition for 500 units or 36 net acres (as calculated in the Vistry offer) it would translate into a figure of £54.9 million. But that requires adjustment to allow for the fact that out of the 500 units there is a portion of affordable housing. If one assumes that the valuation is assessed only by reference to the development of the private units, which in my judgment is an accurate estimate (albeit from time to time it may be some small profit is made by the developer) then this translates into a value of £38.43 million (taking the ratio of private against the overall total). This would suggest that the market value of £31.5 million is on the low side, though it was Mr Hewetson's evidence that if anything there may be a cost

rather than a benefit associated with affordable housing which would take the figure down.

268. Thirdly, however I also consider, as a cross-check, the offers from Vistry and Countryside. In my judgment the Vistry offer is a detailed one which has been the subject of detailed work by Vistry and also has gained from adversarial scrutiny. If one makes adjustments to allow for that then the Vistry offer would be worth £34 million. The Countryside figure is ostensibly at £27.5 million, but the entire documentation has not been fully disclosed.

269. For straightforward valuations one would expect a range of c. 10%. For more difficult valuations the range may be more significant and exceptionally difficult valuations can generate 15%, or even higher ranges, from competent surveyors acting reasonably. On a valuation figure of £31.5 million that would suggest a potential lower end figure of £27 million and an upper end of the range of about £35 million. In broad terms this enables a rationalisation of the three categories of evidence I have considered, albeit it might suggest the figure I have alighted on is on the conservative side.

270. I conclude therefore, having considered the market appraisal evidence, and considered that against comparable evidence and the 2 offers I have mentioned, that a market valuation of the 500 unit phase is £31.5 million.

271. I conclude that is the valuation whether a valuation date is taken in 2018 or to date. Mr Hewetson's evidence was that the development land values had not changed significantly, which evidence I accept. I do not consider any discount should be applied for the contingency associated with the section 106 being granted having regard to the fact that it is now known that the section 106 agreement was granted and outline planning consent has been granted (applying the principles to be derived from *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12: where an event has already happened by the time damages are assessed the court should have regard to what had actually occurred so that estimation was no longer necessary).

272. The next question, however, is whether or not this is the correct figure to apply judged by reference to the Heads of Agreement. In my judgment it is not, and needs some adjustment, because the Heads of Agreement was more favourable to BHB on both the site servicing costs and the section 106 costs. I make no adjustment for the former, to take into account the fact that the figure for site servicing costs was based, to some degree, on BHB's own assumptions and estimates for this site in 2017, but I think an adjustment is required for the section 106 figures, to increase the figure by £1.5 million to reflect the bargain struck between the parties. Therefore the valuation to BHB, assessed by reference to the phase 1 land contract which they would have acquired under this scenario was £33 million.

273. In addition, and based on Mr Heweton's evidence, BHB claim the profit they would have made as a developer, in the sum of £36,195,328. There is a conceptual objection, on the part of the P3 parties to the claim for both the land value and the profit. They contend this is double counting and suggest BHB should not be able to claim a loss of profits in circumstances where it has not

taken the risk of development and cite the decision of Lewison J (as he then was) in *Vision Golf Ltd v Weightmans (a firm)* [2005] EWHC 1675 (Ch) at [51]-[52]. That case concerned the forfeiture of a lease and a claim in negligence against solicitors. In that context a claim for loss of profits on top of the claim for the lease was rejected because it would be expected that the valuation would take into account the profit which could be earned. In my judgment this supports the notion that care needs to be taken not to allow for a loss of profit claim which is already reflected in a capital value, but it would be to draw too much from this case to suggest a claim for loss of profit cannot be made. Indeed it seems to me that where the claimant is seeking to acquire an asset for development, as opposed to simply acquiring the asset, the circumstances are different. The profit is being generated through the development activity not simply the use of the asset as it is. Moreover, it makes more sense to assess the loss of profits at the date of that intended development, rather than take the value of the asset as at the date of acquisition, in circumstances where the developer was not intending to simply flip the land on, but to build out.

274. If the assumption is an acquisition and flip on sale scenario this would indicate a value to BHB of £33 million, less £20,281,976 million (being the sum which the parties had agreed BHB would be paying to the P3 parties for the phase 1 land in 2018, and reflected in the figures of Mr Hewetson in the table in section 11 of the Joint Statement in the sum of £22,081,976, less the payments already made by BHB against that sum of £1.8m). That would mean a claim for £12,718,024, or if a 60% loss of chance is applied, a claim for £7,630,814 million. However in my judgment this would under-compensate BHB, since it does not take into account what BHB intended to do with the asset. They intended to build out for a profit after development.

275. So far as the total profit on phase 1 is concerned, Mr Hewetson's figure of £36,195,328 is based on purchasing the land at the cost which was in contemplation based on the Heads of Agreement. This is a lower figure than the open market valuation I have found above. In my judgment it would involve double counting to simply add this on to the land value figure stated above, and to do so would also be inconsistent with the scenario under contemplation here, which is that BHB would have acquired as a developer and built out.

276. In my judgment the correct approach is to take the figure of £36,195,328, being the loss of profit figure suggested by Mr Hewetson for phase 1, and then consider whether any adjustments need to be made to the figure, and also then go on to consider whether a further deduction needs to be made for loss of chance. So far as adjustments on the figures I note that Mr Hewetson has used site servicing at £15,000 per plot or £7.5 million and section 106 costs at £21,000 per plot or unit, or £10.5 million. In my judgment this may be an underestimate of the profit figures which BHB could have made on the project, by about £1.5 million, for reasons I have already identified above. As this was the claim figure put forward by BHB, and supported by their expert, I was not inclined, initially, to make that upward adjustment. However a further factor has been identified by the P3 parties, which would, if correct, result in a downward adjustment to these figures, which was also not identified in Mr Hewetson's report, concerning the effect of the overage provisions. This would have an

impact on what profit BHB would have retained since a 20% overage would have been payable by BHB to the P3 parties on £53,794,290, submits the P3 parties. The £53,794,290 figure is calculated by taking sale prices at £370 per square foot, as used by Mr Hewetson, taking away the overage ceiling figure of £241, resulting in a difference of £129 per square foot, then multiplying by the total square footage on phase 1 private sector housing at 417,010. Overage at 20% of £53,794,290 is £10,758,858. In opposition to this suggested adjustment BHB submitted this point should have been put to Mr Hewetson, but I reject that. It is evident from his calculations that overage was not taken into account, and so cross examination was not required on this point. I also reject the submission from BHB that I should remove both the overage and section 106 adjustments, because the parties agreed in principle in November 2017 that the overage would be dropped in favour for excess section 106 costs. In fact the suggestion in contemporaneous emails was for BHB to bear all the section 106 costs (see paragraph 113 above), and I am not satisfied this would have been a materially better outcome to BHB on the numbers presented (if anything, on my calculations the adjustment would be in favour of the P3 parties on my calculations). Moreover, if it did favour the P3 parties, the P3 parties could reasonably have required the original adjustments (both ways) to be reinstated if this suited them (as indeed could BHB if the position were the other way round). I consider both section 106 and overage adjustments should be made. The same might have been said in relation to an adjustment in relation to affordable housing, but I have accepted the evidence of Mr Hewetson that this was likely a neutral factor. There is a third factor, or proposed adjustment, raised by BHB, which is that in Mr Hewetson's calculations he has assumed a land acquisition cost of c. £22m, but of this BHB had already advanced £1.8m and so there was £1.8m less they needed to advance on acquisition costs to make this profit, or, to put it another way, Mr Hewetson's figures need adjusting upwards by £1.8m to reflect the position they were in by the end of 2017 (and thereafter). I accept the submission this should be factored in (and I have made a similar adjustment to the land profit assessment in paragraph 274 above where I have concluded the same point is applicable). The end result is I accept I should make an overall adjustment downwards, in terms of profits to be retained by BHB, from £36,195,328 to the figure of £28,736,470 (making allowance for both the upward adjustment of £1.5 million, and the downward adjustment of £10,758,858, and then the upward adjustment of £1.8m).

277. Applying a loss of chance adjustment to £28,736,470 at 60%, that percentage being based on the same factors as above, results in the sum of £17,241,881. However in my judgment because what is being considered here is not simply the contingencies associated with the land acquisition from the P3 parties, but also the contingencies associated with the build out process, I need to consider whether a further deduction should be made to take into account the contingency that might not happen. I conclude it would be wrong to do so in relation to £7,630,814 of that sum, which represents the profit related proportion made on acquisition, without any development, but in relation to the sum of £9,611,067 on top, which represents the separated build out profit proportion, in my judgment it would be appropriate to make a further deduction to take into account the risk that the build out would not take place. I do not consider this is the most likely outcome, but I do bear in mind that BHB had suffered difficulties

on the Chatham site, and it may well have had to adopt a different model in the build out than was originally contemplated. I also consider that the costs associated with a new-build eco-town, or part eco-town, also generate further uncertainty. In the circumstances I apply a further deduction to reflect the chance that the build out would not have proceeded with by BHB, or would have been less successful than forecast, of a further 40% to the £9,611,067. That results in a figure of £5,766,640 million. To that I add the £7,630,814 million figure. The resulting sum is £13.4 million (rounded). That is the sum I award for damages for the breaches of contract I have identified above.

278. There is a further, residual, question which arises which is whether or not I should award a further sum for the loss of chance of BHB participating in a wider scheme, beyond the initial phase, which they would hope to make a profit on. The difficulty I have in doing so however is that not only would this require all the contingencies I have identified above to be factored in but further contingencies and assumptions to be made in relation to the potential profits to be made on the further phases. There are likely to be a number of them, but to take one example: the Grampian condition which requires to be satisfied before those phases could commence has still not been satisfied. I consider some evidence would need to have been led on this topic and the matter scrutinised before I could begin to engage with this exercise. I therefore do not do so. There are limits on the principle that the law is tolerant of imprecision or uncertainties and this matter has passed that limit.

A footnote – consequential loss claim

279. Finally, I should add that the claim included a claim for consequential losses. This was based on the allegation that the failure to complete the sale by the P3 parties meant that BHB's business was deprived of working capital and funding. This in turn meant, so it is alleged, BHB were unable to repay loans and make anticipated distributions to facilitate development works at 39/40 Upper Grosvenor Street, for which planning was in place for a duplex apartment (2723 sq ft), and preparation works for a penthouse application (2648 sq ft) and redevelopment of the mews at the rear of the property (16 large apartments 20,000 sq ft) were well advanced and projected to yield a profit £56m. It was claimed that the claim for consequential loss in this respect is ongoing and continues to accrue until payment or settlement.

280. I accept the submissions of the P3 parties that the loss in this respect is too remote and entirely unproved. Given that planning consent was not obtained in this case until January 2020, and it is likely that working capital would have been required in the initial stages of the build out, it is difficult to see how this case could get off the ground even if some evidence had been adduced to support it. As it happens it simply did not feature as part of BHB's submissions, whether in writing or orally.

Issue 6: What, if any, trust affects the Property or estoppel or equity has arisen in favour of BHB and what is the effect of the same?

Introduction and rejection of primary submission

281. BHB's primary submission under this heading was that where there is a contract for the sale of real property in the period between contract and completion the vendor holds the property on trust for the purchaser. It cites the passage in *Snell's Equity*, 34th Ed (2020), at para 24-002 in support of this proposition.

282. BHB goes on to submit that such equitable interest was protected by the UNs it registered in December 2018, combined with sections 28-32 of the Land Registration Act 2002. Section 32(3) provides that the fact that an interest is the subject of a notice does not necessarily mean it is valid but it does mean that the priority of the interest, if valid, is protected. The anterior question as to the validity of the claim for an equitable interest, therefore, remains to be answered.

283. I reject this primary submission. I have already set out the reasons for doing so under issues 1 and 2 above, but in summary here: (1) the Heads of Agreement and/or Agreements did not constitute a contract for the sale of land – instead they were in the nature of a preliminary contract to facilitate the entry into such a contract in the future; (2) if any variations made to the Heads of Agreement since are relied on to support the assertion that such a contract for sale had come into existence it runs into the problem that such a contract would be unenforceable as a contract for sale of land under section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989; (3) the time for performance has now ceased.

Pallant v Morgan equity

The principles and submissions

284. BHB puts its case in a further or alternative way, namely that a constructive trust arose in this case under the principle in *Pallant v Morgan* [1953] Ch 43. A convenient summary of the requirements of a *Pallant v Morgan* equity (though recognising the need to maintain the flexibility of equity to respond to new circumstances where the need arises) is to be found in *Snell's Equity*, 34th Ed, at para 24-039:

"A Pallant v Morgan equity typically relates to specific property that is not at first owned by either of the parties, A or B. A and B form a common intention that A will take steps to acquire the property; and that, if A does so, B will obtain some interest in it. They may contemplate, for example that A will buy the property, subdivide it and convey part of it to B, or that it will be acquired by a corporate vehicle, the shares in which will be divided between A and B. The common intention need not be recorded in writing, but its main term must be agreed between the parties. The equity cannot arise where the agreement is expressed to be subject to contract, or where A and B realise that their agreement is legally unenforceable because they plan to enter into a binding agreement in the future.

In reliance on A's assurance or B's expectation that B would acquire an interest in the land, B then does something which confers an advantage on A in acquiring the property or which is detrimental to B's ability to acquire it on equal terms. B may, for example, withdraw from making his own bid to acquire the property, with the consequence that A acquires the property more cheaply

than he would otherwise have done. The effect is that it would then be unconscionable for A to keep the property for itself. But A does nothing unconscionable if he resiles from an agreement that was expressed to be subject to contract or which both parties realised was not legally binding between them. Where A and B are commercial parties dealing at arm's length, B takes the risk that a binding agreement may not materialise.

The effect of the equity is that A becomes bound by a constructive trust to prevent him from benefiting by his unconscionable breach of the agreement. A may, for example, hold the property on trust for himself and B jointly. The effect is to force A to bargain with B for the proper implementation of their agreement or to allow the division of the proceeds of sale between them."

285. In *Banner Homes v Luff Developments* [2000] Ch 372, Lord Justice Chadwick reviewed the relevant first instances authorities and drew together the principles. He expressed that he did this because he understood it was the first time that the *Pallant v Morgan* equity, protected by a constructive trust, had been argued in the Court of Appeal. He stated this at page 397 (with bold emphasis added by me):

"It is important, however, to identify the features which will give rise to a Pallant v. Morgan equity and to define its scope; while keeping in mind that it is undesirable to attempt anything in the nature of an exhaustive classification. As Millett J. pointed out in Lonrho Plc. v. Fayed (No. 2) [1992] 1 W.L.R. 1 , 9b, in a reference to the work of distinguished Australian commentators, equity must retain its "inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction." Equity must never be deterred by the absence of a precise analogy, provided that the principle invoked is sound. Mindful of this caution, it is, nevertheless, possible to advance the following propositions.

(1) A Pallant v. Morgan equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. ***It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it****. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that "equity looks on that as done which ought to be done;" or an equity may arise under the principles developed in the proprietary estoppel cases. As I have sought to point out, the concepts of constructive trust and proprietary estoppel have much in common in this area. Holiday Inns Inc. v. Broadhead, 232 E.G. 951 may, perhaps, best be regarded as a proprietary estoppel case; although it might be said that the arrangement or understanding, made at the time when only the five acre site was owned by the defendant, did, in fact, precede the defendant's acquisition of the option over the 15-acre site.*

(2) ***It is unnecessary that the arrangement or understanding should be contractually enforceable****. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the Pallant*

v. Morgan equity; equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust. On its facts Chattock v. Muller, 8 Ch.D. 177 is, perhaps, best regarded as a specific performance case. In particular, it is no bar to a Pallant v. Morgan equity that the pre-acquisition arrangement is too uncertain to be enforced as a contract—see Pallant v. Morgan [1953] Ch. 43 itself, and Time Products Ltd. v. Combined English Stores Group Ltd., 2 December 1974 —nor that it is plainly not intended to have contractual effect—see Island Holdings Ltd. v. Birchington Engineering Co Ltd. , 7 July 1981.

(3) ***It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property****. Further, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.*

(4) It is ***necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it.*** *Pallant v. Morgan [1953] Ch. 43 itself provides an illustration of this principle. There was nothing inequitable in allowing the defendant to retain for himself the lot (lot 15) in respect to which the plaintiff's agent had no instructions to bid. In many cases the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market. That will usually be both to the advantage of the acquiring party—in that he can bid without competition from the non-acquiring party—and to the detriment of the non-acquiring party—in that he loses the opportunity to acquire the property for himself. But there may be advantage to the one without corresponding detriment to the other. Again, Pallant v. Morgan provides an illustration. The plaintiff's agreement (through his agent) to keep out of the bidding gave an advantage to the defendant—in that he was able to obtain the property for a lower price than would otherwise have been possible; but the failure of the plaintiff's agent to bid did not, in fact, cause detriment to the plaintiff—because, on the facts, the agent's instructions would not have permitted him to outbid the defendant. Nevertheless, the equity was invoked.*

(5) That leads, I think, to the further conclusions: (i) that although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that although there will usually be advantage to the one and correlative

disadvantage to the other, the existence of both advantage and detriment is not essential—either will do. ***What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted.*** *Those circumstances may arise where the non-acquiring party was never "in the market" for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangement or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage therefrom."*

286. The second of these principles (i.e. the lack of need for a contractually enforceable arrangement) has been questioned by Lewison LJ in *Generator Developments v Lidl UK GmbH* [2018] 2 P & CR 7, but, submitted Mr Jefferis, that does not affect the situation here.

287. Relying on the above case law, and principles, BHB submitted that the starting point here was an agreement that the parties expressly agreed should be binding and under which the parties were to act in good faith. It was not "subject to contract". Mr Jefferis submitted that P3 was to acquire land and sell 100 acres of it to BHB in three phases, with an option for 400 acres more. In reliance on the Agreement and Exclusivity Agreement, BHB caused the P3 parties to be paid £1.8 million to advance the project and the BHB worked long and hard to achieve the planning permission and the success of the project. In these circumstances BHB submits a *Pallant v Morgan* constructive trust arises in favour of BHB. Mr Jefferis submits that this plainly bites on any land in the name of either of the P3 parties and extends to lands held by their nominee or those with whom they colluded.

288. He emphasises that the position as to a constructive trust arising in circumstances such as those that arise here, in commercial circumstances, has not been undermined by the case of *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, and he relies on the observations of Lord Scott at [30]-[32].

289. He went on to submit that even if one leaves aside who is at fault for the parties' failure to complete, then this is the situation of a "failed joint venture" falling within the relevant principles. He went on to emphasise that the Heads of Agreement contained the following terms (some of which I have already cited above, but some I have not and so for convenience I shall set them out here as relied on by Mr Jefferis):

"Mutual Benefit: the transaction will be structured in a manner which will most effectively achieve the desired commercial and financial outcome for the parties".

Anticipated Demand: Both the parties agree that there is considerable scope to roll out significantly more residential units, over and above those referred to above. Both P3 and BHB commit to using their best endeavours to work jointly to help facilitate additional demand with a view to growing the actual delivery of completed residential units over the medium term.

Good faith: Each party shall act in good faith throughout the period of this Agreement

Agreement: The parties shall use all reasonable endeavours to enter into a final binding Agreement which captures legally these Heads of Agreement acting in good faith towards each other…".

290. He also relies on paragraph 60 of the statement of Mr Holleran, which stated "*He" [Steve Nardelli] "kept assuring me that everything was in place and he was anxious to finalise matters so that we could then move forward to planning as partners and resolve all other matters including the affordable housing provision in "that spirit of partnership which has stood us in good stead so far*".

291. He also relied on paragraphs 22, 30, 38 and 108 of the statement of Mr Costello as follows:

"22. The solicitors worked together in trying to agree a suitable contract and we very much worked hand in hand with P3 as in effect a 'consortium member', which was how Steve Nardelli referred to us over the following years as I said earlier, in various meetings, presentations which we attended jointly with P3 (council, farmers and indeed consultant).

30. We also all worked closely with Steve and Graham in relation to dealing with the land owners with whom they held and were seeking options. On one occasion we arranged an event at the RAC Club in order to entertain the Mailins family (from whom P3 were trying to acquire significant lands, which would back into our subsequent 400 acres) and their professional advisors. The event was also attended by Steve Nardelli and Graham Johnson. Of course, we covered the cost. This event followed a meeting with PWC, where senior PWC personnel outlined the work they were doing on our behalf pertaining to financing acquisitions.

38. The dealings in relation to the A2 issue and how we were told they had been resolved demonstrates a failure of P3 to deal with us in an open and transparent way. Notwithstanding the issues in relation to A2, Steve was always keen to gloss over pertinent issues and say that it was important that we move forward to finalise the contract so that we could proceed as planning partners (and consortium members) and resolve all other matters including the affordable housing provision in the "spirit of partnership which had stood us in good stead so far".

108. These were very much forward-thinking discussions between two parties that were partnering together."

292. Based on this evidence Mr Jefferis invites me to conclude that this was a joint venture, which has failed to come to fruition, and that the P3 parties and their nominees and those with whom they colluded cannot walk away with all the fruits of the joint work and expense. By joint he means including the work of BHB.

293. I have no hesitation in accepting the parts of the evidence put forward by Mr Jefferis in support of the equity he is contending for as summarised above. However whether or not that evidence takes the court to the conclusion that a *Pallant v Morgan* equity arises is a different matter.

294. The P3 parties submitted that it did not. They drew my attention to the fact that the decision in *Cobbe* and its implications for *Pallant v Morgan* equity had considered by Arden LJ in *Herbert v Doyle* [2010] EWCA 1095. She explained at [57] the "common thread" in the speeches of Lord Scott and Lord Walker is that "*if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement*."

295. They also emphasised that in *Generator Developments* above Lewison LJ rejected the equity on a number of grounds which they say all apply here. The first they pointed to was that the equity was rejected as it was a case "*of commercial parties, advised by lawyers, working at arms' length towards the conclusion of an agreement for a purely commercial enterprise the terms of which were never agreed*". As Lewison LJ explained, at [78], in that case "*as in Cobbe, there can have been no expectation on either side that the parties were legally bound to each other*".

296. Secondly, the proposed joint venture was made "subject to contract". As Lewison LJ explained, at [79], that label meant neither party intended to be bound unless and until a formal contract was made and it followed therefore that the parties "*took the commercial risk that one or other of them might back out of the proposed transaction"* and that the claimant *"never expected to acquire any interest in the land otherwise than by way of a legally enforceable contract*".

297. Thirdly, that the parties had entered into a "*lock-out*" agreement. The existence of this showed that the claimant was relying on the prospect of a legally binding contract to protect it, rather than on some ill-defined honourable conduct on the part of the defendant ([80]).

298. Applying the above principles to the present case they submitted that the claim for a *Pallant v Morgan* equity or equity by proprietary estoppel cannot succeed because:

(1) The Heads of Agreement, Exclusivity Agreement and the Addendum were agreements by negotiated by experienced commercial parties who were advised by lawyers;

(2) The Heads did not amount to an agreement for sale. The parties, who had experience of the property world, knew that under the terms of the Heads there was no absolute obligation on either of them to enter into the conditional sale agreement ("CSA"). Rather the obligations were more limited, in that the parties were required to use reasonable endeavours and good faith in negotiating a CSA;
(3) In these circumstances, there was no representation or assurance that BHB *would* acquire any interest in the Property. Rather, as BHB knew, it was an inherent risk under the Heads that, even if the parties (acting in good faith) spent time and money negotiating, agreement might not be reached and would not acquire any interest in the Property. BHB chose to run this risk;
(4) BHB did, however, have contractual protection. First, it had the benefit of the Exclusivity Agreement which imposed restrictions on P3 relating to disposition of the Property whilst CSA negotiations were ongoing. Secondly, it had the benefit of the Addendum Agreement which dealt with the risk that agreement of the CSA might not be possible by providing for the return of monies paid by Brooke (less the initial £250,000);
(5) Imposing a constructive trust or proprietary estoppel would thus contradict the parties' contractual intention. The parties' expectations were that, if possible, they would enter into a CSA but that, if this was not possible, the position was dealt with by virtue of the Addendum Agreement.

299. It follows, they submitted, that the claim for an inquiry as to the quantum of equitable compensation must also fail. Equitable compensation is designed to make good the loss caused by a breach of an equitable duty and/or to compel a defendant to perform an equitable duty substantively by paying an equivalent amount of money instead (see *Snell's Equity*, 34th Ed, at para 20-028 and following). P3 do not owe BHB equitable duties (e.g. duties of a trustee or fiduciary) and accordingly questions of equitable compensation do not arise.

300. There has been some debate as to whether a *Pallant v Morgan* equity is based on a common intention constructive trust of the kind enunciated in *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886, or whether it might be better rationalised on the basis that the cases in question involved a breach of fiduciary duty. In a dissenting judgment of Etherton LJ *Crossco No 4 Unlimited and others v Jolan Ltd and others* [2011] EWCA Civ 1619 a strong argument was put forward in favour of the latter, though the majority (Arden LJ and McFarlane LJ) concluded that it could not be doubted that the ratio was the former, and it required a higher court to conclude otherwise. At [130] Arden LJ concluded that "*Applying the requirements for a constructive trust of this kind, as explained by Chadwick LJ in the Banner Homes Group case (see [76], above), the critical question in the constructive trust claim on this appeal is, therefore, whether the conduct of the Gill's side was unconscionable.*" This was a reference back to the passage in *Banner Homes* I have already quoted and highlighted at [285]. At [107] Arden LJ also recognised that the absence of a concluded agreement on all terms is not necessarily a bar to an equity arising, putting in context what she said in *Herbert v Doyle* above.

301. BHB sought to emphasise therefore that the key question was unconscionability. BHB submitted, on the basis of the *Crossco* decision there were eight factors which supported the submission as to unconscionability, namely:

(1) BHB had paid the £250,000 non-refundable deposit;
(2) BHB paid £1.8m to facilitate the P3 parties advancing the planning position, which they did gaining a resolution to grant, S106 and outline consent;
(3) At least £233,600 of BHB's payment to the P3 parties via their accountant, Calder and Co, of £250,000 on 31 May 2017 was (unknown to BHB at the time) paid towards the CFJL deposit under the CFJL Agreement with the Murfitt Hensons on 31 May 2017;
(4) BHB paid for part of CFJL's contractual rights. It was submitted this also gave rise to a constructive trust as BHB provided the money for the deposit;
(5) BHB kept on spending money on contractual negotiations;
(6) BHB, to the knowledge of the P3 parties, spent money on advancing planning for detailed consent. There is an issue whether the P3 parties discouraged this expenditure. BHB's evidence was that there was no such discouragement. It was to the P3 parties' advantage that planning was advanced as far as possible;
(7) Mr Ives gave evidence of the work which he did and his meetings with the Council, with Mr Nardelli and/or Mr Johnson. Mr Ives was, BHB submitted, a clear, forthright and credible witness;
(8) Mr Ives also explained, in frank terms, that his work on the factory on certain land (called the Bonners land) was done at the P3 parties' request and for their benefit, in order to try to avoid having a large warehouse right next to the eco residential site. It was not the best option for BHB, as the military site was much cheaper, with the building already in place.

Pallant v Morgan equity – my conclusions

302. Whilst there was some dispute as to whether not all of the £1.8m came from BHB I would accept that such monies were paid at its direction and effectively on its behalf. So nothing turns on that point. I also accept the other factual assertions set out by BHB as listed in paragraph 301 above. Again however the question remains as to whether or not those facts provide the necessary foundation for the equity to arise.

303. In my judgment however they do not provide any general equity of the type contended for by BHB, which would give BHB a proprietary interest in all the land acquired and held in the name of the P3 parties. This is substantially for the reasons advanced by the P3 parties, but I will put them in my own words.

304. The essential and first main reason why I conclude they do not is that the Agreements made clear here that the "*pre-acquisition arrangement*", to use the language from *Banner Homes* did not contemplate that BHB would acquire an interest in land on P3 acquiring such an interest in land, but instead that BHB would acquire such an interest when a conditional sale agreement was entered into. This was and remained in the future. Therefore there was no agreement for acquisition of land which P3 was acting inconsistently with. P3 was acting inconsistently with the Agreements, as I have found, but that gives rise to a contractual claim in damages, not an equity.

305. The second main reason is that the contractual machinery provided a mechanism for the return of monies, other than the initial £250,000 deposit, which was not refundable. So the parties agreed a contractual mechanism by which and under which BHB would be protected.

306. Thirdly, the mere fact that this initial deposit was not refundable cannot be relied on. This was paid as the opportunity to enter into a conditional sale contract and also for the Exclusivity Agreement, which contained lock-out restrictions. This was a valuable contractual right.

307. Fourthly, the presence of lock-out restrictions tends to suggest that the parties concluded this was to provide the protection for BHB. This pulls against the notion that some wider equitable relief is justified.

308. Fifthly, the colour which one gains from the pre-acquisition agreement points away from, rather than towards, a general equity arising in this case so as to confer a proprietary interest of the type contended for by BHB.

309. I would add that this is not to say the points raised by Mr Jefferis are not relevant to other aspects of the complaints made by BHB, and including to issues 3 and 7 below. But in my judgment they do not support the conclusion a *Pallant v Morgan* equity has arisen (as opposed to an argument for some form of remedial constructive trust; that might be thought to be a desirable development, but at present English law does not recognise it).

310. My conclusions above should not be misconstrued as suggesting that the *Pallant v Morgan* equity can only arise if there is an enforceable contract for the sale of land. Clearly they can, and if the equity was relegated to such a role there would be no utility in it. An informal agreement which contemplates one party will gain an interest on another acquiring a property can give rise to such an equity. But not in circumstances where the parties have agreed that no proprietary interest will be conferred on the claimant until a point in the future which has not yet arrived. Or to put it another way there was no expectation of a land interest until the conditional sale agreement had been entered into. There being no such expectation there is nothing for the alleged unconscionable acts to "bite on".

311. I should also add that there is the conceptual confusion in this case that the parties did intend the Heads of Agreement to be binding and enforceable. But as I have sought to emphasise above properly understood that was by way of a preliminary or process contract which was intended to lead to a conditional sale contract. If no such contract was concluded and BHB wanted its money back then the Addendum provided for that. In particular clause 1 of the Addendum stated:

> "*In order to facilitate P3 in acquiring land that will be subject of the Heads and the Future Option agreements referred to therein BHB have agreed that they will provide this payment to assist with this ("the Pre-Payment").*"

312. Thus payments by BHB to the P3 parties were positively intended to facilitate them in acquiring land that would be the subject of a future conditional sale

agreement. The language is expressed in the future tense. At one point in the submissions I was attracted by the submission that this point did not assist the P3 parties because what it was describing was a payment to facilitate P3 in acquiring land, not CFJL, and so therefore it could not be said that conferring an equity would be inconsistent with the bargain the parties struck. Followed to its logical conclusion this might confer a limited equity on BHB which might be protected by the court declaring that any interests in the land acquired by CFJL should stand charged in favour of the P3 parties' liabilities to BHB. But ultimately I have concluded this would be to conflate, wrongly, two different matters. The matter can be tested in this way: if money is paid over by A to B without any expectation that it would result in A being conferred an interest in land until a future event had occurred, which has not yet occurred, but B wrongly diverts it to C, can it be said that nevertheless A should have some interest in the land because of that wrongful diversion. In my judgment it does not. There may be other remedies, but I cannot see this should result in the conferral of an equity.

Fiduciary duties – another route?

313. Mr Jefferis went on to submit, perhaps sensing that the law might be turning towards the requirement that in order to invoke the *Pallant v Morgan* equity a fiduciary relationship must exist, that one did exist here. I raised with counsel whether or not the decision of Rose J (as she then was) in *Pennyfeathers Ltd v Pennyfeathers Property Co.* Ltd [2013] EWHC 3530 (Ch), in which an unsuccessful attempt was made to rely on a *Pallant v Morgan* equity, might be of relevance. In that case the claimants won on their primary case and Rose J stated at [97] that it was not necessary to consider *Pallant v Morgan*. So, what was said was obiter dicta. Rose J nevertheless addressed the matter in some detail. She rejected the contention that fiduciary duties were owed on the facts. The points of principle, as she saw them, were stated at [99] in the following terms:

> *"99. The Claimants referred me to the decision in Ross River Ltd v Waveley Commercial Ltd & Peter Barnett [2013] EWCA Civ 910 where the Court of Appeal reviewed the case law on when a fiduciary duty is owed by one joint venturer to another and the content of that duty. The principles that I derive from that case are as follows:*
>
> *i) As a matter of general principle, the court should be slow to introduce uncertainty into commercial transactions by the over-ready use of equitable concepts such as fiduciary obligations. Thus, the court should not use equitable principles 'to make up for what might be seen as deficiencies (in the events which happened) in the agreed contract' (see paragraph 31 of the judgment of Lloyd LJ).*
>
> *ii) Where the relationship is governed by contract, then the terms of the contract are of primary importance and wider duties will not lightly be implied, in particular in commercial contracts negotiated at arms' length between parties of comparable bargaining power (see paragraph 56 of the judgment quoting from the judgment of Briggs J in Ross River v Cambridge City Football Club [2007] EWHC 2155 (Ch)).*
>
> *iii) The fact that the alleged fiduciary has his own, personal interest in*

the exploitation of the development, to which he is entitled to have regard, does not rule out the existence of a fiduciary duty: paragraph 55.
iv) The existence of a fiduciary duty in such a case is very fact-sensitive."

314. Mr Jefferis submitted, in summary, that, having regard to what was said by Rose J in *Pennyfeathers*, whether there is a fiduciary duty is very fact sensitive, and each case must turn on its own facts. He submitted that: the parties owed one another fiduciary duties of good faith, right from the start; the terms expressly provide for good faith and to act for mutual benefit; added to this, Mr Nardelli more than once spoke of acting as partners (and the parties names and/or logos were included alongside each other in "consortium" documents); and he emphasised that you do not judge an agreement by its title alone. He submitted that this plainly was a joint venture agreement, with the parties looking forward to working together for years ahead.

315. I do not accept these submissions support the conclusion that a fiduciary duty was owed by the P3 parties to BHB. First, I consider if a fiduciary relationship was to be relied on this should have been pleaded and was not. This might not have been critical, however, and no particular objection to the argument being raised was taken by Mr Reynolds. Secondly, the fact that the parties agreed to duties of faith does not mean that they were fiduciary duties. It is clear from the development of the case law in relation to the implication of duties of good faith in long term inter-relational contracts that such duties are not, are not automatically, fiduciary duties. Thirdly, the mere fact that the parties may have on occasion referred to themselves as partners was no more, in my judgment, that the sort of language commercial parties might use to show goodwill intent to each other. Mr Jefferis did not submit this was in fact a partnership under the 1890 Act. Fourthly, I agree the Agreements plainly involved the parties on a joint venture, but it was a joint venture governed by contractual relations. I repeat what I said at the start of Issue 1 in this respect. I consider it is possible that the P3 parties might have owed fiduciary duties as an agent in the event that, for example, they had entered into a conditional sale agreement, and the P3 parties was gathering in property to enable that agreement to be fulfilled. But, again, that was in the future. But even if I am wrong about that it does not follow that a breach of these duties should be said to give rise to an equitable interest in the land itself.

The last submission

316. Mr Jefferis' final submission was that there was another reason why BHB should be held to have an interest in the Property. If BHB succeeds in its claim for damages against the P3 parties then he submitted they may become insolvent. That may or may not be so, but the courts have never granted a constructive trust simply because the defendant may become insolvent. The law has other remedies at its disposal, where insolvency is involved to protect creditors or contingent creditors, but generally speaking a claimant has to take the defendant as they find them. In my conclusion this final submission laid bare the lack of merit in the contention advanced in favour of some form of equity or proprietary interest being recognised as submitted by BHB.

Issue 3: Is and was CFJL at all material times under the effective control of P3 or P3 Eco? and

Issue 7: Did the Defendants collude together "to steal a march on the Court" and try to avoid BHB obtaining specific performance or another proprietary remedy as alleged in paragraph 22F of the Amended Particulars of Claim and paragraph 22H of the Amended Reply?

Introduction

317. I have grouped these two issues together because issue 7 raises issues which potentially overlap with issue 3. What lies at the heart of them is concerned with, at least primarily, what occurred in relation to the incorporation and use of CFJL, and whether or not what had occurred was an abuse of corporate power so as to justify the court piercing the corporate veil. On clarification, in closing, Mr Jefferis also submitted that issue 7 had relevance to his claim that CFJL, Desiman and Desiman 2 all should take subject to the equities or proprietary interest or claim of BHB. As I have concluded that BHB does not have any such rights to specific performance or other proprietary remedy or equity then it seems to me this latter point falls away. Nevertheless I shall briefly deal with it below. I shall start however by considering the principles relating to the piercing of the corporate veil and whether those are to be applied here in relation to CFJL and if so to what effect.

Piercing the corporate veil - principles

318. In *Prest v Petrodel* [2013] 2 AC 415 Lord Sumption JSC considered the relevant principles in relation to what remains of piercing the corporate veil, and he noted that cases might be divided into cases where the concealment principle applied and cases where the evasion principle was invoked. In the former the court was not piercing the corporate veil but instead looking behind the concealed façade to discover the true facts which the corporate structure is concealing. The second, the evasion principle is a true invocation of piercing the corporate veil and the court may disregard the corporate veil, according to Lord Sumption (at [27]) "*if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical.*" He similarly summarised the evasion principle as follows at [35]:

"*I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce*

the corporate veil. Like Munby J in Ben Hashem v Al Shayif [2009] 1 FLR 115, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in VTB Capital v Nutritek [2012] 2 Lloyds Rep 313 who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

319. Lord Neuberger effectively agreed with this analysis (see at [81]). Baroness Hale JSC (with whom Lord Wilson JSC agreed) expressed the view that it may be Lord Sumption's classification was not necessarily exhaustive of the doctrine. She stated at [92]:

"I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business. But what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if it existed at all)."

320. Similarly, Lord Mance (at [100]-[102]) and Lord Clarke (at [103]) recognised the existence of the principle, but also declined to shut the door on the notion that it was necessarily exhaustive, albeit that no one should be encouraged to think that any further exception to the recognition of separate legal personality on incorporation, in addition to the evasion principle, would be easy to establish, if it exists at all. Lord Walker doubted the independent existence of the principle at all (see at [106]).

321. It is clear in these circumstances that the principle of piercing the corporate veil is based on the evasion principle, absent further development of the law. Often cases which involve mis-use of corporate personality will be capable of being addressed effectively in other ways, sometimes because of the application of trust principles, or agency principles, whether or not that is concealed or not. On the facts in *Prest v Petrodel* the court did not find it necessary to invoke the evasion principle because it found that, drawing suitable inferences based on concealment and lack of disclosure from the husband, that the companies held the properties beneficially for the husband, such that they were available when making an order for ancillary relief in matrimonial proceedings. In assessing whether or not the evasion principle applies it may also be useful to ask, having regard to the observations of Baroness Hale as mentioned above, whether or not unconscionable advantage has been taken of that separate legal personality.

322. An example of a case where the court did conclude that the concealment and evasion principles applied on the facts was *Pennyfeathers*, where Rose J concluded at [117]-[119] both of these principles applied.

Piercing the corporate veil – my conclusions

323. So far as the question posed by issue 3, and the question of who controlled CFJL, it was submitted by the P3 parties and CFJL that CFJL is not a nominee and nor is it under the effective control of the P3 companies. Whilst it was accepted there are common directors between the companies, it was submitted they are independent companies. These parties pointed to the evidence of Mr Nardelli who stated in his evidence that "*There is no link between the companies. There are however common directors, being myself, Graham and Ian. CFJL did not act as nominee for P3 Eco or PPP in connection with the CFJL Agreement*." They further emphasised that the CFJL Agreement is distinct and separate from the Murfitt Henson Option. I reject the evidence of Mr Nardelli that there was no link between the companies, and there was simply a coincidence of common directors. Nor in my judgment does the fact that the CFJL Agreement was set up as a distinct agreement answer the question of whether or not CFJL was acting as agent or nominee for P3 Eco or PPP in connection with the CFJL Agreement.

324. Mr Jefferis, for BHB, referred to a number of evidential factors in support of his submissions that either CFJL was simply acting as the P3 parties' agent, or nominee, or that the evasion principle applied. I agree with those submissions and shall set out the factors relied on by him, and some additional factors I consider to be of relevance, and why I consider they demonstrate that it is appropriate to recognise an agency or nominee concept here, and in addition or in the alternative to find that the evasion principle is applicable. I shall start with the factors which support my conclusion that an agency or nominee relationship exists.

325. First, the companies had the same directors, who were directing all three companies. That is not necessarily conclusive, but in my judgment the P3 Group was viewed as, and directed as, if they were all part of one group, the P3 Group, and there was little distinction made between them. In my judgment CFJL was viewed as being umbilical to P3 Eco and/or PPP and under their control, via the decision making led by Mr Nardelli. I note that no board minutes of any meetings concerning any of the material transactions have been produced or drawn to my attention which would evidence an independent decision-making process in relation to each of them. Nor has any other documentation been produced to demonstrate these were operated by independent decision making. The decisions were all made together, and in relation the relations with BHB were in the main led by Mr Nardelli, with some participation from Mr Johnson. I have seen no evidence of participation by Mr Inshaw and he was not tendered as a witness.

326. Second, there is the exchange of emails on 28 March 2018 between Mr Costello and Mr Nardelli shows Mr Nardelli accepting that CFJL "*is a P3 entity*". I have already referred to this exchange in paragraphs 197 and 198 above. In the email from Mr Costello to Mr Nardelli, sent to Mr Nardelli on a P3 Eco email address,

Mr Costello recorded Mr Nardelli stating to him verbally that *"CFJL Property Partners is a P3 Eco entity, despite revised shareholding."* In my judgment this was a reference to CFJL and gives rise to the implication that CFJL was acting as an agent or nominee for P3 Eco and PPP, absent any clear documentary disclosure to the contrary. Mr Nardelli's email in response, on the same P3 Eco email address stated: "*CFJL is an independent company controlled by us as directors*". I agree with Mr Jefferis that the use of the word "*us*" is indicative that it was controlled by the P3 Eco directors on behalf of P3 Eco and PPP. I conclude this was true. As noted above Mr Johnson was copied in on this email.

327. Third, I have seen no evidence to suggest that the shareholders played any independent role. The shareholders were all family members, or partners, of the three directors (in addition to the directors themselves) and Mr Nardelli and Mr Johnson stated it was set up to enable this company to capture the profits to be made from the ventures, for the benefit of their families and future generations. In my judgment Mr Nardelli summarised it accurately in his email of 28 March 2018 when he told Mr Costello that he could safely ignore the different shareholdings.

328. Fourth, Mr Nardelli and Mr Johnson emphasised, however, that it was always the intention that any assets which CFJL acquired would be transferred to the P3 parties to enable them to discharge their obligations to BHB, if and when the time came to do so. Whilst not a documented agreement, what Mr Nardelli and Mr Johnson were, in effect, saying was that there was an informal arrangement or agreement as between the P3 parties and CFJL such that CFJL would transfer the property interests it acquired in relation to Himley Village to one or other of the P3 parties so as to enable the P3 parties, in due course, to discharge its contractual obligations to BHB, should that be required. In my judgment this was effectively an admission of agency or nominee role for CFJL, or came very close to it.

329. Fifth, in relation to the transaction where CFJL needed to be involved, concerning the Murfitt Henson land, the land was duly transferred, as soon as it had been acquired in the name of CFJL, and passed on to P3 Eco (in relation to the 10 acres) on 7 March 2018. This was done on a back-to-back basis. This is consistent with the notion that CFJL was viewed as being an agent or nominee.

330. Sixth, at one stage in negotiations, in August 2017, the suggestion was raised in an email dated 7 August 2017 from Mr Marsden to Ms Zatouroff that in order to try to resolve the A2D problem as A2D were in contractual relations with P3 Eco the contract with BHB could be completed with PPP only, on the basis that PPP "*have effective control of the site*." I do not believe Mr Marsden would have said this if it was not true. He clearly shows in my view that the P3 parties were in control of the CFJL rights, and could direct them where they wished.

331. Seventh, I also conclude that the transaction involving Desiman 2, which I consider in further detail in paragraph 343 below also shows CFJL acting as a nominee or agent for the P3 parties.

332. In conclusion, therefore, I find that CFJL is holding the rights it has under the CFJL Agreement as a nominee for P3 Eco and PPP and on trust for those entities

or as agent for those entities. If necessary, I would conclude that this was by reason of the application of the concealment principle, but I doubt that adds anything to the analysis.

333. I also consider this is a case where the evasion principle applies. I consider it would be appropriate to disregard the separate legal status of CFJL and treat it as liable jointly with the P3 parties for the discharge of any obligations to BHB, either in addition, or in the alternative, to my findings as to it being a nominee or agent for the P3 parties. I shall now summarise the reasons why I have found that to be so.

334. First, as I have already noted in paragraph 193, when considering the issue of breaches under issue 4, Mr Nardelli stated in his evidence that he did not wish to tell BHB about the proposed renegotiation involving the Murfitt Henson families, and this was the reason why CFJL was interposed and its existence kept secret for as long as possible. This is effectively an admission that, and I so find that, Mr Nardelli, in his capacity as a director of P3 Eco and PPP, was deliberately using CFJL to defeat or evade the rights of BHB under the Agreements, and in particular the restrictions in the Exclusivity Agreement. I conclude that the reason for the interposition of CFJL was to cast that renegotiation into the darkness so that BHD did not know about it, or the details of it. I have also concluded that CFJL has been deliberately used to further frustrate the enforcement of those rights, since by design the Murfitt Henson Option rights have been allowed to lapse, where as the CFJL rights have been preserved.

335. Secondly, it is apparent that Mr Nardelli had instructed Mr Marsden to keep the existence of CFJL secret. The transaction involving the transfer of the 10 acres using CFJL was not disclosed to BHB in advance. Nor was CFJL's role disclosed in relation to the other transactions. The CFJL Agreement was itself not disclosed until after proceedings had been issued, and following orders for disclosure.

336. Thirdly, I conclude that Mr Nardelli was dishonest in his description of the role of CFJL to Mr Costello, Mr Holleran and Mr Doyle, both verbally, as recorded in the email exchanges on 28 March 2018, and in writing, as evidenced in those same email exchanges. I refer to my findings in paragraph 199 above. Mr Johnson stood by and did not correct the position.

337. Fourthly, the P3 parties were no stranger to the idea that a company might be interposed in order to circumvent or potentially evade contractual rights owed to third parties. In the email of 7 August 2017, which I have already referred to in paragraph 330 above, it was suggested that in order to try to resolve the A2D problem as A2D were in contractual relations with P3 Eco the contract with BHB could be completed with PPP only. I accept the submission of Mr Jefferis that this mirrors the position which we have here. This "company switch" argument was suggested barely 2 months after the CFJL Agreement with the landowners. It was a concept which was rejected by Mr Costello who stated in his evidence that "*our trying to cut A2 out on the basis of the old agreement effectively being superceded because we were the new owners looks stupid on our part (for want of a better word).*" I would suggest a better word would be

dishonest. It was plainly an opportunity to evade that was not missed by the P3 parties in relation to CFJL.

338. In conclusion, therefore, I find this is one of those rare cases where the corporate veil should be lifted, or the legal personality of the company CFJL "pierced", to deprive the P3 parties of any advantage caused by the introduction and interposition of CFJL. In my judgment unconscionable advantage was sought to be taken through the use of the separate legal personality of CFJL. The fact that Mr Nardelli and Mr Johnson might also have wanted to benefit their families is not exculpatory. I note that it is possible that in the event of the winding up the P3 parties a liquidator might have at their disposal other potential claims under the Insolvency Act 1986, which would bring any assets held by CFJL back into the P3 parties. It is also possible that a claim could be advanced by BHB under section 423 of that Act. But I do not read the analysis of Lord Sumption in *Prest* to suggest that because there is the existence of other possibilities of unpicking the wrongdoing, the court should not pierce the corporate veil where the evasion principle is applicable. That would be an inefficient use of court resources, and I conclude is inconsistent with the majority in *Prest*.

Alleged collusion to avoid specific performance or other proprietary relief

339. That leaves me with the question relating to the role played by the Desiman parties. I have already explained above that the allegations in relation to collusion involving Desiman under issue 7 are focussed on the notion that they had sufficient notice of the wrongdoing in question so that they cannot take free of the proprietary rights of BHB. Those proprietary rights have not been made out so what I say here is not necessary in support of my conclusions and I will keep it brief and not refer to the voluminous underlying documents in any detail.

340. The circumstances in which P3, CFJL and the Desiman Parties entered into transactions relating to the land at Himley Village may be summarised as follows. P3 needed to obtain alternative finance to acquire parts of the land so that it did not fall into the hands of third parties. It was in these circumstances that P3 approached Desiman and entered into the facility agreements with them. The allegations made by BHB of collusion, "stealing a march" are complained of as being vague, by the Desiman parties, and are denied.

341. A large part of the complaint made in relation to Desiman concerned the allegedly rapacious terms on which Desiman lent. Ultimately the question of whether or not those terms are justifiable or not is not a matter for me to decide, but the commercial context of the lending was that the P3 parties were in difficulty. They had not concluded any terms with BHB and time was running out in relation to the Options. There was no prior relationship between Desiman and the P3 parties before the transactions in issue in this case. I accept the evidence of Mr Fellows that its interest in this matter at all times has been as a lender hoping to make a return on short term finance. Until the latter part of 2020 it cannot be disputed that this was the relationship. The monies it advanced to the P3 parties were supported by facility documents which identified it as a lender and security was granted to support repayment. Mr Fellows explained that a success fee of 25% was negotiated on the Pains land because Mr Nardelli

wished to have the facility in place to buy the Pains land but it may not get used, as he intended to do a back-to-back purchase and onward sale. There is a sound commercial logic to Mr Fellows negotiating some return for Desiman in these circumstances. Other fees and substantial build-up of interest are all readily understood on the basis that the finance was intended to be short term, in the nature of bridging finance, and it ended up being much longer term. Each time the loan term expired Desiman could negotiate further and better terms. It has been very patient and supportive and demanded a price in return for that. Mr Nardelli had little other options at the time.

342. The matter becomes more complicated in relation to the last transaction in 2020, the acquisition of further lands from the Murfitt Henson families on 23 October 2020. Again this was originally intended to be structured as a secured loan arrangement. However by this time Desiman had acquired much greater knowledge about the claim brought by BHB and this caused them concern. BHB had made plain that they were unwilling to subordinate their equitable claim below that of Desiman. Desiman were unwilling to make a further loan without priority, but in addition they appreciated that by this time they were, to use the words of Mr Smith, in it "deep". The evidence of Mr Fellows and Mr Smith that a commercial decision was made by Mr Fellows that he concluded that the Murfitt Henson land needed to be bought to protect the value in the existing parcels of land over which Desiman held security. I accept that evidence. Mr Jefferis sought to contend that there was already sufficient existing security. That may, or may not, prove to be the case, but in my judgment Desiman was within its rights to wish to seek a first charge security in relation to further lending.

343. The solution which was ultimately struck on, and put into place, was, as I have noted in paragraph 38 above, a curious one. It was decided that the land would be purchased by CFJL and then a contract for the sale of that same land entered into between CFJL and Desiman 2, for the same figure, of £4 million. In view of my conclusions in relation to the value of this land I conclude this sale was less than it was worth to CFJL. A so called "option" was granted as a schedule to this contract to enable CFJL to buy the land back from Desiman. The price however was not £4 million but instead £19,047,238.23. This document, on its own, makes no sense. It was explained in evidence that the sum of £19,047,238.23 was the calculation by Desiman of the total sum due to it by way of lending, fees not just from CFJL, in the sum of £4 million, but also from the P3 parties. CFJL was clearly acting simply as a nominee and under the direction of the P3 parties in this respect and Desiman still viewed the P3 parties as being the borrower. This contract was completed the same day, on 23 October 2020, and the land was transferred by CFJL to Desiman 2 for £4 million and is now registered in the name of Desiman 2 under Title Number ON360325. Mr Fellows explained in his evidence that there was no intention for Desiman 2 to make any profit. The intention was that Desiman would earn the agreed fees and interest as had previously been agreed when envisaging the loan being from Desiman to the P3 parties. Desiman 2 was simply being used as a convenient holding vehicle for the land. It is apparent to me, in the circumstances, that the true intention was, as before, a lending relationship and that the transfer of land to Desiman 2 as security. The matter can be tested in this way. If, as has

happened, the time for the buy-back has expired, Desiman 2 could turn around and say, bad luck we now own the land, even though the P3 parties and CFJL had fully repaid all that was due and owing would Desiman be entitled to say no? In my judgment they would not. Mr Fellows did not suggest otherwise and emphasised that irrespective of what the document might say Desiman would transfer the land back on payment in full.

344. When considering the nature of an instrument, such as a charge, English law looks to the substance of the transaction, not the label or the form: see for example the discussion in fixed and floating charges in *Re Spectrum Plus Ltd* [2005] UKHL 41. There is a distinction between an absolute assignment and an assignment by way of security. In order to determine whether the security instrument is an assignment or a charge, the substance of the instrument has to be considered as a whole: see *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376, supra, at [45] per Aikens LJ citing *Hughes v Pump House Hotel Company Limited* [1902] 2 KB 190. Key factors will be whether the assignor has retained any rights or title in relation to the debt or whether it has passed in its entirety. In *Ardila Investments NV v ENRC NV & Anr* [2015] EWHC 1667 (Comm) at [10] – [23], Simon J held that the assignment in that case was not absolute but operated by way of security. In particular, he held that although the instrument referred to an absolute assignment it was expressly subject to "*a proviso for re-assignment on redemption of the Secured Liabilities*". This proviso for redemption was held to be inconsistent with an absolute transfer of title. Simon J went on to identify other features of the instrument which had the effect of reserving to the "assignor" rights and powers in respect of the security assets.

345. The 23 October 2020 transaction only makes sense if the transfer of the land to Desiman is viewed as an assignment by way of security. Even if the contractual documentation would not ordinarily be construed as such I consider that it ought to be interpreted (if necessary by way of constructional rectification) as providing for a right of re-assignment on redemption to the Desiman parties. Should it have been necessary I would also have concluded that the contractual documentation did not reveal the full and true picture in this respect (which would also have enabled rectification on a wider basis, or simply enabled the court to look through the document to the true intent behind it). This does not affect my conclusion, however, that this is valid security.

346. The Desiman parties had another string to their defence bow, should BHB have made out a case for a proprietary claim. They submitted that even if BHB is able to establish a proprietary interest, such interests do not have priority over their interests. In support of this argument they cited the decision of the Supreme Court in *Southern Pacific Mortgages Ltd v Scott* [2015] AC 385. In this case, the purchaser of a house represented to the vendor that, if she sold the property to him, she could stay in the house indefinitely. The purchaser acquired the property with the assistance of a mortgage, which was secured by a charge over the property. When the mortgagee bought possession proceedings, the vendor sought to defend on the basis that the purchaser held the property on a constructive trust and/or subject to proprietary estoppel in her favour, and that this right overrode the charge. This argument was rejected. As Lord Collins

explained at [79] only personal rights were acquired initially and the rights were only capable of becoming proprietary and taking priority over a mortgage when the acquisition of the legal estate occurred. But, following the decision in *Abbey National Building Society v Cann* [1991] 1AC 56, there is no "scintilla temporis" between the acquisition of the property and the grant of the charge, during which time legal title to the property would vest in the purchaser free of the charge. The reasoning of the House of Lords in *Cann* is not limited to the grant of charges, they submitted, citing *Whale v Viasystems Technograph Ltd* [2002] EWCA Civ 480.

347. They submitted, applying the above principles to the present case: (1) neither the P3 parties nor CFJL owned any of the land at Himley Village when BHB and the P3 parties entered into the Heads or the Exclusivity Agreement. Thus, any rights BHB had in relation to the land were necessarily personal only at least until the P3 parties and/or CFJL acquired the relevant parts of the land; (2) on 7 March 2018 title to the 10 Acres was transferred by the Murfitt Hensons to CFJL which, in turn, transferred title to the land to P3 Eco. Desiman funded this acquisition and was granted a charge over this land; (3) on 6 January 2020 the Pains transferred title to the Pains Land to PPP. This acquisition was funded by Desiman, which was granted a charge over the land; (4) The reasoning of the Supreme Court in *Southern Pacific* and the House of Lords in *Cann* means that Brooke cannot claim priority over Desiman's Charges . At no time was title to the land vested in P3 or CFJL free of Desimans' Charges; (5) This analysis also applies to the Further Murfitt Henson Land. On 23 October 2020 there were back-to-back transfers between (i) the Murfitt Hensons and CFJL (ii) CFJL and Desiman 2. Given that Desiman funded the acquisition of this land, the substance and reality of the dealing was that CFJL did not acquire freehold title to it free of the obligation to transfer the land to Desiman 2, and BHB cannot claim priority over Desiman 2; (6) They also added, BHB has another problem in relation to the 10 Acres in that the priority of any proprietary interest it did have was not protected and was, in accordance with s.30 of the Land Registration Act 2002, postponed on completion of the first legal charge by registration.

348. Subject to three qualifications, or observations, I accept those submissions. The first is that if equitable interests in the land had been acquired by the P3 parties or CFJL via an exercise of Option rights or via the CFJL contract then this line of reasoning would not work. I do not find that to be the case, but the point was not explored in detail in submissions. Secondly, if the P3 parties were acting in a fiduciary capacity and Desiman and parties were knowingly assisting in that respect then I suspect matters would have unravelled for Desiman. But no such case was advanced and I have rejected the submission that the P3 parties were acting as a fiduciary. Thirdly, in relation to the 23 October 2020 transaction these submissions support my conclusion that the 23 October 2020 transaction should be viewed as an unconventional way of Desiman acquiring security. As it happens, based on these secondary submissions, it probably need not have structured the transaction in the way it did.

349. Finally, as for the allegation of "stealing a march on the court", or similar phrases used by BHB, it does not seem to me they disclose any additional cause

of action known to law, or in any event none have been developed before me. BHB had access to court at all times during this case, save for the short period when the stay applied under a consensual Tomlin Order.

Issue 8: Did Desiman incite a breach of the agreements between BHB and the P3 parties?

Introduction – the principles as to tortious inducement of breach of contract

350. There was no substantial dispute between the parties as regards the relevant legal principles. What follows is substantially taken from the Desiman parties written opening submissions, which I adopt, with some adjustments.

351. The ingredients of the tort of inducement of breach of contract were considered recently in *Kawasaki Kisen Kaisha Ltd v James Kemball Limited* [2021] EWCA Civ 33 at [21]. The four ingredients are as follows: (1) There must be a breach of contract by B; (2) A must induce B to breach their contract with C by persuading, encouraging or assisting B to do so; (3) A must know of the contract and know that its conduct will result in breach of the contract; (4) A must intend to procure the breach of contract either as an end in itself or as the means by which it achieves some further end. A fifth matter requires consideration: (5) If A has a lawful justification for inducing B to break B's contract with C, that may provide a defence against liability. Considering each of those in further detail here.

352. *The first ingredient: breach of contract:* As explained by Lord Hoffmann in *OBG v Allen* [2007] UKHL 21, [2008] 1 AC 1 at [5], liability for inducement of breach of contract is an accessory liability and is thus dependent upon the contracting party having committed an actionable wrong.

353. *The second ingredient: inducement:* It was also confirmed, in *OBG* at [178], that inducement is a key component of the tort. This requirement was also considered by the Court of Appeal in *Kawaski* by Popplewell LJ who, having reviewed the authorities, explained at [32] that "*they make clear that conduct cannot qualify as inducement if it constitutes no more than preventing B from performing the contract with C as one of its consequences. There must be some conduct by A amounting to persuasion, encouragement or assistance of B to break the contract with C*". The judge further explained, at [33], that participation by A in B's breach must have a "*a sufficient causal connection with the breach by the contracting party to attract accessory liability*" and that "*inducement requires the defendant's conduct to have operated on the will of the contracting party*".

354. *The third ingredient: knowledge:* As Lord Hoffmann explained in *OBG* at [39] "*to be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so*" ([39]). Lord Hoffmann continued at [40] and [41]: "*The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a*

consistent line of decisions. In Emerald Construction Co Ltd v Lowthian [1966] 1 WLR 691 union officials threatened a building contractor with a strike unless he terminated a subcontract for the supply of labour. The defendants obviously knew that there was a contract—they wanted it terminated—but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said, at pp 700–701: "Even if they did not know the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not." *[41] This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact: see Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] 1 AC 469 . It is not the same as negligence or even gross negligence…"* Consistently with the above, Lord Nicholls explained in *OBG* at [202] that an honest belief by a defendant that his conduct will not involve a breach of contract is inconsistent with an intention to induce breach of contract, even if that belief is "muddle-headed and illogical".

355. The knowledge requirement, and the relevance of legal advice, were considered by the Court of Appeal in *Allen (t/a David Allen Chartered Accountants) v Dodd & Co Ltd* [2020] QB 781. In this case, prior to recruiting a new employee, an employer obtained legal advice as to the enforceability of covenants in the prospective employee's previous contract of employment. The gist of that advice (which turned out to be wrong) was that, whilst the matter was not risk free, it was more likely than not that the covenants were ineffective and unenforceable [2]. Lewison LJ explained at [27]: "*in order to be liable for the tort of inducing a breach of contract, you must know that you are inducing a breach of contract. "Are" is not the same as "might be". You must actually realise that the act you are procuring will have the effect of breaching the contract in question. "Will have" is not the same as "might have"..... it is for the claimant to prove the defendant's actual knowledge of the breach; not for the defendant to prove an absolute belief that there would be no breach*." The judge went on to articulate the important policy consideration that persons be able to act on legal advice even if turns out that advice is wrong, saying that at [34] "*As everyone knows lawyers rarely give unequivocal advice……to insist on definitive advice that no breach will be committed would have a chilling effect on legitimate commercial activity*".

356. He further observed that it "*may be the case that if the legal advice goes no further than to say that it is arguable that no breach will be committed, that would not be enough to escape liability*" but, as that question did not arise on the appeal, he expressed no opinion on it. However, in his view "*if the advice is that it is more probable than not that no breach will be committed, that is good enough*" ([36]). The claim against the new employer was unsuccessful.

357. *The fourth ingredient: intention:* as to intention, it is not enough for a breach of contract to be a foreseeable consequence. Rather breach of the same must be intended as an end, or a means to an end (per Lord Hoffman in *OBG* at [43]).

358. *The fifth point:* justification: as confirmed in *Edwin Hill & Partners v First National Finance Corp Plc* [1989] 1 WLR 225, taking reasonable steps to protect an equal or superior contractual right may be justified even if this will cause a party to break their contract. The facts of that case concerned a charge holder who had loaned sums to enable a developer to acquire a site. At the same or similar time, the developer entered into a contract with a group of architects giving them the right to develop the site. This proved more difficult than expected and the development stalled. The lender had the usual remedies of calling in the loan etc. open to it but, instead of exercising those, it financed the build itself but insisted, as part of doing so, that the architects be replaced (see paragraph 227F). The architects' claim for inducement of breach of contract was rejected by the Court of Appeal holding that the interference with the architects' contract was justified as being in defence and protection of an equal or superior right under the charge.

359. To that I might also add a sixth factor: (6) If the breach incited did not cause C to suffer any loss then there can be no liability on the party of the third party inciter, A.

Analysis and conclusions on tort of inducement of breach of contract

360. Having regard to the above principles, BHB submitted that the tort was made out in this case either on the basis of actual knowledge by the Desiman parties were inciting or participating in a breach of contract by the P3 parties, or on the basis the Desiman parties were recklessly indifferent or blind to the same.

First ingredient – breach of contract

361. In my judgment the first ingredient of the tort, that there must be a breach of contract by the P3 parties, is satisfied. I have already set out my reasons in that respect under issue 4 above.

Second ingredient – inducement

362. I am also satisfied that the second ingredient of the tort, that the Desiman parties induced the P3 parties to breach their contract with BHB, is made out since what the Desiman parties did was, in my judgment assisting the P3 parties in doing so. Desiman advanced funds to enable the 3 transactions in question to take place and obtained security as part of the process. The first involved a back-to-back transaction involving CFJL, and the third a purported sale on from CFJL to Desiman.

Third ingredient – knowledge

363. The more challenging ingredient for BHB to make out is that the Desiman parties knew of the contract and that their conduct would result in a breach. I shall now set out the evidential factors relied on by BHB in support of this

conclusion, in chronological order, breaking them down into before each of the relevant transactions. I will also identify the Desiman parties' evidential points in reply at the same time, and make my findings as to knowledge at the three relevant dates (7 March 2018 (10 acre transfer and first charge), 6 January 2020 (Pains land and a second charge) and 23 October 2020 (further Murfitt Henson land and transfer to Desiman 2).

364. (1) up to 7 March 2018: The first document relied on by BHB is an email, dated 29 January 2018 from Mr Fellows to Mr Nardelli where Mr Fellows asked Mr Nardelli whether the P3 parties might wish to cast their net wider in relation to potential purchasers beyond BHB and if so Desiman might be willing to act as finder/introducer. However there was no evidence that Mr Fellows did in fact take on this role and the point was not pursued any further. I do not consider there is any significance in this.

365. Mr Jefferis also pointed to the absence of any written record, or evidence, of the Desiman parties or Mr Smith, their solicitor, doing any due diligence, before 7 March 2018, or indeed later.

366. Dealing with their knowledge on 7 March 2018, the date of the grant of the first charge in support of the 10 acre parcel of land, the Desiman parties' submitted as follows: (1) Desiman had been told of an "in principle Agreement" and that contracts were not yet exchanged. Desiman did not understand there to be a binding contractual relationship between the P3 parties and BHB as a result of what they had been told. Desiman had not seen a copy of the Exclusivity Agreement; (2) Desiman understood that the P3 parties were free to grant the charge and that doing so would not amount to a breach of any obligation. Indeed, they submit this was expressly stated in the charge; (3) thus, even if the grant of the first charge by the P3 parties amounted to a breach of the Exclusivity Agreement, Desiman did not know this.

367. Mr Fellows and Mr Smith were tested on these matters in cross-examination. Mr Fellows explained that he did not concentrate on the corporate structures overly and concentrated more on the people involved, in this case that meant mainly Mr Nardelli. He also explained he relied on Mr Smith to look into legal matters for him. Mr Smith was cross-examined on the idea that Desiman had only been told of an agreement in principle and by reference to an email dated 9 February 2018. However, as Mr Smith pointed out in oral evidence, this email supports the idea that BHB's interest as purchaser was based on a non-binding agreement. It referred to "*We already have an in principle Agreement*". He stated he received nothing to show there was a concluded agreement. He understood what conceptually had been agreed was the price, but that there was no committed agreement and he received nothing indicating otherwise. The transaction was a potential transaction, as is often case.

368. I accept the evidence of Mr Fellows and Mr Smith that Desiman did not know that there was a binding agreement at this time. It follows that they cannot have thought they were in breach. Nor do I consider it might be said either of them turned a blind eye in these circumstances, or were recklessly indifferent to BHB's rights. They required the P3 parties, in clause 5.4(b), to verify that they could do what they were proposing to do. A similar obligation is contained in

clause 11.2 of the facility document. The mere fact that Desiman were keen to secure land which was important to the development as a whole, as is evident from the contemporaneous emails, is simply them looking after their own commercial interests and there is nothing sinister in that in my judgment.

369. (2) up to 6 January 2020: BHB went on to submit that, and building on the above submissions, the Desiman parties in any event knew of the action on 7 February 2019, since Mr Nardelli mentioned it in an email to Mr Fellows on this date. Mr Jefferis submitted to not think about the effect of the CFJL Agreement (by which I understood him to mean vis-à-vis the rights of BHB) is not good enough. The Desiman parties could have obtained the court documents in these proceedings from the P3 parties, or from the Court (the court proceedings being referred to on the UNs at the Land Registry). I agree with Mr Jefferis that the absence of any written record showing what Mr Smith did to investigate matters when he became aware of the contract with Brooke or indeed advice given over the telephone does require consideration. However I do not believe there is anything suspicious in it. Mr Smith had a close working relationship with Mr Fellows and he stated Mr Fellows was not the type of client who wanted reports in writing. There is in any event plenty of contemporaneous email traffic between Mr Fellows, Mr Smith and Mr Marsden from which deductions can be made as to the state of mind of the parties at the time.

370. Mr Jefferis further submitted that there was a telling email from Mark Smith to David Marsden of 14 June 2019 in which Mr Smith stated as follows:

"Is the s 106 Agreement now in an approved form? I understand that the s 106 agreement needs to be completed in over to get over an exclusivity agreement clause (in favour of Brooke) which provides exclusivity to Brooke until 21 days after planning permission (and hence the sl06 agreement) has been obtained. May I see the agreement please?

How are things progressing with Brooke? Reading between the lines, perhaps unfairly, I sense that there is an issue with Brooke. Hence the need to complete the s106 to escape the exclusivity.

Is the contract agreed with Brooke? If not, what is outstanding? Can you please send me the current draft and summarise what remains in dispute?"

371. Mr Jefferis submitted this shows Desiman's solicitor seeing the completion of the S106 not as an opportunity to sell to BHB but as a means of getting rid of BHB. By this time it is clear that Desiman did know about some possible binding contractual rights being asserted by BHB. They knew proceedings had commenced and that an issue was whether or not an exclusivity agreement was in force. But I do not read the email from Mr Smith as disclosing any knowledge that anything which Desiman was being invited to do involved a breach or procuring a breach. On the contrary it appears to me to be the sort of responsible questions a solicitor acting for a lender would ask. He was asking these questions of Mr Marsden, a solicitor in a reputable firm. It is a legitimate point however that Mr Smith did not follow these points up, but in my judgment the fact of settlement by the time of 6 January 2020 must also be borne in mind. On

22 November 2019 the litigation had settled, albeit it was later revived, in May 2020.

372. Mr Jefferis referred to the absence of any written advice about the Tomlin Order and drew my attention to the fact that Mr Fellows took advice about the Tomlin Order from friends who are barristers in a social context of a restaurant and without giving them any documents. I agree Mr Fellows approach in this respect was unconventional, but Mr Fellows does not follow the ordinary conventions of a high street bank in his dealings with people.

373. On Desiman's part, as regards their knowledge on 6 January 2020, the date of the second charge and when the Pains land was purchased, they submitted as follows: (1) Desiman had been told of an "in principle Agreement" and of an exclusivity agreement, but had not seen any contractual documentation between BHB and the P3 parties and had no further knowledge of the Exclusivity Agreement (or any of the other agreements); (2) Again, the second charge provided that entry into the same would not constitute a breach by P3 of any obligation binding on it; (3) Desiman knew that proceedings had been commenced by BHB, but believed, based on their discussions with P3, that the claim was vexatious, that it was brought on the basis of an agreement which had expired. Desiman had also been recently told that the claim had settled; (4) Thus, even if the grant of the second charge by P3 amounted to a breach of the Exclusivity Agreement, Desiman did not know this.

374. In my judgment the first point has less force, for Desiman, by 6 January 2020 bearing in mind the exchanges Mr Jefferis has focussed on and I have mentioned above, in February and June 2019. By this time Mr Smith and Mr Fellows knew that BHB was asserting some form of binding contract. They did however still require the P3 parties to sign up to clause 6.9, to verify that the contemplated acts would not constitute a breach. The amended facility documentation contained a revised facility agreement which contained a repetition of clause 11.2, to similar effect. Most significantly, during this period, in my judgment, is the fact that Mr Nardelli had been repeatedly assuring and seeking to reassure Desiman that they need not worry as the matter would be settled. Mr Smith gave evidence confirming that, after requesting further information on receipt of the email of 7 February 2019 from VWV he received an e-mail from Katie Hickman of VWV on 15 February 2019 where further information was provided about the claim.

375. So far as events in June and July were concerned, Mr Smith asked Mr Marsden for "chapter and verse" on or about 18 July 2019. Mr Marsden referred back to the email from Katie Hickman and he explained his client was making efforts to dispose of the action. Overall, Mr Smith stated that the impression given by both the information provided by Mr Nardelli and Mr Marsden/VWV was that the claim was not a concern, would be resolved, and a sale was expected still to proceed to either BHB or Legal & General, as had been advised previously. The claim was in fact settled on 22 November 2019. Mr Smith was informed of this by Mr Marsden. I am satisfied that Mr Smith was entitled to rely on what Mr Marsden had told him.

376. I also bear in mind that the further funds which were requested by the P3 parties was to support the acquisition of land in respect of which an option was about to expire. This was the genuine purpose of the borrowing and the money was used to secure that objective. The land was to be transferred into the name of PPP. None of this would have suggested that it was an attempt in some way to prejudice BHB or interfere with their contractual rights.

377. I conclude that Desiman did not believe that what it was doing was involving a breach of the rights of BHB by assisting with or entering into the 6 January 2020 transaction. Nor do I conclude that Desiman was recklessly indifferent to that.

378. (3) up to 23 October 2020: Mr Jefferis referred to a series of emails on 1 September 2020, including in particular and email from Mr Smith to Mr Marsden which referred to a proposed simultaneous "collapse and regrant" of the Murfitt/Henson Option Agreement and he submits this series of emails shows that the Desiman parties were aware of the attempt to circumvent BHB, and were prepared to run with it. This issue was explored in the oral evidence of Mr Fellows and Mr Smith.

379. Mr Fellows explained that it was based on a misunderstanding by him as to what was to happen, which led to Mr Smith referring to it in an email. Mr Smith gave the same evidence, stating that he had repeated these words which had been used in an e-mail from Mr Fellows to him. Mr Marsden confirmed that there was no intention for the 2010 Option to be altered or substituted, as is recorded in his email of 8 September 2020 to Mr Smith. Rather the proposal was to acquire the land in the name of CFJL pursuant to the CFJL Agreement. Mr Smith understood from VWV that the CFJL Agreement enabled the land to be purchased for virtually half what would have been payable under the Option Agreement. Mr Fellows explained that Mr Nardelli had explained to him that he did not want to disclose the confidential terms relating to this to BHB for fear it would cause a further negotiation exercise with them. I accept Mr Fellows and Mr Smith's evidence that this is what Mr Nardelli told them. It explained to them his sensitivity in relation to CFJL and the use of CFJL.

380. Mr Jefferis submitted that Mr Smith did absolutely nothing about investigating BHB's rights asserted in these proceedings until 20 October 2020, bar asking for "chapter and verse" from the P3 parties a few times, and accepting oral assurances. He drew my attention to the fact that Mr Smith took a hasty view, in the few days between 20 October 2020 when he received the pleadings to 23 October 2020 when the deal was completed, and apparently relied solely on his own view of the merits of BHB's case, when he was not a litigator. He noted that Mr Smith did not seek counsel's advice.

381. He submitted that it is clear from the Defendants' evidence overall that it was at Desiman's insistence that the 59 acres was transferred to Desiman 2. Whatever Mr Fellows may say, he submitted it is a most extraordinary situation where a lender knows a client has an exceptionally good opportunity (to buy consented development land at £75,000 per acre) and the lender insists on buying the land itself, through its own wholly owned subsidiary, at a price way below market value. The purchase price declared to the Land Registry on the sale from CFJL to Desiman 2 was only £4m. There was an option to buy back

but at £19.2m, when £4m had been paid. The option has now expired, and the Defendants assert it has not been renewed. So, CFJL, he submits, has only an alleged oral promise to sell it back, which would not be enforceable under section 2 of the Law Reform (Miscellaneous Provisions) Act 1989. If the P3 parties are insolvent or become insolvent the 59 acres will, no doubt, rest in Desiman 2, he suggests. This transfer to Desiman 2, not the P3 parties, was not justified. The transfer could have been to the P3 parties, which was a party to these proceedings. The transfer to Desiman 4 was knowingly done to better their position because Desiman was not then a party to proceedings. He submitted the Court will not allow its jurisdiction to evaded by this sort of conduct.

382. I can understand why BHB has taken such a jaundiced view of this transaction. On its face it is a curious one. It certainly provides ammunition in support of the complaint that Desiman was inciting a breach of contract. However in my judgment what was happening here was not so much to do with any belief or concern as regards a contractual breach, but the desire by Desiman to insulate itself in relation to BHB's proprietary claim and obtain first ranked security. The reason why the land was transferred into Desiman 2 was, as I have found above, in order to enable first ranked security to take place.

383. Mr Jefferis went on to point out that Desiman's need for a deed of priority or removal of the UN1 was to get rid of a proprietary claim. The fact that Desiman insisted on this and then required a transfer to Desiman 2, shows that, he submitted, they knew it was probable C did have the rights which they assert in these proceedings, including contractual rights to buy the land and/or prevent a sale to others and trust interests. Thus, he submits, the Desiman parties did have sufficient knowledge of BHB's rights.

384. I would agree with the submission that Desiman wished to ensure it did not get hurt by a proprietary claim by BHB. But this was based on an existing claim. It does not support the conclusion that they knew what they were doing was to circumvent contractual rights which they thought were likely to be valid.

385. Overall Mr Jefferis submitted that the documents passing between the P3 parties and Desiman showed that they were working together to exclude BHB from the site. He submitted that the Desiman parties were wilfully blind in the sense used by Lord Denning in *Emerald Construction Co Ltd v Lowthian* as quoted in paragraph 353 above. For the reasons identified above in paragraph 381 above I do not consider that Desiman was working to exclude BHB from the site, but in any event this is not the correct question to ask. As for whether or not they had knowledge that was to take place was a breach of contract or that they were wilfully blind, I accept there is evidence which requires an answer from Desiman in this respect.

386. As to that answer, Desiman submitted, as regards their knowledge on 23 October 2020, the date of the transfer of further land from the Murfitt Henson families to CFJL and on to Desiman 2, that they considered, on advice from Mr Smith, that BHB was unlikely to make out its breach of contract claim.

387. They refer to the fact that on 20 October 2020 Desiman was provided, for the first time, with the Exclusivity Agreement, the Heads of Agreement, the

Addendum and the other documents relating to this litigation. They took legal advice in relation to the same from Mr Smith. They drew my attention to the following passages in his witness statement:

"58. The exclusivity agreement provided that the aforesaid "P3 Group" would not in relation to any residential property market the property or negotiate with any third party for the sale or lease of the property or enter into any contract for any disposition or development of the property unless Brooke were to withdraw from the transaction.

59. It was my opinion, as advised to Desiman at the time, that Brooke's conduct in failing to agree the sale and purchase agreement demonstrated a withdrawal from the proposed transaction

… I considered that the documentation, albeit poorly drafted, did not anticipate that the exclusivity should apply beyond 31 December 2016

64. Neither Rosemary Louise Henson nor Julian Francis Murfitt and Catherine Rachel Murfitt had entered into any direct contractual arrangement with Brooke. Brooke's purported interest in the property derived from the 2010 Option granted in favour of P3Eco. The 2010 Option itself had come to an end due to no notice having been given by P3Eco to the landowners within the option period to purchase the land (the option period had expired due to the passage of time since the grant of the planning permission)."

388. Desiman submitted that, as explained by Lewison LJ in *Allen*, Desiman was entitled to rely on the advice given by Mr Smith. In these circumstances, even if the acquisition by CFJL and/or Desiman 2 of the further Murfitt Henson land was a breach of the Exclusivity Agreement, there is no evidential basis whatsoever, they submit, for suggesting that Desiman had knowledge of the same and Desiman accordingly invite the Court to dismiss the claim.

389. As I have already noted when providing my observations in relation to the witnesses overall, the absence of any contemporaneous notes from Mr Smith to verify this evidence is a factor which gives me pause for thought as to whether I should accept his evidence in this respect. I also consider that Mr Fellows was accurately described by Mr Smith as being "in deep" by this time and he judged that he needed to proceed with this transaction to protect the position of Desiman, and this was the reason for using Desiman 2. He was concerned the land would be lost if it was not purchased. This might be said to lend some support to the notion that Desiman and Desiman 2 proceeded with this third transaction with reckless indifference as to the contractual rights of BHB.

390. Ultimately, however, I have concluded that they did not do so. Mr Smith did demand to see and did consider the Exclusivity Agreement and the Heads of Agreement and the Addendum. I do not accept the absence of counsel's advice on the issues could be considered to amount to reckless indifference. The Desiman parties sought and obtained legal advice from a solicitor who gave them advice and on which they seemingly relied. In these circumstances, it is more difficult to suggest that the Desiman parties were acting in a manner recklessly indifferent to the rights or claims of BHB. On the contrary it shows

they were most concerned to understand more about them. In these circumstances, on this third transaction, I do not accept the conduct of the Desiman parties could be said to one of turning a blind eye. In my judgment the issues becomes a more stark question of actual knowledge. I accept Mr Smith's evidence that he did not consider there was a breach of BHB's contractual rights in relation to the proposed transaction and advised Mr Fellows accordingly. His oral evidence was to the same effect as his witness statement, as summarised in paragraph 387 above, notwithstanding robust cross examination from Mr Jefferis. He confirmed in his oral evidence his view was that the Exclusivity Agreement had come to an end on any analysis given the passage of time since the grant of planning permission. I note, but for my conclusions in relation to the impact of the Tomlin Order, I would have come to the same conclusion.

391. In my judgment the steps taken in relation to the use of Desiman 2 and the curious nature of that transaction were due to Mr Smith's concern, shared with Mr Fellows, to try to protect his client as best he could in relation to a past proprietary claim. That was the motivation for the use of Desiman 2 by Mr Fellows.

392. I should add that, ultimately, whilst I have come to a different conclusion than Mr Smith in relation to the contractual position, I should not allow the fact that I have come to a different conclusion to jump to the conclusion that Mr Smith is not telling me the truth, when he says he advised his client in the terms he did. I have concluded that the Exclusivity Agreement was still in force on 23 October 2020 based on a detailed analysis of the contractual documentation, and the Tomlin Order, the evidence of the parties, and with the benefit of submissions, all over the space of 9 days. Mr Smith did not have those benefits.

393. My overall conclusion, therefore, is that the requisite knowledge ingredient is not made out in relation to any of the three transactions. It is unnecessary to make further findings beyond this, but I will briefly set out my further findings on the other ingredients/factors I have mentioned above.

Fourth ingredient – intent

394. Turning to the fourth ingredient, had I been satisfied as to the knowledge ingredient I would also have concluded that the necessary intent is made out, and procuring the breach was a means to an end. The Desiman parties submitted this had not been adequately pleaded, but in my judgment BHB's case in this respect is relatively easy to understand, even if it might have been more fully articulated. If knowledge had been established then it is clear intent would have been made out, since the breach was a necessary means to achieving the desired outcome, for Desiman, of securing the land in question in advance of the rights of BHB.

Defence of justification

395. There is also the fifth factor to consider, namely the defence of justification. Mr Jefferis submitted that the Desiman parties' actions were not justified as reasonable steps to protect an equal or superior right. Desiman had a charge over the first 10 acres. This 10 acres of land was worth much more than the loans on

it, he submitted. He referred to a string of emails as to what type of land Desiman wanted and was given as security, from 19 to 21 December 2017. This land was near to the road and Mr Marsden had told Mr Smith there was no need for the usual due diligence as nothing could go wrong with its development. Mr Nardelli suggested this parcel of land was worth £8 million in his email of 4 June 2019. He submitted Desiman did not have to loan to buy the Pains land to protect its loan on the 10 acres. That was a fresh loan to earn good interest and fees. He emphasised the 25% sale fee which Desiman negotiated in this respect, drawing my attention to the email exchange on 5 and 6 September 2019. Likewise, he submitted Desiman 2's purchase of the final tranche of land was simply a very beneficial deal for Desiman 2. It was not to protect loans on the first two transactions.

396. The Desiman parties submitted it was entitled to take reasonable steps to protect its commercial interest (under and in relation to its lending and its first charge on 7 March 2018) even if those steps involved breach of contract by another party. On the facts, reasonable steps included acquisition of the further Murfitt Henson land, they submitted, since this land was strategically important to the entire development: it is intended that the main service roads for the development will run over it. If a third party had acquired this land, the entire development would have been at risk. The land over which Desiman had existing securities is worth considerably less as agricultural land than it is worth as part of a residential development sold as a whole and, in these circumstances, there was also a risk that Desiman's securities would be devalued if the further Murfitt Henson land was lost on expiry of the options, or if the matter was left for any longer.

397. There is an interesting legal argument as to whether or not Desiman 2 could rely on this defence in circumstances where it did not have any equal or superior prior contractual right. However in my judgment it would be wrong to ignore the prior interests of Desiman, and Desiman 2 was simply, in my judgment, being used as a vehicle for Desiman in relation to this transaction. That is made plain from the contract which refers to sums owed to Desiman. In addition Desiman 2 was a subsidiary of Desiman 2. In my judgment therefore the actions take by the Desiman parties can and should be viewed together and Desiman wished to take steps to ensure the further Murfitt Henson land was acquired to protect its existing lending and security package. I would have concluded it was taking reasonable steps for it to do so but for the fact that I think there is some justifiable criticism in the way it sought to structure the transaction, which was at best confusing and which at worst might be said to have been an attempt to frustrate the proprietary rights or claims of BHB. Ultimately, I have concluded it did not and that it is likely that Desiman would have secured its rights free from any claim by BHB in any event because it acquired its security at the same time as this land was brought into the fold of the P3 parties (including CFJL). I do not consider however the steps taken can be described as reasonable ones and so therefore do not consider this defence would have been made out if the other elements of the cause of action had been made out.

Causation and loss

398. There is the sixth factor I should address. Did the breach which it is alleged the Desiman parties incited cause BHB to suffer any loss? In my judgment the Desiman parties are right to submit that BHB has not proved that any such breach has caused the losses alleged, or any loss, at least independently of other breaches I have mentioned. I repeat the conclusions I have set out in relation to this under issue 5 under the heading of causation. It is has not been lost on me that the first two transactions involved land being secured into the name of P3 Eco and PPP. The third is in the name of Desiman 2, but I have found above that in substance this is a security arrangement. I have also found that CFJL is acting as agent or nominee for the P3 parties. Ultimately therefore the transactions in question involving Desiman did not materially contribute or add to any causation or loss claim and it would be counterintuitive in those circumstances to fix liability on a person who was accessory to only those breaches.

Issue 9: Is the proposed sale to Countryside a sale at an undervalue?

399. The Defendants submitted that they did not consider this to be a relevant independent legal issue. I agree. It would only have had any potential relevance were I to be satisfied of a proprietary claim. I have rejected such a claim. I do not have sufficient material before me to assess whether or not the contemplated sale would be at an undervalue or not. It is a matter for the directors of the P3 parties, and CFJL, to satisfy themselves that the proposed sale is the best that can be reasonably obtained in the circumstances.

Issue 10: The misrepresentation claim

Introduction

400. The final issue I am asked to determine is whether or not the P3 parties made any misrepresentations in relation to the Tomlin Order. This breaks down into four sub-issues (representation, falsity, inducement and losses). Before addressing the allegations, however, I should mention that this claim was very much a fall-back claim for BHB, in case I concluded that they lost rights or were prejudiced by entering into the Tomlin Order by the expiry of the Exclusivity Period during the stay. Ultimately, I have concluded they have not been so prejudiced. There is no need for them to rescind the Tomlin Order, since it provided them with the ability to lift the stay and continue with these proceedings. They have lifted the stay and have established their claim to the extent it was valid. The significant change of position the Tomlin Order brought about was that BHB agreed to the section 106 agreement having priority over their UNs. However nothing turns on that since I have concluded BHB do not have a priority claim. Moreover no doubt BHB would have wished this to happen to enable the section 106 agreement to be concluded and planning to proceed. It seems to me, in the circumstances, the misrepresentation claim would only have any relevance should I be wrong in any of my conclusions on the issues I have already decided. In the circumstances, I will state my reasoning and conclusions here on the misrepresentation claim in short order, and consider the elements of representation, falsity and inducement in relation to each of the allegations at the same time. I take the misrepresentations from those alleged in paragraph 22A of the Amended Particulars of Claim.

The first alleged misrepresentation

401. The first representation relied on is that CFJL was intended to be used to purchase only commercial lands at Himley, and transactions by CFJL would not impinge on the Three Agreements. The evidence relied on in this respect is the email exchange of 28 March 2018 between Mr Costello and Mr Nardelli which I have already referred to in paragraphs 197-199 above. For reasons which I have already discussed there I conclude that this representation was made and it was false. In my judgment however it is difficult to see how this induced Mr Holleran's decision making in October/November 2019 when deciding to proceed with the Tomlin Order. The matters referred to do not concern entry into the Tomlin Order and the email referred to was sent some 18 months prior to entry into the same. In these circumstances, I accept the submissions of the P3 parties that BHB was not induced by any such representation, or relied on the same, when entering into the Tomlin Order. Even if it may be said that this representation was a continuing one and repeated the fact of the matter is that proceedings were issued in December 2018 and what induced BHB to enter into the Tomlin Order was the promise of payment, not anything to do with the earlier dishonest statements made by Mr Nardelli.

The second alleged misrepresentation

402. The second alleged misrepresentation is that any delays would not adversely impact on BHB and that the P3 parties would stand over the Three Agreements and would not circumvent them. The evidence relied on by BHB in this respect was the email dated 17 August 2018 sent by Mr Costello to Mr Nardelli, recording what Mr Nardelli had said in earlier conversations. I have already considered this email in paragraphs 129 and 175 above and it related to the negotiations with L&G. Again, they had nothing to do with the Tomlin Order discussions, which occurred over a year later. Moreover it was clear that BHB did not consider they could rely on these assurances because they sought a comfort letter to be signed, that was not signed and that is what caused, in large part, for proceedings to be issued. In these circumstances I conclude that whilst this probably was a misrepresentation by Mr Nardelli in August it did not induce the Tomlin Order.

The third alleged misrepresentation

403. The third allegation misrepresentation relied on is that if the payments provided for in the Schedule to the Tomlin Order were not made and these proceedings re-started, then BHB's rights would be "stood over", in the sense that BHB would not be prejudiced by the passage of time, amounting to a standstill agreement. This relied on the evidence of Mr Holleran as to what was discussed between him and Mr Nardelli in late October/early November 2019. I have already considered that above in paragraphs 132-137. Mr Holleran's oral evidence did not support the misrepresentation alleged. I have concluded that the Tomlin Order should be read as including an implied term to suspend time during the stay period, at paragraphs 139 and following above. But in my judgment this is not because of any misrepresentation.

The fourth alleged misrepresentation

404. The fourth and final allegation of misrepresentation pleaded at paragraph 22A of the Amended Particulars of Claim is that the P3 parties intended to honour their obligations under the Tomlin Order at the time they entered into it. The P3 parties gave evidence that they did intend to honour their obligations under the Tomlin Order. They referred to the following matters: the Tomlin Order provided for three payments to be made by the P3 parties by reference to specified trigger events. The first of these payments was to be made 6 weeks and 3 working days after the grant of planning permission. Based on the heads of terms issued by Countryside on 22 November 2019, it was anticipated that the P3 parties and Countryside would have exchanged by this time and that funds would be available to pay BHB. They contend that by reason of the Covid-19 pandemic, there was delay in finalising the Countryside deal and this was the reason why the P3 parties did not make any payments under the Tomlin Order. They say they pressed Countryside in the first quarter of 2020 to do the deal but matters were substantially slowed down as a result of the uncertainty surrounding the Covid-19 pandemic. Accordingly, they deny that the matters complained of constituted a false statement of fact.

405. As I have already noted in paragraph 139 above this would be a truly Machiavellian plan and I have concluded this was not the P3 parties plan, though I have some sympathy as to why the allegation was advanced. The fact that the P3 parties had negotiated heads of agreement with Countryside and these were issued on 22 November 2019, the same date as the parties entered into the Tomlin Order, tends to show that these were serious negotiations. In fact the heads are dated 19 November 2019, showing the discussions had been ongoing, and show that the plan was to proceed with a phase 1 purchase, in relation to the first 500 units, conditional on outline planning being granted. It contemplated that £15 million would be paid on the grant of outline consent. It may be thought the P3 parties were taking a risk to enter into the Tomlin Order without anything certain being in place, but it is quite another thing to conclude they did not intend to honour it.

406. In BHB's Reply at paragraph 22A(4) it was contended this did not address the fact that the P3 parties had failed to set up back-up finance, which BHB allege the P3 parties told them they had. I turn back to consider the evidence of Mr Holleran in this respect. At paragraph 95 of his statement he records discussions with Mr Nardelli, before the Tomlin Order, as follows in relation to funding:

> *"He said he had organised funding from a body called Desiman. They had agreed to lend him the money he needed to exercise the option on the Paines land and that he did not need any help from Land Invest. He said that his funder would not advance any money unless the unilateral notices were released. He also said he had an offer to purchase the land from a large developer but that they would not go ahead with the purchase until the unilateral notices had been released."*

407. He went on to say at paragraph 98 that terms were agreed with Mr Nardelli, after further conversations, and he went on to state: "*We shook hands and agreed if for whatever reason the payments were not forthcoming from a sale he had standby funds ready…"*. Mr Holleran confirmed this in his oral evidence.

408. At paragraph 57 of his second statement Mr Nardelli stated "We did not discuss any backup finance when discussing the Tomlin. The issue of finance was only raised after the Tomlin was signed, and in a different context. We did not suggest that the monies would be coming from any other source". He confirmed this in his oral evidence.

409. Mr Nardelli referred to later discussions, in December 2019, with London Wall, for a finance facility, and mentioned that an offer in principle of £10 million was obtained from them, though this was contingent on the Countryside deal. The term sheet he was referring to was dated 26 March 2020 and required a first legal charge over freehold land.

410. Mr Johnson's evidence was to similar effect. He stated that there were reassurances given to BHB about an alternative financing line being put in place to meet the obligations, though those were conditional on there being a contract with Countryside.

411. Those explanations from Mr Nardelli and Mr Johnson did not make much sense, because if the alternative financing line was conditional on there being a contract with Countryside then they were not a true alternative, stand-by or back up.

412. The question remains however whether or not the representations were made in the terms alleged before the Tomlin Order was entered into.

413. There were some written exchanges between Mr Costello and Mr Nardelli, to which Mr Holleran was copied in, on 16 January 2020 when Mr Costello stated:

"*It was good to meet yesterday and get Wednesday week in the diary for our next follow up meeting to stay abreast of developments at Bicester.*

As we all agreed we need to ensure that the S106 is optimised and not signed until there is clarity and agreement on either a sale with the party you are negotiating with or suitable funding in place to allow you move forward, which you feel is effectively there. It's good that you completed with Pains on Monday and have, as you said flexibility with Murfin Henson in order to avoid any critical timing issues for any of us re S106 sing-off [sic].

As we said at the meeting we have alternative funding opportunities so it is critical that we are told straight away if you anticipate any issues with what you are doing so we can set everything in motion (finalising DD etc in a timely manner, conscious as we said of the timelines for such a process."

414. This email tends to indicate that as early January 2020 BHB did not consider Mr Nardelli had given any clear or firm representations as to the existence of back-up finance being ready in November 2019, or that if he did BHB was relying on that. I conclude that it is likely that Mr Nardelli did make assurances to Mr Holleran as to back-up funds, but I cannot be satisfied these were made before 22 November 2019 in view of this email sent by Mr Costello on 16 January 2020, and I conclude they probably came later. In addition I cannot be satisfied that material reliance was placed on such assurances. I note in

particular that the Tomlin Order did not finally settle the case, if payments were not made, so it is pregnant with the suspicion that the P3 parties may well not pay the money and did not have a solid standby finance agreement in place. I also note from Mr Holleran's witness statement, as referred to in paragraph 406 above that it would seem Mr Holleran had made the decision to accept the proposed terms, and they were agreed, and the assurance as to standby funds came after that.

415. In the circumstances I conclude that the misrepresentation claim fails.

Issue 11: Is BHB entitled to the relief claimed in the Amended Particulars of Claim against the Defendants by way of injunction, declaration, enquiry as to equitable compensation, Specific Performance of the Agreements and damages?

416. Having regard to my conclusions on the above issues I am satisfied that BHB is not entitled to any proprietary relief, for the reasons set out under issues 1 and 6 above. It follows that there is no need for any enquiry as to equitable compensation. I have also concluded there is no basis for an order for specific performance, either on a proprietary or a contractual basis, having regard to my conclusions on issues 1, 2 and 6 above.

417. I presently see no utility in any declaratory, or injunctive relief, but I am willing to hear further submissions on that after judgment has been handed down.

418. I am satisfied that BHB is entitled to damages against the P3 parties for breach of contract, as set out under issue 4 above. As set out under issue 5, paragraph 277 above, I have found the sum due to them is £13.4 million. For the avoidance of doubt I reject the submission that I should add £1.8 million, being the sum paid by BHB to the P3 parties under the Agreements. I have already made an adjustment to reflect the fact of this payment in paragraphs 274 and 276 above. BHB has suggested a calculation which would result in a lower loss of profit award of £12.3 million (removing the fact of payment from the calculations I have performed in paragraphs 274 and 276 above), but suggested I should then add £1.8 million by way of reimbursement, so justifying a higher overall award of £14.1 million. I note, however, that BHB has not made a separate claim for the sum of £1.8 million to be repaid in its Amended Particulars of Claim. There is, accordingly, no such claim for reimbursement before me. In any event, and without prejudging any further arguments there might be, should such a claim be permitted to be made, and be made, in the future, I would wish to hear further argument as to whether or not BHB could properly pursue such a claim in addition to its loss of profit claim. I anticipate in any event that the maximum claim for repayment would be for £1.55 million, not £1.8 million, since £250k was a non-refundable deposit.

419. For the reasons I have identified above it has not been necessary for me to be precise as to when this award is to be assessed, because the market values have remained static during the relevant period. I provisionally conclude it should be treated as an award of damages assessed at trial, given the nature of the award I have made, which reflects a loss of opportunity to make a profit. I am willing to hear further submissions and argument on that point following the hand down

of judgment, as it would suggest no award for interest should be made, but the parties have yet to address me on that.

420. In addition, for the reason identified under issues 3 and 7 above, I conclude that CFJL is liable for that sum together with the P3 parties.

421. I have rejected the claims against the Desiman parties, for the reasons set out under issues 7 and 8 above.

422. I make no findings as to whether or not the proposed sale to Countryside is at an undervalue, and conclude issue 9 is not an issue I need to determine and should not determine.

423. I have concluded that the misrepresentation claim should be rejected, disposing of issue 10.

424. I invite the parties to agree an order accordingly. I will deal with any disagreement as to the form of order, and consequential issues, at a hearing to be listed shortly following the hand down of this judgment. I thank counsel for the parties for their helpful submissions.

POSTSCRIPT 1: FOR THE PARTIES

425. The consultation for the building of zero-carbon "eco-towns" commenced in 2008. At that time the concentration of carbon dioxide ("CO_2") in the atmosphere was reported to be in the region of 386 parts per million ("ppm"). As I noted at the start of my judgment, Bicester is the sole survivor of the eco-town concept, and much of it is still yet to be built. According to the World Meteorological Organization, the concentration of atmospheric CO_2 has now reached 413 ppm. The UK is currently hosting the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow (on 31 October – 12 November 2021). It is still not too late for the parties to co-operate to enable the project to proceed at a quicker pace than hitherto, to help contribute to a more sustainable housing stock, and a reduction in carbon emissions.

POSTSCRIPT 2: REMOTE OR E-TRIALS

426. This trial proceeded via a video platform using electronic technology with witnesses being called to give evidence from across the UK, and from Spain, without the need to travel. In the Annual COMBAR lecture given by Sir Geoffrey Vos, the then Chancellor of the High Court, on Tuesday 12th November 2019, entitled *Future Proofing for Commercial Lawyers in an Unpredictable World*, he forecast that climate change would be a factor in the future conduct of litigation and use of modern technology. Covid-19 protocols have accelerated the pace of that change. In my judgment efficiency under CPR 1.4(2)(l) can include the consideration of carbon reduction efficiency. It is not the only factor, of course, and each case should be considered on its own merits, with the ultimate decision being made in order to deal with matters justly. The parties and their legal representatives are to be commended here, however, for effectively co-operating in this respect in enabling this "remote" trial to proceed efficiently. I prefer the term "e-trial", or "e-hearings", however, as no objective

observer would conclude that the trial process was "remote". Any future hearings in this matter should proceed in the same way, by way of an e-hearing, absent any further application for a contrary direction.