Neutral citation number: **[2024] EWHC 3625 (TCC)**

IN THE HIGH COURT OF JUSTICE CLAIM NUMBER HT-2022-MAN-000059
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

BETWEEN:-

(1) PATRICK JOHN LOMAX

(2) ORCHARD HOUSE PROPERTY DEVELOPMENTS LIMITED Claimants

and

(1) SUSAN WENDY DIMELOW

(2) LORNA MARY DIMELOW Defendants

AND

IN THE HIGH COURT OF JUSTICE CLAIM NUMBER HT-2023-MAN-000044
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

BETWEEN:-

ORCHARD HOUSE PROPERTY DEVELOPMENTS LIMITED Claimant

and

(1) SUSAN WENDY DIMELOW

(2) LORNA MARY DIMELOW Defendants

BEFORE HIS HONOUR JUDGE BEVER
SITTING AS A HIGH COURT JUDGE

Manchester Civil Justice Centre
1, Bridge Street West
Manchester M60 9DJ
Trial – 2,3,4,5 and 13 September 2024
Draft Judgment circulated- 29 October 2024
Judgment handed down – 5 November 2024

JUDGMENT

Wilson Horne of Counsel and Aaron and Partners, Solicitors, for the Claimants

Pepin Aslett of Counsel and Kuit Steinart Levy, Solicitors, for the Defendants

Introductory Index

1. This is my judgment following the trial of the above claims.

The Parties

2. The Second Claimant (**Orchard House**) is a property development company which was incorporated on 25 May 2015. The First Claimant (**Mr Lomax**) is the sole director of Orchard House. At all material times he was the controlling mind of the company.

3. The First Defendant (**Mrs Dimelow**) and the Second Defendant (**Ms Dimelow**) (together **the Defendants**) are mother and daughter respectively. At all material times, they were the registered freehold owners of a property

known as Mount View Farm, Wrexham Road, Malpas, Cheshire SY14 7EJ, and of the adjoining land (**the Farm).**

The Background Facts

4. In or around January 2013, Mr Lomax was running a company known as Land Planning Limited (**LPL**). LPL's business was seeking and securing planning permission for development on behalf of landowners.

5. Mr Lomax approached the Defendants with a view to obtaining planning permission to construct residential properties on the Farm. The Defendants had made a number of unsuccessful attempts to secure such planning permission dating back to 1996.

6. They, therefore, engaged with Mr Lomax's proposals, leading to LPL and the Defendants signing a promotion agreement dated 5 September 2013 (**the Promotion Agreement**), which was drafted by the Defendants' then solicitors, Hibberts. The basis of the Promotion Agreement was that LPL would apply for, and obtain, planning permission in relation to land on the Farm and that, when the land was subsequently sold with the benefit of that planning permission, LPL would be entitled to receive 25% of the difference between the eventual sale price and the original value of the land prior to planning permission being obtained.

7. The Promotion Agreement ran for its full 2-year term, after which time the parties then agreed to extend it by a further 2 years. However, prior to the expiry of this extended period, Mr Lomax proposed a different arrangement to the Defendants, pursuant to which he or Orchard House would purchase the land from them and develop it.

8. This proposal was accepted by the Defendants and, following negotiations through solicitors, the terms of the agreement were captured in a contractual document dated 19 January 2017 (**the Master Agreement**). The parties to the Master Agreement were Orchard House, Mr Lomax and the Defendants. Prior to this project, Orchard House's activities had been limited to barn conversions and single unit developments.

9. Pursuant to the Master Agreement, the Defendants were to sell the Farm to the Claimants, subject to their retaining part of the land on which Orchard House would construct a property for them (**the New Farmhouse**). Mr Lomax and Orchard House were not in a position to purchase the Farm outright when the Master Agreement was entered into. It was, therefore, agreed that they would purchase certain parcels of land on the Farm immediately, and that they would acquire an option to purchase the remaining land which they were to acquire under the Master Agreement.

(i) The Master Agreement

10. The Master Agreement divided the Farm into six separate plots, referred to as Plots A to F.

11. Plots A,B and D consisted of agricultural land and it was the Claimants' intention to secure planning permission to build houses on those plots.

12. The material terms of the Master Agreement were as follows:-

- by Clause 2.1, the Defendants agreed to sell Plots A, B and D to Orchard House for a purchase price of £370,000;
- by Clause 2.2, Orchard House agreed to construct the New Farmhouse on Plot E for occupation by the Defendants;
- By Clause 2.4, the Defendants agreed to grant Orchard House an option to purchase plot C (**Option C**);
- By Clause 2.5, the Defendants agreed to grant Mr Lomax an option to purchase plot F (**Option F**).
- the construction of the New Farmhouse on Plot E was to begin before any works were commenced on plots A, B and D and it was to be completed within 18 months of the date of the Master Agreement (namely by 19 July 2018), failing which the Defendants had the right to terminate Options C and F;

13. Pursuant to the Master Agreement, the parties carried out the following steps:-

- Orchard House purchased plots A, B and D for £370,000 on 19 January 2017, and those plots were subsequently developed in late 2020, with 18 properties being built on them;
- Orchard House and the Defendants entered into an Option Agreement on 19 January 2017 in relation to Plot C (**Option Agreement C**);
- Mr Lomax and the Defendants entered into an Option Agreement on 19 January 2017 in relation to plot F (**Option Agreement F**);

(ii) Option Agreement C

14. Option Agreement C contained the following key provisions:-

- by Clause 7.1, Orchard House "may exercise the option at any time during the Option Period provided that Planning Permission has been granted by serving an Option Notice on [the Defendants]";
- the "Option Period" is defined as "five years from [19 January 2017]";

- by Clause 7.2, “the Option may only be exercised in respect of the whole of the Property and not in respect of part only”;
- by Clause 8.1, “on the date of exercise of the Option [Orchard House] will pay the Deposit to [the Defendants’] conveyancer as stakeholder on terms that on completion the Deposit is to be paid to [the Defendants] with accrued interest”;
- by Clause 8.2, “the Deposit must be paid by direct credit”;
- by Clause 8.4, “if the Deposit is not paid on the date of exercise of the Option, the Option Notice will be null and void”;
- by Clause 8.5, “the provisions of Clause 8.6 to 8.9 (inclusive) will only apply if: (a) the Deposit is less than 10% of the Purchase Price; or (b) no Deposit is payable upon exercise of the Option”;
- By Clause 8.6, “Deposit Balance means…(where no Deposit is payable upon exercise of the Option) a sum equal to 10% of the Purchase Price”;
- By Clause 8.7, “if completion does not take place on the Completion Date due to the default of [Orchard House, it] will immediately pay by direct credit to the [Defendants’] conveyancer the Deposit Balance (together with interest on it at the Contract Rate for the period from and including the Completion Date to and including the date of actual payment)”;
- by Clause 9.1, “if the Option is exercised in accordance with the terms of this agreement, [the Defendants] will sell and [Orchard House] will buy the Property for the Purchase Price on the terms of this agreement”;
- the Deposit is defined as “10% of the Purchase Price (exclusive of VAT)”;
- By Clause 17.1, “the Purchase Price will be the amount agreed or determined as being 75% of the Market Value”;
- by Clause 17.2, “if the parties reach agreement on the Purchase Price within twenty Working Days after the date of exercise of the Option, they will immediately endorse and date a memorandum of the Purchase Price on the Option Notice and the date of the memorandum will be the date of the agreement of the Purchase Price for the purposes of clause 19(b)”;
- by Clause 17.3, “if [the Defendants] and [Orchard House] fail to agree on the Market Value within twenty Working Days after the date of exercise of the Option, either party may refer the matter for determination by an Expert”;
- by Clause 17.11, “the Expert will act as expert and not as arbitrator. The Expert will determine the Market Value. The Expert’s written decision on the matters referred to the Expert will be final and binding on the parties in the absence of manifest error or fraud”;
- by Clause 19, “completion will take place on the later of, (a) the date which is four weeks after the service of the Option Notice or (b) the date which is four weeks after the date that the Purchase Price is agreed or determined”;
- by Clause 21(a), “[the Defendants] may terminate this agreement with immediate effect by giving notice to [Orchard House] if…[Orchard House] is in fundamental breach of any of its obligations under the agreement”.

(iii) <u>Option Agreement F</u>

15. Option Agreement F contained the following specific provisions:-

- by Clause 8.1, “subject always to clause 8.2, Mr Lomax may exercise the Option at any time during the Option Period by serving an Option Notice on [the Defendants]”;
- by Clause 8.2, “Mr Lomax may not exercise the Option before the issue of the Completion Certificate [relating to the New Farmhouse] (as defined by the Master Agreement)”;
- by Clause 8.3, “on the date of exercise of the Option Mr Lomax will pay the Deposit to [the Defendants’] conveyancer as stakeholder on terms that on completion the Deposit is paid to [the Defendants] and that the accrued interest is paid to Mr Lomax”;
- by Clause 9.1, “if the Option is exercised in accordance with the terms of this agreement [the Defendants] will sell the Property to Mr Lomax for the Purchase Price”;
- by Clause 1.1 (definitions):-
  - the “Completion Date” is defined as “the date which is four weeks after date of service of the Option Notice”;
  - the “Option Period” is defined as “the period of two years from the date on which [the Defendants] shall be able to vacate the existing dwellinghouse on the Property and move into the new dwelling house to be constructed in accordance with the terms of the Master Agreement”;
  - The “long stop date” is 6 years from the date of the agreement;
  - the “Deposit” is stated to be a fixed sum of “£32,500 (exclusive of VAT)”.

(iv) <u>Subsequent events in relation to Plots C and F</u>

16. After the Option Agreements had been entered into, Orchard House embarked on constructing a property for the Defendants on Plot E.

17. On 25 June 2018, a Certificate of Practical Completion was issued in relation to the New Farmhouse.

18. It is the Defendants’ case that they moved into the New Farmhouse in June 2018. Mr Lomax does not accept that they did so. He maintains that the move did not take place until February 2019. I return to this issue below.

19. Mr Lomax wrote to the Defendants on 20 July 2018, setting out a proposal. The letter has been central in the trial. In the letter, Mr Lomax:-

- informed the Defendants that he had been unaware that a main water pipeline (**the Severn Trent Pipeline**) ran directly across the land which the Claimants had acquired and proposed to buy and suggested that they ought to have disclosed its existence to him during pre-contractual disclosure in 2016;
- informed them that the additional costs to the Claimants associated with moving the pipe (which he considered to be the only realistic option) were substantial, and in the region of £220,000;
- particularised additional costs of £46,289 for which he maintained that the Defendants were responsible in connection with the New Farmhouse;

- proposed that the Defendants convey to Orchard House part of Plot C, which later became known as Plot G, to enable him to extend the gardens of some of the houses which the Claimants were building;
- proposed a Purchase Price of £250,000 for the remainder of Plot C;
- proposed that the Defendants agreed to remove the restrictive covenant on Plot F prohibiting the construction of additional buildings on that land, other than the redevelopment of the Defendants' original farmhouse (**the Old Farmhouse**);
- proposed that the Defendants granted additional easements over Plot E for the installation of new water pipes to connect to the on-site drainage system; and
- proposed that the Defendants granted any necessary service easements over plot C for the installation of new or existing easements in relation to the diversion of the Severn Trent Pipeline.
- proposed that, on this basis, he/Orchard House would meet the costs of moving the Severn Trent Pipeline, the additional costs associated with the New Farmhouse and all solicitors' costs, and would agree to take no further action in relation to "the non-disclosure" of the Severn Trent Pipeline.

20. On 2 August 2018, the Claimants' solicitor, Stuart Rose (**Mr Rose**) sent a copy of Mr Lomax's letter by email to the Defendants' solicitor, Wynford Collins (**Mr Collins**), who replied to him on 31 August 2018:-

"I understand from Mrs S W Dimelow that at the time your client first expressed an interest in the land, she pointed out to him that there was a water main crossing it. She also informed me that she had mentioned this to him again on subsequent occasions, including just prior to our respective clients entering into the present arrangements. The usual drainage and water maps searches would have revealed the existence of the water main".

21. In his live evidence, Mr Rose told me that such a search would usually have been undertaken but had not been carried out owing to time constraints. He said that a later search had not revealed the pipeline, although he had not retained a copy of it because his firm had been subject to an intervention by the Solicitors' Regulation Authority and its files could no longer be accessed.

22. In relation to the Severn Trent Pipeline, Ms Dimelow's evidence was that her mother warned Mr Lomax of its presence on the land prior to the parties entering into the Master Agreement and that she herself reminded him of it on the day on which that contract was executed. She recalls that he told her that there was no problem with it.

23. Ms Dimelow's evidence was that the figure claimed by Mr Lomax in relation to expenses associated with the New Farmhouse was excessive, but that nevertheless that amount was stated to be the consideration for the transfer to Orchard House of Plot G.

24. Following the correspondence between Mr Rose and Mr Collins in August 2018, there was a series of interactions, correspondence and meetings between the parties and/or their solicitors. The Claimants' case is that, in effect, the sum of £250,000 was agreed as the Purchase Price for Plot C. The Defendants contend that no such agreement was reached.

25. On 2 September 2018, Ms Dimelow sent a text message to Mr Lomax, proposing a meeting with a view to proceeding with "negotiation for the next bit".

26. There was a meeting on 4 September 2018 at the office of the Defendants' solicitors (**Hibberts**), which the parties and their legal advisers attended. That meeting does not appear to have been followed up by any correspondence. Ms Dimelow's evidence is that the focus of the meeting was the Severn Trent Pipeline, that Mr Lomax put forward an offer of £250,000 for Plot C, that Mr Collins said that no offer could be entertained before Planning Permission had been obtained and that the figure advanced was not agreed.

27. In the Particulars of Claim, it is pleaded that there was a further meeting on 19 October 2018. That meeting is not referred to in Mr Lomax's trial statement. In her statement, Mr Lomax's personal assistant, Cathy Davies (**Mrs Davies**) refers to such a meeting but says that she did not attend it. Mr Rose does not mention a meeting on that date in his trial statement. Ms Dimelow does not refer to it in her statement.

28. Mr Collins sent an email to Mr Rose headed "without prejudice" on 19 October 2018. In that email, he made no mention of any meeting on 19 October 2018. Rather, he writes "further to our meeting on 4 September 2018…".

29. In that letter, Mr Collins stated that the Defendants "would agree to the release of [Plot G], provided that the price of the remainder of [Plot] C would be £250,000 or 85% of market value, whichever was the greater. Such payment to be made on the grant of Planning Permission."

30. There then appears to have been a meeting on 6 November 2018 at the New Farmhouse, which was attended by Mr Lomax, Mrs Davies and the Dimelows, but not by the parties' solicitors.

31. Mr Lomax recalls that the Defendants did not challenge the proposed Purchase Price of £250,000 for Plot C and that there was a discussion about adjusting the Purchase Prices of Plots C and F to secure a Capital Gains Tax (**CGT**) advantage for the Defendants. Ms Dimelow says that this was at Mr Lomax's instigation.

32. Mr Lomax followed up that meeting with an email to Ms Dimelow dated 8 November 2018 (which was dictated by him and sent by Mrs Davies) in which, under the heading "Agreement in Principle" he proposed that the agreement

in relation to Plot C be amended "with an option to buy the land for £25K once planning permission has been obtained" and that "once this has been achieved a purchase of [Plot] F will be executed at the same time for a price of £525K which includes the remainder of the total amount for [Plot] C, plus the monies for the house with an additional £25K for the uplift of the restrictive covenant [relating to the building restrictions referred to at paragraph 19 above]." Towards the beginning of the email, Mr Lomax observed that "it will be much easier to obtain an agreement in principle prior to involving solicitors, save as to costs and time delays."

33. It appears to be common ground that the proposed adjustment to the Purchase Prices of Plots C and F was to limit the Defendants' potential liability for Capital Gains Tax.

34. On 11 November 2018, Mrs Davies sent an email to Ms Dimelow, chasing a response. Ms Dimelow replied the same day:-

    "This looks fine in principle, although I think the solicitors will insist on a time frame against points 3 & 4, unless the time restraint of 2 years from when we moved still stands?"

35. Mrs Davies replied on 13 November 2018, informing Ms Dimelow that the agreement was being drafted by Mr Rose and that it should be with her on the Monday of the following week. Mrs Davies subsequently sent the legal documentation (including amended versions of Option Agreements C and F) to Ms Dimelow on 23 November 2018, and commented "I am going to break down the documents and the relevance, as to what we originally proposed and you agreed in principle." Her letter also stated that "once you and [Mrs Dimelow] are happy with absolutely everything, then we will send over to [Mr Collins] and we can hopefully have everything signed off in the next couple of weeks, if you are in agreement."

36. In response to that email and to Mrs Davies' proposal that there should be a meeting, Ms Dimelow replied on 25 November 2018:-

    "If you could print me everything off before you come it would be a help and it would need to be 5.30pm again to give me time to get home and do the horse, also you have forgotten to add the £225 on top of the £350 for [Plot] F."

37. There was then a face to face meeting between Mr Lomax, Mrs Davies and the Defendants on 27 November 2018. Mrs Davies recalls that, at the meeting, there was no challenge from the Defendants to the proposed Purchase Price of £250,000. Mr Lomax says that the amended prices for the two plots were agreed by the Defendants. Ms Dimelow's evidence was that, at the meeting, she and her mother were more concerned about sorting out problems with the New Farmhouse. She denies that any agreement was reached on the Purchase Price for Plot C.

38. Mrs Davies sent an email to Ms Dimelow the following day in which she asked, “can you confirm to [Mr Collins] that you are happy (as long as you are) with everything that we have discussed and possibly arrange to go in and see him.” Mrs Davies also emailed the legal documentation (including amended Option Agreements C and F) to Mr Collins on the same day.

39. After receiving two chasing emails from Mrs Davies, Mr Collins replied to her correspondence on 17 January 2019 in a letter headed “Subject to Contract and Without Prejudice”, confirming that he had taken his clients’ instructions, and raising various issues in relation to Plots C and F.

40. Mrs Davies replied substantively to Mr Collins on 23 January 2019 and then emailed him again on 5 February 2019, copying in Ms Dimelow and Mr Lomax:

    “Further to our recent emails regarding the Master and Options agreements, it would be beneficial if we could all sit down together and finalise the proposed agreement in person, as opposed to emails going back and forth.”

    It would save time and money and seems a reasonable way forward”.

41. There appears to have been a subsequent meeting between Mrs Davies and the Defendants, which Mrs Davies followed up with an email on 21 February 2019, having “had a think about the meeting and worked out some calculations”, setting out the financial benefits of the proposed agreement from the Defendants’ perspective and stating that “what we need to do between us, is to move this forward, and make sure it works well for you (and I can see [Mr Collins] wants to do the best for you which is absolutely right and correct).” In the email, Mrs Davies writes:-

    “…I have had a think about the meeting and worked out some calculations. If you can give me your input I will then put the suggestion to [Mr Collins], I am still trying to find a way to work this out in favour of yourself and your mum, and this is the only way around it, I think…
    I have tried to calculate the price on the plots (you may need your land plan for this).
    ABD have been bought at £375K
    G and H (which are the two small strips) would be bought at £46,289.91. C will be bought at £250K
    F will be bought at either £325K or £350K without the restriction
    The farmhouse (your new home) is probably worth about £1.2 million
    Which gives a total of £2,221,289.91 (which is not a bad deal at all)
    What we need to do between us, is to move this forward, and make sure it works well for you (and I can see [Mr Collins] wants to do the best for you which is absolutely right and correct).
    There are time restraints that we need to take into consideration to ensure it works, and we have been trying to sort this out for 6 months.

…I think [Mr Lomax] wants to be extremely fair to you, however we have had a lot of running costs which were unexpected…
The only way I can think that may be more favourable to yourselves and looking at a tax efficient way of putting the deal together is if Patrick looks to buy [Plot F] within or around the next 6 months from you with the restrictive covenant released which would give you £350K, and buy [Plot C] at the same time for £25K giving you £375 in total".
We could then put in a caveat that plot F will increase to £600K (which includes the £225K for [Plot C]) if there is planning permission granted…".

42. Mrs Davies wrote to Mr Collins in the following terms on 4 March 2019 attaching a section of the email which she had sent to Ms Dimelow on 21 February 2019:-

"I have thought about our meeting and have put the following suggestion to [Ms Dimelow], she had asked me to send this to you. I missed [her] when she came into the office last week, however if you could have a think about it and maybe we could put pen to paper."

43. There then followed correspondence between Mrs Davies and Mr Collins relating to certain technical legal issues relating to the transfer of Plot G and a Judicial Review application made by Orchard House. It had judicially reviewed the local planning authority's decision to review the settlement boundary in order to protect Plot C as a development site. It had already incurred substantial costs moving the Severn Trent Pipeline from Plot C to land which it already owned.

44. On 22 May 2019, Mrs Davies wrote to Mr Collins, suggesting two alternative options for the purchase of Plot C, both based on a valuation of £250,000 for Plot C.

45. Plots G and H (a small portion of Plot E required by Orchard House) were subsequently transferred to Orchard House by the Defendants on 31 May 2019.

46. Shortly afterwards, Mr Collins retired from practice and conduct of the Defendants' file passed to his colleague at Hibberts, Nicky Platt (**Mrs Platt**).

47. It appears that, during a conversation between Mr Lomax and Ms Dimelow in early April 2019, Ms Dimelow indicated that she proposed to obtain a valuation of Plot C.

48. Mr Lomax and Ms Dimelow then met again, following which he sent a letter to her dated 17 June 2019 in which he made the following observations (amongst others):-

"The price was agreed, and we have spent the last 9 months trying to get [Mr Collins] to complete the contracts, and only half of them were completed which is completely unacceptable…

Having finally reached signing off point of the final section, it appears the deal is now being re-assessed by your new solicitor. This is completely unfair and improper.

As the overall agreement was not reached prior to [Mr Collins] retiring as agreed, then it would seem that the costs already paid should be refunded.

Despite the non-disclosure of the water main and other hidden costs, we have not come back to you to reduce our offer."

49. Mr Lomax followed his letter up with an email on 21 June 2019 saying, "it would be far better if we discussed this with your solicitor and valuer as soon as possible".

50. On 24 June 2019, Ms Dimelow replied, saying that the valuation of Plot F had only very recently been undertaken by her surveyors, Wright and Marshall, and that she had not received their report. She told me in the witness box that the valuation, in fact, related to both Plots C and F and that Wright and Marshall had ceased trading shortly afterwards, without ever sending their report to her.

51. On 27 June 2019, Mr Lomax wrote to the Defendants purporting to exercise Option F for the first time. No deposit was paid at that time. The written notice did not include a request for Hibberts' bank details. Mrs Davies told me that she had prepared the notice but that she would have had it checked by Mr Rose before it was sent to the Defendants.

52. Mrs Davies (on behalf of Mr Lomax) sent a copy of the Option Notice to Hibberts on the same day and, in relation to Plot C, the email stated:-

"Once we have a value that both parties agree to, we would like to exercise the option set out in Clause 7.1 of the agreement by serving an option notice on your client."

53. Mrs Davies maintains that she chased Mrs Platt and Hibberts for their banking details but that they were not forthcoming. Mrs Davies wrote to Mrs Platt on 24 July 2019, noting:-

"…we would like to sit down with yourself and your client to discuss progressing both F and C. After our successful judicial review planning permission is imminent. Subsequently we would like to be in a position to purchase the site without delay.

We would like to understand what direction your client wants to take. Whether there is further discussion to be had regarding the original agreement set up over 9 months with [Mr Collins], or whether we just exercise the option agreement on [plot] C which means that we would be awaiting a valuation figure from your client…".

54. On 26 July 2019, Ms Dimelow wrote to Mrs Davies:-

"Having been very taken aback with the content of the letter that [Mr Lomax] sent us we have been thinking long and hard about the way forward and are in the process of organising valuations. As I do not want to waste anyone's time or money with solicitors' meetings until this is obtained, we will be in contact once we are in a more informed position to talk".

55. On 30 July 2019, Mr Lomax (via Mrs Davies) wrote again to Ms Dimelow saying (amongst other things):-

"We are as you know proceeding with the purchase of the house, we have already exercised the option on [Plot F], however we are no further forward with this and it would be good to know what date your valuation is on and if possible if we could have a copy of the valuation that you have undertaken…"

56. There appears to have been little movement until Planning Permission (for 7 dwelling houses) was granted on Plot C on 13 February 2020. Mrs Platt instructed a valuer, Nigel Eckersley (**Mr Eckersley**) to produce a valuation in relation to Plot C.

57. Mrs Davies (on behalf of Mr Lomax) wrote to Mrs Platt on 22 February 2020:-

"Could you please confirm that the valuation will be undertaken within the next 14 days as we would now like to exercise the Option agreement C and are fully aware that upon exercising this agreement a deposit is due.

Moreover, this being the case we would need to know the market value, and if agreement with the same we can send the correct 10% deposit over to yourselves as Stakeholder for your client."

58. Mr Eckersley then undertook his valuation and sent an email to Mr Lomax, setting out his conclusions, on 8 April 2020. His valuation was £1,000,000 to £1,250,000, subject to the 75% deduction provided for in Option C. He concluded that "given the above we are prepared to recommend to our client to settle for an overall price of say £840,000".

59. Mrs Davies wrote to Mrs Platt on 9 June 2020, asking her to confirm (given the 2 year option period) when her clients moved out of the Old Farmhouse because the Claimants were "looking at exercising the option agreement

known as “F””. Mrs Platt replied on 12 June 2020, confirming that the date of the move was 28 June 2018.

60. The Claimants contend that, in July 2020, a global purchase price of £601,000 for Plots C and F was agreed on their behalf by Hadyn Gregson (**Mr Gregson),** then a director of Orchard House- £250,000 for Plot C, £325,000 for Plot F, £25,000 for the lifting of the restrictive covenant, and £1000 “for good measure” and some snagging work for the dwelling house. The Claimants’ case is that that offer was put forward by the Defendants and was accepted by Mr Gregson. Mr Gregson denies that any such agreement was reached, as do the Defendants.

61. There is a text message exchange between Mr Lomax and Mr Gregson on 30 June 2020. Mr Gregson asked:-

“What was the total amount on the table H”

62. Mr Lomax replied:-

“£250K for the land [Plot C] £325K for the house [Plot F]…The deal is take it or leave it…”

63. Mr Gregson told me that Mr Lomax had informed him that he had reached an agreement with the Defendants and that that prompted him to contact Mr Rose. Mr Gregson said that Mr Lomax had given him a number of different figures to put to the Defendants. Mr Lomax was unclear about the conversations which he had had with Mr Gregson and Mr Rose about the possible Purchase Price of Plots C and F.

64. There was then a telephone conversation between Mr Gregson and Mr Rose on Friday, 10 July 2020. After the weekend, Mr Gregson emailed Mr Rose at 10.30 am on Monday, 13 July, stating

“Re our conversation on Friday could you send out a letter to Lorna Dimelow setting out the final agreed offer to purchase both options, and for phase 3 and purchase of existing farm house and paddock…”

65. Mr Rose told me in cross-examination that it was “unique” for Mr Gregson to provide him with instructions and that he would have contacted Mr Lomax for confirmation of those instructions before accepting them and writing to Mrs Platt.

66. Mr Rose sent an email to Mrs Platt at 12.02pm the same day (just over 90 minutes after receiving Mr Gregson’s email) in which he wrote:-

"I understand that agreement has been reached between our respective clients as to the sale and purchase of the remainder of the land comprised within [Plot] C and the whole of the land in [Plot] F as shown on the plans attached to the option agreements affecting both areas of land dated 19 January 2017, the consideration being £601,000. I am told that any apportionment of the price is largely a matter for your clients, although I would have thought that my client might require some input into this".

67. Mrs Platt replied on 17 July 2020 informing Mr Rose that Hibberts were no longer instructed by the Defendants in connection with the matter.

68. Mr Lomax then wrote to the Defendants on 21 July 2020 formally accepting their "counteroffer" and recording the total consideration to be £601,000.

69. Ms Dimelow replied to him the following day:-

"I am at present having to find a new solicitor, as soon as I have found one I will let you have the details to be able to proceed".

70. Mrs Davies sent an email to the Defendants' new solicitor, Christian Eagle (**Mr Eagle**) of Ralli solicitors (**Ralli**) on 28 August 2020, noting her understanding that he was instructed to act for the Defendants and informing him that "we have exercised both these options [C and F, although Option C had not, in fact, been exercised at that time] and have reached a financial agreement with your client. The amount agreed with your client for both Options C and F equates to £600,000".

71. There followed correspondence from the Claimants' solicitors in which they were maintaining that an agreement had been reached in relation to the Purchase Price of Plot C. Mr Eagle did not confirm that such an agreement had been reached. However, after reviewing Hibberts' files, he wrote to Mr Rose on 18 December 2020, confirming:-

"I am not currently able to confirm that our clients are in a position to proceed with the contract as drafted. As a matter of priority, and without waiving any legal privilege, our clients are engaging in a claim against their previous advisors, Hibberts LLP and must, therefore, mitigate their position in that regard."

72. On 6 January 2021, Orchard House served an Option Notice on the Defendants relating to Plot C within the applicable five year Option Period, but it did not pay a deposit when doing so.

73. On the same date, the Claimants' then solicitors wrote to Mr Eagle in the following terms:-

“Please accept this letter as notice that the contracts tendered are now withdrawn as the basis for future discussions between our clients. Please be good enough to return the documentation to us forthwith.”

74. That same day, Orchard House, invoked the mechanism by which an expert would be instructed to determine the Purchase Price. The appointed expert was Paul Wilson of P Wilson & Company, Chartered Surveyors (**Mr Wilson**).

75. On 29 January 2021, a second option notice in relation to Plot F was served by Mr Lomax on the Defendants. On the same date, the Claimants’ solicitors sent a cheque for £32,500 (being a 10% deposit), along with a Form TP1 for completion by the Defendants.

76. Mr Eagle replied by a letter dated 9 February 2021, returning the cheque and setting out their clients’ position in relation to both Plots C and F.

77. In that letter, Mr Eagle advanced a claim for misrepresentation, and stated “the increased “offer” of £601,000 that you refer to was only made based on the misrepresentations made by your client”.

78. On the Defendants’ case, the second Option Notice was served outside the applicable two-year Option Period contained in Option Agreement F. However, Mr Lomax’s position is that, due to completion of other works at the Defendants’ new property carried out at their request, they did not, in fact, move into the New Farmhouse until February 2019, as evidenced by an email sent by the Defendants to the Local Authority dated 2 June 2019. On that basis, Mr Lomax says that the option was exercised within the applicable two-year period. I return to this issue below.

79. Mr Wilson engaged with Mr Eckersley and Orchard House’s appointed surveyor, Will Rees, a director of Legat Owen (**Mr Rees**). There was disagreement between the parties as to the basis on which Mr Wilson was to produce his report.

80. On 9 June 2021, Mr Wilson determined the market value of Plot C at £940,440.

81. On 11 June 2021, the Claimants’ solicitors, Aaron and Partners (**Aarons**) wrote to Mr Wilson, raising procedural and substantive challenges to his report, and concluding:-

“ You will perhaps understand why [Orchard House] feels that (1) it has been dealt with inequitably and (2) that your valuation is based on incorrect assumptions and is erroneous.

Our client, therefore, invites you to withdraw the valuation delivered on 9 June and to reset the timetable to give it the opportunity to respond to the submissions of [the Defendants]”.

82. Ralli responded to that correspondence on 14 June 2021, objecting to Aarons' complaints and clarifying their clients' position.

83. Mr Wilson responded the same day, and concluded by saying:-

"For the record, I did not accept either party's submissions in their entirety nor did I accept either Mr Eckersley's or Mr Rees's definition of market value. You have stated that I have somehow relied upon privileged information but I did not. All the information used by me is in the public domain.

Throughout the process, I have given the parties equal opportunity. I took on the burden of the appointment and decided the issues in absolute good faith without fear or favour. If my valuation is erroneous then that is up to others to decide.

[Orchard House] is now free to decide whether or not to exercise the option and whether or not to reach an agreement on the apportionment of value."

84. Mr Rees produced a letter dated 5 August 2021 addressed to Mr Wilson, in which he set out what he considered to be "a number of errors and omissions of fact as well as in the adopted residual valuation approach" and suggested that Mr Wilson should have an opportunity to revisit his valuation.

85. On 20 August 2021, Aarons wrote to Ralli, highlighting that they had concerns about Mr Wilson's determination and saying:-

"If these errors are correct, we have advised our client that these are of sufficient gravity to pursue a High Court application to have the valuation set aside on the grounds of manifest error…

…if a court application has to be made to set aside the valuation, which application will only be made if your clients do not agree to the re-opening of the valuation determination, then we reserve our client's right to seek a costs order from your clients."

86. Ralli responded on 3 September 2021, rejecting the suggestion that Mr Wilson made significant errors impacting on his valuation and stating, "all our client's rights and remedies are reserved".

87. Orchard House took no further steps in relation to Mr Wilson's report. It had not completed the purchase of Plot C within four weeks of the date of the report, namely by 7 July 2021, in accordance with Clause 19 of Option Agreement C.

88. On 21 October 2021 Ralli wrote to Aarons, attaching a formal Notice of Termination and to Orchard House's conveyancing solicitors, purporting to exercise their clients' right to terminate Option C under Clause 21 of Option Agreement C and on the basis of "a fundamental repudiatory breach of contract at common law". Ralli made the following points (amongst others):-

"It is clear on any objective and reasonable analysis that there has been no manifest error by the independent expert and of course there is no question of fraud.

"…completion was to take place 4 weeks after the Purchase Price is agreed or determined. The Purchase Price was determined by the expert on 9 June 2021. The relevant 4 week period therefore expired on 7 July 2021. [Orchard House] is therefore in fundamental breach of contract for failing to complete in the requisite period and…has deprived [the Defendants] of the benefit of the Option without prejudice to [their] position as to the validity of the Option.

The above is also a fundamental repudiatory breach at common law.

….Under Clause 21 [the Defendants] may terminate the Option with immediate effect if [Orchard House] "is in fundamental breach of any of its obligations in this agreement.

It is very clear that Mr Wilson adhered to his professional obligations and followed his instructions in reaching his determination. He has not made any obvious or demonstrable error in his expert determination. Our client is therefore very confident that there has been no manifest error such that the independent expert determination is not to be final and binding pursuant to Clause 17.11 of the Option.

[Orchard House] is in fundamental breach of the Option because it is not accepting a determination of the Purchase Price pursuant to the expert determination which is final and binding and because [Orchard House] has failed to complete in accordance with Clause 19(b) of the Option as set out above.

…[the Defendants] hereby give [Orchard House] notice to terminate the Option immediately based upon its fundamental breach in failing to accept the valuation as determined by the independent expert and seeking to avoid completion pursuant to Clause 19(b).

[The Defendants reserve] all of [their] rights and remedies in relation to any breach under [Option Agreement C] and at law".

89. Aarons had sent an email to Ralli "to remind [the Defendants] that [Option F] has been validly exercised by [Mr Lomax] and that [the Defendants] are not in a position to sell it to anyone else". Ralli replied by email (also) on 21 October 2021, disagreeing with the assertion that Option F had been validly exercised and contending that the option had expired on 13 June 2020. Aarons replied the following day, pointing out that Option F had first been exercised on 27 June 2019. Ralli replied on 29 October 2021, arguing that Mr Lomax had not exercised the option validly, because the deposit had not been paid.

90. Orchard House sought to re-exercise Option C on 17 January 2022, tendering a cheque of £25,100 in relation to the Deposit, on the basis that it and the Defendants had agreed a Purchase Price of £251,000 for Plot C (including the additional £1,000 referred to above).

91. On 28 January 2022, Ralli returned the deposit cheque to the Claimants' solicitors and asserted that no such agreement had been reached in relation to the Purchase Price of Plot C.

92. There followed a letter of claim from Aarons dated 10 February 2022. Following further correspondence between the parties' solicitors, Aarons sent draft Particulars of Claim to Ralli on 8 June 2022. Aarons then served the proceedings on Ralli on 20 December 2022.

(v) <u>The date of the Defendants' move to the New Farmhouse</u>

93. Mrs Davies had written to Ian Shroder of the Local Authority (**Mr Shroder**) on 18 May 2019, enquiring about the circumstances in which there may be an exemption from Council Tax for empty properties, suggesting that "one of the properties [on the development] is in such a [state] of disrepair." Mr Shroder replied the same day, confirming to her that the matter would need to be considered by the Local Authority's Valuation Office.

94. Mrs Davies forwarded Mr Shroder's reply to Ms Dimelow.

95. Ms Dimelow wrote to Mr Shroder on 2 June 2019 in the following terms:-

> "[The New Farmhouse] was about finished building in August 2018.
> We were still living in [the Old Farmhouse] (which we have paid rates up to date) and there was a transitional period of moving furniture across until about February 2019 when [the Old Farmhouse] got into such a bad state that we finally moved in".

96. Ms Dimelow told me that, whilst she acknowledges that this statement was untruthful, Mrs Davies had suggested to her that she should write to Mr Shroder in those terms. That allegation is strongly rejected by Mrs Davies.

97. In support of her contention that she and her mother moved into the New Farmhouse in June 2018 Ms Dimelow has produced copies of:-

- a holiday request form, indicating that she was to be away from work on 28 and 29 June 2018;
- a removal van invoice/receipt dated 28 June 2018 referring to a "part move, total cost £80. Paid cash";
- a gas safety certificate dated 22 May 2018, an air permeability certificate dated 23 May 2018, a fire alarm certificate dated 12 June 2018, an electrical

installation certificate dated 12 June 2018 and an energy performance certificate dated 13 June 2018, all relating to the New Farmhouse;
- a letter from Assent Building Control dated 13 June 2018 confirming that the building "meets the requirements of the current Building Regulations and can be occupied", and a Part Final Certificate dated 15 June 2018;
- a Certificate of Practical Completion dated 25 June 2018;
- an email from Mr Gregson to herself dated 21 June 2018 stating, "Just to confirm that the carpets are booked and are being fitted on Tuesday morning";
- her correspondence with the site manager dated 20 June 2018, in which she refers to a "move in by the end of the week as [she had] booked time off work to move".

98. There is an email from Ms Dimelow to a service provider dated 20 June 2018, in which she states, "we are half way through the year and I want to be in and settled before Christmas".

99. On 2 January 2019, Mr Lomax sent an email to Ms Dimelow, asking for an opportunity to "look around the old house".

100. In an email dated 17 June 2020, Mrs Davies noted the inconsistency between the Defendants' position on this issue and the content of her email to Mr Shroder. She also stated that "having spoken to both Patrick Lomax and Haydn Gregson it seems that there was a transitional period where furniture was being moved from one residence to another over a period of months, which would fully support the email that was sent from your client to [Mr Shroder]".

101. Ms Dimelow told me in the witness box that she and her mother had slept at the New Farmhouse every night since they moved into the property towards the end of June 2018.

102. Mr Gregson's trial witness statement is silent on the point.

103. In his statement, Mr Lomax says that the Certificate of Practical Completion, the gas safety certificate, the electrical certificate and associated documents were not issued to the Defendants until February 2019. However, he acknowledges that he is unable to say precisely when they moved out of the original farmhouse into the New Farmhouse.

<u>The issues to be determined in relation to Plot C</u>

104. The issues to be determined in relation to Plot C are:-

- whether there was a certain and binding oral agreement between Orchard House and the Defendants between September 2018 and March 2019 as to the Purchase Price for Plot C (less Plot G);
- whether there was a further binding oral agreement (or a certain binding variation to any prior agreement) between Orchard House and the Defendants

in or around July 2020 as to the Purchase Price for Plot C as part of a wider agreement, the total consideration for which was £601,000;

- whether waiver by estoppel arose up to July 2020 upon which reliance was placed by Orchard House, so that the Defendants are estopped from denying that a price of £251,000 was agreed for Plot C (less Plot G);
- whether Orchard House is estopped from relying on any agreement by reason of its decision to exercise the option over Plot C on 6 January 2021 and invoke the expert determination provisions;
- whether the purported exercise of the option for Plot C on 6 January 2021 was required to be conditional upon the payment of a deposit; and, if it was so, whether the Defendants waived compliance with the requirement to pay a deposit at the time of the exercise of that option;
- whether Orchard House was ready and able to tender any deposit on 6 January 2021;
- whether the Defendants validly terminated Option C on 21 October 2021 for the reasons set out in their solicitors' letter of the same date;
- whether the second purported exercise of Option C on 17 January 2022 was valid;
- whether the Defendants are in breach of Option Agreement C by failing to transfer Plot C to Orchard House;
- what loss, if any, has been suffered by Orchard House by reason of any breach by the Defendants.

The Parties' broad positions on Plot C

105. Orchard House maintains that the Defendants are in breach of Option Agreement C by failing to transfer Plot C to it and that it has suffered loss as a consequence of that breach.

106. It maintains that it reached a binding oral agreement with the Defendants between September 2018 and March 2019 that the Purchase Price for Plot C (less Plot G) was to be £250,000.

107. Moreover, it contends that a further binding oral agreement (or a variation of the original agreement) was reached by the parties in or around July 2020 as to the Purchase Price for Plot C in that they agreed a global Purchase Price of £601,000 for Plots C and F taken together.

108. Orchard House argues that the alleged agreement satisfies the requirements of Clause 17.1 of Option Agreement C or that a waiver by estoppel arose on which it relied, preventing the Defendants from denying that a Purchase Price of £251,000 was agreed.

109. It also contends that it is not estopped from reverting to the oral agreements which it reached with the Defendants, in the event that the expert determination is binding on the parties.

110. Orchard House does not accept that, in order to be valid, the first exercise of Option C on 6 January 2021 was conditional on the payment of a

deposit, and it contends that it was ready and able to pay the deposit on that date. Alternatively, it maintains that the requirement to pay the deposit was waived by the Defendants' failure to attribute an exact value to Plot C.

111. Orchard House argues that Mr Wilson's expert determination is not binding on the parties as it was infected by manifest error. Accordingly, the Defendants were not justified in terminating Option C on 21 October 2021.

112. Orchard House also contends that, without prejudice to its arguments concerning the first purported exercise of Option C, the second purported exercise of the option on 17 January 2022 was valid.

113. The Defendants deny that they are in breach of Option Agreement C and they say that no loss has been pleaded by Orchard House.

114. They do not accept that any agreement was ever reached as to the Purchase Price of Plot C.

115. In any event, they contend that the withdrawal of the draft contracts and the concurrent exercise of Option C with a view to there being an expert determination of the market value of Plot C renders any allegation of prior agreement nugatory. Accordingly, their position is that Orchard House is now estopped from seeking to rely on the antecedent negotiations as to the Purchase Price.

116. Moreover, they contend that the exercise of Option C without an accompanying deposit rendered it invalid with no contract coming into being as a consequence.

117. The Defendants say that it is for Orchard House to show that they were ready, willing and able to pay the deposit as at 6 or 27 January 2021.

118. They maintain that their solicitors were entitled to terminate the Option because completion had not taken place by 7 July 2021.

119. The Defendants argue that the second purported exercise of Option C was invalid, because the expert had determined the Purchase Price, Orchard House had failed to complete in accordance with that valuation, they had terminated Option Agreement C and Orchard House was estopped from relying on any antecedent negotiations or an alleged agreement on price by reason of its election to invoke the expert determination procedure.

<u>Issues to be determined in relation to Plot F</u>

120. The issues for determination in relation to Plot F are:-

- whether the effective exercise by Mr Lomax of Option F on 27 June 2019 was conditional on the payment of a deposit;
- the date on which the Defendants moved into their new property;
- whether the purported exercise by Mr Lomax of the option for Plot F on 29 January 2021 was within the Option Period as defined in Option Agreement F;
- whether the Defendants are in breach of Option Agreement F by failing to transfer Plot F to Mr Lomax;
- what loss, if any, has been suffered by Mr Lomax by reason of any breach of contract by the Defendants.

The Parties' broad positions on Plot F

121. Mr Lomax does not accept that payment of the deposit was a condition precedent to the exercise of Option F.

122. Therefore, the exercise of the option was valid and, given that the Defendants have taken no steps to terminate the option, he is entitled to complete the purchase of Plot F. The Defendants' refusal to pass title, therefore, amounts to a breach of contract.

123. Alternatively, the Defendants waived their right to the payment of the deposit by their failure to confirm how much of the Purchase Price was attributable to plot F and/or their solicitors' failure to provide their client account details to Mr Lomax.

124. Mr Lomax's case is that the Defendants only moved into the New Farmhouse in February 2019 and that, accordingly, he exercised Option F (on the second occasion) within the two-year Option Period.

125. Mr Lomax argues that, in the circumstances, the Defendants are in breach of contract and that he is entitled to specific performance along with damages for the delay which he has suffered in the completion of the transfer to him of Plot F.

126. For their part, the Defendants maintain that payment of the deposit was a condition precedent to the exercise of Option F.

127. They deny that their solicitors failed to provide their bank details to Mr Lomax and/or that they have waived their right to payment of the deposit.

128. The Defendants do not accept that they only moved into the New Farmhouse in February 2019. They say that they moved there in June 2018 and that Mr Lomax purported to exercise Option F on the second occasion out of time.

Procedure

129. On 15 December 2022, the Claimants' solicitors issued a Part 7 Claim seeking Orders for specific performance of Option Agreements C and F (**the Part 7 Claim)**. The Defendants filed a Defence and Counterclaim on 15 February 2023 (seeking in the counterclaim declarations that the various purported exercises of Options C and F were invalid).

130. The first Case Management Conference was listed to be heard on 27 April 2023, but it was adjourned (by consent) pending determination of a reverse Summary Judgment application dated 14 April 2023 made by the Defendants in relation to the Part 7 Claim.

131. I heard the Summary Judgment application and gave judgment on 6 July 2023. I did not accede to the application. However, I concluded that, whilst it might have been open to me to grant Summary Judgment in the Defendants' favour on certain issues, given the interconnection between the various contentious matters and the background factual issues, it was preferable for the claim to proceed to trial. I made an order of costs in the case in relation to the application.

132. I relisted the Case Management Conference to be heard in October 2023. However, shortly before the hearing, Orchard House issued a claim under Part 8 of the Civil Procedure Rules (**the Part 8 Claim**) by which it seeks to set aside Mr Wilson's determination in relation to Plot C.

133. Initially, the Defendants' position was that the Part 8 Claim should be stayed, pending the outcome of the Part 7 Claim. The Claimants argued that both sets of proceedings should be determined at the same time.

134. I ordered that the two sets of proceedings should be case managed and tried together. I also made a Costs Management Order based on the parties' consolidated budgets.

135. The claims were issued in the Technology and Construction Court (**TCC**). Whilst their subject matter does not fall within the core business of the TCC, I did not see any need to transfer them to another division of the High Court, as expert evidence from valuation experts was involved and it was more straightforward to case manage the claims within the TCC.

The Part 8 Claim

136. Orchard House initiated the Part 8 Claim, with a view to establishing that Mr Wilson's expert determination should not be final and binding on the parties, on the grounds that he had exceeded his jurisdiction and/or fallen into manifest error.

137. Mr Wilson produced his valuation on a net residual land value basis, assessing the likely sale proceeds of the proposed development authorised by the Planning Permission and then deducting relevant costs. He received written submissions from the parties' experts before producing his valuation.

138. Mr Wilson produced his valuation of the entirety of Plot C, rather than Plot C less Plot G. Orchard House maintains that the diminished land should have been valued, by virtue of an estoppel by convention. It notes that Mr Rees raised this issue with Mr Wilson before he produced his report but that nevertheless he valued Plot C in its entirety. Accordingly, Orchard House's position is that the report was produced on a flawed basis and that Mr Wilson departed from his jurisdiction.

139. The remaining bases of the Claimant's challenge are that Mr Wilson committed manifest errors in that:-

- he valued the incorrect size of the development authorised by the Planning Permission;
- he made no allowance in his valuation for the effect of the Planning Permission which required Orchard House to build affordable housing;
- accordingly, his build cost figure was overstated and his Gross Development Valuation was incorrect;
- he correctly estimated build costs by reference to the Building Costs Information Service (**BCIS**), but he allowed in his valuation those costs explicitly excluded by BCIS;
- he failed to allow for other build costs; and
- he made no allowance for the Community Infrastructure Levy which the developer was obliged to pay pursuant to the Planning Permission.

140. The parties each obtained and exchanged reports from their retained experts. Those experts (Mr Rees for Orchard House and Mr Eckersley for the Defendants) prepared a joint statement and gave evidence at the trial.

141. In their joint statement the experts reached a large measure of agreement. In particular, they agreed that:-

- the valuation of property benefitting from Planning Permission should be on a residual basis and in accordance with the RICS Guidance Note (1st edition, October 2019);
- the best comparable sales for the subject site were those of the adjoining development, known as Plots A,B and D;
- Plot C should be valued based on the Planning Permission for 7 dwellings, 2 of which were to be affordable tenure housing;

- In his determination, Mr Wilson stated that the Planning Permission was for 7 dwellings and that the affordable housing element was offset by a separate payment in lieu of the affordable tenure housing;
- Mr Wilson's calculation of Gross Development Value and build costs is, therefore, overstated;
- the Gross Development Value of the 2 affordable housing units is £324,000 with no separate payment made in lieu of any affordable housing element;
- in respect of their initial valuation submissions, the experts would have benefited from a direction as to what was to be valued, namely the whole of Plot C or Plot C minus Plot G.

142. The main point of disagreement was that Mr Rees considered that Mr Wilson's residual appraisal calculation did not include an allowance for usual development costs or abnormal costs. Mr Eckersley's opinion was that those elements were included in Mr Wilson's residual appraisal calculation. Mr Rees also considered that an allowance for the Community Infrastructure Levy had been excluded from Mr Wilson's calculation.

143. Mr Rees and Mr Eckersley stood by their views when they were in the witness box.

144. The Defendants do not accept that Mr Wilson exceeded his jurisdiction: there was no Deed of Variation entered into when Plot G was carved out of Plot C; the expert, therefore, rightly said that to do other than to value the whole of Plot C would be to go outside the terms of his appointment; and neither party requested that the matter be referred to the Court as a preliminary issue. The Defendants reject Orchard House's estoppel by convention argument.

145. The Defendants do not accept that any errors made by Mr Wilson meet the high threshold set out in the authorities required to invalidate an expert determination. Mr Aslett points out that Mr Wilson's valuation is within £30,000 of Mr Eckersley's valuation and that it has taken a trial and expert evidence, including live testimony, from the experts to determine the issue. The overarching point is that it cannot be obvious that a manifest error was made by Mr Wilson.

Approach to the witnesses' evidence

146. I have read the witnesses' statements and I have listened carefully to their live evidence. I have reflected on that evidence, and I have taken full account of the written and oral submissions made by Mr Horne and Mr Aslett.

147. The events concerning which the parties have given evidence date back many years. Leggatt J sounded a warning in Gestmin SGPS v Credit

Suisse (UK) Ltd [2013] EWHC 3560 about the interpretation of evidence, especially in the context of the passage of time. He observed that “an obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.”

148. He went on to say:-

- “[there is] a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten when retrieved”

- “memory is especially unreliable when it comes to recalling past beliefs”

- “civil litigation itself subjects the memories of witnesses to powerful biases… [which is] obvious where the witness is a party or has a tie of loyalty”

- “[a party’s witness statement] is made after the witness’s memory has been “refreshed” by reading documents.”

149. I, therefore, remind myself to be cautious about the witnesses’ oral testimony and to only make findings of fact, after considering all the evidence, both oral and documentary, and after reflecting on the inherent probability of what I am being told.

150. I bear in mind the helpful guidance given in Phipson on Evidence 20th Ed at 45.18, namely that, when assessing the reliability of a witness’s evidence, I should take account of:-

(1) the consistency or otherwise of the witness’s evidence with what is agreed, or clearly shown by other evidence, to have occurred;
(2) the internal consistency of the witness’s evidence;
(3) consistency with what the witness has said or deposed on other occasions;
(4) the credit of the witness in relation to matters not germane to the litigation;
(5) lies established in evidence or in the context of proceedings;
(6) the demeanour of the witness; and
(7) the inherent probability of the witness’s account being true.

151. I have been assisted by the documents to which I have been referred and I am grateful to the solicitors for producing the helpful trial bundle.

152. I shall need to make findings of fact. In doing so, I remind myself that I must only find a fact proven if I am satisfied on the evidence that I have heard and read that it is more likely than not to be true. In other terms, each such fact must be established on the balance of probabilities. The burden of proof rests with the party asserting the allegation.

The witnesses

153. I should begin by making observations about the impression which I formed of the witnesses' evidence.

154. My knowledge of the witnesses is gleaned from their presentation in the witness box, the manner in which they responded to questions on cross-examination and the witness statements which they signed and to which they put their names.

155. I took evidence from Mr Lomax, Mrs Davies and Mr Rose (on behalf of the Claimants) and from Ms Dimelow and Mr Gregson (on behalf of the Defendants).

156. Overall, I found Mr Lomax to be a reasonable witness. I do not doubt that he believes the evidence which he gave to me in the witness box to be true.

157. However, I do have reservations about his evidence.

158. He told me at one point that, in one particular respect, his second witness statement was "possibly a little more accurate" than his first statement. That was not an isolated example of inconsistencies in his documented case.

159. I found that, when he answered questions from Mr Aslett, he would often couch his replies as assumptions, rather than statements of fact. I also noted that, when challenged about what he had done, or not done, in the past, he had a tendency to fall back on his dislike of, or unfamiliarity with, administrative tasks, or, at times, on his dyslexia, when neither of those factors should have impacted on his memory of events or on his ability to provide explanations for the case which he was advancing.

160. I was not persuaded by some aspects of his evidence. One example was his account of the Severn Trent Pipeline issue. He told me that he was unclear about the searches which had been undertaken and suggested that there had been confusion with another pipeline, which appeared to have been of a different nature altogether. Ms Dimelow addressed this issue with far more clarity and detail.

161. I also found that Mr Lomax had a tendency to take steps without ensuring that the Defendants were fully informed of his plans. Ms Dimelow told me (and I accept her evidence on these points) that he had not consulted her before making the Judicial Review application and before applying for Planning Permission to build additional properties on Plot E.

162. I was struck by the inconsistency of Mr Lomax's approach in his dealings with the Defendants. For example, he would often leave negotiations

and interactions with them to Mrs Davies and, at some crucial points, he entrusted matters to Mr Rose and Mr Gregson. On other occasions he would engage directly with the Defendants. This has perhaps made it more difficult for him to persuade me of his case on whether the Purchase Price was agreed. If there had only been one point of contact, his position on this issue might have been more persuasive.

163. Mr Lomax sought to present himself as an ideas person, rather than an administrator or a businessman with a firm grasp on legal and administrative technicalities. I was not altogether persuaded that this was an accurate characterisation of him. He is clearly a very capable and intelligent man who has made a success of his business. He will have gained experience of legal, procedural and planning issues through his work as a commercial developer. He has been the driving force behind the development of the Farm and other projects.

164. I found Mrs Davies to be an impressive and persuasive witness. She was a good historian. She answered the questions which were put to her without hesitation or prevarication. She made appropriate concessions, notably when she told me openly about the minutes of the meetings which she had taken.

165. I appreciate that she was being asked to remember events which happened some time ago in a business in which she has not been involved for many years, but I am confident that she came to Court with the intention of telling me the truth, as she recalls it.

166. I accept her evidence that she did not draft, or advise Ms Dimelow on, the content of the email which she sent to the Local Authority concerning the date on which she and her mother moved to the New Farmhouse. Mrs Davies struck me to be a person of integrity who takes her duties and responsibilities very seriously. She had no reason to encourage Ms Dimelow to be untruthful in preparing the email. She had nothing to gain from it and, given her career aspirations, much to lose.

167. However, although it does not reflect on Mrs Davies' credibility, I had considerable concern about the absence of the minutes of the meetings which she took. I return to this point below.

168. I found Mr Rose to be a good witness. I have no doubt that he was doing his best to give me an accurate picture of events. He was very open and was prepared to tell me when his memory was inconsistent with Mr Lomax's position.

169. My overarching impression of Ms Dimelow was that she was a truthful and honest witness. She made concessions on certain points. She seemed to have a good memory of past events, despite the passage of time.

170. However, perhaps inevitably, I was concerned about the email which she sent to the Local Authority. She accepted that the content of the email was untruthful. I found it troubling that she would send such an email, purely with a view to minimising her liability to Council Tax.

171. As I have already indicated, I do not accept Ms Dimelow's allegation that Mrs Davies assisted her in drafting that email. However, it does not follow that I think that she was seeking to mislead me on that point. It may well be that she genuinely believes that Mrs Davies steered her to draft the email in a particular way. Even so, I have no hesitation in finding that she is mistaken on that point.

172. Mr Gregson was an impassioned witness and I am sure that he came to Court with a view to telling me the truth.

173. However, in answer to a question from me, he accepted that his business relationship with Mr Lomax had broken down and it was clear to me that it had done so in acrimonious circumstances. On that basis, I cannot, and do not, regard Mr Gregson to be a wholly independent witness without an axe to grind.

174. However, I fully accept that he personally did not reach any agreement with the Defendants on the Purchase Price of Plot C. He was very clear and detailed in his evidence on that point.

<u>The minutes of the meetings taken by Mrs Davies</u>

175. In the witness box, Mrs Davies told me that she took minutes of the meetings which she attended, which was consistent with Mr Lomax's evidence. She told me that she had left those minutes in a drawer in her desk at Orchard House's office.

176. In her trial witness statement, Mrs Davies says that she was at the meeting on 7 November 2018 "to assist in taking minutes and recording any agreements that were made". She went on to state:-

" Due to the passage of time, I have made this statement based on my own detailed notes that I made in April 2022 when events were fresher in my mind".

177. Mrs Davies is said to have attended meetings (and, therefore, presumably to have taken minutes) on 6 November 2018, 27 November 2018, 12 February 2019, 8 March 2019, 19 March 2019, 26 April 2019 and 21 May 2019.

178. At no point have the Claimants disclosed copies of the minutes taken by Mrs Davies. In fact, I understand that the first search for those minutes took place during the course of the trial. I was told by Mr Horne after the search had taken place that it had revealed no documents, either in hard copy or electronic form.

179. It is unfortunate that an earlier search was not undertaken, bearing in mind that it was clear from Mrs Davies' trial witness statement that she had taken minutes of meetings which she had attended. It is difficult to understand how they did not come to light when Mrs Davies was producing her "detailed notes" in April 2022.

180. Given that Orchard House is inviting me to conclude that agreements were reached at various meetings in relation to the Purchase Price of Plot C, I would have expected that it would have considered notes of those meetings to have been a very persuasive source of evidence. The absence of this evidence does not assist its position.

181. Mr Aslett invites me to draw an adverse inference from the absence of the minutes. He suggests that there is a serious risk that they have been destroyed and that the fairness of the trial process has been compromised. He points out that there is no evidence as to when or how the notes were lost or destroyed. He complains that the late stage at which it was confirmed that the documents were not available deprived him of the opportunity to cross-examine Mrs Davies or Mr Lomax about the missing minutes.

182. Mr Aslett refers me to Malhotra v Dhawan 8 Med LR 319, CA, where a defendant accountancy firm, albeit not deliberately, destroyed files which were relevant to the issues in a claim brought against it by a former partner. In the Court of Appeal Morritt LJ made the following observation:-

"I am bound to act on the principle laid down in the well-known case of Armory v Dalamirie, and presume, as against the person who destroyed the evidence, everything most unfavourable to him, which is consistent with the rest of the facts, which are either admitted or proved."

183. Mr Aslett also refers me to Gulati v MGN Limited [2015] EWHC 1482, where it was highlighted that any inferences that are drawn must be in line with other evidence in the case and that the Court is not to ignore evidence that is made available or to make speculative or fanciful findings.

184. I do not propose to draw adverse inferences as a result of Orchard House's failure to disclose the minutes of the various meetings, given that, any such inferences would have to be in line with other evidence in the case. Moreover, I do not think for one moment that either Mr Lomax or Mrs Davies would have destroyed or concealed the minutes on the basis that they did not support Orchard House's claim.

185. However, that does not mean that the issue is of no consequence. It is. If the minutes had supported the case advanced by Orchard House, it may well have strengthened its position on the key issue of whether an initial agreement had been reached on the Purchase Price in relation to Plot C. The absence of those minutes means that Orchard House has been unable to provide me with any contemporaneous documentation to corroborate its

account of a concluded agreement. In that sense, it has undermined Orchard House's claim and it is not an issue which I can, or should, overlook.

Discussion and Analysis

186. I am grateful to Counsel for their oral and written submissions. I do not intend to highlight all of the points which they have raised, but nevertheless I have taken them into account in arriving at my conclusions.

The key factual issues to be determined

187. There are three key factual issues to be addressed, namely:-

A. Was there was a certain and binding oral agreement between Orchard House and the Defendants reached between September 2018 and March 2019 as to the Purchase Price for Plot C (less Plot G)?;
B. Was there a further binding oral agreement (or a certain binding variation to any prior agreement) reached between Orchard House and the Defendants in or around July 2020 as to the Purchase Price for Plot C as part of a wider agreement, the total consideration for which was £601,000?;
C. What was the date on which the Defendants moved into the New Farmhouse?

188. I shall address these issues in turn.

A. Was there a certain and binding oral agreement between Orchard House and the Defendants reached between September 2018 and March 2019 as to the Purchase Price for Plot C (less Plot G)?

189. Orchard House's position is that, from shortly after Mr Lomax wrote to the Defendants on 20 July 2018, setting out his detailed proposal for, and justification of, the Purchase Price of Plot C, the parties proceeded on the footing that the Purchase Price would be £250,000. The Defendants did not put forward any counterproposal and they were conducting themselves as if Mr Lomax's proposed figure were uncontroversial. The only variation of that figure that was discussed was based on the potential for the Defendants to reduce their liability for CGT.

190. Ms Dimelow accepts that the figure of £250,000 was used in negotiations and discussions between the parties, but her position is that it was never, in fact, agreed.

191. Orchard House has not persuaded me, on the balance of probabilities, that the parties agreed a Purchase Price of £250,000 for Plot C between September 2018 and March 2019.

192. Firstly, I have not been able to find anywhere in the email correspondence passing between the parties (or between their solicitors) any express agreement of the Purchase Price. If it had been agreed, I would have

expected that fact to have been recorded distinctly and clearly, especially in the solicitors' correspondence.

193. If anything, the email correspondence (or, at times, the absence of it) suggests that no agreement was reached.

194. For example, Mr Collins sent an email to Mr Rose on 19 October 2018 in which he suggested that the Purchase Price would be £250,000 or 85% of the market value of Plot C. Mr Lomax suggested that this was an error on Mr Collins' part, but it does not seem to have been challenged at the time and, in my view, it is unlikely that Mr Collins would have made such a mistake.

195. In her email to Mr Collins on 23 January 2019, Mrs Davies was referring to a "proposed agreement" and the tenor of her email to Ms Dimelow on 21 February 2019 was persuading her to reach an agreement, rather than confirming that an agreement had been finalised.

196. As late as 27 June 2019, Mrs Davies wrote to Ms Dimelow saying, "Once we have a value that both parties agree to, we would like to exercise the option set out in Clause 7.1 of the agreement by serving an option notice on your client."

197. Moreover, the emails sent following meetings at which the parties were without legal representation often suggested that any common ground was to be advised on, or endorsed by, the lawyers.

198. For example, in his email dated 8 November 2018, Mr Lomax says, "it will be much easier to obtain an agreement in principle prior to involving solicitors, save as to costs and time delays." On 23 November 2018, Mrs Davies wrote to Ms Dimelow, "once you and [Mrs Dimelow] are happy with absolutely everything, then we will send over to [Mr Collins] and we can hopefully have everything signed off in the next couple of weeks, if you are in agreement."

199. Furthermore, the correspondence sent by Mr Collins was generally marked "Subject to Contract and Without Prejudice", suggesting that no final, binding agreement had been reached, or would be reached, until all outstanding contractual issues had been resolved.

200. Secondly, as I have noted above, and leaving aside email correspondence, Orchard House has not produced any persuasive contemporaneous documents tending to show that an agreement was reached by the parties in relation to the Purchase Price. In particular, it has not disclosed any file notes or the minutes taken by Mrs Davies and I have seen no relevant internal emails sent, or file notes taken, by Mr Lomax or Mr Rose.

201. Thirdly, Orchard House's case on this issue has lacked clarity and consistency. Mr Lomax acknowledged in the witness box that some of the dates referred to in the Claimants' evidence and pleaded case "might not be exact".

202. In response to a question from me, Mr Lomax accepted that he could not recall a particular time when the agreement of £250,000 for the Purchase Price was reached. Mrs Davies told me that the deal was reached when Mr Rose drew up the contractual agreements.

203. In my oral judgment following the reverse Summary Judgment application, I made the following observations:-

"… Where a claim is based on an oral agreement, the Particulars of Claim should set out the contractual words used and should state by whom, to whom, and when they were spoken. The paragraphs of the Particulars of Claim about which the Defendants complain do not appear to comply with this guidance…"

"… There appears to be no case stated by reference to the principle of offer and acceptance…"

204. Orchard House subsequently elected to amend its Particulars of Claim.

205. In the Amended Particulars of Claim, it is pleaded that at a meeting on 4 September 2018, "Mr Lomax repeated the offer [of £250,000] made in his letter dated 20 July 2018] and Mr Wynford Collins stated that the Defendants agreed that the sale price of the balance of Option C would be £250,000 and that the sale would occur on the grant of planning permission. Mr Lomax agreed to this".

206. Therefore, on Orchard House's pleaded case, an agreement on the Purchase Price was reached on 4 September 2018.

207. However, that assertion was not reflected in the witness statements of Mr Lomax or Mr Rose, and Mr Lomax's evidence in the witness box was that "it was not a definite deal at this point". Mrs Davies was not able to comment on the meeting on 4 September 2018 because it took place before she began working for Orchard House.

208. It is perhaps worth noting that this apparently pivotal date of 4 September 2018 did not even appear in Orchard House's original Particulars of Claim and that Mr Horne's Skeleton Argument refers to the alleged agreement having been reached during meetings on 19 October, 6 November and 7 November 2018.

209. Mr Lomax's evidence on the meetings of 4 September 2018 and 19 October 2018 was far from clear. He told me that his witness statement contained an error in that it indicated that the Defendants were not present at the meeting on 4 September 2018, when they were. He was unsure whether there was a meeting on 19 October 2018 or whether he was present at it. It seems that the only witness statement served by the Claimant referring to a meeting on that date is that of Mrs Davies, who confirms that she did not attend it.

210. I am not satisfied on the evidence that a meeting took place on 19 October 2018.

211. In any event, there is the email sent by Mr Collins to Mr Rose on 19 October 2018 (referred to above) which suggests that the agreement for which Orchard House now contends had not been reached.

212. Mr Lomax is now clear that he attended the meeting on 6 November 2018, whereas he had previously indicated that he was not at the meeting.

213. Orchard House's position now appears to be that the agreement was reached at some point between the meetings on 4 September 2018 and 19 March 2019.

214. Its pleaded case suggests that, at the meeting on 19 March 2019 which was held at Hibberts' offices, "it was confirmed by the Defendants during those discussions… that the agreed sale price of the balance of plot C was £250,000". However, this additional wording was introduced at a late stage at paragraph 9(v) of the Amended Particulars of Claim, which again is surprising, given the crucial nature of the allegation.

215. It is also noteworthy that the Claimants' letter of claim made no reference to any of the meetings between the parties before 12 February 2019.

216. I accept that mistakes can be made, but there are too many inconsistencies in Orchard House's written case to justify making the finding which it seeks.

217. Fourthly, the basis of the figure of £250,000 is the letter dated 20 July 2018 sent by Mr Lomax to the Defendants. I was referred to that letter several times during the trial. However, it is apparent that Mr Lomax's offer was premised on a number of factors, and chiefly on his allegation that the Defendants had failed to disclose the existence of the Severn Trent Pipeline, leading to Orchard House incurring very substantial outlay. That appears to have been a key feature of Mr Lomax's justification for the proposed Purchase Price.

218. The Defendants were prompt in disabusing Mr Lomax of his position. Mr Collins wrote to Mr Rose, to confirm that, not only had the Defendants informed Mr Lomax of the presence of the pipeline on two separate occasions, but that, in any event, it was his responsibility to make the appropriate drainage searches. I found Ms Dimelow's evidence on whether Mr Lomax had been informed about the water main compelling, and I accept what she told me. She was very specific and detailed about when and how the information was conveyed to Mr Lomax.

219. On any view (and this was accepted by Mr Rose), a drainage search ought to have been undertaken by Orchard House, and yet it did not take that step. Mr Rose says that the search that was ultimately carried out did not reveal the Severn Trent Pipeline. However, he has not been able to produce a copy of the search (for understandable reasons) and, in any event, it takes the matter no further.

220. The Severn Trent Pipeline issue was, on any view, contentious. The Defendants did not, and do not, accept that they were at fault in failing to disclose its presence on the Farm. Mr Lomax claimed that it had cost him approximately £220,000 to move. In light of their justifiably strong views on the issue and given that it was the key plank of the reasoning behind Orchard House's offer, it is unlikely that the Defendants would have simply accepted Mr Lomax's proposed starting point for the calculation of the Purchase Price.

221. In the same context, I note that the Defendants say that they did not accept Mr Lomax's calculation of the sums for which they were liable in relation to the New Farmhouse. The amount in dispute was less substantial than the costs to be incurred as a result of the pipeline, but nevertheless Mr Lomax's figures appear to have been unacceptable to the Defendants.

222. Fifthly, it was Ms Dimelow's clear evidence that no such Purchase Price had been agreed and that the figure of £250,000 was simply used in negotiations. Whether she was correct or not, she recalled that Mr Collins had told her that no Purchase Price could be agreed until Planning Permission had been obtained. I found her evidence on this issue persuasive and consistent with the documentary evidence and the other matters to which I have referred above.

223. Sixthly, if the parties had agreed the Purchase Price at £250,000, there would have been no reason for the further agreement for which Orchard House now contends.

224. Indeed, if it was sure of its ground, then I would have expected Orchard House to have exercised Option C on the first occasion on the basis of the Purchase Price which it contended had been agreed.

225. Lastly, there is the perhaps obvious point that, even on Orchard House's case, there are a number of figures advanced as the agreed

Purchase Price: £250,000; £25,000; £251,000. This lack of consistency does not assist Orchard House's case.

226. Moreover, I accept Mr Aslett's point that any agreement reached (none having been found by me) would have constituted a new agreement, as set out in the amended contractual documentation prepared by Orchard House, rather than an agreement pursuant to Option Agreement C. I note that Mr Lomax accepted that a new agreement had been proposed and was unable to recall whether Mr Rose had discussed its implications with him.

B. <u>Was there a further binding oral agreement (or a certain binding variation to any prior agreement) reached between Orchard House and the Defendants in or around July 2020 as to the Purchase price for Plot C as part of a wider agreement the total consideration for which was £601,000?</u>

227. Orchard House contends that its position on this issue is supported by the contemporaneous correspondence and documentation.

228. In his email dated 13 July 2020, Mr Gregson asked Mr Rose to write to Ms Dimelow "setting out the final agreed offer to purchase both options." Orchard House's case is that this can only mean that an agreement had been reached between Mr Gregson (on its behalf) and Ms Dimelow. Approximately 90 minutes later, Mr Rose wrote to Mrs Platt noting his understanding that an agreement had been reached between their respective clients in relation to Plots C and F. Orchard House's position is that Mr Rose would not have written to Mrs Platt in those terms if he was not satisfied that an agreement had been reached, having taken confirming instructions from Mr Lomax.

229. Mr Horne asks me to be cautious about Mr Gregson's evidence on this (and other) point(s), given his apparent hostility towards Mr Lomax.

230. The Defendants deny that any such agreement was ever reached and they rely on Mr Gregson's corroborative evidence.

231. I do not find on the balance of probabilities that a further agreement was reached by, or on behalf of, the parties in July 2020.

232. Firstly, and crucially, the individuals who are said by Orchard House to have reached the agreement both contend that no such agreement was reached.

233. I have found Ms Dimelow to be a truthful and honest witness and I have no reason to doubt her evidence on this point. In my judgment, it is in no way inconsistent with the documentary evidence.

234. Whilst I have expressed reservations about Mr Gregson's independence as a witness, in his live evidence he was insistent that no such agreement was reached by him and the Defendants. I am persuaded that his evidence on this point was truthful, accurate and consistent with the documentation which has been shown to me.

235. Mr Gregson's evidence in his first witness statement (prepared for the reverse summary judgment application) was that Mr Lomax told him that he had made an offer of £601,000 to the Defendants but that they had not responded to it. He, therefore, asked Mr Gregson to reduce the offer to £50,000 because Plot C was landlocked and of no value. In his trial witness statement, Mr Gregson told me that Mr Lomax had informed him that he had reached the agreement with Ms Dimelow. Mr Lomax told him to write to Mr Rose to confirm the position. Mr Gregson later went to see Ms Dimelow on Mr Lomax's instructions to warn her that the price would go down if it was not confirmed. On cross-examination, Mr Gregson told me that Mr Lomax consistently changed the figure which he was prepared to offer to the Defendants, and that at one point he was asked to put an offer of £601,000 to them. He was clear that they did not accept that offer.

236. The core point made by Mr Gregson was that he was instructed to threaten Ms Dimelow with a low Purchase Price. I accept his evidence on that point. It is consistent with Mr Lomax's later decision to exercise Option C based on obtaining an independent determination, which he thought would produce a low valuation.

237. Secondly, there is no direct evidence from Orchard House's witnesses that such an agreement was, in fact, reached because they were not involved in any negotiations. Their evidence on this point is, at best, second hand.

238. In his trial witness statement, Mr Lomax does not say that Mr Gregson told him that he had reached an agreement with the Defendants. He simply relies on the email sent by Mr Gregson to Mr Rose on 13 July 2020.

239. Mr Lomax told me that he was not certain precisely when it had communicated to him that a Purchase Price of £601,000 had been agreed. He was unable to tell me whether he had a discussion with Mr Gregson or Mr Rose at or around that time. He told me that he had "assumed" that Mr Gregson had told him about the agreed Purchase Price at the time. His evidence on this issue was unclear and was not persuasive.

240. Mr Rose recalls that Mr Gregson told him that an agreement had been reached with the Dimelows. However, for the reasons I give below, I am not confident that his recollection is entirely consistent with the email correspondence which has been shown to me.

241. Moreover, given that the conversation took place many years ago, and that Mr Rose has not retained (or been able to retain) a written record of it, I must treat his evidence on this point with some caution.

242. Thirdly, the contemporaneous communications which I have seen do not support Orchard House's position. The initial text message from Mr Lomax to Mr Gregson makes no reference to an agreement and Mr Gregson's email to Mr Rose dated 13 July 2020 does not confirm that a settlement had been reached, but rather refers to "the final agreed offer", which is somewhat ambiguous in its meaning.

243. I suspect that, as he told me, Mr Rose is likely to have taken instructions from Mr Lomax before writing to Mrs Platt. I think it likely that Mr Lomax would have told him that he believed that a deal had been concluded. Otherwise, Mr Rose would not have written to Mrs Platt in the terms set out in his email to her. However, as I have already noted, Mr Lomax was not a party to any discussions.

244. Fourthly, I find it inherently unlikely that the Defendants would have agreed to a Purchase Price of £601,000 at that stage. They had already obtained a valuation from Mr Eckersley, suggesting that Plot C had a value well in excess of the figure which they are said to have agreed with Orchard House. Moreover, at that stage, relations between Mr Lomax and the Defendants had effectively broken down.

245. Lastly, there is no correspondence or documentation confirming that such an agreement had been reached, save for Mr Rose's email to Mrs Platt on 13 July 2020 and Mr Lomax's email to the Defendants dated 21 July 2020 in which he "accepts" their "counteroffer". Ms Dimelow replied to that email the following day in terms which, on a fair reading, cannot be construed as confirming any settlement. Her reply was, in my judgment, no more than a holding response. I accept her evidence on cross-examination that she was "taken aback" when she received Mr Lomax's email and that she had not put any offer to him.

246. For all of these reasons, Orchard House has not persuaded me that, on the balance of probabilities, an agreement was reached for a Purchase Price of £601,000 in aggregate for Plots C and F.

C. <u>What was the date on which the Defendants moved into the New Farmhouse?</u>

247. Mr Lomax contends that the Defendants moved into the New Farmhouse in February 2019.

248. He told me that, whilst he had meetings with the Defendants in the New Farmhouse, it was not apparent to him that they were living there. He said that, for example, he was not offered a cup of tea at the meetings.

249. In any event, whilst he had received a Certificate of Completion and the other documents (referred to at paragraph 97 above) in 2018, he did not send them to the Defendants or to their solicitors until February 2019. He would not expect any of his purchasers to move into their new properties until they had been given those documents. He recalls that he was still maintaining the gardens of, and paying insurance in relation to, the New Farmhouse until February 2019, and that, in 2018, the property was not fully completed, with, for example, the stables and landscaping works still to be finished.

250. Orchard House has no clear and direct evidence on this issue, but Mr Lomax relies principally on the email which Ms Dimelow sent to the Local Authority, informing them that she and her mother had not completed their move into the New Farmhouse until February 2019. I have seen copies of photographs which are said to show that, towards the end of 2018, the Defendants had still not fully vacated the Old Farmhouse.

251. The Defendants' case is that they moved into the property in June 2018. They rely on the various documents to which I have referred at paragraph 97 above.

252. In the witness box, Ms Dimelow told me that she and her mother had slept at the New Farmhouse every night from June 2018 onwards and that they had moved the majority of their clothes by that time.

253. She accepted that she had misled the Local Authority about the date on which she and her mother had moved into the New Farmhouse, with a view to minimising their exposure to Council Tax.

254. I find, on the balance of probabilities, that the Defendants moved into the New Farmhouse in June 2018. I have reached this conclusion for the following reasons.

255. Firstly, this was the clear evidence of Ms Dimelow and, as I have noted above, I found her to be an honest and reliable witness. That extends to the evidence which she gave to me on this issue, which was specific and detailed.

256. Secondly, Mr Lomax has no direct evidence on this point. He does not say (and nor do his witnesses) that he observed the Defendants continuing to reside (to any meaningful extent) in the Old Farmhouse in the latter part of 2018 and in early 2019.

257. Moreover, even his amended pleaded case states that "the Option period for the option over plot F commenced on or around 25 June 2018". In

the witness box, Mr Lomax told me that this was incorrect, but it reinforces my impression that he is unsure on this point.

258. Thirdly, there is no dispute between the parties that meetings were held in the New Farmhouse during the latter half of 2018. I would not have expected the meetings to take place there if the Defendants were still living (wholly or partly) in the Old Farmhouse. I am not persuaded by Mr Lomax's observation that the Defendants did not appear to be in occupation of the New Farmhouse, based on his not being offered refreshments when he visited.

259. Fourthly, and crucially, the available documentation overwhelmingly suggests that the Defendants moved into the New Farmhouse in mid-2018.

260. Mr Lomax's letter to the Defendants dated 20 July 2018 opens with "I do wish you every happiness in your new home, and I really do hope it has been worth the wait". In my view, that sentiment is entirely inconsistent with the Defendants not having moved into the New Farmhouse or not intending to do so imminently.

261. Moreover, there is a very substantial amount of contemporaneous documentation supporting the Defendants' position on this point. Many of those documents, which are addressed to Orchard House, suggest that, from a practical or regulatory perspective, the New Farmhouse was ready to be occupied in June 2018. Those documents include a gas safety certificate, an air permeability certificate, a fire alarm certificate, an electrical installation certificate, an energy performance certificate and the certificate of practical completion. The dates of those certificates all coincide with the period immediately before the Defendants moved into the New Farmhouse, which suggests that they were obtained in preparation for their move.

262. I was far from convinced by Mr Lomax's suggestion that he would have retained the documents until the New Farmhouse was handed over to the Defendants. It seems unlikely that they would have been deliberately withheld from the Defendants when they were available and when (even on Orchard House's case) they had access to the New Farmhouse.

263. The invoice/receipt from the removal firm confirms that it assisted the Defendants in June 2018. The reference to a "part move" and the modest fee charged perhaps reflect that the extent of the firm's task was not as extensive as it perhaps would ordinarily be, but, in the absence of corroborative evidence, it does not necessarily support Mr Lomax's position.

264. Lastly in terms of documentation, there is the document evidencing that Ms Dimelow took leave at the end of June 2018 and her correspondence with the site manager and others at that time.

265. In my judgment, this documentation and its timing have provided a formidable obstacle for Orchard House to overcome on this factual question.

266. Moreover, the Defendants' position on this point has been consistent. On 12 June 2020 (and, on any view, within the 2-year Option Period) Mrs Platt wrote to Mrs Davies confirming that the date of the move had been 28 June 2018.

267. Lastly, the date of the Defendants' move to the New Farmhouse contended for by the Defendants is consistent with the timetable set out in the Master Agreement.

268. I should make clear that I accept that Ms Dimelow sought to mislead the Local Authority about the date on which she and her mother moved to the New Farmhouse, with a view to minimising their Council Tax liability. The email which she sent to the Local Authority is vague and has the hallmarks of such an approach.

269. As I have already indicated, I do not accept that Mrs Davies assisted Ms Dimelow in drafting the email. Ms Dimelow told me that Mrs Davies had advised her to be "woolly" in choosing her words. However, she accepted that Mrs Davies did not provide her with draft wording and that she did not "stand over" her while she drafted her email to the Local Authority.

270. As I have explained, I think it unlikely that Mrs Davies would have encouraged any dishonesty. Ms Dimelow has accepted that she was attempting to mislead the Local Authority. I think it likely that with the passage of time, she has confused various conversations which she had with Mrs Davies on the issue. I do not think that she has sought to mislead me concerning Mrs Davies' involvement.

271. Even so, I accept that the email was not truthful in its content. It is the only credible piece of evidence which suggests that the Defendants moved into the New Farmhouse later than the Summer of 2018 and, for the reasons I have given, it does not undermine the compelling evidence to the contrary.

Plot C – Issues for determination

Issue 1: Was there a certain and binding oral agreement between Orchard House and the Defendants between September 2018 and March 2019 as to the Purchase Price for Plot C (less Plot G).

272. For the reasons set out between paragraphs 189 to 226 above, I do not find that such an agreement was reached.

Issue 2: Was there a further certain and binding oral agreement (or a certain and binding variation to any prior agreement) between Orchard House and the Defendants in or around July 2020 as to the Purchase Price for Plot C as part of a wider agreement, the total consideration for which was £601,000

273. For the reasons set out between paragraphs 227 to 246 above, I do not find that such an agreement was reached.

Issue 3: Whether waiver by estoppel arose up to July 2020 upon which reliance was placed by Orchard House, so that the Defendants are estopped from denying that a Purchase Price of £250,000 was agreed for Plot C (less Plot G)?

274. Given my conclusions in relation to Issue 1, this issue no longer falls to be considered.

Issue 4: Whether the purported exercise of the Option C on 6 January 2021 was required to be conditional upon the payment of a deposit; and, if it was so, whether the Defendants waived compliance with the requirement to pay a deposit at the time of the exercise of that option.

275. This issue involves an interpretation of the provisions in Option Agreement C relating to whether a deposit was payable on the exercise of Option C and, if so, consideration of whether it was a condition precedent of exercising Option C that a deposit is paid.

276. The relevant law applies equally to Plot F, Issue 2.

The Law

277. Barnsley's Land Options, 7th Ed at 4-028 and 4-029 addresses this issue:-

"Whether or not the payment of the deposit is a condition precedent to the exercise of the option is a question of construction of the instrument which contains the option."

278. The authors describe Hare v Nicoll [1996] 2 QB 130 and Millichamp v Jones [1982] 1 WLR 1423, in which apparently conflicting decisions were made on this point, to be either side of "the line".

279. In Hare v Nicoll, the Court of Appeal considered an option to purchase shares which provided that, if notice was given by a certain date, on payment

of a deposit one month later a contract would come into being for the purchase of the shares. The Court determined that, on those terms, the payment of the deposit was a condition precedent to the exercise of the option.

280. In Millichamp v Jones, the contractual provision required payment of a deposit "upon the exercise of the option". Warner J distinguished Hare v Nicoll on the facts of the case. He also observed that the payment of a deposit was not ordinarily a condition precedent which must be fulfilled before a contract for sale can come into existence.

281. The conclusion reached by the authors of Barnsley's Land Options is that each option contract must be interpreted individually by careful consideration of the contractual provisions. In other words, in each case, it is a question of construction whether or not the payment of the deposit is, in fact, a condition precedent to the exercise of the option. However, in a foot note (at pages 136/137), they "agree that it would be difficult to construe an option as making payment of the deposit a pre-condition of exercising the option without clear words to that effect".

282. In Petrol (Passive Emissions Testing Research Organisations Laboratories) Ltd v Industrial Property Investment Fund [2006] EWHC 2219 (Ch), the Court found that the deposit clause amounted to a condition precedent for exercising the option. The clause provided, "If the purchaser wishes to exercise the option, it shall do so by signing… the option notice and serving the option notice on the vendor before the expiry date together with payment of 10 per cent of the purchase price…"

283. In Truegold International Ltd v Questrock Limited [2010] EWHC 966 (Ch) the Judge found that a requirement to pay the deposit "on the service of the option notice" did not amount to a condition precedent. He referred to Petrol (Passive Emissions Testing Research Organisations Laboratories) Ltd v Industrial Property Investment Fund and observed that, in that case, "both notice and payment are provided by the option agreement to be necessary steps to be taken in exercising the option".

284. A similar conclusion that payment of a deposit was not a condition precedent was reached by the Court in Peacock v Imagine Property Developments Ltd [2018] EWHC 1113(TCC), where the contract required the deposit to be paid "on the exercise of the option".

285. In Myton Limited v Schwab-Morris [1974] 1 WLR 331, a condition as to payment of a deposit was held to be a condition precedent, although doubt was cast on that conclusion by the Court of Appeal in Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445.

286. Turning to waiver by estoppel, this may occur if, without any request by one party that the other should forbear to insist on the mode of performance fixed by a contract, the former represents to the latter that he will not enforce

or rely on a term of the contract, and the other party acts in reliance on that representation. A waiver may be oral, written or inferred from conduct even though the provision is found in a contract required to be made or evidenced in writing (Chitty paragraph 26-044).

287. A waiver by estoppel may only be suspensory in effect and depends on whether it is inequitable for the promisor to go back on their promise. It is rare for the estoppel to be extinctive, rather than suspensory.

288. The legal principles relating to the interpretation of contracts ought not to be contentious. As Lord Neuberger observed in Arnold v Britton [2015] AC 1619, 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."

289. In particular, the Court must assess that wording in the light of:-

- The natural and ordinary meaning of the clause;
- any other relevant provisions in the contract;
- the overall purpose of the clause and the contract;
- the facts and circumstances known or assumed by the parties at the time the contract was made;
- commercial common sense; but
- disregarding subjective evidence of any party's intentions.

Analysis

290. The provisions contained in Option Agreement C are, at first blush, somewhat puzzling.

291. Clause 8.1 provides that Orchard House is to pay the deposit on the date of the exercise of Option C and Clause 8.4 stipulates that failure to do so will result in the exercise of the option being "null and void".

292. However, Clause 17.2 envisages that the parties might reach agreement on the Purchase Price within 20 working days after the date of the exercise of Option C and Clause 17.3 provides that, in the event that they fail to do so, either party may refer the matter for determination by an expert. In either case, when exercising the option, it would not be possible for Orchard House to pay the deposit, because it could not be calculated, the Purchase Price not having been agreed or determined. Moreover, whilst Clause 8.5(b) is not altogether clear in its application, it suggests that there are circumstances in which no deposit is payable on the exercise of Option C.

293. Applying the principles of contractual interpretation set out above, it is important not to lose sight of the natural and ordinary meaning of Clauses 8 and 17.

294. Clause 8 attaches importance to the timely payment of the deposit in that it invalidates any attempt to exercise the option if the deposit is not paid on the date on which the option is exercised.

295. Equally, Clause 17 envisages a timetable for agreement or determination of the Purchase Price which does not allow for the deposit to be paid in accordance with Clause 8.1 and 8.4.

296. In my judgment, the most reasonable interpretation of these apparently conflicting provisions is that the deposit is payable on the exercise of Option C if the Purchase Price has been agreed in advance of the option being exercised, failing which the sanction in Clause 8.4 applies and that, if no Purchase Price has been agreed, no deposit is payable at that point.

297. If I were to conclude otherwise, then either Clause 8.4 would be of no effect or it would apply in circumstances in which Orchard House could not possibly comply with its obligation to pay the deposit. In either case, I would not be giving effect to the natural and ordinary meaning of the provisions.

298. In my view, this interpretation of the contractual provisions makes commercial sense. It reinforces the importance of paying the deposit on exercising the option where it is possible to do so, but it leaves open the prospect of deferring payment of the deposit where the Purchase Price has neither been agreed nor determined. This is in keeping with the overall purpose of the clauses and the contract.

299. I have no hesitation in concluding that, in circumstances where the Purchase Price has been ascertained prior to the option being exercised, it is a condition precedent that the deposit is paid. In my judgment, the wording of Clause 8 makes it plain that payment of the deposit is an essential step to be taken before the option can be exercised validly. The words “null and void” are clear words to that effect.

300. In the present case, I have found that no agreement was reached in relation to the Purchase Price and, in any event, the option was exercised on the basis that the expert determination provisions were being invoked. The amount of the deposit was, therefore, not ascertainable and payable by Orchard House when the option was exercised.

301. In light of my conclusions, I do not need to go on to address the issue of waiver.

<u>Issue 5: Whether Orchard House was ready and able to tender any deposit on 6 January 2021;</u>

302. On the basis of the letter from Capital Stackers dated 16 July 2024, which has been endorsed by Mr Lomax, I am satisfied that Orchard House was ready and able to tender a deposit on 6 January 2021.

Issue 6: Whether the Defendants validly terminated Option C on 21 October 2021 for the reasons set out in their solicitors' letter of the same date.

303. Mr Eagle's letter of termination relies on Orchard House's failure to accept Mr Wilson's determination and to attend to completion, either as a fundamental breach of the Option Agreement under Clause 21 or, alternatively, as a repudiatory breach at common law.

304. Mr Aslett suggests that, even if Orchard House were to succeed in the Part 8 Claim, it would be of no benefit to it because the 5-year Option Period has now expired, such that Orchard House cannot validly exercise it.

305. I do not agree with Mr Aslett on that point.

306. Given that I have already concluded that the deposit was not payable when Orchard House exercised Option C on 6 January 2021, and in the absence of any other conditions precedent applicable to the exercise of the option, it follows that it was validly exercised on that date. At that point, a contract was formed between the parties pursuant to which Orchard House had 4 weeks to complete from the date of Mr Wilson's valuation.

307. The question to be decided is whether, given the failure of Orchard House to complete, or indeed to take any further steps after the expert determination was made available to the parties, the Defendants were entitled to terminate the contract.

308. At the outset, I shall consider the contractual position in relation to, firstly, the steps to be taken in the event that one of the parties considered that the expert had made a manifest error or had acted fraudulently and, secondly, the payment of the deposit once the determination was to hand.

309. There are no express contractual provisions covering these points and so I must decide whether any suitable terms should be implied into the contract to deal with them.

310. In Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592 Scrutton LJ put it this way:-

" A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will

happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some conclusion such as that, it ought not to imply a term which the parties themselves have not expressed".

311. In the Privy Council case of BP Refinery (Westernport) Proprietary Limited v Shire of Hastings (1977) 180 CLR 266 at 283 Lord Simon set out the following approach:-

"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; and (5) it must not contradict any express terms of the contract".

312. "Manifest error or fraud" is stipulated in the contract as the exception to the expert determination being "final and binding on the parties". However, the contract is silent as to the steps to be taken by a party wishing to challenge the determination against the background of the 4-week completion period imposed by Clause 19.

313. In essence, Mr Aslett suggests that, if Orchard House intended to challenge Mr Wilson's determination, it ought to have done so within the 4 week completion period, by applying to the Court for an Order equivalent to injunctive relief to ensure that the disputed issue was resolved within that timeframe.

314. Mr Horne disagrees. His submission is that Option C was exercised on 6 January 2021 and that the option to complete remains available to Orchard House, until and unless the Court decides that there was no manifest error in Mr Wilson's determination, subject only to the applicable 6-year limitation period.

315. I do not agree with Mr Horne on this point. In my view, it does not follow from the inclusion of the "manifest error or fraud" exception that any challenge to the expert determination is, essentially, open-ended, subject to limitation.

316. Moreover, I do not accept that a simple complaint in correspondence should lead to the wholesale relaxation of the option timetable.

317. In either case, if that had been the intention of the parties, I would have expected appropriate provision to have been made in the contract. It was not.

318. Similarly, I do not accept Mr Aslett's suggestion that Orchard House should have initiated and concluded legal proceedings to ensure compliance with the 28-day completion date stipulated in Option Agreement C. That would involve a very ambitious procedural challenge, which, practically, would be

very unlikely to be achievable, especially given that expert evidence would be required.

319. However, without an implied term, this aspect of the contract has the potential to be unworkable.

320. In my judgment, to make commercial sense of the contract and to cater for the applicable principles outlined in paragraphs 310 and 311 above, a provision should be read into the contract requiring any party wishing to challenge an expert determination to take concrete procedural steps by issuing proceedings for a declaration or order that the expert determination was not binding owing to manifest error or fraud, within 28 days of receipt by the parties of the expert determination (i.e. within the window for completion).

321. Such an implied term is reasonable, equitable and gives business efficacy to the contract, especially as there would appear to be a lacuna in the express terms of the contract covering this eventuality.

322. I am confident that, if the parties had considered this point when they entered into the contract, they would have considered it clear that such a term needed to take effect.

323. The implied term is capable of clear expression.

324. It is in keeping with commercial common sense that the completion date would not be open-ended without positive action being taken by a party wishing to challenge the expert determination.

325. It is also consistent with the other terms of the contract and principally with the completion period set out in Clause 19(b). The purpose of that clause was to bring matters to a close within a short period of time of the Purchase Price being agreed or determined.

326. In my judgment, there are no other contractual provisions in Option Agreement C which would suggest that, if either party was not content with the expert determination, then (subject to the limitation period) there would be an unspecified extension to the completion timetable.

327. An alternative route to reaching the same conclusion would be to interpret the contract in such a way that, where a party was willing to complete but wanted to challenge the expert determination on the basis of manifest error or fraud, completion means taking all reasonable steps required for completion and issuing proceedings seeking a finding within the completion period.

328. If I am wrong on this point, then at the very least such a term should be implied on the same basis requiring the objecting party or to take such

action to challenge the determination within a reasonable period of time. This is simply the application of the implied term that each party should do all that is necessary to be done on its part for the carrying out of the purchase, bearing in mind that the parties are required to cooperate in order for completion to take place. Chitty on Contracts (35th edition) at 17-027.

329. Whilst what is reasonable must depend on the particular circumstances at the time, in my judgment, in the context of the facts of this case, a reasonable period of time would have been, at most, 8 weeks from receipt of the expert report. That would allow Orchard House, as the party dissatisfied with the expert determination, sufficient time to investigate, obtain expert input (if need be), raise the matter with the other party and/or the expert and, in the absence of agreement, issue proceedings.

330. I now turn to the payment of the deposit.

331. It is clear from the sanction set out in Clause 8.4, that paying the deposit was deemed to be such a crucial step that failure to do so would invalidate the exercise of Option C where the Purchase Price had been agreed or determined by that time.

332. In my judgment, it cannot reasonably be contended that, in other circumstances, namely where the parties follow the Clause 17 route, not only is the deposit relegated in importance, but it is not payable at all.

333. Payment of a deposit is always crucial because it reflects the Purchaser's commitment to proceed to completion. It is all the more so here, where failure to pay the deposit in other circumstances invalidates the exercise of the option.

334. In my view, but for the right to challenge the expert determination clause, in order to achieve consistency across the contract, and given that the contract is silent on the point, a term ought to be implied that, after the Purchase Price had crystallised (where Clause 17 applies), the deposit is payable within a limited period of time and certainly by the date of completion envisaged by the contract.

335. However, this runs up against the difficulty that such an implied term could not sensibly apply if Orchard House were to comply, or intend to comply, with the implied term to take concrete procedural steps to challenge the determination within 28 days (or 8 weeks, as applicable) because, in those circumstances, the quantum of the deposit would not be calculable because the Purchase Price could not be determined until the challenge had been concluded. In my judgment, the answer in such a case is that Orchard House would still have to pay the deposit based on the expert's determination as a form of guarantee whilst, at the same time, challenging the expert determination. At the very least it ought to have paid the deposit within the 28-day period.

336. Such an implied term is reasonable and equitable, and does not contradict (and indeed is consistent with) the other terms of the contract. Given the terms of Clause 8.4, I am confident that the parties would have given expression to it, had they considered the issue when they entered into the contract.

337. There may be an argument that Clause 8.7 may have some application, although this clause is not pleaded and has not been drawn to my attention. However, in my judgment, it is not altogether clear how that clause (and indeed Clause 8.5) should be interpreted and to what it relates. For example, the meaning of "default" is uncertain. If it were to be relevant to this situation as an express term, then, in my view, default would relate to a failure to take steps to complete (and/or to procedurally challenge the expert's determination) on the part of Orchard House.

338. Orchard House, was, therefore, in breach of Clause 19(b) by failing to complete by 7 July 2021. Moreover, it did not comply with the implied term to take concrete steps to challenge the expert's determination. It was also in breach of its obligation to pay the deposit after the expert determination had been received and not challenged, even though it intended to challenge it.

339. Against that background, the next question is whether the Defendants were entitled to terminate the contract.

340. A party to a contract may terminate it pursuant to its common law or contractual rights.

341. At common law, this is done on the basis of the other party's conduct, which may take the form of a repudiatory breach, and/or renunciation of the contract and/or conduct rendering performance of the contract impossible.

342. The common thread is that the breach must be of sufficient seriousness to justify termination.

343. In relation to repudiatory breach, it will involve the breach of a condition of the contract or, in the case of an intermediate term, a breach which goes to the root of the contract and essentially deprives the innocent party of the benefit of it.

344. In the context of renunciation, in Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 Etherton LJ observed:-

"61. I would make the following general observations on all those cases. First, in this area of the law, as in many others, there is a danger in attempts to

clarify the application of a legal principle by a series of propositions derived from cases decided on their own particular facts. Instead of concentrating on the application of the principle to the facts of the case in hand, argument tends to revolve around the application of those propositions, which, if stated by the Court in an attempt to assist in future cases, often become regarded as prescriptive. So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, ”perspicuous”. It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refused to perform the contract.

62. Secondly, whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value…

63. Thirdly, all the circumstances must be taken into account insofar as they back on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in Woodar (at p. 281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.

64. Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply…”

345. Clause 19.2 of Option Agreement C provides the Defendants with a contractual right to terminate the contract if there is a “fundamental breach of any of its obligations under the agreement”. The Courts have generally interpreted “any” breach to mean “any fundamental” breach.

346. I turn firstly to Orchard House’s failure to pay a deposit.

347. It appears to be generally accepted that payment of a deposit is a condition of a contract for the sale of land, such that time is of the essence in relation to it, entitling the seller to treat the contract as discharged if the deposit is not paid.

348. In Millichamp, Warner J found that it would be “unnecessarily harsh” to construe the contract as entitling the grantor to treat the agreement as repudiated merely because of a delay in the payment of the deposit. The consequence was that the failure to pay the deposit only entitled the grantor to treat the option agreement as discharged once the grantor had indicated his intention to the grantee of so doing and had given the grantee a reasonable time in which to pay the deposit.

349. However, in Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445, Lewison LJ made the following observation:-

> "The only reason [Warner J in Millichamp] gave for not holding that time was of the essence of payment was that it would be "unduly harsh". But that is a conclusion; not a principle. Nor was the Portaria Shipping case cited to him, so he did not have the benefit of the view of Robert Goff J. In my judgment all these factors make the decision in Millichamp v Jones suspect."

350. He went on to observe that:-

"I would hold that, in the ordinary case, the requirement to pay a deposit, including the time of payment, is a condition of the contract or, to use the phrase used in courts of equity, that time is of the essence of the date the payment."

"Since the payment of a deposit at the executory stage of the contract is an earnest or guarantee of further performance, it is no surprise that a failure to pay the deposit on time is taken to demonstrate that the buyer is unwilling to perform the contract as a whole. In addition, without actual receipt of the deposit, the seller does not know where he stands. Is the buyer serious about the contract or not? A right to call off the contract for failure to pay the deposit on time restores to the seller his freedom to market the property. In the case of late completion, the seller at least has the deposit in his hands as part compensation for any loss. If the deposit itself is not paid, he has nothing except a fetter on his freedom to deal with his property."

351. I, therefore, conclude that payment of the deposit in accordance with the implied term (or, if applicable, Clause 8.7) was a condition of the contract and that, by failing to comply with it, Orchard House committed a repudiatory breach of Option Agreement C.

352. The next issue is whether Orchard House's failure to complete the contract amounted to a repudiatory breach of the contract.

353. Ordinarily, in contracts of land, time is not of the essence as far as completion is concerned. On the face of it, the position is no different here.

354. Firstly, the contract itself does not stipulate that time was of the essence.

355. Secondly, no specific completion date was identified in Option Agreement C. It was to be determined (in the case of prior agreement of the Purchase Price) by the date on which the option was exercised or, in the case of a later agreement or expert determination pursuant to Clause 17, by the date on which that agreement was reached or the expert produced their valuation. The completion date could have been anywhere within the 5-year Option Period and, where the expert determination was to be challenged, perhaps even beyond that time.

356. Thirdly, the subject-matter of the contract was not such that it was important that it was completed on a particular date. This contract relates the sale of land. It might have been a different matter if it had related to, for example, shares, the value of which was fluctuating.

357. Of itself, therefore, Orchard House's failure to complete may not be considered to be a breach of a condition of the contract, but, coupled with its failure to take steps to challenge Mr Wilson's determination (and indeed its failure to pay a deposit) it may amount to the breach of an intermediate term with sufficiently serious consequences (namely it goes to the root of the contract) or a renunciation of the contract.

358. In the context of renunciation, the question for me, therefore, is whether, considering the circumstances of the case objectively, a reasonable person in the Defendants' position would consider that Orchard House had clearly shown an intention to abandon and not to perform the contract.

359. Looking at all the circumstances of the case, I must ask myself whether the Defendants would have considered that Orchard House had demonstrated a clear intention to abandon the contract and to refuse to move to completion. If I answer that question in the affirmative, then it was open to the Defendants to treat Orchard House's failure to complete (and to take associated steps) as a repudiatory breach of Option Agreement C.

360. As the authorities make clear, whether or not there has been such a breach is fact sensitive and little can be gained from considering decided cases.

361. Orchard House failed to comply with the stipulated deadline for completing Option Agreement C and to take any concrete steps to challenge Mr Wilson's determination. The high point of the action taken by it was Aarons' correspondence to Ralli dated 20 August 2021 in which they indicated that they had advised their clients to make an application to the Court if the Defendants did not agree to reopen the expert determination. That was met with a firm refusal from Ralli on 3 September 2021, after which there was no response from Orchard House on the issue until after the Defendants purported to terminate the contract.

362. Orchard House had failed to complete the contract, failed to pay a deposit and failed to take any steps to formally challenge the expert's determination.

363. Mr Wilson's valuation had been obtained. It had not been formally challenged. No agreement had been reached. Orchard House had no route to take to completion, other than to complete on the basis of Mr Wilson's valuation. They had made it clear that they had no intention of doing so.

364. This would have been apparent to the Defendants or to a reasonable person in their position, in the knowledge that previous negotiations had been based on Mr Lomax's proposed Purchase Price of £250,000 for Plot C. Relations between the parties had effectively broken down. In correspondence, Orchard House had not accepted Mr Wilson's determination.

365. Completion, of course, goes to the very heart of the contract. It is fundamental to it.

366. In my judgment, given those circumstances, a reasonable person in the position of the Defendants would have considered that Orchard House had demonstrated that it had no intention of completing the contract, especially as Mr Lomax's decision to pursue an expert determination was driven by his expectation that it would produce a very modest valuation.

367. In those circumstances, it would have been apparent that Orchard House had effectively abandoned the contract or, at least, was not prepared to proceed with the contract in accordance with its express and/or implied terms.

368. For completeness, I would have reached the same conclusion even had I not found that Orchard House was contractually obliged to pay the deposit even where it was intending to challenge the expert determination.

369. Orchard House's breach deprived the Defendants of the benefit of the contract. In my judgment, it entitled them to bring the contract to an end at common law, as they, in fact, elected to do.

370. It follows from the above analysis that the Defendants were also entitled to bring the contract to an end pursuant to their contractual rights.

371. It also follows that, even if Orchard House were to be successful in the Part 8 claim, it would be of no consequence.

Issue 7: Whether the second purported exercise of the option for Plot C on 17 January 2022 was valid.

372. Given my conclusions above, it follows that the second purported exercise of Option C was not valid.

Issue 8: Whether the Defendants are in breach of Option C by failing to transfer Plot C to Orchard House.

373. In light of my conclusions on the above issues, the Defendants were not in breach of Option Agreement C by failing to transfer Plot C to Orchard House.

Issue 9: what loss, if any, has been suffered by Orchard House by reason of any breach by the Defendants.

374. This issue no longer falls to be determined. In any event, I note that, in his closing submissions, Mr Horne appeared to acknowledge that there was no evidence to support his client's claim for losses arising out of the alleged breach of contract.

The Part 8 Claim

375. It is not necessary for me to consider the issues which have arisen in the Part 8 Claim because they are now of no consequence. I shall, therefore, not analyse the merits of the claim in any detail.

376. However, for the sake of completeness, I record that I would have allowed the Part 8 Claim.

377. Principally, my reason for doing so would have been that Mr Rees and Mr Eckersley agreed that Plot C should be valued based on the Planning Permission for 7 dwellings, 2 of which were to be affordable tenure housing, whereas Mr Wilson incorrectly stated that the Planning Permission was for 7 dwellings and that the affordable housing element was offset by a separate payment in lieu of the affordable tenure housing. On those bases, the parties' experts agreed that Mr Wilson's calculation of gross development value and build costs was overstated.

378. In my judgment, these were substantial errors which had the potential to affect the outcome of the determination. They were recognisable without extensive investigation and indeed they were identified in the parties' experts' joint report. The errors will inevitably have had a material effect on the valuation produced by the expert.

379. I would also have had considerable sympathy with Orchard House's argument that the expert had exceeded his jurisdiction by valuing the entirety of Plot C when Plot G had already been transferred to Orchard House.

Option F – Issues for determination

Issue 1: was the purported exercise by Mr Lomax of the option for Plot F on 27 June 2019 conditional on payment of a deposit?

380. Mr Lomax purported to exercise Option F on 27 June 2019.

381. Clause 8 of Option Agreement F provides that, on the date of exercise of the option, Mr Lomax "will pay" the deposit to the Defendants' conveyancer "as stakeholder on terms that on completion… the accrued interest is paid to [Mr Lomax]."

382. It is common ground that no deposit was paid.

383. It is also uncontroversial that, leaving aside the non-payment of the deposit, the option was exercised validly.

384. The first issue to be determined is whether, as a consequence of no deposit having been paid, the purported exercise of the option was invalid or, in other words, whether the requirement for Mr Lomax to pay the deposit was a condition precedent of exercising Option F.

385. The Defendants' case is that the payment of the deposit is a condition precedent of any liability being accrued under the contract. Mr Lomax advances the contrary case.

The Law

386. This is covered at paragraphs 277 to 286 above.

The parties' respective positions

387. Mr Horne contends that the language of the contract is such that the payment of the deposit should not be construed as a condition precedent to the exercise of the option. He argues that, if the draughtsman had intended otherwise, he would have included appropriate wording in Clause 8.1 or 8.3 of the contract, whereas Clause 8.3 simply provides that the deposit is to be paid "on the day of exercise of the option".

388. Mr Horne points to the Option Notice at Schedule 1 to Option Agreement F, which, he says, makes no reference to how and when the deposit should be paid.

389. He also refers me to clause 10.1 of Option Agreement F, which incorporates into the contract the Standard Commercial Property Conditions (Second Edition). Clause 10.2 provides that, on the exercise of the option, Part 2 of the conditions will not be incorporated. Mr Horne says that, accordingly, the interest provisions found in the Standard Conditions are not excluded on the exercise of the option. He argues that the reason for this is to allow interest to accrue on a deposit payment not made on time.

390. Mr Horne asks me to find that, in any event, the Defendants waived their right to payment of the deposit by the actions of their solicitors, Hibberts

LLP, who were asked to provide their client's account bank details but failed to do so and did not take instructions from the Defendants on the issue.

391. Mr Horne argues that it must have been implicit that the Defendants would do nothing to prevent Mr Lomax from exercising the option during the Option Period. The solicitors' failure to supply their bank account details constituted a breach of that obligation. The consequence is that either the provision should be interpreted as not being time critical or, alternatively, the Defendants by their actions implicitly represented that the payment of the deposit was not time critical. Either way, on Mr Lomax's case, the Defendants are estopped from asserting that he has failed to exercise Option F or that he has failed to pay the deposit, when required to do so.

392. Moreover, Mr Horne notes that Clause 8.3 of the Option Agreement provides that the Defendants' solicitors were to hold the deposit "as stakeholder", pending completion. On the basis that they refused to cooperate in the provision of their banking details, the solicitors, in effect, rejected their role as stakeholder.

393. The Defendants' case is that the words "on the date of exercise" in Clause 8.3 render the requirement to pay the deposit a condition precedent to the exercise of the option.

394. Mr Aslett points out that the deposit payment still remains unpaid. A payment was made on Mr Lomax's second attempt to exercise the option approximately 18 months after he purported to exercise the option for the first time, but Mr Aslett argues that it was out of time in any event.

395. The Defendants do not accept the factual basis of Mr Lomax's assertion that they waived the payment of the deposit.

Analysis and decision

396. As is made clear in Barnsley's Land Options, each option contract must be construed individually, with careful consideration being given to the words used in the contract. The Court's decision in any given case is, therefore, determined by the usual principles applying to the construction and interpretation of contracts.

397. Clause 8.1 makes provision for how Mr Lomax is to exercise Option F, namely "by serving an Option Notice on [the Defendants]".

398. The only limitations on service of the Option Notice are contained in Clause 8.1 (that it may only be exercised during the Option Period) and Clause 8.2 (that it may not be exercised before the issue of a Completion Certificate).

399. Clause 8.3 then sets out an additional obligation on Mr Lomax to pay the deposit "on the date of exercise of the Option".

400. The authorities referred to above indicate that the Courts have tended to accept that deposit clauses amount to conditions precedent to the exercising of options where payment of the deposit is a necessary and constituent part of exercising the option.

401. The obligation set out in Clause 8.3 is not tied to the exercise of the option. Clause 8.1 does not stipulate that Mr Lomax may exercise the deposit by serving an Option Notice and paying the deposit. Paying the deposit is not an element of the process of exercising the option. The payment of the deposit is a separate, but related, obligation.

402. The wording of Clause 8.3 requires the deposit to be paid "on the date of exercise of the Option". That requirement could be met by paying the deposit after serving the Option Notice.

403. If the draughtsman had intended Clause 8.3 to amount to a condition precedent, he could have made that clear by deploying appropriate wording in the contract. He did not to do so.

404. Moreover, Option Agreement C was executed at the same time as Option Agreement F. The former contract stipulated that, in the absence of payment of a deposit, the exercise of the option would be null and void. Option Agreement F contained no such provision.

405. Therefore, after careful consideration, I am not satisfied that payment of the deposit under Clause 8.3 was a condition precedent of the proper and effective exercise of Option F.

406. Turning to Mr Horne's waiver argument, I do not find that it has been established that Hibberts refused, to provide their bank details to Mr Lomax and that he was unable to pay the deposit for that reason.

407. Firstly, there was no reason why Mr Lomax's solicitors could not have provided the Defendants' solicitors with a cheque in relation to the deposit at the same time as they exercised the option (as they did on their second attempt). The deposit did not have to be paid by direct credit (unlike the requirement in Option Agreement C).

408. Secondly, on cross-examination (for the first time), Mr Lomax suggested that he had the bank details for one of Hibberts' offices, but that he was not sure that they were the correct details for the office dealing with this transaction. In my view, it is almost inconceivable that payment to the Hibberts office for which he had the correct bank details would not have been accepted by the firm and the Defendants. As far as I am aware, Hibberts was one firm, irrespective of how many branch offices it had.

409. Thirdly, it was for Mr Lomax to ensure that he was in a position to pay the deposit. There was no urgency involved in exercising the option. This was accepted by both Mr Lomax and Mrs Davies. Mr Lomax could quite properly have waited until he was in a position to pay the deposit, before exercising the option.

410. Fourthly, I do not accept that Hibberts were being obstructive. There is no correspondence in which Mr Lomax or his solicitors requested Hibberts' bank details. If the matter were of such urgency and concern to Mr Lomax, I would have expected to see such correspondence. The emails from Mrs Davies to Mrs Platt which are included in the trial bundle (dated 28 June 2018, and 2, 8, 12, 23, 24 and 25 July 2018) make no reference to the payment of the deposit.

411. At paragraph 20 of the Amended Particulars of Claim it is pleaded that Hibberts "were verbally requested to give their client account details but… refused to do so pending the taking of instructions from the Defendants, which instructions were either never taken or never given".

412. Mrs Platt has not been called to give evidence and the high point of Mr Lomax's case on this issue is that, during a telephone call on 9 July 2019 (some 12 days after the Option had been exercised), she told Mrs Davies that "before we could proceed with making payment of the deposit, she needed to speak with her client".

413. Mrs Davies and Mrs Platt were dealing with a range of issues at that time. I cannot accept that Mrs Davies' memory of an alleged remark by Mrs Platt some 5 years ago (and concerning which there is no file note in the bundle) could justify a finding that Mrs Platt had effectively declined to provide her firm's bank details.

414. Moreover, it was not put to Ms Dimelow that she had instructed Hibberts not to provide Mr Lomax with her bank details.

415. In line with the discussion above in the context of Plot C, following the decision in Samarenko, it is clear that the requirement to pay a deposit is generally a condition of a contract. In my judgment, there is nothing in the present case which takes it out of the ordinary run of cases in the context of the purchase of land, such as to render the payment of the deposit otherwise.

416. The deposit remains unpaid to this day.

417. On 29 January 2021, Mr Lomax's solicitors purported to pay the deposit, but that was in relation to their second attempt to exercise option F which, for the reasons set out elsewhere in this judgment, I do not accept was valid or effective. The covering letter dated 29 January 2021 referred specifically to the Option Notice served on that day. The Defendants were entitled to return the deposit cheque to the Claimants' solicitors.

418. The Defendants' solicitors have made it clear in correspondence that they have elected to treat the contract as being at an end. They have done so by their actions and in their correspondence with the Claimants' solicitors. Specifically, in Mr Eagle's email dated 21 October 2021, he made clear that the Defendants considered the contract to be at an end.

419. Mr Horne's position is that the Defendants waived their right to terminate the contract by taking no steps to do so after Mr Lomax had failed to pay the deposit. In order to succeed in this argument, he would need to show that the Defendants had affirmed the contract. Affirmation may be express or implied. Mere inactivity does not, of itself, amount to affirmation. In considering this issue, the Court is not conducting a mechanical exercise, but is exercising a judgment.

420. I do not find that there was any such affirmation or waiver. Firstly, relations between the parties had all but broken down by the time the option was exercised, which was a matter of 10 days after Mr Lomax wrote to Ms Dimelow, criticising the Defendants' conduct in relation to Plot C. Secondly, Ms Dimelow had written to Mr Lomax only 3 days before the option was exercised, reminding him that she was awaiting a valuation for Plot F, whereas, under Option Agreement F, the Purchase Price was to be fixed. She wrote to Mrs Davies in similar terms the day before the option was exercised for the first time. Thirdly, there appears to be no subsequent correspondence from Mrs Platt or from Ms Dimelow, indicating an intention to press on with the sale of Plot F on the basis of the option notice served, irrespective of Mr Lomax's failure to pay the deposit. In fact, matters went quiet whilst Plot C took centre stage.

Issue 2: the date on which the Defendants moved into the New Farmhouse;

421. I have found above that the Defendants moved into the New Farmhouse in June 2018 for the reasons set out between paragraphs 247 and 271 above.

Issue 3: was the purported exercise by Mr Lomax of the option for Plot F on 29 January 2021 within the Option Period as defined in Option Agreement F?

422. It follows that the purported exercise of Option F by Mr Lomax on 29 January 2021 was outside the Option Period as defined in Option Agreement F.

423. As noted above, the definition of "Option Period" in Option Agreement F is:-

"the period of two years from the date on which the Owner shall be able to vacate the existing dwellinghouse on the Property and move into the dwellinghouse to be constructed…"

424. Mr Lomax's position is that the use of the conjunctive "and" suggests that two events must occur for the Option Period to begin, namely that the Defendants were able to vacate their existing house and did, in fact, move into their new property.

425. The Defendants interpret the second limb of the definition of the Option Period as a reference to being able to move into the new property, as opposed to actually moving into it.

426. Given my finding of fact on this issue, this question of interpretation is of no consequence.

427. However, I agree with the Defendants on this point of interpretation. The words "shall be able to" apply to both limbs of the sentence. As a matter of interpretation based on the principles outlined above, not only is it in my judgment the natural and ordinary meaning of the sentence, but it also makes commercial sense. Once Mr Lomax had taken the necessary steps (namely making the New Farmhouse available for occupation by the Defendants), the Option Period would begin. Mr Lomax had control over when it was to begin.

428. The alternative interpretation would give rise to uncertainty from Mr Lomax's perspective about precisely when the Option Period began.

Issue 4: were the Defendants in breach of Option Agreement F by failing to transfer Plot F to Mr Lomax?

429. Given my conclusions above, it follows that the Defendants were not so in breach.

Issue 5: what loss, if any, has been suffered by Mr Lomax by reason of any breach of contract by the Defendants?

430. This issue no longer falls to be considered. In any case, in his closing submissions, as he did in relation to Plot C, Mr Horne appeared to acknowledge that there was no evidence to support his client's claim for losses arising out of the Defendants' alleged breach of contract.

Disposal

431. The Order which I propose to make is, therefore, that:-

- Orchard House's claims, including the Part 8 Claim, are dismissed
- Mr Lomax's claim is dismissed.