Neutral Citation Number: [2017] EWHC 1994 (Ch)

Case No: HC-2016-003160

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/08/2017

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

ALFRED GEORGE SPARKS	**Claimant**
- and -	
PHILIP NICHOLAS BIDEN	**Defendant**

- -
- -

Mr Tom Weekes QC (instructed by **Gregsons Solicitors**) for the Claimant
Mr Nathaniel Duckworth (instructed by **Field Seymour Parkes**) for the Defendant

Hearing date: 24 May 2017

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Approved Judgment

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

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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

HH Judge Davis-White QC:

1. This is a trial of a Part 8 Claim. The issue is whether a term is to be implied into an option agreement. The option agreement, as subsequently varied, contained the grant of an option to buy land, for £1, by the claimant, Mr Sparks, to a company called Linkwood Consultants Ltd ("**Linkwood**"). The benefit of the agreement was subsequently assigned by Linkwood to the defendant Mr Biden. Linkwood was effectively Mr Biden's company.

2. The option was one to purchase an area of land at Havelock Road, Wimbledon that Mr Sparks had acquired over time (the "**Land**"). Save for an access road, the Land is surrounded by four rows of terraced houses. Those houses on three sides are situated on Havelock Road (which turns through various sharp angles). On the fourth side they are situated on Kohat Road. In very loose terms (but not in precise shape) the Land can be imagined as the hole in a doughnut ring, laid flat.

3. Mr Sparks had gradually acquired the Land over time, parcel by parcel. This was with the idea that it had potential for residential development. He hoped that the unlocking of that development potential would provide him with a pension fund.

4. By about 2000, Mr Sparks had acquired the entirety of the Land, including areas of land adjacent to the original access way to the main parcel. The acquisition of this adjacent land meant that the access way could be widened and the development proceed.

5. Mr Sparks did not have the expertise or the funds to carry out the development himself. His background was not in that area. From about 1980 he and his then business partner had run a vehicle repair business from a workshop on the Land. The Land also had situated on it a house (divided into two residential flats) and some garages. These were all leased out. Mr Sparks needed to find a developer.

6. Mr Sparks, having investigated the market, decided to deal with an individual rather than a big corporate developer. He met Mr Biden. Mr Biden is a developer with some 35 years' experience. Through his company, Linkwood, he has entered into a number of development agreements over the years. Having talked to Mr Biden, and having seen another of his developments, also in Wimbledon, Mr Sparks decided to go with Mr Biden.

7. The proposed development was of about 8 new houses. It was proposed that the existing house would remain, the garages and workshops being demolished to make way for the development. The workshops had been used in Mr Sparks' vehicle repair business. The proposed sale of the Land under the Option Agreement was with vacant possession save for the garages and the existing house. The sale was to be subject to the existing tenancies of those properties.

8. The option agreement is dated 9 June 2005 (the "**Option Agreement**"). At that stage Mr Sparks was in his late 60s. The agreement is not on standard terms. Each party had reputable commercial conveyancing solicitors, Palmers (Mr Sparks) and Field Seymour Parkes (Mr Biden/Linkwood) acting for him. There is a dispute as to how much information about the process of negotiation is properly admissible into evidence. I will consider that matter later in this judgment.

9. As I have said, the Option Agreement, contained the grant of an option to Linkwood to purchase the land. If the option was exercised the purchase price under the resulting contract for sale was £600,000, together with overage. As is well known, in the context of sales of land, an overage (also called "claw back") is used to describe a sum of money in addition to the original sale price which a seller of land may be entitled to receive following completion, provided certain conditions are met. In this case, the Option Agreement required the buyer, during a period of three years from the date of the agreement, to apply for relevant planning permission and to use "all reasonable endeavours to obtain" the same. The buyer's option over the land could be exercised within the same three-year period, subject to one qualification. If the relevant planning permission was formally issued within the three-year period that I have mentioned, then the buyer had one month from formal issue of the permission to exercise the option. If the option was exercised and the sale completed, the buyer was required to "proceed as soon as practicable" to construct the development in accordance with the relevant planning permission and subject to obtaining any other necessary consents.

10. Overage arose once any one of the new dwellings were sold. Broadly, the seller was entitled to receive 33 1/3 % of the sale price of each newly constructed dwelling. This was subject to two conditions. The first was that the overage only arose with regard to sale proceeds in excess of the purchase price of £600,000. In other words, the buyer was not obliged to pay overage in relation to the first £1,800,000 received from relevant sales. The second condition was that notwithstanding the first condition that I have just mentioned, the seller was in any event to receive a minimum payment of £700,000 by way of overage in addition to the purchase price of £600,000.

11. The obligation to pay overage depended on there being sales of the newly constructed dwellings. For these purposes a "sale" was defined as a freehold or long leasehold sale of a dwelling. Overage became payable upon the sale of any such dwelling (subject to the first condition that I have mentioned, that overage did not fall due in respect of the first £1,600,000 (later £1,500,000) received from relevant sales) and any outstanding balance of the minimum payment of £700,000 only became due on sale of the final newly constructed dwelling to become ready for occupation.

12. The Option Agreement was subsequently varied by a supplemental agreement dated 22 July 2008 (the "Supplemental Agreement"). The Supplemental Agreement among other things:

    i) extended the option period, which had expired;

    ii) reduced the purchase price to £500,000, in return for building work that Mr Biden had carried out for Mr Sparks;

    iii) as a consequence of (ii), altered the overage provision, so that the overage only arose with regard to sale proceeds (from newly constructed dwellings) in excess of the purchase price for the Land of £500,000. In other words, the buyer was now not obliged to pay overage in relation to the first £1,500,000 received from relevant sales. The minimum overage payment of £700,000 remained in place.

13. At the same time as the Supplemental Agreement was entered into, Linkwood assigned the benefit of the option to Mr Biden and Mr Biden exercised the option.

14. Outline planning permission for a development of eight houses had been obtained in about February 2007. The construction of eight houses took place between about March 2012 and February 2015.

15. Instead of selling the new dwellings, Mr Biden let all but one of the eight houses under assured shorthold tenancies of varying lengths. The term of one of those tenancies has expired the terms of the remaining tenancies expire on different dates between 31 August 2017 and 31 March 2019. Mr Biden also himself occupies one of the new houses. He says that he is not obliged to sell any of the new houses unless and until he, at his unfettered discretion, decides to do so. There is, he says, no express term in the Option Agreement requiring him to sell, though there were covenants, as I have mentioned, that planning permission should be applied for and the development progressed. Any obligation to pay overage can, he says, therefore be delayed indefinitely by the simple expedient of him not selling any one of the new eight houses.

16. Mr Sparks says that this interpretation of the Option Agreement fundamentally undermines its whole working and underlying purpose. A term is to be implied, he says, requiring Mr Biden to market and sell the each of the newly constructed houses and within a time period which he suggests is either "as soon as reasonably practicable" or "within a reasonable period of time" of the new dwelling in question being constructed.

17. Mr Sparks was represented before me by Mr Weekes QC and Mr Biden by Mr Duckworth of Counsel. I am grateful to both of them for their clear and concise submissions, both written and oral. The written evidence put before me was not challenged in cross-examination. So far as I do not hold it to be inadmissible, as to which see further below, I therefore treat the witness statements as establishing their contents.

The Option Agreement

18. I agree with Mr Weekes' characterisation of the overage provisions in the Option Agreement as being "highly compressed". The Option Agreement is not itself a very long document. It comprises some 23 clauses.

19. Clause 1 is a definition and interpretation clause. For present purposes, the most important definitions are as follows (I have altered the order in which the terms are set out, which, in the Option Agreement is alphabetical):

> " *"Sale"* *means a freehold or long leasehold sale of a Dwelling.*
>
> *"Dwelling"* *means a separate building for residential use constructed on the Property as part of the Development*"

"Property" (as amended by the Supplemental Agreement) is defined to encompass what I have called the "Land." "*Development"* is primarily defined as *"the erection of buildings on the property for residential use or for such other development as may first be approved in writing by the seller"* subject to various refinements which I need not go into.

20. Clauses 2 and 3 set out the grant of the option and how it is to be exercised (and the effect of such exercise: namely the coming into existence of a binding contract for the sale of the Land).

21. Clause 4 deals with the planning application and various related undertakings. For present purposes, the key provisions are clauses 4.1.1 and 4.1.3 which contain covenants by the buyer in the following terms:

> " *4.1.1 during the Option Period at its own expense to apply to the local planning authority for Planning Permission and use all reasonable endeavours to obtain Planning Permission for the Development of the Property and at the same time as submitting the application to provide the Seller with a copy of it*
>
> *4.1.2 ……*
>
> *4.1.3 if any application for Planning Permission submitted by or on behalf of the Buyer shall be refused) whether on an actual or deemed basis) or shall be granted subject to conditions which are unacceptable to the Buyer the Buyer will if advised by counsel nominated by the Buyer and approved in writing by the Seller (such approval not be unreasonably withheld or delayed) that the Buyer would have greater than a 75% prospect of success on appeal submit and pursue an appeal to the Secretary of State*".

22. Clause 5 deals with completion. Clause 6 deals with the title guarantee. Clause 7 deals with vacant possession. Clause 8 deals with title. Clause 9 deals with encumbrances. Clause 10 contains what is described as a disclaimer by the Buyer and an entire agreement clause. Clause 11 incorporates various standard conditions, as well as stating that all express agreements made or undertakings given by one party to the other are incorporated into the agreement. Clause 12 prevents merger on completion of the transfer. Clause 13 contains various VAT provisions. Clause 14 deals with registration. Clause 15 contains an English law choice of law and submission to the jurisdiction of the English courts. Clause 16 provides that the agreement is a deed. Clause 17 deals with notices. Clause 18 deals with the Contracts (Rights of Third Parties) Act 1999.

23. Clause 19 deals with the overage. As subsequently varied by the Supplemental Agreement, it provides as follows:

> "***19. <u>Overage Provisions</u>***
>
> *19.1* ***The Sellers Entitlement***
>
> *In addition to the Purchase Price* [£500,000] *the Seller shall be entitled by way of Overage to receive 33 1/3% of the Sale Price of each Dwelling when sold by the Buyer LESS the Purchase Price (which for the avoidance of doubt means that the Buyer shall not be obliged to pay any Overage in relation to the first £*[1,500,000.00] *received from selling a Dwelling or Dwellings) PROVIDED THAT the Seller shall receive in total a minimum payment of SEVEN HUNDRED THOUSAND POUNDS (£700,000.00) by way of overage in addition to the Purchase Price.*

19.2 ***Development obligations***

The Buyer shall after Completion proceed as soon as practicable to construct the Development in accordance with the Planning Permission and subject to obtaining all other necessary consents

19.3 ***Payment of the Overage***

19.3.1 *The Overage shall become payable to the Seller immediately upon the Sale of a Dwelling and shall be payable to the Sellers previously nominated bank account by CHAPS payment*

19.3.2 *Any outstanding balance of the minimum payment of £700,000.00 referred to in clause 19.1 shall become payable to the Seller immediately upon the sale of the final Dwelling on the Development to become ready for occupation and shall be payable as provided in clause 19.3.1."*

24. Clause 20 contained various provisions for the protection of the seller's entitlement to overage requiring certain covenants to be included in the transfer of the Land. They contained restrictions on the disposal of the whole of the Land, requiring the buyer to enter into various covenants in the transfer of the Land. The first such covenant was not to dispose of the whole of the Land without first procuring that that disposal was subject to the terms of the Option Agreement so far as then unperformed and that the person acquiring the Land would covenant with the seller to comply with the then unperformed terms of the agreement. Clause 20.1.3, being another such clause to be entered into by the buyer, provided as follows:

"*20.1.3 Not to dispose of a Dwelling without (where appropriate) simultaneously paying to the Buyer the Overage pursuant to clause 19 of this Agreement."*

The Transfer was also to contain an application by both parties to the Chief Land Registrar to enter a restriction on the register of titles. The restriction in fact entered on 20 August 2008 was as follows:

"*No disposition of the registered estate (other than a charge) by the proprietor of the registered estate is to be registered without a certificate signed by a solicitor that the provisions of clause 14 of the Transfer dated 22 July 2008 referred to in the Charges Register have been complied with effectively preventing dispositions of the registered estate or any part thereof without a solicitor's certificate."*

25. The Transfer is not in evidence before me. However, I surmise from clause 20 of the Option Agreement that the certificate effectively certified, among other things, that, at the least, the Overage provision in Clause 20.1.3 had been complied with.

26. Clause 21 provided for disputes to be referred to an expert. Clause 21 dealt with assignment. Clause 23 dealt with transfer of certain rights and a statutory declaration

to be provided by the Seller to the buyer regarding enjoyment, use of and control over access to a portion of the Land.

The Law

27. I was referred to a significant number of authorities regarding the circumstances in which the court will imply terms into a contract. Any summary of the principles runs (at least) a dual risk. The first risk is that the summary is then read as if it were a full, complete, and accurate definition of the principles, to be read as a statute. The second connected risk is that any summary is then open to attack as an inaccurate summary and therefore incorrect application of the law. I therefore stress that the below is only a broad summary and that I have in mind the relevant passages of the judgments that I cite but which I do not propose to set out in this judgment.

28. The issue that arises is whether a term should be implied into the Option Agreement in the light of its express terms, commercial commonsense and the facts known to the parties at the time that the contract was made (*Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72*;* [2016] AC 742 paragraph [15]).

29. The term sought to be implied in this case is one which (a) imposes an obligation on the buyer to sell the newly developed houses and (b) within a particular time period.

30. If a contract does not expressly provide for what is to happen when some event occurs or in some situation then the most usual inference is that nothing is to happen. If the parties had intended otherwise they would have stated that in the contract. However, there are circumstances in which the Court will imply a term into the contract (*Attorney General of Belize v Belize* Telecom [2009] 1 WLR 1988 paragraph [17]]. This is where the term satisfies the applicable tests based on necessity.

31. The test formulated by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1970) 180 CLR 266, 283 distils the essence of the matter though its simplicity can be almost misleading:

> "*for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract",*

(*Marks & Spencer* case paragraphs [16]-[19]).

32. Of that formulation (which is itself only a summary of the principles and not to be read as a statute), it is questionable whether the first condition will usually, if ever add anything. If a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. As regards conditions (2) and (3), they are alternatives in the sense that only one of them needs to be satisfied but in practice it may be a rare case where only one of them would be satisfied. Necessity for business efficacy involves a value judgment. Another way of looking at the second condition is to say that a term can only be implied if, without the term, the contract would lack practical or commercial coherence (*Marks & Spencer* case paragraph [21]).

33. Although implication is based upon the presumed intention of the parties, the implication of a term is "*not critically dependent on proof of an actual intention of the parties*". Of course a term will not be implied that contradicts the express terms of the agreement, but "*if one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time*" (*Marks & Spencer* case paragraph [21]).

34. On the facts it may be "*difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue*" because "*it may well be whether the omission was the result of the parties oversight or of their deliberate decision"* or where they suspect they are unlikely to be able to agree what is to happen in an eventuality, they may have deliberately left the matter uncovered in the hope that the eventuality will not occur. (*Marks & Spencer* case paragraphs [19], [20].

35. A term should not be implied into a detailed commercial contract "*merely because it appears fair or merely because the judge considers the parties would have agreed it if it had been suggested to them*." The test is one of necessity, not reasonableness, and it is a stringent test (*Marks & Spencer* case paragraphs [21], [23], [62]).

36. Interpretation (or construction) of a contract and the implication of terms into it are two distinct processes or exercises with distinct rules, though the consideration of the same or similar factors may be relevant to both processes: such as the words used in the contract, the surrounding circumstances known to the parties at the time of the contract, commercial commonsense and those co-travellers on the Clapham Omnibus, the reasonable reader or reasonable party. Of course, it is usually necessary to construe the contract in question first to decide whether a term should be implied and, if so, what it should be (*Marks & Spencer* case paragraphs [25]-[31]).

37. I was referred to a number of other cases dating before and after the *Marks and Spencer* case. They are useful examples of cases highlighting one or other of the matters that I have referred to above or providing a different formulation or description of the relevant principles. I have reconsidered them in preparing this judgment but it does not seem to me that they add anything extra in terms of other principles to the basic propositions that I have identified.

Cases on overage

38. Mr Weekes QC relied on two cases specifically concerning overage. As I understood it this was not on the basis that either of them identified any specific point of law or principle not otherwise dealt with by the cases that I have referred to but to show examples of how the court had approached overage in other cases.

39. In *Renewal Leeds Ltd v Lowry Properties Ltd* [201] EWHC 2902 (Ch) there was a contract for the sale of land. The buyer was a developer. There was a provision for the payment of overage by the buyer in the event of a development. The relevant contract did not provide for the buyer to agree to build the relevant development. However, if the buyer did so then overage became payable after completion of the final sale of a completed residential unit on the development. The buyer held back on completing the construction of the last four houses of the development and marketed them for sale at

what was said to be a significant overvalue. Mr Anthony Ellery QC, sitting as a Judge of the Chancery Division, held that the contract contained implied terms which had the following effect: "*if the buyer were to carry out the planned residential development it was obliged to complete and sell the final unit*", so that overage became payable. Were the contract to be treated as permitting the buyer not to complete and sell the final unit of its residential development then, in the assessment of the learned Judge, the overage provisions would have been "*inefficacious, futile and absurd*" (see especially paragraphs [38],[39]). "*Were the parties to have addressed the question as to whether the Buyer could proceed with the residential development but then suspend or abort the final sales of units so that Overage would not arise, in my view the officious bystander would have said, "Of course not"."*

40. I should add that although the learned Judge followed the *Attorney General v Belize* case without the benefit of the speeches in the *Marks and Spencer* case he appears to have followed the strict test for implying terms endorsed by the latter case. I cannot detect that he applied some weaker test which it was suggested in the Marks and Spencer case had been identified by certain commentators as flowing from the speeches in the earlier case. I also note that the decision was reached by considering in combination a textual analysis of the contractual documents and the surrounding circumstances.

41. The second case that I was referred to in the area of overage was *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56; [2012] UKSC 2012. In that case, there was a contract for the sale of land. There was a provision for overage in the event of development and subsequent disposal. There was an intercompany sale by the purchaser to another company within the group. That on its face triggered the overage provisions. However, the price had been set at a level that resulted in no overage being payable under the applicable formula. The buyers argued that the terms of the contract made clear that the provision for overage was by reference to the gross sale proceeds. The sellers argued that the commercial purpose of the contract was to enable them to benefit from a proportion of the development value and that that was to calculated on the basis of an open market transaction. The Supreme Court held that, on the facts, a term should be implied that in the event of a sale which was not at arm's length in the open market, an open market valuation should be used to arrive at the base figure for the calculation of the profit share. In this case the focus seems to have been on a textual analysis of the agreement rather than the background circumstances. I was also referred to *Arnold v Britton* [2015] AC 1619.

42. I have found these cases helpful in seeing how the courts have approached particular factual situations but, ultimately, they are cases on their own facts. In this case I have to consider the particular document and background circumstances in evidence before me.

This case : the submissions

43. In broad terms the respective submissions of Mr Weekes QC and Mr Duckworth are as follows.

44. Mr Weekes QC submits that it is unsurprising that an obligation to sell within a specific time period is not mentioned in the contract; the contract is relatively compressed and

basic and a non-sale (and instead lets and/or the buyer living in one of the houses) would have seemed an improbable contingency. Secondly, he says that clause 19 makes it obvious that there is an obligation to sell. Thirdly, the obligation on the buyer to proceed as soon as practical to construction makes little sense if the buyer can then avoid paying overage indefinitely by not selling. Fourthly, he submits that the agreement lacks commercial coherence if a term is not implied as sought. (Why would the site be sold for only £600,000 plus overage if the buyer could avoid paying overage: especially when, in unchallenged evidence, Mr Sparkes estimates the value of the new houses as being not less than £700,000 each and possibly £800,000 or even more?)

45. Mr Duckworth also relies on terms of the Option Agreement which he says point against the implication of the term sought. He submits that this is a paradigm case where the background to the Option Agreement is such that there is no room for implication of a term as relied upon by the claimant. He also relies heavily on the term sought to be implied, saying that there is more than one candidate and there is no obviously prime candidate. Finally, he says that neither the officious bystander nor business efficacy test are met.

46. So far as the background circumstances are concerned, there are what might be called the procedural background matters and the substantive background matters.

47. The procedural background matters are that the parties instructed reputable commercial conveyancing solicitors to act for them and that those solicitors were involved in the preparation and drafting of the Option Agreement and the Supplemental Agreement. Those Agreements are not "standard term" documents. I accept that these are factors which point against the implication of a term.

48. One matter that is disputed is whether or not I should take into account, as the Defendant urges me to do but the Claimant resists, the following facts relied upon in Mr Duckworth's skeleton argument: (1) that it took almost a year to progress the first draft of the Option Agreement to its final executed form; (2) that the Option Agreement went through a total of 13 iterations in this period; that the changes made during this period were not merely matters of drafting detail but reflected the negotiation and renegotiation of the essential terms, including the reworking of the overage clause; (3) that finalising of the Supplemental Agreement took some 8 months; (4) that the Supplemental Agreement went through 3 iterations and was an opportunity to revisit the Option Agreement.

49. On this issue the Claimant relies on the general rule that evidence about pre-contractual negotiations is inadmissible when construing a contract (re-affirmed in *Chartbrook v Persimmon Homes Ltd* [2009] 1 AC 1101 paragraphs [28] to [47] esp. paragraph [42]) or in ascertaining whether and, if so, what term should be implied (*Government of Kelantan v Duff Development Company Ltd* [1923] AC 395 at 411). The exclusionary rule is directed at what was said or done during the course of negotiations, not at the mere fact that there were negotiations. It seems to me that I can therefore take into account the fact that there were negotiations over time and that the agreement was not, by way of contrast, one that was, for example, first drafted and executed at 11pm within the space of 20 minutes. However, if one moves to any greater detail the position becomes problematic. Granted negotiations may have continued over a year but how frequent were they and how intense were they? How many versions of the

document were there? What were the differences in the different versions: were they significant? One starts to move inexorably into what was said or done in the course of the negotiations. In fact the evidence is even more detailed than the summary relied upon in the skeleton argument of his Counsel. Mr Biden exhibits all 13 redrafts, identifying the changes, exhibiting all the solicitors' correspondence and giving a fairly blow by blow account of the negotiating process and the substantive matters that were sought to be agreed and were not and (in his case) why not. I am satisfied that this evidence as a whole breaches the applicable exclusionary rule of evidence. Accordingly, I take into account the very basic propositions set out in the skeleton argument referred to above regarding the time over which negotiations took place but reject the evidence (and the submission) regarding what was negotiated and the number of drafts. In short, I am left with the proposition that the genesis of the agreement was subject to lawyer's involvement and that it was not negotiated in a rush, but little more than that.

50. So far as the substantive background is concerned. It is relevant that the parties are both businessmen and that the buyer is a developer. However, it is also relevant that the seller is not a developer but in the line of business that he was in. I have not found in the witness statements any reference to knowledge on the part of Mr Biden of Mr Spark's intention that the development (including any overage) should, in effect, assist in funding his retirement and I therefore leave this aspect out of account in that precise form. It may, however, make little difference because it is clear that Mr Sparkes was known to be intending to benefit personally from the sale (and overage provisions) and his approximate age and that he had retired or was about to retire from the business formerly running from the premises must also have been known by Mr Biden. On balance, it seems to me that these matters, taken together with the overall terms of the Option Agreement which I shall refer to below, do point towards an implication of a term requiring the seller to sell developed properties so that overage becomes payable.

51. So far as the detailed terms of the Option Agreement (as amended) are concerned, a number of detailed arguments have been put to me. I will return to some of these shortly. However, in my judgment, it is important to keep an eye on the wood and not get lost in the trees.

52. In my judgment the key factor pointing towards the implication of a clause requiring the development to be sold and for overage therefore to become payable, is the structure whereby (a) the Buyer is placed under an obligation to use all reasonable endeavours during the Option Period to obtain planning permission for the Development (and indeed to pursue an appeal against refusal if advised prospects of success are more than 75%); (b) after completion of the sale of the contract arising from exercise of the option, to proceed "as soon as practicable" to construct the Development and (c) to pay overage, which in principle is triggered as an obligation once any of the newly constructed houses is sold (even if payment is delayed) and which is an a minimum sum of £700,000. The obligations in (a) and (b) are clearly premised on the basis that all reasonable efforts to carry out the development are carried out as soon as possible. That must be with a view to realisation of the value of the development and, from the Seller's perspective, the entitlement to overage. Otherwise it is difficult to see what interest the buyer has in imposing or enforcing these obligations. It is, I suppose, theoretically possible that the Seller was interested in increasing the housing stock in Wimbledon in the public interest but, in my judgment, the natural reading of the Option

Agreement is that obligations (a) and (b) are directed at bringing about a situation where the overage will become payable. This fits in entirely with the substantive background facts that I have referred to above.

53. I do not consider that the words used in clause 19 about entitlement to overage in addition to the purchase price or about it falling due "when" a house is sold, of themselves demonstrate that there is an obligation to sell the houses. As Mr Duckworth pointed out, it is at least theoretically possible that planning permission would have been refused, but the option nevertheless exercised. Further, an overage obligation is only triggered (though payment may be delayed) when a house is sold: that does not of itself tell one whether (and when) the Buyer is obliged to sell a house. However, I should add that the possibility that overage will not be payable in circumstances where the option is exercised but planning permission refused, does not, in my judgment, undermine the overall point that if the development is completed then there must be implied a term to require the Buyer to realise the value of the development, and pay overage, by selling the newly constructed houses.

54. The fact that there is an entire agreement clause is a factor against implying the term sought to be implied by the seller, but , as Mr Duckworth recognises, only a factor. I do not regard it as a very strong one on the facts of this case,

55. Similarly, while it is true that the agreement contains, as Mr Duckworth submits, a raft of "time-limited obligations", it seems to me that that does not point against implication of the term sought to be implied. Rather it simply highlights that there is no express clause containing what the Seller seeks to imply.

56. Mr Duckworth also submits that the minimum overage payment provides a good measure of protection to the Seller against adverse market conditions at the time of eventual sales. He says that, on the basis of the implied term, the Buyer is given no protection of any kind against market fluctuation and has therefore undertaken a greater commercial risk. On the basis there is no implied term then, says Mr Duckworth, the Buyer also has a measure of protection because he can control when properties are sold. However, it seems to me that this sort of consideration moves into the forbidden area of the court approaching the matter on what it thinks is fair or reasonable. Further, and in any event, if the buyer can control the sale price the likelihood is that he would do so by ensuring there was profit to pay the overage and profit for him in which case the minimum overage becomes much less of a protection for the seller.

57. At the end of the day, it seems to me that the first question is whether a term should be implied requiring the Buyer to sell the new houses. If there is, then necessarily the implied term must provide a time within which that obligation must be performed. The question is whether or not there is a clear time period which should be implied. In this context, I note that in his Skeleton Mr Duckworth put the matter as being that the Buyer had a discretion as to the time at which he could sell or control over the time of sale. However, and as was clear from oral submissions when it was suggested that there had to be (in the sense of an obligation) a sale at some time but that time was of the Buyer's choosing, this betrayed to me that it was difficult to argue on the facts that there was no obligation to sell. What Mr Duckworth had to succeed on, it seemed to me, was the argument that there was no obligation at all on the Buyer to sell, not simply that there was an obligation to sell but at no particular time. It would, in my view, be very difficult

to imply a term that the buyer had to sell the houses but no terms as to when. Of course, if it is not possible to identify the time period within which the sale had to occur that might be a reason why there would be no obligation to sell either. It was on the question of the formulation of any time limit that Mr Duckworth concentrated.

58. The claimant put forward two alternative versions of a time clause. The first was that a sale of each new house had to be effected "as soon as reasonably practicable". The second alternative was that such sale had to be effected "within a reasonable period of time". Mr Duckworth submitted that the mere fact two candidates were put forward demonstrated that the it was not clear which term the parties would have intended. I disagree. The court may helpfully consider various candidates to judge their difference but if it comes to the view that one is the obviously the one that would have been agreed then that is the end of it.

59. I am clear that it is the second alternative that applies. The "reasonable period of time" formulation permits the obligation to sell to take account of such matters as whether it is reasonable to sell one house, say at a depressed price because the entire development is not completed or it is reasonable to wait. If the test is one of reasonable practicality of sale, there may be circumstances where it is reasonably practicable to sell a house (e.g. off plan or with a tenant) but, in price terms, not reasonable to require the sale at that precise point. In this context I note also the principle expressed in "The Interpretation of Contracts" (Sir Kim Lewison, 6th Edn) at 6.16 et seq, and where the relevant cases are considered, that "*where a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation the law usually implies that it shall be performed within a reasonable period*."

60. Mr Duckworth also submitted that such a term should not be implied because such a term was itself inherently uncertain and formulated with insufficient precision. In this context he relied upon *Shell U.K. Limited v Lostock Gaange Limited* [1976] 1 WLR 1187. In that case, the court by a majority held that there was no implied term enabling the defendants to terminate a contract containing a solus agreement. The implied term contended for was that the right to terminate arose if Shell discriminated abnormally against the buyer. As Lord Denning MR said such a term could not be formulated with sufficient precision. As Ormrod LJ put it, the difficulty was demonstrated by "the vagueness and the ambiguity inherent in such words as "discriminate" and "abnormality" " . In riposte Mr Weekes relied upon the dicta of Bridge LJ in his dissenting judgment where he said (at 1204F-H):

> " *it is said that lack of precision in the criterion to be embodied in the implied term is fatal to any implication. But it is no novelty in the common law to find that a criterion on which some important question of liability is to depend can only be defined in imprecise terms which leave a difficult question for decision as to how the criterion applies to the facts of a particular case. A clear and distinct line of demarcation may be impossible to draw in abstract terms; yet the court does not shrink from the task of deciding on the facts of any case before it on which side of the line the case falls*."

61. It seemed to me that although Bridge LJ dissented on the application of this principle to the facts of the case before him, the general principle that he stated and which I have quoted above is one that is not undermined by the fact that he was in a minority. Having expressed this view I was heartened to be shown the extract from paragraph 6.10 of Sir Kim Lewison's work where he says:

> "*it is thought that the approach of Bridge L. J. is correct in principle, although on the facts of Shell UK Ltd v Lostock Garage Ltd itself the majority were correct in holding that the suggested implied term was too imprecise."*

62. Different degrees of precision have also been identified in other areas, for example with regard to the approach of an appellate court to the question of whether the court below has reached the correct decision in applying a standard. In this context, see for example, discussion in *re Grayan Building Services Ltd* [1995] Ch 241 at 254-5 regarding the test of "unfit conduct" under the Company Directors Disqualification Act 1986:

> "*The judge is deciding a question of mixed fact and law in that he is applying the standard laid down by the courts (conduct appropriate to a person fit to be a director) to the facts of the case. It is in principle no different from the decision as to whether someone has been negligent or whether a patented invention was obvious: see Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370. On the other hand, the standards applied by the law in different contexts vary a great deal in precision and generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision. So in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. [1983] 2 A.C. 803 Lord Bridge of Harwich was considering the application of the test of "fair and reasonable" in the Unfair Contract Terms Act 1977. He said, at pp. 815–816:*
>
> > *"It would not be accurate to describe such a decision as an exercise of discretion. But [such] a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which … section 11 of the Act of 1977 direct[s] attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong."*
>
> *Similar comments were made in this court in In re Coventry, decd. [1980] Ch. 461 about a decision as to whether a testator had made "reasonable financial provision" for a dependant for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975. Buckley L.J., at pp. 495–496,*

> *described such a decision as a "value judgment" which should not be disturbed unless the judge had made an error of principle.*
>
> *These cases are at one end of a spectrum and decisions such as whether a motorist has driven with due care and attention are probably somewhere near the other end. Where lies the decision that a director's conduct fell below the appropriate standard? In my view, nearer to the negligence end than that represented by Finney Lock or Coventry."*

63. Obviously the vaguer the clause sought to be implied the less likely it is that such a clause will be capable of being implied. However, a clause that imports some descriptive, rather than a definitional, test and which requires the weighing of various factors will not on that account alone automatically be incapable of being implied. In my judgment, the "within a reasonable time" test is sufficiently clear and certain that it will not fail to be implied on the grounds of vagueness or uncertainty and that is demonstrated by the principle and authorities set out in Sir Kim Lewison's work to which I have already referred.

64. A further point has arisen which is when the obligation to market and sell arose. In a sense, the development being complete, the point is to some extent academic but it is part and parcel of the argument about lack of certainty as to what clause is being sought to be implied. In my judgment, there is a clear answer to this: which is that the obligation should only arise when both the Option has been exercised and planning permission sufficient to enable the Development to proceed has been obtained. In some cases marketing and even sales "off plan" are common. Whether or not that is appropriate in the case of this particular development would be dealt with by the fact that the obligation is only to market and then sell in each case within a time span that is "reasonable".

65. A still further point has arisen which is whether the obligation is one to sell with vacant possession. I heard no real argument on this issue and would decline to determine it at this stage. I anticipate that it will be in both parties' interests to allow the current tenancy of any house to come to an end or to be determined, to the extent it can be, prior to selling (though not necessarily prior to marketing for sale). Further, it is unlikely (at its lowest) that Mr Biden can sell any house that he occupies to himself at a depressed price because of being the occupier. The point may be wholly academic. I therefore leave this issue over. The issue maty arise as well in the context of what a reasonable time period is.

Conclusion

66. In my judgment, a clause falls to be implied into the Option Agreement to the effect that the Buyer is under an obligation to market and sell each house constructed as part of the Development within a reasonable time of the Option having been exercised and the planning permission having been obtained. Such a clause is one that is necessary as a matter of business efficacy and without it the Option Agreement lacks practical or commercial coherence. Furthermore, I consider that the clause is so obvious that it goes without saying.

67. That leaves the question of remedy. It is not suggested that damages are an adequate remedy; nor is it suggested that in principle it would be wrong to order specific performance. The resistance to any sale makes such an order prima facie appropriate. The only objection to an order for specific performance is, submits Mr Duckworth, that I cannot now precisely lay down the detail of how specific performance can take place. It seems to me that the answer to this is the well-established practice of the trial Judge making a decree for specific performance and then adjourning the working out of the order to the Master. The Master can then give direction as to evidence and the parties can focus on the detail of each of the eight houses concerned. Obviously the reasonable time for selling each house may vary as between different houses. Accordingly, I propose to make an order for specific performance but then to adjourn the working out of that order to the Master and thus adjourn the matter to him for a case management conference in the first instance.

68. The parties have agreed that time is needed to consider this judgment and to determine the precise form of order that I should make. I therefore make an order in the meantime (which largely reflects agreement between the parties) that the question of the terms of the Order dealing with all matters consequential on the judgment is adjourned to a further hearing to be held by telephone on or after 15 September 2017 with a time estimate of 30 minutes; dates of availability are to be lodged with Leeds Combined Court Centre, District Registry Judges Listing by 4pm on 11 August 2017; not less than two clear days before the said telephone hearing the parties should lodge (1) an agreed document setting out those parts of the proposed order that are agreed and where agreement has not been possible, the proposed alternatives put before the Court; (2) skeleton arguments and (3) a combined bundle of any authorities; in the event that the parties are in the meantime able to agree the terms of an order then as soon as possible thereafter the parties should lodge a copy of the same with Leeds Combined Court Centre AND the Rolls Building (Chancery listing) as soon as possible and notify the Court that the said telephone hearing is no longer necessary. Finally, the time for filing a Notice of Appeal is extended until 21 days after the sealing of any order giving effect to this judgment either as agreed or as determined following such telephone hearing as referred to above.