*137 Walton Homes Ltd v Staffordshire CC

Chancery Division

8 October 2013

[2013] EWHC 2554 (Ch)

[2014] 1 P. & C.R. 10

Peter Smith J.

8 October 2013

Clauses; Contracts for sale of land; Error of law; Interpretation; Local government; Overage;

H1 *Real property—contract for sale of land—overage clause—construction—valuation—error of law—whether surveyor's decision manifestly erroneous*

H2 The claimant, W, entered into an agreement for the sale and purchase of land with the defendant council. The purchase price was £107,000. The agreement contained an overage clause. Clause 5.4(3)(c) provided for the payment of "additional consideration" which represented the difference between the open market value of the property without planning permission and the open market value with planning permission. W owned the land for 11 years and then contracted to sell it to B conditional upon B procuring planning consent for residential development. Permission was granted and the open market value of the property was £1,248,874. The council was entitled to 50 per cent of the difference between that sum and the open market value of the property without planning permission. A dispute arose over the interpretation of how "additional consideration" was to be determined under clause 5.4. W believed that the uplift was £250,000 and offered the council £125,000 plus the initial purchase price. On reference to an independent chartered surveyor, the surveyor sought the advice of counsel on the meaning of the phrase "the (planning) permission does not exist". On the basis of this advice, the surveyor issued an interim determination that the valuation of the land was to be made on the assumption that:

> "The permission does not exist, the recommendation of the Planning Officer leading to the grant of the Permission has not been made and the resolution of the Planning Committee to grant the Permission has not been passed."

The surveyor rejected as commercially absurd W's submission that "the Permission" should be interpreted literally as applying only to the planning decision notice. Such a literal meaning would frustrate the intention that additional consideration should reflect the uplift in value brought about by unlocking the development potential of the property. W applied for an order that the interim determination was manifestly erroneous.

H3 **Held,** refusing the application, that it was impossible to say that the surveyor's reasoning was manifestly erroneous. The word "manifest" gave a very limited window of opportunity to challenge, such as an arithmetical error or a reference to a non-existent building. That there was nothing "manifestly wrong" about the ***138** instant decision was well demonstrated by the fact that the competing arguments were very strong on both sides. This was not a situation where a dispute was created so as to lead to a suggestion that it could not be manifestly wrong. There was merit in both sides' arguments. The parties gave the surveyor the power to determine the decision in law and fact. The surveyor's reasoning was not obviously wrong. It was not obvious that he was disentitled from looking to the factual matrix outwith the four corners of the agreement because the limited construction put forward by W produced a commercially absurd result. It was not manifestly erroneous for him to apply the principles in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38* and apply that to the words "the Permission" and come up with a wording which reflected the intent, namely that the parties were to share equally the planning gain obtained in respect of the site. It was not intended for the planning gain to be largely pocketed by W which was the logical conclusion of the application of the literal wording in the agreement. Something must have gone wrong and these were perfectly acceptable reasons for the surveyor's conclusion.

Cases referred to in the judgment:

Cadogan Petroleum Plc v Tolley [2009] EWHC 3291 (Ch)

Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] Bus. L.R. 1200; [2010] 1 P. & C.R. 9

Healds Foods Ltd v Hide Dairies Ltd Unreported 1994

ING Bank NV v Ros Roca SA [2011] EWCA Civ 353; [2012] 1 W.L.R. 472; [2012] Bus. L.R. 266

Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 W.L.R. 896; [1997] C.L.C. 1243; [1997] P.N.L.R. 541 HL

Jones v Sherwood Computer Services Plc [1992] 1 W.L.R. 277; [1992] 2 All E.R. 170; [1989] E.G. 172 (C.S.) CA (Civ Div)

L-B (Children) (Care Proceedings: Power to Revise Judgment), Re [2013] UKSC 8; [2013] 1 W.L.R. 634; [2013] 2 All E.R. 294 Sup Ct

Melanesian Mission Trust Board v Australian Mutual Provident Society (1997) 74 P. & C.R. 297; [1997] 2 E.G.L.R. 128; [1997] 41 E.G. 153 PC (NZ)

Veba Oil Supply & Trading GmbH v Petrotrade Inc (The Robin) [2001] EWCA Civ 1832; [2002] 1 All E.R. 703; [2002] C.L.C. 405

H5 **Application** by the claimant, Walton Homes Ltd, for an order that an interim determination of Mr David R Johnson, an expert surveyor, dated 17 December 2012 be set aside on the ground that his interpretation of an overage clause in an agreement for the sale of land dated 11 January 2000 made with the defendant, Staffordshire County Council, contained a manifest error. The facts are stated in the judgment.

H6 **Representation**

John de Waal QC and Nicholas Brookes (instructed by Ansons LLP) for the applicant.

Wilson Horne (instructed by the in-house Solicitor) for the respondent.

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Approved Judgment

Peter Smith J.:

Introduction

1 This trial raises a short but interesting argument on the meaning and effect of an agreement for sale of land between the Defendant (1) and the Claimant (2) dated 11 January 2000. The dispute is over the meaning and effect of an overage clause.

2 The point was extremely well argued by both sides.

Background

3 The Claimants ("Walton") seek an order that the Interim Determination ("the Determination") of Mr David R Johnson DipArb, FRICS, FCIRArb MEWI dated 17 December 2012 be set aside on the ground that on the question of the correct interpretation of the relevant clause in the transfer dated 14 February 2000 pursuant to the Agreement it is manifestly erroneous.

4 It will be seen that I am not being asked to construe the Agreement. Nor is this an appeal in any form against that Determination.

5 The only issue before me is whether the Interim Determination contains a " *manifest error* ".

6 Mr de Waal QC and Mr Brookes who appear for Walton accepted that was the position. He also accepted that the effect of the clause in the Agreement (see below) is that all determinations as to fact and law arising under it are to be determined by a surveyor expert and such decision is " *final and binding on the parties subject to the Surveyor providing each of the parties with a detailed statement setting out the reasons for making the decision which the Surveyor has arrived at* ."

7 This was an inevitable concession in view of the well known case of *Jones v Sherwood Computer Services Plc [1992] 1 W.L.R. 277* . It is insufficient for the present application if the Decision is arguably wrong and it is even insufficient if the decision is wrong providing it was in accordance with his instructions and does not contain any manifest error. The circumstances when a determination by an expert can be challenged are *tightly circumscribed* (per Potter J. in Healds Foods Ltd v Hide Dairies Ltd 112/94 and the Court of Appeal 6/12/96 see *Cadogan Petroleum Plc v Tolley [2009] EWHC 3291 (Ch)* at [31]).

8 The hurdle of opening the door in the case of a manifest error is even more tightly circumscribed.

9 In *Lindley & Banks on Partnership* , 19th edn (London: Sweet & Maxwell, 2013) (para.10-73) the learned authors expressed a view as to what manifest was and it has long been said in previous editions of Lindley that manifest errors " *applies only to errors in figures and obvious blunders, not to errors in judgment, e.g. in treating as good debts which ultimately turn out to be bad, or in omitting losses not known to have occurred. All errors are manifest when discovered; but such clauses as those referred to here are intended to be confined to oversights and blunders so obvious as to admit no difference of opinion* ".

10 That sentence was cited with approval by Potter J. in the Healds Food Ltd case above. ****140***

11 In *Veba Oil Supply & Trading GmbH v Petrotrade Inc (The Robin) [2001] EWCA Civ 1832* Simon Brown L.J. as he then was echoed the observations of Lindley as set out below:—

> "30 Although that conclusion is sufficient to dispose of the appeal, I would touch briefly on the alternative basis for decision relied upon by the Buyers, the reference in clause 10 to 'manifest error'. Morison J below went no further than to say that he was "inclined to the view that there was a manifest error here, due to the wrong test being used.
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> 31 Morison J had previously considered the meaning of 'manifest error' in Conoco (UK) Ltd v Phillips Petroleum (unreported,19 August 1996) where, following dicta in earlier cases, he held that manifest error referred to: 'oversights and blunders so obvious as to admit of no difference of opinion'.
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> 32 The question then arising is whether it is relevant to consider whether the error is one that affected the result. Considering that question in Conoco v Phillips , Morison J said this:

> '… it seems to me that there is no room for any debate as to whether the oversight or blunder would or would not have made any material difference to the result. If it could be shown that there was a manifest error then in my judgment that would be an end of the case. If fraud was shown, I cannot accept that it would be open to debate as to whether the fraud did or did not affect the result; so also would manifest error.'
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> 33 I confess to some difficulty with this approach. Fraud, of course, would vitiate the determination irrespective of whether it affected the result: 'Fraud or collusion unravels everything' (per Lord Denning in *Campbell v Edwards*). The exception for 'manifest error', however, seems to me of a rather different character and to be designed essentially to fill the gap in the law created by the development to which I have already referred: the overthrow of the Dean v Prince principle of setting aside determinations for mistake. Nowadays, if parties wish to contract on the basis that they will not be held to mistakes made by the expert in the course of carrying out his instructions, they must needs include a term like this with regard to manifest error. But if they do, is it then really to be said that provided only the mistake is obvious, the determination will be avoided irrespective of whether it could affect the outcome? In this context I am inclined to think not. Take the very error committed in *Frank H. Wright (Constructions) Limited v Frodoor* , the erroneous inclusion of a 'not' in the report. I do not think that that ought properly to be regarded as a 'manifest error'. Rather I would extend the 'definition' of manifest errors as follows: 'oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion'. (emphasis added).
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> 34 If, of course, the error consists of a departure from instructions, then, assuming I am right in my earlier conclusion, it will never be necessary to ask whether in addition that error amounts to a 'manifest error': it will vitiate the determination in any event. If, however, I am wrong in my earlier conclusion — if, in short, the Inspectors' use of the wrong test method here ***141*** ought properly to be regarded as an immaterial departure from their instructions — I would not conclude that it nevertheless constituted a manifest error such as to entitle the Buyers to set aside the determination on that alternative basis.
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> 35 That, however, is by the way. For the reasons given earlier, I would hold the determination not to be binding because of the Inspectors' material departure from their instructions, and accordingly dismiss this appeal."

12 Finally Sir Kim Lewison's book *Interpretation of Contracts* , 5th edn (London: Sweet & Maxwell, 2011) (Ch.18 section 7) adds some observations on manifest error as follows:—

> "Some clauses permit a challenge on the ground of 'manifest error'. In Conoco (UK) Ltd v Phillips Petroleum (UK) Ltd Morison J said that a 'manifest error' referred to 'oversights and blunders so obvious as to admit of no difference of opinion'. In *IIG Capital LLC v Van Der Merwe* Lewison J said that:
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> ''A manifest error' is one that is obvious or easily demonstrable without extensive investigation.'
>
> If the mistake is obvious then it may be that it does not also need to be demonstrated immediately and conclusively. In *Menolly Investments 2 Sarl v Cerep Sarl* Warren J considered a provision referring to 'manifest error' in a certificate of practical completion given under a building contract. He said:
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> 'That is not to say that the only evidence admissible is the certificate itself. The certificate must, after all, be construed against the background of the contract under which it is given and its subject matter, as well as in the context of the factual matrix against which manifest error is to be Judged. Mr McGhee gives the example of the complete absence of an extra storey which the contractor has promised to build. This of course is a fanciful example; if a certifier were actually to certify the building as practically complete in such a case, it is obvious that something serious has gone wrong and that the certificate cannot stand. But the point is that it is only possible to say that something has gone wrong if (a)

reference is made to the contract (which includes provision of the extra storey) and (b) the position on the ground i.e. that the extra storey has not been built. It cannot be the case that the obvious error must be apparent on the face of the certificate itself.'

In *Natoli v Walker* , Kirby P said:

'Obviously, there is difficulty with the word 'manifest'. What may be 'manifest' to one judicial officer may fail to persuade another. The criterion cannot be the swiftness of mind of the sharpest intellect. Nor can it be the perception of one whose whole career has been devoted to examining and reflecting upon building contracts. An objective, not a subjective, test for what is 'manifest' is contemplated. But the word will not go away. Against the background of its history in this context it requires swift and easy persuasion and rapid recognition of the suggested error'" ***142**

Terms of the Agreement

13 In order to analyse the submissions it is necessary to start with the terms of the Agreement. It was dated 11 January 2000 and was between Staffordshire County Council (1) ("Staffordshire") and Walton (2).

14 It was an agreement for the sale and purchase of freehold land comprising the former playing field of Anstey College, Goosemoore Lane, Erdington Birmingham in the city of Stafford.

15 The purchase price was £107,000 exclusive of VAT. The dispute arises over the overage clause in 5.4 which is as follows:—

"Development Value Claw-back Clause

5.4 The assurance of the Property to the Buyer shall also contain the following development value claw-back provisions for the benefit of the Seller:

(1) Sub-clause (3) of this clause shall apply if at any time during a perpetuity period of eighty years from and including the date of this deed if either:

(a) the Buyer (or any successor in title to the Buyer in respect of the whole or any part of the Property) secures any planning permission for the carrying out of any development on the Property (or any part thereof);

(b) a third party obtains planning permission for the carrying out of a development on the Property (or any part thereof) and the Buyer (or any successor in title to the Buyer in respect of the whole or any part of the Property) resolves to implement the same or allows any third party to implement the development in question.

(2) For the purposes of this clause, the word 'development' shall have the meaning prescribed in Section 55(1) of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (or any statutory re-enactment thereof);

(3) If this sub-clause applies then within one month of the occurrence of the relevant contingency set out in sub-clause (1) of this clause (time being of the essence) the Buyer or its successor in title (as applicable) shall serve notice on the Seller ('the Notice'):

(a) to inform the Seller of the granting of the relevant planning permission ('the Permission') in relation to the Property (or the relevant part thereof);

(b) enclosing a copy of the Permission together with (if the Permission relates to a part only of the Property) an ordinance survey based location plan showing clearly the extent of the Property effected by the Permission;

(c) stating the sum ('the Additional Consideration') which in its opinion (acting reasonably) represents the difference between the following two values determined as at the date of the service of the Notice ('the Valuations') (subject to sub-clause 5.4(4) below):

(i) firstly, either (whichever the greater) the open market value of the Property (or the relevant part thereof) assuming that the Permission does not exist, or £107,000 (provided that if the Permission relates to a part only of the Property the figure of £107,000 shall be applied on a pro-rata basis according to the proportion of the Property effected thereby); ***143**

(ii) secondly, the open market value of the Property (or the relevant part thereof) with the benefit of the Permission.

(4) For the purposes of sub-clause (3)(c) of this clause references to the 'open market value' shall mean the open market value of the Property (or the relevant part thereof) determined by applying the definition of 'open market value' set out in Practice Statement 4.2 of the Royal Institution of Chartered Surveyors' Red Book' in conjunction with the following additional assumptions:

(a) there is no onerous or unreasonable restriction or impediment to the implementation of the Permission;

(b) the Buyer is able to sell the Property (or the relevant part thereof) with vacant possession on completion, except in relation to any part thereof which is the subject of a lease or tenancy created prior to the service of the Notice in which case the valuation in respect of such part or parts thereof shall be at the open market value based on the existing use thereof);

(c) the Buyer is to sell the Property (or the relevant part thereof) with full title guarantee and free from incumbrances (other than incumbrances which were binding on the Property, or the relevant part thereof, as at the date of the Conveyance of the same to the Buyer by the Seller, in so far as the same are still subsisting and capable of taking effect as at the date of the service of the Notice);

(d) there is unrestricted vehicular and pedestrian access to the Property from the public highway.

(5) The parties shall each use their best endeavours to negotiate in good faith and agree the Valuations and the Additional Consideration within one month of the service of the Notice by the Buyer, provided that the Seller shall have the option of serving a counter-notice on the Buyer (or its successor in title, as applicable) at any time in order to waive the application of the succeeding provisions of this clause if the Seller concludes that the granting of the Permission has not had any material effect on the open market value of the Property (or the relevant part thereof; as applicable);

(6) If; within either (whichever the earlier) one month of the service of the Disposal Notice or two months of the granting of the Permission, the parties fail to agree the Valuations and the Additional Consideration, then at the request of either of the parties such determination shall be referred to an independent chartered surveyor to be nominated without delay by agreement between the parties ('the Surveyor') whereupon the succeeding sub-clauses of this sub-clause (6) shall also apply:

(a) if the parties are unable to agree who should act as the Surveyor then the

Surveyor shall be nominated on the joint application of the parties (or if either of them neglects to concur in such application then on the sole application of the other) by the president or other chief officer or acting chief officer for the time being of the Royal Institution of Chartered Surveyors;

(b) the Surveyor shall act as an expert and not as an arbitrator; ***144**

(c) the Surveyor shall set a strict (but nevertheless fair) timetable, not exceeding two months in its entirety, with which the parties must comply in order to secure a resolution of the dispute without undue delay or expense;

(d) the Surveyor shall invite the parties (or their respective agents) to submit written representations to him to explain their respective cases in relation to the dispute and the Surveyor shall disclose any such representations to the other party so that they can submit written comments on the same to the Surveyor, provided that the Surveyor shall not be fettered or bound by any such representations or the comments thereon;

(e) the decision of the Surveyor shall (in the absence of manifest error) be final and binding upon the parties, subject to the Surveyor providing each of the parties with a detailed statement setting out the reasons for making the decision which the Surveyor has arrived at;

(f) the costs of the application to the Surveyor shall be borne in equal shares by the parties or as otherwise directed by the Surveyor if the Surveyor concludes (acting reasonably) that there are proper grounds for determining that either of the parties have acted unreasonably in connection with the dispute.

(7) Within ten working days of either, the parties agreeing the amount of the Additional Consideration, or, the Additional Consideration being determined via the procedure referred to in sub-clause (6) of this clause (time being of the essence) the Buyer shall make a payment to the Seller by a bank transfer (or a bankers draft from a London clearing bank acceptable to the Seller) of a sum representing 50% of the Additional Consideration (subject to sub-clauses (8) and (9) of this clause);

(8) If the Buyer fails to make payment to the Seller in accordance with the time limit in sub-clause (7) of this clause or if the Buyer implements the Permission in whole or in part prior to the payment of the Additional Consideration to the Seller then the Buyer shall also pay interest to the Seller on sum payable under sub-clause (7) of this clause, which said interest shall be calculated from either (whichever the earlier) the date of the expiry of the time limit for payment set in sub-clause (7) of this clause or the date of the commencement of the development authorised by the Permission, and shall be payable up to and including the date that the sum payable under sub-clause (7) of this clause (and the interest thereon) is paid to the Seller as aforesaid;

(9) For the purposes of sub-clause (8) of this clause the interest payable by the Buyer (or its successors in title) shall be calculated at either the base lending rate of the Cooperative Bank Plc for the time being in force plus 4%, or the equivalent rate plus 4% of such other London clearing bank as shall be specified by the Seller in any notice served by it on the Buyer from time to time for the purposes of this sub-clause."

16 The land was transferred by Staffordshire to Walton by a transfer dated 14 February 2000 and the buy back provisions are replicated in clause 12.3.

17 The dispute is over the interpretation of how the *"Additional Consideration"* is determined by clause 5.4 (3) (c). ***145**

18 It is stated to be the difference between two values determined at the date of service of the Notice (being a notice required to be served within 1 month of the granting of the relevant

planning permission). Those two valuations are (i) (which ever is the greater) the open market value of the Property … assuming that the Permission does not exist, or £107,000 and (ii) the open market value of the Property … with the benefit of the Permission.

19 The word "Permission" relates back to sub clause (3) being the granting of the relevant planning permission.

20 Walton contracted to sell the land comprising the Transfer to Bellway Homes Ltd ("Bellway") on 11 July 2011 conditional on Bellway procuring planning consent for residential development. The planning permission was granted on 8 March 2012 and as a result of that the open market value price of the Property for the purposes of the Agreement was £1,242,874. Thus the amount in issue is the difference between that and the open market value of the Property assuming that the Permission does not exist. Staffordshire are entitled to 50 per cent of the difference between the two figures (sub clause (7)).

21 Walton believes that under the terms of the Agreement the uplift is £250,000 and have offered £125,000. Staffordshire has neither accepted nor rejected that amount and the issue is not before me. It is to be noted that Walton put no effort in itself in progressing an application for planning permission up until the time it acquired the Property nor did it take any steps to acquire planning permission thereafter. It held the land for 11 years and Bellway completed the exercise by obtaining the planning permission. Thus whilst Walton held the land for 11 years on its case it is entitled to £1,117,874 following an outlay of £107,000. Staffordshire is entitled to the initial purchase price £107,000 plus £125,000, i.e. £232,000.

The Decision

22 The provisions of subpara.(6) set out the procedure where the parties fail to agree the valuations and the Additional Consideration. It is the time honoured reference to an independent Chartered Surveyor (the "Surveyor") agreed between them or nominated by the President of the Royal Institution of Chartered Surveyors. The Surveyor acts as an expert not an arbitrator and after procedural matters as I have set out above subpara.(a) makes his decision in the absence of manifest error provided it is reasoned final and binding on the parties.

23 This case represents in my view a classic reason as to why the initial allure of a (possible) speedy and informal procedure is the way forward and turns out not to be so attractive. That might be all right for questions of valuation where the Surveyor is a valuer. This case involves entirely questions of law. Yet the parties subject to the manifest error exception allowed all questions of fact and law in dispute to be determined by someone who might have no experience of legal matters. Thus in the present case the Surveyor retained Counsel (Mr Anthony Tanney of Falcon Chambers) to advise him as to the meaning of the phrase *"the [planning] Permission does not exist"* . Further the Interim Determination dated 17 December 2012 shows that the Surveyor simply left the making of the Determination to the opinion of Mr Tanney which he adopted. Thus his Interim Determination said this:—

> " 1.20 The basis of the valuation at that date shall be on the assumption that; ****146***
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> 1.21 The Permission does not exist, the recommendation of the Planning Officer leading to the grant of the Permission has not been made and the resolution of the Planning Committee to grant the Permission as not being passed
>
> 1.22 I attach a copy of Counsel's opinion in this regard at Appendix 4 which sets out the reasoned argument leading to this Opinion and my Determination."

Reasoning in Opinion

24 After expressing his view (see the Determination at 1.21 above) Mr Tanney reviewed the facts. Then in para.8 he said this:—

> "8 Pausing there, when the 1R1 refers to 'the Permission', to my mind the literal meaning

> of that expression equates to what I have called the PDN. Upon a literal meaning, the expression 'the Permission' is a reference neither to the recommendation of a planning officer addressed to the planning committee that permission ought to be granted, nor to the decision of the committee itself resolving to grant permission (which necessarily must precede the issue of a PDN). I consider that this view of the literal meaning of 'the Permission' is supported by the fact that under clause 12.3(3) of the TR1, the Transferee or its successors is required to serve on the Transferor with the Notice a 'copy of the Permission'. Such language is apt to refer to the PDN, and is not apt to refer either to the recommendation of the planning officer, or the decision of the planning committee. Therefore the reference to 'the Permission', speaking literally, is a reference to the PDN alone. Although the present point is a matter of the meaning of "the Permission" for the purposes of the TR1. I do note that the conclusion I have expressed is also the usual position under the general law (see *R v. West Oxfordshire DC ex parte Pearce Homes Ltd [1986] JPL 532* at 524 (2nd COL)). "

25 He expresses the opinion that *"the Permission"* relates to the *literal* meaning of that expression and equates to what he calls the PDN (i.e. the Planning Decision Notice).

26 He rightly observes that the argument is over the phrase *assuming that the Permission does not exist* . He set out the varying submissions and in particular Walton's submission that those words require the Surveyor to ignore the existence on the valuation date of the Planning Permission itself but not to ignore other matters relating to Planning Permission in particular not to ignore the recommendation of the Planning Officer that planning permission should be granted and thus also include a large element of planning gain meaning that the difference in values 1 and 2 for the purposes of the Agreement would be "commensurately small".

27 He disagreed with Walton's analysis. He set out his reasoning starting at para.18 where he says:—

> "18 However, I do not consider Walton Homes Ltd's ultimate contention is correct. This is because Walton Homes Ltd's contention that my instructing surveyor is to ignore the only the planning permission, but must take into account the planning officer's recommendation, must be based on the literal meaning of 'the Permission' which I have outlined above. As I have said, I ***147*** consider the literal meaning to be reasonably clear. However, I consider in the context of the TR1 as a whole, the court would not give effect to that literal meaning. "

28 He concluded that the requirement to ignore only the Planning Permission was based on a literal meaning of the *"the Permission"* . He said that he considers the literal meaning to be reasonably clear. And then he said "however, I consider in the context of the TRI (the transfer) as a whole, the Court would not give effect to that literal meaning".

29 He then gave his reasons in paras 19 through to 21 as follows:—

> "19 The reason is this. If the reference in clause 12.3(3) to 'the Permission' is a reference to what I have called the PDN — and nothing else — it follows that disregarding 'the Permission' would entail not merely valuing the Property with the benefit of the planning officer's recommendation, but also valuing the property with the benefit of the decision of the planning committee resolving to accept that recommendation and grant planning permission. In other words, if Walton Homes Ltd's approach is right, it proves too much. There is no reason to stop, as Walton Homes Ltd does, with the recommendation of the planning officer. The property must, on that approach also be valued with the benefit of the decision of the planning committee (because the PDN alone is to be ignored. The problem, it seems to me, is that, other things being equal, one might expect the value of a property with the benefit of a PDN to differ hardly at all from one which benefits from a decision of the planning committee to issue a PDN, but not an actual PDN itself. Walton Homes Ltd approach to the words in issue — although arguably supported by the literal meaning of those words — would therefore appear to make nugatory the provisions in the I'E1 for the calculation and payment of Additional Consideration. In particular, on Walton

> Homes Ltd's approach, it becomes very hard to see how the amount of the Additional Consideration would ever be more than a very small sum, if anything.
>
> 20 I would reject such a result as commercially absurd. The broad intent of the TR1 is clear: it is that the Transferee or its successors should pay by way of Additional Consideration an amount reflecting the uplift in value brought about by the unlocking of the development potential of the property. The literal meaning of 'the Permission' which underlies Walton Homes Ltd's submissions frustrates that intention.
>
> 21 Where the literal meaning of words in a legal instrument leads to commercial absurdity, binding authority requires a departure from that meaning (see *Investors Compensation Scheme Ltd v. West Bromwich BS [1998] 1 WLR 896*) 2. Further, the courts powers to substitute other words in order to achieve a non-absurd meaning are theoretically unlimited (ie there is no limit to the amount of "red pen" a court is permitted to use: see *Chartbrook Ltd v. Persimmon Homes Ltd [2009] 3 WLR 267*). In the present case, it seems to me that the only way to avoid the commercially absurd result to which one is led by a literal application of the words in issue in this case is to construe 'the Permission' to embrace not merely the PDN, but also those steps in the planning process leading to the issue of the PDN. By 'steps leading to' the PDN, I would exclude the making of the planning application itself, which ****148*** may or may not have led to a PDN. But I would include the recommendation of the planning officer and the decision of the planning committee to accept that recommendation. In my view, both are to be assumed not to exist. "

30 This led him to conclude that the words *"the Permission does not exist"* means the Permission does not exist, the recommendation of the Planning Officer has not been made, and the resolution of the Planning Committee has not been passed.

31 It is that determination which Walton challenge. When I say challenge of course as I have said this is not a review it is not an appeal and I have no power to construe the terms of the Agreement. The only issue for me is whether there is a manifest error as defined above in the decision which is in effect the decision of Mr Tanney summarised above.

Walton's Submissions

32 The essence of Mr Tanney's opinion is to reject Walton's approach as being commercially absurd. This is set out first in paragraph 19 when he pointed out rightly that if Walton's submission was taken to its logical conclusion the only thing that would actually be excluded is the PDN alone. Second as he set out in paragraph 20 the broad intent of the Agreement is clear; it is intended that Walton should pay by way of Additional Consideration an amount reflecting the uplift of value brought about by the unlocking of the development potential of the Property. He concluded that the literal submission put forward by Walton frustrated that intention. I should also add of course that the unlocking is shared equally between Staffordshire and Walton and I should also observe that Walton's contribution to this exercise was the initial £107,000 purchase consideration.

33 Thus Mr Tanney says where the literal meaning of the words leads to commercial absurdity a binding authority requires a departure from that meaning and he refers to the well known case of *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 W.L.R. 896* and he refers also to the ability of the Court with unlimited recourse to red pens to substitute other words in order to achieve a non absurd meaning see *Chartbrook Ltd v Persimmon Homes Ltd [2009] 3 W.L.R. 267* . He concludes that the only way to avoid a commercially absurd result is to conclude that the words *"the Permission"* embraced not merely the PDN but all those steps in the planning process leading to the issue of the PDN.

34 Walton attacks that conclusion.

35 Mr de Waal QC referred me to a number of authorities.

36 The first was the *Chartbrook case [2009] 1 AC 1101* . He referred me first to Lord Hoffman's judgment at [14]–[16] as follows:—

> "14 There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896* , 912-913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents' (similar statements will be found in ***149** *Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251* , 269, *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] RPC 169* , 186 and Jumbo King Ltd v Faithful Properties Ltd (1999) 2 HKCFAR 279 , 296) but said that in some cases the context and background drove a court to the conclusion that 'something must have gone wrong with the language'. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.
>
> 15 It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out. On the other hand, Lawrence Collins LJ thought it had. It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another: compare the *[2005] RPC 169* at pp. 189–190. Such a division of opinion occurred in the *Investors Compensation Scheme* case itself. The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening. It is fortunately rare because most draftsmen of formal documents think about what they are saying and use language with care. But this appears to be an exceptional case in which the drafting was careless and no one noticed.
>
> 16 I agree with the dissenting opinion of Lawrence Collins LJ because I think that to interpret the definition of ARP in accordance with ordinary rules of syntax makes no commercial sense. The term 'Minimum Guaranteed Residential Unit Value', defined by reference to Total Residential Land Value, strongly suggests that this was to be a guaranteed minimum payment for the land value in respect of an individual flat. A guaranteed minimum payment connotes the possibility of a larger payment which, depending upon some contingency, may or may not fall due. Hence the term 'Additional Residential Payment'. The element of contingency is reinforced by paragraph 3.3 of the Sixth Schedule, which speaks of the 'date of payment if any of the Balancing Payment.'" (My emphasis).

37 He reminded me that the fact that a contract may appear to be unduly favourable is not a sufficient reason for supposing it does not mean what it says (ibid para.20).

38 Finally he referred me to what Lord Walker of Gestingthorpe said at paras 80–83:—

> "80 The ARP is defined as follows:
>
> "'23.4 % of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value ['MGRUV'] less the [C&I] suggests a focus on B as an integer and distances it from the percentage. But I readily accept that this would be little more than guesswork.'
>
> The amount of the C&I is agreed to have been relatively trivial — a little less than £250,000 for all 100 flats — and I put it aside for the moment, while recognising that it plays an important part in the technicalities of the argument on construction. If this item is disregarded for the moment the disputed text can be set out in a simplified form, using 'RP' (for residential price) where the judge and the Court of Appeal referred to Unit Price: '23.4% of the RP in excess of the MGRUV'. ***150**
>
> 81 The MGRUV was defined as meaning:

'for each Residential Unit [ie each flat] the [TRLV] divided by the number of Residential Units for which Planning Permission is granted. Under the planning permission eventually granted on 23 August 2002 there were to be exactly 100 flats, which simplifies the arithmetic. Nevertheless it may be unfortunate that the draftsman chose to define the ARP by a formula referring to the MGRUV rather than by referring directly to the TRLV (to which the MGRUV is directly linked, being, as events turned out, one per cent of it). The use of the two linked formulae rather than one, and the fact that the formulae are not set out in mathematical notation, make it harder to keep clearly in mind the structure of the arrangements contained in schedule 6 .'

82 Briggs J expressed the issue in paras 20 and 21 of his judgment:

'Leaving aside for the moment the point at which the C&I are deducted, the broad commercial effect of each of the parties' rival submissions may be summarised as follows. Chartbrook's case was that it was entitled to a 23.4% share of the net proceeds of sale of each Residential Unit in excess of a minimum guaranteed amount (being the unitised Total Residential Land Value of £76.34 per square foot of Residential Net Internal Area). Put another way, its stake in the residential part of the development was to be the whole of the first £76.34 per square foot of net sales value, and 23.4% of the surplus. By contrast, Persimmon's case was that Chartbrook was to receive an additional payment only if 23.4% of the net sales price amounted to more than the Minimum Guaranteed Residential Unit Value. Put more broadly, Chartbrook's stake in the residential part of the development was whichever was the greater of:

(i) 23.4% of the net residential sales price; and,

(ii) the guaranteed minimum of £76.34 per square foot of Residential Net Internal Area.'

83 That is, with great respect to the judge, a confusing way of putting it, because it fails to distinguish between the two elements of the price for the residential development and to make clear whether it is addressing both elements, or only the ARP. The owner was to get the TRLV in any event, as the most important component of the TLV (a point that may be reflected in the expression "in excess of" in the definition of the ARP). Indeed paras 20 and 21 of the judgment are to my mind two ways of describing the same result, unless the judge intended para 20 to state the owner's view of the ARP alone, and para 21 to state the developer's view of the TRLV and the ARP operating in conjunction …

"84 In his brief judgment Rimer LJ quoted the definition of the ARP and observed in para 183: 'There is nothing unclear, uncertain or ambiguous about that. It is clear, certain and unambiguous and its arithmetic is straightforward'. Tuckey LJ agreed. With profound respect to both of them, I totally disagree. ***151*** The definition is obviously defective as a piece of drafting. To start with defects that can be spotted and remedied fairly easily, the draftsman could not decide whether he was dealing with the flats ('each Residential Unit') collectively or individually. The MGRUV was one-hundredth of the TRLV, but the C&I was plainly defined as a single aggregate figure.

85 Much more significantly and problematically, the draftsman has failed to notice the ambiguity of the formula 'x per cent of the RP in excess of the MGRUV less the C&I'. The ambiguity could be resolved by the use of mathematical notation, as the judge observed in paras 18 and 19 of his judgment (though he did not mention that there was also a choice to be made as to putting another set of brackets round MGRUV — C&I, so producing four possibilities rather than two).

86 Treated acontextually, the formula 'x per cent of A in excess of B' is undoubtedly ambiguous. It can mean (x/100 x A)-B or x/100(A-B). If required to guess I would opt for the latter meaning, because the expression 'in excess of' has been used rather than 'less', and to my mind 'in excess of" suggests a focus on B as an integer and distances it from the percentage. But I readily accept that this would be little more than guesswork. suggests a focus on B as an integer and distances it from the percentage. But I readily accept that this would be little more than guesswork. suggests a focus on B as an integer

> and distances it from the percentage. But I readily accept that this would be little more than guesswork'.

39 He submitted that there was no clear indication that something had gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to mean.

40 It is said that there is no such lack of clarity. That then he submitted disentitles Mr Tanney going on to the next stage of his reasoning and applying what he said basically was commercial sense.

41 He drew further support from that in the decision of the Privy Council *Melanesian Mission Trust Board v Australian Mutual Providence Society (1997) 74 P. & C.R. 297* p.4 as follows:—

> "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

42 Finally he referred me to the decision of *ING Bank NV v Ros Roca SA [2012] 1 W.L.R. 472* at 481 per Carnwath L.J. as follows:— ****152***

> "24 I am not convinced that this is sufficient to bring Lord Hoffmann's two-stage test into play. On this view nothing has gone wrong with the language as such. The reference to EBITDA 2006 was intentional. The mistake was not in the language, but in failing to anticipate its consequences.
>
> 25 In any event, I think the interpretation also falls down at stage 2. The question is not whether the judge's approach produces a fairer result, but whether it represents the clear alternative interpretation. The underlying assumption of this part of the judgment seems to be that, at whatever time the transaction might eventually take place, it would be possible objectively to identify 'the current EBITDA', which could thus be said to be 'implicit' in the transaction. This view does not appear to be supported by the evidence.
>
> 26 The judge had himself commented on the likely perceptions of the parties at the time of the Hawk Retainer:
>
> 'At the time of the Hawk Retainer neither the EBITDA for 2006 nor the EBITDA for 2007 could be known as a definite number. But the parties had forecasts of the EBITDA for both 2006 and 2007. The forecast for EBITDA 2006 for the combined enterprise of Ros Roca and Dennis Eagle was about €28 million … (para 23(5))'
>
> This passage to my mind is consistent with ING 's submission that there is not necessarily a 'current EBITDA' objectively ascertainable at any time. It is a matter of judgment depending on the circumstances, and involving a choice between actual and forecast figures. As Mr Phillips QC put it in his skeleton:
>
> 'The choice of EBITDA will always involve elements of judgment. Suppose, for instance, a

> valuation made mid-year; no exactly equivalent EBITDA figure (e.g. an EBITDA figure for the 12 months immediately preceding the valuation date) will be available. Comparison is necessarily to either a historical figure (e.g. the last audited figure) or to a forecast figure, which incorporates elements of speculation about what will happen after the valuation date.'"

43 If I were being asked to construe the Agreement I can see some force in these submissions. However I am not being asked to construe the Agreement; I am being asked to determine that the decision of the Surveyor in light of Mr Tanney's opinion contains a manifest error. This means that Walton must establish not only that the reasoning is wrong but is *manifestly wrong.*

44 The thrust of Mr de Waal QC's submissions is that the person looking at the Decision would have in mind the Agreement and its terms and would conclude that the Agreement on its face does not create any ambiguity or difficulty and simply requires the disregard of the PDN.

45 If one reverts back to the decision of the surveyor embracing Mr Tanney's opinion that is an argument in my view which is strongly arguable but the rejection of that argument in the analysis of Mr Tanney's opinion does not inexorably lead to the conclusion that the Decision is manifestly erroneous. Indeed if I were asked to construe the Agreement my initial view would be that the proposition put forward by Walton is commercially absurd and it follows that the reference to "the Permission" alone is equally commercially absurd so there must be some other reason. This arguably leads to a result that is so commercially absurd that it should ****153*** be rejected. That is the line of reasoning adopted by Mr Tanney. I stress that I am not determining that that is correct simply pointing out that that would be my instinctive view at the start.

46 However it is impossible in my view to say that that reasoning is manifestly erroneous. To my mind Walton's submissions are classic examples of every mistake becoming *"manifest"* when it is discovered. Manifest is a word which gives a very limited window of opportunity to challenge. The examples given in the various authorities above show that it is something like an arithmetical error, or a reference to a non existent building and the like. There is nothing *"manifestly wrong"* about the decision of Mr Tanney. This is well demonstrated by the fact that the competing arguments put forward in this case were in my view very strong on both sides. This is not merely a situation where a dispute is created so as to lead to a suggestion that it cannot be manifestly wrong. There was merit and is merit in both sides' arguments. The parties by the Agreement gave the Surveyor the power to determine that Decision in law and in fact. I do not see that his reasoning provided as set out above is manifestly erroneous. It might be wrong if one was pressed to argue it but that as I have said that is not sufficient. It does not look obvious when reading his analysis. It is not obvious that he is disentitled from looking to the factual matrix outwith the four corners of the Agreement. It is not manifestly erroneous for him to do that because the limited construction put forward by Walton produces a commercially absurd result. It is not manifestly erroneous for him to apply the principles in *Chartbrooke* and apply that to the words *"the Permission"* and come up with a wording which reflects the intent namely that the parties were to share equally the planning gain obtained in respect of this site. It was not intended for the planning gain to be largely pocketed by Walton which is the logical conclusion of the application of the literal wording in the Agreement. As Lord Hoffman said something must have gone wrong. These are perfectly acceptable reasons for his conclusion. They are not manifestly erroneous.

47 When the draft judgment was released to the parties the Claimants in addition to the usual typographical and other corrections invited me to reconsider paragraph [45] and [46] of the draft judgment. This was in accordance with the decision of the Supreme Court in *L-B (Children) (Care Proceedings: Power to Revise Judgment), Re [2013] UKSC 8* .

48 It is said that there are two reasons why I should revisit it. First it is said that my observation that the Claimants' analysis to the relevant clause was commercially absurd is not itself a basis for rewriting the Agreement. I accept that the language I used was not accurate and I have corrected it to point out that the Claimants' analysis as set out above would lead to a construction which would produce a commercially absurd result and the court should not do that if there was some other construction which did not produce that result.

49 The second objection is that criticism is made of my reference to the parties sharing equally in

the planning gain. It is said that was not something that could be found on any objective reading of the Agreement and therefore was not something that should have been taken into account. I do not understand that; my observation merely reflects the division of the proceeds of sale in accordance with clause 5.4(7).

50 There is finally a further objection to the suggested alterations put forward by the Claimants. As I have said in the judgment I am *not* construing the Agreement. I am only asked to consider whether the decision of Mr Johnson should be set aside ***154** on the grounds of manifest error. As I have said there is no manifest error. The matters that I put forward above are points which in my view are strongly arguable and with out deciding those points (because that is not within my remit) they demonstrate further that there is no manifest error in the conclusions that Mr Johnson came to.

51 I therefore dismiss this action.

David Stott.

***155**