Neutral Citation Number: [2022] EWHC 545 (Ch)

Case No: PT-2021-000971

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

7 Rolls Buildings
Fetter lane, London
EC4A 1NL

Date: 11 March 2022

Before :

MR SIMON GLEESON
Sitting as a Deputy High Court Judge

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Between :

(1) QUAY HOUSE ADMIRALS WAY LAND LTD	**Claimants**
(2) QUAY HOUSE ADMIRALS WAY LTD	
- and -	
ROCKWELL PROPERTIES LIMITED	**Defendant**

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- -

Joanne Wicks Q.C and Jonathan Chew (instructed by **Stephenson Harwood LLP**) for the **first and second Claimants**
Jonathan Seitler Q.C. and Harriet Holmes (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Hearing dates: 21 and 22 February 2022

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APPROVED JUDGMENT

Mr Simon Gleeson :

1. This case is but one stage of a larger dispute between the parties to a proposed property development. The development – Quay House - is a substantial project, which would have on completion a developed value in excess of £200m. The claimants are two investment vehicles administered by Firethorn Trust, a property investor. The first claimant is currently the owner of the property, the second is the business entity (referred to in the contract documents as the "DevCo"), and the defendant is the developer. The dispute arises out of the development agreement made between them (the Planning and Development Management Agreement, or "PDMA"). The claimants have purported to terminate the PDMA, and seek to continue the development with other developers, excluding the defendant.

2. The key provision of the PDMA for the purpose of this action is a provision requiring the entry in the land registry of a restriction on the title to the property which could, in some circumstances, give the defendant the power to restrain or prevent the project from proceeding. In this action, the claimants ask for that restriction to be removed, on the basis that the project cannot proceed whilst the risk of this power being exercised continues to exist. The defendant's case – in a nutshell – is that since what has happened is the very thing that the restriction was intended to protect them from, it would be wrong for it to be removed at this stage.

3. Before beginning, it may be helpful to set out the logical framework of what follows. This is an interim application, and the primary question of whether the PDMA is on foot or not is still to be decided. The claimants in this application

therefore – quite properly – begin by assuming against themselves that they are wrong on their primary contention that the contract is terminated. In that case, they say, the express provisions of the contract itself require the defendants to consent to the removal of the restriction, and the court should therefore order the restriction to be removed. However, they also engage with the question of what the position is if the contract does not so provide – either because that is not the effect of its provisions, or because those provisions have fallen away along with the contract. They therefore ask, in the alternative, for an order removing the restriction to be granted as an interim remedy exercising the inherent jurisdiction of the court to amend the register. They therefore seek the same relief by two different logical routes.

4. It is first necessary to set out the factual background and the relevant contractual terms.

The Facts

5. On 29 June 2018 the claimants and the defendant entered into an agreement for the development of Quay House, near Canary Wharf in London (the "Property"). The Property is a half-acre site, and the development project (the "Development") was to be a 400-bedroom hotel and a 279-bed serviced apartment 35-storey building. The first claimant ("C1") is the landowner, and the second claimant ("C2") is its parent company.

6. The agreement entered into was the PDMA This agreement was entered into between C1, C2 and the defendant. The essence of the PDMA was to appoint the defendant as developer, and specify the services which it was to perform in that role. These included formulating strategy, ensuring that the project

documents represented a practicable plan for meeting critical dates, and, importantly, assisting with any Funding Arrangement (Schedule 2 Part 1 para 10). The agreement provided that the defendant would be paid fees of £1.5m. The "Business Plan" was annexed to the PDMA.

7. Importantly, the PDMA was a pure consultancy agreement. Profits were addressed in a separate agreement entitled the Profit Share Agreement ("PSA"). This was an agreement entered into between MCCI S.a.r.l., a company incorporated in the Principality of Monaco and the parent company of the defendant ("MCCI") and C2, whose primary function was to set out a "profits waterfall", which allocated profits on the development between the parties thereto in agreed proportions.

8. The proposed course of the transaction was one common to most large developments of this kind. The first stage involved the completion of a significant amount of paperwork; obtaining the necessary licences, leases and – critically – planning and other governmental permissions for the project. This was to be paid for by the parties to the PDMA. This stage has been completed. The second stage is the actual construction phase. This involves making an agreement with a construction company for the construction, and raising the finance necessary for that construction from external financiers. It is the commencement of this second stage which the Claimants say is held up by the existence of the defendant's restriction.

9. Funding for the second phase of a development of this kind can be structured in a number of different ways. However, in this case the parties agreed that it should be raised through "forward funding". In a forward funding transaction,

the building concerned is prelet or presold to the eventual occupier. The finance required for construction is then raised from a bank or other financial institution, secured on the value of the building itself and the revenue streams to be derived from the forward letting or sale. The pre-let or pre-sale agreement will contain terms which permit the eventual occupier to charge penalties if construction is delayed, or, in extremis, to terminate the arrangement altogether.

10. As noted above, the Quay House development itself is intended to have two distinct parts, one of which is to be built as a hotel, and the other as flats. The hotel part has been pre-let to Premier Inn, a member of the Whitbread group. The agreement to enter into this lease (the "AfL") was signed on the same day as the development agreement - 29 June 2018.

11. The AfL contains obligations to commence and diligently proceed with the development works with a "Target Date" for completion 54 months from the "Unconditional Date". Thereafter liquidated damages are payable at £30,000 per week. If completion has not occurred by a longstop date 78 months from the Unconditional Date, Premier Inn can terminate the AfL. The Target Date is the 30th June 2025 and the longstop date the 30th June 2027. The estimated build time (without contingency) is 2.5-3.5 years.

12. These terms therefore create significant financial risks if the project is not completed in a timely manner.

13. By 2 June 2021 the parties had fallen out, and the claimants served notice on the defendant that they regarded it as in breach of its obligations under the PDMA, and that that contract had therefore terminated. The defendant denies

that there has been any breach of the contract, or that the claimants have any basis on which to serve such a notice, and regard the contract as ongoing.

14. Since the claimants own the Property, they have continued to progress the development, and have appointed another developer. The problem that they face is that the construction stage cannot be commenced until the necessary finance is raised.

15. The obstacle to the raising of this finance is, they say, the existence of a restriction on the title to the property at the land registry. The registration of this restriction was agreed between the parties in the PDMA. The relevant provision of the PDMA (in which the "Developer" is the defendant, and the "Owner" is the first claimant) reads in its entirety:

> 6.2 The Owner shall not sell the whole or any part of the Property otherwise than:
>
> a) 6.2.1 in accordance with this Agreement and the Business Plan;
>
> b) 6.2.2 as directed by the DevCo in accordance with clause 5.4;
>
> c) 6.2.3 as directed by the Developer in accordance with paragraph 2.1 of Schedule 5.
>
> 6.3 The Owner agrees with the Developer for a restriction to be entered onto the proprietorship register of the title to the Property in the form of the restriction set out below (or as close thereto as the Land Registry shall permit):

d) "No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a certificate signed by solicitors acting for the Owner and the Developer that the provisions of clause 6.2 of an agreement dated [•] made between [the Owner], [the DevCo] and [the Developer] have been complied with or that they do not apply to the disposition";

16. As the draftsmen seem to have anticipated, this form of words was challenged by the land registry, and the restriction eventually registered read as follows:-

> "No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction is to be registered without a certificate signed by a conveyancer that the provisions of clause 6.2 of [the PDMA] have been complied with or that they do not apply to the disposition."

17. It is, I think, accepted by both parties that a forward funding arrangement in respect of the Property could only be completed if the forward funder were to be able to acquire the relevant registered estate. The absence of the conveyancer's certificate required by this restriction would therefore be an absolute barrier to the completion of a forward funding agreement. It is also accepted that no conveyancer could sign such a certificate without obtaining confirmation from the parties to the PDMA that the provisions of Clause 6.2 are in fact complied with.

18. Clause 6.2 itself, as set out above, restrains the Owner from selling the whole or any part of the Property otherwise than "in accordance with this Agreement

[the PDMA] and the Business Plan" (it is accepted that the circumstances identified in 6.2.2 and 6.2.3 have not arisen).

19. The relevant provisions of the Business Plan in this regard are not extensive – they provide that:

> "Firethorn Trust and Rockwell will work together on financing the project as a whole. The business plan assumes both elements will be forward funded together, either by two separate funders, or by one single funder."[1]

20. The relevant provisions of the PDMA are set out in Schedule 4. They provide, as far as is relevant, that:

i) The Developer [the defendant] and the DevCo [C2] shall as soon as practicable after the date of this Agreement use reasonable endeavours to procure the agreement of terms for a Funding Arrangement to facilitate the completion of the [development].[2]

ii) The parties acknowledge that they will act in good faith to use reasonable endeavours to procure that any Funding Arrangement is in accordance with the Business Plan, facilitates compliance with the Agreement for Lease and is in accordance with good institutional lending practice and on competitive terms having regard to current market conditions, the purposes for which financial assistance is required, the risks involved,

[1] This is not what the document before the court actually said – however it was accepted by the parties that the original document had been varied by conduct such that this was its true effect.
[2] This was not the wording of the agreement itself, but both sides accept that the agreement was varied by conduct so that its effect was as if the word in square brackets had been substituted for the words in the document.

the nature and quality of the security given, and the duration of the period for which financial assistance is made available.

iii) Each party shall co-operate with and give all reasonable assistance to the other that may be necessary or desirable (both acting reasonably) to facilitate the completion of any Funding Arrangement.

iv) The parties will share any proceeds from a Funding Arrangement in accordance with the Profit Share Agreement.

21. It is clear that these terms do not give the defendant unfettered discretion to veto any proposed transfer. However, if the defendant does not confirm to a conveyancer that they are satisfied that the proposed sale is in accordance with the business plan, it would be impossible for a forward funder to acquire the Property.

22. There is a preliminary point here which I must address. The Claimants say that the fact that a funder could not acquire the Property in this way as part of its security package would constitute an insuperable obstacle to any such funder completing the documentation for a funding transaction, and therefore to it advancing funding. The defendant suggests that this is point of fact which I am not in a position to decide on the basis of the evidence before me – and indeed it was suggested at one point that this was a point which could only be established by expert evidence, of which there is none here. I disagree. I think that the fact that a lender providing forward funding for a project of this kind would not advance a sum in excess of £100m to fund a construction project without being able to fully secure its rights over the relevant property is sufficiently self-evident that I am entitled to proceed on the basis that it is true.

If the defendant wishes to dispute it, it would be open to them to lead evidence to the contrary, but in this case it has not done so. Consequently I am satisfied that the continuation of the restriction in question would be an absolute bar to the completion of a financing transaction.

The appropriateness of interim relief at this stage

23. This takes us to the first substantive point, as to whether it is appropriate to grant interim relief at this time. As I noted above, the defendant's position is that the restriction does not constitute an obstacle of any kind to the commencement and continuation of financing negotiations, but only to their completion. There is therefore, they say, no urgency. The claimants' position is that no funder will be prepared to commit the necessary resources to conduct due diligence on a funding commitment of this size if it knows in advance that there is a substantial obstacle to the completion of the funding transaction. In order to meet the deadlines imposed by the Premier Inn AfL, they must begin negotiating such funding almost immediately. They also make the point that if the commencement of the funding process were to be significantly delayed, this would create the risk that Premier Inn would be able to terminate the AfL, and, since the revenues derived from the resulting lease constitute a significant element of the security required by a lender, such delay would make the development unfundable. Hence, they say, if interim relief is not given immediately the entire development project could fail.

24. On this point I find the defendant's arguments unconvincing. It is common ground that the process of negotiating and raising financing involves a significant commitment of resources by potential lenders – a data-room will

have to be put together, professional input will have to be sought on a number of technical matters relating to the development, and the time of construction finance experts within the lending institution will have to be dedicated to the project. In this regard, it is hard to overlook the fact that this is a very substantial project, requiring a financial commitment from the lender of nearly £100m, and this fact alone will ensure significant and substantial scrutiny within the lending institution of the proposed transaction. The idea that any financing institution would be prepared to commence an exercise of this kind in a situation where there could be no certainty that the transaction under consideration was even viable is I think fanciful. It seems to me to be clear that the evidence given for the claimants to the effect that any potential lender in this situation would insist on the resolution of the issue arising from the existence of the restriction as a necessary preliminary to the commencement of negotiations must be correct. I also note in this regard that the defendant does not necessarily dispute this position, but merely suggest that there might be lenders who might be prepared to proceed otherwise. Even if that were true, I do not think it would be sufficient to negate the claimants' position that there is urgency.

25. Conversely, it is agreed that given the complexity of the issues between the parties, the trial itself will not be heard for 18 months or so. The suspension of negotiations for this period would render the breach of the timetable set out in the AfL a virtual certainty. The defendant argues that Premier Inn might be prepared to renegotiate the AfL, and that there are other mitigants that might be put in place. However, even if this is true, the fact is that a decision to do nothing until trial would be the end of the project in the form envisaged in the business plan referenced in the PDMA.

26. Consequently, I think it is appropriate for the claimants to apply for interim relief at this point in the proceedings.

The obligations of the parties

27. The defendant proceeds on the basis that the PDMA remains on foot and continues to bind both parties. The claimants say that, if this is the case, then the defendant is obliged under the PDMA to acquiesce in the removal of the restriction. The defendant's position is it is not. They say that there is nothing in the PDMA which would have the effect of requiring the restriction to be removed. This is clearly correct, in that if the parties were aligned and jointly approaching financiers for finance, no such issue would arise - the financiers could and would ensure that the restriction was unproblematic by binding the defendant into the financing package. The specific situation which has arisen is not therefore explicitly addressed in the PDMA.

28. The claimants put forward two arguments as to why the PDMA requires the defendant to agree to the removal of the restriction. One is based on a proposed implied term, the other on the argument that the defendant's (admitted) contractual obligation to act in the "utmost good faith" in the implementation of the PDMA and the overall aim of maximising value and to achieve the aims and objectives of the Business Plan (which included the securing of forward funding for the Development) requires it to consent to the removal of the restriction.

29. I will deal first with the implied term argument. There is no dispute that the test for the implication of a term into an agreement is a high bar. The rule is that "…the general presumption is that the parties have expressed every material term which they intended should govern their contract, whether oral or in

writing" (Luxor (Eastbourne) Ltd v Cooper [1941] AC 108). The Court may be prepared to imply a term if the language of the contract itself, and the circumstances under which it was entered into, give rise to an inference that both parties must have intended the term. However, this is true only where the implication of the term is necessary "in order to make the contract work" (Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 7). The Court must be satisfied that both parties would have "rounded on the notional officious bystander to say, and with one voice, 'Oh, of course'" that is what was meant" (Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701).

30. However, even if that test is satisfied, the term to be implied must be capable of being formulated with sufficient clarity and precision. As Rix LJ said in Socimer International Bank Ltd (in liquidation) v. Standard Bank London Ltd [2008] Bus LR 1304 at 1347 - "It is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred.". Where this test is not satisfied, the usual inference to be drawn is that no term is to be implied. As Lord Hoffmann put it, "If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls." Att-Gen of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 at [17].

31. Mr. Seitler, for the defendant, makes the – in my view – indisputable point that it is quite clear that there was no understanding or agreement at any stage that this restriction would be removed prior to the approach to financiers for second stage financing. The reason for this is simply that, if the claimants and the defendant had remained on good terms, there would have been absolutely no reason to require any such removal. Where a financier is negotiating with borrowers who are anxious to receive his money, he legitimately assumes that the borrowers will proceed to completion without themselves raising issues. A financier negotiating with the claimants and the defendant collectively would have been perfectly happy about the existence of the restriction, because he would assume that they could collectively address it at any time. The problem for a lender arises where the parties have fallen out. In that case he is faced with the risk of a loan to a borrower being blocked by a third party with whom the borrower is in dispute. A financier in this position would insist on the ability of the third party to interfere with the financing being removed before he was even prepared to commit resources to serious review of the proposal – which, the claimants say, is exactly the position that they are now faced with.

32. However, to my mind it is clearly wrong to suggest that there could be any implied term to this effect in the contract. If the officious bystander had raised the issue with the contracting parties, they would have been honestly baffled, since he would have been suggesting a circumstance which they did not envisage, and to the extent that it was addressed in the contract, was addressed specifically by the clause imposing the restriction. The idea, therefore, that the occurrence of the situation would trigger that clause's cancellation, would have most likely struck all those involved as bizarre.

33. I am therefore satisfied that there is no implied term requiring the removal of the restriction. The issue before me therefore turns on the construction of the contract itself.

34. Ms Wicks, for the claimants, argues that the defendant's refusal to agree to the removal of the restriction is fundamentally inconsistent with (a) the specific terms in the PDMA relating to the defendant's obligations in relation to funding, (b) the PDMA's more general terms as to co-operation and progressing the development, and (c) the purpose of the PDMA as derived from its context. She says that Para 2 of Schedule 4 to the PDMA (set out at paragraph 20 above) acknowledges that the parties will act in good faith to use reasonable endeavours to (amongst other things) procure any Funding Arrangement facilitates compliance with the AfL. As such, the defendant is obliged to act to try to ensure funding can be procured in time to comply with the deadlines under the AfL. This is supported by the obligation in paragraph 5 of Schedule 4 to "give all reasonable assistance…that may be necessary or desirable (both acting reasonably) to facilitate the completion of any Funding Arrangement". Further, the defendant is obliged in providing the services to assist with any Funding Arrangement entered into by C2 and residual matters consequential upon any Funding Arrangement (para 10 of Part 1 of Schedule 2).

35. The essence of Ms Wicks' argument is therefore that if forward funding requires the removal of the restrictions, since a forward funding deal is a "Funding Arrangement" and would facilitate compliance with the AfL, the PDMA requires the defendant to remove the restrictions.

36. She argues that this is supported by (a) Clause 3.2.3, which requires the defendant to act in accordance with the Business Plan, (b) clause 3.2.9, which requires the defendant to act consistently with C2's obligations under the terms of the AfL, such that if forward funding is required to meet the AfL obligations the defendant is required to act consistently with such obligations, and (c) clause 26 of the PDMA, which imposes an obligation on the parties to act in the "utmost good faith" in the implementation of the PDMA and the overall aim of maximising value and to achieve the aims and objectives of the Business Plan (which included forward funding the hotel Development).

37. As a preliminary matter, Mr Seitler argues that this is not in fact a process of construction of existing express terms, but of implication of new terms, and should therefore be approached on that basis. I do not agree. It is clear that where there are very broad contractual provisions of the form considered here – "use all reasonable endeavours", "give all reasonable assistance" - the specific obligations of the parties remain inchoate, and must be deduced from the circumstances. However, I think that that is a very different thing from implying a term. As Mr Seitler correctly says, the court cannot make a contract for the parties by implying terms that are not there. However, I do not believe that the interpretation of a general requirement to use best efforts involves the implication of terms. The point here is that the whole purpose of a general term of this kind is to create an inchoate obligation, which can be applied to unforeseen circumstances on a case by case basis. That process does not involve the implication of terms, but rather the interpretation of an existing term. One way of putting the resulting position is that although the court is (quite properly) prohibited from making the parties contract for them by implying new terms

into it, generic contractual provisions of this kind which create generalised inchoate obligations to act in good faith are in practice an invitation to the court to do exactly that. Where this invitation is extended to the court, it must respond – the court cannot simply disregard such provisions, or treat them as being of no effect.

38. The problem that arises here is that, in construing this sort of generic provision, the court must approach it within the framework of the contract as a whole, and on the basis that its role is to give effect to the totality of the agreement between the parties. Mr Seitler correctly points out that the clause mandating the restriction was inserted in the agreement explicitly for the purpose of protecting the defendant in the event of a dispute of this kind. His position is that it would be a bizarre reading of any contract to argue that provisions intended to protect one party in a particular event should, by necessary implication, fall away at the very moment that that event occurred. If the contract is to be read as a whole, with all provisions being given equal weight, the question of which prevails over which in the event of a conflict cannot, he says, be as simple as the claimants allege.

39. In order to address this issue it is, I think, necessary to consider what the clause mandating the restriction was in fact intended to achieve. The starting point is the position at the time when the contract was entered into. At that point the defendant had identified the Property as ripe for development. However, the first necessary step was to acquire the Property, and the defendant did not have the money to do that. It therefore approached Firethorn, who agreed to fund the first stage of the project. This included the acquisition of the Property. Since

Firethorn was putting up the money to acquire it, the Property was acquired by C1, a company controlled by Firethorn. The aim and effect of the restriction was therefore to ensure that even though Firethorn owned the Property, it could not use it for any purpose other than the pursuit of the development business plan agreed between the defendant and Firethorn – in other words, it was to ensure that Firethorn did not simply run off with it.

40. The situation with which I am confronted here falls half way between these two extremes. However, I think it can be relatively easily resolved. If we imagine that the defendant and Firethorn had remained on good terms, had sought together to raise forward funding, but had discovered – unaccountably and improbably – that no potential funder would engage unless the restriction was removed, then I think it would have been clear that the defendant would have been required to consent to the removal of the restriction. The balancing act between preserving a minor protection and cratering the entire project could have had only one outcome. Consequently I am entirely satisfied that the true construction of the intentions of all parties at the time of entry into the contract is that the obligation to secure the success of the project would have overridden the desire to retain the restriction.

41. The difference between that situation and the one before me is of course that, for the defendant, the restriction is now no longer a minor protection – it is a significant bargaining chip. However, I do not think that that is relevant in this context. If parties contract to exchange As for Bs on the basis that a B is worth more than an A, the interpretation of their contract is not affected in any way by the fact that when the time comes for performance A is worth more than B. If it

is true that on the facts as envisaged by the parties at the time of entry into the contract it would have been clear that the restriction should be removed if it imperilled the financing of the project, the subsequent change in position between the claimants and the defendant cannot affect that interpretation. Put simply, if the defendant's case is that the agreement is still on foot, it must accept and interpret its terms as they would be interpreted if it were still on foot.

42. Mr Seitler's primary objection to this line of reasoning is that it does not – he says - give proper effect to the intention of the restriction. He says that the circumstances which have arisen are exactly and precisely those envisaged by the provision requiring the restriction, and the actions which the claimants propose to take are exactly those against which the clause was designed to protect the defendant. He therefore argues that it cannot be right to require the removal of the restriction in these circumstances.

43. I agree with Mr Seitler on this point to the extent that a simple extinguishment of the restriction would be open to the objections which he raises. However, I think it is important to consider what the interests are which this particular clause was in fact intended to protect.

44. This takes us to the fact that there is clear blue water between the economic substance of the agreement between the parties as originally intended, and the terms of the documents in which that agreement was eventually recorded. As is common in such cases, the reason for this appears to be fiscal, but that is not relevant here. In order to explain the situation, it is necessary for me to go into the terms of the contracts concerned.

45. The original negotiations relating to the project were conducted between the defendant and Firethorn, and established a fairly simple structure – Firethorn would pay for the initial phase of development up to the obtaining of necessary permissions and consents, upon completion Firethorn would receive a priority return calculated by reference to the amount which they had contributed, and thereafter profits would be split between the two according to a formula. This arrangement was reflected in two agreements – the PDMA, which governed the relationship between the defendant and the claimants as regards the performance of its role as developer, and the Profit Share Agreement ("PSA"), which set out the entitlements of the parties to share in the profits. It is important to emphasise that the defendant's entitlement under the PDMA was to nothing more than the payment of specified fees – participation in returns was allocated exclusively by the PSA.

46. However, at what appears to have been the last moment a new party was introduced. This was MCCI, a Monaco company. MCCI appears to have been simply an alter ego for the defendant, and its introduction was probably part of a scheme to shelter gains from the development from UK tax. Hence MCCI replaced the defendant as the party to the PSA. This resulted in different agreements between different parties – thus the PDMA is between both claimants and the defendant, whereas the PSA is between the claimant development company [C1] and MCCI only.

47. The problem that this contractual structure creates for Mr Seitler is that it neatly torpedoes his argument that the restriction provided for in the PDMA was intended to protect the defendant's interest in the future of the project as a

whole, because, under that particular agreement, it did not have one. The restriction may well have been intended to protect the defendant's rights under the PDMA – indeed, I find that it does – but that right can be protected by a payment into court by the claimants of the amount potentially due as fees to the defendant under the PDMA, along with a commitment not to dispose of the registered title for any reason other than for the purposes of the financing of the development. The claimants have indeed offered to do exactly that. Mr Seitler must therefore argue that the purpose of the clause in the PDMA was in fact to protect MCCI's interests under the PSA.

48. I think there is an insuperable problem for this argument. This is the fact that the PSA provided for a similar restriction to be granted to MCCI for what appears to be the express purpose of protecting its interests under that agreement. This seems to me to be a fairly convincing demonstration of the fact that the protection created in favour of the defendant under the PDMA was not intended to extend to the protection of MCCI's rights under the PSA, since that issue was separately dealt with in that agreement.

49. Mr Seitler explained to me at some length that this was the wrong way to look at the arrangement between the parties. His position was that the separation between the defendant and MCCI was purely technical, that all parties at all times had thought of the defendant and MCCI as fundamentally the same person, and that the contracts themselves should be read on this basis. He therefore argues that it must have been the common intention that protections conferred on either MCCI or the defendant in either document were intended to operate for the benefit of both.

50. In this context it is fair to point out that the amendments to the written contracts to include MCCI appear to have been made in great haste and under considerable time pressure. It is therefore unsurprising that they are uneven, and in some cases clearly incorrect on their face – to take just one example, the PDMA refers to the Defendant as a party to the PSA, when it was not. This confusion goes some way to supporting Mr Seitler's argument that – even though they address different issues and are between different parties – the two should in effect be read together when seeking to establish their true construction.

51. The difficulty with this approach is that for it to have any semblance of credibility it would have to be subscribed to by both the defendant and MCCI. However that is almost the mirror image of MCCIs true position. The first half-day of this hearing was spent dealing with MCCI's claim that the issues which arose in respect of the PSA were entirely different from those in respect of the PDMA, and required to be addressed in a separate hearing, and that the action against them should be adjourned and heard separately. Since MCCI and the defendant are owned and controlled by the same individual, it seems necessary to conclude that both MCCI and the defendant are agreed that their claims, and the issues arising from them, should not be conflated, but must be treated separately.

52. I am therefore unable to conclude that the common intention of the parties to the PDMA was that the defendant should be able to rely on the restriction created by the PDMA in order to protect the potential claims of MCCI under the PSA. I am satisfied that the restriction was created in order to protect the

claims of the defendant under the PDMA, and that if the restriction is to be removed those claims should be protected pending trial. I am also satisfied that the defendant's obligations under the PDMA create an obligation on it to withdraw the restriction where that is necessary for the project to successfully proceed. Since I am satisfied that the project cannot successfully proceed unless the restriction is withdrawn, I am prepared to order that the defendant perform what would be its obligation under the contract if the contract were to be held to be still on foot.

53. I note in passing that logic would ordinarily dictate that the order in this case be a personal order against the defendant requiring him to consent to the removal of the restriction. However, Ms Wicks asks for an order amending the register to remove the restriction. The logic behind this is to be found in the judgement of Megarry J (as he then was) in *Calgary and Edmonton Land Co v Dobinson* [1974] Ch 102 at 138-9. In that case the same issue arose in respect of a caution – whether the court should order the cautioner to remove the caution, or simply order the caution to be removed. He said;

> "On the footing that there is an inherent jurisdiction to make some order on motion, the question is then whether the order should be in the personal form, ordering the cautioner to remove the caution, or in the impersonal form, ordering that the caution be vacated. Mr. Rice accepted that it mattered little in which form the order was expressed, as the result would be much the same in the long run. In [Rawlplug v Kamvale (1969) 20 P&CR 32], the motion sought an order in the personal form, and so in the personal form I made it; but this throws little light on the question. The inherent jurisdiction of the court to grant injunctions requiring someone to undo what he had wrongfully done is undoubted, and so the court can order someone to remove an entry from a register if he ought never to have made it, or ought not to allow it to remain. However, if such an order is disobeyed steps must then be taken to compel the cautioner to do what he ought to have done, or to have it done on his behalf. If

> instead the court can make an order in the first instance upon which the registrar can safely act, it seems to me that this simpler and more direct form of order is preferable; and at all events where, as here, no objection is taken to the order being in this form, then in this form I think it should be made. It can be left for a case in which objection is taken to the order being made on motion in the impersonal form for it to be decided whether (as I think) such an order can be made on motion in all cases. I merely observe that the order made on the deemed motion in Heywood v. B.D.C. Properties Ltd. (No. 2) [1964] l W.L.R. 971 seems to have been an impersonal order "that the registration of the lis pendens be vacated": see at p. 976 per Harman L.J. In this case I hold that the plaintiff company is entitled to orders in the impersonal form that it seeks under the notice of motion: the precise form of the orders may be discussed."

54. I am bound – both legally and logically – by this reasoning. I therefore proceed on the basis that, given my findings on the interpretation of the relevant contracts, the proper remedy is an impersonal order requiring the restriction to be removed.

55. I now turn to address the issue as to what the position is if I am wrong that the effect of the inchoate term is, as set out in paragraph 40 above, to require the defendant to consent to the removal of the restriction. I note in passing that this question potentially arises in two contexts, one being where the term does not in fact have that effect, and the other being the situation where the contract has in fact fallen away so that there is no express term to be relied upon. Since I have already held that there is no implied term requiring such a thing, the only basis on which they could ask for the remedy which they currently seek is as an exercise of the court's jurisdiction to rectify or amend the register.

56. In order to answer this question it is necessary to address the question of the existence, scope and nature of the court's jurisdiction over the register, and identifying the terms on which it can be used.

Jurisdiction to Amend the Register

57. The Court has two relevant sources of jurisdiction in relation to amending registered titles; its inherent jurisdiction, and s.46 of the LRA 2022 (the "statutory jurisdiction").

The statutory jurisdiction

58. S.46 of the LRA 2022 confers on the court the powers specified in Schedule 4 thereto. Schedule 4, for this purpose, provides for two different jurisdictions:

    i) Paragraph 2(1)(a) of Schedule 4 to the Land Registration Act 2002 (the "LRA 2002"), which provides that "the court may make an order for alteration of the register" for the purpose of "correcting a mistake" (Rectification)

    ii) Paragraph 2(1)(b) of Schedule 4 to the LRA 2002, which makes the same provision where the amendment is to be made "to bring the register up to date" (Amendment).

59. There is a third power, created by 2(1)(c), but it is not engaged here.

60. The jurisdiction granted by paragraph 2(1)(a) is not engaged on the facts of this case. On the facts before me, no error has been made – a valid restriction has been entered, and continues in place. The question therefore relates simply to alteration.

61. Para 2(1)(b) has the effect of conferring on the court a specific power to order alteration of the register for the purpose of bringing it up to date. As the authors

of Megarry & Wade's Law of Real Property observe, the exercise of this jurisdiction:

> "… will normally occur because, in the course of litigation, the court determines the substantive rights of the parties to a dispute…and the register must therefore be altered to reflect this outcome" (9th ed. at para 6-133).

62. I do not see any way in which this jurisdiction could be engaged on these facts. What the PDMA provided for was the entry of the restriction on the register, and, once that was done, the contractual obligation was fully performed. The terms of the agreement between the parties absolutely do not provide, either implicitly or explicitly, for the immediate removal of the restriction on the termination of the contract. Thus an order to the registrar to remove it cannot be construed as merely bringing the register up to date.

Inherent jurisdiction

63. The inherent jurisdiction to vacate any entry in the register is well-established. Again, the current edition of Megarry & Wade states that:

> " "The court has a wide inherent jurisdiction to order the vacation of any entry in the register, and it was often used in the past in relation to cautions against dealings…It is commonly exercised speedily on an interim application, without awaiting the trial of any action, thereby preventing the entry from improperly inhibiting dealings with the land." (para 6-076).

The question before me is as to the extent (if at all) to which it is circumscribed by the 2002 Act.

64. The position as regards the inherent jurisdiction was thoroughly considered by Morgan J in Nugent v Nugent [2015] Ch 121. Addressing the question as to whether the previously existing discretion was removed or limited by the 2002

Act, and having conducted a thorough review of the post-2002 authorities, he said:

> "In view of my conclusion as to the jurisdiction of the court in a case under the LRA 1925, the question arises whether that jurisdiction has been abrogated or otherwise affected by the 2002 Act. The first thing to notice is that there is no provision in the 2002 Act which expressly so provides. Accordingly, one could only hold that the earlier jurisdiction has been abrogated or otherwise affected by the 2002 Act if its continued existence in its original form were incompatible with the scheme of the 2002 Act. In order to consider such a possibility it was necessary to consider, as I have done, the provisions of the LRA 1925 and of the LCA 1925 and of the LCA 1972 to see why it was the case that those statutory provisions were not considered to be incompatible with the inherent jurisdiction. In my judgment, there is no sufficient change of substance between the earlier provisions and the provisions now in the 2002 Act which would justify the conclusion that the existence of the inherent jurisdiction is incompatible with the 2002 Act, whereas it was compatible with the earlier legislation.
>
> I conclude that the jurisdiction, recognised and developed by the courts, in relation to the vacation of cautions registered under the LRA 1925, applies also in relation to unilateral notices registered under the 2002 Act. That jurisdiction applied in different ways in relation to cautions to protect claims which were unsustainable and in relation to cautions to protect claims which were well arguable. In the present case, on the material before me, the claimants claim is well arguable. Accordingly, I cannot order the cancellation of the unilateral notice on the ground that his claim is without substance. The earlier cases where the underlying claim was well arguable only went so far as to require an undertaking in damages from the beneficiary of the caution, as a condition of keeping the caution in place. However, the clear philosophy of those cases was that the court should not allow the beneficiary of the notice to have the protection of the notice pending trial without the court considering the position of the registered proprietor and whether, and if so how, the proprietor should be protected pending trial. The court proceeded on the basis of an analogy with the position it would adopt if the beneficiary of the notice had, instead of registering a notice, applied for an interim injunction. I will therefore consider, in accordance with the philosophy in the earlier cases what the court would do, as between these parties, if the claimant applied for an interim injunction pending trial and, in that context, I will take into account any adverse effect on the defendant of the court granting such an injunction."

65. Morgan J returned to the inherent jurisdiction in the specific context of restrictions in Law v Haider [2017] UKUT 212 (TCC). The decision was an appeal to the Upper Tribunal following the reference of a dispute over whether a restriction should be cancelled by the First-Tier Tribunal. The issue related to the terms on which a boundary dispute had been settled, which gave one of the parties to the settlement an option over a parcel of land. The question was whether that option provided a sufficient interest to justify the imposition of a restriction (see [7], [10]-[11]). In deciding in principle to impose the restriction, Morgan J specifically considered what would happen were the beneficiaries (the Laws) to misuse it:

> "If the Laws were to act wrongfully in withholding a certificate referred to in the restriction, then the Haiders could take steps to remedy the position. They could apply to the registrar to disapply the restriction. That procedure might take time if the Laws objected and the objection had to be determined by the FtT. Another possibility would be for the Haiders to apply in the Chancery Division for an order vacating the restriction under the jurisdiction recognised in Nugent v Nugent [2015] Ch 121. That jurisdiction can be exercised on an interim application to the court and the established practice is to adopt a robust approach to the determination of any issues between the parties. Further, if the Laws showed that they had an arguable case to maintain the restriction, the court would have power to permit the restriction to remain but only if the Laws gave an undertaking in damages."

66. In reliance on this consideration of the use of the inherent jurisdiction to police misuse of restrictions, Morgan J then decided in favour of the restriction, and then granted a restriction.

67. Mr Seitler does not dispute the existence of the inherent jurisdiction in cases where the restriction concerned is either wrongfully entered, or entered in circumstances where the appropriateness of its entry is debateable. However, he

argues that the court's inherent power to vacate any entry on the land register does not extend to the removal of a restriction which was voluntarily and properly entered.

68. His starting point is that the Land Registration Act 2002 Act refers to both the court and the registrar having power to amend the register. The Registrar must make an alteration pursuant to an order from the Court which has determined a dispute between the parties to the proceedings, and may also alter the register on his own initiative or on application by a person.

69. Mr Seitler's argument is that whilst s.46 of the 2002 Act gives the Court jurisdiction to order entry of a restriction, nothing in the Act gives the Court an express power to withdraw or cancel a restriction. That jurisdiction is therefore implicitly reserved to the registrar pursuant to s.47 and rules 97-98 Land Registration Rules 2003. His case is therefore that the effect of the act is to reserve this remedy exclusively to the registrar. He argues that the form of the legislation makes this clear:

i) Section 47 provides that a person may apply to the registrar for the withdrawal of a restriction if the restriction was entered in such circumstances, and the applicant is of such description, as the rules may provide. Rule 98 deals with applications to withdraw and provides that such an application "must" be made on Form RX4 and be accompanied by the consents required by sub-paragraph (2);

ii) Rule 97 provides that an application to cancel a restriction "must" be made in Form RX3, which "must" be accompanied by evidence to satisfy the registrar that the restriction is no longer required. If the

registrar is then satisfied that the restriction is "no longer required" then he must cancel the restriction.

iii) Section 41(2) and rule 96 deal with the disapplication or modification of restrictions, which, again, he says is a jurisdiction reserved to the registrar;

70. Accordingly, he argues, the 2002 Act (and rules made thereunder) leaves no scope for the operation of the inherent jurisdiction to remove a restriction which has been validly put in place. In support of this he points out that the jurisdiction granted to the court by s.57 of the 1925 Act to cancel or discharge inhibitions (the predecessor of the modern restriction) was not replicated in the 2002 Act. This, he argues, means that Parliament must have intended to curtail or remove that jurisdiction.

71. He then goes on to consider the relevant authorities. His primary contention is that the authorities only address the question of the existence of the inherent jurisdiction in respect of unilateral notices, and not bilaterally agreed restrictions. In particular, Nugent v. Nugent [2015] Ch 121, the case on which the claimants primarily rely, concerned an application to vacate a unilateral notice against a registered title. Subhani v. Sultan [2017] EWHC 1686 (Ch), on which the claimants also rely, is, similarly, a case concerning unilateral notices and, he says, adds nothing to Nugent on the question of jurisdiction. He therefore argues that Nugent and Subhani are not authorities for the proposition that the Court has an inherent jurisdiction to require the removal of restrictions. He argues that the observations of the Upper Tribunal (which are, of course, not binding authority in any event) add nothing to the position, since they are no

more than an obiter reference to the theoretical possibility of restrictions being vacated "under the jurisdiction recognised in Nugent v. Nugent". His argument is that , since Nugent v Nugent recognises no such authority, this observation is itself of no weight.

72. He says that there is a clear distinction between unilateral notices and restrictions. Unilateral notices may be entered without the consent of the relevant proprietor and in circumstances where the applicant is not required to satisfy the registrar that their claim is valid. Whereas, in order to enter a restriction, significant evidence of entitlement is required.

73. Finally, he says that even if the Court had jurisdiction to remove the restrictions, then the principles governing the exercise of jurisdiction are not clear. It would therefore not be appropriate to approach the matter in the same way as it would an application, by the party who entered the restriction, for an injunction. That may be how the Court has approached cases concerning unilateral notices. But the restriction in this case was entered pursuant to a bilateral contract commercially negotiated with the benefit of legal advice on both sides; if it were to prevent 'abuse' of the registration system, then there is no abuse in this instance. The restrictions were entered pursuant to the contract.

74. Ms Wicks challenges the suggestion that the inherent jurisdiction is limited, and does not extend to bilateral restrictions properly entered. She says that each of the leading cases including Nugent and those referred to therein refer to the jurisdiction in respect of entries on the register without suggesting there is any distinction between different types of entry. Quite apart from restrictions, the width of the jurisdiction can be identified from its extending to the land charges

register as well as entries on the registered title. She also argues that such a limitation would be fundamentally inconsistent with the reasoning and analysis in Nugent and the earlier cases, which is that the inherent jurisdiction exists to prevent misuse of the land registration system. The land registration system can be misused just as much by the entry or retention of restrictions as by notices. It is intrinsic to an inherent jurisdiction that it is capable of responding flexibly to the circumstances that arise in order that the policy behind the jurisdiction can be maintained and the mischief addressed.

75. I should note that the defendant's solicitors drew attention in correspondence to Stein v Stein [2004] EWHC 3212 (Ch), in which Patten J held that the inherent jurisdiction did not exist "under the provisions of the new Land Registration Act 2002" (at [26]). Since in that case only the claimant attended, it may not be cited as authority. However, more importantly, this case was considered in Nugent, where the judge noted that Patten J "did not cite any authority and I think it unlikely that the matter was fully argued before him". Given the matter was fully argued in Nugent, which considered and post-dated Stein, the conclusion and reasoning in Nugent is authoritative and binding.

76. The diligent researches of Counsel in this case have failed to produce any authority – binding or otherwise – which specifically addresses the situation which arises where the court is asked to exercise its inherent jurisdiction to remove a validly bilaterally entered restriction. I am therefore obliged to proceed from first principles.

77. The jurisdiction of the High Court now derives from s.19 of the Senior Courts Act 1981. As regards inherent jurisdiction, this is now established by s.19(2)(b), which provides that:

> (2) Subject to the provisions of this Act, there shall be exercisable by the High Court—
>
> (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision).

78. This is one of a chain of saving provisions, which have been included in legislation going back to s. 16 of the Judicature Act 1873, when the courts were first placed on a statutory basis. The inherent jurisdiction which the High Court has today is therefore – in effect – the common law jurisdiction which the courts had prior to their being established by statute.

79. Although inherent jurisdiction clearly can be constrained or removed by statute, in asking whether a particular statute has in fact curtailed any inherent jurisdiction, the principle to be applied is that set out in section 25.6 of Bennion, Bailey and Norbury on Statutory Interpretation (8th ed. 2020) that "there [is] a general presumption that the legislature does not intend to make changes to the common law".

80. The foundation of this principle is derived from Coke's Institutes, where it is said that:

> "… it is a maxim in the common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law." (2 Inst 200)

81. This principle has been affirmed many times over the years. More recently, in R v Secretary of State for the Home Department, ex p Pierson ([1998] AC 539 at 573) Lord Browne-Wilkinson said:

> "It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions. Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication."

82. The core of Mr Seitler's argument was to the effect that, the 2002 Act having provided a particular remedy in a particular case, this should be taken to have displaced the court's ability to use its inherent jurisdiction to provide a remedy in that case.

83. He also argued that this conclusion was supported by the position as regards s.57 of the Land Registration Act 1925. s.57 explicitly conferred on the court the power to cancel or discharge inhibitions (the predecessor of the modern restriction). This power was not replicated in the 2002 Act. The argument here, I think, is that the courts inherent power was supplanted by s.57, and when s.57 was not continued, it expired.

84. I do not think that this is correct. I think the position is correctly stated in the commentary to s.19(1) in the White Book (at para 9A-67), which observes that "The court may execute its inherent jurisdiction even in respect of matters which are regulated by statute", citing Willis v Earl Beauchamp (1886) 11 PD 59 at 63 per Bowen L.J. It is therefore entirely clear that the court's inherent jurisdiction

can exist alongside a statutory jurisdiction, and that the creation of a statutory jurisdiction does not necessarily exclude the court's inherent jurisdiction.

85. Applying this approach to the 2002 Act, I cannot see any provision of it which conveys with the necessary clarity the idea that the inherent jurisdiction of the court is somehow displaced by the creation of an extrajudicial mechanism for application to the registrar directly for the amendment of the register. Consequently, I am satisfied that the inherent jurisdiction of the court to order the register to be amended in the way that the claimants seek remains intact, and has not been extinguished by the 2002 Act.

How should the Inherent jurisdiction be exercised?

86. As Morgan J said in Nugent, two different tests apply on the exercise of the inherent jurisdiction depending on whether the beneficiary of the entry has "any real substance" in, or a "good arguable" claim to, the right. If there is no good arguable claim or the entry is without substance, then the Court should order the vacation of the entry. This is essentially the summary judgment standard. However, if there is a good arguable claim to the entry, the Court should approach the issue as if the beneficiary of the notice had applied for an interim injunction protecting its claimed interest. As such, as well as requiring a cross-undertaking in damages, the Court should consider the possible adverse effect on the landowner of such an injunction, and whether the landowner would suffer "uncompensatable prejudice".

87. Morgan J returned to this issue in Subhani v Sultan [EWHC] 1686 (Ch), a case concerning a unilateral notice. He said:

> "The way in which the inherent jurisdiction may be exercised depends on the court's assessment of the claim to the alleged interest which is sought to be protected by the unilateral notice. If the claim lacks substance, then the court can vacate the unilateral notice without more ado. In a clear case, the jurisdiction can be exercised on an interim application without a trial and a robust approach is appropriate. The authority which encourages the court to adopt a robust approach is The Rawlplug Co Ltd v Kamvale Properties Ltd. If the claim has some substance, then the court approaches the matter in the same way as it would an application, by the party who has entered the unilateral notice, for an injunction restraining the registered proprietor from dealing with the property in a way which was incompatible with the claim, until the claim is determined. If the court is persuaded that the case is one where the registered proprietor ought to be restrained from dealing with the property in that way, then the court normally allows the entry to remain on the register but only on terms that the person with the benefit of the entry on the register undertakes to the court to pay compensation to the registered proprietor if it should transpire that the claim fails and the entry ought not to have been made. This undertaking is the equivalent of the undertaking in damages which a claimant is required to give in a case where the claimant obtains an interim injunction."

88. This, of course, leaves me with the issue raised by Mr Seitler that there is clear authority on how to approach two situations – the application of the summary judgement standard to unarguable unilateral entries, and the application of the interim injunction standard to arguable unilateral entries – but no authority as to how to approach an application for removal of a validly entered agreed restriction. Mr Seitler sought to convince me that there should be a different and as yet unspecified standard applied to such cases, and invited me to formulate one.

89. Much as I regret the loss of an opportunity for legal innovation, I think this is unnecessary. Any use of an inherent jurisdiction must be subject to, and conditioned by, the overriding objective set out in Part 1 of the Civil Procedure Rules. This requires me to be satisfied that the case is dealt with expeditiously

and fairly. I am unable to think of any reason why the issue before me should not be treated in the same way as any other application for interim relief in respect of the removal of an entry in the register. The essence of Mr Seitler's case was that the position where an entry has been made consensually demands a different approach from that where the entry has been made unilaterally. I do not see why. In all cases of this kind, the court starts with an entry on the register, and must decide whether that entry should be removed. I entirely accept that the circumstances in which the entry was made are material considerations to be taken into account in making the decision as to whether the entry should be removed. But the question before the court – should the entry be removed from the register – is the same regardless of the mechanism by which it was put there, and should be approached in the same way using the same criteria. Any other approach would result in needless complexity.

90. I am consequently of the view that, in respect of any application to remove a restriction from the register through the use of the inherent jurisdiction, there are only two possible approaches – the summary judgement standard and the interim injunction standard – and it is the latter which should be applied in this case. Mr Seitler's putative "third way" is unnecessary and undesirable.

Should the order be made?

91. I come, at last, to the question of whether the order should be made. As noted above, the test to be applied in answering this question is analogous to that which is to be applied in respect of an interim injunction. That involves consideration of the questions of serious issue to be tried, adequacy of damages,

and balance of convenience, as set out in American Cyanamid v Ethicon [1975] AC 396.

Serious issue to be tried

92. I am in no doubt that there is a serious issue to be tried between these parties.

Would the award of damages at trial be an inadequate remedy?

93. The claimant's position is that, if the restriction were not to be removed, the development would be paralysed until judgement was handed down. This, they say, would collapse the entire project – the existing pre-agreed tenants would be released from their obligations, new proposed tenants would have to be found, and the process of designing and financing the project would have to begin anew. If this were to be the finding at trial, the damages award would be very substantial – the claimants suggest a figure of around £19.3 million. In this regard they draw attention to the fact that the defendant is, at least according to its published accounts, a man of straw with a negative net worth – a point which has been made to the defendant, and to which the defendant has not responded. They also argue that their public failure to deliver on time under the AfL to Premier Inn would have a very significant negative impact on their commercial reputation in the market.

94. It is difficult to find anything here which is not compensable through an award of damages. However, there can be no doubt that the delaying of the project by an envisaged period of at least 18 months could increase by an order of magnitude the damages for which the defendant could be liable. There is at least

the risk of the defendant using its own impecuniosity as a negotiating tool in this regard.

95. Conversely, the detriment to the defendant caused by the making of the requested order is very low. Provided that the claimants perform their promise to pay an amount equal to the fees due to the defendant under the disputed agreement - £1.5 million plus VAT - into Court, the maximum entitlement of the defendant is fully secured. I note in this regard that Mr. Seitler sought to convince me that the terms of the PDMA relating to the defendant's entitlement to remuneration (para 7 thereof) were ambiguous, and that it might be arguable that its entitlement was greater than £1.5m. I do not agree – the ambiguity in the words "the total aggregate.. fee.. paid to the Developer by the Devco pursuant to this clause 7.2 shall not exceed £1,500,000" is to me imperceptible.

96. For the reasons I have set out above, I am not prepared to consider any potential detriment to MCCI under the PSA in considering the issue of what order I should make in this action. MCCI actively rejected the opportunity to engage with this hearing, and it must therefore be decided strictly between the parties hereto.

Balance of Convenience

97. It seems to me that the interests of all parties to this litigation are best served by the project continuing as nearly as possible on its original timescale. Any delay will simply increase losses, and therefore potential damages liabilities. This outcome will be most likely to be achieved if the claimants are able to proceed to raise construction financing, and in order for this to happen the restriction must be removed.

98. I am therefore prepared to order that:

i) The restrictions on title be removed.

ii) The claimants give an undertaking in damages to the defendant in the form that would be usual if their application had been a successful application for an interim injunction.

iii) £1.5 million (plus VAT) is to be paid into Court to secure the defendant's potential claim under the PDMA for potential future fees from the Development.

iv) C1 undertakes only to dispose of the Property for the purpose of future funding.

99. I note that some parts of the claimants' evidence in this case are commercially confidential. These items have been segregated in the court bundle into a separate section. I am prepared to consider making whatever orders may be necessary in order to preserve the confidentiality of these documents.