Neutral Citation Number: [2015] EWHC 2287 (Ch)

Case No: HC-2013-000349

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 September 2015

Before :

EDWARD MURRAY
(sitting as a Deputy Judge of the Chancery Division)

Between :

BURROWS INVESTMENTS LIMITED	**Claimant**
- and -	
WARD HOMES LIMITED	**Defendant**

Mr Oliver Radley-Gardner (instructed by **Greene & Greene**) for the **Claimant**
Mr John McGhee QC (instructed by **Osborne Clarke**) for the **Defendant**

Hearing dates: 15 and 16 April 2015

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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EDWARD MURRAY
(sitting as a Deputy Judge of the Chancery Division)

Edward Murray (sitting as a Deputy Judge of the Chancery Division) :

1. This is the trial of the claim of the claimant, Burrows Investments Limited ("Burrows"), for damages on a negotiating basis from the defendant, Ward Homes Limited ("Ward"), for breach of a restriction in a contract between them dated 13 February 2007 (the "Sale Agreement") for the sale of freehold land at White Sand, Scotts Acre, Camber, East Sussex.

2. Burrows is a property investment company incorporated in Jersey. Ward is a property development company incorporated in England and a member of the Barratt Homes group. Burrows owned a site at Camber in East Sussex in respect of which it had received planning permission for the development of residential units. It commenced construction on part of the site and sold the remainder of the site (referred to in the Sale Agreement by the defined term "Property") to Ward under the Sale Agreement, subject, among other things, to a covenant under clause 4.9 of the Sale Agreement given by Ward in favour of Burrows that it would not make any disposal of the whole or any part of the Property without satisfying certain conditions, unless the disposal fell within a permitted exception.

3. In a nutshell, Burrows says that Ward made a disposal of part of the Property, comprised of five residential units, to AmicusHorizon Limited, a private registered provider of social housing, without complying with the conditions and without the disposal falling within a permitted exception. Burrows says that Ward should therefore have sought its consent to the disposal, failing which it claims damages on a negotiating basis. Ward says that the disposal did fall within a permitted exception under the Sale Agreement or, if that is not right, then Burrows is not entitled to damages on a negotiating basis, in which case its damages are nominal. If that is not right, the parties disagree on the factual basis for determining damages on a negotiating basis and also on the correct measure for this purpose.

The issues

4. Accordingly, three issues potentially arise for determination:

   i) Did the disposal by Ward to AmicusHorizon fall within a permitted exception to the restriction on disposals in clause 4.9 of the Sale Agreement?

   ii) If not, is Burrows entitled to damages on a negotiating basis?

   iii) If so, what are those damages in this case?

5. The first issue turns on the correct construction of the Sale Agreement, in particular, clause 4.9 and certain defined terms. The second issue is principally a matter of law, in relation to which I have been referred, in particular, to the decision of Mr Justice Brightman in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch). The third issue turns on expert valuation evidence, as well as the principles applying to calculation of damages on a negotiating basis.

6. Burrows issued these proceedings on 18 July 2015 as a claim under CPR Part 8, but by order made by Deputy Master Bartlett on 22 May 2014 the claim was ordered to be treated as a claim under CPR Part 7.

Background

7. Burrows owned a site at Camber Sands in East Sussex, in relation to which it had received planning permission for the development of 178 residential units on the site. Burrows began construction of 56 units on part of the site and in 2007 sold the remainder, constituting the Property, to Ward under the Sale Agreement for £12,420,512 together with the benefit of an overage payment provision in clause 4 of the Sale Agreement, entitling Burrows to 29.6443 per cent of the amount, if any, by which the proceeds achieved by Ward on sales of residential units exceeded £285 per square foot by reference to the gross internal area of the residential units in the development on the site constituting the Property including any related garage, carport or other space for accommodating a vehicle.

8. The original planning permission for the Property allowed for the construction of 62 units, of which 27 units had been built when Ward decided to seek new planning permission, as permitted by the Sale Agreement, in relation to phases 5 to 7 of the development. The new planning permission was granted by Rother District Council on 15 March 2012, subject, among other things, to Ward's entering into an agreement under section 106 of the Town and Country Planning Act 1990 with Rother District Council, which it did on 29 February 2012 (the "Section 106 Agreement").

9. There were a number of differences between the original scheme and the revised scheme, one of the principal differences being that while a further 35 units could have been constructed under the original scheme, the revised scheme provided for a further 48 units, each on average smaller than contemplated under the original scheme. It is common ground between the parties that smaller units were more saleable at that time in that location. The design of the units was also changed.

Clause 4 of the Sale Agreement and related definitions

10. As I have already mentioned, clause 4 of the Sale Agreement provided for an overage payment from Ward to Burrows. This clause contained the restriction in clause 4.9, which is at the heart of this matter. It is not in dispute that, in the event, no overage payment became due to Burrows under clause 4.

11. Broadly speaking, the overage payment provision worked as follows. Under clause 4.1, Ward was to give notice to Burrows of the exchange of contracts in relation to the disposal of the third to last residential unit to a residential buyer. (In clause 4.1, the terms "Buyer" and "Seller" are reversed, but it was not in dispute that this was simply a drafting error.) On completion of that disposal, Ward was required under clause 4.2 to make a payment on account, calculated on the same basis as already described in paragraph 7 above, but excluding the gross internal area of the two residential units remaining to be sold. Clauses 4.3 to 4.5 dealt with the mechanics of calculation of the overage

payment and referred to clause 5 for determination of any related dispute. Clauses 4.6 and 4.7 provided for an adjusting payment to be made by Ward to Burrows or vice versa, according to whether the overage payment on account exceeded or fell short of the final overage payment amount. Clause 4.8 provided for quarterly sales reporting by Ward to Burrows.

12. Clause 4.9 provided in full as follows:

> "4.9 The Buyer [Ward] covenants with the Seller [Burrows] not to make any Disposal of the Property or part of it other than a Permitted Disposal at any time during the Overage Period without:-
>
> 4.9.1 first procuring that the person to whom the Disposal is made has executed a Deed of Covenant and that Deed of Covenant is delivered to the Seller; or
>
> 4.9.2 in the event that the Disposal is of the third from last or second from last Market Unit on the Residential Development constructed and to be Disposed of making the Payment on Account (if any);
>
> 4.9.3 in the event that the Disposal is of the last Market Unit on the Residential Development constructed and to be Disposed of making the payment of the sum due under Clause 4.6 (if any)."

13. Clause 4.9 contained the following terms, which are defined in clause 1.1: "Property"; "Disposal" and "Disposed"; "Market Unit"; "Residential Development"; "Overage Period"; "Deed of Covenant"; and "Permitted Disposal". "Property" was defined to mean the freehold property at White Sand, Camber, East Sussex transferred by Burrows to Ward under the Sale Agreement. "Disposal" and "Disposed" referred to the transfer or lease of the whole or any part of the Property. "Market Unit" was defined to mean a residential unit including space for vehicle accommodation, and "Residential Development" was defined to mean the residential development to be constructed by Ward on the Property, either under the original planning permission or under a new planning permission. "Overage Period" was defined to mean the period from completion under the Sale Agreement until the disposal of the last residential unit.

14. The term "Deed of Covenant" was defined in clause 1.1 as follows:

> "**Deed of Covenant**: a deed of covenant with the Seller containing covenants in the same terms as those given by the Buyer in clauses 4.1, 4.2, 4.6, 4.8 and 4.9 and clauses 3.3 and 3.4 (where applicable) of this contract with such minor modifications as are approved by the Seller (such approval not to be unreasonably withheld or delayed);"

15. I have already described clauses 4.1, 4.2, 4.6, 4.8 and 4.9. Clause 3.3 referred to Ward's obligation to make an additional payment to Burrows in circumstances not relevant for present purposes, and clause 3.4 provided for Ward's obligation to include clauses 3.3 and 3.4 in the Deed of Covenant.

16. The term "Permitted Disposal" was defined in clause 1.1 as follows:

> "**Permitted Disposal**: means any of the following:
>
> (a) a Residential Disposal save for a Residential Disposal of one of the last three Market Units on the Residential Development constructed or to be constructed and to be Disposed of; or
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> (b) the grant of any lease over the whole or any part of the Property at an open market rent without taking a premium; or
>
> (c) the transfer/dedication/lease of land for the site of an electricity sub-station gas governor kiosk sewage pumping station and the like or for roads footpaths public open space or other social/community purposes; or
>
> (d) a Disposal of the common parts of a residential scheme to a management company managing a residential scheme[; or]
>
> (e) the grant of Security over the whole or any part of the Property[; or]
>
> (f) any disposition of the types referred to [in] Sections 27(2)(d) or (e) of the Land Registration Act 2002[.]"

17. The term "Residential Disposal", used in sub—clause (a) of the definition of "Permitted Disposal", was defined in clause 1.1 as follows:

> "**Residential Disposal**: a disposal by the Buyer or the Seller of one or more individual Market Units (whether to an individual private purchaser or a third party investor) in the open market at arm's length by way of the sale of the freehold or long leasehold estate in such Market Unit or Market Units;"

18. As for the remainder of clause 4:

    i) clause 4.10 provided that Ward would, in effect, be released from its obligations to make an additional payment under clause 3.3 and, critically for present purposes, to make an overage payment under clause 4 upon delivery of the Deed of Covenant to Burrows in compliance with clause 4.9;

ii) clause 4.11 provided that Ward should apply to the Land Registry to register a restriction against the Property conforming to Form L of Schedule 4 to the Land Registration Rules 2003 to the effect that no disposition of the registered estate (other than a charge) was to be registered without a certificate signed on behalf of Ward or its conveyancer that the provisions of clause 4.9 of the Sale Agreement had been complied with; and

iii) clause 4.12 provided for the restriction referred to in clause 4.11 to be withdrawn once Ward's overage payment obligation, if any, had been discharged.

The transaction between Ward and AmicusHorizon

19. Under the Section 106 Agreement, Ward was required to make provision for five units of affordable housing to one of a number of nominated registered social landlords listed in Schedule 1 to the Section 106 Agreement. By virtue of section 80 of the Housing and Regeneration Act 2008, registered social landlords that are not local authorities are now known formally as private registered providers of social housing, but are informally often still referred to as registered social landlords. For convenience and consistency with the terminology of the Sale Agreement, I use the latter term in this judgment.

20. The Section 106 Agreement also prevented the occupation of more than 22 residential units under the revised scheme before complying with the obligation to provide the affordable housing units. Ward selected AmicusHorizon and began negotiations in relation to the transfer of five residential units to AmicusHorizon to be used as affordable housing.

21. Initially, Ward apparently took the view that a transfer of five residential units to AmicusHorizon was not a Permitted Disposal under the Sale Agreement. In e-mail correspondence during the first half of March 2012 between Osborne Clarke as solicitors for Ward and Batchelors Solicitors as solicitors for AmicusHorizon, Ward took the position that AmicusHorizon would need to provide a Deed of Covenant, but, when this was resisted by AmicusHorizon, Ward offered a deed of indemnity to cover any liabilities that AmicusHorizon would incur under the Deed of Covenant. AmicusHorizon rejected this approach and indicated that Ward should obtain Burrows' confirmation that the proposed transaction was exempt or otherwise its approval by way of variation of the Sale Agreement.

22. On 19 March 2012 Ward began discussions with Mr Richard Williams, a chartered development surveyor and a director of Decimus Ltd, who had acted for Burrows in relation to the Sale Agreement. Mr Williams indicated that he thought something could be worked out. Negotiations then ensued over the next three months between Mr Williams, acting as agent for Burrows, and Mr David Banfield of Ward regarding the terms on which Burrows would be prepared to approve the transaction with AmicusHorizon.

23. No agreement with Burrows was reached prior to the completion on 19 July 2012 of Ward's disposal of five residential units to AmicusHorizon in

compliance with the Section 106 Agreement. On 13 August 2012 Mr Williams, apparently unaware of the completion of the AmicusHorizon transaction, chased Mr Banfield by e-mail for a response to his most recent e-mail to Ward of 27 June 2012. On 14 August 2012 Mr Banfield replied to Mr Williams by e-mail stating that he had spoken to his supervisor at Ward, Mr Geoff Blake, and that "as we failed to come to a compromise he [Mr Blake] has closed the file and so it will be safe for Burrows to do the same".

24. On 5 September 2012 Keystone Law, solicitors for Burrows, wrote to Ward seeking confirmation that AmicusHorizon had entered into or would enter into a Deed of Covenant under clause 4.9 of the Sale Agreement. On 10 September 2012 Osborne Clarke replied on behalf of Ward that the disposal to AmicusHorizon was a "Residential Disposal" under the Sale Agreement and therefore a "Permitted Disposal" under the Sale Agreement and, accordingly, that Ward had given the certificate required by clause 4.11.

25. Burrows took issue with this position, and correspondence ensued between Keystone Law for Burrows and Osborne Clarke for Ward on this and related issues before these proceedings were issued by Burrows on 18 July 2013.

The evidence

26. In relation to evidence adduced by Burrows at the trial, in addition to correspondence and documentary evidence, I had a witness statement dated 10 July 2013 from Ms Magdalene Haywood. Ms Haywood had been an in-house solicitor for Decimus at the time the Sale Agreement was entered into and was at the time of giving her statement a consultant solicitor with Keystone Law and a member of its commercial property team. She gave evidence concerning the negotiations between Ward and Burrows between March and June 2012 seeking a specific approval from Burrows and her subsequent discovery that priority searches had been lodged on behalf of AmicusHorizon by Batchelors Solicitors.

27. I also had a witness statement dated 8 November 2013 from Andrea Nicholls, a solicitor at Greene & Greene, who had conduct of this matter for Burrows while a consultant for Keystone Law and continues to have conduct of the matter at her current firm. Her witness statement sets out her evidence in support of Burrows' contention that Ward failed to comply with the Practice Direction on Pre-Action Conduct.

28. I also had evidence from Mr Williams in his two witness statements made in April and September 2013, respectively, concerning the circumstances of the negotiations of the Sale Agreement, his "watching brief" (his words) over the development at White Sand and regarding his negotiations on behalf of Burrows with Ward starting in March 2012 and related issues. Mr Williams had advised Burrows on the acquisition and development of the larger site of which the Property forms part. At trial he also gave evidence regarding other residential developments in the area.

29. Mr Williams was asked in cross-examination by Mr John McGhee QC on behalf of Ward whether he was aware of OPDM Circular 05/2005 (Planning

Obligations) dated 18 July 2005 and, in particular, paras B12-B14, which indicated a change of policy in favour of requiring on—site provision of social housing as part of new approvals for planning permission for residential development schemes. He said that he was aware of the change of policy, but that it was not relevant to Burrows at the time it was published or at the time of the Sale Agreement. Burrows had planning consent dating from 1993 and was in the construction phase by the time of publication of the OPDM Circular. He was asked whether he was aware that Rother District Council had aligned its own policy with the OPDM Circular in the Rother District Local Plan adopted in July 2006, as indicated by para 6.12 of that document. He said that he would have assumed that. He also agreed that he was aware in general terms of Planning Policy Statement 3 (PPS3): Housing issued by the Department of Communities and Local Government in June 2011, which included reference in the last bullet point under para 29 to the presumption in favour of on-site provision of affordable housing. Mr Williams struck me as an honest and reasonable witness.

30. In relation to evidence adduced by Ward at the trial, in addition to correspondence and documentary evidence, I had four witness statements from Mr Mark Bailey, Managing Director of Ward, dated, respectively, 20 August 2013, 20 January 2014, 15 May 2014 and 10 April 2015. His witness statement principally concerned the negotiations with AmicusHorizon, the related discussions with Burrows to obtain its consent under the Sale Agreement to that transaction and, in his fourth witness statement, the basis for the costs figures provided to Mr Mark Flemington, Ward's expert witness in relation to valuation, and revised sales figures, confirming, among other things, that the last plot on the revised scheme was sold in July 2014.

31. Mr Bailey had joined Ward as Managing Director on 1 March 2012, just two weeks before planning permission by Rother District Council for the revised scheme. Mr Ward was cross-examined in some detail by Mr Radley-Gardner as counsel for Burrows regarding a number of issues. The broad themes were: the personnel and process leading to Ward's decision to apply for planning permission for the revised scheme; the motivation for the revised scheme; the disclosure by Ward of information regarding projected and actual costs of the revised scheme; the Section 106 Agreement, the negotiations with AmicusHorizon regarding the affordable housing units and AmicusHorizon's request for an indemnity in relation to Ward's obligations under clause 4.9; Ward's apparent original position that it required Burrows' consent to the AmicusHorizon transaction and the related discussions with Burrows (through Mr Williams), its change of position based on legal advice and its decision not to waive privilege in relation to that legal advice.

32. Mr Bailey had a tendency in giving his evidence to minimise his own involvement in the matters regarding which he was being questioned, and at times he seemed defensive and to be choosing his words carefully. Subject to these minor observations, he appeared to me to be an honest and reasonable witness.

33. Mr John Reed also gave evidence in his witness statement dated 15 May 2014. Mr Reed has been the Construction Director at Ward since 26 October 2008 and a member of the Board of Directors of Ward for most of the period of Ward's ownership of the Property. He gave evidence on the Board's decision to apply for revised planning permission. During cross-examination, he echoed the position of Mr Bailey that the principal driver for applying for the new planning permission was to increase saleability of the residential units in the scheme and therefore improve cash flow, rather than to improve the profitability of the scheme. Mr Reed outlined his own role in relation to the execution of the revised scheme, and he was asked about the costs information relating to the construction of the revised scheme. Mr Reed also struck me as an honest and reasonable witness.

34. I had a witness statement from Mr Banfield dated 19 May 2014. He had been Ward's Senior Land and Planning Manager and Strategic Land Director from 2001 to 2012 and so was involved in the Sale Agreement and later, as I have already noted, in the inconclusive negotiations with Mr Williams at the time of the transaction with AmicusHorizon. His evidence concerned his involvement in the discussions with Mr Williams in May to June 2012, to which I have already referred. Among other things, he stated that he "was a party to these communications more as a post box for Geoff Blake. He was leading the discussions with the Claimant." His witness statement is consistent with Ward's interpretation of the correspondence between the parties, but otherwise does not add anything material to the issues I am required to decide.

35. Finally, each party provided expert evidence on the valuation of phases 5 to 7 of the development at White Sand, namely, the part in respect of which Ward sought and obtained new planning permission from Rother District Council, for the purpose of determining the third issue referred to in para 4 above. The experts were each instructed to provide evidence of the valuation as at 18 July 2012, the day before completion of the agreement between Ward and AmicusHorizon in relation to the five units of affordable housing, of the original scheme, which provided for 35 residential units and the revised scheme covered by the new planning permission, which provided for an additional 13 residential units for a total of 48 units. The five affordable housing units were included in total of 48 units in the revised scheme.

36. At the instruction of Burrows, Mr Mark Linington MRICS, a chartered surveyor, RICS registered valuer and a director of RPC Land and New Homes, prepared a report dated 12 June 2014 and a supplemental report 14 April 2015. At the instruction of Ward, Mr Mark Flemington MRICS FAAV, a director of Savills UK Limited, prepared a report dated 26 June 2014, a supplemental report dated 2 March 2015 and a second supplemental report dated 7 March 2015. I also had the benefit of an agreed statement of points of agreement and disagreement between the experts dated 14 August 2014.

37. At the trial, the experts gave their evidence concurrently in accordance with the arrangements set out in Practice Direction PD35.11 (Concurrent expert evidence). Each expert was clearly appropriately qualified and had co-operated appropriately prior to trial, meeting to discuss their areas of

agreement and disagreement, and producing the statement to which I have referred. Each expert gave his evidence in a measured and professional manner, making concessions, where appropriate. Each struck me as honest and reasonable.

Was the disposal to AmicusHorizon a Permitted Disposal under the Sale Agreement?

38. The first issue, referred to in para 4 above, is whether the disposal by Ward to AmicusHorizon of five residential units as affordable housing fell within a permitted exception to the restriction on disposals in clause 4.9 of the Sale Agreement. As I have already noted, this issue turns on the correct construction of clause 4.9 and related definitions in clause 1.1.

39. The law applicable to the correct construction of commercial contracts is well known and principally set out in a number of leading cases, including in the speeches of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, [1998] 1 BCLC 493 (HL) and in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (HL), as further clarified or developed in more recent decisions of the Supreme Court, including *Re Sigma Finance Corp* [2010] BCC 40 (SC), *Rainy Sky SA v Kookmin Bank* [2011] WLR 2900 (SC) and *Arnold v Britton* [2015] UKSC 36, the last of which was handed down after the trial of this matter, but does not, in my view, indicate any change in the law that applies in this case. The parties do not dispute the relevant law applicable to construction of commercial contracts, but they differ in the application of those principles to the relevant provisions of the Sale Agreement.

40. Mr Radley-Gardner for Burrows made much in his submissions of Ward's having apparently initially taken the view that its disposal of five residential units to AmicusHorizon did not fall within a permitted exception to the restriction in clause 4.9. In an e-mail from Mr Blake to Mr Williams dated 22 March 2012 with the subject heading "Land at White Sand, Camber", Mr Blake put the matter as follows:

> "I refer to your telephone conversation with my colleague, David Banfield, earlier this week in respect of the above development. As I think David outlined to you, we recently secured a revised planning permission over parts of land area phase 5-7 improving product choice and mix to appeal to an ever changing market place. This approval however obligates us to the delivery of five on site affordable housing units. We have secured a registered provider to acquire those units, unfortunately the 2007 contract did not contemplate the sale of affordable housing units.
>
> Obviously Burrows Investments still maintains the benefit of a restriction on our title to protect their future overage payment. The original 2007 contract includes a list of 'Permitted Disposals' and in the event of such a disposal, the overage is not passed on to the incoming purchaser but instead remains

> with Ward. Open market residential sales are clearly within the definition of 'Permitted Disposals' but disposals of affordable housing were not contemplated at the time of Ward's acquisition and therefore there is no specific category of 'Permitted Disposal' to cover this.
>
> What we are now seeking is a side letter to the 2007 agreement to vary that agreement and add to the definition of 'Permitted Disposal' any disposal of affordable housing either to a registered provider or to an occupier of that affordable housing. I believe this would have been the intention had affordable housing been contemplated on this site in 2007 – ie. [t]here is no reason why affordable units should be treated any differently to open market ones in respect of passing on the overage.
>
> I would of course be grateful if you could raise this matter with your client, Burrows Investments, in seeking their views in providing for such a side letter in regularising the provisions currently incorporated within the 2007 contract."

41. As I have already noted, in exchanges between solicitors for Burrows and Ward in September 2012 and subsequently, Ward took the position that the disposal to AmicusHorizon was a "Residential Disposal" and confirmed to Burrows that the certificate required by clause 4.11 had been given in relation to it. Osborne Clarke gave the relevant certificate to the Land Registry on 19 July 2012, the date of completion of the transaction with AmicusHorizon, in relation to each of the five residential units.

42. The purpose of clause 4.9 is, of course, to protect Burrows' right to receive an overage payment calculated by reference to sales to residential buyers. If Ward were to have sold the whole or part of the Property to another developer, the price obtained by Ward per residential unit would, other than in exceptional circumstances, be lower than the price that would be obtained selling each relevant unit to a residential buyer. For this reason, such a sale is prohibited by clause 4.9 unless the purchaser agrees to assume the entire overage obligation by giving a Deed of Covenant, even if the sale is only of part of the Property.

43. Mr McGhee for Ward submitted that the transaction with AmicusHorizon was a Permitted Disposal by virtue of being a Residential Disposal within clause (a) of the definition of "Permitted Disposal". It was a Residential Disposal because it was not a disposal to another developer but, in effect, a disposal to a residential end-user (my words).

44. Mr Radley-Gardner raised two objections to this. His first objection was that to be within the definition of "Residential Disposal", the purchaser must fall within the words "(whether to an individual private purchaser or a third party investor)". Mr McGhee had two responses to this:

i) AmicusHorizon was capable of being characterised as either an individual private purchaser or a third party investor. In the former case, "individual" did not necessarily mean "private individual". AmicusHorizon is an individual private company and not a government-owned entity. In the latter case, AmicusHorizon was buying each unit to let it to a private individual or individuals eligible for social housing, that is, as a form of social investment (my words). In other words, it was buying as a third party investor.

ii) The words "(whether to an individual private purchaser or a third party investor)" are not intended to be exhaustive but merely illustrative.

45. Mr Radley-Gardner's second objection was that the AmicusHorizon transaction could not be characterised as a transaction "in the open market at arm's length". The "open market" means the general market for sales of freeholds or long leaseholds to residential buyers. In the case of the AmicusHorizon, Ward is constrained to sell the five units to a single purchaser, being a registered social landlord approved by Rother District Council at a price that is necessarily constrained in order to meet the social goal of the provision of affordable housing. For the same reason, the sale to AmicusHorizon cannot be characterised as "at arm's length".

46. Mr McGhee responded to the second objection as follows:

i) The fact that a sale is aimed at a limited group of potential purchasers does not mean that it is not a sale in the "open market". The group of registered social landlords is the market for the purposes of compliance with the Section 106 Agreement. Schedule 1 to that Agreement not only listed ten registered social landlords but also included the words "or such other Registered Social Landlord as may be approved by the District Council". This means that the market is, in effect, all registered social landlords, given that the condition of approval by Rother District Council is required also of a registered social landlord selected from the list in Schedule 1. In support of this point, Mr McGhee referred me to the speech of Lord Morris of Borth-y-Gest in *Lynall v IRC* [1972] AC 680 (HL) at 699A. Their Lordships in that case were required to determine the meaning of the words "sold in the open market" in section 7(5) of the Finance Act 1894. Given the factual background of that case and the fact that it concerns statutory rather than contractual interpretation, I approach that authority with some caution as far as its application to this case is concerned. I am required to consider what a reasonable person would have understood the words "in the open market" to have meant when read in the Sale Agreement in their contractual context and with knowledge of the relevant background facts reasonably available to the parties at the time the contract was entered into. I will revert to this point in due course.

ii) The words "at arm's length" simply require the transaction between Ward and AmicusHorizon to have been between unconnected parties.

47. Mr McGhee submitted that the AmicusHorizon transaction was also a Permitted Disposal with clause (c) of the definition, the text of which I have set out in paragraph 16 above. He submitted that the transfer of the five residential units to AmicusHorizon constituted a "transfer/dedication/lease of land for … social/community purposes". It is clear, looking at the reference to "transfer/dedication/lease" that the oblique strokes in that phrase and, by analogy, in the phrase "social/community" should be understood as indicating non-exclusive alternatives. More importantly, it is clear that the provision of affordable housing under the terms required by Rother District Council serves both a social and a community purpose.

48. Mr Radley-Gardner's response to this submission was that the term "social/community purposes" must be construed by reference to the rest of the clause, which refers to recreational facilities and infrastructure ancillary to the residential use of the Property. The phrase "social/community purposes" was never understood by the parties to refer to purposes "for the benefit of society at large". This is supported by the fact that Ward itself relied on clause (a) rather than clause (c) in giving its certifications under clause 4.11 to the Land Registry on 19 July 2012. Its argument that the AmicusHorizon transaction is a Permitted Disposal within clause (c) appears to have been an afterthought, arising during the course of these proceedings.

49. At trial the parties appeared to agree, although perhaps for different reasons and with differing shades of emphasis, that it would not have made commercial sense for AmicusHorizon to agree to assume the entire overage payment obligation by giving the Deed of Covenant, notwithstanding Ward's attempt to persuade AmicusHorizon to do so, subject to a counter-indemnity, during the negotiations prior to the signing of their agreement on 23 March 2012. AmicusHorizon had, quite rightly, held firm on this point.

50. Even with the benefit of a counter-indemnity from Ward, AmicusHorizon would have been subject to the sales reporting obligations of clause 4.8 for which it would need to rely on Ward, which underlines the unrealistic nature of the proposition that AmicusHorizon should give the Deed of Covenant. It also seems unlikely that Burrows would have been content, after receipt of the Deed of Covenant from AmicusHorizon, which would have had the effect of discharging Ward entirely from its overage payment obligation, from relying on the presumably limited financial resources of AmicusHorizon. These observations support the view that a disposal of residential units to a registered social landlord could not have been intended to trigger the obligation to provide a Deed of Covenant.

51. It is clear that the parties contemplated the possibility of Ward's applying for a new planning permission, as evidenced by the definitions of "New Planning Permission" and "Residential Development" in clause 1.1. It appears, however, that they did not specifically contemplate the question of whether a disposal of residential units as affordable housing to a registered social landlord should be a Permitted Disposal for purposes of clause 4.9.

52. Mr Williams had conceded during cross-examination, as I have already noted, that he was aware that government policy at the time of entry into the Sale Agreement included a presumption that affordable housing should be provided in-kind and on-site as a condition to planning permission for a residential development. He was also aware in general terms that Rother District Council had by that time reflected that presumption in its Local Plan adopted in July 2006. On the other hand, he noted that Burrows had obtained its original outline planning permission for the site many years before, and by the time of the Sale Agreement satisfying a planning requirement for the provision of affordable housing was not a concern for Burrows.

53. Bearing in mind the purpose of clause 4.9, in my view a reasonable person having all of the background knowledge that would reasonably have been available to Burrows and Ward at the time of entry into the Sale Agreement, including knowledge of the policy presumption in favour of on-site provision of affordable housing units, would have concluded that the disposition of five residential units by Ward to AmicusHorizon was a Permitted Disposal for the purposes of clause 4.9.

54. First, looking at clause 4.9 in context and considering it in the round, it is clear that it is intended to restrict the disposal of the Property to another developer or similar purchaser. Although clause 4.9 applies to "any Disposal of the Property or part of it", the purchaser, if not within a permitted exception, must give a Deed of Covenant assuming the overage payment, sales reporting and related obligations in relation to the development as a whole. The inclusion of the words "or part of it" is intended to ensure that the effect of clause 4.9 cannot be avoided by disposing of, for example, all but one or two units to another developer.

55. It is manifest, therefore, that a disposal of a small number of units to a registered social landlord for affordable housing is not a type of disposal intended to trigger the obligation to provide a Deed of Covenant. Accordingly, it is either a Permitted Disposal or, if not within the scope of that definition, it is falls into a separate category, namely, an otherwise prohibited disposal that cannot realistically be enabled by the giving of a Deed of Covenant.

56. Turning first to clause (a) of the definition of "Permitted Disposal", the AmicusHorizon transaction must constitute a Residential Disposal that is not of one of the last three residential units comprised in the development. Considerably more than three units remained unsold at the time of the AmicusHorizon transaction, so we are only concerned with whether it was a Residential Disposal.

57. In the definition of "Residential Disposal", it seems to me that the words "(whether to an individual private purchaser or a third party investor)" are exhaustive. That is the natural reading. The words "individual private purchaser" do not, to my mind, necessarily mean "private individual purchaser". Accordingly, the private purchaser could be a private company, such as AmicusHorizon. Also, it seems to me that AmicusHorizon is engaged

in a form of investment that is increasingly commonly referred to as social investment. AmicusHorizon is therefore also capable of falling within the words "third party investor".

58. As to whether the AmicusHorizon transaction was carried out in "in the open market at arm's length", although I have already indicated that I believe that the case of *Lynall v IRC* is of limited direct assistance for the reasons I have mentioned, I do think there is force in the argument that when considering what constitutes the "open market", one needs to consider the class of potential purchasers for the specific product. The "open market" for wholesale copper does not include all potential purchasers of copper, including consumers, but only those able to access and operate effectively in the wholesale copper market. So, the fact that the residential units that were offered by Ward as affordable housing units could only be offered to registered social landlords does not prevent the class of registered social landlords from constituting an "open market" for the affordable housing units offered by Ward. This conclusion is not affected, in my view, by the fact that Rother District Council was required to approve the registered social landlord ultimately selected by Ward under the Section 106 Agreement, particularly when one considers that the approval was not to be unreasonably withheld by the Council, as noted in the definition of "Registered Social Landlord" in 2.1.21 of the Sale Agreement, as well as in clause 2.6 of the Sale Agreement, which provided more generally that any required approval by the Council was to be given in writing and not to be unreasonably withheld or delayed.

59. In order for a transaction to be an open market transaction, there would typically need to be some degree of "openness" about the transaction. In the words of Lord Morris in *Lynall v IRC* ([1972] AC 680 at 699B):

> "the market which must be contemplated, whatever its form, must be an 'open' market in which the property is offered for sale to the world at large so that all potential purchasers have an equal opportunity to make an offer as a result of its being openly known what it is being offered for sale. Mere private deals on a confidential basis are not the equivalent of open market transactions."

60. The words "world at large" must be read as qualified by the words "all potential purchasers", as is clear from Lord Morris' discussion earlier in the same passage of his speech. I did not have evidence as to the manner in which the AmicusHorizon transaction came about. I am not, therefore, able to say whether that transaction was a "[m]ere private deal on a confidential basis". It seems to me, however, that the AmicusHorizon transaction is capable of falling within Lord Morris' description of an open market transaction.

61. Nonetheless, there continues to be some force in Mr Radley-Gardner's submission that "open market" was intended to refer to the general market for residential sales, not the specialised market for affordable housing units. He noted that in the Section 106 Agreement itself, the defined term "Open Market Units" is contrasted with the defined term "Affordable Housing Units". While

it is true that the Section 106 Agreement cannot be used as an aid to construction of the Sale Agreement, the cross-reference does provide support for the submission that in ordinary usage the words "open market" suggest the general market for ordinary residential sales.

62. Generally, context will indicate the class of potential purchasers that defines the relevant "open market". In the case of the Sale Agreement, the words "open market" appear in a definition of "Residential Disposal", which clearly covers ordinary residential sales and makes no reference to the more limited and specialised market for affordable housing units. But the broader contractual context is the use of the definition in "Permitted Disposal", which in turn defines the permitted exceptions to the restriction in clause 4.9. I have already expressed my view that clause 4.9 is intended to restrict disposal of the Property to another developer or similar purchaser, not the disposal of a few residential units to a registered social landlord. Accordingly, on a narrow balance, I conclude that the AmicusHorizon transaction is capable of falling within the scope of "open market" transaction as those words are used in the definition of "Residential Disposal".

63. It is clear from the evidence that the negotiation between Ward and AmicusHorizon was conducted at arm's-length and, indeed, that AmicusHorizon successfully (and, in my view, quite correctly) resisted pressure from Ward to agree to give the Deed of Covenant. There was no evidence to suggest to that there was any close connection between Ward and AmicusHorizon.

64. Accordingly, assuming that the AmicusHorizon transaction was not a "private deal on a confidential basis" but a transaction that was open to be done by other registered social landlords, by virtue of its being openly known to other registered social landlords what was being offered by Ward for sale as affordable housing units, then the AmicusHorizon transaction was a Permitted Disposal for purposes of clause 4.9. As I have indicated, however, I was not presented with evidence sufficient for me to make that determination as a finding of fact.

65. Turning to clause (c) of the definition of "Permitted Disposal", it is clear, first of all, that "social/community purposes" means "social or community purposes or both". It is also clear that the provision of affordable housing achieves an important social purpose of substantial benefit to the community. Mr Radley-Gardner submits that I should read those words down by reference to the other words in clause (c), presumably applying the principle of construction *ejusdem generis*.

66. As noted by Mr Justice Devlin in *Chandris v Isbrandtsen-Moller Co* [1951] 1 KB 240 at 244, the rule "cannot be more than a guide to enable the court to arrive at the true meaning of the parties". One needs to look at the relevant words in context and determine on that basis how wide the general words are intended to be. Similarly, Lord Justice Fry in *Earl of Jersey v Neath* (1889) 22 QBD 555 at 566 warned against a mechanical application of the *ejusdem generis* rule, which could have the effect of narrowing the scope of a clause

relative to the true (objective) intent of the parties. Accordingly, I do not find that principle of much assistance in relation to the question I am currently called on to decide and, to be fair, Mr Radley-Gardner did not expressly invoke it in his submissions.

67. Clause (c) falls into two parts, namely, "the transfer/dedication/lease of land for the site of [(i)] an electricity sub-station gas governor kiosk sewage pumping station and the like or [(ii)] for roads footpaths public open space or other social/community purposes". The whole of the clause clearly includes uses of land potentially required to comply with planning obligations, although it is, of course, not limited to such uses.

68. The intention of clause (c) is clear. The clause recognises that some parts of the land comprised in the Property will need to be used for purposes other than the construction of residential units, for example, for the purpose of complying with planning obligations but also, for example, for generally improving the amenities and therefore saleability of the development. To the extent that this land is so used, it is not a disposal of the type restricted by clause 4.9. The provision of affordable housing units to a registered social landlord clearly achieves both social and community purposes.

69. Construing clause (c) against the relevant background facts (including the central government and Rother District Council policy presumption in favour of on-site provision of affordable housing in effect at the time of entry into the Sale Agreement) and in its contractual context (including, as part of that context, the clear purpose of clause 4.9, already discussed), I am of the view that the AmicusHorizon transaction fell within the scope of clause (c) and therefore constituted a Permitted Disposal.

70. A consequence of that conclusion, of course, is that the AmicusHorizon transaction does not fall into that otherwise unnamed separate category, to which I referred in paragraph 55 above, of otherwise prohibited disposals that cannot realistically be enabled by delivery of a Deed of Covenant.

Is Burrows entitled to damages on a negotiating basis?

71. If I am wrong as to my construction of clause 4.9 and related definitions in relation to the AmicusHorizon transaction, then the question arises as to whether Burrows would be entitled to damages for breach by Ward of clause 4.9 and, if so, on what basis. In the event that this matter goes further, it may be helpful to set out my analysis and conclusion on this question, given that full submissions were made by counsel for each of Burrows and Ward on this question.

72. Given that clause 4.9 was designed to protect Ward's overage payment obligation and given that ultimately no overage payment became due (and, indeed, at the time of entry into the AmicusHorizon transaction it appeared unlikely that any such payment would ultimately become due), Burrows suffered no loss by virtue of Ward's purported breach of clause 4.9 and therefore would not be entitled to compensatory damages or only for a nominal sum.

73. Burrows claims, however, damages on a negotiating basis, that is, based on the sum of money that Burrows might reasonably have demanded from Ward for releasing Ward from the restriction of clause 4.9 in relation to the AmicusHorizon transaction. This was the measure of damages formulated by Mr Justice Lightman in *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798 (, and cited with approval by the House of Lords in *Attorney General v Blake* [2001] 1 AC 268 (CA) and the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323. According to *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) at para 14-038, damages on this basis are properly understood as restitutionary, not compensatory, notwithstanding some case law authority to the contrary.

74. Mr Radley-Gardner submitted that this case involves a breach of a "classic negative restriction", namely, a prohibition on alienation save in certain specified categories. The effect of Ward's breach was that it had access to monies to which it would not otherwise have been entitled. This is not a ransom situation. Ward freely entered into the contractual restriction in clause 4.9, which is clear and which it deliberately breached. Burrows was approached for its approval, and then negotiations were broken off without further communication until Mr Williams contacted Ward for an update several weeks after the AmicusHorizon transaction had, unbeknownst to Burrows, been completed. This is an example of a case where breach of a restrictive covenant cannot be adequately remedied by approaching the determination of damages in the manner that would be appropriate for a breach of a positive covenant. Accordingly, the appropriate approach is to determine Burrows' damages on a negotiating basis.

75. Mr McGhee responded to these submissions by distinguishing this case from *Wrotham Park*. It was no part of the parties' intent that clause 4.9 should restrict the type of scheme that Ward could build out. The contractual restriction in clause 4.9 was, in contrast to *Wrotham Park*, not in the nature of a property right, but merely a personal covenant of Ward to protect the overage payment obligation. Mr McGhee noted that it was for this reason that the covenant in clause 4.9 could not be protected by notice on the register, requiring the parties to agree the restriction in clause 4.11 instead.

76. I agree with these submissions of Mr McGhee. The purpose of clause 4.9 was to prevent the sale of the Property to another developer or similar purchaser other than in circumstances where Burrows' right to payment of overage, if any, was protected by a Deed of Covenant. While the parties did, in general terms, contemplate that Ward might wish or need as part of its development of the Property (including under a new planning permission) to transfer, dedicate or lease land for social or community purposes, the parties did not expressly address in the Sale Agreement the sale of affordable housing units by Ward to a registered social landlord. The fact that they did not appear to have addressed their minds specifically to that scenario is, for present purposes, fortuitous. It should not, in my view, entitle Burrows to extract a profit by way of ransom. No legitimate interest or expectation of Burrows was breached by Ward's selling five residential units to AmicusHorizon to satisfy the condition in its new planning permission relating to the provision of

affordable housing. In that sense, this case differs from *Wrotham Park*, the *Experience Hendrix* case and the right to light case, *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167, to which I was also referred by counsel for Burrows.

77. Accordingly, on the assumption, contrary to my conclusion on the first issue, that the AmicusHorizon transaction was not a Permitted Disposal for the purpose of clause 4.9, I do not believe that damages on a negotiating basis would be appropriate or just in this case.

The appropriate measure of damages in this case

78. In light of my conclusions in relation to the first two issues set out in paragraph 4 above, it is not necessary for me to address the third issue relating to the appropriate measure of damages or to make any findings of fact in relation to the valuation evidence.

Conclusion

79. Burrows' claim is dismissed.