Neutral Citation Number: [2020] EWHC 3368 (Ch)

Case No: PT-2020-000490

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

Royal Courts of Justice
Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 11 December 2020

Before:

DEPUTY MASTER HANSEN (sitting remotely via Microsoft Teams)

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Between:

(1) WESTFIELDS HOMES LIMITED
(2) IVAN R TOSCANI **Claimants**

- and -

KEAY HOMES (WINDRUSH) LIMITED **Defendant**

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- -

John Clargo (instructed by **Edwin Coe LLP** for the Claimants)

Jonathan McNae (instructed by **Veale Wasbrough Vizards LLP** for the Defendant)

Hearing date: **19-20 November 2020**

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JUDGMENT

DEPUTY MASTER HANSEN:

1. This is my judgment following the trial of the Claimants' Part 8 claim issued on 30 June 2020 seeking orders for specific performance as follows:

    i. In compliance with its contractual obligation in Clause 4 of the Supplemental Agreement dated 11th July 2014 ("the Supplemental Agreement") an order that the Defendant do execute forthwith the Revised Deed of Priority to enable the Claimants to finance the development of land near Burford, in the Cotswolds, registered under title number GR110426 ("the Property");

    ii. In compliance with its contractual obligation in Clause 6 of the Supplemental Agreement an order that the Defendant do forthwith provide consent in writing signed by a director of the Defendant, or its conveyancer, to the registration on the title of the Property of a charge to secure proposed refinancing by United Trust Bank ("UTB");

2. The Defendant denies that it is so obligated, or that the Claimants are entitled to the relief sought.

3. The claim was heard over two days (19-20 November 2020), remotely, and has been tried on written evidence only in accordance with the directions of Chief Master Marsh dated 7 October 2020.

4. I have been greatly assisted by the helpful submissions of Counsel, Mr Clargo for the Claimants and Mr McNae for the Defendant.

5. The witness evidence consists of two statements by Mr Varley, a director of the First Claimant, dated 26 June 2020 and 24 August 2020 and one statement by Mr Simm, a director of the Defendant, dated 31 July 2020.

6. The background is as follows. The claim relates to a development in two phases ("Phase I" and "Phase II") by the First Claimant of land near Burford, in the Cotswolds, registered under title number GR110426 ("the Property") which is owned by the First Claimant. As a result of a series of contracts, which I will deal with in more detail below, the Claimants are required to pay money to the Defendant from the net profits once the development has been completed.

7. The development cannot be undertaken without third party funding. Phase I was funded primarily, although not exclusively, by lending from Retail Money Market Limited trading as Ratesetter acting as agent for and on behalf of RateSetter Lenders ("Ratesetter"). In 2017 the Claimants issued proceedings against the Defendant in order to compel it to execute documentation to allow the Property to be charged to Security Trustee Services Limited ("STS"), as agent and trustee for Ratesetter, as security for the lending from Ratesetter. Those proceedings were started in the Chancery Division on 31st July 2017 (under claim number HC-2017-002155 ("the Previous Proceedings")) and were compromised by means of a Tomlin Order dated 3rd October 2017 which enabled the registration of a first legal charge over the Property in favour of Ratesetter and/or STS dated 18 October 2017 ("Ratesetter's Charge") to secure development lending and which was to be in priority to a charge, also dated 18 October 2017, securing the Defendant's entitlement to its profit share ("the Defendant's Charge").

8. The position was formalised as follows. A deed of priority also dated 18th October 2017 was entered into between the First Claimant, the Defendant and Ratesetter and provided that, as between Ratesetter's Charge and the Defendant's Charge, the former was to have priority subject to the terms of that deed of priority ("the Ratesetter Deed of Priority") and one of those terms, at Clause 3.2(b), was that the Defendant's charge would be redeemed in advance of any lending secured by the first legal charge in excess of the Priority Sum as defined in Clause 1.1, being the principal amount of £3,420,000 *plus* costs, interest and fees ("the Priority Cap"). A further deed increasing the Priority Sum to £3,805,380 plus costs, interest and fees was entered into between the same parties on 31st January 2019 ("the Revised Ratesetter Deed of Priority"). Thus the "cap" has gone up over time and has never been a fixed amount. The amount of the "Priority Cap" as defined will ultimately

depend on how long the development takes and when the indebtedness is finally repaid. Delay will lead to higher interest payments and higher fees, as explained by Mr Varley in paragraph 6 of his Second Witness Statement.

9. Phase I is now very close to completion but is not yet complete. The Claimants now wish to press on with Phase II and further financing is necessary in order to complete Phase II. As happened previously, the parties have been unable to agree about the issue of financing, hence these further proceedings.

10. Before I turn to the issues in the present proceedings, I need to set out the terms of the relevant contractual documentation.

11. On 21st December 2012 Cinita Ventures Limited ("CVL") granted the Defendant an option ("the Option") to buy the Property ("the Option Agreement"). The price of the Option was £2,500. In the event of the Option being exercised, the price was to be £925,000 or £1,000,000 (depending on the terms of the planning permission).

12. On 28th February 2013 the benefit of the Option Agreement was assigned to the Second Claimant ("the Assignment Agreement"). The price for the assignment was £35,000 and its terms provided that the Second Claimant would pay the Defendant further money if the Property was purchased by the Second Claimant in particular, (i) on completion of the purchase of the Property by the Second Claimant from CVL, with the benefit of planning permission: £375,000; and (ii) on completion of a sale on of the Property by the Second Claimant: 50% of the net proceeds of sale (as defined in the Assignment Agreement). This was defined in Clause 4.5 as meaning "*such sum as remains after deduction of all reasonable costs and expenses incurred by the Assignee in purchasing the Property obtaining planning permission and in developing and selling the Property*".

13. On 11th July 2014 the Assignment Agreement was varied by the Supplemental Agreement. The relevant variations were that:

    i. Any purchase of the Property from CVL pursuant to the Option would be into the name of the First Claimant rather than the Second Claimant;

ii. The Defendant would be entitled to: (1) Instead of the £375,000 on completion of the purchase from CVL referred to above, the sum of £300,000 either (a) in the event of third party refinancing being used for Phase II of the development, from that refinancing or (b) otherwise, on the sale of all or part of Phase II; and (2) Instead of the 50% of the net proceeds of sale referred to above, "*a 40% share of profit after cost of the entirety of the development … Therefore after all deductions [the Defendant] will receive 40% of the net profit thereafter*"; and

iii. In order to secure such entitlement, the Claimants would charge the Property to the Defendant at the Defendant's request (Clause 3).

14. On 11th July 2014 the Property was transferred to the First Claimant. On 16th February 2015 the Assignment Agreement was varied again ('the Further Supplemental Agreement'). Nothing particularly turns on the terms of the Further Supplemental Agreement but it is relevant to observe that in return for an immediate payment of £75,000, the Defendant agreed that its only further return from the development would be a 20% share of the net profit. The shares of net profit going forward are therefore 80:20 in favour of the Claimants, with the Defendant's entitlement to its profit share secured by the Defendant's Charge.

15. In addition to the Defendant's Charge, the Supplemental Agreement, at Clause 5, also made provision for the Defendant's entitlement to be protected by providing that the Property might be the subject of a unilateral or an agreed notice both before such a charge was registered *and* during any period while such a charge was removed for financing. The Claimants also agreed (by clause 6) that the Defendant should be entitled to enter a restriction against dispositions without the Defendant's written consent. The restriction and notice remain on the title until all sums due to the Defendant have been paid.

16. Thus, the Supplemental Agreement provides three layers of protection for the Defendant. Firstly, the Defendant was entitled to protect its financial expectations

by entering a charge against the property (Clause 3). Secondly, prior to such a charge and in the event that such charge is temporarily removed for finance purposes, as is clearly envisaged by the terms of the Supplemental Agreement, the Defendant is entitled to enter a notice against the property (first part of Clause 5). Thirdly, the Defendant is entitled to enter and maintain a restriction against the title to the Property on dispositions without its written consent (first part of Clause 6).

17. However, the Supplemental Agreement also includes clear provisions as follows to ensure that such protection in favour of the Defendant will not impede the development. Firstly, as regards its charge, the Defendant agreed to postpone its registration or "*to enter into such deeds of priority as it considers reasonable in order to enable [the Claimants] to finance the development*" (Clause 4). Secondly, as regards any notice the Defendant agreed "*to temporarily remove any such notice to enable registration of a first legal charge in favour of a main funder for the development … provided such finance secured by the first legal charge is in accordance with the spirit of this agreement both parties acting reasonably and in good faith to each other*" (second part of Clause 5). Thirdly, as regards any restriction the Defendant agreed "*to give consent to registration of a first legal charge in favour of a main funder for the development … provided such finance secured by the first legal charge is in accordance with the spirit of this agreement both parties acting reasonably and in good faith to each other*" (second part of Clause 6). Finally, also by Clause 6, the Defendant agreed to "*give consents in respect of Notices and the above restriction to enable sales of completed properties provided the terms of this agreement have been complied with*".

18. The resolution of the Previous Proceedings enabled the development to proceed with the benefit of the funding provided by Ratesetter and Phase I is now close to completion. The Claimants now wish to commence Phase II.

19. In order to commence Phase II the First Claimant wishes to refinance the development with UTB so that UTB becomes the project's main funder in place of Ratesetter. UTB are prepared to lend sufficient sums at the same time to (1) redeem

Ratesetter's charge in respect of its Phase I lending and (2) finance the completion of Phase II.

20. By contrast, Ratesetter are (or were) prepared to finance Phase II but only once its lending in respect of Phase I has been repaid. In the absence of refinancing with UTB, that could not happen until all of Phase I has been disposed of and while some parts of Phase I have been sold off, other parts are still in the process of being sold and I was told that there were still seven outstanding transactions in respect of Phase I. Consequently, or at least so say the Claimants, without refinancing with UTB, Phase II cannot complete, the project will be delayed, and that will mean that the First Claimant and the Defendant will not or may not realise a net profit from which to receive a distribution and/or any such profit may be much diminished. There has been voluminous correspondence between the parties' solicitors. I do not propose to refer to it in any great detail, save where necessary, but I shall refer to one letter in particular, upon which the Claimants rely, as being demonstrative (so say the Claimants) of the Defendant's approach and which they say is at odds with the terms and spirit of the Supplemental Agreement. The letter in question is one from the Defendant's solicitors dated 30 April 2020 which says as follows:

> *"We now understand that your client is proposing to re-finance the project. This will, presumably, mean the charge to Ratesetter being paid off and a new charge to UTB being entered into. This, in turn, will mean your clients asking ours to enter into a further deed of postponement. In order that our client may consider this would you please let us have your client's proposals for payment of anticipated profit to ours. You will appreciate that our client cannot be expected to completely remove its charge until most, if not all of the profit is paid to it. We would anticipate some plots being released on no payment to our client but thereafter a schedule will need to be supplied and agreed with our client showing what will be released on each sale".*

21. Thus, in broad terms, the Claimants' solicitors suggest that the Defendant is attempting to accelerate his contractual entitlement. The Defendant accepts or now accepts that it cannot accelerate its contractual entitlement to its profit share but maintains that it is acting in accordance with the terms of the Supplemental Agreement and that it is the Claimants who are in breach. In sum both parties allege the other is in breach of contract. There is, however, no counterclaim by the Defendant. Rather the Defendant relies on the Claimants' alleged breaches of

contract to defeat its claim for specific performance and/or in support of its claim that it is not in breach of Clauses 4 or 6 of the Supplemental Agreement because any obligations on the part of the Defendant under those clauses are dependent on the Claimants performing their obligations, in particular under paragraph 5 of the Annexure to the Supplemental Agreement which provides as follows:

> *"[The First Claimant] will provide [the Defendant] with valuations and monthly accounts to be signed off by both parties throughout the development process and will make all paperwork available immediately on request. It is understood that all costing relating to this development will be audited at the end of each phase".*

22. Matters came to a head in May/June 2020. The Claimants' solicitors wrote on 4 May 2020 seeking confirmation by 11 May that the Defendant would consent to the refinancing on the basis that the Defendant would be entitled to a charge in like terms to that it has behind the STS charge. The Defendant's solicitors did not agree, insisting that their client was acting reasonably, that relevant information had not been provided to their client, that it was entitled to protect its position and that it was not seeking to leverage a more favourable position.

23. The two UTB Facility Letters, one for Phase I and one Phase II, both dated 24 April 2020, and a draft UTB Deed of Priority were sent to the Defendant's solicitors under cover of a letter dated 2nd June 2020. The UTB Facility Letters as signed by the Claimants and a revised draft UTB Deed of Priority were sent to the Defendant's solicitors under cover of an email date 10th June 2020. There was further correspondence in June in which the Defendant's advisers again intimated that further information was required before the Defendant could consent to the refinancing and the Claimants' solicitors maintained that they had provided all necessary information. No progress was made. In short, the Defendant has declined to cooperate with the development's refinancing by refusing to (1) give consent to a charge in favour of UTB and (2) execute a deed of priority. Hence these proceedings, which were issued on 30 June 2020.

24. I have set out above the relief sought by the Claimants. This is resisted by the Defendants on a number of grounds, as explained in the evidence of Mr Simm

where at paragraph 15 of his witness statement he summarises the Defendant's concerns about the proposed financing as follows:

> a. The Proposal is not in accordance with the spirit of the Supplemental Agreement;
>
> b. By failing to provide detailed financial information, the Claimants have not acted reasonably towards the Defendant;
>
> c. Such financial information as has been provided does not suggest that the Claimants are acting in good faith towards the Defendant;
>
> d. Until such time as there is greater transparency around the financial information, and for as long as the Claimants choose not to share financial information reasonably requested by the Defendant, then the Defendant is being prevented from forming a considered view. In those circumstances, it is not unreasonable for the Defendant to insist on the provision of this information before a decision can be made;
>
> e. Finally, the request that the Defendant enters into a Deed of Priority to allow all of the funding provided by United Trust Bank to be in priority to the Defendant's interests is unreasonable.

25. Against that background, the issues are agreed to be as follows:

a. How should the relevant contractual terms be construed?
    i. What is "*the spirit of the agreement"* under Clause 6? (Issue 1)
    ii. What does "*both parties acting … in good faith*" under Clause 6 involve? (Issue 2)
    iii. What does "*both parties acting reasonably*" under Clause 6 involve? (Issue 3)

iv. What does the requirement for reasonableness under Clause 4 involve? (Issue 4)

b. Is the Defendant's refusal of consent to the proposed refinancing justified by reason of:

i. any matter connected with a.i., a.ii., a.iii. or a.iv above ? (Issue 5); and/or

ii. (to the extent that the court is satisfied that the same exist) any (or any substantial) breach of the Claimants' obligations under Clause 5 of the Annexure to the Supplemental Agreement? (Issue 6)

c. If the Defendant's refusal of consent is not justified:

i. Is the Claimant entitled to an order for specific performance? (Issue 7)

ii. If not, to what remedy is the Claimant entitled? (Issue 8)

26. Issues 1 to 4 are thus concerned with the meaning of the Supplemental Agreement. In construing the Supplemental Agreement, and the centrally relevant provisions therein, in particular Clauses 4 and 6 thereof, my starting point is *Arnold v Britton* [2015] AC 1619 at [15]-[23], in particular at [15] where Lord Neuberger said this:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] 1 WLR 1381, 1384—1386; Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-*

Tangen) [1976] 1 WLR 989, 995—997, per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky [2011] 1 WLR 2900, paras 21—30, per Lord Clarke of Stone-cum-Ebony JSC".

27. The principal issues of construction that arise in this case are concerned with the meaning of Clause 6 and the requirement that any proposed financing is "*in accordance with the spirit of [the] agreement both parties acting reasonably and in good faith to each other*" and it is to those issues that I now turn.

28. *Issue 1*. As to the meaning of the "*spirit*" of the agreement, I was taken to *Re Coroin Ltd No.2* [2014] BCC 14, a case concerned with a shareholders agreement which obliged the shareholders to act in good faith towards the other shareholders and do all things necessary or desirable to give effect to the spirit and intention of the shareholders' agreement. At [48]-[53] Arden LJ (as she then was) said this:

"48. That leaves cl.8.5.2 in the first group. Any suggestion that cl.8.5.2 applies to fill gaps in the parties' agreement would have to rest on the words "in good faith". Neither party has suggested that those words lack legal content in this agreement. Lord Goldsmith argues for a meaning for this expression that was really the same as the meaning of cl.8.5.4, namely, that it required the court to enforce the spirit of the agreement and not just "its black letter" (relying on CPC Group Ltd v Qatari Diar Real Estate Investment Company [2010] EWHC 1535 (Ch) at [238]–[246] per Vos J.). That argument in my judgment properly belongs under cl.8.5.4 and I will address it at that point. The respondents proceed on the basis that "good faith" in the context of cl.8.5.2 imposes a duty simply to act honestly. (They did not need to refine the meaning of honesty further than to say that it was a subjective test.)

49. I consider that the respondents are right to submit that the requirement to act in good faith in cl.8.5 involves an obligation to act honestly in a subjective sense as this is its natural meaning and the context does not suggest some other meaning. As it was not put to Mr Quinlan in cross-examination that he had not acted honestly in this sense, then, for that reason alone, Mr McKillen cannot now assert that he did not do so.

50. Moreover, as Mr MacLean pointed out, the terms of the February agreement were inconsistent with the notion that Mr Quinlan intended to act in bad faith as it was conditional on the due observance of Mr McKillen's pre-emption rights on any transfer of his shares to the Barclay interests. I accept that argument.

> *51. I do not consider that the obligation to act in good faith can impose a binding general obligation to act in a manner outside the terms of the shareholders' agreement because there is no indication of the circumstances in which the obligation to act in good faith obliges the parties to go beyond the obligations in the shareholders' agreement. There is, therefore, no benchmark against which the court could enforce the obligation.*
>
> *52. The second group of provisions in the good faith clause is composed solely of cl.8.5.4. The parties agreed to do all things necessary or desirable to give effect to the spirit and intention of the shareholders' agreement. Again, this clause prescribes no basis for determining the "spirit and intention". The "spirit" is by implication an animating principle, which, like the smile on the Cheshire cat (see [23] above), may exist in a state that is detached from the express terms of the shareholders' agreement.*
>
> *53. In my judgment, the only way in which the court can give effect to the obligation in cl.8.5.4 is to treat the reference to the "spirit and intention" of the shareholders' agreement as a reference to the shared aims of the parties in entering into the agreement. Those aims would have to be ascertained in the way in which the court ascertains the background to an agreement as part of the process of interpretation. On this basis, cl.8.5.4 has content, but it is merely a mirror image of the process of interpreting an agreement or implying terms into it".*

29. Mr McNae, for the Defendant, emphasised the potential width of the principle, drawing my attention to the passage in [52] above where Arden LJ described the "*spirit*" as "*an animating principle, which … may exist in a state that is detached from the express terms of the … agreement*". However, as was the case in *Re Coroin (No.2)*, Clause 6 does not actually prescribe any basis for determining the "*spirit*" of the agreement. On the facts of this case, and having regard to the particular terms of the Supplemental Agreement, I propose to treat references to the "*spirit*" as references to the shared aims of the parties in entering into the agreement, to be ascertained in the usual way in which the court ascertains the background to an agreement as part of the process of interpretation.

30. *Issue 2*. The case of *Re Coroin* was also relied on by both parties in relation to Issue 2. In relation to good faith, I was taken to a number of other cases, some pre-dating *Re Coroin Ltd (No.2)*, and some post-dating that decision. I propose to refer to two of the other cases to which I was referred. Firstly, in *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) Vos J (as he then was) considered clause 7.1 in a Sale and Purchase Agreement ("SPA") relating to the

development of the site of the Chelsea Barracks which provided that the parties should "*both act in the utmost good faith towards each other in relation to the matters set out in this Deed*". Following his consideration of various authorities which had considered the duty to act in the utmost good faith, Vos J held as follows at [246]:

> *"the content of the obligation of utmost good faith in the SPA was to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Developable Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the common purpose, and to act consistently with the justified expectation of the parties. I do not need to decide, whether this obligation could only be broken if QD or CPC acted in good faith, but it might be hard to understand, as Lord Scott said in Manifest Shipping how, without bad faith, there can be a breach of a duty of good faith, utmost or otherwise".*

31. Secondly, I was referred to *Essex County Council v UBB Waste (Essex) Ltd (No. 2)* [2020] EWHC 1581 (TCC), where, after a helpful review of the authorities, Pepperall J concluded as follows at [116]:

> *"116.1. Whether a party has not acted in good faith is an objective test.*
>
> *116.2 Dishonest conduct will be a breach of the duty of good faith, but dishonesty is not of itself a necessary ingredient of an allegation of breach. Rather the question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people.*
>
> *116.3 What will be required in any individual case will depend upon the contractual and factual context".*

32. Having regard to the particular terms of the Supplemental Agreement, it seems to me that that formulation captures the essence of good faith in the particular factual context with which I am here concerned. I am not persuaded that *Re Coroin* compels me to find that nothing short of dishonesty will do before a party can be held to have breached the duty of good faith. Every case turns on its facts and I consider that Pepperall J's formulation is apposite to the facts of this case. However, it seems to me that the requirement that the conduct must be capable of being regarded as commercially unacceptable by reasonable and honest people is

still a high hurdle and, as Vos J observed in the *CPC* case, it is hard to understand how, without bad faith, there can be a breach of a duty of good faith.

33. *Issue 3*. There was no dispute about what "*both parties acting reasonably*" meant in Clause 6, it being agreed that the inquiry is objective, and the issue is one for the Court to resolve.

34. *Issue 4.* The parties also agreed that Clause 4 was different and was concerned with what the *Defendant* considered reasonable. In this context, I was referred to the case of *Braganza v. BP Shipping Ltd* [2015] 1 WLR 1661 where the Supreme Court held that where contractual terms gave one party to a contract the power to form an opinion as to relevant facts, it was not for the court to make that decision for them, but where the decision would affect the rights and obligations of both parties there was a conflict of interest and the court would seek to ensure that the power was not abused by implying a term in appropriate cases that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational in the sense in which that term was used when reviewing the decisions of public authorities (see e.g. *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). On that basis it determined that such a decision could be impugned, not only where it was one that no reasonable decision-maker could have reached, but also where the decision-making process had failed to exclude irrelevant considerations or to take account of all obviously relevant ones. Mr McNae made the point that that case was concerned with implied terms and that there was no need to imply any term here because there was an express term. That is right but I am not persuaded that that materially alters the fundamental approach. His better point was that there may, in such circumstances, be a range of reasonable responses, and provided the Defendant's decision is within the range, as he said it was, that is sufficient and the Court cannot substitute its own opinion. That accords with the traditional *Wednesbury* approach to the legality of decision-making in a public law context and that is the approach I shall take, although that approach includes a consideration of whether the decision maker has had regard to irrelevant considerations or failed to have regard to relevant considerations.

35. *Issue 5.* I have set out above my conclusions on the meaning of Clauses 6 and 4. I must now consider the application of those provisions to the facts of the case and assess whether the Defendant's refusal to consent to the refinancing is, on the facts, justified by reference to the terms of Clause 6 and/or Clause 4. The contractual provision which is at the heart of this case dispute, namely Clause 6 of the Supplemental Agreement, bears repetition. The material part of Clause 6 provides as follows:

> *"…[The Defendant] agrees to give consent to the registration of a first legal charge in favour of a main funder for the development of the Property by the Assignee provided such finance secured by the first legal charge is in accordance with the spirit of this agreement both parties acting reasonably and in good faith to each other.*
>
> *[The Defendant] further agrees to give consents in respect of Notices and the above restriction to enable sales of completed properties provided the terms of this agreement have been complied with."*

36. I turn first to the "*spirit*" of the agreement and make the following observations before turning to the specific points raised by Mr Simm in his evidence in relation to the spirit of the agreement, reasonableness and good faith. This is not a joint venture. The Defendant's entitlement is to 20% of the net profit at the conclusion of Phase II of the development. The Claimants and the Defendant have a common interest in maximizing sales and minimizing costs but the operational responsibility for carrying out the development lies entirely with the First Claimant. The Defendant is entitled to security behind the main funder but it is not entitled to frustrate the development by withholding consent to proposed financing or refinancing unless the proposed financing is not in accordance with the spirit of the agreement, is unreasonable or in bad faith. I referred earlier to the shared aims of the parties as being relevant to ascertaining the "*spirit*" of the agreement. The shared aims seem clear to me. They are to undertake a mixed-use development of the Property, in accordance with planning permission, with a view to maximising the profit to be shared between the parties, using finance to be secured by a first legal charge that has priority over any charge securing the Defendant's profit share and the Defendant can only withhold consent to any finance proposal where that proposal is outwith the spirit of the agreement so understood and/or in bad faith and/or unreasonable.

37. The parties clearly recognized that third party funding for the development was essential for both phases of the development and that the main funder would require security with priority to any security provided to the Defendant. Further, the parties recognized that the main funder might change, necessitating one or *more* deeds of priority. As a matter of construction, I am satisfied that the Defendant's obligation to give its consent to a financing proposal that is in accordance with the terms of Clause 6 is *not* dependent on the provision by the Claimants of information in accordance with paragraph 5 of the Annexure to the Supplemental Agreement. I agree with Mr Clargo that where this is the intention, it is made clear by the draftsman, the obvious example being the second part of Clause 6 which obliges the Defendant to give consents in respect of notices and restrictions to facilitate sales of completed properties, "*provided the terms of this agreement have been complied with".*

38. I turn then to consider the matters relied by Mr Simm in his evidence in opposition to this claim. Mr Simm deals with the alleged breaches of the spirit of the agreement at paragraphs 16-19 of his witness statement. His evidence relies on three matters in particular.

39. Firstly, he says that absence of any priority cap from the draft UTB deed of priority that forms part of the refinancing proposal materially changes the level of risk for the Defendant as all of the lending proposed will rank in priority to the Defendant's charge. It is common ground that there is no priority cap in the revised draft UTB Deed of Priority but I am not persuaded that its omission amounts to a breach of the spirit of the agreement. I referred above to the shared aims. In my judgment, there is nothing in the refinancing proposal which runs counter to those aims. The fact that there was such a cap in the Ratesetter Deed of Priority does not mean that the current financing proposal is outwith the spirit of the Supplemental Agreement. The Supplemental Agreement contains no provision for a priority cap. Further, the crucial fact, it seems to me, is that the level of risk has *not* materially altered for the Defendant. There is no clear suggestion in the evidence, and even if there were, there is no clear evidence upon which I could find that the new facilities involve excessive lending. It is and was always the position that the Defendant only benefits

if the development makes a net profit. Before there can be any question of profit, all the lending must be repaid, whether secured or not. As Mr Clargo said in his skeleton argument, "*even if Ratesetter's priority is limited, this merely reduces the security for the indebtedness to Ratesetter. It does not reduce the indebtedness to Ratesetter and, consequently, has no effect on (1) the profit figure made on the development and (2) D's 20% share of that*". The same would be true moving forward with UTB and the presence of a priority cap in the UTB deed of priority would not alter those fundamentals. I repeat too what I said in paragraph 8 above about the "cap".

40. Secondly, Mr Simm contends that Phase I must be completed before Phase II starts and that there must be an audit of Phase I in accordance with paragraph 5 of the Annexure to the Supplemental Agreement before Phase II starts. The material part of paragraph 5 provides that: "*It is understood that all costing relating to this development will be audited at the end of each phase*". The Claimants' evidence is that Phase I is not yet complete: see paragraph 10 of Mr Varley's Second Witness Statement. I have no reason not to accept his evidence. The commencement of Phase II is not conditional upon completion of Phase I either expressly or as a matter of necessary implication. Further, I accept the point Mr Varley makes in paragraph 11 of the same statement where he says that the Supplemental Agreement does not make refinancing conditional upon completion of any audit process. He goes on to explain in the same paragraph why such an interpretation would make no commercial sense. I agree with his observations, although I arrive at my conclusion on the interpretation of the agreement primarily by reference to the contractual language.

41. Thirdly, insofar as Mr Simm also questioned the necessity to refinance and the timing of the proposal, I am satisfied, essentially for the reasons advanced by Mr Varley, that it is more commercially sensible to refinance with UTB and proceed to completion of the redevelopment than to await the redemption of the Ratesetter charge from sales from Phase I. I consider that approach to be consistent with, rather than contrary to, the spirit of the agreement.

42. In sum, I am entirely satisfied that the proposed refinancing with UTB is in accordance with the spirit of the agreement.

43. I turn then to the question of good faith or the lack of it. I see no basis for finding bad faith, or a lack of good faith, on the part of the Claimants. In my judgment the case does not even come close. Further, I note that no application has been made to cross-examine Mr Varley and put such an allegation to him. In those circumstances, it is hard to see how I could find the Claimants guilty of acting in bad faith or not acting in good faith. In any event, considering all the circumstances of the case, and for substantially the same reasons as I have already given, there is nothing commercially unacceptable in the sense explained above about the financing proposal.

44. Mr Simm deals with the matters which he contends are "*suggestive*" of a lack of good faith on the part of the Claimants at paragraph 28 of his statement. Firstly, he complains about the inclusion of abortive costs for projects unconnected with the development of the Property. Mr Varley's evidence at paragraph 18 of his second statement explains that the abortive costs relate to other developments connected to the parties but which have not proceeded and which Mr Simm has agreed could be deducted from a subsequent profitable development. In any event, it seems to me that this is primarily an accounting issue to be taken account of, if at all, at the end of this development. I note too Mr Varley's evidence that if Mr Simm disputes the position, these costs will be pursued separately. I am entirely unpersuaded that this issue is evidence of, or demonstrative of, bad faith on the part of the Claimants.

45. Secondly, Mr Simms refers to an anticipated Phase III. According to Mr Varley, there is no Phase III and no planning permission for any development apart from that comprised in Phases I and II. I accept that evidence.

46. Thirdly, Mr Simms complains about the inclusion of the assignment consideration of £35,000. It seems to me that this is a proper cost of the development but again this is an accounting issue and/or falls to be resolved at the end of the development in determining what costs are properly deductible from the proceeds of sale. In any

event, this item is not evidence of, or demonstrative of, bad faith on the part of the Claimants.

47. Fourthly, Mr Simms complains about the inclusion of the £75,000 paid for the reduction of the Defendant's profit share from 40% to 20%. I repeat my comments above. In any event, this item is not evidence of, or demonstrative of, bad faith on the part of the Claimant.

48. Finally, Mr Simms complains about what is referred in the UTB Facility Letter for Part II as "*part equity release*" where it is said at Clause 4.1(a) that £860,000 can be taken "*to assist with the refinance the Property with any balance as part equity release*". As Mr Varley explains at paragraphs 19-20 of his second witness statement, the figure of £860,000 in the Phase II UTB Facility Letter is to cover (1) the shortfall between the indebtedness to Ratesetter and the Phase I UTB Facility Letter and (2) (partial) repayment of borrowed money expended on (a) land purchase and (b) planning/construction/marketing funded by the Claimants and/or AB Homes Limited. Thus he makes the point and I accept that this cannot be considered a profit distribution to the Claimants and there is nothing unreasonable or unacceptable about using some part of the proposed UTB facility to repay other unsecured lending. As Mr Clargo submitted, "*The whole package represents a refinancing of the development, which takes into account expenditure which has previously been covered by secured or unsecured lending*". In these circumstances, I consider it wrong to describe any such repayments as "*preferential payments to the Claimants*", as the Defendant suggests. On the contrary, I am entirely satisfied that there is no evidence here of a lack of good faith on the part of the Claimants, a fortiori given the fact which Mr Varley makes, and which I accept, namely that the original intention was that the entire land purchase and development costs were to be funded by bank lending.

49. I should say I also agree with the submission of Mr Clargo that I am not concerned here in any general sense with a lack of good faith. I am concerned only with the financing proposal but again, for the same reasons, there is no basis for finding that the Claimants have not acted in good faith in relation to the financing proposal. Even if I am wrong about that, I remain firmly of the view that there is no basis

whatever for finding the Claimants guilty of a lack of good faith generally in relation to their conduct in relation to the development and/or specifically by reference to their performance of the Supplemental Agreement. It seems to me relevant in this context to repeat the observation that the parties' interests are aligned in an important sense in that it is in both parties' interests for the development to be as profitable as possible and that depends on maximising sales and, more importantly for present purposes, minimising costs.

50. Finally, in relation to Issue 5, I turn to the question of reasonableness. This falls to be considered on an objective basis in relation to Clause 6 and on a ***Wednesbury*** basis in relation to Clause 4. Mr Clargo tended to elide the two and appeared to suggest that my findings under Clause 6 would be determinative of the issue under Clause 4. There is clearly an overlap here but it is possible that the Defendant could fail by reference to Clause 6 but succeed by reference to Clause 4.

51. In relation to reasonableness, the Defendant relied largely, but not exclusively, on what it said was a failure by the Claimants to abide by their obligation in paragraph 5 of the Annexure to the Supplemental Agreement to "*provide [the Defendant] with valuations and monthly accounts to be signed off by both parties throughout the development process and will make all paperwork available immediately on request*".

52. The written evidence on both sides deals with the provision of information at great length but, without intending any disrespect, the written evidence was rather unsatisfactory. The Defendant alleged that information had not been forthcoming. The Claimant insisted that it had been made available. No one took me through the correspondence in any comprehensive or systematic way. Indeed it was not clear to me from the correspondence that I had it all in any event and if I did, it was certainly not in chronological order. Reference was made to a number of letters containing links which, if clicked on, were said to take the reader to a dropbox or other repository of some kind containing relevant documents in electronic form: see e.g. Mr Varley's email to Mr Bonura dated 30 April 2020 timed at 16.51. This did not assist me particularly in bottoming out the detail, although it does tend to suggest that the Claimants provided much more information to the Defendant than

the Defendant suggests. Ultimately, whilst both Counsel pressed their respective positions, both seemed to acknowledge the difficulty for me in making any clear findings, absent a comprehensive schedule of requests for information and answers in chronological order, and possibly cross-examination as well.

53. Insofar as I must nonetheless decide the point, I conclude that the Defendant has not established any breach by the Claimants of its obligation under paragraph 5 of the Annexure to the Supplemental Agreement or any unreasonableness in relation to the provision of information. The two exchanges to which I am about to refer are, in my judgment, a fair reflection of the position and ultimately lead me to conclude that the Defendant has not proved any breach of paragraph 5 of the Annexure (in relation to the provision by the Claimants of information) and has not justified its refusal to consent to the refinancing (whether by reference to the spirit of the agreement, good faith or reasonableness (whether under Clause 6 or Clause 4)) on the basis of any lack of information. The Claimants' solicitors wrote to the Defendant's solicitors on 9 March 2020. The letter was written primarily in response to a letter from the Defendant's solicitors dated 20 February 2020 but also appears to be designed to respond to a request from the Defendant's accountant, Blick Rothenberg Limited, dated 5 February 2020 seeking further information. The 9 March letter denies any breach of contract on the part of the Claimants and maintains that there is "*no outstanding information due to your client*". The letter then sets out a long list of various classes of documentation which is said to have been provided to the Defendant on a monthly basis. The letter concludes: "*Accordingly, as far as our client is concerned, it has complied with its contractual obligations as regards the provision of financial information. It is for you (not Blick Rothenberg Limited) to precisely specify the extent to which it is alleged our client has not complied*". The Defendant's solicitors eventually replied on 30 April 2020 as follows: "*Thank you for your letter of 9 March 2020. Your letter does not address our client's concerns as previously stated. Bearing in mind the history of this matter there is probably little point in repeating them save to say that your clients expect our client to abide by the terms of the agreement, whilst not complying with it themselves*". In my judgment, that is not good enough. After a delay of almost two months, it was incumbent on the Defendant's solicitors to take up the challenge contained in the 9 March letter and provide chapter and verse as to

the extent to which the Claimant had not complied with its obligation in relation to the provision of financial information. I infer that, as at that date, the Defendant had no real outstanding complaint and that conclusion is strongly reinforced by the second exchange of correspondence to which I now refer.

54. It begins on 23 April 2020 when Mr Varley emailed Mr Simm what was described as a Project Summary. Blick Rothenberg was copied in. It appears to me to have been a comprehensive summary and appears to have included further supporting documentation. It noted the then lack of response to Edwin Coe's letter of 9 March 2020, to which I have already referred, and emphasised the urgency in dealing with matters and moving things forward. It called for a response by 30 April 2020. Correspondence then ensued between John Bonura at Blick Rothenberg and Mr Varley, with Mr Simm copied in. Further detailed information was requested and given in emails dated 28 and 29 April 2020. The culmination of all this was an email from Mr Simm to Mr Varley dated 1 May 2020 in which he said, inter alia, the following:

> *"I am pleased to be informed that crucial information has now been received allowing our auditors to review the full picture". […]. It is now clear the profit level previously suggested is greater than first indicated as we now have a truer understanding of the sales values, together with the purchase price of the land and a reasonable idea of the build cost. From this information we are able to establish the reasonable profit element of this transaction, of which is showing a higher return within your spreadsheet, which originally indicated single figures. We will need to establish a mechanism and bottom out all figures … so that we can work towards a fair profit level afforded to each party. […]. On our current figures we foresee Simco Homes (Windrush) Ltd receiving circa £850,000 to £1,000,000 as their profit share."*

55. It seems to me that the exchanges to which I refer above fatally undermine the Defendant's case on the alleged failure on the part of the Claimant to provide relevant financial information. Insofar as the correspondence continued thereafter pre- and post-issue, I am not persuaded that it alters the conclusion and I adopt the points made by Mr Clargo in paragraph 30b of his Skeleton Argument. I therefore reject the suggestion that the Claimants are in breach of paragraph 5 of the Annexure. For the same reasons, I reject any allegation that the Claimants have

acted outwith the spirit of the agreement, or in bad faith, or unreasonably in relation to the provision of information.

56. In any event, I also accept the submission made on behalf of the Claimants that, as a matter of construction of the Supplemental Agreement, the obligations on the Defendant in respect of facilitating refinancing are not dependent on any obligations on the Claimants in respect of the provision of financial information, although had this breach been made out by the Defendant, it would likely have been highly relevant to the claim for specific performance. As it is, however, I reject the Defendant's complaints in relation to alleged deficiencies in the provision of information by the Claimants.

57. In relation to the other points raised by Mr Simm in his evidence, my findings are these. I reject the suggestion that the Claimants' alleged failure to provide information has meant that the Defendant has been unable to form any properly considered view of the proposed refinancing transaction and/or that the Defendant's hand is being unreasonably forced. This largely follows from what I have already said above and Mr Simm's own email dated 1 May 2020 but I specifically reject the allegation of stalling made against the Claimants in relation to the provision of financial information as well as the allegation that the Defendant has not been afforded a proper opportunity to consider the refinancing proposal. It has, in my judgment, had more than sufficient time, particularly given the fact that the UTB proposal is not dissimilar to the previous arrangements with Ratesetter.

58. Insofar as Mr Simm complains that the "*effective priority under the proposal is unreasonable*", I have largely dealt with this point already. However, for the avoidance of doubt, I reject the complaint and the particular points he makes at paragraph 31 and following of his statement. He says he did not agree to any unsecured lending and suggests that the use of any part of the UTB money to repay unsecured lending is a "*shameless attempt to distort the position in favour of the Claimant*". I repeat what I said in paragraph 48 above. Further, as Mr Clargo submitted, Mr Simm's consent to any development cost is not required. The particular costs with which this complaint is concerned represent capital costs secured otherwise than from banks and it seems to me right to take account of those

but ultimately this is an accounting issue to be taken account of (or not) at the end of the development in assessing profit. I note again that the Defendant's interest in the development is solely in its 20% share of the net profit and, as Mr Varley points out, but Mr Simms appears to have forgotten, it is in both parties' interests to minimise costs because every unnecessary pound spent on the development may cost the Defendant 20p but will cost the Claimants 80p.

59. The question of reasonableness also arises in the context of Clause 4 and whether it was ***Wednesbury*** reasonable for the Defendant to refuse to execute the UTB deed of priority. I have previously accepted that the issue here is, theoretically at least, analytically different from the issue of reasonableness under Clause 6. However, having firmly concluded that none of the concerns raised by the Defendant provide any reasonable justification for withholding its agreement to the proposed refinancing with UTB, and indeed that the Defendant appears to have had regard to irrelevant considerations and ignored relevant considerations in reaching its conclusion in relation to the proposed refinancing, it would be strange if I nonetheless concluded that it was reasonably open to the Defendant to refuse to execute the proposed deed of priority which is part and parcel of the refinancing proposal which I have adjudged to be reasonable, in good faith and in accordance with the shared aims of the parties. I conclude that it is not reasonably open to the Defendant to refuse to execute the UTB deed of priority.

60. In considering reasonableness, and the particular matters relied on by the Defendant, I should say, at this point, that whilst the parties have dealt with particular issues under particular heads, the same matters may be relevant to the spirit of the agreement and/or good faith and/or reasonableness. Thus, whilst the structured approach taken by the parties helps to identify, frame and decide the issues, I have not allowed the structure of the argument or the form of this judgment to obscure the substance of the inquiry before me and I should be taken as having considered all the issues raised generally by reference to the entirety of Clauses 6 and/or 4, and indeed by reference to the totality of the terms of the Supplemental Agreement. Having considered the terms of the Supplemental Agreement, and in particular Clauses 4 and 6 thereof, read in its appropriate documentary, factual and commercial context, and the totality of the evidence adduced on both sides, I am

satisfied that the proposed refinancing with UTB is "in *accordance with the spirit of [the] agreement both parties acting reasonably and in good faith to each other".* I am further satisfied that it is not reasonably open to the Defendant to refuse to execute the revised UTB deed of priority.

61. Finally, I should mention the fact that the Defendant attempted to rely on a number of points in relation to the financing proposal that were not raised in Mr Simm's evidence and not foreshadowed in correspondence until after the evidence had closed: see e.g. the Defendant's solicitors' email dated 2 September 2020 raising points about the UTB draft deed of priority (in particular clauses 3.2, 5.2 and 7.2 thereof). They were not referred to in the Defendant's skeleton argument either but first saw the light of day on the afternoon of Day 1 of the trial. Mr Clargo invited me to treat the raising of these issues as analogous to a late application to amend in the context of a Part 7 claim. On that basis, and applying the principles set out in the White Book at 17.3.8, he invited me to refuse permission to the Defendant to rely on these further points. I did not hear detailed argument on the point and, on further reflection, I consider I do not need to decide whether Mr Clargo's suggested approach is correct. The Court has broad case management powers under CPR 3.1. In particular, CPR 3.1(2)(k) empowers the Court to exclude an issue from consideration and I propose to exercise that power and exclude these issues from consideration. I do so on the basis that these points were not dealt with in Mr Simm's witness statement or indeed Mr McNae's Skeleton Argument and the Claimants have not therefore had a proper opportunity to deal with them. In those circumstances I consider that the overriding objective militates strongly against allowing the Defendant to raise these issues, as does the overall balance of prejudice. I therefore exclude them from consideration. In any event, even if the late points are admitted, they are, in my judgment, devoid of merit. Reliance was placed on clauses 3.2, 5.2 and 7.2 of the draft UTB deed of priority. I see nothing objectionable in any of these provisions and I note that Clause 3.2, which was particularly relied on by Mr McNae, is very similar to clause 11.2 in the Ratesetter deed of priority.

62. *Issue 6*. In view of my conclusions above, I am satisfied that the Claimants are not in breach of their obligations contained in paragraph 5 of the Annexure to the

Supplemental Agreement and therefore the Defendant is not justified in withholding its consent to the refinancing proposal on that account.

63. *Issue 7*. The Supplemental Agreement is a subsisting contract enforceable at law. I am satisfied that the Claimants are and remain willing and able to perform their side of the Supplemental Agreement. By contrast, I am satisfied for the reasons set out above that the Defendant is in breach of its obligations under Clause 4 and Clause 6 by reason of its failure and refusal (i) to enter into the UTB deed of priority and (ii) to give its consent to the registration of a first legal charge in favour of UTB. The primary remedy which the common law affords for breach of contract is an award of damages. In equity, however, the due performance of the contract may be enforced by a decree of specific performance upon the ground of the inadequacy of the damages recoverable for the breach. The modern remedy of specific performance is a discretionary remedy founded on settled principles available where damages are inadequate. The discretion to award specific performance is not a wide or unfocussed one, but is rather, to be exercised in accordance with well-established principles, which do not have to be re-examined in every case, but which the courts will apply in all but exceptional circumstances: see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1 at 9, per Lord Hoffmann. In resisting specific performance, Mr McNae for the Defendant emphasised the following principles:

    i. Specific performance will not be ordered where damages are an adequate remedy: *Co-operative Insurance Society Ltd v Argyll Stores (Holding) Ltd* [1998] 1 AC 1 at 15.

    ii. Damages will generally be considered an adequate remedy even if the Claimants regard specific performance as preferable to an award of damages, perhaps due to concerns over quantification, and the Defendant's financial situation and potential difficulty in meeting an award of damages are also not generally relevant to whether damages are inadequate: *Snell's Equity, 34th Ed,* Para 17-008.

iii. Claimants who seek to enforce a contract must show that they have performed, or have been ready and willing to perform, all terms and conditions (apart from trivial ones) then to be performed by them: *Australian Hardwoods Pty Ltd v Commissioner for Railways* [1961] 1 WLR 425 (PC), applied in *National and Provincial Building Society v British Waterways Board* [1992] 11 WLUK 379.

iv. It is for the Claimants to show that they have not acted in contravention of the essential terms of the contract: *Swain v Ayres* (1888) 21 QBD 289.

64. Mr McNae submitted that damages were an adequate remedy. He made the point that finance was available for the next phase of the development and that the only issue was one of delay; that delay, he submitted, had a quantifiable cost. In support of that submission, he referred to correspondence from the Claimants' solicitors in which they had threatened to hold the Defendant liable for the increased costs of the development. He also relied on alleged breaches by the Claimants of their obligations under the Supplemental Agreement, both in relation to the provision of information, but also in relation to the spirit of the agreement, good faith and reasonableness. For the reasons I have already given, I reject any suggestion that the Claimants are themselves in breach of contract. That disposes of that objection. That leaves the question of whether I should exercise my discretion to order specific performance. I am satisfied that I should. Mr McNae relied in particular on *Co-operative Insurance Society Ltd v Argyll Stores (Holding) Ltd* (above) and the reference in Lord Hoffman's speech at p.11 to the settled principles which the court applies in considering whether to order specific performance and in particular the principle that specific performance will not be ordered when damages are an adequate remedy. That is, of course, one of the settled principles. However, in my judgment, that presents no obstacle on the facts of this case. In fact, I regard this as a paradigm case for ordering specific performance because I am entirely satisfied that damages at law would not give the Claimants the full compensation to which they are entitled and emphatically would *not* put them in a position as beneficial to them as if the Supplemental Agreement had been specifically performed: see Snell's Equity (33rd Ed.) at 17-002 & *Harnett v Yielding* [1803-13] All ER Rep 704.

On the particular facts of this case, and claims for specific performance are peculiarly fact-sensitive (see e.g. *Co-operative Insurance Society Ltd v Argyll Stores (Holding) Ltd* at p.9G), I am satisfied that the Claimants have a legitimate interest extending beyond pecuniary compensation for the breach and requiring specific performance: see e.g. *Cavendish Square Holding BV v Makdessi* [2016] A.C. 1172. Ultimately, the considerations that bear on the issue of whether or not to order specific performance are "*mostly of a practical nature*" (see Lord Hoffman's speech at p.11H) and, as Lord Hoffman observed, the principles to be applied, like all equitable principles, are *"flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne L.C. once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law*": p.9 F-G. Mr Clargo submitted that the present case was analogous to a case involving the sale of real property where the court almost invariably specifically enforces the contract because of the perception that every piece of land is unique. Whilst it might be said that the contract here is concerned with an interest in land, I am not persuaded that the comparison with contracts for the sale of land is necessarily an appropriate comparison on the facts of this case. Nonetheless, I am satisfied that I should exercise my discretion to order specific performance as sought, having regard to the settled principles that apply to such cases. Whether damages constitute an adequate remedy is a question of fact in each particular case. Further, it seems to me that the adequacy or inadequacy of damages must, as Mr Clargo submitted, be considered from a practical and not a theoretical point of view. So viewed, I am satisfied that damages are not an adequate remedy on the facts of this case because an award of damages would not provide identical benefits or identical consequences for the Claimants when compared with specific performance. In those circumstances it is clearly more just to grant specific performance than to award damages. To order specific performance will, on the facts, cause no unfairness or injustice to the Defendant. On the contrary it will put the parties in the position relative to each other in which by the terms of the Supplemental Agreement they were intended to be placed.

65. *Issue 8*. This issue does not arise. However, had I refused specific performance, I would have awarded the Claimants damages at common law, to be assessed, alternatively damages under s.50 SCA 1981.

66. For the reasons set out above, I propose to grant the Claimants the relief which they seek. I will hear Counsel as to the appropriate form of Order.