Neutral Citation Number: [2023] EWHC 438 (Ch)

Case No: PT-2021-NCL-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE UPON TYNE
PROPERTY TRUST AND PROBATE LIST (ChD)

The Moot Hall, Castle Garth,
Newcastle upon Tyne, NE1 1RQ
Date: 03/03/2023

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

(1) MOGENS ALEX BASTHOLM
(2) GRAHAM GILL
(3) ANGELA JANE GRAVES
(4) LAWRENCE PAGDEN
(as Trustee in Bankruptcy of the Estate of Barry Dunn)
(5) JONATHAN FRANK JACKSON

Claimants

- and -

(1) PEVERIL SECURITIES (DALTON PARK RETAIL) LIMITED
(2) BRITISH OVERSEAS BANK NOMINEES LTD
(3) WGTC NOMINEES LTD

Defendants

- -
- -

Mr Jason Jamil of **Arndale Solicitors LLP** for the Claimant
Mr Jonathan Gavaghan (instructed by **Flint Bishop LLP**) for the First Defendant
The Second and Third Defendants did not appear and were not represented.

Hearing dates: 12-15 December 2022

- -

Approved Judgment

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

.....

HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 03 March 2023

HH Judge Davis-White KC :

1. This case concerns a payment deed (the "Payment Deed") under which overage becomes, or became, payable in certain circumstances. There having been an attempt to submit a valuation question to expert determination, under the terms of that Deed, as long ago as May 2014, the main question is whether that attempt was valid or not and, if it was, whether the expert determination clause should now be enforced. However, the parties, in an agreed list of issues, agreed that various other matters would be put before the court for determination.

Representation before me

2. The claimants were represented by Mr Jason Jamil, a solicitor with Higher Court advocacy rights who also acted for the claimants as the partner in the firm of Arndale Solicitors Limited and having conduct of the litigation on their behalf.

3. The first defendant was represented by Mr Jonathan Gavaghan of Counsel, instructed by Flint Bishop LLP.

4. The second and third defendants did not appear and were not represented. I am told that they are content to abide by the court's decision as is set out in their Defence where they explain their position and that they do not intend to participate in these proceedings.

5. I am grateful to Mr Jamil and Mr Gavaghan for their helpful written and oral submissions.

The background to the Payment Deed

6. The agreement under which overage could arise is a payment deed dated 9 May 2000 (the "Payment Deed").

7. The background to the Payment Deed is as follows.

8. On 10 June 1998 a company called Matthew Fox (UK) Limited was incorporated. It changed its name to Matthew Fox Developments Limited ("MFD") on 25 June 1998.

9. Also on 25 June 1998, the first claimant, Mr Mogens Alex Bastholm ("Mr Bastholm"), was appointed director and secretary of MFD. Mr Graham Gill, the second claimant ("Mr Gill") and Mr Barry Dunn (Mr Dunn") (whose trustee in bankruptcy is the fourth claimant) were also appointed directors. The relevant representatives of the company formation agents resigned on the same date as director and secretary. Two shares were also issued and allotted, one each to Mr Gill and Mr Dunn.

10. By the time of the annual return submitted as at 10 June 1999, the shareholdings in MFD were as follows:

Mr Bastholm	30
Mr Dunn	20
Mr Gill	20

Angela Matthews (the 3rd claimant)	30

11. By letter dated 31 January 2000, the Secretary of State, on the joint application of MFD and JJ Gallagher Limited granted outline planning permission for development of land lying to the west of the A19 at Dalton Flats, Murton, Seaham, County Durham, which land was shortly afterwards purchased by MFD, as explained below. The site is located east of Murton, approximately 3 miles south-west of Seaham and 5 miles north of Peterlee.

12. By letter dated 15 February 2000, David Sail, a development surveyor agreed to market for sale the shares in MFD.

13. On 4 March 2000, Mr Bastholm and Mr Dunn resigned as directors and on 6 March 2000, Mr Mark Graves, the husband of Angela Graves (nee Matthews) was appointed a director of MFD.

14. On 13 March 2000, MFD, as purchaser, entered into an agreement with RJB Mining (UK) Limited, as vendor, in relation to the purchase of land described as "land lying to the west of the A19 highway at Dalton Flats, Murton of 35 hectares or thereabouts" as further identified as a plan attached to a draft TR1 attached to the said agreement. The sale price was in excess of £3.5 million. I shall refer to this land as "Dalton Park".

15. In April 2000, further shares in MFD were issued and allotted so that the overall shareholdings were as follows:

Mr Bastholm	40
Mr Dunn	40
Mr Gill	40
Mrs Graves	60
Mr Jackson (the 5th claimant)	60

16. On 9 May 2000, a number of documents were entered into in connection with the sale of the shares in MFD to London and Amsterdam Developments Limited ("LAD"). These included a share option agreement and a share sale agreement. Under the latter agreement, the shares in MFD were sold for a consideration of just over £4.4 million together with certain sums to pay off certain expenses due to various of the vendors from the MFD. The total of such payments was just under £5m million. In addition, further sums were due to be paid by LAD to MFD to clear its borrowings with its bankers.

17. The Payment Deed was also entered into which provided for overage payments in certain circumstances.

The Payment Deed

18. The Payment Deed was entered into between Mr Bastholm, Mr Dunn, Mr Graves, Mrs Gill and Mr Jackson, described collectively as "the Seller", and MFD, described as the "Purchaser". The opening part of the Payment Deed is as follows:

> *"THIS DEED is dated 9 May 2000*
> *And is MADE BETWEEN:-*
> *(1) MOGENS ALEX BASTHOLM of [address] BARRY DUNN of [address] GRAHAM GILL of [address] ANGELA JANE GRAVES of [address] and JONATHAN FRANK JACKSON of [address] (together called "the Seller")*
>
> *(2) MATTHEW FOX DEVELOPMENTS LIMITED whose registered office is at [address] Company Registration No 3578654 ("the Buyer")"*

19. Later on, at a meeting at Teeside Airport in December 2013, it was decided to refer to the former shareholders in MFD, referred to in the Payment Deed as "the Seller", as the "Matthew Fox Consortium". I shall use the term the "Consortium" to refer to the relevant individuals, namely Mr Bastholm, Mr Dunn, Mr Gill, Mrs Graves and Mr Jackson.

20. The Payment Deed identified two separate areas of land within Dalton Park. These two areas are respectively referred to as "Phase 1" and "Phase 2". For convenience I refer to these two areas of land as "Phase 1 Land" and "Phase 2 Land". This is to avoid confusion with the separate concept of Phase 1 development and Phase 2 development, being informally used to cover development that took place at different times. Overage under the Payment Deed became payable in certain circumstances by reference to development works carried out on the Phase 2 Land, provided that they commenced within the "Phase 2 Period" being a period of 15 years commencing with the date of the Payment Deed. That period therefore expired on or about 9 May 2015.

21. Clause 1 of the Payment Deed contains definitions which I shall come back to,

22. Clauses 2 to 5 and clause 11 of the Payment Deed relate to various obligations between Buyer and Seller with regard to applying for, facilitating and paying for an application for planning permission in relation to the Phase 1 Land. Those provisions are not immediately relevant.

23. Clause 6 of the Payment Deed sets out the circumstances in which overage may become payable. The following definitions in clause 1 of the Payment Deed are immediately relevant to clause 6:

> "*"Notional Interest" means 1 per cent above the base rate from time to time of Barclays Bank plc compounded with quarterly rests thereon from the date hereof to the date payment is made to the Seller pursuant to Clause 6*
>
> *"Credits" means:-*
> *(a) all reasonable and proper costs (including, without limitation, professional fees) incurred by or on behalf of the Buyer in obtaining any planning permission for Development on the Relevant Phase 2 Part*
> *(b) the cost of all Infrastructure Works servicing the Relevant Phase 2 Part which are in place prior to commencement of Development on the Relevant Phase 2 Part*

(c) Notional Interest on the Relevant Phase 2 Part Value

"Development" means development works other than Infrastructure Works, the commencement of ground works, operations in connection with site clearance, demolition of existing buildings, archaeological investigation works for the purposes of assessing contamination remedial works in respect of any contamination diversion of services and the creation of means of enclosure for site security

"Infrastructure Works" means the construction of any infrastructure works serving Phase 2 including (without prejudice to the generality of the foregoing) roads, footpaths, utilities drains, sewers other service media and landscaping but excludes buildings and permanent car parking and service yards

"Payment Date" means the twenty-eighth day after the commencement of Development on the Relevant Phase 2 Part

"Open Market Value" means the best price for which the Relevant Phase 2 Part might be reasonably be expected to be sold by private treaty assuming:-

(a) a willing seller;
(b) a reasonable period in which to negotiate the sale;
(c) that values will remain static during that period;
(d) that the property will be freely exposed to the market and;

(e) that no account will be taken of any higher price that might be paid by a purchaser with a special interest; and
(f) that both parties to the transaction will act knowledgeably, prudently and without compassion

"Phase 2 Period" means fifteen years from the date of this Deed

"Relevant Phase 2 Part" means the whole or any part of Phase 2 in respect of which Development is commenced

24. Clause 6 provides as follows:

"*6.* ***Phase 2 Payment Provisions***
6.1 In the event of any Development commencing on Phase 2 during the Phase 2 Period by the Buyer or the successors in title of the Buyer the Buyer shall pay the following sums to the Seller
6.2 The Buyer shall pay to the Seller within 28 days of the commencement of any Development on the Relevant Phase 2 Part by the Buyer or the successors in title of the Buyer during the Phase 2 Period or if later within 10 working days of expert determination of the Open Market Value as provided for below a sum calculated in accordance with the following formula

$$\frac{A-B}{2}$$

A = Open Market Value as provided for below
B = The Credits

6.3 In the event that the Buyer and the Seller cannot agree upon the Open Market Value for the Relevant Phase 2 Part (which they will endeavour to do forthwith upon the commencement of Development on the Relevant Phase 2 Part) the parties shall refer determination of such Open Market Value to an expert as provided for in clause 10 below
6.4 The procedure in clauses 9.2 and 9.3 shall be followed on the commencement of Development on each Relevant Phase 2 Part by the Buyer or the successors in title of the Buyer in the event of Development not commencing in respect of the whole of Phase 2 at any one time during the Phase 2 Period
6.5 The Buyer shall pay to the Seller interest at the rate of 4 per cent above the base rate of Barclays Bank plc ("the Interest Rate") on all sums due from the Buyer under this clause 6 and not paid on the due date, calculated from and including the due date up to the date of payment and compounded on a monthly basis
6.6 It is agreed that the Buyer shall not be obliged to make any payment pursuant to this clause 6 in respect of all valuations agreed or determined under this clause 6 until the aggregate of all payments which would have been made to the Seller pursuant to Clause 6.2 but for this Clause 6.6 exceeds two million pounds (£2,000,000)
6.7 It is further agreed that if the Buyer shall procure the delivery to the Seller of a deed of covenant in accordance with the provisions of Clause 8 the Buyer shall have no further liability to the Seller in respect of this Agreement."

25. Clauses 6.3 and 6.4 refer respectively to expert determination pursuant to clause 10 and to a procedure under clauses 9.2 and 9.3. Further there are references to open market value "below" when the definition is now "above". Something appears to have gone wrong with the Payment Deed.

    (1) Clause 10 is in fact a clause dealing with Credits and, among other things, the recording of the same, rights of the Seller to inspect and take copies of relevant books of account recording the same and to underlying evidence. Ultimately the clause provides for resolution of any dispute about Credits by expert determination pursuant to clause 7.

    (2) Clause 9 is a clause dealing with the giving of notices. It only comprises clause 9.1 and its sub-clauses.

26. It was, as I understood matters, common ground that the references to clauses 10 and 9.2 and 9.3 should be read as references to the expert determination procedure under clause 7. However, it seems to me more likely that the references to clause 9.2 and 9.3 should be read as references to clauses 6.2 and 6.3. Such references would make more sense than references to clauses 7.2 and 7.3 and would fit in with the re-numbering of clauses not having been taken into account so that clause 7 may have been clause 10 in an earlier draft and clause 6 may have been clause 9. Clause 7 provides as follows:

    "*7. **Dispute Resolution Procedure***
    7.1 Any dispute under this Agreement is to be determined by an independent expert appointed by the parties jointly or if they do not agree on an appointment, appointed by the President (or other acting senior officer) for the time being of the Royal Institution of Chartered Surveyors at the request of either party
    7.2 The person so appointed is to act as an expert and not an arbitrator

7 .3 The expert must be a person who has at least ten years of experience of valuing property of the same type and in the same location as the Property
7.4 The expert must afford each party the opportunity within reasonable time limits to make representations to him, inform each party of the representations of the other, and allow each party to make submissions to him on the representations of the other
7.5 The fees and expenses of the expert, including the cost of his nomination are to be borne equally by the parties, who, unless they otherwise agree, are to bear their own costs relating to the determination of the issue by the expert
7.6 The determination of any matter referred to such expert is to be conclusive and to bind the parties"

27. Clause 8 deals mainly with Land Registry matters and the protection of the Seller's interests under the Payment Deed by the registration of a notice protecting rights under the Payment Deed and a restriction preventing transfer of Phase 2 Land without a solicitor's certificate that clause 8 has been complied with. In addition, clause 8 importantly provides:

"*8.1 It is agreed that the provisions of this Deed shall be binding on the Buyer and its successors in title and shall benefit all successors in title and the estate and effects of the Seller*

8.2 In the event that the Buyer shall sell or otherwise dispose of its freehold interest in Phase 2 or any part of it or grant a lease for a term in excess of 35 years of Phase 2 or any part of it (excluding a mortgage or charge) ("Relevant Disposal") the Buyer shall procure that the person to whom the Relevant Disposal is made ("the Third Party") covenants by deed with the Seller to observe and perform this deed (mutatis mutandis) as if it or they had been made a party to it so that upon any Relevant Disposal to any Third Party the same obligations as are contained in this agreement shall apply and that the provisions of this agreement shall be binding upon and capable of enforcement against any Third Party."

Main events after entry into the Payment Deed

(1) 2000 to 2010

28. MFD subsequently changed its name. First, on 9 November 2000, to London & Amsterdam Murton Limited. Secondly, on 7 October 2002, to Dalton Park Limited. In 2015, it entered members' voluntary liquidation and has since been dissolved. For convenience I refer to this company as "MFD" throughout the judgment.

29. Meanwhile, in about 2002 development started at Dalton Park. The vast majority of the development works, involving the building of a cinema, the building of roads and the construction and layout of a car park, took place on the Phase 1 Land. However, there was some development, comprising the laying out and marking and construction of some of the carpark on Phase 2 Land. I deal with the timing of this later on as there was oral evidence on the point.

30. The main contractor was Ballast Construction Limited. Practical completion appears to have been certified as at 27 March 2003. In June 2003 a building regulations certificate was issued.

31. On 29 August 2006, Mr Dunn was made bankrupt. The bankruptcy order was made in the Middlesborough County Court. The trustee in bankruptcy of Mr Dunn was Mr Lawrence Pagden, the fourth claimant, ("Mr Pagden") of the firm Benedict Mackenzie. He was appointed by the Secretary of State pursuant to section 296 Insolvency Act 1986 ("IA 1986"). It is common ground that all contractual rights and benefits under the Payment Deed which had been vested in Mr Dunn at the date of his bankruptcy, vested in Mr Pagden pursuant to section 306 IA 1986.

32. Mr Dunn was discharged from bankruptcy on 26 March 2007. It was common ground that such discharge did not re-vest any assets in himself that had become vested in his trustee in bankruptcy.

33. Prior to his bankruptcy Mr Dunn had been in business in partnership with a Mr Davidson. The name of the partnership was EPM Marketing and Management Consultants. Mr Davidson had commenced legal proceedings against Mr Dunn to establish a full account of the assets and liabilities of the partnership.

34. On 24 October 2007, a compromise of the partnership proceedings was agreed between Mr Dunn, Mr Pagden and Mr Davidson. As regards the 20% "share" of any overage payments under the Payment Deed it was agreed that the first £375,000 realised was to be paid to Mr Pagden (as trustee in bankruptcy) and thereafter any realisations were to be shared as to 60% by Mr Davidson and as to 40% by Mr Pagden (as trustee in bankruptcy).

35. On 29 December 2009, an application for planning permission was made in relation to Dalton Park. The applicant was MFD. The application was supported by a detailed Planning and Retail Report prepared by Indigo Planning Limited. As explained in paragraphs 1 to 5 of the Executive Summary:

> *" 1. This Planning Report is submitted in support of an outline planning application for the next phase of the regeneration strategy al Dalton Park. Planning consent is sought for a foodstore, cinema, hotel, petrol filling station and food and drink units. This application is supported by a suite of technical reports which demonstrate the appropriateness of the scheme.*
> *2. The proposal forms the next phase of the regeneration of Dalton Park. In 2000, the Secretary of State (SoS) approved consent for a major mixed leisure and retail scheme. Only part of that scheme was implemented (namely the Outlet Shopping Centre and ancillary food and drink offer). The remainder of the scheme which was not implemented included a cinema, hotel, food and drink outlets, health club, bowling alley and other commercial uses.*
> *3. This current application will deliver some of the uses previously approved, and deemed appropriate on this site, whilst also delivering a new foodstore.*
> *4. The scheme will realise the overall regeneration of Dalton Park as envisaged at the time of the granting of consent by the SoS.*
> *5. This proposal includes a large proportion of the same elements which the SoS previously found acceptable and approved, as part of the regeneration strategy of*

> *the site. This proposal will deliver the regeneration benefits previously expected but not yet fully realised."*

36. Later in this judgment I refer to some of the main planning applications that followed. The details are not comprehensive and are given simply to illustrate, as a general matter, the time period and approximate scale of the planning applications submitted regarding development of the Phase 2 Land.

37. By letter dated 20 October 2010, Macfarlanes LLP, solicitors to LAD (by then re-named ING Red (UK) Limited), wrote to Mr Pagden's solicitors, Sprecher Grier Halberstam LLP. The individual concerned was a Mr Sejas. The firm that he worked for later changed name and/or merged with another firm. At at least one point he left that firm and formed another one. For convenience, I shall refer to the solicitors for time to time acting for Mr Pagden as "SGH". In the letter, Macfarlanes explained (in relation to Dalton Park and the Phase 2 Land) that:

> " *We understand from our clients that the planning application is with the planning authority and they are currently awaiting confirmation of a planning committee date.*
>
> *In the event that planning is granted, a valuation and calculation will need to be done to ascertain whether any payment is due under the terms of the Payment Deed*."

38. This letter was relied upon by Mr Jamil as an admission that the grant of planning permission amounts to "Development" under the Payment Deed and thus triggers, or potentially triggers, the payment of overage. However, events after an agreement has been entered into are not usually admissible to assist in its construction. In any event, I consider that the letter was not descending to detail as to when payments would fall due under the Payment Deed.

(2) 2011 to 2013

39. In his report to creditors dated 7 June 2011, Mr Pagden explained the settlement that had been reached in relation to Mr Davidson. As regards any realisations under the Payment Deed, Mr Pagden explained that recovery was dependent on the grant of planning permission and the development proceeding. He was unable to give any indication as to the likelihood of that happening as he had been advised that the earliest that development might begin would be 2012.

40. On 7 June 2011 the relevant local planning authority (Durham County Council) (the "Council") resolved to grant planning permission as regards the Phase 2 Land subject to a referral to the Secretary of State and the prior completion of a form of Deed between MFD and the Council pursuant to s106 of the Town and Country Planning Act 1990.

41. On 3 August 2011, MFD agreed to sell Dalton Park to Peveril Securities Limited pursuant to a sale agreement of that date (the "2011 Sale Agreement"). The purchase consideration was some £36,625,000. Completion was subject to satisfaction of a condition precedent, defined as the "Condition". The copy of the 2011 Agreement which is in the trial bundles is incomplete and missing several pages. In broad terms

however I understood it to be agreed that the Condition was the obtaining of a relevant satisfactory planning permission for development of the Phase 2 Land.

42. The sale agreement required a number of ancillary deeds to be entered into. One was a deed between Peveril Securities Limited and the Consortium (that is the former MFD shareholders). Another was a Deed of Indemnity by which Peveril Securities would indemnify MFD against claims under the Payment Deed.

43. By letter dated 8 November 2011, SGH wrote to Macfarlanes (solicitors for LAD) referring to the Payment Deed and pointing out that it provided for payment of an uplift upon commencement of development in respect of Phase 2 (Land) and that this would suggest that further monies were then payable. The letter went on to ask either for details of when the money would be paid and to provide a calculation as to its quantum, alternatively to explain why it was said (if it was) that nothing was due. The letter also stressed that no payments should be made to Mr Barry Dunn personally but rather any payment referable to him should be paid to his trustee in bankruptcy.

44. On 26 March 2012, outline planning permission was granted by Durham County Council for the further development of Dalton Park. The s106 Deed was entered into on the same day. The outline planning permission was for a retail unit, an hotel, food and drink retail units, a petrol filling station and new access and landscaping works.

45. By letter dated 4 April 2012, Fladgate LLP acting on behalf of MFD wrote to SGH. The letter confirmed that outline planning permission had been granted and enclosing a copy. It went on to refer to previous correspondence and confirmed that there remained the threat of a judicial review application and that their client was not in a position at that stage to implement the planning permission.

46. By letter dated 18 April 2012, SGH looked forward to receiving an update in due course as to whether a judicial review application had been made or confirmation as to when MFD anticipated being able to implement the planning permission.

47. By letter dated 30 October 2012, SGH chased Fladgate LLP seeking confirmation as to:

> "*whether your client has to date implemented planning permission obtained, and accordingly whether the additional payment has now been triggered".*

48. On 9 April 2013, full planning permission/consent was applied for by Peveril Securities Limited/Dalton Park Limited in connection with the Phase 2 Land development. According to that form, building work had not commenced. Permission was granted on 9 July 2013.

49. By letters dated 15 May 2013, SGH sought information as to whether work had started on site and how long it was expected to take. Letters were sent both to the Council and Fladgate LLP.

50. On the same date, a planning application in relation to ground works and associated landscaping was submitted on behalf of Peveril Securities and MFD. Again the form confirmed that the building works had not commenced. Permission was granted on 23 July 2013.

51. By letter dated 17 May 2013, Fladgate LLP confirmed to SGH that the application for judicial review had been refused but that at that stage they could not confirm whether and if so when work was likely to start on site or how long it was expected to take.

52. On 3 June 2013, a further planning application was submitted with regard to amended vehicular access to the approved petrol station. Permission was granted on 15 August 2013.

53. On 5 June 2013, a further planning application was submitted regarding certain reserved matters regarding appearance, landscaping, layout and scale. Permission was granted on 28 April 2014.

54. On 6 August 2013, certain planning conditions were removed.

55. On 2 September 2013, Peveril Securities (Dalton Park Retail) Limited ("Peveril Securities (DP)"), the first defendant, acquired the benefit of the contract to acquire Dalton Park from MFD. Where I refer to "Peveril" it is to Peveril Securities (DP) or Peveril Securities Limited.

56. Under clause 8 of the Payment Deed, as I have explained, MFD had covenanted not to transfer part of Dalton Park, described as Phase 2, without first procuring that the transferee enter into a deed of covenant with the Consortium (that is the former MFD shareholders) to observe and perform the Payment Deed as if it were parties to it.

57. Accordingly, by deed dated 2 September 2013, Peveril Securities (DP) entered into a deed of covenant with the members of the Consortium (the "2013 Deed of Covenant"). The deed recited among other things the Payment Deed and clause 8.2 of it and that Peveril Securities (DP) had taken an assignment for the benefit of a contract to acquire the land and would later that day complete the transfer of the land to it. A copy of that transfer as executed is in evidence before me. The substantive clause of the Deed is as follows:

> "*The Covenantor* [Peveril Securities (DP)] *hereby covenants with the Covanantee* [Mr Bastholm and the others] *that with effect from today's date it will until released in accordance with clause 8.5 of the Payment Deed comply with the obligations on the part of Dalton Park Limited set out in the Payment Deed to the extent the same relate to Phase 2 (as that term is defined in the Payment Deed).*"

58. Mr Gavaghan submitted that the reference to covenanting with effect from todays date is that the covenant only applies to obligations on the part of MFD which first arose after that date.

59. By letters dated 20 September 2013, Fladgate LLP in letters to Mr Bastholm, Mr Dunn and SGH referred to the sale and transfer by MFD to Peveril Securities (DP), the 2013 Deed of Covenant that I have just referred to and gave the details of Flint Bishop LLP as acting for the purchaser.

60. Flint Bishop LLP, in the person of Mr Nick Wells, has acted for Peveril Securities Limited and its relevant associated companies throughout.

61. On 23 and 24 September 2013, further planning applications were submitted regarding release of a raft of further conditions. Permission was given on 19 March 2014 and 28 April 2014.

62. On 9 October 2013, a further planning application was made regarding construction of car parking spaces. The application was approved on 23 December 2013.

63. On 11 October 2013, revised version C (the original version having been issued on 12 November 2009), of an arboricultural impact assessment of trees at Dalton Park was authorised by Mr Watson FLS.

64. By letter dated 23 October 2013, SGH in a letter to Fladgate LLP asked again for confirmation as to when work was likely to start on site:

> "*bearing in mind that further payment will be triggered upon commencement of said work*".

SGH sent a similar letter to Flint Bishop LLP.

65. On 25 October 2013, a further planning application was submitted regarding ground works and associated landscaping. It was approved on 14 January 2014.

66. By October/November 2013, some of the claimants were in touch with a Mr Alex Munro a partner in Knight Frank LLP. The discussions were regarding what sums might be payable under the Payment Deed. In an email dated 17 November 2013 to Mr Bastholm Mr Gill expressed irritation with what he regarded as the arrogance of Mr Munro and suggested that they needed to pursue with all haste "*our uplift agreement and be aggressive and pedantic so they are in no doubt as to our intentions*". Mr Graves responded to Mr Gill:

> "*We cant do anything until they start on site. Alex/Barry think this will be early next year"*

67. Negotiations with Mr Munro continued in the background. Some forms of offer were put forward by the Consortium. Mr Munro's response was "Expert!". This matter appears to be the subject of without prejudice privilege.

68. By November 2013, the Consortium (or one or more of them) believed that development works on the Phase 2 Land would begin about 6 weeks after mid-November, I assume therefore about early in the new year. There was email traffic between them regarding the overage that they could expect including by reference to other sites. It was decided that they should meet together. A meeting was set up for 28 December 2013 at Teeside Airport.

69. By December 2013, a tender process was underway with regard to development of the Phase 2 Land.

70. By email dated 27 December 2013 to other members of the Consortium, Mr Dunn indicated that it was common knowledge that Peveril had announced that it would start construction works at the end of January/first week of February 2014 and complete by November 2014:

> "*well in time before the expiry of our uplift agreement in May 2105-so we have no worries here !*
>
> ,,,,
>
> *As they will start construction in February this triggers in our uplift agreement and from the appointment of an "Expert" for the independent valuation."*

71. The meeting at Teeside Airport took place on 28 December 2013 and was the subject of oral evidence at trial which I will deal with later in this judgment.

72. On 8 April 2014, SGH wrote to Flint Bishop LLP chasing responses to their letters of 23 October 2013 and 3 January 2014. Setting out the interest of the trustee in bankruptcy in the Phase 2 development, the letter stated:

> "*Our understanding is that planning permission has been obtained, and accordingly that further monies will become payable to the estate in bankruptcy upon commencement of works on Phase [2].*"

Confirmation of the current position regarding commencement of works was requested.

73. By letter dated 10 April 2014, Flint Bishop replied to SGH saying that their client was in the process of obtaining a reserved matters approval and had no committed start date. There were also several pre-commencement conditions which needed to be discharged. Their client, it was said, did not anticipate any payment falling due under the terns of the Payment Deed.

74. By further letter dated 15 April 2014, Flint Bishop confirmed to SGH that no development had been carried out on Phase 2 Land but that the site was open for access for the trustee's surveyor to inspect, as had been requested.

75. By email dated 16 April 2014, Mr Dunn informed Mr Pagden that Peveril had "announced on TV that they would start building this summer".

76. By letter dated 24 April 2014, Mr Grahame Morris MP, whose constituency included Dalton Park within its area, wrote to Peveril Securities stating that to date no work had started on site and raising concerns about the delays.

77. By letter dated 15 April 2014, SGH wrote to Flint Bishop accepting that additional payments under the Payment Deed were not necessarily dependent on planning permission being granted but upon "Development" having commenced within the relevant 15 year period and seeking confirmation that no such "Development" had occurred regarding the Phase 2 Land.

78. By email dated 28 April 2014 Mr Pagden wrote to Mr Dunn and with some perspicacity asked:

> "*What is to stop them simply doing nothing until next year and then not paying anything?"*

79. By letter dated 28 April 2014, SGH wrote to Flint Bishop referring to their understanding that Peveril had made an offer and complaining that the trustee had not been kept informed. Ultimately any settlement would have to be agreed by the trustee in bankruptcy. However, given the possibility of a surplus arising in the bankruptcy if payments were made under the Payment Deed, the trustee had no objection to Mr Dunn being involved in the negotiations. However, the trustee had to be kept informed and would be the only person with standing to conclude a settlement on behalf of Mr Dunn.

80. By email dated 7 May 2014, Mr Pagden wrote to Mr Dunn that:

> "*My solicitor…has received a letter from Flint Bishop in which they state that their client does not anticipate making any payment under the terms of the Payment Deed dated 9 May 2000. The implication is that they consider no development has commenced and that it will not start prior to 9 May 2015*".

He went on to suggest that an independent surveyor be instructed to inspect the site. As I understand Mr Pagden's oral evidence, that was to confirm (or primarily to confirm) that no "Development" had commenced.

81. By letter dated 9 May 2014, Peveril Secuities replied to Mr Morris MP explaining that delays to the start of works had been caused by various factors and that the most recent issue was a request, by the proposed supermarket retailer, to vary the layout of the overall building which would result in a need for a further planning application. However, Peveril was "keen" to start the phase 2 development as soon as possible and anticipated that that would be in early autumn 2014.

82. By a document dated 23 May 2014, the "Mathew Fox Consortium" made an application to RICS for the appointment of an independent expert. The nature of the dispute was stated as being:

> "*Determination of average uplift agreement valuation as per legal agreement dated May 2000 See attached documentation for phase 2 development of Dalton Park-Retail Development-Murton SR7 9HU."*

The form was completed on the basis that it was submitted by Mr Dunn.

83. A separate typed document, the status of which is unclear from its face (i.e. whether or not it was included with the application) is headed "Document sent with application of appointment of expert 10-05-2014". Before the documentation is listed out there is a paragraph as follows:

> "*Reference Valuation dispute Uplift agreement between:- Mathew Fox consortium = Barry Dunn + Alex Bastholm + Graham Gill + Angela Graves and Jonathan Frank Jackson and Peveril Securities Dalton Park Retails who changed their name on 1 July 1011 to Bo'ness Retail Developments Limited*"

It is noticeable that Mr Pagden's name is not included. At its foot the document has the name Barry Dunn and the date of 10.05.14.

84. In an email to MrPagden dated 19 May 2014, Mr Bastholm suggested that phase 2 had already started because of the construction of the car park on Phase 2 Land during the earlier development on the Phase 1 Land which carpark extended into the Phase 2 land.

85. By email dated 30 May 2014, RICS wrote to the parties to confirm that the President had appointed Mr P C Smith BSc., FRICS of Peter A Smith Chartered Surveyors as the independent expert on the application of the Matthew Fox Consortium.

86. On 4 June 2014 a further planning application (dated 3 June 2014) was lodged with regard to reserved matters. It was approved and the decision issued on 19 August 2014.

87. On 9 June 2014 a further planning application was lodged to discharge various planning conditions. It was approved on or about 23 September 2014.

88. On 21 July 2014, a further planning application was lodged regarding discharge of a further planning condition. It was approved on or about 23 September 2014.

89. By letter dated 30 July 2014, Flint Bishop wrote to Mr Dunn (as representative of the Mathew Fox Consortium). Among other things the letter asserted that the application to RICS was invalid. Four points were made in this respect:

(1) First, it was said that Mr Dunn had no standing because of his earlier bankruptcy and the application was invalid so far as it was brought by Mr Dunn rather than his trustee in bankruptcy;

(2) Secondly, it was said that the claim was barred by the Limitation Act. A claim based on development under Phase 1 encroaching onto the Phase 2 Land commenced more than 12 years before the claim to payment under the Payment Deed. No development had commenced more recently and there were outstanding planning consents being sought in that respect.

(3) Thirdly, it was said that the development in question was carried out prior to 2 September 2013 when Peveril acquired the site and that the claim should have been brought against MFD.

(4) Finally and in any event, the only development that had taken place on Phase 2 Land was a small car-parking area and that would be of no significant value so a valuation now would be an academic exercise.

The letter was copied to the appointed expert, Mr Smith.

90. By letter dated 11 August 2014, Mr Barry Dunn, as "Acting agent for Matthew Smith Consortium" replied to Flint Bishop's letter of 30 July 2014.

(1) As regards the question of the persons bringing the application for the appointment of an expert, Mr Dunn said:

> " *We are of course aware that Mr Barry Dunn does not personally have an interest under the deed as his former interest is now held by Mr Laurence Pagden as trustee in bankruptcy. Mr Dunn has however been acting as agent on behalf of the other members of the consortium <u>save for Mr Pagden</u> who is*

> *fully aware of the steps being taken by the other Consortium members.*" (emphasis supplied).

(2) As regards limitation it was said "our understanding" was that works may well have commenced in late 2002 and early 2003 prior to being completed in March 2003, that this was on Phase 2 Land and that it amounted to development within the definition of the Payment Deed.

(3) As regards the question of whether a claim arose against Peveril, Mr Dunn referred to the terms of the 2013 Deed of Covenant.

He suggested that the appointment of Mr Smith be put on hold for three months whilst the parties entered discussions to try to resolve the matter amicably.

91. By email of 15 August 2014 from SGH to Mr Dunn, the following among other points were made:

> *"whilst our client will have no objection if the balance of the Consortium intends to progress to arbitration, although we note the comments made by Flint Bishop in their letter dated 30 July 2014, our client has not formally consented and will not formally consent) to such an arbitration taking place. The balance of the Consortium may be entitled to progress arbitration notwithstanding this that is ultimately a matter for them. Our client will take a neutral stance in any proceedings will not risk a costs being awarded against the estate in bankruptcy.*
>
> *....*
>
> *Our client is of course keen to achieve greater realisations for the benefit of the creditors in bankruptcy, but nonetheless cannot allow the estate to be exposed on costs."*

92. As is clear from the email of 15 August 2014, Mr Pagden was not agreeing to being a party to the "arbitration" (in fact expert determination) though he did not mind whether the Consortium members proceeded without him, it was a matter for them whether or not they were entitled to do that under the Payment Deed.

93. By letter of the same date sent by SGH to Flint Bishop, SGH made the point that:

> "*In so far as concerns the application to RICS for a valuer to be appointed, this was not an application that was made by our client or with our client's consent. The balance of the Consortium are not however entitled to make such application as they consider appropriate*"

It is common ground that in the last sentence cited above the word "not" was inserted in error. Even with the errant "not" removed it is clear that Mr Pagden's position was as I have stated, namely, that the application was not made on Mr Pagden's behalf and he had not consented to being a party to the same. However, the consortium could make such application as they thought fit in effect at their own risk.

94. On 19 August 2014, the planning application made on 4 June 2014 was granted.

95. By email dated 8 September 2014, Mr Smith informed Flint Bishop that he had placed the reference on hold given the background and asked whether or not there had been a response to the letter dated 30 July 2014.

96. By email dated 9 September 2014, Flint Bishop informed Mr Smith that there had been a reply by the consortium to the Flint Bishop letter of 30 July 2014 and that Flint Bishop would like to address the jurisdictional issues further with them before any formal steps were taken.

97. By email dated 9 September 2014 from SGH to Mr Dunn, replying to the latter's suggestion that the trustee was prepared to run up the costs of employing an independent surveyor and yet not risk costs in relation to the appointment of an expert, said as follows:

> *"My client's position is that he has not consented to this matter being referred to arbitration at this juncture. It is correct that my client has asked for access to the site, so that an FRICS valuer appointed by my client can inspect whether any works are been undertaken on site in respect of phase II that constitutes "development" under the terms of the relevant Payment Deed .*
>
> *I note that you, and the other shareholders, intend to progress to arbitration, and that is ultimately a matter for you to determine. My client needless to say is entitled to any interest you may have in the Payment Deed as this constitutes an asset in your bankruptcy. However my client will not fully participate in the arbitration proceedings, although as aforesaid access to the site has been requested, and will not therefore accept any liability for any costs orders that may be made against the shareholders."*

98. By email dated 9 September 2014 sent to SGH, Mr Dunn asked:

> *"Please don't waste any money on FRICS valuer yet because my trustee in bankruptcy will be the first 1 to know if Peveril actually start work which will trigger the uplift agreement and then the appointed expert valuation can proceed with the valuation under our uplift agreement"*

99. By letters dated 23 September 2014, confirmation was given that the planning authority had discharged various planning consent conditions further to applications of 9 June 2014 and 22 July 2014.

100. By letter dated 23 September 2014, Flint Bishop replied to Mr Dunn's letter of 11 August 2014, reiterating their previous position but suggesting that the matter be put on hold for three months whilst they entered discussions to try to resolve matters amicably. A mediation was suggested.

2015

101. By email dated 23 February 2015, Mr Munro informed Mr Graves that:

> "*Everything is being geared up to start on site shortly. …It hasn't exactly been plain sailing!!"*

102. On 16 March 2015, a further planning application was made. This related to a change in planning conditions with regard to new access and landscaping. This was approved on 15 July 2015.

103. By a Deed of Covenant dated 30 April 2015 and made between British Overseas Bank Nominees Limited and WGTC Nominees Limited (as nominees of Henderson UK Property OEIC) (the "Covenantor") of the one part and the members of the Consortium of the other part, it was recited that the Covenantor had exchanged contracts to acquire the relevant land and would that date complete a transfer of it (the "2015 Deed of Covenant"). The Covenantor then covenanted with the members of the Consortium that it would until released comply with the obligations on the part of MFD set out in the Payment Deed to the extent that the same related to Phase 2.

104. On the same date Dalton Park was transferred by Peveril Securities (DP) to British Overseas Bank Nominees Limited and WGTC Nominees Limited (the Second and Third Defendants).

105. Notes of a project review meeting held on 5 May 2015 made by Gardner and Theobald LLP contain details of a Program Update as follows:

> *"3.1 Bowmer and Kirkland contract programme dated 21 April 2015 still current which identifies the commencement on site of 26 May 2015."*

106. I am satisfied that works on site only commenced on 26 May 2015, outside the Phase 2 15 year period.

107. In a letter dated 7 May 2015, from SGH to Flint Bishop, SGH referred to the Payment Deed and made the point that the relevant period would lapse on 9 May 2015 and that whether any further payment was then owing to the estate in bankruptcy would simply be determined by whether Development had taken place during the relevant period and this was a matter for expert evidence from a surveyor. The letter went on to say:

> "*We had understood that the other shareholders of Matthew Fox Developments Limited had taken steps to commence arbitration proceedings, and were of the view Development on Phase 2 [Land] had commenced. We have not received any updates in this regard either from your offices, or the other shareholders. We should be grateful if you would confirm the current status of any arbitration, or proceedings brought/threatened by the other shareholders."*

108. As confirmed by a statement of practical completion dated 23 May 2016, the relevant contract for works made between Peveril Securities (DP) and Bowmer & Kirkland Ltd was made on 26 May 2015.

109. By letter dated 11 September 2015, Flint Bishop wrote to Mr Grahame Humphrey, referring to an email from the latter to Wragges (who were acting for the new purchaser) and which email had been passed to Flint Bishop. As regards a reference in this email to continuing with the expert determination process previously commenced, Flint

Bishop referred to and enclosed copies of earlier correspondence from 2014 and said that that set out the respective position of the parties.

> "*The crucial point for us to flag at this stage is suggestion that any rights of the Consortium are joint rights and therefore can only be enforced on a joint basis. SGH….. have confirmed that the expert referral was not made by their client or with their client's consent. As such we cannot see how the expert can have been validly appointed, nor any basis for a selection of the "Consortium" to enforce the joint rights severally."*

110. By letter dated 18 September 2015, Flint Bishop wrote to Mr Smith referring to the recent correspondence with Mr Humphrey and reiterating their position with regard to the expert appointment.

111. By email dated 22 September 2015 sent to Mr Humphrey and Flint Bishop and copied to Wragges, Mr Smith said:

> "*Mr Humphrey asks me to proceed as per my appointment. This I am unable to do given the fact that Mr Wells* [of Flint Bishop] *is of the view that I have not been validly appointed and have no jurisdiction to decide any valuation. Until this issue is resolved I am unable to take matters any further.*
>
> *…*
>
> *Patently it is up to the parties as to how these matters are resolved and whether my appointment is valid. I be grateful if the parties could keep me informed of any progress in this matter*"

112. Correspondence was then pursued by Mr Humphrey with some vigour.

113. By email dated 4 November 2015, Mr Smith wrote to the relevant parties as follows:

> *"I do not wish to hear from Mr Humphrey about valuations or numbers at the present time. I have stated this previously but will reiterate that the parties MUST reach agreement on whether I have been correctly appointed and therefore have the legal ability to proceed. Until this is done I cannot see how I can proceed and I do not believe that establishing these facts falls to me.*
>
> *It may well be that the parties require very significant periods of time to clarify matters and reach agreement and that is fine with me. Can I reiterate that the reaching of agreement between the parties in respect of these matters is FUNDAMENTAL*"

114. During October and November 2015, Mr Humphrey pursued Flint Bishop for payment by Peveril of one half of the RICS application fee, £184.50p. Eventually a threat was made to issue a claim in the Small Claims Court for recovery of such sum. Flint Bishop

pointed out that this raised again the question of the validity of the application, which their client contested. By email dated 6 November 2015, Flint Bishop explained that payment of the sum sought would be made on a commercial, and in effect, without prejudice basis:

> *"… It will cost us more to defend on this basis than the £184.50 you are requesting. Therefore on a purely commercial basis and without any acceptance of the validity of the referral to the expert or that the referral was even made by the Seller as defined in the payment deed, my client will reimburse the £184.50 to whoever made the payment"*

115. Despite the careful wording of the email dated 6 November 2015, and a letter dated 22 December 2015 enclosing the payment on the same terms, Mr Humphreys subsequently used the payment in question as a 'commercial" admission of the validity of the expert referral (as he put it, "why else would they have agreed to pay it?"). This of course ignored the commercial reason for paying it as expressly set out by Flint Bishop at the time. Later the letter was relied on as a legal admission of the validity of the referral by a letter from Wilkin Chapman solicitors in 2017. Again, this was clearly misguided.

116. By November 2015, and despite all the earlier correspondence, Mr Humphrey was asserting that Mr Pagden had agreed to the reference to an expert being made by Mr Dunn on his, Mr Pagden's behalf.

117. By an email dated 9 November 2015 to Mr Humphrey, Mr Dunn confirmed:

> "*yet again my administrator agreed some time ago the question of my validity of acting on their behalf and the consortium*".

The suggestion that Mr Pagden agreed to Mr Dunn (or the Consortium) as acting on his behalf in seeking the appointment of an expert flies in the face of the earlier documentary evidence.

118. By email dated 25 November 2015 to Mr Dunn, Mr Pagden referred to a telephone conversation that they had had and said that he had spoken to Mr Sejas at SGH and that the latter had agreed that the letter to Flint Bishop dated 14 August 2014 contained an erroneous "not" in the final sentence of the first paragraph and that a letter was to be sent to Flint Bishop to confirm this. This therefore confirmed that at this time Mr Pagden was agreeing that the Consortium could take whatever course it thought fit but that he was not agreeing to any application being made on his behalf or in his name, which is what the letter of 14 August 2014 makes clear, even if the errant "not" is removed.

119. By email dated 1 December 2015, Mr Pagden set out his position to Mr Humphrey. Among other things he said:

> "*if proceedings are issued in my name as Trustee then there is a risk that, should those proceedings fail, there is an award of costs against me i.e. in simple terms-I bear the risk of failure the creditors the benefit of success.*

> *For those reasons, as previously set out in correspondence, I have taken a neutral position in relation to the arbitration proceedings as I have no funds with which to meet any costs order that may be made against the former shareholders".*

Although he continued to refer to "arbitration proceedings" it is clear that he was referring to the expert determination referral and process.

120. By email dated 1 December 2015, Mr Humphrey wrote to Mr Smith seeking an estimate of Mr Smith's probable costs involved in the valuation exercise if he were to proceed.

> "*Mr Pagden and in any event the other party is still responsible for 50% of these."*

121. By email dated 3 December 2015, Mr Smith confirmed that he had quoted his hourly charging rate to Mr Dunn in June 2014. It was, he said, almost impossible to estimate the likely level of his fees in the matter except to say that he would expect them to be very substantial and probably in the range of £15,000-£20,000. That was on the assumption that the process would be very straightforward and clear evidence and opinions would be provided by both parties. He went on to say that it did seem to him that many legal hurdles need to be overcome which currently existed between the parties and given the status of Mr Dunn he would require payment in advance before he would commence the valuation proceedings.

122. Under cover of a letter dated 22 December 2015, Flint Bishop sent Mr Dunn a cheque for £184.50 in satisfaction of any claim to 50% of the RICS application fee. The letter stated:

> "*This payment is made on a commercial basis without prejudice to our position that the referral was invalid for the reasons previously set out by us*"

No admissions as to the validity of the request to RICS and the appointment by RICS of an expert can therefore be gathered from the fact of the payment.

2016

123. By email dated 5 January 2016 Mr Smith wrote to the relevant parties and Mr Humphreys, clearly in some frustration. So far as Mr Humphreys was concerned, Mr Smith referred to him as having "*suddenly appeared on the scene*" and not having confirmed by whom he was instructed and on what basis. He referred back to the letter from Flint Bishop to Mr Dunn dated 30 July 2014 which, as he said, was "perfectly clear and easy to understand". There appeared to Mr Smith to have been no progress, other than a suggestion by Flint Bishop of mediation, that the claimants had not "in any shape or form" rebutted the assertions in Mr Wells letter or taken counsel's opinion. "Much activity" from Mr Humphreys appeared to him of "no effect" as the claimants were not addressing the legal difficulties which Mr Wells pointed out. He referred to having sent at least four emails to the parties confirming that the legal matters must be resolved before any independent expert could proceed. He ended by suggesting that the claimants address the outstanding issues otherwise he could not see that the reference would make any progress.

124. On 19 February 2016 a further planning application was made to discharge planning condition number six. That was approved in April 2016.

125. In March 2016, Mr Humphrey sought to suggest to Flint Bishop that that firm was suggesting that the reference made to expert determination was invalid because Mr Dunn had been bankrupt. By email dated 18 March 2016, Flint Bishop clearly stated their position and that of their clients:

> *"The issue is whether or not a valid referral was made by the relevant parties jointly at the time. As you point out, Mr Dunn's interest vested in the Trustee and the trustee has confirmed that any appointment process did not involve him and was not on his behalf. If the right to refer cannot be exercised severally, this must mean that the appointment was invalid.*
>
> *So however we dress this up and however many different routes we take, we always come back to this very same point. And it will always result in the same response because we are comfortable that it is legally the correct position.*
>
> *As I have mentioned previously, you should take legal advice on your position if you disagree that ours is legally correct."*

126. In a letter dated 19 March 2016 to Mr Smith, Mr Humphrey again sought to persuade Mr Smith to continue with the reference. As regards the question of the validity of Mr Smith's appointment, Mr Humphrey now argued that Mr Pagden, who on bankruptcy stepped into Mr Dunn's shoes, was a member of the Consortium and had to abide by the majority's decision as to how the matter was progressed. He ended by saying that although Mr Pagden was free to withdraw from the Consortium at any time he wished to, he had not done so to date.

127. Mr Smith's response, by email dated 22 March 2016, was to point out that the issues that arose were legal ones. Mr Humphrey was not a lawyer. Mr Smith had seen no letter or report from lawyers on his behalf on which he relied. Mr Smith asked for a copy of any such letters or reports so that he could consider his position in the light of them.

2017

128. By letter dated 10 February 2017, Wilkin Chapman LLP, solicitors, wrote to Mr Smith on behalf of their clients, the Consortium. Dealing with the four issues raised by Flint Bishop, they made the following points (among others):

(1) Authority of Mr Dunn: Mr Dunn had full authority of the Consortium. Mr Pagden had been kept fully informed. He had not objected to the steps taken by Mr Dunn. He was content for Mr Dunn to take the actions which Mr Dunn had taken. He simply wished to protect the bankruptcy estate from any adverse cost sanction. It was not accepted that the "Seller" as defined under the Payment Deed had not acted together.

(2) Limitation: the date on which were commenced on the car parks had not been evidenced by Flint Bishop. This was the sort of dispute that the independent expert should determine.

(3) Liability of Peveril Securities (DP): there was a dispute as to the construction of the Deed of Covenant entered into on 2 September 2013. This was a dispute for the expert to determine.

(4) Academic exercise: valuation was a matter for the expert to determine. It was accepted by their clients that if the value attributed is less than £2 million then they would not be entitled to any payment under the Payment Deed.

129. The letter also asserted that Peveril had reimbursed their clients with 50% of the cost of the RICS application fee and that it was therefore "clear" that Peveril were in agreement that their clients were entitled to appoint the expert in accordance with the payment deed. This of course ignored Flint Bishop's email of 6 November 2016 and their letter of 22 December 2015 both of which had been perfectly clear as to the payment being made for commercial reasons and on a without prejudice basis.

130. By letter dated 9 March 2017, Flint Bishop wrote to Mr Smith dealing with the letter of Wilkin Chapman LLP of 10 February and apologising for the delay in responding to Mr Smith. As regards the authority of Mr Dunn to invoke the expert appointment process, the letter made the point that the Wilkin Chapman letter did not really address the issue. Non-objection and contentment with the course taken did not amount to agreement that the application would be made on the trustee's behalf. As regards the second and third issues, Flint Bishop did not agree that the legal issues should be dealt with by an expert valuer. As regards the fourth issue, that is whether any valuation exercise would be academic, the letter made clear that the relevant argument was not connected with the validity or otherwise of any expert appointment but merely a suggestion that time and costs in pursuing the matter would be likely to be academic as a result of the £2 million threshold (or as I have called it, collar) required to be met before any payment fell due under the terms of the Payment Deed. The letter also referred back to their letter of 22 December 2015 as regards the payment of half of the RICS fee.

131. By email dated 29 March 2017, Mr Smith reiterated, yet again, his position to the parties that without a valid appointment he could not proceed and it remained paramount that that issue was resolved before he could commence his role as expert.

132. By letter dated 8 August 2017 to Mr Smith, Mr Pagden made a number of points to the effect that Mr Dunn had kept him appraised as to his efforts and that Mr Dunn had Mr Pagden's agreement to work in the interests of creditors to secure the monies due. However, the restriction was that he could not commit the bankruptcy estate to any cost liability without Mr Pagden's agreement e.g. the expert costs. The letter also corrected the typing error in the earlier letter from SGH dated 15 August 2014, confirming that the word "not" had been erroneously inserted so that it should correctly have stated that *"the balance of the Consortium are entitled to make such application as they consider appropriate, whether it had my support or not*".

133. By letter dated 26 September 2017, SGH also confirmed the error in the earlier letter of SGH dated 15 August 2014.

134. By email dated 10 October 2019, Mr Smith informed Flint Bishop as a matter of courtesy that he had stood down from the RICS appointment as Independent expert as of today. "I have heard nothing from the claimants for the last two years until last week". Flint Bishop replied to say that it was well over a year since they last heard anything.

135. By letter dated 6 November 2019, Mr D. R.Heap of Walker Singleton, chartered surveyors, gave notice that he had been appointed by the President of RICS to act as independent expert in connection with the dispute and asked for relevant documents.

136. Flint Bishop sought clarification as to whether Mr Heap had been appointed to replace Mr Smith on the 2014 purported appointment or whether a new application had been made. By email dated 19 December 2019, having looked into the matter, Mr Heap was able to confirm that his appointment was as the replacement for Mr Smith, who had stood down.

137. By letter dated 20 December 2019, Mr Heap set out the procedural directions that he was making on the expert reference.

2020

138. Flint Bishop immediately raised the question of whether Mr Heap had been made aware of the reasons why Mr Smith had not progressed the independent expert determination. On being informed of that position, by email dated 6 January 2020 Mr Heap wrote to the parties as follows:

> "*I can confirm that I have received no information from the RICS in relation to the previous appointment and any dispute relating to it and I have not heard from Mr Humphrey but my position is the same as that of the previous appointee.*
>
> *If there is a fundamental dispute between the parties on the validity of my appointment I am unable to proceed unless and until the dispute is resolved between the parties or through the Court."*

139. Predictably, Mr Humphrey invited Mr Heap to proceed, referring to the issue raised as being "all hot air and bluster". By further email of 7 January 2020, Mr Humphrey asserted that Mr Dunn had always had authority to act and that the application was a valid one.

140. By email dated 8 January 2020, Flint Bishop attached previous correspondence and said:

> "*In substance, the position remains precisely as set out in those communications. Had Mr Smith attempted to proceed with the determination regardless, we would have had to go to court to get an injunction to prevent the continuation of the determination until the validity of the appointment had been ruled on by the court. As Mr Smith correctly took the view that he could not determine the matter where his appointment was potentially invalid, we did not need to get that injunction*"

141. By email dated 8 January 2020, Mr Heap confirmed his position:

> "*I am unable to proceed until any dispute over the validity of my appointment is resolved".*

142. At about this time, Arndale Solicitors ("Arndale"), in the person of Mr Jason Jamil, were instructed by Mr Bastholm and Mr Gill to deal with the question of payments under the Payment Deed, as evidenced by an email from Mr Jamil dated 13 February 2022 to Flint Bishop.

143. By email dated 14 February 2020, Mr Heap advised the parties that he had been diagnosed with a serious medical condition and had no option but to retire from the appointment.

144. By letter dated 5 March 2020, Arndale wrote a pre-action protocol letter on behalf of their clients the Consortium (but not Mr Pagden) to Gowling WLG (UK) LLP ("Gowling") in relation to their client, the second and third defendants.. Among other matters the letter asserted that development of Phase 2 commenced in around June 2015. That of course was outside the relevant 15 year relevant period defined by the Payment Deed as the Phase 2 Period.

145. By letter dated 13 March 2020, Gowling pointed out that Arndale in their letter had accepted that development of the Park was outside the relevant phase 2 period. Accordingly no liability under the Payment Deed arose.

146. A further RICS form requesting the appointment of a dispute resolver dated 6 October 2020 was completed and sent by Mr Humphrey to RICS. The entry under the request to provide brief details of the nature of the dispute contained, among other things, a reference to the original application by its case number and the statement that "*this form is merely to update RICS of the present active parties. I understand that no further fee is required*." The applicant was described as being "*Former Matthew Fox Consortium*". The form also contained the statement that "*This is an ongoing case requiring reappointment following the resignation of the appointed expert David Heap through ill health*". The other party was listed as being the second and third defendants although of course the original reference had been made with Peveril Securities (DP) as the other party and, as was clear from earlier correspondence, the position consistently been taken was that Flint Bishop should receive relevant communications on behalf of Peveril Securities (DP). It is clear that this was not a new reference but even if it was, Mr Pagden was not a party to it.

147. By email dated 12 October 2020, Professor Graham F. Chase, of Graham Chase and Partners LLP, informed the parties that he had been appointed as independent expert, sought various documents and, in advance of any procedural letter, made some preliminary observations.

148. Initially there was delay caused by Professor Chase being unable to contact the individual provided as the point of contact for the second and third defendants by Mr Humphrey in his updated referral request of 6 October 2020. The response, when it

came, referred Professor Chase to Flint Bishop on the basis that the correct respondent was Peveril Securities (DP).

149. Flint Bishop then patiently explained the position.

150. By email dated 20 October 2020, Professor Chase asked Flint Bishop and Mr Humphrey to liaise and discuss their respective positions and if possible to provide him with agreed instructions either (a) to progress the dispute with a clear mandate or (b) to await the outcome of further legal initiatives or (c) where it was agreed that there is no dispute that he was able to determine, to inform him, so that he should step down. If agreement under the three proposed options could not be reached then he would require legal representatives to make submissions and might himself need to call upon a legal assessor.

151. Mr Humphrey responded by saying there was nothing worthwhile discussing with Flint Bishop. Flint Bishop explained their position by reference to attached communications with the previous appointed expert. They explained that were an expert to have proceeded then they would have sought an injunction to prevent that. However, to date, no expert had decided to proceed and it had not been necessary to obtain an injunction. As the referral was made by the consortium, it was for the consortium to seek a court declaration as to its validity which the consortium had elected not to do for a period of in excess of six years.

152. Professor Chase's response was to point out the difficulty of him proceeding unless the applicant confirmed that he was to proceed and underwrote all his costs. In that event, he would first seek a legal opinion on jurisdiction. If the legal opinion was to the effect that he had jurisdiction he would intend to continue with the reference and it would be for Flint Bishop's client to seek an injunction to stop him proceeding. The alternative and probably safest route, but creating further delay, would be for the applicant to seek a court determination.

153. By document dated 10 December 2020, headed "Court Application Validity of Expert Appointment", Mr Gill, on behalf of the four members of the former Matthew Fox Consortium agreed that Mr Pagden would be indemnified in respect of any and all legal costs involved in and resulting from the said court application and decision. It was not anticipated that further court action would be necessary and "the Respondent will adhere to the decision of the Court".

154. By letter dated 18 November 2020 Arndale confirmed their client's instructions to seek a declaration regarding the validity of the appointment of the independent expert.

2021

155. The current proceedings were issued on 26 March 2021. The claim was issued as a CPR Part 8 claim, but was later transferred to the CPR Part 7 procedure and statements of case were ordered.

The issues

156. The agreed list of issues may go beyond the pleadings but in large part as they largely turn on points of law or construction I am prepared to deal with them in any case. To some extent the issues were refined during the trial.

157. The issues that arise appear to me to be as follows:

(1) Was the application under the Payment Deed to RICS validly made and, in particular:

(a) Did any application have to be made by each and every person defined as the "Seller" or could it be made by one or more of them?

(b) If it needed to be made by all of the persons identified as the "Seller", could a majority bind a minority and on the facts did the majority purport to do so?

(c) What was the effect of Mr Dunn's bankruptcy and subsequent discharge?

(d) As a matter of fact was the Trustee in Bankruptcy one of the applicants, having consented to be such?

(e) Is the reference invalid as referring to the Consortium or by reason of lack of detail as to the dispute?

(2) What are the requirements under the Payment Deed before a payment falls due as regards (a) the meaning of "Development" and is there any implied term as to planning permission being "Development" (b) any duty of good faith (c) how the clause operates with regard to separate phases of developments (d) valuation issues to be determined by the expert and (e) when payments become due.

(3) Is the reference time barred by operation of the Limitation Act 1980 or otherwise?

(4) What is the respective liability position of (a) the first and (b) the second and third defendants under the Payment Deed/relevant Deeds of Covenant?

(5) Should the court exercise its discretion to grant declaratory relief given (a) alleged delay by the claimants in bringing the claim and (b) alleged lack of utility?

(6) Is the Court prevented from ruling on any of the above matters by reason of the agreement to submit matters to expert adjudication as provided for by the Payment Deed?

The witness evidence

158. In evidence, as adopted by them as their evidence in chief, were the following witness statements on behalf of the claimants from the following persons:

(1) Mr Bastholm;

(2) Mr Gill;

(3) Mr Pagden;

(4) Mr Dunn

(5) Mrs Graves;

(6) Mr Jackson;

(7) Mr Humphrey.

159. For the Defendants, the evidence adopted by them as their evidence in chief, were the witness statements of the following:

(1) Mr Munro;

(2) Mr Dodd.

160. Each of the witnesses were cross-examined.

161. As regards the witnesses for the Claimants, at the pre-trial review of this case, on 21 October 2022, I struck out the then trial witness statements relied upon by the claimants on the basis of failures to comply with CPR PD57AC. I permitted replacement witness statements to be served by 4pm on 4 November 2022 subject to conditions as follows:

(1) The statements had to comply with the requirements of PD57AC in form and content;

(2) They should contain no additional substantive evidence not contained in the relevant original statements (save for any explanation within (3) below);

(3) If the statement did not contain the confirmation required by paragraph 4.1 of PD 57AC or the certificate required by paragraph 4.3 of PD 57AC because they could not be given as a matter of fact (i.e. that they would be untrue) then any such statement must explain why and to what extent the said confirmation(s) could not be given.

162. At the start of the trial, Mr Gavaghan submitted that the replacement witness statements served did not comply with my order (or the relevant PD57AC) and that court permission was needed to rely upon them. Whilst reserving his client's position in the event an application for permission was made (and setting out factors that would militate against permission being given), he identified the following failures in the replaced witness statements:

(1) Other than that of Mr Pagden, each statement showed a failure to attempt to follow the proper practice in the preparation of witness statements for trial. In particular, each witness statement stated that the witness was given something preprepared by the solicitor to sign, the solicitor having taken instructions and documents not from the witness personally but from "the Claimant's" as if the preparation and giving of formal trial evidence was a group activity. Rather than each witness being separately interviewed and producing a witness statement in their own words, witness statements had clearly been drafted by the solicitor from generic documents and unidentified instructions and then provided in a ready-made form for the

witness to sign: the quotes drafting equivalent of asking constant (and impermissible) leading questions. I consider this complaint to be well made out.

(2) Secondly, the witness statements (including that of Mr Pagden) fail to identify by list the documents that the witness had been referred to, in breach of the clear requirement under paragraph 3.2 of PD 57AC. Mr Pagden says in his witness statement that he has reviewed his hardcopy and electronic records but does not further identify what these were. I consider that this complaint is well made out.

(3) Thirdly, rather than giving their own evidence, witnesses other than Mr Pagden sought to rely on other people's witness evidence. The statements have the hallmarks of being mass produced and not read properly. For example, there are identical grammatical errors in a number of the witness statements such as "I confirm to have read" (witness statements of other persons). I consider that this complaint is well made out.

(4) Fourthly, Mr Bastholm sought to incorporate by reference a witness statement that he had signed on 26 March 2021 which did not purport to have been prepared under CPR PD 57AC and sets out multiple arguments. I consider that this complaint is well made out

(5) Fifthly, the witness statements were riddled with legal argument and submission. I consider that this complaint is well made out.

(6) Finally the witness statements referred to without prejudice material. In particular, at least some of the without prejudice material had previously appeared in a statement of case of the Claimants and been removed when objection had been taken. As described by Mr Gavaghan, the draftsman of the witness statements apparently could not resist slipping it back in. It was agreed before me that certain passages of the witness statements should be struck out on the grounds that they contained inadmissible evidence of without prejudice negotiations. An order was made by me to deal with this point. Again I consider that this complaint is well made out.

163. As, among other things, the witness statements were comparatively short and largely referred to or set out correspondence (itself a breach of the practice direction), I decided to read the Claimants' witness evidence *de bene esse* and, on the same basis, to hear oral evidence and cross-examination of the witnesses before deciding whether I should exclude the evidence in whole or part or discount the same in whole or part.

164. Mr Gavaghan's concerns of the claimants' witness statements, as impacting upon the quality of the witness evidence were well illustrated by the oral evidence. On the substance of the relevant evidence and as matters emerged, the oral evidence given in cross-examination, largely supported the factual case of the First Defendant, itself reflected by the contemporaneous documents. It was largely not necessary for Mr Gavaghan to take the claimants' witnesses to the contemporaneous documents because their answers to his questions reflected those documents and his case. I therefore formally record that I allow such evidence to be admitted and that to the extent necessary this permission applies even if the witness statements do not comply with my earlier order. I should stress that this is a wholly exceptional course and the Claimants

should regard themselves as fortunate that I did not simply determine that all their witness evidence was inadmissible for non-compliance with my earlier order.

165. I should make clear however that I agree with Mr Gavaghan's criticism of the witness evidence prepared on behalf of the claimants. They contained argumentative matter, in many cases asserted facts without revealing that it was based purely on hearsay from other members of the consortium and, as cross-examination revealed, had been prepared by the witnesses speaking on the telephone to Mr Jamil with one or other members of the consortium (themselves witnesses) present and helping the witness with their recollection, further the documents that each witness had been shown was totally unclear.

166. As the oral evidence of the claimants was directed at fairly narrow areas, I will deal with my assessment of the evidence and relevant findings of fact at the relevant parts of this judgment rather than at this stage of the judgment.

167. Turning to the witness statements for the first defendant, Mr Dodd dealt with the Phase 1 (in time) development in 2002-3. Mr Munro dealt with the involvement of Peveril from the period leading up to its acquisition of the Dalton Park site in 2013.

168. Mr Dodd is the managing director of Napper Architects and is also involved in project delivery. He was involved in the first phase of development of Dalton Park which he considered commenced in about March 2002 (though to some extent this might have been the preliminary infrastructure works and other works not falling within the definition of "Development" in the Payment Deed). Doing the best that he could, and looking at the (now) limited available documents, his evidence (in summary) was to the following effect:

> "*Having looked at the plans and documents that are available to refresh my memory and knowing the rough time scales that various works were complete, I would estimate that the stone road base for the road and car parking was constructed sometime between the end of April and mid-May 2002. I cannot be any more exact due to the documents being destroyed and whilst my memory of this project is still very good, trying to remember exact dates over 20 years later is impossible*"

169. I consider that Mr Dodd was a truthful and careful witness. I accept that his evidence made sense and tied in with the documents. I consider that his estimate was accurate. I accept that estimate as being the factual position on the balance of probabilities.

170. As regards Mr Munro, he is a consultant with Knight Frank LLP ("**Knight Frank**"). He joined Knight Frank about 25 years ago. He was previously employed as the Head of Retail and was a salaried partner. He then became an equity partner until his retirement in April 2021. He has experience in various aspects of real estate across the United Kingdom including mixed use property, speciality development and office, industrial and retail units.

171. I have no hesitation in accepting his written and oral evidence. So far as this case is concerned he was effectively engaged in assisting Peveril during its involvement with the site. So far as the claimants are concerned, he was the individual with whom they

sought to agree figures regarding payment under the Payment Deed. At the end of the day, I did not find that Mr Munro's evidence really added much to the documents in terms of its relevance. It was consistent with the documents. I accept his evidence that there were discussions as to what if any payment was due under the Payment Deed and that the claimants' claim for payment under the Payment Deed had a nuisance value which Peveril was willing to consider paying off on that basis. However, for what it is worth, I also accept Mr Munro's evidence that Peveril considered that little if anything would fall due under the Payment Deed, assuming the anticipated development in 2013 onwards commenced prior to expiry of the relevant 15 year period (rather than just after expiry).

172. Part of the claimants' evidence was to the effect that Mr Munro had encouraged a reference to an expert. There was a question as to how far this was part of without prejudice negotiations. Assuming that it was not, I am satisfied that on any view, whilst Mr Munro almost certainly referred to expert determination pursuant to the Payment Deed as the mechanism to deal with the matter in the event that the parties could not agree (and they were a long way apart), he was only referring to a valid valuation process under the Payment Deed and he did not in any way waive or falsely encourage the claimants in the application that they (other than Mr Pagden) made.

The Law: construction of contracts and implied terms

173. I did not understand there to be disagreement between the parties as to the applicable law.

174. First, it is (in most cases) necessary to construe a contract before going onto consider whether terms are to be implied that contract (*Wells v Devani* [2019] UKSC 4, [2020] A.C. 129 at [28] and [59*]; Duval v 11–13 Randolph Crescent Ltd* [2020] UKSC 18, [2020] A.C. 845 at [26] and [51]).

175. As regards the approach to construction of a contract, Mr Jamil relied primarily upon the judgment of Aikens J (as he then was) in *Douglas Harper v Interchange Group Limited* [2007] EWHC 1834 (Comm), citing the Court of Appeal in *Absalom* [2006] 2 Lloyds Rep 129 I consider that this rather ignores the fact that there have been a number of more recent decisions by the House of Lords and Supreme Court since that date which have grappled and restated the principles.

176. I would therefore prefer to rely upon the more recent summary and analysis of the most relevant Supreme Court cases in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 ("Network Rail") at [18] and [19]:

> "*[18] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:*
>
> (1) *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause,*

(ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

(2) *The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;*

(3) *When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;*

(4) *Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;*

(5) *While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;*

(6) *When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.*

[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been

available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

177. As regards implied terms, there are terms implied in law as applying to specific types of contract. There are also terms implied in fact: that is where the specific facts justify implication of a term. In this case, only implication in fact is relied upon. As explained by Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72; [2016] AC 742, a term implied in fact can be further described as being:

> "*a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made.*"

178. As regards implied terms in fact, it is sufficient to set out relevant passages of Lord Neuberger's judgment in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72; [2016] AC 742. I have considered later cases, including *Barton v Gwyn-Jones* [2023] UKSC 3 but for present purposes do not need to refer further to them. Lord Neuberger's propositions are:

> *"[18] In the Privy Council case BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that: for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*
>
> *…*
>
> *[21] In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266, 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyds Rep 37. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which*

> *they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simons first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is vital to formulate the question to be posed by [him] with the utmost care, to quote from "Lewison, The Interpretation of Contracts 5th ed (2011)", p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simons second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."*

Was the application for the appointment of an expert validly made?

179. The first question is whether, as a matter of construction of the Payment Deed, all of the persons identified as "the Seller" were required to join in an application for the appointment of an expert. In my judgment, it is clear that the Payment Deed required each and every one of the persons collectively described in the Payment Deed as "the Seller" to join in an application for the appointment of an expert. The Payment Deed requires the expert to be appointed "by the parties jointly" or if they cannot agree then by the President (or the acting senior officer) of RICS at the request of "either party". The Seller, as one of the parties is all of the named individuals defined as the "Seller". Subject to the position of Mr Dunn, arising as a result of his bankruptcy, it would not be open to one or more (but not all) of the individuals defined collectively as the "Seller" to "agree" an appointment with the Buyer nor to request the President of RICS to make an appointment. I did not understand Mr Jamil to argue to the contrary and indeed the Particulars of Claim proceed on this basis.

180. The next question is whether or not there was ever any binding agreement amongst the persons described as the "Seller" that they would act by a majority and that if a majority reached a relevant decision, either in connection with the appointment of an expert or more widely, then the minority would be bound by the decision. This was not a point that was pleaded. However, the point was raised at trial and it is right that I deal with it. There is nothing in the Payment Deed itself which suggests that the majority of the persons described in the Payment Deed as the "Seller" could bind the minority. Further, there is no evidence that any such agreement was ever reached, at least before Mr Dunn became bankrupt and his estate vested in Mr Pagden. Further, there is no evidence that

Mr Pagden agreed to any such thing once Mr Dunn had been made bankrupt and his estate had vested in Mr Pagden. Although some form of loose agreement as to how the consortium would be represented was reached at Teeside Airport in December 2013, Mr Pagden was not a party to any such agreement and there is no evidence he ever agreed to be bound by majority decisions of the members of the Consortium other than Mr Dunn: indeed quite the reverse.

181. Furthermore, it is telling from the contemporaneous documents that the application for the appointment of an expert was made by the Matthew Fox Consortium which was identified as being all the claimants except Mr Pagden. There is no suggestion that the persons identified as the "Seller" in the Payment Deed in fact purported to make a decision as a majority binding a minority in relation to the request in 2014 which, in terms, did not mention Mr Pagden.

182. The next issue is the effect of Mr Dunn's bankruptcy. The matter has been traversed in contemporaneous correspondence. Under s306 Insolvency Act 1986, Mr Dunn's estate automatically vested in Mr Pagden on the latter's appointment. For these purposes, estate is defined as comprising "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy" as well as certain other property. On discharge from bankruptcy, Mr Dunn ceased to be subject to the restrictions that apply to bankrupts but his estate remained vested in his trustee in bankruptcy (Mr Pagden). Property is widely defined (see s436 Insolvency Act 1986). It would include rights under the Payment Deed, including the right to join in with the other persons comprising the "Seller" to agree with the Buyer the identity of an expert or to join in making a request for the appointment of one if agreement with the Buyer was not forthcoming.

183. The objection to the request to the President of RICS for the appointment of an expert has never been grounded on the proposition that "as a bankrupt" Mr Dunn was disabled from joining in the request for an appointment. It has always been founded upon the concept that Mr Dunn's rights in this respect had vested in and remained vested in Mr Pagden.

184. The next question is whether or not Mr Pagden in fact consented to the request to appoint being made in his name as opposed to him consenting to or not minding if the request was made in the names of the persons other than Mr Dunn covered by the description in the Payment Deed of the "Seller". Here it will be recalled that the contemporaneous correspondence showed that Mr Pagden did not mind what the members of the Matthew Fox consortium did, or even what Mr Dunn did (whether or not on their behalf), provided two points were respected. First, that any realisations from the Payment Deed which, absent Mr Dunn's bankruptcy, would have accrued to Mr Dunn, should be paid to Mr Pagden as trustee of Mr Dunn's estate. Secondly, that no steps taken by any of those persons would involve Mr Pagden in any liability, or risk of liability for costs. This second provision could not be met as regards agreement (with the Buyer) to an expert being appointed or to a request for appointment of an expert under the Payment Deed. That is because clause 7 of the Payment Deed placed the burden of paying respectively half of the costs of the expert on each of "the Seller" and the "Buyer".

185. In this respect, it is necessary to distinguish clearly between the agreement of Mr Pagden that Mr Dunn could pursue recoveries under the Payment Deed, provided that

he paid the relevant share of such recoveries to Mr Pagden, and that Mr Dunn (and the other Former MFD Shareholders) could themselves invoke the expert determination provisions of the Payment Deed from the fact that Mr Pagden did not agree to be a party to the appointment (actual or sought) of an expert under the Payment Deed.

186. It may be that Mr Pagden would have been content to rely upon an indemnity in this respect, as he has been prepared to do as regards any costs of these proceedings visited upon him as one of the claimants. However, no such indemnity agreement was reached or mooted prior to the request to RICS and, in any event, nothing was agreed. The claimants other than Mr Pagden have from time to time and in these proceedings asserted that Mr Pagden "agreed" to the consortium making an application for the appointment of an expert. He did agree or not object to the consortium doing that. However, he did not agree to being one of the requesting parties himself whether the request was made by the consortium members or by Mr Dunn on their behalf or on his own behalf. Further, the definition of Matthew Fox Consortium as used in the document contemporaneous with the request for the appointment of an expert shows that at the time it was well understood that Mr Pagden was not agreeing to be "joined in" to the application so that it was also made on his behalf, in fact as the document showed it was NOT made on his behalf.

187. The documents in this case speak very clearly. It is surprising that there should have been a factual dispute regarding the question of whether Mr Pagden authorised the application to RICS to be made on his behalf. However, this dispute arose because of the content of the witness statements filed by the Claimant. As it happened, in cross-examination it became clear that the relevant witnesses either had nothing to say on the point or that they agreed that Mr Pagden had not authorised the application to RICS to be made in his name with him as a party to it.

188. Mr Pagden's own witness statement set out clearly that he had authorised Mr Dunn to take any steps that he thought appropriate to secure relevant payment under the Payment Deed <u>provided that it did not expose Mr Pagden or the estate to any costs.</u> He referred to the application from RICS but in terms that did not suggest that the application was made <u>on his behalf.</u> However, in paragraph 19 of his witness statement he concluded that Mr Dunn had his authority to take the application to RICS "on <u>my</u> and the other claimants' behalf" (emphasis supplied). In cross-examination, he readily accepted that Mr Dunn had no authority to expose him to the risk of any costs, that he had not authorised Mr Dunn to make him, Mr Pagden, a party to the expert determination and that he (Mr Pagden) was not a member of the "consortium" referred to in the requesting application sent to RICS.

189. Mr Jackson's witness statement was slightly opaque: it referred to Mr Pagden's consent to Mr Dunn applying to RICS "on our behalf". The natural reading was that "our behalf" meant on behalf of the members of the consortium but not including Mr Pagden. The relevant paragraph also went on to speak of an undertaking to Mr Pagden by the members of the consortium to be responsible for relevant costs. In cross-examination it was clear that he had relied extensively on what Mr Graves had told him in making the witness statement. He was not aware of any agreement to indemnify Mr Pagden until that of 2020 in relation to the current proceedings. As I understood his evidence it was to the effect that, at least as far as he was concerned, the "our" related to the consortium and not to Mr Pagden as well.

190. Mr Gill's witness statement was also opaque as to whether Mr Pagden had consented not just to the application to RICS being made by the consortium but also to the application being made in his, Mr Pagden's, name. Mr Gill also suggested that Mr Pagden had been given an indemnity, as regards both the RICS appointment and as regards the court proceedings. In cross-examination he admitted that he had found out after his witness statement had been made that there was no indemnity regarding the RICS appointment. He had no relevant first-hand knowledge and was reliant on what he had been told. He did not suggest that Mr Pagden had agreed to him, Mr Pagden, being a party to the request to RICS for appointment of an expert.

191. Mrs Graves' witness statement was directed at whether she had given her husband her authority to represent her at the meeting at Teeside Airport in 28 December 2013. In her witness statement she referred to "the undertaking" given to Mr Pagden and said she was aware of it and bound by it. When asked to explain this statement she was only able to say that she understood that Mr Dunn had been bankrupt and that now he was not and so there was no problem and he, Mr Dunn, was no longer bound by the bankruptcy. She was totally unable to explain what she had meant or was dealing with when referring to the undertaking. It is unfortunate that a witness statement had been made for her which she did not understand and more unfortunate that she should have signed it. She did not suggest that Mr Pagden had directly authorised his name to be used in or to be a party to the application to RICS.

192. Mr Dunn's witness statement focussed on whether Mr Pagden had consented to Mr Dunn making the application to RICS in the name of the consortium. It did not in terms address the question of whether Mr Pagden had consented to the application being made also on his, Mr Pagden's, behalf. Indeed, the inference is to the contrary because Mr Dunn confirmed that he was not authorised to incur any costs on behalf of Mr Pagden and that would have been the effect of an appointment of an expert to which Mr Padgen was a party. In cross-examination he readily agreed that Mr Pagden was not a party to the request to RICS to appoint an expert.

193. Mr Bastholm, in his witness statement, did not really address the question of whether the application to RICS had been made on behalf of (among others) Mr Pagden. In terms, however, he did refer to Mr Dunn as attending the meeting at Teesside Airport in December 2013 as doing so "on behalf of his trustee" and then going on to say that the decision was made at the meeting to seek the appointment of an expert by RICS. In cross-examination it was clear that he was not suggesting that at the meeting it was made clear that Mr Dunn would be applying to RICS on behalf of Mr Pagden. Accordingly, his evidence did not really bear on the key point.

194. Mr Humphrey, in his witness statement, did not address the crucial question of whether the application to RICS was one that was also made by or on behalf of Mr Pagden. This is somewhat surprising because it turned out that he had been involved in assisting in making the application. At the end of the day, none of his evidence suggested that Mr Pagden had agreed to be a party to the application to RICS.

195. I am satisfied that the documentary evidence is plain. Mr Pagden did NOT consent to being a party to the application to RICS to appoint an expert, even though he consented to Mr Dunn/the members of the consortium making the application themselves on their

own behalf. The oral evidence on behalf of the the claimants either takes matters no further forward or confirms what the documents show.

196. As the request to RICS to appoint an expert was not made by all of the relevant individuals falling within the term the "Seller" (in the case of Mr Dunn, replaced by Mr Pagden, who steps into his shoes), the request and appointment are invalid. To be clear, Mr Pagden did not authorise the request to RICS to be made in his name. And in fact it was not made in his name, but only in the names of the members of the consortium. It follows that the application was invalid.

197. The question of whether the appointment is invalid as referring to the applicant as the "Matthew Fox Consortium" does not strictly arise. However, in my judgment the application to RICS would not have been invalid on that ground. If an application like this is made by a collective description then provided the collective description had meaning the application is, in my view, valid. Here the application was made by all of the persons defined together as "the Seller" but not by Mr Dunn's trustee in bankruptcy (in whom Mr Dunn's interest had vested).

198. On the balance of probabilities I find that the document outlining the consortium members and the documents sent was sent to RICS at the same time as the request for the appointment of an expert. The relevant factual witnesses were not sure as to whether or not the document was enclosed with the application. However, the document reads to me as not simply being an internal note but a note written to go with the application and this is why I consider on the balance of probabilities that it was sent with the application.

199. Even had it not been sent with the application, so that it was not immediately apparent to RICS which persons made up the "consortium" I would still have regarded the application as one validly made by the persons who were in fact members of the consortium.

200. I am also satisfied that the nature of what the expert was being asked to decide was clear from the application and the Payment Deed taken together. I would not have held the application to RICS and subsequent appointment to be invalid on the ground of uncertainty in that respect.

The operation of the Payment Deed:

(a) "Development": meaning and implied term

201. One of the agreed issues for me to decide was

> *"Issue 2: What were the works relied on by the Claimants and when were they commenced and completed? (Note: three sub-issues have been raised over time by the Claimants as to what "Development" triggered the right for an expert determination:*
>
> *i. The Car Park Works in 2002;*
>
> *ii. The grant of outline planning permission in 2013;*
>
> *iii. Works done by D2 and D3 after the end of the Phase 2 Period.)"*

202. I do not consider that I need decide when works were completed as that is not relevant to the dispute between the parties. The question under the Payment Deed is what is "Development", was there Development in this case and if so, when did it commence.

203. As regards "Development ", I have set out the relevant provisions earlier in this judgment. The commencement of Development potentially triggers a payment of overage subject to questions of valuation. I am satisfied that "development works" being the construction of a carpark on phase two land back in 2002 commenced in April/May 2002 as I have decided above. I am also satisfied that there were no other "development works", in that the main works of construction on the Phase 2 Land were commenced after 15 May 2015 as the documents that I have considered show and as I have already held.

204. The issue that I now address is whether there were any other matters which could amount to "development works" which were commenced prior to expiry of the 15 year period.

205. It is clear to me that "Development" defined as "development works" means physical development. Mr Jamil submitted that the grant of planning permission was encompassed by the term "Development". He also submitted that if not expressly covered by the term "Development", then there was an implied term that approved planning permission constitutes "development works other than Infrastructure Works". Part of his submission was that planning permission is necessary before physical works could be commenced. I suggested that finance to carry out the development might also be a precondition to physical works commencing but that that would surely not mean that securing financing amounted to "development works other than infrastructure works". Mr Jamil also submits that overage becoming triggered by planning permission makes sense as such would usually increase the value of the land.

206. I reject both Mr Jamil's submissions (as to express and implied terms) on these points. The wording of the Payment Deed is clearly expressed and does not include planning permission within the term "Development". There are simply no arguable grounds that that definition as a matter of construction includes planning permission or that it should be altered by way of an implied term as submitted by Mr Jamil.

207. Mr Jamil also sought to suggest that "development" occurred in this case prior to expiry of the relevant period on 9 May 2015, by virtue of works which he submitted must have been carried out to complete the arboriculture impact assessment report. First, I do not accept that that report shows any physical works to the property and, in any event, I consider that any such works would not amount to "development works" given the exclusion (in the definition of "Development") of matters which might otherwise be considered to be developments works.

(b) good faith

208. Some of the witnesses for the claimants referred to the first defendant not acting in good faith. In this respect they suggested that development works had been delayed to avoid triggering the overage clause under the Payment Deed. I did not understand Mr Jamil to rely on any such obligation of good faith (and alleged breach of the same). Be that

as maybe, I would not have allowed such a case to be run as the same was not pleaded. For completeness, there is no express good faith clause and the situation is not one where a duty of good faith would be implied (see e.g. the criteria considered in *Bates v Post Office Limited (No 3)* [2019] EWHC 606 (QB) para [725]).

(c) the time at which development must take place

209. Development must take place within the relevant 15 year period from the date of the Payment Deed.

210. I am satisfied that there was "Development" of part of the Phase 2 land when the permanent car parking which was built in 2002 extended into the Phase 2 land. The effect would have been to trigger the process under clause 6. It was common ground that at the time that such Development was commenced by way of the carparking, the open market value of that part of the Phase 2 Land was not sufficiently high to trigger the payment of any sum under the Payment Deed.

211. So far as the main development of the Phase 2 Land is concerned, for the reasons that I have given, I am satisfied that the Development commenced after expiry of the relevant 15 year period.

(d) payment provisions

212. The question of how the Payment Deed operates is relevant to the resolution of the issue agreed as issue 6 which is as follows:

> *"Issue 6: Should the Court exercise its discretion to grant the declaratory relief sought? In particular:*
>
> *i……*
>
> *ii. In the circumstances of this case, would the declaration(s) sought serve a useful purpose? In particular, is there any realistic prospect that the Claimants will be entitled to payment under the Deed if the matter is remitted to the Expert?"*

213. Under the Payment Deed, payment may fall due if development is commenced within the relevant 15 year period from the Payment Deed (clause 6.1).

214. Payment, if due, will fall due within 28 days of commencement of the development works on the Phase 2 Land or if later within 10 days of the valuation expert having determined the "Open Market Value" of the relevant part of the Phase 2 land on which development works are commenced (clause 6.2).

215. The open market value is one element of the formula that determined what sum is payable (subject to a collar in clause 6.6). The relevant formula requires the identification of the open market value of the Phase 2 land (or the relevant part of it on which development works are commenced). That is to be agreed or determined by an expert. From this figure are deducted certain "credits", essentially the buyer's costs of obtaining relevant planning permission in relation to the Phase 2 land (or the relevant part of it on which development commences) and the costs of infrastructure works

servicing the Phase 2 Land (or the relevant part of it) which are in place prior to commencement of the development (see clause 6.2). The sum of the open market value minus the credits is then divided by two to create the sum to be paid (subject to the collar).

216. In the event that development on the Phase 2 land is carried out in stages then clause 6 operates as regards each relevant part of the Phase 2 land (see clause 6.4).

217. The collar operates to provide that no payment at all is due unless and until the total sums payable under clause 6 would otherwise amount to more than £2 million (clause 6.6).

(1) This means that, as regards the entire development of the Phase 2 land in one stage, the Open Market Value of the land would have to be at least £4 million (assuming no credits fell to be deducted from that figure under the formula). This is the result of the formula in clause 6.2 requiring the relevant "open market value less credits" to be halved to arrive at the sum payable.

(2) In a case where (as here) development of Phase 2 Land took place in stages, then the total sums due applying the formula in clause 6.2 to each stage of the development are then aggregated and payment only falls due once the aggregated sums otherwise due exceed £2million (see clause 6.6 references to "all valuations" and the "aggregate" of payments otherwise due).

218. On the relevant facts, this means that (subject to limitation which I will come onto), if I am wrong in deciding that the current reference to the President of the RICS to appoint an expert was invalid, then the reference could proceed as regards the carparking extended from the Phase 1 land onto the Phase 2 land as carried out in 2002 or so. However, such reference would be pointless because the relevant part of the Phase 2 Land on which that carparking was constructed did not then have a value of over £4 million. There was no subsequent development within the 15 year period provided for on which further sums might fall due (subject to the collar) to be aggregated with the sum otherwise falling due on the development of the initial carparking. In those circumstances there would be no point in the expert determination taking place.

(4) Limitation

219. The agreed issue put before me regarding limitation was as follows:

> *"Issue 5: Is the claim and/or any underlying right to an expert determination time barred by operation of the Limitation Act 1980 or otherwise?"*

220. If, contrary to my decision that the current reference to an expert is invalid and of no effect, the main issue is whether or not the current reference would in any event be invalid as having been made after expiry of any applicable limitation period. Depending on the answer to that question, is the further question of whether or not, because of limitation or otherwise, there is anything preventing a reference to an expert now being made.

221. The first defendant's case is that the Limitation Act 1980 applies to requests to appoint an expert and to invoke the expert determination clause. Put broadly, s9 Limitation

Act 1980 applies to actions to enforce specialities. As a promise under deed, submitted Mr Gavaghan, the power to request appointment of an expert would expire 12 years after the ability to appoint arose. The request in this case was received by RICS on 23 May 2014, therefore, submitted Mr Gavaghan, the relevant works would have had to have commenced after 23 May 2002. However, Mr Dodd's evidence (which I have accepted) is that construction works regarding the carpark commenced in April to mid-May 2002, before 23 May 2002.

222. On this issue of law, I prefer the submissions of Mr Jamil. The time limit to the ability to request an appointment is, in my judgment, brought about because, whether as a matter of construction or as an implied term, the contract is subject to the requirement that the request must be made within a reasonable period. If made within a reasonable time then the request is valid. If made outside that time it is invalid. In this respect I was referred to dicta of Ramsey J in *Braceforce Warehousing Limited v Mediterranean Shipping Company (UK) Limited* [2009] EWHC 3839 (QB) who doubted that limitation applied in this area. I respectfully agree. In my judgment, limitation affects the ability to bring court proceedings not the ability to take steps such as requesting appointment of an expert. Accordingly, the making of a request within a reasonable time will then result in their being 12 years from that request for the appointment to be enforced by court proceedings.

223. I am not satisfied that a reasonable time to apply for the appointment of an expert had elapsed after April/May 2002 and by the time of the request in May 2014. That was still within the relevant 15 year period. After all, it might not be worth appointing an expert until it was clear that there was later development which would result in a value that could be aggregated with earlier development as provided for by clause 6.6 so as to get over the "collar". In those circumstances I would consider that a reasonable time would run until at least expiry of the 15 year period. However, I heard limited submissions as to what a reasonable time would be on the facts of this case.

224. However, I am satisfied that a reasonable time to appoint an expert with regard to the "Development" comprising the carparking commenced in April/May 2002 has now long since passed. Accordingly, in my judgment, it is not now open to the claimants to bring a fresh application to appoint an expert in respect of such matters and such period had expired by the time of the issuing of the claim form in this case (if not long before that). After all, the relevant 15 year period expired in May 2015, over 5 years and 10 months before the issue of the claim form on 26 March 2021. The expiry of that 15 year period is now approaching 8 years ago.

(5) the respective liability positions of the first and second and third defendants vis a vis the claimants

225. As formulated as agreed issues, the questions raised in relation to this topic were as follows:

> *"Issue 3: Who owned the property at the time of those works?*
>
> *Issue 4: Would the First, or any other, Defendant be liable for any obligations relating to such works under the Payment Deed?"*

226. As regards agreed issue 3, the position is clear. As Mr Gavaghan set out in his skeleton argument, it was common ground that:

> "the answer is: a. In respect of the Car Park Works – D1's predecessor in title;
> b. In respect of the obtaining of planning permission in 2013 or 2014: D1
> c. In respect of the works of Development carried out after the expiration of the Phase 2 Period: D2 and D3.".

227. As regards issue 4, in my judgment the entry by the first defendant into the 2013 Deed of Covenant made it liable from then to the members of the Consortium in respect of the obligations of the MFD to pay sums under the Payment Deed as regards the Phase 2 Development Land whenever such obligations arose and even if the relevant development had commenced prior to the date of entry into the 2013 Deed of Covenant. In my judgment that follows from the ordinary construction of the words used in the Deed of Covenant. It also matches common sense and there are no surrounding factors pointing to a different construction of the clause. Although the liability of the covenantor only commences with the Deed the liabilities that it covers under the Payment Deed are all the relevant liabilities in relation to payments arising from development of Phase 2 Land, whether that development took place prior to the Deed of Covenant or post it.

228. The same conclusion applies as regards the 2013 Deed of Covenant.

229. I have assumed that there was no release of either the 2013 Deed of Covenant nor the 2015 Deed of Covenant. I do not have to consider any apportionment of liability as between the different defendants nor MFD. Nor do I have to concern myself whether the obligations under the Deeds of covenant were as guarantor or primary obligor.

Declaratory relief

230. In my judgment it is appropriate to grant appropriate declaratory relief to declare what the parties' rights are. It does not seem to me that delay enters into the position on the basis of the findings that I have made.

The court's jurisdiction in the light of the expert reference

231. Mr Jamil's submission is that only the issue of the validity of the reference to the expert should be determined and that the remainder of the issues are for determination by an expert.

232. As I have found the reference to expert determination to be invalid there is no issue as raised by Mr Jamil's submission as to the court's jurisdiction to make relevant determinations in the light of the appointment of an expert. There is no expert and one cannot now be appointed.

233. In any event, I would have found that the agreement to the list of issues to put before the court mean that those issues at least could be decided by the court.

234. Further, I would also have decided that the reference made to the expert was the question of valuation of the open market value. Questions such as whether there had been relevant "Development" and when would be matters going to the jurisdiction to appoint the expert rather than matters for his determination (see generally *Barclays Bank plc v Nylon Capital* [2011] EWCA Civ 826, [2012] 1 All ER (Comm) 912 esp. at [21]) and thus clearly matters for the court.

Conclusions

235. In summary, my main conclusions are as follows:

(1) No expert was validly appointed in this case under the Payment Deed. The Payment Deed required all of the members of the consortium to join in an appointment. After the bankruptcy of Mr Dunn, his right to join in such an appointment vested in his trustee in bankruptcy and did not re-vest in Mr Dunn after his discharge from bankruptcy. On the facts, Mr Dunn's trustee in bankruptcy did not agree to be joined into the application to RICS for the appointment of an expert, nor did the request for such an appointment purport to be made on behalf of (among others) the trustee in bankruptcy.

(2) The main "Development" of the Phase 2 Land took place after expiry of the 15 year period provided for by the Payment Deed, such that it could not trigger any payment under the Payment Deed.

(3) The only other development of the Phase 2 Land which could in principle have triggered a right to payment (and the right to appoint an expert) was the development by way of construction of carparking spaces on part of the Phase 2 Land in 2002. However, the value of the relevant part of the Phase 2 Land would not at that stage have been such as to trigger any payment to the "Seller" under the Payment Deed because of the "collar" that provided no payment would be made until the application of the formula providing for payments to the Seller resulted in a payment of at least £2 million. It is conceded that the relevant part of the Phase 2 Land on which the carpark was constructed was not worth more than £4 million (which was the minimum open market value required to give rise to a payment of £2 million under the formula. In fact the formula would probably have required the open market value of the relevant parcel of land to be worth more than that because the formula provided for the subtraction of "credits").

(4) It is now too late to apply for an expert to make a determination of the open market value of the part of the Phase 2 Land on which the carpark was constructed in 2002 and academic to do so because of the value of the land on which it was constructed in 2002.

236. No agreed minute of order having been lodged by the time of hand down of this judgment, I make the following order as indicated when a draft of this judgment was circulated: there will be a further consequentials hearing to determine the form of order and all matters consequential upon this judgment (including, without limitation permission to appeal). The time for appealing is also extended so that, in effect, the 21 day period commences from the date of the sealing of the order to give effect to this judgment.