Neutral Citation Number: [2021] EWHC 752 (Ch)

Claim No: PT-2019-000368

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

Date: 29 March 2021

Before :

Mr George Bompas QC
sitting as a Deputy Judge of the High Court

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Between :

(1) ANTHONY JAMES DOWNEY **(2) STEPHEN JOSEPH DOWNEY**	**Claimants**
- and -	
(1) MICHAEL STEVENS **(2) GRAHAM DAWBER** **(3) DONALD LEACH**	**Defendants**

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John Clargo (instructed by Knights plc) for the Claimants
David Hopkins (instructed by Adams & Remers LLP) for the Defendants

Hearing dates: 19 – 23 & 25 – 27 January 2021
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Judgment Approved

Mr George Bompas QC:

Introduction

1. The Claimants, Messrs Anthony and Stephen Downey are brothers. They are in business together as property developers. For convenience, and intending no disrespect, I shall refer to them together as "the Downey Brothers", and individually as Mr A Downey and Mr S Downey. Their business has been conducted in various ways, for example through companies formed for particular projects. For at least some time this has been in conjunction with their father, Mr S Downey Snr, who was himself in the business of property development, and perhaps also with their mother. Mr S Downey's evidence was that he believed his parents to have ceased their involvement in around 2015.

2. Both of the Downey Brothers' parents (that is Mr S Downey Snr and their mother, Mrs Kate Downey) were long-standing members of Magdalen Park Bowling Club, a club affiliated to national and county bowling associations and focused on the game of bowls played on grass during the summer season (May to September inclusive). For much of the material time one or both were members of the club's management committee.

3. This club, which I shall refer to as "the Club", was formed in the early years of the last century. It is an unincorporated association, a perfectly conventional members' club with a constitution set out in a set of simple rules. In summary the Club's management lies with a management committee ("the Committee") and its property is to be held on trust by trustees.

4. In evidence before the Court are two sets of rules: one set in force until 2009, and the second set dating from 2009. The second set of rules differs from the first in various respects, none of which is of material significance for the present case. The way the change came about I explain later. One feature of the changed rules is that on dissolution of the club surplus property is not to be distributed among members but to be applied to the Benevolent Fund of the Surrey County Bowling Association.

5. At some time in the past, certainly before 1990 at the very latest, the Club acquired the freehold of a large tract of land in southwest London, in the vicinity of Earlsfield, Balham and Wandsworth, immediately to the south of Heathfield Square (the square on which HMP Wandsworth stands). It is possible that this land was acquired from Magdalen College, Oxford, as there is still open land belonging to that college, but leased to Magdalen Park Lawn Tennis Club, adjoining the Club's land.

6. A reasonable inference is that during the last century and until comparatively modern times the Club had been thriving, with a large and active membership, but that by the start of this present century the Club's membership was aging and dwindling, and its fortunes were in decline. At all events, although the Club's

land was large enough to encompass two full-size bowling greens, by the early years of this century only one of these greens (the northerly green, which I refer to as the No.1 green) was in use, while the second (the southerly, No.2 green) was rough and out of order.

7. This present action concerns the Club's land, in particular the northern part. For reasons which will become apparent later in this judgment it is necessary to describe that land in some detail.

8. Lying between Magdalen Road on the south-east side and, on the opposite side, the street which runs along the south-east side of Heathfield Square there is an oblong of land used in part by the Club and in part by the tennis club. In what follows I shall for simplicity treat all this area as angled north to south, rather than north-east to south-west. Thus, the street I have just mentioned may be regarded as running north to south, to a point where it turns west along the second side of Heathfield Square, a point where another street (Strickland Row) continues south along the western side of the Club's land.

9. In broad terms the oblong of land is divided in half, the westerly half comprising the Club's land, the easterly half comprising land belonging to the tennis club. However, the Club's land does not run the full length of the westerly half of the oblong, but comprises only the northerly two-thirds: the remaining third appears to be part of the tennis club's land.

10. Access to the Club's land is along a drive from Magdalen Road, at the very north end of the oblong of land, part of this drive belonging to the Club and part belonging to Magdalen College. At the end of this drive, at the very north end of the oblong of land (and on the north end of the Club's land) stands the Club's pavilion and clubhouse.

11. By 2006 the Club's financial position was poor. Its yearly income was not covering its expenditure, on occasion falling short by approaching £4,000. On the other hand the Club's land, registered land with title number SGL434708, was owned outright as freehold land subject only to a charge to secure sums due to a brewery. The registered proprietors of the freehold title were (and are) trustees for the Club. At some time in the early years of this century there were those in the Club who believed that part of the Club's land, in principle one of its two greens, could be developed with housing, the proceeds of the development being used to restore the Club's finances and fortunes and to allow the Club to continue with the second green and a significant endowment.

12. What followed, in summary, was:

    i) the making of an Option Agreement dated 19 November 2008 ("the Option Agreement") to give the Downey Brothers a five-year option to purchase part of the Club's land (this part being defined as "the Property" and comprising the northerly part of the Club's land, including the clubhouse and the No.1 green, with the remaining part

being defined as "the Adjoining Property");

ii) the making by them of three applications (the second and third in the name of the Club's trustees) for planning permission for development of parts of the Club's land: the last of these was submitted on 4 March 2015 (after the expiry of the period of the Downey Brothers' option), refused on 22 April 2016, and ultimately rejected on 4 November 2016 after an appeal brought on 5 August 2016;

iii) the making of a further agreement dated 13 April 2015 (which I shall call "the 2015 Agreement") signed by the Downey Brothers and the Trustees in about April 2015 (again, after the expiry of the five years of the original option) to give the Downey Brothers an option to purchase the Property lasting until 19 November 2018;

iv) the Downey Brothers in 2018 seeking to exercise the option to purchase the Property, despite the absence of planning permission for development, followed in 2019 by the start of these proceedings.

13. The three Defendants, Messrs Stevens, Dawber and Leach (together "the Trustees") were by late 2008 the trustees of the Club's property, and together still are the freehold owners of its land. As to this, Mr Stevens together with two others had been a trustee since 1998; but in 2008, in the run-up to the making of the Option Agreement, those two others were replaced with Messrs Dawber and Leach, their registration as proprietors of the Club's land being completed only on 16 September 2008. The process of changing the trustees must have been started at the latest by 18 February 2008, when minutes of a meeting of the Club's Committee record the fact of Messrs Dawber and Leach having agreed to become trustees, but thereafter appears to have made only leisurely progress.

14. These proceedings must have come as an unwelcome shock to the Trustees, who plainly cannot have anticipated being exposed to the Downey Brothers' claims in the way they have by agreeing to become trustees of the Club's property and then signing the Option Agreement and the 2015 Agreement. Mr Leach has, perhaps in consequence, made some criticism of Mr Green (referred to below) and the Downey Brothers which is without justification and of little relevance to the issues: for example he gave evidence of having been told by Mr Stanley (also referred to below) of Mr Green having been in "*what could only be described as a clandestine meeting at the Club with the [Downey Brothers] and other people who Russell believed were to do with planning*". Nevertheless I am satisfied that each of the Trustees, including MrLeach, was doing his best to give truthful evidence.

15. Mr Stevens joined the Club in the 1980s, and was a member of the Committee for a few years from about 2000. His becoming a trustee cannot have been particularly momentous for him, as his written evidence mistakenly dated that

to 2005; and his written evidence was that he had no appreciation that his function was more than nominal. In his oral evidence he explained that he viewed his being a trustee as a sort of honorary title, to do what he was told to by the Committee. His last bowling season with the Club was 2007, and he has not bowled at all there other than once in 2008, and has not been back (including for Club meetings) other than very rarely, probably only in 2016 as explained later.

16. Mr Dawber was a member of the Club from about 1970 to 2019, but stopped bowling in 2011 and was then a social member. He served as a member of the Committee for many years until 2010, and was treasurer in 2008. His recollection is that in about 2007 or 2008 he was asked to become a trustee, and agreed to do so, and also that he had no real understanding as to what that entailed. He sought to resign as a trustee in 2017.

17. Mr Dawber was the only one of the Trustees who gave any attention to the Option Agreement when it was being negotiated: his involvement, slight as it was, was in his capacity as a member of the Committee. Unlike the other two Trustees, he did have a meeting with the Club's solicitors who were handling the transaction; and he gave evidence, written and oral, concerning his understanding as to the position with the Annual Payments referred to below: on his understanding money would be given to the Club and only be repayable out of profits from development. But Mr Dawber did not read the Option Agreement at the time of signing. His recollection was that he signed after Mr Green had called to come and see him at home and to get his signature as a matter of urgency: he explained that he signed believing the Option Agreement to have been approved by the Committee and without there being time for him to study it before signing.

18. Mr Dawber was also involved with the change in the Club's Rules I have mentioned already: the change came about at his suggestion and was aimed at qualifying the Club as a community amateur sports club, to obtain the tax and rates advantages attaching to that status. That status seems to have been relevant in relation to the way in which certain of the five payments due from the Downey Brothers (payments of £6,000 each, each referred to in the Option Agreement as an Annual Payment) came to have been deferred and paid in small instalments: this treatment may have assisted the Club in mitigating statutory payments.

19. Mr Leach was a member of the Club from 1996 to 2010, leaving at the end of the 2009 season (May to September) and starting bowling at a different club. He was never a member of the Committee. According to his written evidence, he believed he had agreed to become a trustee in about 2005 or 2006; but in fact, as emerged from the contemporaneous documents, this must have been later, probably in early 2008. He explained that his becoming a trustee was to help the Club. He did attend, so he recalls, the Club's extraordinary general meeting held on 15 April 2007, referred to later, although he did not attend many meetings. Curiously, he is recorded as having been present at the Club's

Annual General Meeting of 24 November 2014, referred to below, and Mr Green in his oral evidence said by reference to the minutes of that meeting that Mr Leach was present. But Mr Leach was not asked about that meeting, and he was clear, and I accept, that he had had little involvement with the Club after 2009.

20. Mr Leach's evidence, like that of Mr Stevens, was that he had no recollection of having ever read the Option Agreement and believes that he never did. I have referred already to Mr Stevens' evidence concerning the way he viewed his being a trustee. He considers that he would have signed the Option Agreement having been asked by Mr Green, and that in signing he would have assumed it to have been approved by the Committee. Mr Leach's evidence was similar in that he viewed being a trustee as being a kind of appointed role; and as regards the signing of the Option Agreement, this was because he was a trustee and signing the agreement was what he was being asked to do with the Committee having approved it. Neither of these two can possibly have thought of the Option Agreement as having exposed them to personal liability.

21. These proceedings are for:

i) specific performance of a sale agreement for the Property to the Downey Brothers resulting from their 2018 exercise of their option;

ii) damages for breach of that sale agreement (such damages being in addition or in the alternative to specific performance); and

iii) repayment of (according to the Claim Form), or (according the Particulars of Claim) damages for the Trustees' failure to repay, the sum of £30,000 provided by the Downey Brothers as Annual Payments.

<u>The issues and the trial</u>

22. In outline the issues to be decided are:

i) the validity, meaning and effect of the Option Agreement;

ii) the validity, meaning and effect of the 2015 Agreement;

iii) the success or otherwise of the Downey Brothers' attempt to exercise the option granted by the 2015 Agreement;

iv) (depending on the previous issues), the relief to be granted, whether for either or both specific performance and damages; and

v) whether the amount £30,000 or such other amount as may have been paid by way of Annual Payments pursuant to the Option Agreement is presently repayable by the Trustees or recoverable from them as

damages, and if so the amount now to be paid.

23. In relation to the first two of these issues there is an application on behalf of the Trustees, made only during the closing speech for the Trustees, for permission to amend their Defence in order to resist the Downey Brothers' claims on the basis that the latters' option to purchase the Property was only exercisable if there had first been a grant of the planning permission contemplated by the Option Agreement (that is "Planning Permission" as defined in the Option Agreement). An additional issue, therefore, is whether permission to amend should be given: if it is, an issue in sub-paragraph (i) and (ii) above will include that further aspect of the Option Agreement.

24. The trial before me has been fully remote.

25. During the trial I had written and oral evidence from the Downey Brothers, and from two other witnesses called by them. These were Ms Lynn Murray, the principal of Lynn Murray & Co Solicitors, and Mr John Green. Ms Murray and, under her supervision, staff at her firm acted for the Downey Brothers in relation to the Option Agreement and the 2015 Agreement. Mr Green was the president of the Club from 2005 until November 2017, when he became its treasurer.

26. The Trustees' witnesses, each of whom gave both written and oral evidence, were the Trustees themselves and also Mr Russell Stanley and Mr George Wilson. Mr Stanley was a member of the Club from 2000 to 2010, during which time he was its greenkeeper; and he was a member of the Committee from 2005 until after the making of the Option Agreement. Mr Wilson has been a member of the Committee since 2008 and became president in succession to Mr Green at the end of 2017.

27. At various points in this judgment I set out my conclusions on factual matters addressed by the various witnesses, and as appropriate I explain my assessment of the witnesses' evidence.

28. The Rules of the Club, both before and after 2009, included the following provisions which are relevant for the issues in the present case:

    i) There are to be 6 officers (after 2009 only 5), including the President, the Treasurer, and the Secretary. These are to be elected at each annual general meeting, the election to be by the Club's bowling members.

    ii) The Club's officers are to be members of the Committee. Also to be members of the Committee are to be a number of others, certain of these being elected bowling members and the others being representatives of each of the bowling sections of the Club for which the rules make provision. The quorum for meetings of the Committee is to be six (or, after 2009, five). The Committee has power to co-opt

additional members.

iii) According to the pre-2009 rules, management of the Club is vested in the Committee, to whom is given the sole right of management, but with the Committee having power to make temporary appointments of sub-committees for specific objects. The 2009 rules are less explicit on this point, while nevertheless stipulating that the Committee's duties include controlling the affairs of the Club on behalf of the Members.

iv) The Club is to have three trustees to hold office until death, resignation or removal by resolution of the Committee. The Trustees are to hold "*All properties of the Club, including land, ... in their own names for the use and benefit of the Club*"; and they are "*in all respects*" to "*act with regard to any property of the Club held by them as directed by the Committee*". Further, the trustees are to "*be indemnified out of Club property against any expenses, losses or liabilities which they may incur or sustain whilst carrying out their lawful duties as Trustees*".

29. The Club's constitution does not give its trustees, and thus the Trustees, power to borrow money, or to incur liabilities, and to seek indemnity from the Club's members. If, for example, the Trustees borrowed money for the Club's use in 2008, and were now called on to repay that money by the lender, they would have no indemnity from either the 2008 membership or the present membership. Their remedy would be to seek indemnification out of the Club's property, and in particular out of property held by them (relevantly out of the Club's land).

30. Also, the Trustees hold the Club's land on trust for the Club. They are obliged to deal with it as directed by the Club's Committee. It follows from this, that they are not to dispose of the land without a direction of the Committee (subject, it may be, to the case where they are entitled to be indemnified and need to realise property to that end). This limit on the Trustees' powers of disposition is of importance in the present case.

31. Consistently with the position described in the previous paragraph, the Proprietorship Register in relation to the Club's land has at all material times included the following restriction (restriction 3): "*Except under an Order of the Registrar no disposition by the proprietors of the land is to be registered unless authorised by the rules for the time being of the Magdalen Park Bowling Club as evidenced by a resolution of the members thereof.*"

<u>The making of the Option Agreement</u>

32. The genesis of the Option Agreement lies in a letter dated 13 November 2006 from the Downey Brothers to a Mr Jackson at the Club explaining that "*we understand that there is a current development opportunity with respect to the*

land owned by the Magdalen Park bowling Club". At the time Mr Jackson was a member of the Club's Committee, and later he and Mr Green formed a working party of the Committee in the negotiation and settling of the Option Agreement for execution by the Trustees.

33. The letter proposed a joint venture, which appears to have been for a company to be formed owned equally between the Downey Brothers and the Club, for the Club "*to put up the divided section of land sufficient to allow a development to proceed (approx. 50%), and the rights of way to access the site [being] … the land nearest the present entrance*" (in other words the northerly half of the Club's land, which encompassed the existing clubhouse and the No.1 green). According to the letter the Downey Brothers would fund planning applications, which it seems would cover the whole of the Club's land to provide not only for housing but also for a new clubhouse and bowling green. This, it was said, "*could take up to five years and there is no guarantee that any development will be permitted*". It was noted that while planning permission was being sought "*the club can operate without any disturbance*", and "*should planning be granted the new company would then proceed with the development with us dealing with all funding and construction*".

34. Finally, according to the letter, there was to be a "*non refundable amount of £6,000*" per year paid by the Downey Brothers for each of the following five years, said to be "*Repayable if the project proceeds*". Further explanation was given: "*Should the project then become non viable at the end of this period, either because of planning issues or a market crash, the £30000 paid to [the Club] would not have to be paid back*". But the letter added to this as follows: "*To summarise [the Club] would receive a non refundable amount for £6,000 for the next five years in return for forming a joint venture with us to redevelop the complete site as described above. Other than initial legal fees checking over the proposed contract, [the Club] would have no further costs. Should the development proceed, all costs incurred by us will be redeemed from the profit, including the £6000 per year to date of first property sale*".

35. With the letter there was said to be separate sheet with forecasted figures "*to give you an idea of the project value based on current market values. Please note that these are approximate figures and are subject to final valuations/planning consents/costs*". On the sheet it appears to be assumed that the Property, the part of the Club's Land to be sold by the Club and to be developed with residential development, was to have eight houses built each ofwhich could be sold for £0.5 million, generating a gain of about £1.8 million even after providing for the Club to receive £800,000 in respect of assumed land value before development, but before allowing some £120,000 for the shared costs of an access road. Thus the Downey Brothers would share approaching £0.9 million of the gain, while the Club would have approaching £1.7 million (the gain, before the contribution to the access road, and the assumed land value) to use for building for itself a new clubhouse on the retained land (that is, the Adjoining Property), for reinstating the No.2 green, and for endowing itself. However, the caveat in the letter concerning the figures being approximate was apt. Fundamental to the assumptions was the nature and density of the residential development to which the Property could be devoted.

36. Both Mr Stephen Downey and Mr Green refer in their evidence to a letter of 9 October 2006, rather than that of November 2006 which I have just described as having been the initial proposal. It is not clear whether both letters were sent; but the likelihood is that the second must have been, as the annual payment for the five years of the option period seems always to have been £6,000 rather than £5,000: the earlier letter differed from the later only in the non-refundable amount, which would have been in aggregate £25,000 rather than £30,000 provided for in the later letter. So it is more likely to have been the later letter which, according to the minutes of a meeting of the Club's Committee held on 11 December 2006, was read out by Mr Green at the meeting when describing the Downey Brothers' proposal.

37. On 1 January 2007, and following the meeting of the Club's Committee, Mr Green wrote to the Downey Brothers for clarification of certain aspects of their proposals.

38. In a letter in reply dated 5 February 2007 the Downey Brothers gave the clarification, saying among other things: "*At some stage the clubs land would be transferred to the new company to enable the development to take place. However this would not happen until after necessary planning consent had been obtained. Until that point the cost risk will then be with us, and the club will be receiving an annual fee from ourselves*". The clarification letter also pointed out that the land to be transferred to the company would only be the part of the Club's land needed for the development. At this stage, therefore, planning consent was contemplated as being a necessary pre-condition for the exercise of any option. Also, the reference to the "annual fee" must be to the "*non refundable amount of £6,000 (Repayable if the project proceeds) per year for the next five years*" described in the letter of 13 November 2006.

39. At a meeting of the Club's Committee on 5 February 2007 (according to the minutes of the meeting) attended by, among others, Mr Green and Mr Downey Snr, Mr Green "*read the letter from Downey Enterprises in respect of the freehold of the land. The club to retain the freehold until planning permission is obtained. If difficulties the enhanced value of the land to be negotiated. The club to retain 50% at all times.*" At the conclusion of the meeting the Committee voted by a majority to recommend the Downey Brothers' proposals to a forthcoming extraordinary general meeting of the Club.

40. Following the next meeting of the Committee Mr Green, with the approval of the Committee, circulated for consideration at the EGM a paper describing two proposals for the Club's land and development, one of these being that from the Downey Brothers, referred to as Downey Enterprises. Key elements shown in the paper for the proposals were that they both concerned an "'*Option to Purchase*' *deal for part of the Club's freehold to secure the Club's financial future*". In the case of the Downey Brothers' proposal, there was to be an "*Option to purchase over a period of up to five years at a premium of £6,000 per year, to plan and build a complex of houses. This is non-*

refundable unless the option is taken up, in which case it will be deducted as an expense before the final profit figure is arrived at." The paper indicated also that the exercise of the option would involve the transfer of the Club's land required for development (referred to as "*the land concerned*"), but that the Club could hope to gain £1,377,500 before tax but after paying £375,000 for the "cost of new green & clubhouse". Essentially "development profit" was said to produce a half share of £952,500 for the Club, which was also to receive £800,000 in respect of the land value on transfer.

41. At the Club's EGM on 15 April 2007 the paper which I have just described was presented and the two development proposals were considered, of which the Downey Brothers' proposal was one, this being (according to the minutes) the one recommended by the Committee. It was to involve formation of a limited company "*between the Downey brothers and the Club on a 50/50 basis*", which would require amendment of the Club's constitution.

42. At the meeting (also according to the minutes) "*Assurance was given that nothing would proceed until the relevant planning permission for a new Club House had been granted*". This assurance was probably in response to a concern that planning permission might be obtained only for residential development of the part of the Club's land including the existing clubhouse, with the development then going ahead without provision for a replacement clubhouse on the retained land (namely the Adjoining Property). But it appears also that the obtaining of appropriate planning permission was a pre-condition for any transfer of any of the Club's land.

43. At the conclusion of the meeting it was resolved that "*Permission is given by the membership for your committee to proceed to a contract stage with the 'Downey' option, subject to changes required to the Club's constitution.*" These changes appear to have been because "*The constitution of the Club would have to be amended to accommodate*" the formation of a limited company between the Downey Brothers and the Club on a 50/50 basis.

44. This resolution, as I find, was the only resolution passed at a general meeting of the Club, either (a) to approve any proposal for the Club to sell or to grant a purchase option over its land or any part, or (b) to authorise the Committee to direct the sale or other disposition of its land. But it is important to note that the April 2007 authority given by the Club had three key features. First, the development was to involve a joint venture company in which the Club would be part owner. Second, any option to be granted to the company in respect of the Club's land was only to be exercisable on the grant of planning permission. Third, the £30,000 premium (that is £6,000 per year) was to be non-refundable absent the exercise of the option, and then only to be deduction from the final profit.

45. At this point it is convenient to mention that Mr Green was clear in his oral evidence, which I accept on this point, that at all times he believed (as he still believes) that what was proposed and what came to be granted to the Downey Brothers was an option which could only be exercised upon the grant of

relevant planning permission.

46. By August 2007 Lynn Murray & Co had been instructed by the Downey Brothers to act in relation to the proposed option agreement. In about October 2007 Bulcraigs solicitors had been engaged by the Club: there is what seems to be an engagement letter dated 11 October 2007 from Mr Green to Bulcraigs, and a letter of 16 October 2007 records that Mr Spear of that firm had shortly before met with Messrs Green and Jackson.

47. By this time Messrs Green and Jackson were acting in relation to the proposed option agreement as a sub-committee of the Club's Committee. At all events minutes of a meeting of the Committee held in April 2008 record that Mr Jackson was co-opted to the Committee to "*continue with the working party in negotiations for the option agreement*".

48. It would seem that Mr Spear advised in about October 2007 that it was unnecessary to involve a joint venture company into the proposed option agreement and arrangements between the parties, so that the matter would be purely bilateral between the Downey Brothers and the Club's trustees. Inevitably this would mean that on the exercise of the purchase option and completion of the resulting sale agreement the Club would cease to have even any indirect ownership interest in the option land.

49. Over the succeeding months the drafting of the option agreement between the Downey Brothers' solicitors and the Club's solicitors moved forward without any obvious urgency; and, as mentioned already, there was a little time taken having the Messrs Dawber and Leach joined with Mr Stevens as registered proprietors of the Club's land holding on trust for the Club.

50. By September 2008 it would seem that matters were nearing conclusion as regards the making of what became the Option Agreement. This is indicated by the minutes of a meeting of the Club's Committee on 8 September 2008 in which among other matters Mr Green is recorded as hoping that the option agreement could be signed by November. Shortly after that Mr Spear wrote to Mr Green reporting that the Trustees were now duly registered as proprietors of the Club's land. Then, Mr Green is reported as having explained at a Committee meeting on 3 November 2008, that the option agreement would be signed shortly.

51. On 17 November 2008 Ms Murray sent to Mr Spear a copy of the Option Agreement "*for signature by your client together with the sellers charge*".

52. On 18 November 2008 Mr Spear sent Mr Green a copy of the Option Agreement for signing by the Trustees, along with a "Seller's Charge" (explained below) and a "Committee Resolution authorizing the signing thereof". The letter advised Mr Green to consider the documents carefully. It explained that "*If you are satisfied with your perusal of these documents, then*

Messrs Stevens, Leach and Dawber should please sign" the Option Agreement and the Seller's Charge, which should be returned undated. It also explained that "*The Committee Resolution should be signed by you as President and also returned to me and I propose to date that the day before the Option Agreement is entered into*". Finally Mr Spear added "*Upon receipt of the documents duly signed and witnessed, I will assume it is in order for me to exchange contract. The Downeys Solicitor is hoping this will happen today!*"

53. Earlier I have described the evidence of the Trustees concerning their signing of the Option Agreement. As their signatures must have been obtained by Mr Green on a single document between the time of Mr Spear's letter of 18 November 2008 and exchange of contracts by telephone the following morning, Mr Green must have sought and obtained their signatures as a matter of some urgency. This would be in line with Mr Dawber's evidence of the way he came to sign.

54. Also on 18 November 2008, in the afternoon, Mr Spear sent to Ms Murray an email in which he said, among other things: "*Thank you for your latest email confirming the content of the side letter. ... I have confirmed the position to our clients and I anticipate receipt from them tomorrow signed proposed Agreement, signed Sellers Charge and evidence of the appropriate resolution to deal with restriction 3 on the Proprietorship Register. ... I trust you will have available your clients' signed part of the proposed Agreement with the agreed side letter ...*". A copy of this email was forwarded by Ms Murray to Mr S Downey later that same afternoon.

55. In this email of 18 November 2008:

    i) the reference to restriction 3 is to the restriction I have already explained; and

    ii) the reference to "*the agreed side letter*" must be to the Side Letter described below.

56. The Committee Resolution as signed by Mr Green is dated 18 November 2008. It is headed as "*RESOLUTION OF THE COMMITTEE*", and continues as follows: "*It is hereby resolved that the Club is authorised to enter into an Option Agreement with [the Downey Brothers] in respect of an area of land comprising the Bowling Green and Club House (being part of the land registered at H M Land Registry under Title Number SGL 434708) whereby [the Downey Brothers] will have the option to purchase that land upon planning permission for residential development thereon. The members authorised to sign the said Agreement are the Trustees of the Club, [the Trustees]*."

57. This Committee Resolution document was needed, as a matter of conveyancing, to satisfy H M Land Registry that the Trustees' disposition of the Club's land involved in the grant of a purchase option over part was duly

authorised by the Club in accordance with it constitution. Indeed, in a requisition sent by H M Land Registry to Lynn Murray & Co on 2 December 2008 precisely this point was made when compliance with the terms of the restriction was requested along with "*appropriate evidence of the authorisation*".

58. Plainly, as a matter of language, the Committee Resolution document was approving an option agreement which granted a purchase option exercisable on the grant of planning permission for residential development of the option land and not otherwise. This would be consistent with the decision at the general meeting of 15 April 2007 following the representations made by the Downey Brothers. This is so, whether "the Option Agreement" referred to in the first line of the document is the specific instrument enclosed with Mr Spear's letter (so that, in other words, the last part of the first sentence is descriptive of the intended effect of that document), or whether "the Option Agreement" was to be any agreement having the effect contemplated by the last part of that first sentence.

59. The point is, quite simply, that the Committee Resolution document is clear that it was the planning permission for residential development which was to be a trigger for the option which it approved. If the Option Agreement granted an option for the Downey Brothers to purchase part of the Club's land at any time within five years without any planning permission having been obtained, the Committee Resolution document gave no evidence of any appropriate resolution of the Club or its Committee to authorise the Trustees to enter into the Option Agreement.

60. There was never any other resolution passed by the Club's Committee to authorise the grant to the Downey Brothers of any option to purchase any of the Club's Land. This conclusion I explain later in connection with the making of the 2015 Agreement.

61. Mr S Downey's oral evidence, clarifying his written evidence on the point, was that he was aware at the time the Option Agreement was made that there was also the Committee Resolution authorising the making of the Option Agreement. He also explained, in connection with the Club's general meeting of 15 April 2007, that he knew that approval of the Downey Brothers' proposal for the option arrangements concerning the Club's land was needed in accordance with the Club's Rules.

62. The Option Agreement was exchanged the following day, on the 19 November 2008, and the executed Seller's Charge was provided by Bulcraigs to Lynn Murray & Co. A letter of that date sent by Bulcraigs to Lynn Murray & Co records: "*Following exchange of contracts with you at telephone this morning, I enclose: 1. Our Clients' part of the Option Agreement 2. Sellers' Legal Charge 3. Certified copy of the Resolution of the Club Committee concerning the entry in the Proprietorship Register 4. Certified copy of the Side Letter delivered here this morning by Steve Downey.*"

The Option Agreement

63. Only one counterpart of the Option Agreement as exchanged on 19 November 2008 has been found, this being the part signed by the Trustees. The second part, the part sent to Mr Spear following the telephone exchange of that date, is no longer to be found. This part had been signed by Ms Murray under a signed authority given by the Downey Brothers for the purpose, as she explained in her written evidence. Subject to the point discussed later concerning the Side Letter, the exchanged Option Agreement would have met the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (discussed below).

64. It will be necessary to describe the Option Agreement in a little detail, as well as the other documents referred to in Bulcraigs' letter of 19 November 2008. One point is immediately apparent, however, when considering the Option Agreement. The way in which the Option Agreement is structured and expressed seems inconsistent with the grant of a purchase option exercisable at any time within five years of its grant, regardless of any planning permission. This I explain below. Having regard to this, and also to the terms of the Committee Resolution document signed by Mr Green, it is understandable that Mr Green should have believed that there was no grant of an option to be exercised otherwise than on planning permission being obtained: in particular there is no evidence before the Court of there having been any negotiation, much less any express agreement, between Lynn Murray & Co and Bulcraigs in the drafting of the Option Agreement concerning the need or otherwise for planning permission for the Downey Brothers to be able to exercise the option.

65. Later in November 2008 the Option Agreement and the Seller's Charge were duly entered in the register for the Club's land at HM Land Registry.

66. The title plan in HM Land Registry is clear in showing that the southern boundary of the Property lies just to the north of a line extended west across the Club's land to continue along the northern side of the Heathfield Square street as it runs in an easterly direction to intersect with Strickland Row running south to north. The relevance of this southern boundary is that it sets the dividing line between what was reserved to the Club as the Adjoining Property, and what was comprised in the Property subject to the Downey Brothers' option and on purchase to be used by them for residential development.

67. The Option Agreement recorded that the option thereby granted was granted in consideration of £1 paid by the Downey Brothers; and the agreement contained an acknowledgment of receipt. At the trial there was a question whether the £1 was ever paid. I am satisfied that it was: as to this I accept the evidence of Lynn Murray. But in any case, a failure to pay the £1 would not have avoided the Option Agreement. I reject any suggestion that the Option Agreement could be taken to have been unenforceable by the Downey Brothers for their failure to pay the £1. Further, as explained below, the Option Agreement itself

imposed other more significant obligations on the Downey Brothers connected with the subject matter of the Option Agreement which they performed, notably as regards the making of Annual Payments.

68. The materials before the Court for this trial shed no light on the way in which the Option Agreement came to be drafted into the form which it took, a form which (a) does not expressly make the exercise of the option thereby granted conditional on planning permission, and (b) is poorly drafted as to the repayment obligations in respect of the annual instalments of £6,000 before or after the exercise of the option. In other words, the form of the Option Agreement is a long way from what might have been expected had matters remained as contemplated in the 13 November 2006 letter.

69. It is difficult to imagine it being in the interests of the Club, or the Trustees for that matter, to enter into an agreement which resulted in any real risk of the handing over of the Property for a trivial price and without any development of the Property (or, if there was one which was unprofitable, leaving the Trustees exposed to a share of the loss), while leaving the Club with just a rough green and no clubhouse, and the Trustees liable personally to repay on demand the £30,000 aggregate of the five Annual Payments. However, this was the risk which, according to the Downey Brothers' submissions at the trial, the Club bythe Committee and the Trustees chose to take, and which the Option Agreement provides for on its true construction.

70. Nevertheless, while there is a dispute squarely before the Court concerning the terms agreed as to repayment of the Annual Payments, the Trustees have not contended in their defence of these proceedings either for rectification of the Option Agreement or, (until the closing speech on behalf of the Trustees) that its effect was to grant an option which the Downey Brothers could not exercise at any time they might choose within the option period. The connection with planning permission as a condition for the exercise of the option is one which the Trustees only now wish to make for the first time, having applied at the very end of the trial for permission to re-amend their Defence.

71. At the trial time was taken with evidence concerning the Club's financial position in the period leading up to the making of the Option Agreement and then in subsequent periods. This has been in order to give the Option Agreement context. Broadly speaking, the Club had been running at an annual loss in the years leading to the making of the Option Agreement. An immediate supplement to its income would have been a great help, and must have been recognised as such when the Option Agreement was first mooted in 2006. The Club did not need a second bowling green, and if it could get instead a new clubhouse and surplus cash, that would be a great benefit. This was the commercial interest the Club had in entering into the Option Agreement.

72. Relevantly, the Option Agreement provided that on the Downey Brothers purchasing the Property they would as soon as they reasonably could develop the Property with and turn to account residential dwellings, and they and the

Trustees would "*share any profit or bear any losses equally*" (clause 12.1), but with further detailed provisions (explained below) concerning a waterfall of the order in which the development receipts were to be applied. These provisions included numerous defined terms.

73. In principle, and using for convenience the defined terms, the Development Expenditure would be the Downey Brothers' costs of development; but a combination of the definition in clause 1.15 of and the Second Schedule to the Option Agreement gives an extremely broad scope to the costs to be included. The Sale Proceeds realised from dealing with the developed property would be applied (1) first in meeting those costs, (2) next in paying the Downey Brothers (a) Interest on those costs, (b) the Annual Payment (sic), and (c) Interest on the Annual Payment (sic), (3) third, in paying the Trustees "the Property Value" (explained below), and (4) finally in being shared equally between the Downey Brothers on the one hand and the Trustees on the other (clause 12.3 of the Option Agreement).

74. Clause 1 of the Option Agreement sets out numerous defined expressions. The principal ones relevant are:

i) Clauses 1.1 and 1.29 define "the Adjoining Property" and "the Property": the Property is the whole of the Club's land, excluding the Adjoining Property (which is defined as the southerly portion of the Club's land, the portion to have a "minimum length of 50 metres" running from the southern boundary of the Club's land).

ii) Clause 1.4 explains that "the Annual Payment" means the sum of £6,000.

iii) Clauses 1.6 and 1.35 define "the Buyer's Charge" and "the Seller's Charge": these are explained later in this judgment, but broadly speaking the Seller's Charge is to secure the return of the £30,000 of Annual Payments, while the Buyer's Charge is to secure for the Trustees the sharing of realisations and profits from the Downey Brothers' development of the Property, and is to be granted on completion of the sale of the Property to the Downey Brothers pursuant to the option.

iv) Clause 1.9 defines "the Completion Date", the date when on the exercise of the Option the transfer of the Property is to be completed: this date is to be four weeks after service of the notice exercising the Option, but "*if date (sic) falls between 1 March and 1 September the Completion Date shall be 1 October following*". This definition appears designed to prevent completion having to take place during the bowling season, between April and September.

v) Clause 1.14 defines "Development" as "*the erection of a building or*

buildings for residential use (excluding caravan parks or gypsy encampments) on the Property or such other development as may first be approved in writing by the Seller (such approval not to be unreasonably withheld or delayed) in all cases with associated services and ancillary facilities"; while clause 1.5 defines "Building" as meaning "*each house or flat forming part of the Development and the curtilage or amenity land of such building …*"

vi) There are definitions of "Development Expenditure", "Disposal", "Funder", "Infrastructure", "Planning Obligation", "Receipts", and "Sale Proceeds", and similar expressions, all relevant for provisions directed at the residential development of the Property by the Downey Brothers and the identification and sharing of proceeds from the development.

vii) According to clause 1.30 and the First Schedule "the Purchase Price" for the Property is to be just £1. The option itself was to be granted for another £1.

viii) By clause 1.24 "the Option Period" is five years from the date of the Option Agreement; in other words the period to 19 November 2013.

ix) Clause 1.27 defines "Planning Permission" as meaning "*detailed planning permission for the Development of the Property and for the erection of a bowling green and clubhouse on the Adjoining Property issued by the local planning authority or other authorities responsible for the time being for controlling the development of land and/or on appeal by the Secretary of State*".

x) Clause 1.29 defines "the Property Value" as "*the Open Market Value of the Property with the benefit of Planning Permission*".

xi) Clause 1.40 defines "the Transfer", this being an instrument of transfer of the Property, in a form appended to the Option Agreement, to be made on completion of the sale on exercise of the option to transfer the Property to the Downey Brothers (see clause 16).

75. By clause 2.1 the Trustees granted to the Downey Brothers for £1 the option to purchase the Property for the Purchase Price on the terms of the Option Agreement. This option is defined as "the Option" (clause 1.22). Clause 2.2 added that the £1 consideration was not to be refundable in any circumstances.

76. The exercise of the Option is, by clause 3.1, to be "*exercisable by*" the Downey Brothers by their "*serving on [the Trustees] at any time during the Option Period notice in writing in the form set out in the Sixth Schedule*", and is to bring into effect a binding contract for the sale and purchase of the Property on the terms of the Option Agreement. That form states, in its

operative part, "*In accordance with the terms of the Option Agreement dated (date) made between (name and address of first party) (1) and (name and address of second party) (2) relating to the Property described above WE GIVE NOTICE to you that WE exercise our option to buy the Property [at the price of (purchase price)] and we enclose payment of £1.00 the purchase price*".

77. Clause 4, containing three sub-clauses, concerns the payments to be made by the Downey Brothers to the Trustees, these to comprise five instalments (each referred to as an "Annual Payment") of £6,000 each. The Annual Payments, and the terms agreed between the parties concerning the Annual Payments, are central to the Downey Brothers' claim in this action to payment of £30,000 and interest.

78. A question which is made immediately obvious by the language of clause 4, and which is one of the issues in this case, is whether (as the Downey Brothers have asserted in submissions on their behalf at the trial) each Annual Payment is repayable on demand as and when the Downey Brothers might decide.

79. Specifically, what is set out in Clause 4 of the Option Agreement is as follows:

i) Clause 4.1 provides for the payment of the first two of the Annual Payments (ie. a total of £12,000) on the date of the Option Agreement, followed by a further Annual Payment (ie. £6,000) on each of the second to fourth anniversaries of the Option Agreement (ie in November 2010, 2011 and 2012).

ii) Clause 4.2 provides that, "*The Seller will be liable to repay the total amounts paid to it by way of Annual Payment to the Buyer together with interest at the Contract Rate from the date on which the Annual Payment was made to the date of repayment. The obligation to repay the Annual Payment will be secured by the Seller's Charge provided that the Buyer agrees that it will not seek to enforce the Charge unless and until the Seller disposes of the Property or the Adjoining Property to a third party*." The provision for interest incorporates a defined term, "the Contract Rate", which (by Clause 1.12) means "*four per cent above base rate of Lloyds TSB Bank plc from time to time*". This differs significantly from "Interest", another defined term referred to in sub-paragraph (iii) below.

iii) Clause 4.3 states that, "*In the event that the Buyer completes the purchase of the Property the Buyer will deliver to the Seller a duly executed form DS1 in respect of the Seller's Charge*". A form DS1 is a Land Registry from requesting the cancellation of entries on the register relating to a charge. In other words, the contemplation of clause 4.3 is that on the Downey Brothers completing the purchase of the Property on exercise of their option they are to release their charge over both the

Property and the Adjoining Property. Also, by clause 12.3, there is a regime for allowing the Downey Brothers in that event, and after development of the Property, to recoup their Annual Payments together with "Interest", not interest at the different Contract Rate.

80. Clause 5 contains elaborate provisions dealing with obtaining of Planning Permission during the Option Period (clause 5.1); restrictions on the part of the Trustees during the Option Period designed to prevent rival planning applications or action which could adversely impact on the use or development of the Property (clause 5.2); what was to be done about Planning Obligations, if any were required in order to obtain Planning Permission (clauses 5.3 and 5.4); mutual rights of access before and after the purchase of the Property (clauses 5.5 and 5.7); and a requirement for the Trustees to instruct an expert (agreed or appointed by the President of the Royal Institution of Chartered Surveyors on the application of either party) to determine "the Property Value" within three months of the grant of the Planning Permission (clause 5.6).

81. An important point to note in relation to clause 5 is the intention of the Parties concerning Planning Permission, as expressed in the clause. As to this, reference should be made to the definition of "Planning Permission" in clause 1.27 (set out earlier in this judgment), along with the definitions of "Property" and "Adjoining Property". The Planning Permission was to be in respect of the whole of the Club's land. However, as regards the Property, the northerly part of the Club's land encompassing the No.1 green and clubhouse, thePlanning Permission was to be exclusively for residential development. However the Planning Permission was to include also permission for development on part of the Adjoining Property, the part of the Club's land to be retained by the Trustees for the Club. As to this retained land, which included the No.2 green, the Planning Permission was to be for restoration as a bowling green and was also to include the erection of a new clubhouse: there was not to be any residential development. In other words, the Property's development was to be residential only development, to maximise any development profit and returns for the Downey Brothers and the Club, while the Adjoining Property was to be exclusively for the Club's sporting activity, being the site of the Club's new bowling green and replacement clubhouse.

82. The scheme described in the previous paragraph no doubt reflects what was explained in a letter dated 11 June 2008 from Bulcraigs to Lynn Murray & Co when asking for clarification on a plan of the land to be transferred to the Downey Brothers on exercise of the proposed option, "*remembering that our clients wish to create a new bowling green and build a new club house on retained land*".

83. At the trial there was evidence concerning the financial advantages for the Club to flow from the arrangements with the Downey Brothers. What is not in evidence is any of the plans or costings on which the financial advantages were calculated, other than the sheet provided in late 2006. However an obvious point is that the use of the Property exclusively for residential development, and with no part of the Property being reserved for a clubhouse for the Club, must have been calculated to maximise the gain to be made from developing the Property, a point emphasised by clause 5.1.5 imposing on the Downey Brothers an obligation in preparing their applications for Planning

Permission to endeavour to obtain occupational density consistent with maximising the economic value of the Property.

84. By clause 5.1 the Planning Permission to be applied for by the Downey Brothers was to be subject to the Trustees' written approval (not to be unreasonably withheld); a grant of Planning Permission was to be copied to the Trustees; during the Option Period (but not, as expressed, after – see clause 5.3) the Downey Brothers were to endeavour to obtain Planning Permission except while advised that its prospects of success were no more than 50%; and they were to appeal any refusal or grant on unacceptable conditions, if advised by approved counsel that they had a greater than 50% prospect of success. There was also the requirement, mentioned earlier, for maximising the density for the proposed development.

85. Clause 5.2, imposing obligations on the Trustees, corresponded with clause 5.1.3 in that it was expressed as having application only during the Option Period: where a Planning Obligation had to be undertaken, the Trustees could be required to enter into it, but with an indemnity from the Downey Brothers.

86. The significance of the Property Value, which clause 5.6 requires to be determined within three months of the grant of Planning Permission, is that it was to provide an amount of money which the Trustees were to receive before sharing equally with the Downey Brothers the ultimate surplus of any development proceeds in respect of the Property. It was to be the open market value of the Property if ripe for development with the dwellings for which Planning Permission had been obtained. Obviously the relevant permission had to be that actually obtained in relation to the Development whose proceeds were to be distributed; but equally, Planning Permission is a defined term linking the development of the Property with development of the Adjoining Property for a bowling green with a clubhouse: in other words, with the existing No.2 green being restored or replaced and a clubhouse built alongside.

87. Clauses 6 and 7 are directed at completion of the sale of the Property on exercise of the option. The purchase price, the £1 in other words, is to be paid on the Completion Date. This, it is to be noted, would be inconsistent with the payment of the price having to be made at the time when the exercise of the option was notified, as indicated by the form of the option notice set out in the sixth schedule to the Option Agreement. Also, on completion the Downey Brothers are to charge the Property in favour of the Trustees by entering into the Buyer's Charge to secure the Downey Brothers' obligation to the Trustees in connection with the Development of the Property.

88. Clauses 8 to 12 are directed at the carrying out of the Development "*as soon as practicable after the Completion Date",* being the date of the Downey Brothers' purchase pursuant to the option, "*and the grant of all Requisite Consents"*. They impose obligations on the Downey Brothers in this respect including (clause 8.2) to "*apply for and use all reasonable endeavours to obtain all Requisite Consents as soon as reasonably practicable after the date of this Agreement*", to keep an account of development expenditure (which

they are to try in good faith to keep reasonable – clause 9.3), and to try "*to secure a Disposal of each Building*" (clause 10.1) and to maximise sale proceeds (keeping the Trustees informed), and to calculate and distribute to the Trustees their share of proceeds. Provision is also made for appropriate releases of the Buyer's Charge to allow disposals of the Property as developed (clause 11.5; and also clause 7.2).

89. Clause 12, which I have described already, is of note. It deals with the way in which the parties are to participate in the outcome of any Development. I should perhaps say that in the waterfall set out in clause 12.3 the references to "the Annual Payment" and of Interest on "the Annual Payment" are obviously mistaken in using the singular rather than the plural: the plain intention is that the Downey Brothers would be entitled to the amount of whatever had been paid by them as Annual Payments together with Interest on the separate instalments from payment.

90. Clauses 13 to 17 and 19 deal with the sale of the Property, and its completion, on exercise of the option to purchase, including that the sale incorporates certain Standard Conditions as amended. There are other detailed provisions as well which are not immediately material.

91. Clauses 18.3 and 19.3 require mention.

i) Clause 18.3 contains an entire agreement provision, explaining that "*This agreement contains the entire agreement between the parties and incorporates all the terms agreed between them for the purposes of [section 2 of the 1989 Act referred to below] and there are no other terms or provisions agreed prior to the date of this Agreement which have not been incorporated into this Agreement.*"

ii) Clause 19.3 provides that "*All express agreements made or undertakings given by one party to the other are incorporated in this Agreement.*"

92. Finally there is clause 23.3, which provides for the cancellation of any registrations made by the Downey Brothers in any registers should the option expire.

93. In form the Buyer's Charge and the Seller's Charge as appended to the Option Agreement are unremarkable. Their content is, indeed, fairly described in correspondence between Lynn Murray & Co and Bulcraigs as being largely "boilerplate", the material difference between the two being that the Seller's Charge is to be in respect of the whole of the Club's land and is to be released on completion of the sale of the Property to the Downey Brothers, while the Buyer's Charge to be granted by the Downey Brothers at completion is to be only in respect of the Property.

94. In each of the two charges the chargor is to covenant to pay to the other party, "the Lender", "the Secured Liabilities" when due, and to charge the subject property by way of legal mortgage as security for the payment of the Secured Liabilities. These liabilities are defined as "*all liabilities of the Chargor owed or expressed to be owed to the Lender whether owed jointly or severally, as principal or surety or in any other capacity*". Each of the charges is to include the usual covenants and provisions, including a covenant by the chargor not to dispose of the charged property without the other party's consent.

95. It will be appreciated that the Seller's Charge appears to be intended to secure the Annual Payments, and therefore to be directly connected with clause 4 of the Option Agreement. As appears from what I say later about the Side Letter, the position concerning the Annual Payments is not to be found only in the Option Agreement.

96. I have referred to the form of the Transfer appended to the Option Agreement. This is important as this document, together with the Buyer's Charge, would constitute the basis on which the Downey Brothers would acquire the Property from the Trustees on exercise of the option; and any damages for breach of contract on the part of the Trustees in failing to effect the sale of the Property would normally be to put the Downey Brothers in the position they should have been in, and would be assessed by reference to what had been lost to the Downey Brothers by that failure.

97. The Transfer, when made in the form attached to the Option Agreement, would provide not only for the grant of rights over the Retained Land in favour of the Downey Brothers aimed at supporting the development of Property (for example the use of pipes), but also for a restrictive covenant over the Property in favour of the Trustees to the effect that "*only residential houses and/or flats and the usual outbuildings shall be built on the Property in accordance with planning law and regulations and the Property shall be used for no other purpose*". Resulting from this restriction the Downey Brothers, on the exercise of the option, could no longer use or allow the use of the existing clubhouse or the No.1 green for the Club's purposes, or indeed for any sporting or letting purpose: all that would be permitted would be the carrying out of the Development and the disposal of the residential properties as provided in the Option Agreement.

98. At the time the Option Agreement was made, that is on the 19 November 2008, the Downey Brothers provided the Side Letter to the Trustees, a letter dated 18 November 2008. This was the side letter referred to in the correspondence dealing the exchange of the Option Agreement, in particular Bulcraigs' letter of 19 November 2008 which explained that Mr S Downey had delivered the document to Bulcraigs' offices that morning, the morning of the telephone exchange of the Option Agreement between the two firms of solicitors.

99. In terms the Side Letter provides as follows:

> "*We confirm that if the option is not exercised by us by the expiry date thereof and the [Club] dispose of the whole or part of the Adjoining Property defined in the Agreement dated today, will (sic) provide a DS3 in respect of that land without requiring any funds in satisfaction of the monies due under the Sellers' Charge provided that the land remaining subject to the Sellers' Charge is sufficient security for repayment of the monies due under the Sellers' Charge. Provided further that if the remaining land is not sufficient security then we will discharge the Sellers' Charge upon receipt either of payment of £30,000 plus interest or the net value of the assets of the Bowling Club on dissolution whichever is the lowest and we confirm that there shall be no liability upon the Club Members or its Trustees in respect of any unpaid balance.* "

100. A form DS3 is one to be used to remove, as to part of the land within a registered property, a reference to a charge over the property, acknowledging that the part of the land is no longer subject to the charge. As mentioned, a form DS1 is to be used where the reference to the charge is to be removed from the entirety of the land. In substance the Side Letter was contemplating, in its first sentence, removal of the Seller's Charge from part or parts of the Club's land.

101. As I see it, by the Side Letter the Downey Brothers promised the Trustees two things, these being material to the obligations in clause 4.2 of the Option Agreement but not to those in clause 4.3, and adding to the content of the Downey Brothers' agreement set out in the second half of the second sentence in clause 4.2.

i) First, in circumstances where satisfaction of the amount of the Annual Payments and interest was not to come from the sharing of the proceeds of the development of the Property following the grant of planning permission and the exercise of the option, the option having expired without being exercised, the Trustees would be able to dispose of the No.2 green and the remainder of the Adjoining Land (or parts) free of the Seller's Charge securing the repayment of the Annual Payments and without having to pay anything in respect of the Annual Payments, provided that the Property, namely the site of the No.1 green and existing clubhouse (the land currently in use for the Club's bowling) together with whatever was to remain of the Adjoining Property could still provide security sufficient to produce the amount of the Annual Payments on sale.

ii) Second, where following the circumstances described in the first sentence land the land that was still subject to the Seller's Charge ceased to be sufficient security for the £30,000 plus the accruing

interest, the obligation secured by the Seller's Charge could be discharged, and the Seller's Charge redeemed, on payment either of the £30,000 and interest or of the valuation of the Club's property on dissolution.

102. In his written evidence Mr S Downey explained that on 18 November 2008 the Downey Brothers provided to Ms Lynn Murray two things, the first being the written authority to her to sign a counterpart of the Option Agreement for the Downey Brothers, the second being a side letter directed at resolving an issue concerning Bulcraigs and their client as to the implications of the option not having been exercised and the Seller's Charge still being in place. He summarised "*The purpose*" of the side letter as being "*so that the Club could sell the part of the bowling green which was not part of the Option separately if desired*".

103. No doubt Mr Downey was intending to describe the Side Letter when he gave the evidence I have just described. However, I conclude that the likelihood is that in its signed form the Side Letter was given on the morning of 19 November to Mr Spear direct by Mr S Downey for the purposes of the exchange of contracts (this being evidenced by Mr Spear's contemporaneous letter). But even if Mr S Downey were correct in his written evidence to the effect that the signed Side Letter was given by him to Ms Murray on 18 November 2008 rather than to Mr Spear on 19 November 2008, it would make no difference to what is discussed below, as the Side Letter was only to become operative during the telephone exchange of contracts with Mr Spear for the reason that it was simply an addition to a term of the Option Agreement which had no contractual effect until that time.

<u>Events leading to and following the making of the 2015 Agreement</u>

104. As already explained, the Option Agreement and the Seller's Charge were registered in good order after November 2008; and at about the same time the Downey Brothers paid the first two Annual Payments amounting to £12,000.

105. On 15 June 2010, over 18 months after the making of the Option Agreement, the Downey Brothers' first application for planning permission in relation to the Club land was received by the local authority. The application, seeking permission for six three-storey houses along with a clubhouse, was withdrawn in July 2010. The only indication of any reason is in minutes of a meeting of the Club's Committee on 22 July 2010 which notes that "*Local residents had protested against our Planning Application*", and in an email sent on 12 January 2011 by Mr S Downey to Mr Dawber saying that the application had been withdrawn on the advice of "the planners" following a meeting with them, when they had also asked for "*more in depth items from us to support the new application*".

106. In this first application the proposed new clubhouse was to be a free-standing

structure along the northern boundary of the Adjoining Property, seemingly intended to lie only on the Adjoining Property when one compares the title plan for the Club's land at HM Land Registry with the plans accompanying the first application. One notable feature of the first application, repeated in the later ones referred to below, was that the new clubhouse was to include an indoor bowling rink. This feature may have been intended to compensate for the reduction in open space resulting from the residential development proposed by permitting year-round bowling on the Club's land.

107. On 22 October 2013, the local authority received a second planning application from the Downey Brothers in respect of the Club's land. The plans for this application placed the new clubhouse entirely, so it would appear, on the Property rather than the Adjoining Land while using part of the Adjoining Property for the curtilage and structure of new residential buildings along with those being planned for the Property. This application was rejected on 19 March 2014 for two reasons, one being that the proposal would result in the loss of land used for outdoor sport and open space, without adequate replacement in an area of open space deficiency, the other being that the layout, design and landscaping would not provide a sufficiently high quality scheme for development of open space in a prominent location visible from the Wandsworth Common Conservation Area.

108. Just under a month after the submission of the second planning application the option period contained in the Option Agreement expired. Thereafter, and subject to the 2015 Agreement, the Downey Brothers no longer had any option in relation to the Club's land, and all that remained extant out of the Option Agreement was provisions concerning the £30,000 secured by the Seller's Charge.

109. By the end of November 2013 there was still £4,000 of the last Annual Payment yet to be made: this was paid as to £2,000 in December 2013 and as to the final £2,000 in December 2014. The reason for this delay, which spread the payment of the final annual payment, I have explained already.

110. On 24 November 2014, the Club held an annual general meeting at which Mr Leach seems to have been present, as was Mr Green. The minutes make no reference to any of the Downey family as having been present. They do record, as part of the statement made by Mr Green as president, that *"... the Club's finances are again in a debt free position this year although we must not be complacent as regards the future as the option agreement has now expired with a very small reserve*". The statement went on to record that progress the Downey Brothers were having with the local authority as regards planning was slow, but that plans were being re-designed and would shortly be ready for consultation.

111. The Downey Brothers' third planning application was received by the local authority on 4 March 2015. This time there were to be six residential dwellings, seemingly three semi-detached houses fronting along the Strickland Row/Heathfield Square street, and backing onto a new two storey clubhouse

running north-south over the Property and part of the Adjoining Property. It would appear also that at least one of the houses would stand on part of the Adjoining Property.

112. It has been contended on behalf of the Trustees that they were never asked for, and never gave, their approval of any of the three planning applications, and that this was contrary to the provision in Clause 5.1.1 of the Option Agreement. However there has been no attempt by the Trustees to suggest that the failure to seek their approval, if failure there was, had any practical effect in relation to the Downey Brothers' efforts to obtain Planning Permission. Further, I am satisfied that the making of the planning applications from time to time by the Downey Brothers in relation to the Club's land, and indeed the general nature of the applications, was well-known within the Club and was not objected to. The Downey Brothers (in this regard assisted by Mr Green, who appears to have been a point man gathering help) were keen to elicit support from the Club and its members, as well as wider sporting organisations, in their attempts to convince the local authority that really the applications were for the Club's improvement, rather than for exploitation of open space for development by commercial developers, and would be of benefit to the Club and to sport generally.

113. On the other hand it is doubtful whether the detail of the Option Agreement (including, that is, the particular provisions concerning the planning permission to be sought, the land to be sold and the development to be carried out, the requirements to be met for the exercise of the option, or the arrangements concerning the Annual Payments and the circumstances in which they might be repayable) was ever considered in any serious way by members of the Club's Committee, much less by the generality of the Club membership, after November 2008 and before late 2017 at the soonest. Indeed, the comment in the minutes of the meeting of 24 November 2014 is the only indication that anyone within the Club had noticed the expiry of the option after the five year period in the Option Agreement.

114. At about the time the Downey Brothers had submitted the third planning application, they were reminded that by then they no longer had any option to purchase any of the Club's land. Quite how they were reminded may not be of any consequence; but the minutes of the meeting of 24 November 2014 do not record their having then been present. Mr S Downey's evidence, written and oral, was that the matter was drawn to their attention by their bank manager, Mr Simon Silvester of Handelsbanken. According to Mr S Downey's written evidence, Mr Silvester suggested "*formalising the extension*" of the option, and as the Downey Brothers "*needed business funding from our bank in order to make further planning applications*", they "*asked the Club for a formal extension*".

115. During the week ending Friday 13 March 2015 Mr S Downey contacted Ms Murray by telephone with a request for her to draft an appropriate agreement. Ms Murray explained in her written evidence that she has no record of her instruction from Mr S Downey, but there is material which shows that she must have started her work on her retainer about then. She also explained in her evidence that the reason for the request was that the Downey Brothers had

been asked by their bank to have the extension as the bank felt that their security was exposed. Evidently the Downey Brothers now wished, for whatever reason, to ensure that in the event of planning permission being granted on their recent application, they would be the contractor to proceed with the proposed development and to share in gains in accordance with the waterfall in Clause 12 of the Option Agreement.

116. On Tuesday 17 March 2015 Ms Murray wrote, and had sent to the Downey Brothers, an email which read as follows: "*.... Further to our conversation last week I am now pleased to attach the Deed of Variation of the Option Agreement. This very simply states that the definition in clause 1.24 of the Option Agreement should be deleted and replaced with a definition which states that the Option Agreement will be 10 years from the date of this Agreement, ie., 10 years from 18th April 2008 (sic). As I have said we need to ensure that the Bowling Club are suitably advised on this. Bulcraigs were of course acting for them previously and I would recommend that you ask whether they are still instructed as I do not wish to find that the Bowling Club argue subsequent to the completion of the Deed of Variation that they did not understand the provisions of it. I cannot of course act for them as I act for you. If they are happy to proceed you need to sign one part and they need to sign the other on page 2 (under the 'in witness whereof' bit) and then you should date them and exchange the documents. Can you let me have the document signed by the Bowling Club and I will register this at the Land Registry*".

117. It is clear from Ms Murray's email that she had already spoken with Mr S Downey. Her oral evidence was that he had told her that everyone was in agreement, the Club having said they would sign, and that because she did not think she would be negotiating with solicitors for the Club she explained the need to see that the Club were suitably advised on the fresh agreement. I refer later to this evidence given by Ms Murray. While I accept that Ms Murray may recall having had the explanation from Mr S Downey concerning everyone in the Club being in agreement, Mr S Downey himself gave no evidence about any discussion between the Downey Brothers and anyone within the Club prior to what is referred to in his email of Thursday 19 March 2015 (below).

118. The 2015 Agreement came to be in the form which Ms Murray prepared and sent to Mr S Downey. Mr Hopkins was at pains in his cross-examination of Ms Murray, and in his submissions, to establish that the 2015 Agreement had been derived from a published precedent for a Deed of Variation for a lease. I need make no findings about the way Ms Murray drafted the 2015 Agreement. The precedent offers no assistance to the resolution of the question before the Court, this question turning quite simply on the meaning of the words used in the 2015 Agreement itself, whatever Ms Murray may have chosen to base herself on when setting out those words in the document to be signed by the parties.

119. Although the Trustees had, in their defence, required the Downey Brothers to

prove that the 2015 Agreement was signed by them as it purported to be, they did not seek to have any forensic examination of the document. It is clear, as appears below, that the original document which I saw was provided by Lynn Murray & Co to the Land Registry in the spring of 2015; and I am satisfied that that original was genuine and was signed by each of the Trustees between about the 17 March 2015 and 13 April 2015.

120. The 2015 Agreement is simple and short.

i) It is expressed to be made between the parties to the Option Agreement.

ii) It recites that it is supplemental and collateral to the Option Agreement, the parties having agreed to vary the Option Agreement on the terms set out in the 2015 Agreement.

iii) It contains a short clause setting out definitions, mistakenly attributing the date of 18 November 2008 to the Option Agreement.

iv) The one operative clause, clause 2, states that the Option Agreement is now to be read and construed as varied by the provisions in the Schedule, and that "*The Option Agreement shall remain fully effective as varied by this Agreement and the terms of the Option Agreement shall have effect as though the provisions contained in this deed had been originally contained in the Option Agreement*".

v) The Schedule provides that clause 1.24 of the Option Agreement is to be replaced with "*'the Option Period' means the date of ten years from the date of this Agreement*". (In this quoted text it appears common ground that the word "date" is to be construed as "period" the first time it appears.)

121. On 19 March 2015 Mr S Downey sent to Mr Green an email in which he explained as follows:

> *"… As discussed on the phone just wanted to confirm that the new planning application has now been submitted …. CGI images have been displayed in the club for the members to view.*
>
> *The application was validated on 19/3/15 and we should have some information in 10-12 weeks on progress. ….*
>
> *Re the original option agreement which was signed back in 2008 for five years, our bank that provides our funding for our businesses has*

picked up the fact that this needs to be extended to be fully valid. We would be looking to them to provide funding in the case that planning was approved, so need to keep them on side. Therefore as discussed I will give the paperwork to Dad for Monday and if you can arrange for the trustees to sign please where indicated and pass back to us.

Also as discussed we will contribute £1000 towards the repaired watering system."

122. The £1,000 to be paid for the watering system, seemingly in the context of the making of the 2015 Agreement and Mr Green's assistance in this regard, must have been the same £1,000 which Mr S Downey confirms in his written evidence as having been paid in March 2015: in his written evidence Mr S Downey relies on this payment as showing how the Downey Brothers were on good terms with the Club, frequently offering to help and doing much of the maintenance.

123. On Monday, 23 March 2015 (which must be the "Monday" intended to be referred to in Mr S Downey's email of 19 March 2015) there was a meeting of the Club's Committee attended by Mr Green, the Downey Brothers' father and Messrs Wilson and Stanley, among others. The minutes of the meeting record that "*J Green received an email from the Downey Brothers stating the application for development of bowls club is set to be submitted within the next few weeks*". This may be a description of the content of the first paragraph of Mr S Downey's email of 19 March 2019; but it recorded nothing at all about the suggestion that "*the original option agreement ... needs to be extended to be fully valid*", and that the paperwork would be given to Mr Downey Snr "for Monday" (presumably Monday, 23 March) for the Trustees to sign. In particular nothing was recorded in the minutes concerning the making of any further option agreement, whether to note that a decision had already been made about that by the Committee or anyone else, or to note a discussion at the meeting concerning the desirability of entering into such an agreement. Importantly, there is no record of any decision to approve the entering into of such an agreement.

124. The minutes conclude with a note that the next meeting is to be held on 20 April 2015, and also bear Mr Green's signature over the date 20 April 2015 and the note "*Signed as a true record*". The minutes of that later meeting, similarly signed at a subsequent meeting, contain no record of any discussion concerning the making of any further option agreement.

125. In evidence is a copy of the 2015 Agreement, in the form drafted and sent by Ms Murray, and with the manuscript date of 13 April 2015 and with manuscript signatures. There was also a manuscript correction to the date of 18 November 2008 for the Option Agreement, this correction being noted with the manuscript "*Lynn Murray & Co*". I was also shown what appears to be the original of this copy, the manuscript on that original being what appeared to be

original manuscript.

126. The 2015 Agreement was recorded in the Charges Register of the Club's land as follow: "*By a deed dated 13 April 2015 made between [the parties] the Deed dated 19 November 2008 referred to above was varied as therein mentioned* ". This entry was made despite the restriction in the Proprietorship Register concerning dispositions of the land requiring to be authorised by the Club's rules as evidenced by a resolution of members, no doubt on the assumption that the 2015 Agreement had involved a variation to an existing option rather than the grant of a fresh one. On the other hand the Land Registry had provided to Lynn Murray & Co a requisition concerning the description of the date of the Option Agreement as stated in the 2015 Agreement as executed by the parties, a date which was simply corrected in manuscript by Ms Murray without involving the parties. No other concern was raised by the Land Registry.

127. The third planning application was refused on 22 April 2016.

128. On 15 July 2016 Mr Green sent to the Trustees at their respective email addresses an email attaching "*000006 – Statement of Case.DOC*", headed "*Option Agreement*" and saying among other things, "*I have been asked to arrange the signing of some documents by yourselves, as trustees of the Club to enable our appeal on the decision by Wandsworth Council to refuse our planning application to proceed. ... Please can to (sic) let me know when and where I can meet up with you so you can peruse and sign to (sic) documents (They are not large documents.) ...*".

129. Mr Stevens explained in his oral evidence that he had no recollection of receiving this message. Mr Leach gave similar evidence. As I explain elsewhere, Mr Stevens did sign documents as asked by Mr Green, quite possibly in the Club's car park, in mid-2016 for the purposes of the proposed planning appeal. Mr Leach also signed such documents at about the same time, possibly in the away changing room at the Club with Mr Stanley present. Mr Dawber, shown the email in cross-examination, said that he recalled signing documents to do with the planning appeal. Ultimately nothing now turns on the email (or, indeed, the signing of the appeal documentation by the Trustees): the occasion which their written evidence focuses on as the occasion when they must have signed the 2015 Agreement turns out to have been a different occasion, namely the 2016 one.

130. On 25 July 2016 there was a meeting of the Committee. Minutes of this meeting, made in manuscript, note that "*The planning appeal is ready to go but just awaiting the three signatures needed*".

131. The reason why, in the summer of 2016 the Trustees' signatures were needed for the proposes of the proposed planning appeal became apparent during the trial: the second and third planning applications were made in the names of the Trustees rather than the Downey Brothers (as the first had been). This was,

as I understand it, for reasons of appearance rather than substance, so that the application would seem to be primarily for the Club's purposes rather than the commercial purposes of a property developer: the conduct of the applications and then the appeal lay in reality with the Downey Brothers and their advisers.

132. On 5 August 2016, the appeal was lodged against the planning permission refusal, so the Trustees' signatures must have been obtained by then.

133. The appeal was dismissed on 4 November 2016. The main issue, according to the appeal decision, was "*the effects of the proposal in relation to the loss of land for outdoor sport and open space and the consequent effects on character*"; and the Inspector's conclusion was that there would be loss of land to housing development, land which "*is currently used as part of an outdoor recreational facility would be removed from that use and would be very unlikely to return to that use*".

134. On 23 January 2017 there was a meeting of the Club's Committee, attended by Mr Green and with both the Downey Brothers present. The minutes record that the latter (a) gave "*a personal report on the option agreement*" in which, among other things, they gave reasons for the refusal of the third planning application on appeal, (b) said that they "*have no rights to buy the land but they are entitled to a have a charge to protect any money invested*", (c) suggested a new plan to incorporate everything into one building with two floors of flats above a new clubhouse and indoor green, and (d) said "*Option Agreement may need to be extended until the end of 2017 to facilitate this*".

135. Mr Green in his oral evidence accepted that he did not point out at this meeting that by the 2015 Agreement the option was already to run to late 2018.

136. I refer later to this January 2017 meeting and Mr S Downey's evidence about it. However there is in evidence, in the agreed chronological bundle with a date of 23 January 2017, a document headed "*Update on Current Position of Downey Option Agreement*". This resembles a speaking note or the like for the 23 January 2017 meeting, setting out various detailed points concerning the option arrangement (including, for example, the Downey Brothers' "*considerable investment ... currently estimated at 130K*"), while also pointing out the option was to purchase when planning permission had been granted. Many of the points made in the document were in addition to those noted in the minutes as having been made at the meeting. One significant difference between the minutes and the document is that the minutes record (as mentioned above) a report that the Option Agreement may need to be extended to the end of 2017, while the update document states that the "*agreement was initially for a five year period and has been extended until 2017*".

137. Mr Wilson's written evidence was that the document was an update provided by the Downey Brothers in around January 2017. However, as with so much

else of the documentation referred to by Mr Wilson in his written evidence, it turned out that he did not really recognise the document and had no idea whereit came from, although he must have seen it before. In his oral evidence Mr S.Downey said that he did not recognise the document; and Mr Green said that he did not remember having seen it before and did not know who produced it. Given this, it is impossible to gain any assistance from the document.

138. At the Committee meeting on 27 March 2017, attended by Mr Green, it was reported that the Downey Brothers had two proposals ready to put into planning and that there was to be a meeting between the Downey Brothers and certain members of the Committee and Club, including a Mr Machin, to discuss the matters. Next, the minutes of the Committee meeting on 24 April 2017 contain the following items under the "A.O.B" heading: "*Meeting with the Downey Bros: 2 planning options to be put forward to the planning committee. The club preferred the 2nd option*" and "*Members to continue to talk with local councillors to gain support*".

139. What appears from the minutes of these two meetings is that somewhere between late March and 24 April 2017 there must have been a meeting between the Downey Brothers and some members of the Committee to discuss planning options. I refer below to this meeting. The relevance is that, just as the Trustees were mistaken in their written evidence in confusing the signing of planning appeal documentation with the signing of the 2015 Agreement, so too was Mr Green mistaken in confusing the 2017 meeting for one that he supposed to have taken place in March or April 2015.

140. During the spring and summer of 2017 efforts appear to have been made by the Downey Brothers, in conjunction with at least some of the Committee, to lay the ground for a fresh planning application. The intention appears to have been for there to be a development comprising a single structure, with a new clubhouse and indoor bowling facility below several residential flats. At all events at the Club's annual general meeting in November 2017 Mr Green presented with his President's address to members a statement largely prepared by Mr S Downey, concerning such a development.

141. This AGM was held on 19 November 2017. By this time the Club had managed to secure an arrangement for a nursery school to be run in the clubhouse, the Club now receiving rent from the nursery school. Having this income, income which the Club had needed, appears to have diminished the Club's interest in going ahead with a development project with the Downey Brothers. At this AGM Mr Green was replaced as president by Mr Wilson after a contested election, and became treasurer. This result was probably because Mr Green was believed to be very much a supporter of the proposals for developing part of the Club's land in conjunction with the Downey Brothers. Certainly Mr Green's involvement with Mr S Downey's letter of March 2018, referred to below, points to his being a supporter of the Downey Brothers and their attempts to advance their position as regards their option.

142. Before the November 2017 AGM Mr Dawber and Mr Leach had given notice

of their resignations as the Club's trustees; and at an extraordinary general meeting on 7 January 2018 the Club resolved to appoint Mr Wilson and Mr Fred Hargraves as trustees in their place. Notwithstanding this change, Mr Dawber and Mr Leach remained, and remain, registered proprietors of the Club's land: nothing appears to have been done to transfer the land to new trustees in their place.

143. Within the documents in evidence are letters dated 16 February 2018 seemingly connected with an attempt by Lynn Murray & Co to exercise the Downey Brothers' purchase option contained in the 2008 Agreement. These letters appear to have been misdated, the correct dates being 16 March 2018.

144. On Friday 9 March 2018 in the evening Mr S Downey sent Mr Green an email seemingly about material which he was intending to have sent to Mr Wilson (by then the Club's president) by email, this material concerning the option. Mr Green had already explained in an earlier email of the same day how material might be passed to Mr Wilson. Mr Downey's email then invited Mr Green's view as to the timing of his sending the material for Mr Wilson. He said, "*Was going to send on Sunday so not to give too much time for thought, but enough time to distribute, what do yo (sic) think?*".

145. Mr Green replied very early the following day, Saturday 10 March 2018, agreeing that the message should be sent on Sunday, which must be 11 March 2018 (being the day when the message was indeed sent). Mr S Downey, in an email in reply to Mr Green also sent early on the Saturday said: "*For clarity I am going to add that the freehold will be handed back to the club on completion and sale of the flats ...*"

146. The email sent by Mr S Downey on Sunday 11 March 2018 said it enclosed a letter for the Committee's attention, being self-explanatory and "*in a nutshell ... a great step in the right direction*", and said that "*The letters to the trustees will be sent at the beginning of the following week*". Points made in Mr Downey's letter, dated 6 March 2018, were as follows:

i) A "verbal form" of "green light" had been given to a planning application giving 8 flats above a new clubhouse. This structure would be on and above the existing building and not on open space.

ii) As the application and building "*are going to cost a lot of money and to gain continued support from our lenders they have asked that we action the option agreement in place to guarantee their investment in us*".

iii) "*To action the agreement*" contained in the option agreement, "*we would purchase the land hatched in red on the plan for the sum of £1 as provided in the agreement from the club and lease back the clubhouse until the development took place. We would bear costs*

completing (sic) the lease which would eventually come out of the final deal. The club would carry on exactly as it does at present with all the responsibilities it currently has in physical and financial form. To protect the club from us being able to sell the land the option agreement states that the club will have a legal charge on the land so that only the development as set out in the original agreement can go ahead. In real terms this means that when the flats are built as they are to be sold and the building costs/option agreement costs are assigned the profit will then be split 50/50. The freehold title will then be handed back to [the Club] for them to manage the land and collect ground rents from the flats. Flats would be sold off on 99 year leases."

iv) The option agreement was said to require the Downey Brothers not to complete on the option until after the bowling season and then to require due notice to be given to allow the Club to plan for the season during construction.

v) Finally, it was noted that "*All of the above is as set out in the original option agreement which is a legally binding agreement …"*

147. The third and fourth, and thus the fifth, of the points set out in the previous paragraph were not, in fact, a completely correct depiction of provisions of the Option Agreement, for reasons I have already explained. As to the third, the Option Agreement did not provide for any interim leasing of the clubhouse to the Club, or for a new clubhouse to be built out by the Downey Brothers on the Property and then leased or transferred back to the Club; and as to the fourth there was nothing in the Option Agreement requiring notice to allow the Club to plan for the bowling season during construction.

148. On Friday 16 March 2018 Lynn Murray & Co sent to the Trustees notices purporting to exercise the Downey Brothers' option to purchase the Property for £1.

149. On Monday 19 March 2018, the Club's Committee invited the Downey Brothers to a meeting to discuss the recent correspondence and the Downey Brothers' plans. The following day Mr S Downey sent to Mr Green an email attaching a letter for the Club to consider at the forthcoming meeting, explaining the Downey Brothers' reasons for exercising the option. The letter concluded "*This deal is primarily about protecting the club during the option and for the future so that hopefully it can celebrate another 100 years … what a great legacy to leave behind*". Mr S Downey also emailed to the Club to say that the Downey Brothers could not come to a meeting before 9 April 2018.

150. After some exchanges of correspondence a meeting of the Club's Committee was held on 9 April 2018 attended also by the Downey Brothers; no consensus was arrived at. Shortly after solicitors acting for the Club wrote to Lynn Murray & Co disputing that the option remained capable of being exercised.

151. Over the following months the matter was quiescent, but revived again in October 2018 when Lynn Murray & Co sent to the Club's solicitors a notice to complete. On 31 October 2018 the Trustees' present solicitors, Adams & Remers LLP, replied to Lynn Murray & Co to dispute the validity of the exercise of the option on the basis that there had been no valid option after 2013 for the reason, among others, that there had been no resolution passed in accordance with the Club's rules directing the Trustees to enter into the 2015 Agreement. By this time all the Trustees had retired as trustees of the Club's property and had been replaced by Mr Wilson, Mr Hargraves and Mr Machin (mentioned later); but the transfer of the Club's land into the names of the new trustees had not (and still has not) taken place; and Adams & Remers LLP were acting on instructions from the replacement trustees.

152. On Wednesday 14 November 2018 Lynn Murray & Co sought to exercise for the Downey Brothers the option granted by the 2015 Agreement. This was done by letters, sent to each of the Trustees by special delivery (one of the letters, that to Mr Stevens including a cheque for £1 made payable to the Club) and including a form of Option Notice signed by Lynn Murray & Co. There is in evidence the post office receipt for the letters; Ms Murray's written evidence confirms the posting. (In fact she refers to sending by registered mail, but intends I believe to refer to the Royal Mail's special delivery service.) And in the event Mr Hopkins in his closing submissions accepted that the letters had been duly posted.

153. Clauses 1.37 and 19 of, and the Fifth Schedule to, the Option Agreement included, as terms of the sale of the Property, the Standard Commercial Property Conditions (2nd). (The description in Clause 1.37 and the reference in Clause 19 to the Fourth Schedule are obvious mistakes needing no special comment.) According to those conditions (see conditions 1.3.7 and 1.3.8), the letters sent by Lynn Murray & Co were deemed to be received on Friday 16 November 2018. Only if it were proved (which it has not been) that they were received at some other time would this deeming of the time of service be displaced. It follows that the notice to exercise the option was given before the expiry of the option period.

154. The form of the option notice as given was not in precisely the form set out in the Sixth Schedule to the Option Agreement. This is unsurprising, as the relevant option was in fact that granted by the 2015 Agreement, and the option notice necessarily referred to the 2015 Agreement. However, the Trustees have not put forward any positive case concerning the form of the Option Notice, which I take to have been sufficient compliance with the 2015 Agreement to have made an effective exercise of the option, other things being equal.

155. I also find that the Downey Brothers met the requirement that there should be £1 tendered on exercise of the option. In his witness statement Mr Stevens denied that the letter from Lynn Murray & Co to him had included the £1 cheque. When giving his oral evidence he corrected this, and said that he could not recall whether or not the cheque had been enclosed (as I have found

that it was).

156. After November 2018, the battle lines between the Club and the Downey Brothers were drawn up. There was no solution agreed; and the Downey Brothers issued their proceedings on 8 May 2019.

157. On 29 July 2020, after the start of these proceedings, the Downey Brothers obtained from Mr Brian Madge, BA, MA, MRTPI, a report concerning the "*the probability of achieving planning permission to rebuild the clubhouse with eight flats above*". This hypothetical proposal, described in Mr Madge's report, involved replacing the existing clubhouse on the Property with a substantial single structure comprising a clubhouse with several flats above. There would be no construction on the site of the No.2 green, and much of the No.1 green would be left intact. Broadly this proposal followed the outline presented by the Downey Brothers much earlier, at least by the end of 2017.

158. The proposal, referred to as the "Hypothetical Planning Application" or "HPA", as expressed in Mr Madge's report, appears to have been presented as a basis for the Downey Brothers' damages claim against the Trustees for breach of contract contained in the 2015 Agreement, the assumption being a hypothetical proposed development of the Property on the basis of permission given on the HPA. The HPA has never been put forward to the planning authority as an application for planning permission, and no application has been made since 2016 when the third application was rejected on appeal, a point confirmed by Mr A Downey in his oral evidence.

159. In my judgment the HPA is irrelevant to the issues before the Court and may be ignored.

i) First, it is inconsistent with anything in the 2015 Agreement: were the Downey Brothers to have acquired the Property on the exercise of the 2015 option, they would have acquired land subject to a use restriction reserving the Property exclusively for residential development. This is not what the HPA contemplates. So, Mr A Downey's oral evidence, explaining his conviction that the Downey Brothers could still make a successful application, notwithstanding the opinion of the parties' expert (referred to below), leads nowhere: the planning permission to be sought by the HPA would not be for a permissible development.

ii) Second, a joint expert instructed for this action has given it as his opinion that there is a less than 50% prospect of planning permission being granted for the HPA. There is no evidence as to there being any prospect of any other planning permission being granted for residential development of the Property, and the parties seem to have agreed that itwould be assumed in any assessment of damages that there is none.

160. To complete the present picture, Mr S Downey in his oral evidence explained

that the land in question is of no value without planning permission for development, it cannot be disposed of without planning, and the Club will have a charge on it. The option, in the absence of planning permission, he explains as a "safety net". Quite simply, in his view, the land is no good without planning permission.

The Witnesses

161. Despite the absence of any claim for rectification, the Trustees called Mr Stanley and Mr Wilson to give evidence about their understandings as to the effect of the Option Agreement at the time it was made. Their evidence was of little value.

162. Mr Stanley was a member of the Club and of its Committee between 2005 and early 2009, and acted as greenkeeper. He ceased to be a member of the Club in about 2010. I believe Mr Stanley to be a truthful witness doing his best to speak to what he remembers; but I also consider that at this distance in time he has come to be much more suspicious of the making of the Option Agreement than ever he was at the time. In summary:

i) Mr Stanley's evidence as to the Option Agreement was to the effect that he had not been sympathetic to the Downey Brothers' proposals when made at the end of 2006 and put to the Club in general meeting in early 2007, and that he felt that the Option Agreement had been imposed on the Club without proper information and with the Club being kept in the dark. His belief was, among other things, that the arrangement with the Downey Brothers was for the amount of their annual payments only to be recoverable in the event of their proposed development going ahead, and that their purchase of land would only go ahead once they had obtained planning permission.

ii) Mr Stanley also gave evidence concerning an episode when he and Mr Leach were playing a bowls match at the Club for a different club, Belmont, to which they had moved: Mr Green was said to have come up to Mr Leach and insisted on the latter's signing a document there and then, and saying words to the effect that "*It's something to do with planning, it's not important, it's something and nothing*". This episode, it turns out, was not the occasion when Mr Leach signed the 2015 Agreement, but when he signed a document in 2016 in connection with a planning appeal.

163. Mr Wilson is and has been the Club's president since the end of 2017, as mentioned earlier, having taken over from Mr Green at the Club's AGM of 19 November 2017. Mr Wilson had re-joined the Club in 2006, after a period of absence, and has been a member of the Committee since the start of 2009: the minutes of the meeting of 19 January 2009 show him as then present.

164. In many respects his evidence was unsatisfactory. For example, his written evidence contained detailed analyses of documents, and made arguments based on these documents. These documents included minutes of meetings at which he was not present, while his statement described events which took place at the meetings. He had virtually no memory of various of the documents he referred to in his statements and should have reminded himself of when preparing and signing the statements. An illustration may be taken from his first witness statement: this contained criticism of the Option Agreement, identifying in particular clause 3 as objectionable or mistaken. In his oral evidence he explained that he had never read the whole of the Option Agreement and indeed had never read clause 3 up to the day of his cross-examination. He became bewildered as to how he had been able to refer to the clause at all when making his witness statement.

165. Although Mr Wilson was not a member of the Committee until after the making of the Option Agreement, he nevertheless asserted in his written evidence that, following the Club's EGM on 15 April 2007, Mr Green dealt with all negotiations and decisions with the Claimants relating to the Downey Brothers' proposal and the Option Agreement, and deliberately kept these away from the Club members and, as much as possible, the Committee.

166. To my mind in its wide sweep this was an exaggerated criticism of Mr Green. Mr Green was not acting alone in relation to the making of the Option Agreement. This point was accepted by Mr Dawber, at the time a member of the Committee who attended a meeting with Mr Spear, along with Mr Green and Mr Jackson, to discuss the terms of the Option Agreement. Mr Dawber agreed that, if the Option Agreement did not do what the members of the Committee believed it did, the blame did not stop with Mr Green but was to be shared with the Committee.

167. It is true, however, that after the making of the Option Agreement Mr Green became involved with the development and pursuit of the Downey Brothers' various planning applications, and as time went by also became the principal point of contact between the Club and the Downey Brothers as regards the proposed development. Mr Green himself agreed that gradually he came to be left on his own in this regard, the Club's committee not being active or involved. Mr S Downey gave evidence to similar effect. But I reject any suggestion that before 2015 Mr Green was secretive as regards the Downey Brothers or doing anything more than the Club's Committee were content that he should do. However Mr Green's involvement with the making of the 2015 Agreement was unfortunate, as I explain below, and did lead to him ceasing to be candid with the Committee about what he had done; and by early 2018 he seems to have been aligning himself with the Downey Brothers in their efforts in relation to their option.

168. Like Mr Stanley, Mr Wilson referred in his written evidence to the occasion when Mr Green approached Mr Leach while in the changing room at the Club to ask him to sign a document. As I have explained, this occasion did not

concern the making of the 2015 Agreement, but was a year later and in connection with the appeal of the rejection of the third planning application.

169. On the other hand there is a matter which, I believe, was correctly stated by Mr Wilson. I accept his evidence, corroborated as it is by minutes of meetings of the Club's Committee and Mr Green's own evidence, that before the date of the 2015 Agreement the Committee had never discussed giving the Downey Brothers an extension of the option. As I explain, Mr Green acted at the request of Mr S Downey to arrange for the signing of the 2015 Agreement by the Trustees; and he did this without having first sought the agreement of the Committee or the Club and, until 2017, without telling anyone active within the Club that the option granted by the Option Agreement was (or was to be) extended following its expiry (an expiry reported at the Club's annual general meeting of November 2014).

170. I have already explained in general terms the way I view the Trustees as witnesses. In giving their evidence they had to face two obvious difficulties, namely that so much of what happened took place so long ago and with limited involvement on their part, and also that for a great part of the time they have had so little to do with the Club. To give an example, the evidence of each of the Trustees (evidence which I have already described and which I accept) was that he signed the Option Agreement because that is what he was asked to do; and apart from what was explained by Mr Dawber in his evidence, none of the Trustees gave any attention to the Option Agreement at the time, so that none considered in particular what was provided as to the circumstances in which the option granted by the Option Agreement might be exercised or the consequences of an exercise of the option or as to their responsibility for what was to be paid or done by the Downey Brothers.

171. Mr A Downey's evidence was confined to confirming that any relevant evidence which he might be able to give was sufficiently within Mr S Downey's knowledge and the scope of the latter's involvement with the matters in issue in the action. He also gave evidence concerning his belief as to the prospects of planning permission being obtained, evidence I discuss elsewhere.

172. Mr S Downey's evidence was carefully considered, with attention to contemporaneous documents, and accurately reflects much of what is recorded. Much of his evidence is helpful for an understanding of events. Nevertheless, in my judgment, his evidence was distorted by a tendency to present commercial expediency as altruism, together with a measure of wishful thinking. Also, of course, as the material events were so many years ago, the more important being at least five or six years ago, that Mr S Downey can hardly be expected to have an accurate memory of all the detail even where there are contemporaneous documents to assist. I explain later one respect in which I do not accept his evidence.

173. I have no difficulty in accepting Ms Murray's evidence; and I have referred

earlier to what she recalls having been told by Mr S Downey when she was telephoned by him in March 2015 with his request to her to assist with the making of the 2015 Agreement. I should mention that neither her written nor her oral evidence touched on the question of her understanding as to, or the way in which the Option Agreement came to be drafted as it was, in relation to the connection between Planning Permission and the ability of the Downey Brothers to exercise the option in that agreement. Her client file had been provided to the Downey Brothers' solicitors for the purposes of this action, she had not looked at it before giving her evidence and there was no waiver of privilege in relation to it.

174. Mr Green's oral evidence was materially different in many respects from his evidence in his witness statements, passages which he simply disagreed with, in some cases being unable to explain how he had come to depose to what he had. An important error was in his second witness statement, where he described how it was his belief that as the negotiations concerning the making of the Option Agreement progressed "*the position changed slightly, as the final [Option] Agreement provided for the freehold to be transferred upon exercise of the option rather than on planning permission*". Not only would such a change have been far from slight, but it was not one he understood to have been made, according to his oral evidence to which I have referred already. Nevertheless Mr Green was, I believe, truthful in his oral evidence, genuinely trying to help; and his memory was reasonably reliable bearing in mind that some of what he was being asked to describe was ancient history.

Option Agreement – validity?

175. It is common ground between the parties that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act") applies in relation any agreement, such as the Option Agreement, by which an option to purchase land is granted. Section 2 of the 1989 is, so far as material, in the following terms:

> *"(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 … must be signed by or on behalf of each party to the contract …*"

176. Mr Hopkins on behalf of the Trustees drew attention to North Eastern Properties Ltd v Coleman [2010] EWCA Civ 277, [2010] 1 WLR 2715 in which Briggs J, giving the leading judgment with which Smith and Longmore

LJJ agreed, pointed out that where there is a composite transaction the parties must incorporate all of their agreed terms into a single document (or exchanged contracts) duly signed by or on behalf of the parties. Briggs J noted that section 2 imports a "rigorous discipline" which may allow parties to land contracts to avoid agreed obligations on the ground of their or their counterparties' lack of discipline. But for section 2 to have this effect, the expressly agreed term omitted from the single document (or document referred to therein) must still be a term of the agreement for the disposition of the land, rather than one of some other simultaneous but immaterial agreement. What Briggs J said, as to composite transactions, where one has a single document covering several different transactions, was as follows [para 58]: "*… the parties to a composite transaction are not free to separate into a separate document expressly agreed terms, for example as to the sale of chattels or the provision of services, if upon the true construction of the whole of the agreement, performance of the land sale is conditional upon the chattel sale or service provision.*"

177. In the present case the provisions in the Option Agreement dealing with the Annual Payments and the terms surrounding the Seller's Charge are, in my judgment, integral to the grant of the option: they are integral to the land contract which the Option Agreement was directed at effecting, being part and parcel of the terms concerning the grant of the option for the Downey Brothers to purchase the Property. From the point of view of the parties, the consideration provided by the Downey Brothers included the obligations undertaken by them in connection with the option, including the obligations concerning the Annual Payments and the Seller's Charge. The parties did not try to extract all the terms relating to the Annual Payments from the Option Agreement to keep them separate, for the simple reason that they were an essential part of the contract concerning the grant of the option.

178. The Side Letter's provisions, Mr Hopkins submitted, are themselves integral to the terms on which the Annual Payments were agreed to be made (terms which I discuss further below in connection with the Downey Brothers' repayment claim). This submission I accept. It seems to me that this point was practically conceded by Mr S Downey in his written evidence to which I have referred earlier.

179. Mr Hopkins further submitted that, having regard to the provisions of the Side Letter, the Option Agreement failed to comply with the requirements of section 2 of the 1998 Act. He drew attention to the judgment of Rimer LJ in Keay v Morris Homes (West Midlands) Ltd [2012] EWCA Civ 900, [2012] 1 WLR 2855 at [9] where it was explained, echoing what had been said by Briggs J in the North Eastern Properties case (above), that the section's effect is "*merciless*" and that "*An appropriately signed document purporting to amount to a contract for the sale or other disposition of an interest in land will not in fact create a valid contract unless it includes all the expressly agreed terms of the sale or other disposition. If it fails to do so it will be void …*"

180. It may be unnecessary to reach any conclusion on this submission, so far as

concerns validity of the Option Agreement and the option seemingly granted in 2008: what matters as to the exercise of the option contended for by the Downey Brothers in this action is the validity of the 2015 Agreement and the option then granted. This point was made by Mr Clargo on behalf of the Downey Brothers. Further, in the course of his oral argument Mr Hopkins focused on the 2015 Agreement, being willing to assume that the Option Agreement had continued in force (that is, so far as concerns the arrangements expressed to continue after the Option Period once the option lapsed at the end of 2013). His attack was on the validity of the 2015 Agreement. I deal further with the Side Letter, and the submissions concerning section 2 of the 1989 Act, in that context below.

181. There is, I believe, a point on which the validity of the Option Agreement could be material. This concerns the position with the Annual Payments.

i) The Seller's Charge came to be duly executed and registered. This was not itself a void land contract, but a disposition of an interest in the Club's land and was therefore effective to create the legal charge, whatever may have been the impact of section 2 of the 1989 Act on the Option Agreement. This result is explained by the Court of Appeal in Helden v Strathmore Ltd [2011] EWCA Civ 542, [2011] Bus LR 1592 to which Mr Hopkins drew my attention: section 2 of the 1989 Act applies only in relation to executory contracts for the creation or sale of legal estates or interests in land, and not to documents which actually create or transfer such estates or interests.

ii) If the Option Agreement were valid and effective according to its terms, the Seller's Charge would have secured obligations, whether present, future or contingent, as to payment to the Downey Brothers of the amounts of the Annual Payments when they became due in accordance with the terms agreed between the parties. If, however, the Option Agreement were rendered void for failure to meet the requirements of section 2 of the 1989 Act, there could be a question as to the right of the Downey Brothers to recover the Annual Payments from their recipients.

182. However that may be, the Downey Brothers have not made any claim for repayment of the Annual Payments otherwise than by reference to the terms of the Option Agreement, and in particular have not made any claim in restitution for money had and received or unjust enrichment if the Option Agreement turned out to have been void for failure to comply with section 2 of the 1998 Act. Further, as I explain, below, when dealing with the Downey Brothers' claim against the Trustees in respect of the Annual Payments, while I accept that what was done by the Downey Brothers in making their payments to the Club will have qualified the payments to be Annual Payments duly made under clause 4.1 of the Option Agreement, I also conclude that the monies were not actually paid to the Trustees themselves or received by them; and there has been no argument as to whether the Trustees are liable as having been unjustly enriched by the monies.

183. Later in this judgment I return to the question of the impact of section 2 of the 1989 Act on what was agreed in 2008. First, however, I consider the claims made by the Downey Brothers against the Trustees in respect of the Annual Payments, assuming for this purpose that the parties' respective rights are to be found in what was expressed in the Option Agreement and the Side Letter.

The Annual Payments

184. There are two issues to be decided.

i) The first is whether as much as £30,000 was duly paid in accordance with clause 4.1 of the Option Agreement.

ii) The second is whether the Downey Brothers are at present contractually entitled to call for repayment. This involves consideration of clause 4, including clauses 4.2 and 4.3. The terms of the Side Letter may also be relevant.

185. As to the first issue the Trustees have put the Downey Brothers to proof of what was paid. As to the second issue, the Downey Brothers' contention (as noted earlier in this judgement) is that on the true construction of the Option Agreement the amount of any Annual Payment was a loan repayable on demand, a demand which could be made at any time and indeed even immediately upon the making of an Annual Payment so that nobody had any benefit from it at all.

186. As a preliminary I note that as a matter of principle, as matter of ordinary club law, absent express indemnity (and here there is none), the Trustees did not have any right of recourse against members of the Club, or even against members of the Committee, for engagements undertaken by them for the Club: their right would be to recoup themselves out of the Club's property in their hands (a right expressly given by the Club's rules: see paragraph 28(iv) above). This legal context would make it surprising if the Option Agreement exposed the Trustees to an immediate risk of the Downey Brothers calling for repayment of an Annual Payment, as and when made. The Trustees would have had to retain the cash to meet the liability. It would also make itsurprising that the Downey Brothers could properly pay the Annual Payments to the Club direct and without obtaining express consent from the Trustees,and then at once claim repayment from the Trustees on the basis that in accordance with the Option Agreement the Trustees were personally liable to pay on demand the amount of the Annual Payment.

187. As to the first issue, I am satisfied that £30,000 was paid over by the Downey Brothers to the Club. £12,000 was paid on 26 November 2008; next there were payments of £1,500 and £4,500 on 26 November 2009 and 12 February 2010; the following £6,000 was paid as to £4,000 on 3 December 2010 and as

to £2,000 on 13 April 2011; the final £6,000 was paid in instalments of £2,000 on 4 December 2012, 18 December 2013 and 5 December 2014. For all but £4,000 of these payments there are in evidence bank statements for the Club's banking account showing receipt corresponding to the payment: there are no statements in evidence for the periods in which two instalments of £2,000 were paid.

188. Insofar as the Club's annual accounts are in evidence, all but £14,000 is recorded as having been received. Strictly speaking, if the Annual Payments were being accounted for by the Club as loans rather than gains, assuming that is how properly they should be characterised, they should have been reflected in the balance sheets as debts and not in the income and expenditure accounts as income (that is, as earnings or gains). In fact the balance sheets in evidence contain no statement of a liability to the Downey Brothers, and the receipts of the Annual Payments reflected in the accounts are recorded as income against the legend "Option Agreement" (eg, the September 2011, 2013, 2014 and 2017 income and expenditure accounts and balance sheets). For what it is worth, therefore, it would seem that the Club did not see there as being any liability due to the Downey Brothers.

189. A point taken by the Trustees, in answer to the Downey Brothers' claim against them concerning the £30,000 and interest, is that the payments were not made to the Trustees personally but to the Club. They did not themselves receive the sums paid: the payments went to the Club's treasurer and into its bank account.

190. In my judgment the answer to this point is bound up with what the Option Agreement provided as to the Annual Payments. The Trustees made the Option Agreement in their capacity as trustees of the Club; and the Annual Payments were intended to be made for the Club and not to them beneficially for themselves.

191. This can be seen evidenced by an email exchange of late November 2010 when Mr Dawber, then the Club's treasurer, was providing to Mr S Downey the Club's bank account details to allow the latter to effect a payment to the Club. Mr Dawber's written evidence was that although he had no recollection of the emails, they were not to do with the Option Agreement. In his oral evidence Mr Dawber was unable to explain what he had written, and agreed that the probability was that the email exchange concerned the making of an annual payment: as referred to above, £4,000 was paid by the Downey Brothers shortly after.

192. Further, as mentioned above, I can see that if the Trustees were, on the true construction of the Option Agreement, to be personally liable to repay the Annual Payments (and interest), whether or not they still had property from which to recoup themselves, it would have mattered that personally they should have received the payments so as to be able to decide how to provide for the liability they might be called upon to meet. And in that situation I would agree with the Trustees that the £30,000 has never been paid to them.

193. That said, I have no doubt that the arrangement between the Downey Brothers and the Trustees set out in the Option Agreement (together with the Side Letter) was never for the Trustees to be personally liable to repay Annual Payments and interest whenever the Downey Brothers might choose to ask. Mr Clargo on behalf of the Downey Brothers submitted during the course of argument that demand might be made forthwith upon the handing over of an Annual Payment. That would have anyway been an absurd thing for the Trustees (or the Club) to have agreed to, given that the Trustees could be facing an immediate bill for what could have been for each of them a large amount of money. Further, it would have been counter to the very purpose for which the Annual Payments were to be made if the Trustees might be called upon to pay and to seek to recoup themselves out of the Club's property.

194. In my judgment the Annual Payments, according to the Option Agreement were non-refundable amounts to be recovered, if at all, from the proceeds of sale of the Club's land or (in the event of the option being exercised) on the development of the Property. Clause 4.1 was not providing for the Downey Brothers to make an advance, but to provide sums of money as consideration for the grant of the option, sums which might, or might not, be recouped to the Downey Brothers depending on future events. As to this, clauses 4.2 and 4.3 then deal with two situations.

i) The one, in clause 4.3, is where the option is exercised and the Downey Brothers take the Property. In that case the Downey Brothers might have back the sums of money, with Interest (as defined), if but only if there is sufficient profit after meeting Development Expenditure and Interest so that they are entitled to the total of the Annual Payments and Interest under clause 12.3.3. For this there is to be no security, the Seller's Charge having been discharged. In other words, where the Downey Brothers take the Property the Trustees cease to be under any liability to make any payment to the Downey Brothers as regards the Annual Payments. This, it seems to me, is a powerful consideration pointing against the Annual Payments being repayable at any time on demand by the Downey Brothers.

ii) The other, in clause 4.2, is where the option is not exercised. Here the payment to the Downey Brothers of the amount of the Annual Payments and interest at the Contract Rate depends upon the Trustees disposing of the Property (that is, land subject to the option) or the Adjoining Property to a third party. One obvious circumstance in which this position is arrived at is where part of the Club's land is sold profitably. And an obvious assumption about this is that the sale would be after the expiry of the option, because the Downey Brothers hold the Seller's Charge which itself contains a covenant against disposing of the charged land. Further, the Side Letter itself is premised on, and then adds to what may happen on, there being a disposal of part of the Club's land after the expiry of the option.

195. In short, insofar as there is any express term in the Option Agreement supporting the Downey Brothers' claim to be entitled to call for repayment of on demand of any Annual Payments, it is the provision in the first part of clause 4.2 explaining that "*The Seller will be liable to repay the total amounts paid to it by way of Annual Payment …*". In context, however, that provision is stating no more than that the total of the Annual Payments, when due for repayment, will carry interest at the Contract Rate from payment. The time when the total and interest will be due for payment is explained in the second sentence of clause 4.2, namely disposal of the Club's land to a third party. Until then what is stated in the first sentence is a statement of a contingent liability owed by the Trustees and repayable if at all as set out in the second sentence.

196. There is a forensic point to be noted. The Claim Form issued by the Downey Brothers claimed repayment of the sum of £30,000 (plus contractual interest) as an amount paid by way of loan. The Particulars of Claim appear to have dropped this claim for repayment of a loan. Rather the claim was presented as one for damages for breach of the Option Agreement. The Particulars of Claim asserted that £30,000 was paid pursuant to the obligation in Clause 4.1 of the Option Agreement. The relevant claims against the Trustees then was presented as follows:

i) There was a claim that, absent breach of the 2015 Agreement in refusing to complete the sale of the Property the sum together with contractual interest (to be calculated on a compound basis daily until the date of payment) would pursuant to Clause 12.3.3 have been recovered from the gross proceeds of the developed property.

ii) There was an alternative claim for breach of the Option Agreement in refusing to repay the £30,000 plus interest on the basis that "*in order to give business efficacy to the contract, it was an implied term of the … Option Agreement that, if the proposed development of the Property did not go ahead, [the Trustees] would repay on demand the sum of £30,000 plus contractual interest"*.

197. In other words the Particulars of Claim did not embrace a case that the Downey Brothers were entitled under the express terms of the Option Agreement to immediate repayment of the amount of the Annual Payments whenever the Downey Brothers might think fit. Rather, the inference was that in principle repayment was to be (a) from the proceeds of a development, if the Downey Brothers exercised their purchase option, or (b) in the event of there being no development (and presumably therefore no exercise of the option) then, by implication of a term, as and when the Downey Brothers might ask for it.

198. To my mind the formulation in the Particulars of Claim gets closer to the terms surrounding the Annual Payments and any repayment than the expression in the Claim Form and in the submissions made at trial on behalf of the Downey Brothers.

199. A significant provision in the Option Agreement which in my judgment confirms what one would any way naturally expect, in view of the context in which and purpose for which the Option Agreement was made, is, clause 12.3.3. This includes the amount of the Annual Payments plus Interest in the waterfall for dividing the proceeds of the Development of the Property. Clause 12.3.3 is poorly drafted if the Annual Payments might have been already repaid on the Downey Brothers' demand well before any Development, as it makes no provision for that possibility: it does not contemplate the possibility of an Annual Payment having been made and repaid before the time when the Development is completed.

200. Furthermore, if the Side Letter is taken into account as relevant to the interpretation of the Option Agreement, and in particular to the interpretation of the provisions of clause 4.2 to which I have just referred, I am satisfied that it is at least consistent with the conclusion I have explained; but in my judgment it goes further and supports it. The Side Letter does not address the case where the option is exercised, so that clause 4.3 of the Option agreement becomes engaged. But in the case where the option is not exercised, so that it is clause 4.2 which remains in point, immediate repayment of the Annual Points as a debt from the Trustees due on demand is inconsistent with the provisions of the Side Letter.

i) The Side Letter clarified that there could be a disposal of the Club's surplus land, the rough No.2 green and its surrounding area which was out of use for bowling, free of the Seller's Charge and without there necessarily having to be a trigger for any payment of Annual Payments. What would matter would be that the Seller's Charge remained in place over the No.1 green and clubhouse and the value of that propertyremained sufficient to cover, if sold, the amount of the Annual Payments and interest. In that case the Trustees had the right to dispose of part of the Club's Land without repaying any of the Annual Payments and interest to clear the Seller's Charge. But if and when thevalue of the charged land was less than what was appropriate to secure that amount, the Downey Brothers would accept the discharge of the Seller's Charge for the lesser of that amount and the value of the Club'sassets on dissolution, and would have no further recourse.

ii) The natural reading of the Side Letter is that in the last sentence the reference to £30,000 plus interest was to what the parties expected to be the same thing as "*the monies due under the Sellers' Charge"* in the previous sentence, namely what would be secured at the end of the five years of the option period after the payment of the five instalments of £6,000 Annual Payments. In other words, there would not have been any repayments of Annual Payments before the end of the five years unless the option granted by the Option Agreement had first been exercised and the sale and development of the Property completed. This sits ill with the idea that the Downey Brothers might at any moment call upon the Trustees to pay personally whatever had been paid by way of Annual Payments, whether or not the option had been

exercised and whether or not there was any Development in progress or prospect.

201. It follows that the Downey Brothers claim for repayment of the £30,000 and interest is in my judgement to be dismissed. It follows also that the claim is still to be dismissed, if presented as a claim for damages for breach of the Option Agreement or for that matter of the 2015 Agreement. At present the occasion for repayment has not arrived, not because of any breach of contract by the Trustees, but simply because the Trustees have not sought to dispose of any part of the Club's land.

The making of the 2015 Agreement?

202. Earlier in this judgment I have summarised the contemporaneous documents touching on the making of the 2015 Agreement, and what is apparent from those. However, I need to make further findings concerning the making of the 2015 Agreement, and in particular concerning the attention given to it by the Trustees and within the Club.

203. Mr S Downey's written evidence set out in full both the terms of Ms Lynn Murray's email of 17 March 2015, and his email to Mr Green of 19 March 2015. He explained that he printed off two copies of the 2015 Agreement attached to Ms Lynn Murray's email, signed both and passed them over to his father to give to Mr Green. Mr S Downey added that his father's present condition prevents him giving evidence or assisting with past events, and that he does not know anything of where or how his father passed the documents toMr Green, Mr Green got them signed. He believes that in due course Mr Green put a signed copy into his letter box.

204. It will be recalled that Ms Murray's email of 17 March 2015 explained to the Downey Brothers "*we need to ensure that the Bowling Club are suitably advised on this*" (namely the making of the 2015 Agreement). Neither the Club nor the Trustees took any advice. As to what was done about Ms Murray's direction to Mr S Downey in that email, the evidence and my conclusion is described below.

205. Mr S Downey did not say in his written evidence anything about having passed on to anyone Ms Murray's recommendation as to the obtaining of legal advice. In the papers before the Court is a note which was said to have been provided for the Trustees as part of the papers referred to in Mr S Downey's email of 19 March 2015; in other words papers for the Trustees when Mr Green was to ask them to sign the 2015 Agreement. This note, explained:

> "*Re the enclosed extension forms, these are to amend the option agreement by deed of variation from the original five year period to a ten year period from 2008 to allow for the time it has taken to reach this stage. It does not change anything else within the original*

agreement … As previously explained, our bank that provide our business funding and regularly check all our details, have requested that we bring this up to date in line with their requirements."

206. Mr S Downey said in his oral evidence that he had not himself passed on to Mr Green Ms Lynn Murray's requirement for the Club to have legal advice, whether in the telephone conversation referred to in his email to Mr Green or otherwise. Mr Green did not himself in his written or oral evidence say that he had been told of any such requirement. His oral evidence was that he could not recall having been told but that had he been told he would likely have told the Committee. Instead, so he said in his oral evidence, he dealt with the 2015 Agreement himself without Committee approval, feeling quite alone in the matter.

207. What Mr S Downey did say about this in his oral evidence was that, when passing "the paperwork" to his father to pass on to Mr Green, he had asked his father also to tell Mr Green of the Club's need for legal advice. I am not persuaded that Mr S Downey did this. The obvious occasion for telling Mr Green of Ms Murray's clear direction was when speaking to Mr Green on the phone before sending the email of 19 March, or in that email, or in the note accompanying the paperwork. Had Mr S Downey had any real recollection of having passed on Ms Lynn Murray's direction, it might naturally have been expected to appear in his witness statement where he had, indeed, quoted her email of 17 March 2015. Rather, Mr S Downey's email to Mr Green and the note about the 2015 Agreement were calculated to down-play the importance of the making of the 2015 Agreement.

208. As to this, if the Downey Brothers are correct in their contention that the option given by the 2015 Agreement could be exercised at any time within the Option Period despite the absence of Planning Permission, the result for the Club would have been striking: without any further negotiation, let alone further payment, the Club was to be exposed to the risk of immediately losing both its No.1 green, the bowling green that was in use, and its clubhouse against the possibility that at some future time it might be able to share in some proceeds from a redevelopment, as and when that might happen, after the Downey Brothers had recouped their costs incurred in their previous failed attempts to obtain planning permission.

209. But even if the Downey Brothers are mistaken as to their ability to exercise the option without Planning Permission, an obvious question for the Club by its Committee to have considered in 2015 would be whether the Club might be able to take advantage of the fact that the Option Period had expired and the Downey Brothers plainly wanted to remedy that, having spent money they might not otherwise recoup. Unfortunately, as I explain, the 2015 Agreement was signed without any consideration having been given to it by the Club.

210. At the trial there was an investigation into the circumstances in which each of the Trustees might have signed the 2015 Agreement. Before the start of the

trial the Trustees' evidence was misdirected, as I have explained already, muddling an occasion in 2016 with what happened the previous year.

i) Mr Stevens recalled having been asked by Mr Green by telephone to sign a document as a matter of urgency, going to the Club and there, in the car park, having signed some document which he was told was needed to allow the Club to progress with the planning proposals and which he did not press to read as he trusted Mr Green. Mr Stevens thought this must have been after the start of a bowling season (and hence after April). He said that he did not know about the 2015 Agreement until the commencement of these proceedings, and was certainly not given any legal advice about making it.

ii) Mr Dawber recalled a similar telephone conversation, then Mr Green coming around to his house, and Mr Dawber's signing some document or documents which he did not have time to read and was told were to do with an appeal by the Downey Brothers against a refusal of planning permission. Mr Dawber also explained that he never received legal advice in connection with the making of the 2015 Agreement, and he did not believe he had any discussion with anyone about it and, indeed, was not aware that he had signed, or been asked to sign, the 2015 Agreement before the start of the present proceedings.

iii) Mr Leach also recalled similar telephone conversations which he dated to April or May of either 2015 or 2016, when Mr Green called to have him urgently sign a document. His written evidence was that it was always a rush with Mr Green, and that he remembers that on one of the occasions Mr Green told him that he was that last to sign the document, and that it had to be done that day. He said also that he signed what he believes to be the 2015 Agreement when he was visiting the Club to play a bowls match in which he was a member of the away team, the Belmont Club's team. This was while he was in the changing room, and was asked by Mr Green to sign a document without being allowed the opportunity to read it, and being told by Mr Green that it was just about planning and was nothing important.

211. It is probable in my judgment, and as I find, that Mr Green made contact with each of the Trustees in the period between mid-March and mid-April 2015 and had each sign the 2015 Agreement without his going into any particular detail about it. That, I believe, is the conclusion to be drawn from Mr Green's own evidence, written and oral, and is consistent with such memories as the Trustees have of being contacted by Mr Green.

212. Mr Green's written evidence explains how he can recall receiving by hand a foolscap envelope containing the 2015 Agreement for signature, and he can recall passing documents to the Trustees to sign, in Mr Dawber's case at his home. He added, "*When they were signing I do recall telling them it was an extension of the [Option] Agreement to allow the development to go ahead*". He also made it clear in his oral evidence that he had believed that really the

2015 Agreement had every advantage for the Club, and no disadvantage, and ought to be made. He explained, too, that Mr S Downey had said it needed to be done quickly.

213. It is likely, in my judgment, that Mr Green presented the document to the Trustees for signing as a small matter of little moment and to be done quickly as it was needed for the Club. This appears to have been the way in which the Trustees came to sign the Option Agreement itself, and also the 2016 planning appeal document: each Trustee was asked by Mr Green to sign some document required by the Club as a matter of urgency. He cannot have had any thought, or advised any of the Trustees, that legal advice was needed when asking each to sign the 2015 Agreement.

214. I have referred already to the mistake made in Mr Green's evidence about the circumstances in which the 2015 Agreement came to be made. Mr Green's written evidence was that in March 2015 and before the 2015 Agreement was signed there was an informal meeting at the Club about it, with a number of members of the Club, and some Committee members, present. Mr Green's written evidence was that Mr S Downey explained that without an extension of the option no development could go ahead. But Mr Green did not describe the meeting as resulting in any formal decision on the part of the Club. Mr Green also explained in his written evidence that the 2015 Agreement was on the same terms as the previous option agreement except that it granted a new option period, and that the Club had been happy with that previous agreement and Bulcraigs had said it was a good agreement so he thought there was no reason not to enter into it and, he believed, the rest of the Committee thought the same.

215. In his oral evidence Mr Green accepted not only that he may have been confused in his memory concerning the informal meeting, which may not have been about the Downey Brothers' option at all, but also that it was likely to have been the one following a meeting of the Committee on 27 March 2017, attended by Mr Machin, and concerned rather with the planning permission which might then be sought.

216. I have no doubt that Mr Green is mistaken in his written evidence concerning the meeting said to have taken place before the signing of the 2015 Agreement, and that there was no such meeting. This is borne out by the fact that there is no evidence of there having been any discussion by the Club's Committee of any proposal to grant the Downey Brothers a purchase option to last for a period beyond November 2013, whether before that time or at any later time, much less any evidence of any decision that such an option should be granted. Other than by reference to the supposed meeting, Mr Green did not suggest that any such decision has been made by the Committee.

217. I am satisfied also, and find, that there was no resolution from the Club or the Committee to support a direction to the Trustees by Mr Green as to their

entering into the 2015 Agreement. My reasons for this include the following:

i) Mr S Downey's email of 19 March 2015 is inconsistent with there being at that time a plan agreed with the Club's Committee, or indeed with Mr Green, for the grant of an option.

ii) The minutes of the 23 March 2015 Committee meeting are silent on the point which really ought to have been mentioned if any renewal of an option was to be made, or possibly to be made, with continuation of a number of years. The minutes of the next meeting, that of 20 April 2015 are likewise conspicuously silent about any agreement being made about the Downey Brothers' option. Mr Green's written evidence, which he did not qualify in his oral evidence and which I accept on this, was that he "*would have diligently checked the minutes, before signing those shown to be signed by me as Chairman at the following meeting. Having reviewed the minutes … between 2006 and 2017, I can see that I attended almost every meeting for which we have minutes until November 2018. I cannot remember each occasion when I signed the minutes, but I believe that they must have been a true record of events at the relevant meeting, otherwise I would not have signed them off.*"

iii) Mr Green's oral evidence was that he had not told anyone about the extension in 2015, because "we" just wanted the option to continue. According to his oral evidence (which I accept) there was no Committee vote on the point because his reasoning was that nothing changed from the 2008 arrangements beyond, as he was told by the Downey Brothers, a date change for the option, with the consequence that he did not say anything about it.

iv) Mr Green also agreed in his oral evidence that in 2017 the Club's Committee believed that the option period then needed extension, pointing therefore to the fact that not only had there been no discussion and agreement of the matter in 2017 but further that the Committee was not aware of the 2015 Agreement having been made. In his oral evidence he agreed that he did not at the 27 January 2017 Committee meeting say anything about the option having already been extended; indeed he explained that he may not have told anyone about it because he had not said anything about it in 2015. Further, the signed minutes of that Committee meeting contain the notes which I have already described: these point to the Committee having been told that the Downey Brothers did not at the time have an option.

218. In his oral evidence Mr S Downey accepted that he could not recall the meeting of 23 January 2017, that the minutes provide a better record than his memory, and that the minutes give an indication of the substance of what he discussed at the meeting, although not necessarily his actual words. He denied, however, having said that the option might need to be extended, as set out in the last entry in the minutes. Even if he may be correct about this, the

signed minutes nevertheless support the conclusion that from the perspective of the Committee it was not at that time appreciated that the Downey Brothers had an option lasting until November 2018.

219. As I conclude on this issue, Mr Green was given by Mr S Downey (most likely through the agency of his father) one or two copies of the 2015 Agreement to have signed, along with the note referred to above; that most probably Mr Green was given the documents at the Committee meeting on 23 March 2015, a meeting attended by Mr Green and Mr S Downey senior; that Mr Green then made an appointment to see, or found an occasion to see, each of the Trustees and asked for a signature on the one or two copies of the 2015 Agreement in the way that I have explained already; and that he then returned the signed document to Mr S Downey or Mr Downey Snr. This process was completed by about 13 April 2015.

220. While the Downey Brothers may not have given any thought to the question whether there was any need for a fresh resolution by the Club or the Committee to authorise the Trustees to enter into the 2015 Agreement granting a fresh option over the Property, they also had no belief that any further resolution had been passed since the EGM of 15 April 2007 and the Committee Resolution document of November 2008. In November 2008, the need for a resolution, and the relevance also of that to the restriction in the Proprietorship Register of the Club's land, was demonstrated in the correspondence which Mr S Downey saw at the time of the making of the Agreement and the exchange of both the Committee Resolution and the Side Letter. There was nothing similar in 2015.

221. In his written evidence Mr S Downey went to some lengths to detail his family's involvement with the Club. Both his parents were members of the Committee in 2015. It is nevertheless striking that the 2015 Agreement came to be made, as Mr S Downey knew, without any negotiation at all between the Club and the Trustees on the one hand and the Downey Brothers on the other beyond his own request to Mr Green evidenced by his email of 19 March 2015; and it must have been apparent to him that what was being agreed to was a matter of importance for the Club and the Trustees, and yet the agreement was being made without any consideration of its desirability by the Committee.

Validity and effect of the 2015 Agreement.

222. A number of contentions were put forward on behalf of the Trustees in support of the case that the 2015 Agreement was of no effect. These included that the Trustees never signed the 2015 Agreement, that if they did they had no intention of contracting with the Downey Brothers on the terms of the document, and that the Downey Brothers gave no consideration for the Trustees' grant of the option contained in the 2015 Agreement.

223. Others of the Trustees' contentions are considered below; but these first three can be shortly disposed of.

i) As I have explained already, I am satisfied that the Trustees did sign the 2015 Agreement, the signatures I have seen on a copy of the document being theirs.

ii) The Trustees' signatures on a document of obvious contractual force knowingly signed by them are sufficient to dispose of a case that they had no intention of contracting on the terms of the document. I agree with Mr Clargo, citing from the judgment of Longmore LJ in Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWCA Civ 1334 at [17], that although no contract can be made without an intention to be legally bound, that intention is to be ascertained objectively, not by looking into the parties' minds.

iii) The Downey Brothers undertook, by clause 5.1 of the Option Agreement as extended by the 2015 Agreement to pursue to appeal the planning application on foot at the time of the 2015 Agreement (subject to a 50% success prospect). If nothing else, that undertaking given by the making of 2015 Agreement was sufficient consideration moving from the Downey Brothers for the agreement not to have been a simply gratuitous promise by the Trustees.

224. The other challenges put forward on behalf of the Trustees in relation to the 2015 Agreement concern section 2 of the 1989 Act and undue influence. I turn to these.

225. [Section 2 of the 1989 Act] Although Mr S Downey's email to Mr Green explained that the original option agreement "*needs to be extended to be fully valid*", and although in Counsels' submissions during the hearing before me there was occasionally reference to the 2015 Agreement having extended the option period contained in the Option Agreement beyond the original five years to ten years, the reality is that the 2015 Agreement provided for the grant of a new option, the previous one having expired so that the Downey Brothers no longer had the benefit of any option to purchase any of the Club's land. Thus it is common ground between the parties that the effect of the 2015 Agreement, if valid, was to grant a new option which could continue until 19 November 2018, and in relation to which the terms of the Option Agreement would be applicable.

226. As mentioned above, the 2015 Agreement had to satisfy the requirements of section 2 of the 1989 Act, referred to above, in order to be valid and enforceable. This is common ground between the parties.

227. On behalf of the Trustees Mr Hopkins has submitted that in its drafting the 2015 Agreement was defective, failing to meet the section 2 requirement of

incorporating into a single document all the terms agreed between the parties about the disposition involved in the grant of the fresh option either by setting them out in the 2015 Agreement or alternatively setting them out by reference to that and some other document (the Option Agreement).

228. Mr Hopkins' submission is that the 2015 Agreement purported only to amend the Option Agreement and to breath fresh life into the option, and the attendant arrangements, which had been granted by the Option Agreement. The 2015 Agreement, so it is said, did not, and did not purport, to incorporate into the 2015 Agreement the terms of the Option Agreement. To the contrary, submitted Mr Hopkins, the 2015 Agreement is the operative land contract as regards the option then granted, and it does not profess to incorporate any terms by reference to the Option Agreement, but is expressly seeking to incorporate its own terms into the Option Agreement. For this proposition Mr Hopkins relied in particular on the last words of clause 2.2 of the 2015 Agreement which required the terms of the Option Agreement to have effect "*as though the provisions contained in this deed had been originally contained in the [Option Agreement]*".

229. A further submission made by Mr Hopkins concerning the 2015 Agreement and the impact of section 2 arises from the Side Letter. As mentioned above, the Side Letter was in terms connected with clause 4.2 of the Option Agreement: the Side Letter purported to supplement the terms of the Option Agreement, notably clause 4.2, concerning (a) the circumstances in which and extent to which the Downey Brothers might call for repayment of the Annual Payments when the option had not been exercised and (b) the ability of the Trustees to deal with the land charged by the Seller's Charge in those circumstances. On behalf of the Trustees the submission is that terms of the land contract sought to be entered into with the 2015 Agreement also included the terms of the Side Letter, albeit without those terms being incorporated by reason of being set out in a document referred to in the 2015 Agreement.

230. Considering simply the language of the 2015 Agreement, the question is whether the document of April 2015 set out in it, as well as by reference to some other document (the document identified as "Option Agreement" in the definition in clause 1.1), all the terms of the contract for a purchase option that the parties were then making.

231. In my judgment were it not for the Side Letter this question would be answered in the affirmative. The 2015 Agreement referred to the Option Agreement. The intended effect of the 2015 Agreement was to grant a purchase option on the same terms as had been granted when the Option Agreement was made, save that now the option period was to be ten (rather than five) years measured from the date of the Option Agreement. It seems to me to be beside the point that the parties may not have been clear that what was being done was to grant a new option, rather than to vary the terms of an existing one. To find the terms of the contract agreed between the parties in April 2015, one is referred by the text of the 2015 Agreement to the Option Agreement. Section 2(2) permits incorporation of terms into a document

containing a land contract by having that document make reference to some other document for terms of the contract. That is what the 2015 Agreement does when instructing the reader to look at the Option Agreement and to read it as if amended in the manner explained in the 2015 Agreement.

232. There is, nevertheless, an uncomfortable feature of the 2015 Agreement resulting from the Side Letter. This feature is the assumption underpinning the 2015 Agreement, namely that the Option Agreement was valid and effective. So it is that clause 2.2 states (emphasis added) that "*The Option Agreement shall remain fully effective* …". Nevertheless, there has been no submission made on behalf of the Trustees that the 2015 Agreement might have been affected by any principle concerning contracts made by mistake. But this assumption in the 2015 Agreement, and what is provided in that regard, is in my judgment destructive of the 2015 Agreement's validity as a contract. The starting point for this is the Option Agreement itself.

233. In principle I have no doubt that the Side Letter contains provisions which are material in the context of a composite transaction, which the 2008 one was. This is because the Side Letter purported to supplement what was set out in clause 4.2 of the Option Agreement, developing further the way in which following the making of the Option Agreement the Club's land might be dealt with free of the Seller's Charge absent an exercise of the option thereby granted. The promises in clause 4.2 were part of the consideration moving from the Downey Brothers to the Trustees for the land contract set out in the Option Agreement.

234. On behalf of the Downey Brothers Mr Clargo submitted that there are two objections to a conclusion that the Side Letter caused the avoidance of the Option Agreement.

i) First, he submitted that the Side Letter was nullified by the entire agreement provision in clause 18.3 of the Option Agreement.

ii) Second, he submitted that the Side Letter's terms were incorporated by reference into the Option Agreement, the operative provision referring to it being found in the form of the Seller's Charge and for that matter the Buyer's Charge annexed to the Option Agreement. In this form is a term, headed "Incorporation", which explains "*This deed incorporates the terms of the Finance Documents and any side letters between the parties to the extent required to ensure the validity of any purported disposition under this deed of any freehold or leasehold property under s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989*".

235. The first of the two submissions is in my judgment to be rejected. I am satisfied that the Side Letter was provided to the Trustees' solicitors on the date the Option Agreement was exchanged, and its terms became between the parties terms of an agreement made simultaneously with the Option Agreement and adding to those in the Option Agreement. It was not a case

where the terms or provisions contained in the Side Letter were "*agreed prior to the date of*" the Option Agreement (words used in clause 18.3 of the Option Agreement). The contents of the Side Letter were intended by the parties to be part and parcel of their bargain.

236. In the circumstances clause 18.3 did not in my judgment profess to exclude the Side Letter from being part of their agreement made on that date concerning the option to purchase the Property. If anything clause 19.3, in relation to which neither party made any submissions, would be more in point, stating that "*All express agreements made or undertakings given by one party to the other are incorporated in this Agreement*".

237. In relation to clause 18.3 of the Option Agreement Mr Hopkins referred to the judgment (dissenting) of Carnwath LJ in Cheverny v Whitehead Mann [2006] EWCA Civ 1303, [2007] 1 All ER (Comm) 124 at [91]: Carnwath LJ, in discussing the scope of an entire agreement clause (a matter not considered by the majority in their judgments, as they had disposed of the appeal on other grounds) pointed out that attention does need to be paid to the wording of such a provision when sought to be relied on. In that case the relevant clause was directed at excluding as operative any agreements "*preceding the date of this Agreement*". Carnwath LJ considered that in that case the Judge had been right to find that, where there is a package of agreements including a principal written agreement and a side agreement made together at the same time, an entire agreement clause precluding previous agreements was not apt to exclude the side agreement which directly professed to qualify the operation of particular terms of the principal agreement.

238. I noted above clause 19.3 of the Option Agreement. I rather think that Mr Clargo was right not to seek to rely on the clause as a way of dealing with the Side Letter, as the provision does not set out in the Option Agreement the terms set out in the Side Letter (thus failing to qualify under section 2(1)), and does not identify, that is to say it does not refer to, the Side Letter (thus failing to attract any assistance from section 2(2)). Quite simply, the reader of the Option Agreement will not have any indication from reading the Option Agreement that they need also to look at the Side Letter to find part of the parties' agreement relating to the option.

239. I do not accept the second of Mr Clargo's two submissions either. As appended to the Option Agreement the forms of the two Charges are drafts. However, at the time the Option Agreement was exchanged, the Seller's Charge was held by Bulcraigs as an escrow, ready to be delivered when the Option Agreement was exchanged; and it may be that the definition of "the Seller's Charge" in the Option Agreement identified that document expressly. Nevertheless neither the drafts with the Option Agreement nor the executed Seller's Charge make specific reference to the Side Letter. The drafts were simply drafts: they were inchoate and made no reference to anything specific. As and when executed the term would become operative (insofar as needed at all to enable the charge to involve a disposition of any of the Club's land); but as set out in the Option Agreement the term in the draft charges about the incorporation of terms of other documents had no practical effect as the drafts

were just that and therefore did not profess to incorporate anything. On the other hand the executed Seller's Charge, insofar as referred to in the Option Agreement, was capable of effecting a disposition of the Club's land, not itself being an agreement within section 2 of the 1989 Act, and therefore did not incorporate anything either: it did not need to incorporate the Side Letter to be valid.

240. In order to deal with the Trustees' submission concerning the effect of the Side Letter in relation to the 2015 Agreement, it is necessary to consider the implications of the 2015 Agreement having sought to grant a fresh option contract but on the terms agreed when the Option Agreement was made, where previously there was no contract between the parties concerning the Club's land or, indeed, in that context concerning the Annual Payments.

241. By the time of the 2015 Agreement the Downey Brothers had paid to the Club the aggregate amount of the Annual Payments specified in the Option Agreement. As I have explained, the sums paid were not in fact paid "*to the Seller*" within the literal language of clause 4.1, although nevertheless the payments as made would have been sufficient compliance with the clause. If the Option Agreement only took effect in April 2015 as part of the contract made by the 2015 Agreement, it must follow that the remaining provisions of clause 4 (namely clauses 4.2 and 4.3) along with clause 12.3.3 were to be brought into operation. Having regard to the fact that the Seller's Charge was already in place, were the 2015 Agreement valid I would also expect that charge on the making of the 2015 Agreement to secure the Trustees' liability under clause 4.2 in relation to the Annual Payments where previously the Trustees may have had no liability at all, never having received them and never having made any promises in the Option Agreement as to repayment.

242. The problem is that the Side Letter contained a further term relating to the Annual Payments, and affecting what was expressed in Clause 4.2. The question then is what impact if any that had when the 2015 Agreement came to be signed.

243. In my judgment Mr Hopkins' submission is correct: the 2015 Agreement was void by reason of failure to satisfy the requirements of section 2 of the 1989 Act in that there were terms of the parties' contract made in 2015 which were not expressly set out in the 2015 Agreement, these being the terms contained in the Side Letter. This is because the 2015 Agreement was attempting to make a new contract on the terms of the parties' bargain when they made the Option Agreement. But that bargain was to include, as regards the Annual Payments where the option had not been exercised, the terms set out in the Side Letter.

244. As mentioned, the mistaken premise underpinning the 2015 Agreement was that the parties' bargain in the Option Agreement remained on foot, save that the Option Period had expired; and the 2015 Agreement's provisions were directed at giving a further option by giving a new Option Period. What went wrong was that the bargain in the Option Agreement included, as regards

clause 4, what had been agreed in the Side Letter; and the Side Letter was not itself referred to in the Option Agreement (other than inferentially in clause 19.3) or the 2015 Agreement. So it was that the 2015 Agreement's direction about the Option Agreement's remaining fully effective was a direction that what had been agreed at that time when the parties agreed the Option Agreement, the parties' respective obligations undertaken when they made that document, were to continue. But the Option Agreement did not in itself state all their obligations.

245. I have referred earlier to Mr Clargo's submission that the parties' bargain made when they made the Option Agreement was to be found entirely within the Option Agreement and was not affected by the Side Letter by reason of the entire agreement provision in Clause 18.3 of the Option Agreement. I start with the assumption that I am correct in my conclusion that that provision did not negative the Side Letter; that is, I assume I am correct in rejecting Mr Clargo's submission that after all what was stated in the Side Letter was without any force and was no part of the bargain made in 2008 between the parties concerning the Club's land and the Downey Brothers' purchase option granted by the Option Agreement. On this assumption Clause 18.3 is beside the point, so far as concerns the 2015 Agreement. Part of the bargain the parties had sought to make included the Side Letter, which purported to supplement the parties' agreement concerning the Annual Payments. In Clause 18.3 "*the date of this Agreement*" is the date when the Option Agreement was originally made, so Clause 18.3 had no greater effect inrelation to the Side Letter than it did on 19 November 2008.

246. It will be appreciated that if Mr Clargo's submission were correct, so that in 2008 and thereafter Option Agreement was effective according to its stated terms and was not made void by section 2 of the 1989 Act as a result of the Side Letter, then that section could not have avoided the 2015 Agreement. On this basis, however, the Side Letter and the Downey Brothers' agreement set out in it must have been of no relevance when the 2015 Agreement was made, meaning that as revived in 2015 the Option Agreement's provisions stated in clause 4.2 were exhaustive of the Downey Brothers' obligations, and of the Trustees' rights, in the event of a proposal by the Trustees to deal with any part of the Club's land even after the expiry of the new Option Period. For reasons I have already explained, I reject that conclusion.

247. [Undue Influence] This leads to the second ground put forward on behalf of the Trustees in support of the case that they are not bound by 2015 Agreement. The argument, under the badge of undue influence, is that the Trustees' consent to the 2015 Agreement when they signed it is not to bind them. The foundation of the law concerning undue influence is that of abuse of a relationship in which one person may influence another. In the present case the relevant relationship contended for is that between the Trustees and Mr Green; and the abuse alleged being his causing the Trustees to enter into the 2015 Agreement.

248. As a matter of first impression, it is surprising to think that the law relating to undue influence, as commonly understood, would be in point in the present

case. The law concerning undue influence developed in the courts of equity, where in relationships in which one person might have ascendancy over another, as for example parent and child or solicitor and client, the conscience of the ascendant person might be affected by the way a transaction with the dependent was entered into. Looked at in this light, it is difficult to see how there could be any such relationship between Mr Green and the Trustees.

249. In summary, however, the case for the Trustees was that (a) the Trustees reposed trust and confidence in Mr Green as the Club's president in the management of the Club's affairs, (b) the 2015 Agreement called for explanation, being disadvantageous for the Club and the Trustees, and (c) either Mr Green was acting as the Downey Brothers' agent when arranging the signature of the 2015 Agreement, or alternatively that the Downey Brothers had actual or constructive notice of his undue influence. The result, so it is argued, is that the Trustees are not to be bound by the 2015 Agreement.

250. For the Downey Brothers Mr Clargo accepted that there is a rebuttable evidential presumption of undue influence where a party enters into a transaction with another which calls for explanation and which was induced by a person in whom that first party placed trust and confidence. He nevertheless submitted that principles relevant for undue influence cannot assist the trustees because:

i) The transaction contained in the 2015 Agreement was a perfectly conventional commercial one which did not call for explanation.

ii) The relationship between the Trustees and Mr Green was not one of trust and confidence in any recognised category in which a relationship might be regarded as generating a presumption of influence, and there was no evidence of actual influence or of a relationship which might have given rise to one.

iii) There is nothing to cause the Downey Brothers, as the Trustees' counter-party in the 2015 Agreement, to be affected by any undue influence on the part of Mr Green: to be affected they must be privy to what he did, either because he was their agent or because they knew (actually or constructively) of his undue influence, while none of these conditions can established.

251. Mr Clargo summarised by submitting that the present is a case in which a commercial contract was entered into by the Trustees because they were asked to by someone (Mr Green, the Club's president) who was entitled to require them to do so, there being no basis for concluding that the Downey Brothers were privy to or aware of anything which might impact their ability to rely on the Trustees' agreement to the terms of the 2015 Agreement concluded by their signing the document.

252. I was naturally referred to Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] AC 773, the leading case on undue influence. What stands out in that case is the recognition that the law of undue influence is concerned with the case where a person's consent to a transaction, procured in an improper manner, ought not fairly to be treated as the expression of a person's free will: see in particular the speech of Lord Nicholls at [7]. It is apparent from what I have said earlier that I regard the present case as very far away from a paradigm undue influence case. Nevertheless the principles are relevant and, potentially, capable of having effect in the present case.

253. The position in my judgment is as follows.

i) The Club's Committee had not decided that the 2015 Agreement should be entered into by the Trustees. Whatever may have been decided by the Committee or the Club about the Option Agreement before the end of 2008 cannot possibly have authorised the making of a new and different agreement several years later.

ii) Mr Green therefore had no authority to obtain the Trustees' signatures to the 2015 Agreement and to cause them to enter into the 2015 Agreement. Merely holding the office of the Club's president did not confer on him any delegated authority to decide for the Committee.

iii) In signing the 2015 Agreement the Trustees relied on Mr Green.

iv) The Trustees were mistaken in doing so. There was no Committee direction to them as required by the Club's Rules on which they held the Club's land, and therefore they were acting contrary to the terms on which they held the Club's land.

254. Given this, the question is whether the Downey Brothers are able to rely on the consent given by the Trustees to the 2015 Agreement? It is here that it is relevant to consider the nature of the 2015 Agreement, and what the Downey Brothers knew about its making by the Trustees.

255. Mr Clargo submitted that the 2015 Agreement was not one calling for explanation: it imposed obligations on the Downey Brothers, in particular to continue pursuing Planning Permission during the extended Option Period. That is of course correct. Going the other way is the risk that, if the option were exercisable regardless of any Planning Permission during the Option Period (as the Downey Brothers claim in this action) and were exercised (as the Downey Brothers have sought to do), the Club might well find itself without a clubhouse or presently usable bowling green and without any reasonably foreseeable prospect of receiving anything from the Property as a result of a Development. Further, the Option Agreement did provide for the Trustees to share development losses with the Downey Brothers. Further, in the absence of the 2015 Agreement and had the then pending planning

application succeeded, the Club might have been able to negotiate an improvement on the terms of its enjoyment of fruits of permitted development.

256. Mr Hopkins summarised the position in the 2015 Agreement as being in effect a sale of the Property for just £1 with the hope, but after several years since 2008 by no means any assurance, that at some reasonably foreseeable future time there might be some share in profit from the Property's development. To this might be added the contrast with the position under the Option Agreement, which had awarded a payment of £6,000 per annum for each yearof the then five-year Option Period.

257. My conclusion on this point is that the 2015 Agreement was a very poor bargain indeed from the Club's point of view. If Mr Green had been correct in his belief that the option could not be exercised in the absence of Planning Permission, the position would have been less one-sided. Even then, hindsight shows that the language of the Option Agreement would have benefitted from legal scrutiny before the Trustees simply agreed to grant an option on the same terms. The fact is that the Club should have had the opportunity to take legal advice on the 2015 Agreement, had it chosen to do so, and if so decided to decline to enter into it. This consideration was also relevant for the Trustees personally.

258. This then leads to the crucial question. Can the Trustees say that the conscience of the Downey Brothers must be so affected by what Mr S Downey knew concerning the Trustees' making of the 2015 Agreement that the latter are not bound by their consent to the 2015 Agreement? This question arises because I reject the submission, made on behalf of the Trustees, that Mr Green was the Downey Brothers' agent when he sought their signatures to the 2015 Agreement. As to that, he did what he did in the belief that the making of the 2015 Agreement would be to the Club's advantage, and having been asked to do so by Mr S Downey because he was president of the Club and the person most active for the Club in relation to the development project.

259. I have explained earlier my finding concerning Mr S Downey's position in relation to the making of the 2015 Agreement. Quite simply, he asked Mr Green to do what was set out in his email of 19 March 2015, and had no reason for thinking, and cannot have believed, that Mr Green did anything more and, in particular in that regard, that he sought or obtained the Committee's approval.

260. In my judgment this is sufficient to make it unconscionable for the Downey Brothers to seek now to rely on the 2015 Agreement as entitling them to purchase the Property in return for £1 and the giving of the Buyer's Charge.

Planning permission as a condition for the exercise of the option?

261. Making the assumption that, contrary to my conclusion as to the impact of section 2 of the 1989 Act on the validity of the 2015 Agreement, it had created a valid and enforceable option contract between the Downey Brothers and the Trustees, there is the question whether the Trustees should be allowed to put forward in this case the argument that (a) the option could not be exercised in the absence of Planning Permission, and (b) there was no Planning Permission before expiry of the option: this is in paragraphs 13(2) and 58(1) and (2) of the Trustees' draft Re-Amended Defence provided on the last day of the trial.

262. Mr Hopkins on behalf of the Trustees grouped his submissions concerning the terms and meaning of the Option Agreement under four headings, these being that in the absence of a condition in the Option Agreement making the option's exercise dependent upon there being a grant of Planning Permission: (a) there were practical difficulties which could arise, (b) there was an absurd risk allocation, (c) there was no need for any option at all as contrasted with an outright sale, perhaps with delayed completion, and (d) specific clauses in the Option Agreement are otiose or make little sense.

263. There is much force in Mr Hopkins' submissions. It is unnecessary for present purposes to describe them all.

264. There are features of the Option Agreement which appear to connect the exercise of the option with the previous obtaining of Planning Permission during the Option Period. Planning Permission is, as mentioned already, a defined expression which includes permission for certain developments on the Adjoining Property in addition to the residential development on the Property, and which on the face of Clause 5 is only required to be sought during the Option Period (that is, the period of five years from the date of the Option Agreement), and not thereafter even if the option has in the meanwhile been exercised.

265. Clause 5.7, referred to above, is illustrative. It provides for the Trustees to be able to "*carry out [their] proposed development of the Adjoining Property comprising the Bowling Clubhouse and a new bowling green* ", and to have on the Adjoining Property, and to receive services of sewage, gas, electricity and water provided by the Downey Brothers for, the Trustees' "*temporary or replacement Clubhouse whilst the [Trustees' construction works proceed* ", the Downey Brothers' cost of providing the services to be "*part of the Development Expenditure*" (and thus to be recovered from the proceeds of the Development). Clause 5.7 only makes sense if the Club, displaced from the Property on the exercise of the option, is thereupon to be able to reinstate its clubhouse and bowling activity on the No.2 green - for which planning permission would be required – even while the Downeys' development of the Property is in progress. This is precisely the reason why the definition of "Planning Permission" included the construction of a new clubhouse on the

Adjoining Property.

266. Related to the significance of the definition of "Planning Permission" is the fact that when the Property is transferred to the Downey Brothers on exercise of their option, only residential buildings are to be built on the Property and that the land is to be used for no other purpose.

267. Further, during the remaining part of the specified Option Period after the exercise of the option (always assuming that the option is exercisable before the obtaining of Planning Permission), but not after the end of the Option Period, the Downey Brothers would in principle need to be seeking to obtain Planning Permission subject to the 50% probability threshold in clauses 5.1.3 and 5.1.4.

268. Meanwhile clause 8.1 (in contrast with clause 5) is not expressly subject to any temporal or other limit save that it is only triggered by completion of the purchase of the Property on exercise of the option, and is set out under the heading "*Execution of the Development*" (a heading which according to clause 1.48 is not to be taken into account in construing the Option Agreement). By this clause the Downey Brothers are to procure the carrying out and completion of the Development as soon as practicable after completing the purchase of the Property and "*the grant of all Requisite Consents*". The definition of "*Requisite Consents*" is "*all planning permissions consents approvals licences certificates and permits (whether of a public or private nature) as may be necessary lawfully to carry out the Development*".

269. Clause 8.2 is expressed as requiring the Downey Brothers "*to apply for and use all reasonable endeavours to obtain all Requisite Consents as soon as reasonably practicable after the date of this Agreement*". In contrast to clause 8.1, therefore, this obligation appears not to depend on the exercise of the option but to take effect immediately on the making of the Option Agreement and to be of indefinite duration.

270. Clause 8.3, a provision given no express timing, adds that the Downey Brothers "*may make such alterations additions or variations to the design and specification of the Development as are required in order to obtain the Requisite Consents and … shall act reasonably in this respect*".

271. The expression, "*Requisite Consents*", is a defined term which goes very much wider than the definition of Planning Permission. The latter term features in connection with what is to be put in train during the Option Period and not thereafter, but is qualified by reference to the 50% prospect limit in clauses 5.1.3 and 5.1.4; and in relation to the obtaining of Planning Permission during that period, there is provision for the Trustees to be required to enter into Planning Obligations (clause 5.3). Clause 8.2, in contrast with clause 5.1, does not contain any qualification concerning the 50% prospect.

272. To my mind the evident aim of clause 8.1 is to require the Downey Brothers,

following the grant of Planning Permission for the Development and the exercise of the option, to get on with that Development with all expedition. I believe that clauses 8.2 and 8.3 are to be read in that context. The assumption underpinning clause 8 is that, when it becomes operative, there will be Planning Permission, which will include in particular the Development: the Development to be carried out pursuant to clause 8 is not some Development yet to be the subject of a planning application, much less yet to be planned for, after the Completion Date arrives.

273. In this respect clause 12.3.4 is significant: on Planning Permission being obtained, the Property Value is to be arrived at. This value is critical to the Trustees' entitlement to share in the profit distribution in clause 12: it is by reference to what the Planning Permission does for the Property that the Property Value is to be found.

274. Further, in this connection, the Buyer's Charge is, at the time of the transfer, to be given to secure among other matters the payment by the Downey Brothers of amounts due to the Trustees in the waterfall of surplus Sale Proceeds. In other words, only when there has been "the Development" and the resulting distribution in accordance with the waterfall has been made, including the distribution in respect of "the Development Expenditure" and "the Property Value", will the Buyer's Charge be released.

275. In this connection "the Development Expenditure" includes, by the Second Schedule, (a) as part of the infrastructure costs, the cost of laying out and maintaining parts of the Property designated by any "Planning Permission", among other matters, for landscaping and so forth, (b) as part of the fees, the "*achieving a Planning Permission*", and (c) as part of the miscellaneous items, the "*obtaining Planning Permission*". The way in which the item (b) and (c) inclusions are expressed contemplates that the Development Expenditure, which is to cover sums expended in relation to the Development and in complying with the clause 5 obligations, will cover the cost of arriving at a successfully obtained Planning Permission, that is a permission pursuant to which the Development is carried out and which has the characteristics of the defined expression.

276. However, and significantly in a detailed agreement prepared with professional assistance (as the Option Agreement was), there is no express term limiting the circumstances in which the option might be exercised within the Option Period, the period of a specified number of years from its grant. Clause 2 of the Option Agreement grants the option. Clause 3.1 states that it may be exercised by service of a notice in a particular form (the Sixth Schedule form) given within a specified time period (the Option Period of five years ending on 18 November 2013). But neither clause 3 nor any other provision of the Option Agreement states in terms that the notice may only be given on the obtaining of Planning Permission.

277. It follows that any condition to be met before the option becomes exercisable,

in particular any restriction making the exercise of the Option conditional upon the obtaining of Planning Permission, would need to be implied into the Option Agreement. In giving the advice of the Judicial Committee of the Privy Council in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 Lord Hoffmann remarked, in a well-known passage, that "*in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean*". Taken at face value what Lord Hoffmann explained in the Privy Council's advice would provide a fair platform to support of an argument that the Option Agreement should be understood to have provided for an option which was not exercisable before the obtaining of Planning Permission.

278. But of course there has been much relevant case law on the implication of terms into contracts since the Belize case. I was not referred to any of this in the course of Counsels' submissions. The present position I nevertheless take to be that the restriction contended for by Mr Hopkins can only be accepted as part of the Option Agreement's terms if it is necessary to give the Option Agreement business efficacy, and in addition or alternatively if it is so obvious (that is, it was so obvious at the time of the making of the Option Agreement) that anyone reading the Option Agreement along with the Side Letter would have appreciated that the term was to be understood.

279. As to the first of these requirements, that of business efficacy, it would have been remarkably improvident for the Trustees to have committed themselves (and therefore the Club) to the risk of a transfer of the Property to the Downey Brothers immediately or shortly after the Option Agreement was made, regardless of whether Planning Permission was ever in prospect, for £1 (the price of the Option Agreement), another £1 on the exercise of the option, and perhaps up to £30,000 by way of Annual Payments (albeit an amount recoverable in certain circumstances). This is because, on the terms of the Option Agreement and without some further agreement from the Downey Brothers, the Club would immediately have parted with its No.1 green and clubhouse and been left with only the rough No.2 green. The Club could hardly have been expected to survive such a disaster. Meanwhile the Trustees would face the prospect of perhaps being called upon at some future time to contribute to any loss made by the Downey Brothers in developing the Property.

280. On the other side of the coin, it would have been peculiar for the Downey Brothers to have made such an agreement. They would have the Property, certainly, and for little cost; but they would not be able to do anything with it beyond attempting to obtain Planning Permission and in due course, if this were allowed, carrying out a Development with proceeds being shared with the Trustees.

281. The problem, though, is to decide whether the practical difficulties and

absurdity thrown up when the option is exercised before any Planning Permission has been obtained are sufficiently marked to lead to a conclusion that, without the implication of a term about the need for Planning Permission, the Option Agreement lacks business efficacy; that, in short, the Option Agreement requires the implication of the term for it to be workable. There is a value judgment deciding whether the Option Agreement is commercially and practically incoherent without the term.

282. The other way of arriving at the need for an implication of a term is to conclude that the implication should be so obvious that it really goes without saying. The question is whether the Trustees are correct when they say that anyone reading the Option Agreement would understand that the option was not exercisable in the absence of Planning Permission, and that it was only to be exercisable once the application for Planning Permission dealt with in Clause 5 of the Option Agreement had been successfully obtained so that, for example, the Expert could be instructed in accordance with Clause 5.6 to determine the Property Value.

283. The difficulty with this is that in the present case one is not looking at whether a term would be sensible, but whether anyone reading the Option Agreement would see that essentially each of the parties must have recognised, had their attention been directed to the point, that really that term was part of their agreement. But one has a professionally drawn and negotiated instrument in which there is a statement as to the duration of the option explaining that during that period the option is exercisable, while conspicuously failing to place any condition on the exercise. A reader of the Option Agreement might well wonder whether the omission was intentional, rather than a mistake: one would not normally expect there to have been any omission of such an obvious and important term unless intentional.

284. In the event I have decided that I do not need to reach a conclusion on these questions. I accept the submission made by Mr Hopkins, that it is very well arguable that a term is to be implied into the Option Agreement. However, in my judgment this is not a case in which permission should be given to the Trustees to amend their Defence now to take the point and for the Court to make a final decision on it.

285. In response to the Trustees application to amend Mr Clargo on behalf of the Downey Brothers made the following submissions:

i) The application for permission, made after Mr Clargo had completed his closing submissions (apart from any reply to Mr Hopkins' closing) is about as late as it could possibly be.

ii) No explanation has been given for the making of the application only at the end of the trial, when in truth the point should have been taken right at the outset, in 2018 or at the latest 2019, if it were to be taken. While

the purported exercise of the option has been challenged on behalf of the Trustees on all kinds of bases, it has never once been suggested on their behalf, from the time when the Downey Brothers first started indicating a present intention of exercising the option, that in the absence of planning permission the Downey Brothers could have no right to exercise the option. On the contrary, the written evidence of Mr Wilson is to the effect that clause 3 of the Option Agreement gave an option exercisable within the prescribed period but without any reference to the previous grant or otherwise of Planning Permission. According to Mr Wilson in his written evidence, he was advised by the Trustees' solicitors that "…*Clause 3 of the Option Agreement entitled the [Downey Brothers] to purchase the Club Land at any time during the Option Notice (sic) (as defined in the Option Agreement) regardless of whether the Claimants had obtained planning permission*". Mr Stanley in his written evidence made a similar comment concerning advice from the Trustees' solicitors as to the effect of clause 3 of the Option Agreement.

iii) Had the point been raised in good time before the trial, there could have been investigation into the making of the Option Agreement, in particular into its drafting in the form that it eventually took; and there might have been evidence about this. Raising the point at the end of the trial denies the Downey Brothers even the chance to consider that aspect.

286. In support of his submissions Mr Clargo referred me to the judgment of Carr J in Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm). In that case an application to amend the particulars of claim was made by the claimant on 6 February 2015, in advance of a trial due to start on 4 March 2015. In her judgment Mrs Justice Carr pointed out that an applicant seeking to amend had to be seeking to put forward a case which is better than merely arguable. She then listed the many authorities to which she had been referred before setting out a lucid summary of the applicable principles.

287. Without repeating all Carr J's summary, I refer in brief to what I see as key propositions relevant for the present application, an application which if allowed would not involve any postponement of the trial.

i) In exercising its discretion as to amendment the court must strike a balance between injustice to the applicants if the amendment is refused and injustice the other way, including injustice (if any) to other litigants if the amendment is allowed.

ii) Where a very late amendment is sought, the burden on the applicant is a heavy one to show the strength of the new case and why justice to the applicant, the opponent and (where relevant) other court users requires the applicant to be able to pursue the new case.

iii) "*A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost …*"

iv) Lateness is anyway a relative concept, depending on a review of the nature of the proposed amendment, the quality of the explanation for its timing, a fair appreciation of the consequences in terms of work, wasted and to be newly generated.

v) Simply recompensing the opposing party in costs is not necessary a sufficient justification for allowing amendment.

vi) "*It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay*".

vii) Procedural obligations in modern litigation serve the purpose of ensuring that parties conduct litigation proportionately in order to ensure their own costs are kept within proportionate bounds.

288. The present application, if allowed, would not have any impact on the trial date. Mr Hopkins submitted that therefore the application is not very late; and within the definition in the previous paragraph that would be correct. But the expression "late amendment" is not a term of art. By any normal measure this present application is exceptionally late: it would only be later if it were one of those unusual applications for leave to amend after judgment. But the fact that allowing the amendment would not impact a trial date or affect other court users means only that that particular factor does not weigh against allowing the amendment. Against that, the fact the amendment is being sought as the trial is concluding means that, if allowed, the new issues introduced by the amendment cannot be attended to in a fair and just way during the trial.

289. A reason Mr Hopkins suggested in justification for the timing of the application is that it was Mr Green's oral evidence as to his understanding being, and always having been, that the Downey Brothers' option depended upon a grant of Planning Permission which justified a positive case concerning the meaning of the Option Agreement. But Mr Green's evidence as to his belief or otherwise concerning the effect of the Option Agreement would at most be only one part of the story to be investigated; and according to Mr Hopkins (although there was no evidence on this) no attempt had been made on behalf of the Club or the Trustees to ask Mr Green about his belief. If, which I find difficult to accept, Mr Green's evidence was the key to the presentation of a case concerning the meaning of the Option Agreement, in my judgment the oral evidence given by Mr Green is insufficient justification for the making of an extremely late amendment.

290. The problem for the Trustees' argument which Mr Hopkins' submission

highlights is that if Mr Green's evidence is relevant, then Mr Clargo is necessarily correct when saying that the parties' evidence has all been completed, and that it is far too late to introduce arguments which might properly have been addressed on the basis of evidence which has not been given.

291. It is very familiar law that among the governing principles of contractual construction the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. This particular principle, as I have just stated it, would militate against there being any relevant evidence which might have been explored if the Trustees' amendment had been made in good time.

292. While acknowledging the force of this point, I nevertheless conclude that in fairness to the Downey Brothers the amendment could not be allowed without their having a proper opportunity to consider whether there was any evidence they might wish to put forward. To take an obvious point, at the trial there has been no examination of the question whether the Option Agreement was, or was not to be, rectified; and for all I know the term sought to be implied might well be one which could be excluded on a rectification claim as being contrary to the parties' agreement as it stood when the Option Agreement was about to be signed. While there is evidence as to what Mr Green himself believed, for example, as well as evidence from Mr Dawber and others of the Trustees' witnesses, there was very little examination of the negotiation between the parties' respective solicitors and none of it directed to this particular issue, and very little evidence as to the Downey Brothers' input or understandings in relation to that negotiation.

293. I am also mindful of a further point. A decision to allow the amendment would require me to reach a definite conclusion on the implied term issue. However, argument on this issue on the last day of the trial was comparatively brief and without my being shown any authority at all. Even if ultimately there were no further evidence relevant to the implication of a term into the Option Agreement beyond what is already before the Court, I do not consider that, in fairness to the Downey Brothers, it would be right to decide the implied term issue without also being satisfied that they had had a proper opportunity to put before the court all they considered appropriate.

294. The fact is that as long as these proceedings have been on foot, indeed since the end of 2018 at the latest, the Trustees guided by their legal advisers have accepted that the obtaining of Planning Permission was not a condition for the exercise of the option, and while seeking to resist the Downey Brothers' claims on all kinds of grounds concluded that that particular one was not to be put forward.

295. For these reasons I refuse the Trustees' application for permission to amend. Between simply the competing interests of the Trustees in having the amendment allowed and the Downey Brothers in having it refused, I consider the balance to be clearly in favour of the Downey Brothers.

Remedies

296. In view of my conclusions on the invalidity of the option at the time of the attempted exercise, it is not strictly speaking necessary for me to make any decision on the question whether specific performance should be ordered of any contract on the part of the Trustees to sell the Property, or on the question of the amount of any damages to be awarded in favour of the Downey Brothers. However, in case the case goes any further, I set out briefly my conclusions and reasons on these issues.

297. [Specific Performance] If the 2015 Agreement had successfully granted a fresh option for the Downey Brothers to purchase the Property, I would nevertheless refuse specific performance. This is because the 2015 Agreement was made by the Trustees without the Club having sanctioned the making of the agreement. There was no such resolution as required by the restriction in the Property Register of the Club's land. Enforcing the agreement by an order of specific performance would require the Trustees to transfer the Property in breach of their duty to the Club.

298. In relation to this point Mr Clargo referred to section 16(7) of the Trusts of Land and Appointment of Trustees Act 1996. Section 16 of that Act provides protection for purchasers of land held on trust, but its operation is excluded by section 16(7) where the land in question is (as here) registered land. By sections 23 and 24 of the Registered Land Act 2002 ("the 2002 Act") a registered proprietor is in principle entitled to exercise all the owner's powers to in relation to their registered land to make any disposition of any kind permitted by the general law. Nevertheless, section 26(2)(a) of the 2002 Act removes from the protection given to disponees of registered land a limitation reflected by an entry in the register.

299. Shortly stated, the objection in the present case to an order of specific performance is that it would be enforcing a transaction depriving the Club of its land in breach of the Club's constitution and the terms on which the Trustees held the land. Authority for this objection is set out in paragraph 37.07 of Lewin "Trusts" 20th edn, and the cases at footnote 190. This objection stands, according to the editors of Lewin, "*however correct the conduct of the purchaser*".

300. Further, as an additional reason, I have regard to the fact that the 2015 Agreement was an improvident one for the Trustees to make, at any rate without the Club having had legal advice as to the effect of the 2015 Agreement if made and as to the likely advantages and disadvantages. The Downey Brothers had been told by their solicitors of the need for the Club to have legal advice; the Downey Brothers did not pass on that message, instead merely inviting Mr Green to arrange for the Trustees to sign documents where indicated and pass back to the Downey Brothers. The Downey Brothers took the risk of the Trustees

arguing that the 2015 Agreement was not one they should have made and was not one they should be compelled to perform.

301. There are two matters which would not have provided any objection to an order for specific performance, had that been relevant. For completeness I mention these.

302. First Mr Hopkins submitted that the Downey Brothers have been in breach of the agreement contained in the Option Agreement and the 2015 Agreement, so that for that reason specific performance should be refused. This submission I reject without hesitation. One argument in support of this submission was that the three planning applications actually made by the Downey Brothers had been without the previous agreement of the Trustees, contrary to clause 5.1.1 of the Option Agreement. Another was that after the third application was dismissed on appeal there was no further application. Neither of these points have any force at all. Both are sterile.

i) As to the first, it was never suggested until after 2018 that the permissions sought wanted approval on behalf of the Club or the Trustees; and it has never been suggested on behalf of the Trustees that a changed application would or might have succeed or been in any way an improvement on those made.

ii) As to the second, the position taken by the Trustees in these proceedings, a position which I consider likely to be correct, is that at present there is small prospect of success for an application for residential development of the Property. Given this I cannot see how the Downey Brothers can be criticised for not having made any further applications. The HPA, I should add, was not one within the definition of Planning Permission at all, so the Trustees could not have called for its pursuit.

303. A second submission made by Mr Hopkins was that specific performance should be refused because the Downey Brothers had at various times misrepresented the terms on which the option was to be exercisable or misrepresented their intentions as regards the exercise of the option. Mr Clargo dealt with this submission, rightly in my judgment, by pointing out that there was no claim made by the Trustees challenging the Option Agreement or the 2015 Agreement as having been procured by misrepresentation, and there was no case of estoppel advanced by the Trustees. Indeed, the only specific statement said to have been made by the Downey Brothers concerning their ability to exercise, or their intentions as to the exercise of, the option following the making of the 2008 Agreement is one made in January 2017 in connection with the Committee meeting of 23 January. It has not been explained how this statement was relied upon by the Club or the Trustees or affected the Downey Brothers ability to exercise their option.

304. [Damages] In preparation for trial the parties each had a separate expert's report prepared, the instructions to their respective experts being to value the Property with and without the benefit of planning permission, as well as in relation to the likely profits to be made from a hypothetical development. More precisely, the issue on which, by a consent order of October 2020, the experts were to give their opinions was directed to paragraph 26 of the Downey Brothers' Particulars of Claim: this identified as the amount of their damages claim the lost profit from the HPD (this loss arrived at on the basis that clause 12 of the Option Agreement applied to the HPD), and in addition or alternatively the market value of the Property with planning permission for the HPD, and the market value of the Property without any planning permission.

305. Logically, the lost profit referred to in the previous paragraph would have included the £30,000 plus the contractually specified interest (subject, of course, to the HPD having produced sufficient gain over Development Expenditure and interest).

306. In the light of the opinion given by the single join expert, Paul Dickinson, BA, MRTPI, MRICS, MCMI, as to the prospects of planning permission for the HPD, the parties agreed that damages should be quantified on the basis that there would be no planning permission for a development. However, the parties' separate experts had agreed a present value of the Property, without planning permission or hope value, of £303,000. The Downey Brothers claim that amount, less £1 for the option exercise price, as their damages.

307. If the parties have agreed that the Downey Brothers are entitled to £302,999 as the amount of their damages, assuming the Downey Brothers have established that in breach of contract because the Trustees have failed to sell the Property pursuant to the option as sought to be exercised in November 2018, then there would not need to be any further investigation.

308. In the absence of such an agreement, I doubt that the damages are correctly to be measured by the open market value of the Property without planning permission. The Downey Brothers' contractual right in relation to the Property would only have been to take it subject to the Buyer's Charge (and thus subject to the obligations in the Option Agreement, in particular clause 12) and to the restriction concerning the use of the Property set out in the Transfer. Therefore a simple market value of the Property absent planning permission and hope value does not represent the Downey Brothers' loss. This submission is indeed made by Mr Hopkins in his Skeleton Argument for the trial.

309. On the hypothesis that there was no planning permission and no hope value, the Downey Brothers would have acquired sterilised land from which they could not recover any Development Expenditure or anything in respect of the £30,000 or anything by way of shared profit after allowing for the Trustees' "Property Value" (assuming any such amount were appropriately to be taken into account). The £302,999 amount mentioned above has been arrived at on the basis of "existing use value". The difficulty is that the Downey Brothers

would not be entitled to continue to use the Property in the way it is used at present, so it is not apparent that this value is appropriate to take into account.

310. Given this, had I concluded that the Downey Brothers had made out their claim that the Trustees were in breach of contract, I would have wished to hear further argument about the appropriate order to make, including whether to direct an assessment of damages.

Conclusion

311. For the reasons I have given at some length, I dismiss the Downey Brothers' claim to enforce the 2015 Agreement, and for damages for breach of that agreement or for payment of the amount of the Annual Payments.