JUDGMENT : MR JUSTICE MORGAN: Chancery Division. 7th June 2007

The issue

1. The Defendants are the freeholder owners of Chilmington Green Farm, Great Chart, Ashford, Kent. Their farm comprises some 840 acres. By an agreement dated 12th December 2003 ("the Agreement"), the Defendants agreed with the First Claimant that the First Claimant would use its property development expertise to maximise the potential of a substantial part (some 520 acres) of the Defendants' land for development; in return the First Claimant would receive a fee in certain specified circumstances. The issue which arises in this case is whether the Defendants are free to sell the part of their farm which is the subject of the Agreement or, as the First Claimant contends, a sale of that part of the farm by the Defendants would be an actual or an anticipatory breach of the express and/or implied terms of the Agreement.

The Claimants

2. Berkeley Group Plc is an established property developer in London and the South East. It has over twenty five years' experience of providing quality residential and mixed use developments. It has a subsidiary, Berkeley Residential Limited, which itself has subsidiaries, including Berkeley Strategic Land Limited and Berkeley Community Villages Limited. The First Claimant is Berkeley Community Villages Limited and it was the contracting party in the Agreement. The Second Claimant is Berkeley Group Plc. The Second Claimant does not assert any cause of action but was joined as a claimant so as to give an undertaking to support an application for an interim injunction sought, and obtained, by the First Claimant.

The Defendants

3. The three Defendants are, respectively, father, mother and son. The father is now aged eighty five, the mother is aged eighty seven and the son is in his fifties. The Defendants are dairy farmers and own about 840 acres of land at Chilmington Green. The Defendant who was principally relevant, in relation to the negotiations which led up to the making of the Agreement, was the Third Defendant, John Pullen. John Pullen's awareness of the planning background and planning opportunity is disclosed by his Witness Statement. His personal involvement in planning matters potentially affecting the land went back to 1989. Around that time, the Defendants were advised by a chartered surveyor and by planning consultants. His Witness Statement describes further events in the long planning history in 1991, 1998 and 1999 but I need not recite the detail of those. By 2000, the Defendants were being advised by the firm of Hobbs Parker, Land and Estate Agents, in Ashford. That firm suggested to the Defendants that they arrange for interested developers to present proposals to the Defendants. Over two days in September 2000, the Defendants were given presentations as to the development potential of their land by the Berkeley Group and by two other house builders. Between 2000 and 2002, there were negotiations with the Berkeley Group and with another house builder, but in August 2002 the Defendants decided to wait and see how the planning process evolved. Negotiations appear to have been revived in December 2002. From this time until the making of the Agreement, the Defendants were advised by Mr Lightfoot of Hobbs Parker and in the later stages had the benefit of legal advice from a Mr McDonald, a solicitor and partner in the firm of Hallett & Co of Ashford.

The planning background to the Agreement

4. I have some evidence as to the planning background prior to the making of the Agreement and a great deal of detailed evidence as to planning events which have occurred since the date of the Agreement. I do not propose to rehearse in this judgment the detail of the events which have occurred since the date of the Agreement. Those events had not, by definition, happened when the parties entered into the Agreement. Mr Wood QC (who appears with Mr Clark on behalf of the Claimants) submitted to me that I should look at the post-Agreement events because I would be able to hold that the events which actually happened were, more or less, the events which the parties would have predicted would happen if they had made their prediction as at the date of the Agreement. I agree with Mr Wood that the parties' expectations as at the date of the Agreement are a material part of the background facts but I do not believe that I can simply look at what actually happened and equate that, even more or less, with what the parties would have expected would happen. In so far as it is relevant to consider the parties' expectations at the date of the Agreement, those matters ought to be determined by reference to the events leading up to the making of the Agreement.

5. I was told that the relevant local plan was the Ashford Local Plan which was to govern the position in the period 2000-2006. At the date of the Agreement, the land in question was zoned for agriculture in that local plan. Further details as to the planning background are given in the Witness Statement of Gerald Allison, FRICS. In summary, he stated that Ashford had been an area of expansion since the mid 1950s and Central Government had given policy support to the idea of expansion through the South East Regional Plan, the Kent Structure Plan and the Ashford Local Plan. The Office of the Deputy Prime Minister had nominated Ashford as one of three growth areas in the South East region. Under the Sustainable Communities Plan, Ashford was destined to double in size with 31,000 new dwellings and 28,000 additional employment opportunities by 2030. In 2003, the Office of the Deputy Prime Minister created a new body called "Ashford's Future". This body was made up of a large number of authorities and other bodies including Ashford Borough Council, English Partnerships, the Environment Agency, Kent County Council, Central Government Departments and others. The new body was charged to deliver growth in Ashford by co-ordinating development and infrastructure. This body sought to act by agreement and on the basis that private developers would provide new homes and business accommodation and contribute towards the cost of the infrastructure needed to support the expansion in the area.

6. Some further evidence as to the planning background was given in the Witness Statement of Mr Brown of 2nd May 2007. Mr Brown is a Director of the First Claimant. Mr Brown referred to the Sustainable Communities Plan with its target figures for homes and jobs. He stated that this plan required a change to the pre-existing Regional Guidance contained within RPG 9 in relation to the Ashford growth area in respect of the period to 2016. Proposed Alterations to the Regional Guidance, South East, were first published in July 2003 for consultation; the final version was published after the Agreement was entered into. The Proposed Alterations did not define the immediate area in which the Defendants' land was situated as a Growth Area. In September 2003, a company in the Claimants' group of companies submitted representations in relation to the Proposed Alterations. Mr Brown stated that the Claimants' group was invited to attend the examination in public of the Proposed Alterations to RPG 9 and, in November 2003, the Claimants' group submitted a statement for use at the examination in public, which was scheduled to take place on the 15th December 2003.

7. Mr Brown also described that, at around the same time, in November 2003, the deposit draft Kent & Medway Structure Plan had been published for public consultation. This plan was to provide the strategic planning framework for the period to 2016 within the county of Kent. The Claimants' group submitted representations in relation to the draft Structure Plan in November 2003.

8. The various emerging planning documents to which I have referred were prepared in accordance with the provisions of the Town and Country Planning Act 1990. The relevant provisions of that Act in force at the time were sections 29-54, 70 and the definition of "development plan" in section 336 (1).

9. In July 2002, the Office of the Deputy Prime Minister announced revisions to the system of structure and local plans and these changes were enacted in the Planning and Compulsory Purchase Act 2004, the relevant part of which was brought into force in relation to England, after the date of the Agreement, on 28th September 2004. The relevant provision of the 2004 Act is section 38.

10. Because it was known in 2002 and 2003 that major changes to the development plan system were in prospect, the Office of the Deputy Prime Minister gave advice as to the implications of the proposed changes for work on development plans that was then in progress. This advice was given in a letter of 5th December 2002 and further advice was given in a letter of 13th June 2003.

The negotiations prior to the Agreement

11. I will next refer to some of the steps in the negotiations which took place between 16th December 2002 and the making of the Agreement on 12th December 2003. Although I was shown a number of documents which recorded the negotiating position from time to time and although some of these documents were of some limited value in so far as they showed the aim and intent of the transaction, the particular matters on which the Defendants relied was a comparison between the terms of some earlier drafts of what became the Agreement and the concluded form of the Agreement. The First Claimant submitted to me that evidence as to the various drafts of what became the Agreement was not admissible and was not helpful on the issue as to the true meaning of the Agreement. I will attempt to describe the steps in these negotiations as concisely as possible.

12. On 16th December 2002, Mr Shrubsall MRICS, on behalf of the Berkeley Group, wrote to Mr Lightfoot on behalf of the Defendants. The letter stated that the Berkeley Group had been closely monitoring the planning and political situation at Ashford, at the Regional Assembly and at the Office of the Deputy Prime Minister. The letter referred to various meetings that had taken place with representatives of those bodies. The letter expressed confidence that there would be significant growth at Ashford over a thirty year programme commencing post 2006. The letter referred to, and attached, the document called Ashford's Future. The letter pointed out that the "search area" for accommodating growth covered the Chilmington Green area, although specific sites were not identified. Mr Shrubsall stated that the time was right "to really push forward the case" for sites including Chilmington Green and he referred to the contacts that would need to be formed with a large number of agencies. He also referred to the threat of compulsory purchase by a public body if public/private sector partnerships were to fail. After that introduction, Mr Shrubsall's letter offered to buy all of the Defendant's land for £12 million. The purchase was to be unconditional, that is, it was not conditional on obtaining a satisfactory planning outcome. The letter included an alternative proposal expressed in these terms:

"Management Agreement

If we cannot agree a purchase price for the land, our alternative proposal remains a promotional service for which we previously offered a 15% fee to promote the land at our cost, on a "No-Win, No Fee basis" i.e. we only receive our fee from the value of the land when you sell it with our planning consent, and through our developers expertise as "game keeper turned poacher", we would expect a significantly increased value of the land for sale. In order to encourage support for this alternative option we would be prepared to reduce our fee to 10% + costs, still on a "No Win, No Fee basis"."

1. Mr Shrubsall and Mr Lightfoot met in January 2003. The suggested purchase price appears to have been increased to £16 million. On 27th January 2003, Mr Lightfoot wrote to Mr Shrubsall accepting the offer to purchase approximately 714 acres of land at Chilmington Green Farm for £16 million. Work seems to have been undertaken to carry the proposed sale forward but on 30th May 2003, Mr Shrubsall sent an e-mail to the Defendants direct (rather than to Mr Lightfoot) with "the disappointing news" that the sale was not going to proceed. What the Berkeley Group had been seeking to do was to attract institutional funders to provide the funds for the purchase. It is not necessary to go into the detail of the letter of 30th May 2003 save to say that it reported on the planning expectations and how, it is said, they had altered. The letter also referred to

an exercise which would involve significant contact with central and local government. Mr Shrubsall stated in the e-mail:

"We have however established not only excellent contacts but also a very thorough understanding of all the issues, such that I genuinely feel we really could contribute to trying to bring forward your land to have our best shot at the current review process, with the second agenda of trying to ensure the site is best placed for a future allocation.

To that end, we would like to ask if you would consider the potential of appointing us as consultants to promote you[r] land on a "no win, no fee" basis. This type of Consultancy Agreement that we are pioneering allows landowners to benefit from our planning promotion, but without the costs of the professional team of consultants, which are paid for by us, with a view to you being able to sell your land on the open market with the benefit of a planning consent if we are successful. Our return is then a fee paid out of the receipts from you selling the land to the highest bidder. Because it is not an Option, it avoids restrictions on you[r] title, and an obligation to sell exclusively to us, which can restrict the price you could ultimately reach, as compared to your own Agent being able to "auction" the site with the benefit of our very best optimised planning consent."

The text of the e-mail of 30th May 2003 was converted into a letter on 2nd June 2003 (with a few typing corrections) and this letter was sent to the Defendants.

14. It appears that Mr Shrubsall sent Mr Lightfoot a draft agreement around this time because by 16th July 2003, Mr Lightfoot reported by letter to the Defendants that he was in the process of going through "their standard agreement" in order to amend it to suit the Defendants' circumstances. Mr Lightfoot enclosed a document just released by the South East England Regional Assembly and described the implications for Chilmington Green. The draft agreement named Berkeley Community Village Limited as a party to the agreement but does not name the other party to the agreement who is defined as the "Owner". The draft agreement bears a reference which shows it was drafted by a Mr Vernon who was, and is, a partner in the real estate department at Ashurst, the solicitors acting for the Berkeley Group in this matter. The draft agreement was called a "Consultancy Agreement". The agreement was effectively set out in three appendices. Appendix 1 was headed "Planning", appendix 2 was headed "Sale Process" and appendix 3 was headed "General Provisions". In view of certain submissions made to me I will set out paragraphs 7 and 8 of appendix 3 which were in these terms:

"7 This Deed is binding on the successors in title to any part of the Property heirs, assigns and administrators of the Owner and the Owner shall not enter into any disposition of any description without procuring that the disponee enters into a deed of covenant with Berkeley to perform and observe the provisions and obligations on the part of the Owner contained in this Agreement (including the obligation not to make any disposition of any part of the Property without obtaining from the disponee a deed of covenant that accords with this paragraph 7) in a form that is acceptable to Berkeley

8 The parties shall forthwith supply to the Chief Land Registrar for the entry of a restriction upon the register of title for the Property (once registered) to the effect that except under an order of the registrar no transfer lease or other disposition of the Property is to be registered unless there is furnished a certificate by the solicitor for Berkeley that the disposee (sic) has covenanted in accordance with Schedule 4 (sic) paragraph 7 of this Agreement and where applicable the Owner shall procure any mortgagee's consent to the registration of such restriction".

15. I was shown three documents from the period July to August 2003. A hand written note referred to a meeting of 2nd July 2003. This note might record what was said at the meeting or might have been a note prepared prior to the meeting. The second document is Mr Lightfoot's "notes on consultancy agreement" and the third document is an e-mail, apparently sent on 1st August 2003 by Mr Lightfoot to Mr Shrubsall. The hand written note has a paragraph in these terms: *"Free to sell, lease etc. (no restrictions on title) the purchasers must take up agreement or there is a deal to buy out Berkeley".*

In the note of 25th July 2003, Mr Lightfoot wrote *"I think owners should be free to sell without Berkeley's approval as long as it does prejudice the Objective";* there is obviously a *"not"* missing. Further, as against paragraph 7 of appendix 3, Mr Lightfoot wrote: *"Does not apply to small sales where they do not affect the overall Objective".* In the e-mail sent on 1st August 2003, Mr Lightfoot wrote: *"No planning permission- no fees. I appreciate that the agreement makes provision for this at the end of (1) but for the family's peace of mind it maybe worth clarify (sic) that point in a dedicated clause. It is the element that they think about above all else."*

16. On 19th August 2003, Mr Shrubsall replied to the e-mail of 1st August 2003. In relation to the comment in respect of paragraph 7 of appendix 3, Mr Shrubsall wrote: *"Agreed – we can tighten up the drafting. "*

17. On 1st October 2003, Mr Lightfoot sent a draft of the consultancy agreement to Mr McDonald, the solicitor at Hallett & Co who was acting for the Defendants. Mr Lightfoot stated in his letter that he and the Defendants had gone through the draft agreement in detail. He reminded Mr McDonald that time was passing in respect of the proposed amendments to RPG 9 and that the Berkeley Group had already committed themselves to a serious amount of work in terms of promoting the Defendants' land. The documents include a copy of the draft consultancy agreement in the form it had reached by this time. Paragraph 7 of appendix 3 had been amended so that paragraph 7 did not apply to a disposal which was not considered to prejudice the Planning Objective.

18. On the 7th November 2003, Mr Lightfoot sent an e-mail to Mr Shrubsall reporting a conversation that Mr Lightfoot had with Mr McDonald. Mr McDonald had said that he did not want to amend the draft which had been

prepared by the Berkeley Group but he was "going to start from scratch using [the] draft as a base." Mr Shrubsall's e-mail in reply on 7th November 2003 expressed concern at the time that the redrafting might take and also referred to the fact that English Partnerships had clearance for a Compulsory Purchase of any land not being made available in the way which might be desired.

19. By early December 2003, Mr Lightfoot and Mr Shrubsall were concerned that an agreement had not been entered into with the Defendants and the date of the examination in public of the Proposed Alterations to RPG 9, on 15th December 2003, was getting ever nearer. Concern about the delay was expressed in three e-mails between Mr Lightfoot and Mr Shrubsall on 5th December 2003.

20. Mr McDonald of Hallett & Co appears to have produced his draft agreement on or about 10th December 2003. Mr Pymont QC (who appeared with Mr Ayres on behalf of the Defendants) drew attention to two specific matters in this draft agreement. The first was that there was no provision equivalent to paragraph 7 or paragraph 8 of appendix 3 of the earlier draft consultancy agreement. Further, paragraph 2 of the second schedule in Mr McDonald's draft provided: *"No reimbursement of Berkeleys Fee shall be paid to Berkeleys on the sale or other disposal of the whole or any part of the Property unless the disposal is achieved pursuant to the terms hereof".*

21. On 10th December 2003, Mr Shrubsall sent an e-mail to Mr Lightfoot stating that it seemed to Mr Shrubsall that Mr McDonald's draft agreement largely followed *"the agreed Heads of Terms".* He added: *"There are a number of more onerous changes from our draft Agreement, but in the interests of speed I am prepared to compromise and accept the draft, with the exception only of a few points which have fundamentally departed from the Heads of Terms such that they would make the terms unviable, and outside of the Main Board Authority which I have pursuant to the Heads of Terms."*

Mr Shrubsall went on to propose certain *"minimum amendments".* He hoped that these amendments would be acceptable as they were stated to be: *"limited to the minimum necessary to get back to the key Heads which were essential".*

22. On 12th December 2003, there was a telephone conversation between Mr Lightfoot and Mr McDonald which referred to the fact that the Berkeley Group would have the option of terminating the agreement on three months' notice.

23. In addition to that which appears from the documents, the negotiations were also described in the Witness Statements of Mr Shrubsall and Mr Vernon. Mr Shrubsall stated that the absence of paragraphs 7 and 8 of appendix 3 of the original draft Agreement was never discussed by him with Mr Lightfoot or any other person representing the Defendants, nor was it specifically brought to his attention by anyone on behalf of the Defendants. He stated that negotiations took place on 10th, 11th and 12th December 2003 but they were largely between Ashurst and Hallett & Co. Mr Vernon of Ashurst stated in his Witness Statement that the negotiations with Hallett & Co which occurred immediately prior to the 12th December 2003 did not include any reference at all to the absence of paragraph 7 and 8 of appendix 3 of the original Agreement and the question of the Defendants' ability to sell the land before the Planning Objective was achieved or planning consent obtained was never discussed between Ashurst and Hallett & Co.

The Agreement

24. The parties entered into the Agreement on 12th December 2003. The document was now called an "Agreement" and was no longer called a "consultancy agreement". The Agreement was between the Defendants, defined as "Pullens" of the one part, and the First Claimant, defined as "Berkeley" of the other part.

25. The Agreement recited that Pullens owned the land specified in the First Schedule to the Agreement which was stated to have potential for development. The second recital was in these terms: *"Berkeley has requested Pullens to allow and authorise them to assist in the promotion of the Property to maximise its potential for development and the development value thereof for the consideration hereinafter specified".*

26. Clauses 1.1. to 1.13 of the Agreement contained definitions. Clause 1.4 stated: *"Where the context so admits the expression "Pullens" and "Berkeley" includes the personal representatives of Pullens and Berkeley and "Berkeley" shall include any successors in title".*

27. Clause 1.11 defined "Market Value" to mean: *"The price at which the Property or such part thereof that has Consent could reasonably be expected to be sold on the open market at the date of the Consent Provided Always that the assessment of the value shall be by reference solely to the definition of Market Value contained in Chapter 3 Practice Statement 3.2 of the Royal Institute (sic) of Chartered Surveyors Appraisal and Valuation Standards 5th Edition or the relevant Statement of its successor manual".*

28. Clause 1.12 defined "Net Figure" to mean: *"The Market Value or the sale price on the open market less all relevant agents and surveyors and solicitors fees incurred in connection with the sale of the Property or any part thereof with Consent including all or any of Berkeleys or their agents and professional advisors fees and Without Prejudice to the generality of the foregoing after deduction of the Servicing Costs".*

29. Clause 1.13 defined "the Planning Objective" as: *"The inclusion of all or any part (in excess of 10 acres) of the Property in the next Local Plan or the Local Development Framework or equivalent development plans for Ashford or such successor plans for the Ashford area for residential and/or mixed development".*

30. Following clause 1.13 there was an unnumbered clause which provided: *"In consideration of the matters referred to in the Second Schedule hereto Berkeley shall promote the Property before all relevant planning and Government bodies with the purpose of achieving the Planning Objective and with that intention shall carry out the matters referred to in the Third Schedule hereto".*

31. The First Schedule described the Property by reference to a plan which showed the land at Chilmington Green just outside the built up area of Ashford.

32. The Second Schedule to the Agreement was in these terms:

"In consideration of the contents of the Third Schedule

1. Pullens agree to pay to Berkeley upon sale of all or part of the Property with Planning Consent for Development ("Consent") a fee of 10% of the Net Figure ("Berkeleys Fee") to be made within 28 days of completion of sale of the part of the Property with Consent and to be held by Pullens solicitors as Stakeholders until payment to Berkeley and in addition Berkeley shall reimburse Pullens reasonable surveying legal and accountancy fees in entering this Agreement and Pullens shall pay the proportion of any outside agency fees incurred by Berkeley in obtaining a Consent ("Berkeleys Costs") (not including Berkeley's employees or administrative costs) subject to a maximum of £1,000,000.00 and such Berkeleys Costs up to the said maximum shall be reduced in proportion to the area obtaining a Consent compared to the area allocated for Development in the Local Plan and Local Development Framework Provided Further that none of Berkeleys Costs or the Servicing Costs shall carry interest thereon during the term of this Agreement.

2. No reimbursement of Berkeleys Fee or Berkeleys Costs shall be paid to Berkeleys on the sale or other disposal of the whole or any part of the Property unless the disposal is achieved pursuant to the terms hereof".

33. The third schedule contains some 36 paragraphs and it is necessary to refer to the majority of them. The relevant paragraphs are the following:

"1. Berkeley shall use their reasonable endeavours to promote before all relevant planning and government bodies the Property with the purpose of achieving the Planning Objective and obtaining a Consent or Consents thereafter so as to maximise the development value of the Property or any part thereof

2. Pullens and Berkeley shall co-operate and use all reasonable endeavours to promote the Property or part thereof for development through the planning process in order to achieve the Consent

3. Berkeley will appeal against any actual or deemed refusal to grant planning consent where there is at least a 50% chance of success as determined by an independent planning consultant to be appointed by the Royal Town Planning Institute in default of agreement by the parties

4. Berkeley will negotiate any planning agreement where required in connection with any proposed development of the Property or part thereof

5. Berkeley will not without obtaining the prior approval of Pullens submit substantially vary or withdraw any planning application nor promote any other greenfield site greater than 10 acres within the Ashford Borough other than the Property prior to the termination hereof

6. Having contained any Consent Berkeley will have the right subject to the prior approval of Pullens to pursue any application for reserved matters approval

7. Pullens will render all reasonable assistance necessary to Berkeley in connection with Berkeleys efforts to obtain a Consent or Consents in relation to the Property or part thereof Berkeley indemnifying Pullens in respect of the costs thereof

8. Pullens will not make any planning application or do anything in relation to the Property or any adjoining or neighbouring land (save for the area shown edged green on the attached plan being land at Manor Farm and Brisley Farm) which may directly prejudice Berkeley achieving the Consent

9. Pullens will not as long as the Agreement remains in force, other than in connection with agriculture, develop or change the use of any part of the Property or create any encumbrances (excluding financial charges) over any part of the Property without first notifying Berkeley

10. At the request of Berkeley and if so required by the local planning authority or other competent authority Pullens shall enter into any planning agreement relating to the Property imposing covenants or planning obligations provided that the planning agreement:

a) imposes no positive obligations on Pullens or (if it does) those positive obligations must be specified as not taking effect until the development is initiated and

b) either contains a suitable indemnity from Berkeley or provides that Pullens shall be released from any liability thereunder on parting with all its interest in the Property or that part that is affected by that planning agreement

11. Berkeley will advise Pullens in writing when Berkeley considers that Consent is acceptable and comprises not less than 10 acres. At that point matters referred to in the Second Schedule (sic) shall commence subject as hereinafter mentioned

12. In the event that the Planning Objective has not been achieved on any part of the Property prior to the Adoption of the next Local Plan or Local Development Framework or equivalent development plans following the current Local Plan then this agreement shall be at an end

13. Provided the Planning Objective is achieved prior to 31 December 2006 or as extended in clause 12 above then this Agreement shall continue until 31 December 2016 unless terminated in accordance with clause 20 hereof

provided always that if a Consent is obtained before such date this Agreement shall continue until Berkeley has received the Berkeleys Fee and Berkeleys Costs

14. *Upon a Consent being obtained Pullens shall appoint an agent ("Agent") (being Hobbs Parker whilst Bill Lightfoot remains a partner or director of Hobbs Parker or if not such other suitably qualified and experienced agent as Pullens may appoint and whose name shall be notified to Berkeley) and Hallett & Co ("Solicitor") to act for Pullens on the sale of the relevant part of the Property. The Agents fee (2%) ("Agents Fee") and Solicitors fee (0.1%) ("Solicitors Fee") shall be deducted from the Sales Proceeds subject as hereinafter mentioned*
15. *Following those appointments Pullens Berkeley and the Agent shall agree the strategy timing and method for the sale of the relevant part or parts of the Property including details of areas to be disposed of timing of sale and any obligations (financial or otherwise) to be imposed on Pullens or Berkeley in respect of accessing or servicing any part of the Property or other land belonging to Pullens*
16. *The Agent and Solicitor shall be requested to prepare a sale pack for any proposed sale which shall include sales and marketing particulars planning title and draft contract for sale and a draft transfer containing such exceptions rights reservations and covenants as shall be reasonably required by Pullens whilst allowing the practical and efficient development of the Property consistent with maximising the Market Value of the Property subject of the Consent and the Agent and Solicitor shall liaise with Berkeley agreeing the contents of the sale pack*
17. *In the event that no agreement shall be reached between Pullens and Berkeley as to the method for the sale or the content of the sale pack within one month of negotiations commencing then either party may refer the matter to an arbitrator for determination pursuant to clause 25 herein*
18. *Following agreement or determination of the appropriate method for the disposal of the relevant part of the Property the Agent shall be instructed by Pullens to market the part of the Property subject of the Consent as vigorously as reasonably and commercially prudent and on terms so as to maximise the Market Value*
19. *If Berkeley and Pullens agree (but not otherwise) Berkeley may provide services to any relevant part of the Property as part of the obligations of the vendor/developer under any proposed sale agreement where providing services to the relevant part of the Property would facilitate the disposal thereof and any infrastructure or other costs incurred or contracted to be incurred by Berkeley pursuant to this provision ("the Servicing Costs") shall be reimbursed to Berkeley from the amount of money or other consideration received or receivable following the sale or any other disposal of any relevant part of the Property ("the Sale Proceeds")*
20. *If following a reasonable period of marketing (no more than 4 months) Pullens do not wish to proceed with a sale then Pullens shall have the option upon giving notice to Berkeley of deferring the sale by an initial period of up to two years and if Pullens so opt thereafter by a further period of up to the next three years on condition that such further deferral shall be made at the beginning of each tax year and shall only be undertaken if an aggregate of the tax payable on a disposal by Pullens shall exceed 50% of the Net Figure Provided That at the end of each such deferral period or periods Pullens shall give notice to Berkeley either to proceed with marketing or to terminate this Agreement and upon termination to pay Berkeleys Costs as apportioned and Berkeleys Fee*
21. *Berkeleys will use its reasonable endeavours to assist Pullens in mitigating any tax payable by Pullens howsoever arising hereunder*
22. *Pullens will not exchange contracts in relation to any sale or any part of the Property without first advising Berkeley as to the form and content of any relevant documentation*
23. *Pullens shall be responsible for providing full vacant possession of the relevant part of the Property on or before completion of the sale*
24. *No reimbursement of Costs shall be paid to Berkeley save as a deduction from the said Sale Proceeds or upon termination of this Agreement as provided herein*
25. *Any dispute or difference of any kind whatsoever arising out of or in connection with this Agreement shall be referred to an arbitration in London under the rules of the London Bar Arbitration Scheme for determination in accordance with the law of England Wales by a single Arbitrator to be appointed by or on behalf of the Chairman for the time being of the London Common Law and Commercial Bar Associates (sic) and otherwise pursuant to the Arbitration Act 1996 or any amendments thereto*
26. *Wherever the approval or consent of one party is required in relation to any of the matters set out in this Agreement it shall be implied that such approval shall not be unreasonably withheld or delayed and shall be deemed to have been given if not actually refused within 28 days of any request for approval or consent being sought*
27. *...*
28. *...*
29. *The parties hereto shall freely and promptly perform and execute all such further acts and deeds as may be reasonably requisite in order to achieve the Planning Objective and to obtain the Consent and so as to permit the development and sale of the Property as quickly as reasonably practicable*
30. *Berkeley shall report on a quarterly basis to Pullens on the expenditure incurred by them on outside agencies and on the progress of Berkeley in connection herewith*
31. *The provisions of this Agreement shall not merge in any transfer or other deed executed pursuant to this Agreement in so far as any obligation remains to be observed and performed*

32. Berkeley is herby permitted to have access to the property on 7 days notice to Pullens at all relevant times to enable it to perform its obligations set out in this Agreement provided that Berkeley shall make good to the reasonable satisfaction of Pullens any damage caused to the Property as soon as reasonably practicable

33. In all matters relating to this agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times

34. It is herby declared that there is no partnership between Pullens and Berkeley and that there is no joint and several liability between the parties and that neither party is authorised to act on behalf of the other or to commit the other to any contract

35. In the event that the Planning Objective is achieved then the terms of this Agreement unless terminated or extended as herein contained shall continue until 31 December 2016 but no longer (subject to the proviso in paragraph 13 above) and provided always that Berkeley can terminate this Agreement on giving not less than three months notice at any time

36. The parties will keep the terms and existence of this Agreement confidential at all times save to the extent that Berkeley is required to disclose the Agreement by law or in connection with the Planning Objective and the Consents or as a requirement of its insurers"

Events since the Agreement

34. I have been provided with a considerable amount of unchallenged evidence as to the efforts which the First Claimant made to promote the Defendants' land with a view to maximising its potential for development. For present purposes, it is sufficient to record that the First Claimant has been very active in this regard and that the prospects of the land obtaining a Planning Consent of considerable value have been enhanced by the First Claimant's efforts.

35. The turn of events which has led to this present dispute is that the Defendants now wish to sell their land, which is the subject of the Agreement, to a third party. The Defendants' solicitor has stated that the third party has offered "*a highly advantageous price*" and it transpires that the offer involves a price in excess of £35 million. The First Claimant contends that the Defendants have been able to secure an offer of £35 million or thereabouts because of the significant improvement in the planning prospects for the Defendants' land, which improvement has been brought about by the First Claimant's efforts. Although there was no formal admission to that effect from the Defendants, Mr Pymont's submissions on the subject of a claim in restitution certainly appeared to assume the First Claimant's contention was correct.

The Agreement is still in force

36. At one stage in this litigation it appeared that an issue might arise under paragraphs 12 and 13 of the Third Schedule to the Agreement and, in particular, an issue as to whether the Agreement came to an end on the 31st December 2006. If there had been an issue of that kind then the Claimants were prepared to argue that the Planning Objective had been achieved by the 31st December 2006, alternatively, the Claimants would say they were progressing towards achievement of the Planning Objective up to and at 31st December 2006 and so that the Agreement continued in force until, if it should happen, the Defendants' land was excluded from the next relevant Local Plan or Local Development Framework. The reason the issue does not now arise is that the Defendants have accepted that the Agreement is continuing by reason of an extension of time under paragraphs 12 and 13 of the Third Schedule although the Defendants do not accept that, on the true construction of the Agreement, the Planning Objective had been achieved by 31st December 2006. In view of the consensus as to the legal position (although not as to the reasoning), it is not necessary for me to make any determination on this matter and I proceed on the basis of the result agreed between the parties.

The Claim

37. Prior to 4th April 2007, the First Claimant became aware of the possibility that the Defendants might sell the land the subject of the Agreement to a third party. The present proceedings were issued on the 4th April 2007. On the same day, Lewison J granted an interim injunction restraining the Defendants from selling or otherwise disposing of any estate or interest in the land the subject of the Agreement. On 16th April 2007, Pumfrey J accepted undertakings from the Defendant to the like effect and ordered an expedited hearing of this action. The expedited hearing then came before me. The Particulars of Claim, seek, first, a declaration that the Defendants are not entitled to sell or otherwise dispose of any estate or interest in the land the subject of the Agreement or any part thereof before the earlier of the grant of a Consent (as defined in the Agreement) or 31st December 2006. The Particulars of Claim seek, secondly, an injunction restraining any sale contrary to the terms of that declaration. The Defendants have counterclaimed seeking a declaration that there is no express or implied or other restriction upon the Defendants' entitlement to sell or otherwise dispose of their interest in the land subject to the Agreement prior to the grant of planning consent for development.

The First Claimant's submissions

38. The First Claimant contends that the Defendants are not free to sell any part of the land the subject of the Agreement as the Defendants now propose. The First Claimant invites me to read the Agreement as a whole from which, it is said, it will be apparent that the parties to the Agreement were to remain in the relationship of "consultant" and land owner until the position had crystallised in relation to the Planning Objective and the obtaining of Consent. The First Claimant points out that the fee payable to the First Claimant is payable only by the Defendants and by no other party, such as a successor in title to the Defendants. The First Claimant also relies upon authorities which are said to establish the proposition that where the achievement by one party of the

benefit under a contract is dependant upon the conduct of the other party it will be implied that the latter will do nothing to prevent the former from obtaining that benefit. This implication is said to be underpinned by certain of the express provisions in the Third Schedule. The First Claimant next submits that the Agreement would become unworkable if the Defendants were to sell at this point. It is also said that the Defendants' interpretation of the Agreement is so inherently unfair that it could not represent the genuine commercial intention of both parties. The First Claimant takes as an example the possibility of the Defendants waiting until the local planning authority resolved to grant a highly favourable planning consent for the development of the land and following that resolution being made but before a Planning Consent is formally granted, the defendant were to sell the land at an enhanced price reflecting the resolution to grant planning permission. The First Claimant asks could it really have been intended that the Defendants could behave in that way and deny the First Claimant its fee under the Agreement? Finally, the First Claimant contends that a sale by the Defendants at the present time would be a breach of the obligation as to good faith contained in paragraph 35 of the Third Schedule.

The Defendants' submissions

39. The Defendants obviously take a diametrically opposed position. They say that the starting point must be the precise terms of the Agreement itself. One needs to ask four questions. The first question is: what express restrictions in the Agreement prevent the Defendants from selling the land? The second question is what implied restrictions prevent the Defendants from selling the land and what is the basis of such implication? The third question is: when do such express or implied restrictions operate and do they operate at the present time? The fourth question is: what other material, whether from the factual matrix or otherwise, assists the court to answer the above three questions?

40. The Defendants stress the second recital referring to the First Claimant "requesting" the Defendants to allow the First Claimant to assist in the promotion of the land. The Defendants rely heavily on paragraph 2 of the Second Schedule which, they contend, is a clear statement that the Defendants are free at any time to effect a sale or other disposal of the whole or any part of the land subject of the Agreement. When considering whether there is an express restriction in the Agreement on a sale or a disposal, the Defendants contend that paragraph 2 of the Second Schedule has precisely the opposite effect. In relation to the argument for an implied term, the Defendants contend that the way in which the Agreement works and was intended to work was that whilst the parties may have assumed that the Defendants would continue to own the land throughout the lengthy period of the operation of the Agreement, at all times the First Claimant bore the risk that the Defendants would at some stage sell or dispose of the land and matters would for all practical purposes come to an end. The Defendants rely again on paragraph 2 of the Second Schedule this time for the purpose of saying that there cannot be implied a restriction on sale or disposal when that express term permitted sale or disposal.

41. The Defendants then developed another argument which raised the possibility that in a case like the present where there is a sale or disposal at a time when the value of the land has been increased by reason of the First Claimant's efforts, but yet the contractual fee is not payable, there might be scope for a court to award the First Claimant a "reasonable fee" either on the basis of a quantum meruit or pursuant to a claim in restitution. This topic was first raised in the Defence where it was said that the parties had failed to address the question of what compensation "might" be payable to the First Claimant and the Defendants went on to make "no admissions" as to any claim which the First Claimants might advance in this way. This suggestion was not taken up by the First Claimant in its Reply. In their Skeleton Argument, the Defendants returned to this topic stating that "there may be an argument" that the First Claimant was entitled to a reasonable fee. In the course of oral submissions, when pressed to say one way or the other whether the First Claimant was entitled to a reasonable fee in the present circumstances, Mr Pymont finally took up the position that the First Claimant was indeed so entitled and that this entitlement should be taken into account as part of the legal background against which the workability of the Agreement was to be assessed. He particularly relied on this entitlement as part of his reasoning for saying that it was not necessary to imply a restriction on sale or disposal.

42. Finally, the Defendants submitted that the issues as to construction and implication of term were significantly assisted by the deletion of paragraphs 7 and 8 of appendix 3 of the draft consultancy agreement. The Defendants argued that paragraphs 7 and 8 of appendix 3 contained "milder restrictions on alienation" than those now argued for by the First Claimant.

Further Submissions

43. In the course of oral argument, considerable attention was given to the meaning of the express provision in paragraph 2 of the Second Schedule to the Agreement. Further, as to the interpretation of the express terms of the Agreement, the First Claimant submitted that whilst there was no explicit restriction on a sale or disposal, a sale or disposal as intended by the Defendants at the present time would place the Defendants in anticipatory breach of a number of express obligations upon them. Next, the First Claimant submitted that a sale or disposal at the present time would prevent the First Claimant performing its express obligations under the Agreement and there should be implied into the Agreement a term to the effect that the Defendants would not take a step which had that effect. Next, the First Claimant submitted that its entitlement to a fee under the Agreement depended upon the event of a Consent being obtained and there should be implied into the Agreement a term to the effect that the Defendant should not take a step which would prevent that event coming about. Further, there was argument as to the meaning of the obligation as to good faith contained in the Agreement and as to the possible entitlement of the First Claimant to a reasonable fee on a quantum meruit basis or pursuant to a claim in restitution. Finally, there was extensive argument as to the admissibility of pre-contract negotiations and the

approach which the court should adopt where the negotiations show that a term at one time appeared in a draft agreement but was omitted in the executed Agreement.

The admissible background material

44. In order to resolve the issues between the parties, the starting point must be the express terms of the Agreement. There is however, a preliminary question as to the material which can be considered for the purpose of construing the express terms of the Agreement. The parties agree that some background circumstances are material for this purpose. For example, there does not appear to be any dispute as to the admissibility of the facts as to the planning background prior to the Agreement. I have referred to this planning background earlier in this judgment. It does not seem to be necessary for the court to be satisfied that the relevant planning background, which would have been known to objective reasonable parties in the present case, was also known to the actual negotiating parties. However, as the negotiations summarised above tended to show, both parties to the negotiations were aware of the planning background to a considerable extent.

45. What is controversial is whether the court can take into account the fact, much relied upon by the Defendants, that the draft consultancy agreement contained paragraphs 7 and 8 of appendix 3 and no similar provision was expressed in the Agreement.

46. In my judgment, the relevant principle to apply in the present case is that stated by Lord Wilberforce in ***Prenn v Simmonds*** [1971] 1WLR 1381 at 1383 H to 1385D. Having stated that the court can, and should, construe a contract against the background circumstances or the matrix of fact, Lord Wilberforce considered whether a court should construe the contract against the background of the course of the prior negotiations which led to the contract. In a passage which bears repeating Lord Wilberforce said at 1384G to 1385D:

"On principle, the matter is worth pursuing a little, because the present case illustrates very well the disadvantages and danger of departing from established doctrine and the virtue of the latter. There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (although the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the ***Utica Bank*** *case. And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go: it may be a matter of degree, or judgment, how far one interpretation, or another, gives effect to a common intention: the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective – even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it a partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised."*

47. The topic discussed by Lord Wilberforce was referred to by Lord Hoffmann ***in ICS Limited v West Bromwich BS*** [1998] 1WLR 896 at 913B where he said: *"The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."*

48. The Defendants drew attention to the decision of the Court of Appeal in ***Pro Force Recruit Limited v Rugby Group Limited*** [2006] EWCA Civ 69. The point in that case was a narrow one. One party contended that in the course of negotiations, the parties had agreed on the meaning of, or the definition of, a particular phrase which appeared, wholly undefined, in the executed agreement. The Court of Appeal held, following the decision at first instance in the ***Karen Oltmann*** [1976] 2 Lloyds Law Report 708 at 712, that where parties had agreed, in the course of negotiations, on the meaning to be given to a phrase, evidence of their agreement in the course of negotiations was admissible to assist with the interpretation of the undefined phrase in the executed agreement. That decision could be seen as providing a gloss on the statement of principle in ***Prenn v Simmonds*** but, if so, it is a gloss to a limited extent only. Indeed, in ***Chartbrook Limited v Persimmon Homes Limited*** [2007] EWHC 409 (Ch) Briggs J. confined this "private dictionary" gloss to a case where the phrase which fell to be construed was not defined in the executed agreement. Briggs J's judgment contains an interesting discussion of the policy considerations in play but it is not necessary for present purposes for me to contribute to that debate. The orthodox view, expressed in

Prenn v Simmonds as to the non admissibility of pre-contract negotiations was restated by the Court of Appeal in ***Square Mile Partnership Limited v Fitzmaurice McCall Limited*** [2006] EWCA Civ 1690 after a discussion of the earlier decision in the ***Pro Force*** case.

49. Thus, based on the above authorities, the legal position appears to be clear that the court should not receive into evidence, nor allow itself to be influenced by, the fact that some of the terms of the draft consultancy agreement are not repeated in the executed Agreement.

50. In arguing the Defendants' case, Mr Pymont had submitted that the court was entitled to have regard to the "deletion" of paragraph 7 and 8 of appendix 3 of the draft consultancy agreement. I drew attention to the discussion as to "deletions" in Chitty on Contracts, 29th Edition, Volume 1 at para 12.069, which refers to certain circumstances in which "deletions" may, and may not, be relied on as an aid to interpretation. I had in mind the earlier part of this paragraph which summarises the orthodox position in a case where it is suggested that one should have regard to draft documents which formed part of the prior negotiations. However, reference to that paragraph in Chitty led Mr Pymont to make a detailed submission, based on the authorities referred to in Chitty, culminating in a submission that there was a special rule for a case where a term was deleted from a draft document and did not appear in the executed document and this special rule stood by way of exception to the general principle in ***Prenn v Simmonds***, alternatively, that I should develop the law in that direction. This submission led to both Counsel citing to me a string of authorities namely, ***Inglis v Buttery*** (1878) 3App. Cas. 552, ***Sassoon & Sons Limited v International Banking Corporation*** [1927] AC 711, ***Louis Dreyfus & Cie v Parnaso Cia Naviera SA*** [1959] 1QB 498, ***Timber Shipping Co SA v London & Overseas Freighters Limited*** [1972] AC 1, ***Mottram Consultants Limited v Bernard Sumley & Sons Limited*** [1975] 2 Lloyds Reports 197, ***Mineralimportexport v Eastern Mediterranean Maritime Limited (the "Golden Leader")*** [1980] 2 Lloyds Reports 573, ***Ben Shipping Co Limited v An Bord Bainne*** [1986] 2 Lloyds Reports 285, ***Wates Construction (London) Limited v Franthom Property Limited*** (1991) 53 BLR 23, ***Punjab National Bank v De Boinville*** [1992] 1WLR 1138 and ***Team Services Plc v Kier Management and Design Limited*** (1993) 63 BLR 76.

51. It is not necessary, and not desirable, for present purposes for me to attempt to restate what is established by this long string of authorities, nor to attempt to smooth out any apparent inconsistencies between the decisions. What is striking, for present purposes, is that in none of those cases is there any discussion of the general principle in ***Prenn v Simmonds.*** This of itself suggests that the cases listed above are not concerned with comparing a draft agreement with an executed agreement to see what has been deleted or omitted but are instead concerned with some other subject matter. In fact, the cases are concerned with executed agreements where the executed agreement itself reveals that the document had earlier existed in a different form and the document was amended, usually by deleting words, to its final form. The older authorities appeared to deny the admissibility of the fact of deletion as an aid to interpretation but following a tentative opening of the door by Lord Reid in ***Timber Shipping Co SA v London & Overseas Freighters Limited*** [1972] AC 1 at 15-16, the fact of deletion was relied upon as an aid to interpretation in ***Mottram Consultants Limited v Bernard Sumley & Sons Limited*** [1975] 2 Lloyds Report 197 per Lord Cross at 209. The decisions in the ***Louis Dreyfus*** case and the ***Punjab National Bank*** case turned on rather special considerations and did not involve using the fact of deletion from a draft as an aid to interpretation of the executed document. The decision in ***Team Services plc*** might be thought to be more controversial: see the note of the editors of the Building Law Reports at 63 BLR page 79. However, the decision did not involve the examination of draft documents and a comparison of the draft documents with the executed document. What the Court of Appeal seem to have done is to hold that a standard form of contract (the green form) was part of the legal background, which assisted with the construction of the contract the parties made. It was held that a comparison of the standard form with the actual contract showed an omission of a term which was regarded as throwing light on the meaning of the executed agreement.

52. In order to succeed in the present case, Mr Pymont has to go further than any of the cases referred to above, dealing with deletions and omissions. He does not say that the draft consultancy agreement is part of the general legal background which would be known to anyone negotiating an agreement of the kind of the actual agreement. In order for him to develop his point he has to have admitted into evidence the draft agreements which were considered by the parties and then to invite the court to compare the terms of the draft agreements with the executed agreement. However, in my judgment this is the very thing which as a matter of principle ***Prenn v Simmonds*** says cannot be done.

53. My conclusion therefore is that the draft consultancy agreements are not admissible in evidence for the purpose of the court being asked to compare the draft agreements with the concluded agreement as a suggested aid to the interpretation of the concluded agreement.

54. In any event, if I had admitted evidence of the draft consultancy agreements and had compared the terms of the draft agreements with the concluded agreement and had considered whether I derived assistance from that exercise, I do not believe that the exercise would in the end have assisted me. It is worth repeating the remarks of Lloyd J. in the ***Golden Leader*** [1980] 2 Lloyds Reports 573 and 575. After considering the possibility of looking at deletions in a printed clause, he added: *"But it seems to me quite another thing to say that the deletion itself has contractual significance; or that by deleting a provision in a contract the parties must be deemed to have agreed the converse. The parties may have had all sorts of reasons for deleting the provisions; they may have thought it unnecessary; they may have thought it inconsistent with some other provision in the contract; it may even have been deleted by mistake."*

55. Even in the cases where the fact of deletion is admissible as an aid to interpretation, there is a great difference between a case where a self contained provision is simply deleted and another case where the draft is amended and effectively re-cast. It is one thing to say that the deletion of a term which provides for "X" is suggestive that the parties were agreeing on "not X"; it is altogether a different thing where the structure of the draft is changed so that one provision is replaced by another provision. Further, where the first provision contains a number of ingredients, some assisting one party and some assisting the other, and that provision is removed, it by no means follows that the parties intended to agree the converse of each of the ingredients in the earlier provision.

56. I have dealt with the question of admissibility of the negotiations at some length in deference to the careful arguments of Counsel but, in the end, the position in the present case is, in my judgment, the orthodox position that the principle in ***Prenn v Simmonds*** applies and the draft agreements may not be relied upon as an aid to the interpretation of the Agreement.

The express terms of the Agreement

57. Having cleared the decks, I can now return to the express terms of the Agreement to see, on the true construction of those terms and in the light of the evidence I have received, what the effect of the Agreement is. In carrying out this exercise, I am essentially seeking to find answers to the following questions:

(1) Is there an express term in the Agreement which permits the Defendants to sell the land, either in all circumstances or, at least, in the present circumstances?

(2) Is there an express term which recognises the existence of a right in the Defendants to sell the land, either in all circumstances, or at least, in the present circumstances?

(3) Would a sale by the Defendants at the present time give rise to an actual breach by them of express obligations imposed upon them?

(4) Would a sale at the present time by the Defendants give rise to an anticipatory breach of an express obligation imposed upon them?

58. Mr Pymont draws attention to the second recital referring to the First Claimant requesting the Defendant to allow and authorise the First Claimant to assist in the promotion of the land. He suggests that this assists in determining whether the Agreement did or did not impose a restriction on the Defendants selling or disposing of the land. I do not think the terms of this recital have any bearing on that issue. The recital sets out the genesis of the agreement being in the First Claimant's request to the Defendants to "allow" and "authorise" the First Claimant to assist in the promotion of the land. That being the genesis, what matters is what the parties then agreed should be their rights and obligations under the Agreement. I do not read the recital as stating that the First Claimant has to continue to request the Defendant for authorisation from time to time so that the Defendants are at any time able to withhold authorisation.

59. Clause 1.4 defines the "Pullens" to include their personal representatives but not otherwise their successors in title. Conversely, "Berkeley" is defined to include any successors in title. This is not conclusive as to whether the parties intended that the Defendants should or should not be free to sell. No one suggests that, if the Defendants were free to sell, the Defendants' obligations would bind a successor in title. Nonetheless, this definition and the remainder of the Agreement means that the First Claimant has the benefit of obligations binding only the Defendants and their personal representatives.

60. Clause 1.11 defines the "Market Value" and it is clear that the required valuation is on the basis of a sale at a date which is the date of Consent. If no Consent is ever obtained then there will be no valuation date for the purposes of the definition.

61. Clause 1.12, referring to the sale price, makes it clear that the relevant sale is a sale "with Consent".

62. The Second Schedule contains two paragraphs. The first paragraph deals with payments by one party to the other and the general thrust of paragraph 1 is to provide for a payment to be made by the Defendants to the First Claimant. The references in paragraph 1 to "Consent" make it clear that a payment is only due to the First Claimant in the event of there being a Consent.

63. Paragraph 2 of the Second Schedule provides for a circumstance in which the First Claimant is not to receive the Berkeleys Fee or Berkeleys Costs (both of those terms being defined in paragraph 1 of the Second Schedule). Mr Pymont places considerable reliance on paragraph 2 of the Second Schedule. In his submission, paragraph 2 of the Second Schedule effectively amounts to an express statement that the Defendants may sell or otherwise dispose of the whole or any part of the land at any time. If I were to read paragraph 2 in that way, that express declaration of a right to sell on the part of the Defendants would significantly condition my reading of the later provisions in the Agreement. However, I do not read paragraph 2 of the Second Schedule that way. What can be said about paragraph 2 of the Second Schedule is that it contemplates there will be some circumstances in which the Defendants may sell or dispose of the whole or any part of the land. Paragraph 2 of the Second Schedule does not define the circumstances in which the Defendants will be able to act in this way. Paragraph 2 of the Second Schedule certainly does not say that the Defendants will be able to sell or dispose of their land "in all circumstances" or "whenever they choose". If I find a clear express obligation elsewhere in the Agreement on the part of the Defendants which would be broken in the event of the Defendants selling or disposing of the land, then the terms of paragraph 2 of the Second Schedule would not, in my judgment, prevent me holding that a sale in those circumstances would amount to a breach of the other express obligation on the Defendants.

64. In some respects, paragraph 2 of the Second Schedule is a puzzling provision. There was discussion at the hearing as to whether the provision was necessary. The provision which requires the Defendants to reimburse the Berkeleys Fee or the Berkeleys Costs is paragraph 1 of the Second Schedule. However, as explained, liability to pay falls on the Defendants only where there is a Consent. Where there is a Consent, then paragraphs 14 onwards of the Third Schedule provide for a sale in accordance with the Agreement. It is therefore not obvious why it was thought to be necessary to say that reimbursement of the Berkeleys Fee and or the Berkeleys Costs should only be made on a sale or disposal pursuant to the terms of the Agreement. It is possible to suggest some answers to this difficulty. The parties might have been referring to a sale or disposal after the Agreement came to an end because the Planning Objective was not achieved, or a sale or disposal after 31st December 2016. These answers are not completely satisfactory because in those events, the Agreement would cease to apply and, it might be thought, an obligation under paragraph 1 of the Second Schedule would not arise. Although the puzzle remains, in my judgment it is not appropriate to use the fact of this difficulty to read paragraph 2 of the Second Schedule so that the Defendants become entitled to sell or dispose of the land even though that action on their part would, on the face of it, place them in breach of another express obligation on them under the Agreement. My overall conclusion is that the thinking behind paragraph 2 of the Second Schedule was that it was to be an emphatic restatement of what is already stated in paragraph 1 of the Second Schedule, which can be summarised as "no win, no fee".

65. The Third Schedule imposes obligations on both the Defendants and on the First Claimant. The Defendants now wish to sell the land the subject of the Agreement. Accordingly, it is necessary to ask whether such action on their part would place them in breach of the express obligations they have undertaken in the Third Schedule. Mr Wood on behalf of the First Claimant relies in particular on the obligations on the Defendants in paragraphs 2, 7, 8, 10 and 29, and in a separate way, on the obligation as to good faith in paragraph 33. I have set out these paragraphs earlier in this judgment. There are other obligations on the Defendants, for example, the obligations in paragraphs14, 15, 16, 18 and 23 of the Third Schedule. That second set of obligations are all to do with a sale of the land by the Defendants. If the Defendants were to sell the land at the present time then plainly they would not be able to sell the land again at a later time as contemplated in paragraphs 14, 15, 16, 18 and 23.

66. In considering whether a sale at the present time by the Defendants will amount to a breach of the provisions relied upon by Mr Wood, one can effectively take the obligations in paragraphs 2, 7 and 8 of the Third Schedule together. Paragraph 2 refers to the Defendants cooperating and using all reasonable endeavours to promote the property for development through the planning process in order to achieve the Consent. Paragraph 7 refers to the Defendants rendering all reasonable assistance necessary to the First Claimant in connection with the First Claimant's efforts to obtain a Consent. Paragraph 8 refers to the Defendants not doing anything in relation to the land which might directly prejudice the First Claimant achieving the Consent.

67. Mr Wood presses me with the conclusion that it is self evident or, as he would put it, "common sense" that if the Defendants sold the land at the present time they would necessarily break their obligations in paragraphs 2, 7 and 8. I doubt if that conclusion is self evident. However, Mr Wood further submitted that there was unchallenged evidence before the court on which I can confidently make a finding that a sale by the Defendants at the present time would indeed amount to an actual breach of paragraphs 2, 7 and 8.

68. The evidence to which I was referred was contained in the Witness Statement of Mr Brown of 2nd May 2007, at paragraphs 24, 25, 26, 30, 33 and 46. Mr Brown was not cross examined on any part of his Witness Statement. This evidence was therefore not challenged nor was its effect qualified or limited by any questions put in cross examination. I recognise that the evidence does not appear to have been prepared directly for the purpose of providing an answer to the question: would a sale by the Defendant prejudice the First Claimant's chances of obtaining a Consent within the meaning of the Agreement? Indeed, some of the evidence read in the context of the surrounding paragraphs is also addressing an additional question as to whether the Agreement went far enough for the joint purposes of the parties and whether the purposes of the parties might have been better served with a different agreement under which the First Claimant had an interest in the land so that deliverability or implementation of any planning consent would be to a greater extent under the control of the First Claimant. I read the paragraphs with some reservation as a result of these matters.

69. I will not set out the lengthy passages in Mr Browns' Second Witness Statement in this judgment. I am able to express my overall conclusion having read those passages. My conclusion is that the prospects of the First Claimant and the Defendants obtaining a Consent as defined in the Agreement would be impaired if the Defendants were not in a position to enter into an arrangement, called in the Witness Statement a "collaborative arrangement" with adjoining land owners. If the Defendants sell the land at the present time then they will cease to be owners of the land and will not be able to enter into a collaborative arrangement as land owner.

70. I have considered, however, whether the Defendants' obligations in the Third Schedule, fairly read, obliged the Defendants to enter into collaborative arrangements of the kind described in the Witness Statement. As I have explained, this evidence from Mr Brown was not cross examined and no submissions were made to me on behalf of the Defendants to the effect that "collaborative arrangements" would be harmful to the Defendants' interests so that, for some such reason, the Defendants, were not obliged under the provisions of the Third Schedule to enter into those arrangements. As I understand the Witness Statement of Mr Brown, the collaborative arrangements were designed to be beneficial to the Defendants and in so far as the Defendants might conceivably be required under the collaborative arrangements to give up possible claims to a ransom position as

against adjoining land owners, it was beneficial for the Defendants to do so because adjoining land owners would give up rather more obvious claims to ransom as against the Defendants. In those circumstances, in my judgment, entry into a collaborative arrangement by the Defendants was something that the Defendants would have been obliged to do under paragraphs 2, 7 and 29 of the Third Schedule to the Agreement. If the Defendants now sell the land they will, in my judgment, place themselves in breach of paragraphs 2, 7 and 8 of the Third Schedule.

71. I now turn to consider the argument in relation to paragraph 10 of the Third Schedule. This paragraph has been set out earlier in this judgment. Paragraph 10 refers to "any planning agreement". The First Claimants submitted that the words "any planning agreement" included an agreement under Section 106 of The Town and Country Planning Act 1990. There was no submission from the Defendants to the contrary and I construe the words "any planning agreement" as including a Section 106 agreement.

72. Section 106 of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, refers in Section 106(1) to an agreement by "any person interested in the land in the area of the local planning authority". By Section 106 (3), a planning obligation in such an agreement is enforceable by the authority against the person entering into the obligation and against any person deriving title from that person. By Section 106 (4), the planning agreement may provide that a person shall not be bound by the planning obligation in respect of any period during which he no longer has an interest in the land. By Section 106 (9), a planning agreement must be an agreement by deed, must identify the land in which the person entering into the obligation is interested and must identify the person entering into the obligation and state what his interest is in the land. Accordingly, it follows that in order for an agreement with the local planning authority to be a planning agreement within Section 106 of the 1990 Act as amended, the other party to the agreement must have an interest in the land.

73. Paragraph 10 of the Third Schedule obliges the Defendants to enter into a planning agreement at the request of the First Claimant and "if so required by the local planning authority or other competent authority". In its Particulars of Claim, the First Claimant stated that any Consent within the meaning of the Agreement would require a Section 106 Agreement to be entered into by the owner of the land. In their defence, the Defendants denied that any Consent would require a planning agreement but rather it was averred that a planning agreement was "a possibility". In its Reply, the First Claimant pleaded that it was inconceivable that the local planning authority would grant a Consent without a Section 106 Agreement.

74. The Defendants did not call any evidence on the question whether the requirement of the Section 106 Agreement should be regarded as a mere possibility or as a near certainty. The First Claimant did call such evidence in the form of paragraphs 28 and 29 of the Witness Statement of Mr Allison, FRICS and paragraphs 79 to 83 of the Second Witness Statement of Mr Brown. Based on that evidence I conclude that it is a near certainty that an agreement under Section 106 would be required in order to obtain a Consent of the kind envisaged by the Agreement.

75. However, there is another sense in which there is uncertainty as to whether a Section 106 Agreement will be required. The Section 106 Agreement will only be required if the relevant planning authority decides in the exercise of its planning judgment that the land in question should be granted a planning permission of the kind contemplated by the Agreement, subject to the owner of the land entering into an appropriate Section 106 Agreement. At present it is not possible to predict whether this planning judgment will be formed by the relevant planning authority. If the Defendants now sell the land the subject of the Agreement and if the relevant planning authority later decides that it is appropriate to grant planning permission for that land, subject to the owner of the land entering into an appropriate Section 106 Agreement, then the Defendants will not be in a position to enter into a Section 106 Agreement and the sale will have disabled them from performing paragraph 10 of the Third Schedule to the Agreement. Conversely, if the relevant planning authority decides that it is not appropriate to grant any planning permission that is relevant for present purposes, with or without a Section 106 Agreement, then there will not come about a requirement from the planning authority that the Defendants do enter into a Section 106 Agreement and the fact that the Defendants are unable to enter into such an agreement in any event will not matter. Accordingly, judging the matter at the present time, it is uncertain whether future events will turn out so as to place the Defendants in breach of the obligation in paragraph 10 of the Third Schedule.

76. The First Claimant says that in the circumstances the Defendant should be restrained from selling the land so that if it should turn out that a relevant planning permission is forthcoming, conditional upon the owner of the land entering into a Section 106 Agreement, then at that point the First Claimant will have the benefit of a contractual obligation on the Defendants as owner of the land to enter into that agreement.

77. This submission gave rise to a discussion as to the correct legal analysis which should be applied. One possible analysis is that a sale by the Defendants of the land at the present time is an anticipatory breach of paragraph 10 of the Third Schedule and the court should restrain, by granting an injunction, that anticipatory breach. A second possible analysis is that the First Claimant is entitled to a quia timet injunction because there is a sufficient fear or concern that the Defendants will break the obligation in paragraph 10 of the Third Schedule in due course (by reason of a sale of the land at the present time). The third possible analysis involves the implication of a term. The suggested implication is based upon the statement of Cockburn CJ in ***Stirling v Maitland*** (1864) 5 B & S 840 at 852, in these terms: *".....if a party enters into an arrangement which can only take effect by the continuance of a*

certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can become operative."

78. The obligation on the Defendants under paragraph 10 of the Third Schedule is contingent upon the relevant planning authority requiring a Section 106 agreement. This depends upon the relevant planning authority considering it appropriate to grant a planning consent, subject to a Section 106 Agreement, being entered into. It is not certain at the present time that the relevant planning authority will so determine.

79. The legal principles dealing with the concept of an anticipatory breach are clear and established. If, before the time arrives by which a party is bound to perform a contract, that party expresses an intention to break the contract, then he commits an anticipatory breach. The doctrine of anticipatory breach is not confined to declarations of intended breach but also applies where the contracting party disables himself from performing an obligation which falls to be performed at a future date. The doctrine of anticipatory breach applies even where the obligation to be performed at a future date is a contingent obligation: see ***Frost v Knight*** (1872) LR 7 Ex 111 and ***Synge v Synge*** [1894] 1QB 466.

80. However, the law as to the effect of an anticipatory breach has been developed to answer the question as to when an anticipatory breach is a repudiatory breach, entitling the innocent party to treat the contract as at an end, even though the time for performance by the other party has not yet arrived. If the innocent party does not treat the contract as at an end then the contract continues in being and all of the rights and obligations thereunder enure for the benefit of both parties. In the present case, the First Claimant does not wish to treat the Agreement as at an end but wishes it to continue in effect. The case law on anticipatory breach does not, as far as I have seen, discuss whether a court can grant an injunction to restrain the commission of an anticipatory breach where the act complained of is an act which will disable a contracting party from performance of an obligation at a future date.

81. In ***Frost v Knight*** at page 114, Cockburn CJ analysed a case of an anticipatory breach in this way: *"The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage a repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly."*

82. The latter part of this passage explains why the innocent party can treat the anticipatory breach as bringing the contract to an end. However, the earlier part of this passage appears to describe the anticipatory breach as an infringement of the innocent party's present rights under the contract. In such a case, it might be argued that such an infringement can be restrained by an injunction in an appropriate case. It might also be said that the position is not dissimilar to that considered in ***Goodhart v Hyett*** (1883) 25 Ch D 182. In that case, the plaintiff had an easement to run pipes under the defendant's land and, accordingly, a right to enter on the land to gain access to the pipe in order to repair them. The defendant intended to build on the land above the pipes and the building would make it more difficult for the plaintiff to get access to the pipes if it ever became necessary for the plaintiff to do so. At page 189, North J. considered the evidence as to whether the pipes would or would not ever need to be repaired. He held that he could not find that they would never require to be repaired. He held that an injunction should be granted and said at page 190: *"It appears to me that this is a case in which I am bound to interfere by granting an injunction, because there is not only a mere possibility that harm may come, but the necessary effect of what is now being done is that when the pipes have to be repaired there will be a greater difficulty and greater expense in doing it than at the present time……. It seems to me that a time will arrive at which the existence of this house upon the defendant's property will materially affect the right of the plaintiffs, and that therefore under these circumstances they are entitled to an injunction."*

This decision was followed in ***Abingdon Corporation v James*** [1940] Ch 287.

83. These matters were not explored in detail in argument and in the absence of a clear authority, and in view of the later conclusions to which I come in relation to good faith and an implied term in the Agreement, I feel it is preferable to leave these points open and I will not decide whether it is appropriate to grant an injunction to restrain a sale because it amounts to an anticipatory breach of a contingent future obligation. Another approach might be to say that the First Claimant can seek a quia timet injunction to restrain the future breach which the Defendants will commit of paragraph 10 of the Third Schedule if the relevant planning authority consider it appropriate to grant planning permission subject to a Section 106 Agreement. In the cases concerning quia timet injunctions, the issues are usually as to whether the defendant is threatening a breach of an obligation and whether the claimant's fear of a breach is well justified, alternatively whether the fear of real harm resulting from a breach is well founded. In the present case, if the relevant planning authority require a Section 106 Agreement before granting a relevant planning permission then it seems that there will be a certainty that the Defendants will break their contractual obligation, causing harm to the First Claimant. The uncertainty relates to a different matter, namely, whether the relevant planning authority will consider it appropriate to grant a planning permission subject to a Section 106 Agreement, in other words, whether the contingency will come about which brings into existence the Defendants' obligation. As before, in the absence of a clear authority drawn to my

attention and in view of the conclusion to which I come to in relation to good faith and the implication of a term into the Agreement, I prefer not to base my judgment on this line of argument.

84. Before passing to consider the question of good faith and the implication of terms into the Agreement, I should point out that the considerations identified above in relation to the contingent obligation in paragraph 10 of the Third Schedule to enter into a Section 106 Agreement would appear to apply in a similar way to the contingent obligations upon the Defendants to participate in a sale of the Property following a grant of a Consent pursuant to paragraphs 14, 15, 16, 18 and 23 of the Third Schedule to the Agreement.

85. Taking stock at this point, I have held that the intended sale by the Defendants will place the Defendants in breach of paragraphs 2, 7 and 8 of the Third Schedule to the Agreement and I have discussed the position under paragraph 10 (and later paragraphs) of the Third Schedule to the Agreement, but have left open the question whether the First Claimant is entitled to an injunction in respect of the position under paragraph 10 (and later paragraphs) of the Third Schedule.

The obligation as to utmost good faith

86. The last express term of the Agreement, to which it is relevant to refer, is the term as to utmost good faith contained in paragraph 33 of the Third Schedule. In opening the First Claimant's case, Mr Wood made detailed submissions on the implication of terms into the Agreement and then, by way of a tail piece to his submissions, submitted that a sale of the land by the Defendants in the present circumstances would be contrary to this express term. In Reply, Mr Wood gave more emphasis to the express term as to utmost good faith. Strictly speaking, I ought to consider the meaning and effect of this express term first, so that I understand the way in which the contract works in accordance with its express terms, before I consider whether it is appropriate to imply a term or terms.

87. It is convenient to set out the term again at this point. Paragraph 33 of the Third Schedule provides: *"In all matters relating to this Agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times"*

88. Mr Wood submits that this express obligation on the Defendants obliges them to observe reasonable commercial standards of fair dealing in relation to matters arising under the Agreement. He also submits that this obligation requires the Defendants to be faithful to the agreed common purpose of promoting the land for development purposes and consistent with the justified expectations of the First Claimant as to its ability to promote the land and, if successful, to receive a fee.

89. Mr Pymont submits that one cannot have an obligation of good faith in the abstract but the obligation must relate to some other defined matter. The defined matter which he identifies may be an express obligation elsewhere in the Agreement. As there is no express obligation elsewhere in the Agreement restricting a sale or other disposal by the Defendants, such a restriction cannot be created out of an obligation as to good faith. On the basis, which I have rejected, that paragraph 2 of the Second Schedule conferred upon the Defendants an express entitlement to sell or dispose of the land, he was prepared to accept that this entitlement was one of the "matters" which was the subject of the Agreement and therefore within paragraph 33 of the Third Schedule. He was thus prepared to accept that paragraph 33 would impose upon the Defendants an obligation as to the manner in which they went about selling or disposing of the land. For example, he suggested, that the Defendants would be obliged to inform the First Claimant of their intentions and to be prepared to discuss the matter with the First Claimant. He also accepted that even if paragraph 2 of the Second Schedule did not expressly confer an entitlement to sell or dispose of the land, the absence of an express restriction on sale or disposal nonetheless meant that a sale or disposal was a "matter" within the Agreement and the same obligation as to informing the First Claimant and discussing with the First Claimant could arise. To my mind, this submission revealed that Mr Pymont had to accept that paragraph 33 of the Third Schedule could place upon the Defendants an obligation to do something, which obligation was not expressly stated elsewhere in the Agreement.

90. In my view, the right conclusion as to paragraph 33 of the Third Schedule is that it creates a contractual obligation to behave in the way described in paragraph 33 that is to act with "utmost good faith". The question then is as to the meaning of "good faith or "utmost good faith".

91. Mr Wood cited some dicta of Bingham LJ in ***Interfoto Picture Library Limited v Stiletto Visual Programmes Limited*** [1998] I All ER 348 at 352-353 and two Australian decisions, namely, ***Renard Construction (ME) and PTY Limited v Minister for Public Works*** (1992) 26 NSWLR 234 and ***Bropho v Human Rights & Equal Opportunity Commission*** [2004] FCAFC 16.

92. The ***Interfoto*** case did not concern a contractual obligation to act in good faith. It concerned the question whether a contract was subject to a condition printed on a document which was given by one party to the contract to the other. At page 353 C, Bingham LJ said that the question whether a suggested contract term was sufficiently drawn to the attention of the other party so as to become a contract term raised, at one level, a question of fairness and reasonableness. He prefaced this remark by referring to the absence in the common law of an overriding principle that parties should act in good faith in making and carrying out contracts. Having referred to this overriding principle, he said: *"It is in essence a principle of fair and open dealing"* (page 352 J).

93. Bingham LJ. was certainly including within an obligation to act in good faith an obligation to be fair and open. He went on to give examples of how English law tackled perceived unfairness and he referred in particular to the role of equity in striking down unconscionable bargains. At a general level, Bingham LJ was regarding the subset

of equity's intervention in the case of unconscionable bargains as part of the larger set of cases involving a requirement of good faith.

94. The discussion in the ***Renard Construction*** case is interesting but is of little help in defining the content of an obligation to act in good faith or with the utmost good faith.

95. In the ***Bropho*** case, the judgment of French J. contains a very detailed discussion of the concept of good faith. It is not necessary to set out the facts of the ***Bropho*** case but it is necessary to remind oneself that it was not a commercial case nor was it a case where there was an obligation to act in good faith. Good faith came into the matter because conduct which would otherwise be unlawful as contrary to a statute would not be unlawful if the conduct was for a particular purpose and was done "reasonably and in good faith". Notwithstanding the context, French J's judgment at paragraphs 83 -103 looked broadly at a great deal of material which offered guidance as to the meaning of good faith. He cited text books and legal articles and a range of decisions dealing with many different subject matters. At paragraph 90 he quoted from dictionaries and Mr Wood relied in particular on the quotation from Black's Law Dictionary, 7th Edition, West Group (1999) (at 701) and the reference to: *"Observance of reasonable commercial standards of fair dealing in a given trade or business"*.

At paragraph 92, French J. quoted from the United States Second Restatement of Contracts paragraph 205 which was in these terms: *"The phrase "good faith" is used in a variety of contexts and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterised as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."*

96. At paragraph 93 French J expressed the matter thus: *"In a statutory setting a requirement to act in good faith, absent any contrary intention express or implied, will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement. In ordinary parlance it may require adherence to the "spirit" of the law. This may attract the kind of penumbral judgments by courts of which Professor Stone wrote. That is not necessarily a matter for concern in the case of civil proscriptions. They are evaluative judgments which the courts are authorised and required by the legislature to take. A good faith provision offers a warning that game playing at the margins of a statutory proscription or obligation may attract a finding of liability. There is nothing in principle to prevent the legislature protecting a rule by attaching an uncertain risk of liability to conduct in the shadow of the rule."*

97. Mr Pymont did not suggest that these statements by French J. (and the material referred to by the learned judge) were not a useful attempt to describe the concept of *"good faith"*. Nor did Mr Pymont refer me to any English authority, or any other authority, which adopted a different approach. In these circumstances, based on the material that has been put before me, I feel I am able to construe paragraph 33 of the Third Schedule to the Agreement as imposing on the Defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant.

98. Before finally addressing the question whether the Defendants' intended sale would amount to a breach of the obligation of good faith, it is convenient at this point to consider Mr Pymont's submissions as to quantum meruit or the entitlement to a reasonable fee in restitution.

The possibility of a quantum meruit

99. I referred earlier to the initial submission made on behalf of the Defendants that the First Claimant "might" be entitled in the present circumstances, in the event of the sale to a third party, to receive a reasonable fee from the Defendants. In the course of the hearing, the Defendant submitted that the First Claimant "would" be entitled to a reasonable fee in such circumstances.

100. Mr Pymont began this part of his submissions by referring again to paragraph 2 of the Second Schedule which refers to *"no reimbursement of Berkeleys Fee or Berkeleys Costs shall be paid to Berkeleys on the sale or other disposal of the whole or any part of the Property unless the disposal is achieved pursuant to the terms hereof"*. He submitted that this only ruled out the payment of Berkeleys Fee and Berkeleys Costs, which are terms defined in paragraph 1 of the Second Schedule. He submitted that this did not rule out the payment of a reasonable fee, if a reasonable fee was payable pursuant to an implied term or pursuant to the principles of restitution. He pointed out that where an otherwise valid contract for services fails to specify the amount of the price for those services, the court can imply a term that the price should be a reasonable one. Where there is no express contractual obligation there may be a right to payment in the law of restitution or in quasi contract. Where services are provided in the expectation that they will be paid for, a right to be paid can arise. He specifically relied on ***Foley v Classique Coaches Limited*** [1934] 2 KB1, ***F & G Sykes (Wessex) Limited v Finefair Limited*** [1967] 1 Lloyds Law Reports 53 and ***Bates v Wyndham's (Lingerie) Limited*** [1981] 1WLR 505. In the first of these cases, the contract provided for petrol to be supplied at a price to be agreed by the parties in writing and from time to time. It was held that a term should be implied into the agreement that the petrol should be of a reasonable quality and sold at a reasonable price and any dispute into those matters was to be determined by arbitration pursuant to the agreement. In the second case, a reference to "*such other figures as may be agreed between the parties*" could be given effect by holding that the figures were to be reasonable and in default of agreement to be determined by

arbitration under the agreement. In the third case, a rent review clause in a lease which referred to such rent as shall have been agreed between the lessor and the lessee could be construed to mean a fair rent as between the lessor and the lessee.

101. If the Agreement in the present case had contained an express term that the Defendants would pay to the First Claimants "a fee to be agreed" in the event of the Defendants selling the land and if a dispute as to the amount of the fee was within the arbitration clause in the Agreement, then there would be scope for argument based upon the three authorities referred to. However, the Agreement does not contain any such express term and, in my judgment, those three authorities are of no assistance in the present context.

102. Mr Pymont also relied on ***Way v Latilla*** [1937] 3 All ER 759. The precise analysis of that decision is open to interpretation. On one analysis, it involved an express contract which contemplated payment for services but did not contain an express term as to such payment, in which case a term was to be implied that payment would be made on a quantum meruit basis. Alternatively, there was no express contract between the parties but the dealings between the parties gave rise to an implied contract to pay on a quantum meruit basis. Again, I do not find that decision as offering any assistance in the present context.

103. Mr Pymont then cited a number of passages from Chapter 1 of Goff & Jones, the Law of Restitution, 7th Edition, which dealt with matters such as a right to restitution sometimes arising where there is free acceptance of an incontrovertible benefit at the expense of the claimant to restitution. He submitted that those requirements were satisfied in the present case and this ought to suffice to produce the result that in the event of the sale of the land by the Defendants at the present time the First Claimant would be entitled to recover a reasonable fee. He further submitted, in connection with the computation of that fee, that the reasonable fee would be similar to the basis on which the contractual fee was payable in the event of a Consent being obtained.

104. In his reply, Mr Wood cited ***Bentall, Horsley and Baldry v Vicary*** [1931] 1KB 253. This was an estate agent's commission case where the estate agent's client sold the property direct to a third party. The estate agent was not entitled to commission in accordance with the agreement and the court rejected the submission that the estate agent was entitled to damages for breach of an implied term of the contract. The court also rejected the claim to a quantum meruit. McCardie J. stressed that the contract provided for the circumstances in which the estate agent was to receive a commission and those circumstances had not come about. There was therefore "no scope" for the operation of the doctrine of quantum meruit.

105. A similar approach was adopted by the House of Lords in ***Luxor (Eastbourne) Limited v Cooper;*** see, in particular, per Lord Russell at page 125 and per Lord Wright at page 141. In my judgment, the reasoning in both passages is that the express terms of the contract which provide for the payment of a commission in specified events necessarily exclude a claim to a quantum meruit in other events. Notwithstanding the submission of Mr Pymont to the contrary, I do not regard Lord Russell's essential reasoning as to quantum meruit to be dependant upon an earlier statement he made to the effect that the commission agent in that case was not under an obligation to do anything.

106. Mr Wood also referred to paragraph 1-063 of Goff & Jones, The Law of Restitution, which explains the relevance of the express terms of the contract, in so far as they provide for remuneration, to a suggested claim to quantum meruit outside the terms of the contract. Finally, Mr Wood relied upon Article 56 in Bowstead and Reynolds on Agency, 18th Edition, which includes the statement: *"Where the event upon which the agent's entitlement for remuneration arises does not occur, the agent will not be entitled to receive remuneration on a quantum meruit unless provision for this is expressly made in the agency contract, or unless a term to such effect can be implied into the agency contract in order to give it business efficacy or otherwise to give effect to the intentions of the parties."*

I do not accept Mr Pymont's submission that this statement applies only in a case where the agent is under no obligation to perform any services.

107. I prefer Mr Wood's submissions to those of Mr Pymont on the question of quantum meruit. The express terms of the Agreement as to remuneration leave no scope for a quantum meruit claim or a claim in restitution. It is not appropriate to imply a term as to payment in any circumstances other than the circumstances expressly specified in the Agreement. The tenor of the Agreement is that the First Claimant will receive no fee unless there is a Consent.

108. Mr Pymont also relied on the decision in ***Firth v Hylane Limited*** [1959] EGD 212. However, that case turned upon the course of dealing and on the correspondence in that case and does not establish any general principle.

Conclusion as to good faith

109. In those circumstances, I can now reach my conclusion as to whether a sale by the Defendants of all of the land the subject of the Agreement, at the present time, would break the obligation in paragraph 33 of the Third Schedule. Asking that question with reference to the intended sale at the present time, the matters which are relevant are the following:

1) since the making of the Agreement, the First Claimant has invested considerable time and effort and incurred expense;

2) the consequence of the First Claimant's actions is that the value of the Defendants' land has been significantly enhanced;

3) although the Defendants submitted as a matter of law that the Agreement obliged them to pay to the First Claimant a reasonable fee in the present circumstances, there is no open offer from the Defendants to the First Claimant to pay a reasonable fee; in the absence of an open offer and, consistently with my conclusion that the Defendants are not obliged in law to pay a reasonable fee, the present situation is that the First Claimant will not have an entitlement to a reasonable fee in the event of the proposed sale;

4) in any event, the First Claimant's expectations under the Agreement were not to receive what a court might consider to be a reasonable fee at this point in the project of promoting the land but the First Claimant's expectations were to take the promotion of the land to a conclusion involving (if possible) the obtaining of a Consent and a sale on the open market whereupon the First Claimant would be entitled to a fee based on the express contractual terms as to calculation of the fee;

5) on a sale to a third party, the third party will not be bound by the Agreement;

6) the Defendants do not put forward any extenuating circumstances or any hardship either at all or, at any rate, of a kind that was not foreseeable at the date of the Agreement.

110. In my judgment, a sale of the kind envisaged by the Defendants in the present circumstances breaks the obligation in paragraph 33 of the Third Schedule. It does not observe reasonable commercial standards of fair dealing in this case. It does not observe faithfulness to the agreed common purpose. It is not consistent with the justified expectations of the First Claimant.

Whether I need to consider the arguments as to an implied term?

111. Taking stock at this point, I have held that the proposed sale will result in a breach of paragraphs 2, 7 and 8 of the Third Schedule to the Agreement. I have also held that the proposed sale is a breach of paragraph 33 of the Third Schedule to the Agreement. In those circumstances, it is strictly not necessary to determine whether it is appropriate to imply a term restricting a sale or other disposal. In view of my conclusion as to paragraph 33 of the Third Schedule to the Agreement, it might be said that it is not necessary, in order to give business efficacy to the Agreement, to imply a term to prevent a sale or other disposal, because the question of sale or disposal has been dealt with by the express terms of the Agreement in the way considered above. Conversely, an implied term as to sale or other disposal might operate differently in some circumstances from the way in which the obligation of utmost good faith operates. In all the circumstances, I do not feel it necessary to decide whether there is an implied term as to sale or other disposal which imposes a restriction on the Defendants *in addition* to their express obligations as construed above.

112. Nonetheless, in view of the fact that the question of an implied term was fully argued and in case my decision on good faith is wrong and in case it might be of assistance to the parties I will consider the question of a possible implied term on the basis contended for by Mr Pymont that paragraph 33 of the Third Schedule does not add anything of substance to the express obligations of the Defendants under the Agreement.

The implication of a term

113. On the subject of implied terms, Chitty on Contracts 29th Edition Volume 1 paragraph 13.012 under the heading "Prevention of performance" states: *"By the same token, "if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can become operative." Also where a binding contract is subject to a condition precedent, a term may be implied that a party will not do an act which, if done, would prevent fulfilment of the condition. But these implications are not inevitable: the alleged term may be unreasonably wide or the nature of the contract may indicate otherwise. A term may also be implied that a right, remedy or benefit expressly conferred upon one party to a contract or to which he may be entitled shall not be available if that party relies on his own breach of the contract, to establish his claim."*

The words within the quotation marks in this paragraph from Chitty are taken from the judgment in ***Stirling v Maitland*** (1864) 5 B&S 840 at 852.

114. In Lewison on the Interpretation of Contracts (Third Edition) under the heading **"*Terms as to Prevention of Performance*"** at paragraph 6.11, the author wrote: *"In general, a term is necessarily implied in the contract that neither party shall prevent the other from performing it. Both parties to a contract are taken to contract on the footing that they wish the contract to be performed, and accordingly must be taken to have agreed that neither will actively prevent performance. It is possible that the duty does not rest upon the implication of a term, but may be a positive rule of the law of contract that conduct of either the promisor or the promisee, which can be said to amount to himself of his own motion bringing about the impossibility of performance, is itself a breach of the contract. However, since ultimately the rule of law (if such it is) depends upon the intention of the parties, it is submitted that it may properly be categorised as an implied term. The classic formulation of the implied term is that of Cockburn CJ in* ***Stirling v Maitland*** *…… This formulation has been applied many times. In* ***Southern Foundries (1926) Limited v Shirlaw*** *[1940] AC 701, Lord Porter described it as a "well known principle", and in* ***Schindler v Northern Raincoat Co Limited*** *[1960] 1 WLR 1038, Diplock J described it as "that respectable principle". However, the limits of the implied term must be recognised. First, the implied term must not be illegal, contrary to public policy, or (in the case of a corporation) ultra vires the contracting party. Thus no term will be implied preventing a public authority from exercising powers vested in it by statute to be exercised for the public good. Second, the implied term is limited to the act of prevention of performance, and probably does not extend to passivity in the face of the action of some third party. Third the act complained of must itself be wrongful, either as being a breach of the express implied terms of*

the contract, or wrongful independently of the contract (for example tortious). As with other implied terms, the test of necessity must be satisfied."

115. In my judgment, there appear to be three circumstances in which an implied term not to prevent performance needs to be considered.

116. The first circumstance is where the action of the defendant prevents performance of an obligation on the claimant. A claimant will often have an interest in performing its obligation and may wish to complain if the defendant's action prevents the claimant performing its obligation.

117. The second circumstance is in relation to an obligation on a defendant. Of course, in the case of an obligation on a defendant, it would normally not be necessary to have recourse to the implication of a term. If the action of the defendant is contrary to an express obligation on the defendant, the claimant would simply allege an actual or threatened breach of that obligation and not a breach of an implied term not to prevent performance of the defendant's obligation. However, an implied term may still be appropriate in the case of a defendant's obligation where the obligation is to be performed in the future or is a contingent obligation. For example, if the owner of land contracted to sell it to a purchaser in six months time, one could properly say that the owner of the land is under an implied obligation not to sell the land to a third party in the meanwhile. In the present case, in relation to the contingent obligations on the Defendants in paragraphs 10, 14, 15, 16, 18 and 23 of the Third Schedule to the Agreement, it is relevant to ask whether a term should be implied that the Defendants should not disable themselves from performing those obligations if the contingency were to come about.

118. The third way in which an implication can arise in the present type of case is where the defendant's obligation is subject to a pre-condition and the suggested implied term is that the defendant should not do anything to prevent the pre-condition being satisfied.

119. In my judgment, all three of these possible implied terms need to be addressed in the present case. Indeed, the First Claimant asserts that all three of these implications are properly to be made.

120. Before determining whether any or all the suggested implications are proper ones, it is useful to identify the effect of a sale by the Defendants in the light of the evidence which I have received.

121. I have already held that a sale by the Defendants amounts to a present breach of the express terms in paragraphs 2, 7 and 8 of the Third Schedule. If the contingent obligations in paragraphs 10, 14, 15,16, 18 and 23 of the Third Schedule were to arise, then a sale by the Defendants at the present time would mean that the Defendants would break those obligations when the time for their performance arrived.

122. The First Claimant also asserts that a sale by the Defendants at the present time would prevent the First Claimant from performing the obligations on it in paragraphs 1, 3 and 4 of the Third Schedule. I am not satisfied that that would be the case. This is because the obligations on the First Claimant in paragraphs 1, 3 and 4 of the Third Schedule are not absolute obligations but are qualified obligations. The obligation in paragraph 1 of the Third Schedule is on the First Claimant to use "*reasonable endeavours*" to promote the land. Whilst the Defendants own the land, the endeavours required of the First Claimant will be more extensive than those which are required when the Defendants have sold the land. It might even be the case that following a sale of the land by the Defendants, very little would be required of the First Claimant by way of "*reasonable endeavours*" on the basis that there was very little the First Claimant could do to promote land owned by a third party in respect of which the First Claimant had no status. That would be a case of the content of the obligation of paragraph 1 of the Third Schedule being changed by reason of the sale of the land but it would not be a case where performance of paragraph 1 of the Third Schedule had been prevented. In the case of paragraph 3 of the Third Schedule, if the sale of the land meant that there was not a 50% chance of success of a planning appeal brought by the First Claimant, then the First Claimant would not be obliged to appeal. Again, the content of the obligation may be affected by the sale but the sale would not prevent performance of what remained of the obligation. Similar reasoning applies to paragraph 4 of the Third Schedule.

123. The next question to consider is whether a sale by the Defendants would prevent the First Claimant securing a Consent within the meaning of the Agreement. The obtaining of a Consent is the key to the Defendants coming under an obligation to sell to a third party, which in turn leads to the payment by the Defendants to the First Claimant of the fee and other monies due under the Agreement. I have already referred in detail to the effect which a sale of the land would have on the First Claimant's ability to obtain a Consent when I considered the First Claimant's case as to breach of paragraphs 2, 7 and 8 of the Third Schedule. I concluded then that a sale by the Defendants would prejudice the First Claimants ability to obtain a Consent. The same finding applies in the present context also.

124. The parties cited to me many of the decided cases dealing with the implication of terms in a context like the present.

125. The facts in ***Stirling v Maitland*** (1864) 5 B&S 840 are not particularly revealing; indeed, in my judgment, that was not a case where the implication of a term was necessary for the resolution of the dispute.

126. In ***Mackay v Dick*** (1881) 6 App.Cas. 251, the conduct of one party did not prevent performance of an obligation by either party but prevented satisfaction of a condition on which completion of the contract depended. Lord Blackburn said at page 263: *"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in*

doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

That statement goes rather further than a negative stipulation restraining acts which prevent performance and extends to positive acts of co-operation.

127. In ***Barque Quilpue Limited v Brown*** [1904] 2KB 264 Vaughan Williams LJ said at page 271-272: *"The second point is, that in this contract, as in every other, there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract, in the same way as you import into every contract a stipulation that the various things which are to be done by the one party or the other are, if no time is specified, to be done within a reasonable time. In each of these cases that may be called an implied contract. It must not, however, be supposed that the law readily implies any special affirmative contracts; I think the law very rarely does or indeed ought to imply such a contract. But the particular stipulation on which the plaintiffs rely is, as far as I know, implied in every contract."*

128. ***Stirling v Maitland*** was considered by the House of Lords in ***Southern Foundries (1926) Limited v Shirlaw*** [1940] AC 701. The decision was by a majority of three to two. The minority were prepared to imply a term, to some extent, in accordance with ***Stirling v Maitland*** but felt there was no breach of that term. The majority held that the company was in breach of contract but the reasoning of all members of the majority does not appear to be the same. Some of the majority appear to have held that the company was in breach of the express terms of the contract of employment, whereas others in the majority appear to have held that the company was in breach of an implied term not to do anything which would prevent performance of the contract. Viscount Maugham (in the minority) was prepared to imply a term in accordance with ***Stirling v Maitland*** although he said at pages 712 – 713 that that case did not lay down a rigid rule and the principle was capable of qualification in any particular case depending on the true construction of the agreement. Lord Atkin (in the majority) applied the principle in ***Stirling v Maitland*** although he preferred to regard it as a positive rule of law rather than an implied term. Although Lord Wright (in the majority) referred to ***Mackay v Dick,*** as I read his judgment, he appeared to hold that the company was in breach of the express terms of the contract of employment rather than of a separate implied term. Lord Romer (in the minority) held there was an implied term in accordance with ***Stirling v Maitland*** but there was no breach of it. Lord Porter (in the majority) applied ***Stirling v Maitland.***

129. ***Mackay v Dick*** was considered by the House of Lords in ***Luxor (Eastbourne) Limited v Cooper*** [1941] AC 108. In that case, the unsuccessful estate agent argued for an implied term that if he introduced a purchaser, the estate agent's client was under an obligation to sell to the purchaser. The House of Lords rejected that implication. They also rejected a lesser implication that the estate agent's client would not do anything (such as selling the property himself) which would prevent a sale to a purchaser introduced by the estate agent. However, if the client was not under an obligation to sell to the purchaser introduced by the estate agent, there was less purpose in having a restriction upon the client selling elsewhere. Viscount Simon LC said at page 118: *"If A employs B for a reward to do a piece of work for him which requires outlay and effort on B's part which depends on the continued existence of the given subject-matter which is under A's control ……there may be an implied term that A will not prevent B doing the work by destroying the subject-matter."*

At page 124, Lord Russell of Killowen drew a distinction between the case of an agent who was under no obligation to do anything (as in that appeal to the House of Lords) and a different case where there was a contract of employment by which one party bound himself to do certain work and the other bound himself to pay remuneration for the doing of it. At page 154, Lord Romer said: *"If I employ a man for a reward to build a house on my land I subject myself to an implied condition that I will do nothing to prevent him carrying out the work."*

130. In ***Mona Oil Equipment & Supply Company Limited v Rhodesia Railways Limited*** [1949] 2 All ER 1014, it was held that there was an implied term as to cooperation between the contracting parties but only to a limited degree. Devlin J. said at 1017e: *"In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be considered in relation to the business efficacy of the contract, but it is not necessarily the most important, and is certainly not the only matter. There are many decided cases in which it has not prevailed. "*

131. In ***Thompson v Asda-MFI Group plc*** [1988] Ch 241, Scott J. declined to imply a term that the defendant would do nothing to cause the contingent rights of the plaintiff to fail by reason of non satisfaction of the contingency.

132. In a very different context, in ***Crehan v Inntretreneur Pub Co*** [2007] 1AC 333 at 339, Lord Bingham of Cornhill referring to the duty under Article 10 of the EC Treaty as to cooperation between member states, imposing both positive and negative duties on member states, said: *"They are duties comparable with those which English law readily implies into contracts: **Mackay v Dick** (1881) 6 App Cas 251, 263 and **Stirling v Maitland** (1864) 5 B&S 840, 852."*

133. Finally, I should refer to the decision of the House of Lords in ***Rhodes v Forwood*** (1876) 1 App Cas 256. This case was carefully analysed by Counsel in the course of argument. The case does not contain general propositions of law which can be directly applied in a later case. Indeed, Lord O'Hagan said at page 275: *"As in most cases of the kind, we are little assisted by authorities. Judicial decision on one contract can rarely help us to the understanding of another; and, dealing with that before us within itself, regarding the relevant position of the parties as throwing light upon this meaning and upon the real purpose; and remembering the admission at the Bar that the Appellant was*

deliberately to sell his coals in other markets besides that of Liverpool, I approve the view adopted by the Court of Exchequer, which is commended, as I have said, by many considerations of consistency and convenience not to be found in that to which it is opposed."

In my judgment, the powerful and persuasive reasoning in ***Rhodes v Forwood*** does not offer any particular help, one way or the other, in the resolution of the issue in the present case.

134. With the assistance of the statements of principle described above, I can now approach the question whether any or all of the implied terms contended for by the First Claimant are to be found in the present case. I confess that there is some artificiality in approaching this question in view of my earlier finding that a sale by the Defendants in the present circumstances would be a breach of the express terms contained in paragraphs 2, 7 and 8 of the Third Schedule. (It will be remembered that in this part of my judgment, I am assuming that the obligation as to good faith does not impose any obligation of substance on the Defendants.) Nonetheless, there are, in my judgment, very powerful arguments in favour of the implication of a term that the Defendants would not sell the land because to do so would disable the Defendants from performing their obligations in paragraphs 10, 14, 15, 16, 18 and 23 of the Third Schedule and, further, that a sale by the Defendants would prejudice the First Claimant's ability to obtain the Consent which is the trigger for the Defendants' obligation to sell the land, leading to a payment to the First Claimant. I am significantly influenced by the fact that the Agreement places extensive obligations on the First Claimant which it is obliged to perform, potentially, over a lengthy period and, almost certainly, at considerable expense to itself. The Agreement places obligations on the Defendants and their personal representatives but not on any third party to whom the defendants sold the land. The matters to which I referred above as to why a sale would be a breach of the Defendants' obligation of good faith (as I have earlier construed it) are powerful arguments in favour of the implied term (if my interpretation of the obligation of good faith is wrong). In my judgment, in the absence of countervailing considerations, it is necessary to give business efficacy to imply into the Agreement that the Defendants may not sell the land whilst the Agreement remains in force.

135. Mr Pymont said that no such term should be implied because the law would imply a term as to payment on a quantum meruit basis or allow the First Claimant to claim a reasonable fee by way of restitution. I have already given my reasons for rejecting those submissions. However, the fact that Mr Pymont felt it was necessary to imply such a term into the Agreement shows that without some implied term, whether his suggested term as to quantum meruit, or the term which seems to me to be appropriate, the Agreement really does not have business efficacy.

136. Next, Mr Pymont raised questions as to what would happen in the event of the death of the Defendants or the bankruptcy of the Defendants or the compulsory purchase of the land or a sale by a mortgagee of the land. It is correct that the Agreement does not contain express terms dealing with those consequences. If one of the three Defendants died, title to the land would vest in the other two by survivorship. If two of the Defendants died, title to the land would vest in the third by survivorship. If the third died, then title to the land would vest in personal representatives. The personal representatives would be bound by the obligations on the part of the Defendants contained in the Agreement. I can see that a time might come when the personal representatives would wish to assent to the land vesting in a beneficiary of the estate of the deceased. I can see it would be inconvenient to reach the conclusion that the personal representatives could not assent to the land vesting in a beneficiary save on terms that the beneficiary was subject to the terms of the Agreement.

137. If all three of the Defendants became bankrupt then the beneficial interests in the land would vest in their trustee or trustees in bankruptcy although it may be that the legal title would remain vested in the Defendants. It is possible that the trustee or trustees in bankruptcy could act so as to have title to the land vested in third parties. However, such a consequence, if it were to arise following three bankruptcies, does not throw much light on what the parties intended in a case where there was no bankruptcy.

138. In the case of a compulsory purchase, the acquiring authority would not be bound by the Agreement and because the Defendants would no longer be the owners of the land, they would be unable to perform many of the provisions of the Agreement. It appears from the correspondence before the Agreement was entered into that some consideration was given to the possibility of compulsory purchase and it may have been thought by the First Claimant that it would have a right to compensation in such a case. The point was not explored in argument before me and I am doubtful whether this assumption was correct but, in the end, I do not see that this throws any light on the issue whether the Defendants were entitled to effect a voluntary sale of the land.

139. As to the possibility of there being a charge over the land, paragraph 9 of the Third Schedule to the Agreement contemplates that the Defendants might grant a charge over the land. The grant of a charge would not in itself disable the Defendants from performing their obligations under the Agreement. If the chargee exercised a power of sale, that would result in the land being vested in a third party purchaser who was not bound by the Agreement and, this in turn, would produce the result that the Defendants were unable to perform many of the obligations on them under the Agreement for which damages would be payable.

140. Taking these various points together, I do not see that the somewhat special cases of death, bankruptcy, compulsory purchase or sale by a mortgagee alters what term should be implied to deal with the possibility of a voluntary sale by the Defendants.

141. The result of the above is that there are no sufficient countervailing arguments to overwhelm what I have described as the powerful arguments in favour of an implied term that the Defendants should not be free to sell

the land during the term of the Agreement. Accordingly (on the assumption that the obligation as to good faith did not impose any obligation of substance on the Defendants) I conclude that there is to be implied into the Agreement in order to give it business efficacy a term that the Defendants will not sell or otherwise dispose of any of the land the subject of the Agreement during the period covered by the Agreement.

The relief which is appropriate

142. Mr Pymont has throughout accepted that if the court should reach the conclusion that the proposed sale is contrary to the express or implied terms of the Agreement then the appropriate relief for the court to grant is an injunction restraining such a sale. I will hear Counsel as to the terms of such an injunction and any declaration which might be said to be necessary to record the conclusions reached in this judgment.

Derek Wood QC and Wayne Clark (instructed by Ashurst) for the Claimants
Christopher Pymont QC and Andrew Ayres (instructed by Hallett & Co) for the Defendants