



Neutral Citation Number: [2002] EWHC 2113 (Ch)

IN THE HIGH COURT OF JUSTICE

Claim No: HC01-01422

CHANCERY DIVISION

Royal Courts of Justice  
Strand, London WC2A 2LL

Tuesday 22 October 2002

Before:

THE HONOURABLE MR JUSTICE RIMER

BETWEEN:

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MINISTRY OF DEFENCE

Claimant

- and -

(1) COUNTRY AND METROPOLITAN HOMES  
(RISSINGTON) LIMITED

(2) COUNTRY AND METROPOLITAN PLC

Defendants

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Mr Michael Booth QC and Mr Wilson Horne (instructed by Davitt Jones Bould)  
appeared for the Claimant

Mr Matthew Horton QC and Mr Ben Hubble (instructed by Courts & Co) appeared  
for the Defendants

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JUDGMENT

I direct pursuant to CPR PD 39, para. 6, that no official shorthand note shall be  
taken of this Judgment and that copies of this version as handed down may be  
treated as authentic.

A handwritten signature in black ink, appearing to read "CPR" followed by a flourish.

The Honourable Mr Justice Rimer

## JUDGMENT

### MR JUSTICE RIMER:

#### Introduction

1. The claimant is the Ministry of Defence (“the MoD”). Mr Michael Booth QC and Mr Wilson Home represented it. The defendants are Country & Metropolitan Homes (Rissington) Limited (“CMH”) and Country & Metropolitan Homes PLC (“PLC”). CMH is a wholly-owned subsidiary of PLC. Mr Matthew Horton QC and Mr Ben Hubble represented both defendants.

2. On 14 August 1996, the MoD and PLC entered into a written agreement for the sale by the MoD to PLC for £8m of 70 hectares of land at RAF Little Rissington, Gloucestershire (“the site”). The sale was completed by two transfers dated 10 October 1996. Part of the site (“the BPT land”) was transferred at the direction of PLC to the Bradford Property Trust (“BPT”), a sub-purchaser of PLC. The remainder of the site (“the CMH land”) was transferred at the direction of PLC to CMH, with PLC joining in the transfer as a guarantor of CMH’s obligations. The MoD’s claim against CMH is for payment said to be due under that transfer, and PLC is sued as guarantor. Having drawn this distinction in the roles of the defendants, there is no further need to distinguish between them and subsequent references to CMH will mean either the CMH group, or the relevant group company in the context.

3. The site formed part of a former RAF base which was closed in June 1994. It was sold by the MoD and purchased by CMH with a view to its residential and commercial development for civilian purposes. It comprised 249 houses in varying conditions (some requiring refurbishment), an officers’ mess, barracks, hangars and other buildings. It was first marketed in 1995, by which time DTZ Debenham Thorpe (now DTZ Debenham Tie Leung) (“DTZ”) had prepared for the MoD, in consultation with three local planning authorities, a “planning brief” for it. A primary objective of the brief was “to provide a framework for the civilian use of the base by a combination of the renovation of existing buildings, the replacement of some buildings and, where appropriate, limited new development to create a small rural community of not more than 300 dwellings.” The brief also identified a need for “a local/neighbourhood shopping facility to support the community, probably comprising a grouping of small unit shops.”

4. The planning brief did not constitute a planning permission for the development of the site in any particular way, but it was common ground between the MoD and CMH that in practice planning permission would, when sought, be granted for a residential development of it by the creation of at least 300 houses. It was also common ground that the MoD and CMH shared the expectation that planning permission could probably be obtained for a greater number of houses on the site.

5. The issue in the action is whether or not CMH has incurred a liability under the October 1996 transfer to pay “overage” to the MoD in consequence of a planning permission for the development of part of the CMH land, a permission which CMH both obtained and implemented on 17 July 1998. The MoD’s claim is for £819,926.88 plus contractual interest, a total sum now exceeding £1m. Its case is that the claim is straightforward, and that it is not necessary (or legitimate) for its determination to

look beyond the terms of the October 1996 transfer and the undisputed events that have since happened. By contrast, CMH's case is that, upon the true construction of the transfer and in those events, no overage is due. If CMH is wrong on this, then it says that the transfer failed by a common mistake of the parties to include a provision showing that, in the events that have happened, no overage is due; and it asks for an order for the rectification of the transfer. The MoD disputes that there was any such mistake.

6. I have, therefore, had arguments on construction and rectification. The rectification case necessarily involved a trawl through the negotiations leading to the signing of the contract for the sale of the site on 14 August 1996, which fixed the form of the October 1996 transfer. Whilst such evidence is admissible in a rectification claim, it is inadmissible on arguments on construction (see *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896, at 913, per Lord Hoffmann), and the rectification claim anyway only arises if CMH is wrong on construction. It follows that I must deal first with the construction issues, and in doing so I must put out of my mind the evidence as to the course of the negotiations.

#### **A. The construction issues: the transfer dated 10 October 1996**

7. The October 1996 transfer transferred to CMH "the land shown edged pink on the plan No. 1 annexed hereto ... excluding therefrom the land transferred by the BPT Transfer". The pink land comprised what I have called "the site". The land transferred to CMH ("the CMH land") formed part of it, and the remainder comprised the BPT land, which was transferred to BPT, CMH's sub-purchaser, on the same day. The CMH land was transferred in consideration of the payment of £1.457m, the balance of the £8m contract price being paid to the MoD by BPT.

8. Clause 5 of the transfer deals with the overage liability, that is the circumstances in which CMH would be liable to pay the MoD what was in effect a deferred consideration over and above the £8m which it and BPT together paid for the site. Clause 5 is drafted with reference to Plan No. 2 (although clause 5.1.9 refers erroneously to Plan No.1, but nothing turns on that). Clause 5.2 imposes the basic overage obligation. Translating and reducing it to what is sufficient for present purposes, it provides:

"[CMH] hereby covenants with [the MoD] that if [within 10 years of the transfer] *Planning Permission* is granted and is (at any time before the end of the period of 15 years from the date of this Transfer) either *acted upon* or before being acted upon the land in benefit is either sold by way of freehold sale or sold by way of the grant of a Lease otherwise than at a rack rent ... [CMH] shall pay to [the MoD] an *Overage Payment* in accordance with the terms of this Clause 5." (My emphasis of key words)

9. Clause 5.1.10 defines "Planning Permission" as any outline or detailed planning permission granted during the 10 year period "for the development of the *Overage Land* or any part or parts thereof" (my emphasis again) other than certain excepted types of permission. Permission for residential development is not within the exceptions, and the permission that CMH obtained which has led to this claim is for residential development. That permission was obtained on 17 July 1998.

10. Clause 5.3 defines when a planning permission is “acted upon” for the purposes of clause 5.2. CMH disputes that the planning permission it obtained is for the development of land which ought properly to be regarded as “Overage Land”, but if it is wrong on that there is no dispute that the permission was “acted upon” on 17 July 1998 within the meaning of clause 5.3.

11. “Overage Land” is defined as comprising the parts of the site “shown edged blue and edged blue hatched red on Plan No. 1.” The relevant plan (in fact, Plan No. 2) shows the whole site, and is in the nature of a layout plan for its proposed development, identifying (inter alia) what is described as “existing housing” and “proposed housing”, as well as areas apparently designated for open space, for community facilities and for mixed commercial uses. The key on the plan states that there are 212 “existing” houses on the site, and each can be identified on the plan. They are all comprised within the BPT land, and lie towards the northern end of the site. The key also states that there are 85 “proposed” houses, and the site of each can also be similarly identified (in fact, the plan identifies the sites of 88 proposed houses, so bringing the total of existing and proposed houses to 300 rather than 297). In general terms, the area designated for the 88 proposed houses abuts the southern side of the BPT land, and the site of all 88 proposed houses is within the CMH land. The area shown edged blue and hatched red on the plan (which I shall simply call “the hatched land”) is shown as the site for 37 of those 88 houses, and forms part of the overage land. The remaining area edged blue (which I shall call “the blue land”) comprises a further part of the CMH land, and represents the remainder of the overage land. No part of the blue land was designated on the plan as the site of any of the proposed houses, nor of course does it comprise any of the existing houses, which were all within the BPT land.

12. That verbal description will not, by itself, provide a very clear picture of the general layout, but its details do not matter. So far, the scheme of clause 5 is simple. If CMH obtains, and acts upon, a planning permission for the residential development of any part of the overage land as so defined – that is, any part of either the blue land or the hatched land - it becomes liable to make an overage payment to the MoD. Thus, the obtaining, and acting upon, of a permission for the building of the 37 proposed (or any) houses on the hatched land would trigger an overage liability. So would the obtaining, and acting upon, of a permission to develop any part of the blue land. On the other hand, a permission for the development of the remainder of the site (that is, the BPT land and/or of the area of the CMH land designated for the remaining 51 proposed houses, no part of such land being overage land) would, even when acted upon, not trigger any liability for overage.

13. Clause 5.1.8 defines an “Overage Payment” as meaning the sum calculated in accordance with the “Overage Calculation”, which is itself explained in Clause 5.1.7. It is one half of the sum arrived at after deducting from the “Open Market Value” of the relevant area of land a “Base Value” for it. The open market value is calculated as at the date of the implementation of the planning permission. The “Base Value” is defined by clause 5.1.1 as £30,826.14 per hectare “but this sum shall be automatically increased to £32,750.00 per hectare following demolition of all the buildings on the land shown edged brown on Plan No. 2.”

14. This introduces a gloss on the scheme I have just described. The brown land is part of the CMH land and comprises two island sites within the BPT land. At the date of the transfer there were 37 houses on them, but they are not shown on Plan No. 2: that plan shows both sites as designated as public open space. The brown land is central to the dispute, and the sense of the words just quoted from clause 5.1.1 becomes clearer from clause 5.13.6, which (adapted to reflect my abbreviations) reads:

“IT IS HEREBY AGREED AND DECLARED that following demolition of the buildings on the land shown edged brown on Plan No 2 [the hatched land] shall forthwith be released from the Overage Payments and the parties hereto shall do all necessary acts to complete all documentation as may be necessary to release such land from the Overage Payments.”

15. That clause too is simple enough. As has already been made clear, and as clause 5.13.6 impliedly repeats, the hatched land is part of the overage land. Plan No. 2 shows it as designated for 37 new houses, and – subject only to clause 5.13.6 – the obtaining and implementing of a planning permission for such a development would trigger an overage payment. But Clause 5.13.6 provides that once all the buildings on the brown land have been demolished, the hatched land is “forthwith ... released from the Overage Payments.” So the scheme is that the price of the right to build 37 (or any) overage-free houses on the hatched land is the demolition of the 37 houses on the brown land. There is no dispute that, if such demolition occurs *before* any planning permission in relation to the hatched land is acted upon, then its subsequent implementation will not trigger any overage liability: the hatched land will be overage-free. There is, however, a dispute as to what the position is if the demolition only happens *after* a planning permission in respect of the hatched land has been both obtained and acted upon.

16. I need not refer to much more of clause 5. Clause 5.7 provides for a reference to arbitration of any dispute over the open market value of the overage land. There was such a reference in the present case, although it was made without prejudice to CMH’s claims that no overage is due. As a result of the arbitrator’s award dated 4 May 2000 there is no dispute as to the figures if, contrary to its case, CMH is liable to make an overage payment: the dispute is simply as to liability. Clause 5.8 provides that if any overage payment which has become due is not paid within two months of becoming payable (or, if later, within one month of the written determination of an arbitrator) then interest is payable on it. Clause 5.10 is of some importance and provides that:

“[CMH] hereby charges the Overage Land by way of equitable charge in favour of [the MoD] with payment of all such sums (with interest) as may become due under this Clause 5 from time to time.”

17. Clause 5.4 provides that:

“Upon [CMH] making any Overage Payment hereunder or upon delivery to [the MoD] of a duly executed and stamped deed in accordance with Clause 5.9 hereof [the MoD] shall supply [CMH] with a duly executed form of release of

the land concerned from the charge in Clause 5.10 and such land shall thereafter be free and exempt from any further Overage Payments.”

**The facts relevant to the construction issues**

18. The problem debated in the action has arisen because of two main factors. First, although Plan No. 2 shows the hatched land as an area designated for 37 new houses, the planning permission which CMH obtained and acted upon in July 1998 in respect of the hatched land was for the building of only 26 houses. The reduced number does not itself give rise to any difficulty. What did cause a problem for CMH is that the plot sizes of the houses were greater than had been its original plan, with the result that the development of the hatched land extended beyond its boundaries on to areas of blue land lying on the southern and north-eastern sides of the hatched land (“the overspill areas”). On the face of it – at least as regards the development of the overspill areas – there would seem to be no doubt that an overage liability has arisen, although CMH disputes even that.

19. Secondly, as regards the development of the hatched land itself, that too is expressly designated as overage land, so that, again, any planning permission in relation to it is, if acted upon, potentially liable to give rise to overage. In relation to the hatched land there is, however, the escape route provided by clause 5.13.6, which provides that “following demolition of the buildings on” the brown land, the hatched land will be released from “the Overage Payments”. But the MoD says, although CMH disagrees, that CMH has failed to take advantage of that escape route, so that the hatched land was still overage land when the July 1998 planning permission was acted upon. That is because although CMH had before then demolished 35 of the 37 houses on the brown land, it did not also demolish the last two. It instead converted them into a shop so as to comply with a planning requirement that a village shop should be provided for the local community. It was always foreseen that the provision of such a shop – or perhaps more than one - would be required (see paragraph 3 above), but at the date of the transfer it was not foreseen that the shop would be sited on the brown land, and it was thought that it would be sited elsewhere.

20. I should explain that, although the conversion works involved the carrying out of substantial structural alterations to the two houses and the demolition of at least *part* of them, Mr Horton did not suggest, and I did not understand it to be CMH’s case, that the works were of such a nature or degree as to constitute “demolition” of the houses within the ordinary meaning of that word. I was not referred to the authority, but counsel’s approach to the correct sense of the word “demolition” was in line with the guidance provided by Lord Hope of Craighead in *Shimizu (UK) Ltd. v. Westminster City Council* [1996] 3 PLR 89, where he said, at page 106:

“According to its ordinary meaning, the word ‘demolish’ when used in reference to a building means to pull the building down – in other words to destroy it completely and break it up.”

21. Even so, Mr Horton’s argument is that in the particular context of the October 1996 transfer, the buildings on the brown land should nevertheless be *regarded* as having been demolished prior to the grant and implementation of the July 1998 planning permission. If so, the result would have been (a) an immediate release of the hatched land from any liability to overage, and (b) an increase in the base value per

hectare as provided by clause 5.1.1 (which latter would, on CMH's case, only be relevant to any *future* development giving rise to overage)

22. Before coming to the arguments, I make clear also that there is no suggestion that CMH was *required* to convert the two houses into a shop and flat, and I find that it was not. Mr Foster was the CMH director who was principally concerned with the planning aspects of the development of the CMH land following the completion of the purchase. He accepted in his witness statement, and confirmed in cross-examination, that CMH could instead, had it chosen to do so, have demolished the last two houses and then built the required shop in their place. He opined that it would have been "barmy" to do this, although he also said he did not know about the terms of the demolition condition in clause 5.13.6, to which he gave no consideration in connection with his approach to the planning questions. He agreed in cross-examination that the planning authorities were not taking the stance that the shop had to go on the brown land and nowhere else. It was the local residents who were bringing most pressure for its location on the brown land, and CMH was content to co-operate with them. Mr Wicks (a director of CMH, the group managing director of PLC and the main witness for the defendants) also accepted in cross-examination that the decision to site the shop on the brown land was not imposed on CMH, it was a decision CMH made after consultation with others. Mr Foster also admitted that, had he appreciated that potentially adverse consequences might flow from failure to demolish all 37 houses, he would have discussed the matter with all relevant parties first, but as he did not know about clause 5.13.6 he did not do so. He said that he had no reason to believe that the planning authority would have had any reason to object to the demolition of all the houses and the rebuilding of a shop and flat in their place. Mr Horton was also at pains to explain that in fact no planning permission for the demolition of the houses was required. Had CMH demolished all 37 houses and then built the required shop on the brown land, I consider (as I discuss below) that it would have satisfied the condition and would not have infringed any restriction imposed by the transfer. It preferred, however, to follow the conversion option, for which it obtained planning permission, because it regarded it as a cheaper and less wasteful option. In the short term, it may have been. Mr Wicks accepted ruefully in evidence that, if CMH were to lose this case, that choice will have turned out to be significantly more expensive than the alternative which was open to it.

### **The arguments on construction**

23. Mr Horton advanced a careful argument as to why, on the true construction of the transfer, no overage has become due in respect of the permission obtained in respect of either the hatched land or the overspill areas. He emphasised, and I accept, that the transfer must not be construed in a vacuum and that there is a setting in which it must properly be placed for the purpose of construing it. He referred me to Lord Wilberforce's speech in *Reardon Smith Line Ltd. v. Yngvar Hensen-Tangen* [1976] 1 WLR 989, at 995 to 996 and reminded me of the guidance as to the interpretation of documents given more recently by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 986, at 912 to 913. He referred in particular to Lord Hoffmann's first stated principle, namely that "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." He acknowledged that Lord Hoffmann also pointed out that "The law

excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.”

24. I will not attempt to list comprehensively all the matters to which the “reasonable person” attempting to construe clause 5 could legitimately have regard, but I will refer to what seem to me to be the main ones. He would of course have to put out of his mind anything he might have learnt about the course of negotiations leading up to the execution of the transfer. But he would be entitled to, and should, take into account the physical state of the site as at the date of the transfer, and so would know that the brown land had 37 houses on it in varying states of repair. He would be able to deduce from Plan No. 2 (and would anyway know) that it was common ground that CMH intended to carry out certain developments to the CMH land, including (apparently) the dedication of the brown land as open space and the building of up to 37 houses on the hatched land (overage land) and 51 houses on the non-overage land. He would note the provisions in clause 5 relating to overage, the references in clauses 5.1.1 and 5.13.6 to the demolition of the buildings on the brown land and the condition in the latter clause providing for the release of the hatched land from overage liability. Armed with this information, he would infer that the those two clauses represented a “trade off” between vendor and purchaser – namely, that CMH was to be entitled to carry out an overage-free development of 37 new houses on the hatched land subject to demolishing all 37 houses on the brown land. He would, however, note that there was no *obligation* on CMH either to demolish the buildings on the brown land or to build as many as 37 - or any - houses on the hatched land: it was for CMH to choose how to develop the CMH land (including the hatched land). Importantly, he would also know that no planning permission for any development of the CMH land had yet been obtained and that there was necessarily an uncertainty as to the terms of any permission that might in future be granted. He would know that there could be no certainty that CMH would obtain permission for as many as 37 houses on the hatched land. He would also know that, under the transfer, CMH assumed such planning risks as there were: in particular, if it bought in the expectation that it would be able to build 37 houses on the hatched land, it also assumed the risk that it might not obtain permission enabling it to do so. He would also know that the parties contemplated that a village shop would have to be provided somewhere on the site, and he might also assume that it would ultimately be sited elsewhere than on the brown land; but he could not regard that as a certainty.

25. Mr Horton’s primary argument was that the clause 5.13.6 condition should be regarded as satisfied, with the consequence that the hatched land had been fully released from any potential overage liability by the time the relevant planning permission had been obtained and acted upon. His submission was that as the only buildings on the brown land at the date of the transfer were houses, the reference to “buildings” in clause 5.13.6 must be construed as meaning “houses.” He said it followed that the intention of the clause was for there to be an exchange of existing houses on the brown land for new houses on the hatched land and that the condition of clause 5.13.6 would be satisfied provided that there came a point when none of the buildings on the brown land either was in fact a dwelling or could be used as a dwelling. He said that this condition had been satisfied: 35 of the houses on the brown land had been demolished and the remaining two had been so converted that they were no longer usable as dwellings. He did not accept that his argument was weakened by the fact that the conversion works created not just a village shop, but



also an associated flat for residential occupation, so that part at least of the buildings still standing on the brown land can be and still is used as a dwelling.

26. Persuasive though Mr Horton was, he failed to convince me that there is any substance in his argument that the clause 5.13.6 condition has been satisfied. Whilst a court of construction should always endeavour to arrive at an interpretation of a document which accords with what it perceives to be the intention of the parties, a sound starting point for that exercise is usually a consideration of the language by which the parties have chosen to express that intention. That may not always also be the finishing point, particularly in cases where its ordinary interpretation appears to lead to an absurdity or where, to borrow Lord Hoffmann's words, it appears that "something must have gone wrong with the language, ...". In that type of case it may well be legitimate, indeed necessary, to look beyond the words to the background against which they were used in an endeavour to discern the true intention. In this case, however, I see no grounds for looking for the parties' intended meaning outside the clear and unambiguous language they have used.

27. Clause 5.13.6 provides that what is required to trigger a release of the hatched land from overage liability is the "demolition of the buildings on" the brown land. There is, in my view, no doubt that the parties must be taken to have used the word "demolition" in its ordinary sense, a view which is reinforced by the fact that CMH's plans for the brown land at the time of the transfer (as Plan No. 2 shows) were to devote it to use as open space. I consider that there is also no doubt that all the buildings have not been demolished: the conversion of the last two into a shop and associated flat did not, I find, constitute their demolition. It follows that the condition for the release of the hatched land from overage has not been satisfied.

28. Mr Horton's argument really comes down to the attribution to the parties of a different intention. The logic of his argument is that the clause 5.13.6 condition would be satisfied if the houses on the brown land were either demolished in accordance with the ordinary meaning of that word, or else converted to a non-residential use. But clause 5.13.6 does not say that, and I see no reason for interpreting it as incorporating the gloss for which Mr Horton contends. All that the parties contemplated at the time of the transfer was that the brown land would become open space. They did not contemplate any other non-residential use of it, and so they cannot have intended their chosen words to carry that gloss. Their chosen language shows that demolition is what is required in order to satisfy the condition. Nothing less will do. Mr Horton's suggested construction involves a re-writing of the clause, not its interpretation.

29. The point can perhaps be tested further by considering whether, once the houses on the brown land have been demolished, there would be any restriction preventing CMH from either rebuilding them, or rebuilding in their place buildings designated for some use other than a residential one. I cannot detect anything in the transfer imposing any such restriction and, in particular, I cannot see how compliance by CMH with the clause 5.13.6 condition would have subjected CMH (or its successors) to an implied covenant not to rebuild on the brown land. If the MoD had been minded to impose such a restriction, it would have had to do so expressly, but it did not do so, probably because any such development was simply not foreseen as likely. As it did not impose any rebuilding restriction, I consider that it would follow that, once demolition had taken place, CMH would have been free, if it had so chosen,

to redevelop the brown land in any way for which it might obtain permission. It might, therefore, also be said that if, upon the true construction of clause 5.13.6 CMH can demolish and then promptly rebuild, there can be little or no point in requiring it to demolish in the first place. In a practical sense, that may be so, and it is considerations of that sort which caused Mr Foster to express the view that it would have been “barmy” for CMH solemnly to demolish and then rebuild. But it would in my view be illegitimate to argue from this that CMH could satisfy the clause 5.13.6 condition by simply doing nothing. The clause imposed a condition which made complete sense against the background of an apparent intention by CMH to devote the brown land to open space. There is no basis on which it can or should be regarded as capricious or penal, and CMH willingly signed up to it. It was CMH’s own decision to convert the last two houses, rather than to demolish them and then to rebuild. The problem to which this decision led is, therefore, a self-induced one.

30. Mr Horton says that to construe the condition according to the sense of its language leads to the unreasonable result that CMH has to pay overage on houses falling within the 300 limit which the transfer shows was intended to be overage free. There are two fallacies in that. First, Plan No. 2 is merely a layout plan reflecting CMH’s intentions as at the date of the transfer: there was no certainty that CMH would obtain permission to build up to the 300 limit in the way the plan shows that it intended. That was a planning risk which CMH chose to assume when it bought the land. In the event, it did not obtain the permission it originally wanted, and I have explained what permission it did get for the hatched land. Secondly, the hatched land was itself also expressly designated as overage land, and was only to become overage-free if CMH complied with the clause 5.13.6 condition. It chose not to comply with that condition, although it could have done. The result of its choice is that the hatched land remained overage land. I cannot see what is unreasonable about that.

31. Mr Horton also says that to construe clause 5.13.6 according to the ordinary meaning of the parties’ language is to attribute to them an improbable and unbusinesslike intention. This does not persuade me either. It is quite possible that, had the parties foreseen a planning condition requiring the village shop to be on the brown land, they would have made some provision for this in clause 5.13.6. But they did not foresee it, they did not so provide, and there is no basis on which the court can now engage in a rewriting of their contract so as make some such provision. In any event, as I have said, the need to site a shop on the brown land did not represent an obstacle to due compliance with the clause 5.13.6 condition.

32. The result is that I hold that, in light of the terms of clause 5.13.6, and in the events which have happened, the hatched land has not become released from overage. In arriving at that conclusion I bear in mind the observations of Lord Mustill in *Charter Reinsurance Co. Ltd. v. Fagan* [1997] A.C. 313, at 388:

“There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they

can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.”

33. Mr Horton argued further that, if he was wrong in his suggested interpretation of clause 5.13.6, it was necessary to imply into the clause a proviso to the effect that, should it turn out to be necessary or desirable for a building to be retained on the brown land for retail purposes, then this should not be regarded as defeating sufficient compliance with the clause 5.13.6 condition. He had some difficulty in defining the terms of the suggested proviso. CMH’s first suggestion was that it should read:

“provided that if any of the said buildings cannot be demolished because it is required by the Local Planning Authority to be retained and used for purposes other than wholly residential purposes the release of [the hatched land] from overage payments shall occur upon the demolition of all the buildings other than those so required to be retained.”

34. In his closing speech, Mr Horton suggested two alternative versions. They were respectively:

“provided that if any of the said buildings cannot be demolished because they are required by the Local Planning Authority to be retained and used as a shop in accordance with the planning brief the release etc”

“provided that if any of the said buildings are to be retained to satisfy the requirement of the Local Planning Authority for the provision of a shop in accordance with the planning brief the release etc”

35. The need for three attempts at identifying the proviso which it is said should be implied into clause 5.13.6 speaks eloquently of the difficulty which I regard Mr Horton’s argument as facing. In support of his submission, Mr Horton placed particular reliance on the evidence of Mr Derrick Hockney. He was formerly a senior land agent with the MoD and was directly involved in the sale of the site to CMH. He said in his witness statement that, had CMH wanted to provide in the transfer for the possibility that the planning authority would want to retain a building on the brown land, he would have been happy to agree to an appropriate clause in the transfer, but he said that CMH never raised the point. In cross-examination, Mr Hockney was also disposed to agree that the inclusion of a proviso to clause 5.13.6 along the lines suggested would not have been contrary to the intention of the parties insofar as the object underlying clause 5.13.6 was to trade houses against houses. He agreed also that it would have been fair for the MoD to agree to such a proviso and that it would be desirable to have some such clause in order to make the contract work.

36. The difficulty I have with attaching any weight to that evidence is that I do not regard it as admissible on the question of whether or not any proviso should be implied into clause 5.13.6. That is because it is always a question of law, not of fact, whether a term should be implied into a contract (see *Mosvolds Rederi A/S v. Food Corporation of India* [1986] 2 Lloyd’s Rep. 68, at 70, per Steyn J). Mr Horton submitted that one or other of his suggested provisos should be implied either on the “business efficacy” test, as explained in *The Moorcock* (1889) 14 P.D. 64, or else on the “officious bystander” test – namely, that it is an obvious inference that it must

have been intended – as explained by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227. I am not persuaded that either test is satisfied in this case. Whether or not it would or might have been fair or reasonable to include some such proviso to clause 5.13.6 is irrelevant. Terms are not implied into contracts simply because it would be fair or reasonable to include them (see *Liverpool City Council v. Irwin and Another* [1977] AC 239, at 253H, per Lord Wilberforce, at 258B, per Lord Cross of Chelsea and at 262B to D, per Lord Salmon). The business efficacy test requires that the contract will not be workable without the suggested term. I cannot see on what basis this contract either was or became unworkable without it. It was a planning requirement that a shop and flat should be provided, but this could have been achieved by demolishing all 37 houses and building a shop and flat. As for the suggestion that it is a matter of obvious inference that some such proviso should be read into clause 5.13.6, I do not regard that as seriously arguable.

37. Mr Horton advanced next an even more fundamental submission. It was to the effect that, upon the true construction of the transfer, the building of houses on the CMH land (on whichever part they might be built) was to be overage-free so long as the resultant total number of houses on the site did not exceed 300: overage was only to be payable on houses in excess of that number (“the 300 houses point”).

38. In support of that, Mr Horton invited me to add into the factual background to which I should have regard in construing the transfer various further matters, including the planning brief, the genesis of the contract, the basis on which the MoD sought offers for the land and on which they were made, a brochure for its development which CMH produced and what Mr Horton called the commercial purpose of the contract.

39. I do not regard those matters as helpful in interpreting the transfer. Even accepting, about which I have my doubts, that the planning brief, tender invitations, offers and brochure are admissible as relevant background material, I do not see how they can shed any relevant light on the meaning of the transfer. Between (i) the making and acceptance of the original offers and (ii) the signing of the transfer, a good deal either had or might have happened in the way of negotiations between the parties, none of which is admissible for the purposes of interpreting the transfer. There is no warrant for any presumption that the commercial bargain reflected in the transfer was intended to be precisely the same as that which the parties had in mind at the outset of their negotiations. The net result of the parties’ dealings was the executed transfer, and the presumption is that it represented the final bargain they intended to make. Accordingly, I consider that I have to assess Mr Horton’s 300 houses point primarily by reference to the language of the transfer.

40. Having done so, I have to say that, with respect, I regard the argument as hopeless. The scheme of the transfer is unambiguously clear. Its *legal* effect is that (subject only to the escape condition contained in clause 5.13.6) the blue land and the hatched land is overage land, with the consequence that any residential development on it – and regardless of the impact on the overall number of dwellings on the site – triggers a liability to overage. It is, I accept, possible to deduce from the transfer and Plan No. 2 that *the then practical intentions* of the parties – or at any rate of CMH – were that CMH would build a total of 88 overage-free houses: 51 on non-overage land, and 37 on the hatched land; and CMH’s expectation was, no doubt, that by the

time of the development of the latter that land would have been released from overage by the due satisfaction of the clause 5.13.6 condition. But, in the circumstances I have explained, things did not work out like this. CMH did not get a permission to build all 37 houses on the hatched land (and the risk that it might not was one which it voluntarily assumed), and it did not satisfy the clause 5.13.6 condition. I see no basis for the construction of the transfer for which Mr Horton contends.

41. By way of alternative argument, Mr Horton submitted that a term ought to be implied into the transfer qualifying the overage obligation in clause 5.2 in terms essentially reflecting the 300 houses point. I see no basis - whether on grounds of business efficacy, obvious inference or otherwise - for implying such a term, one which contradicts the basic, and very simple, scheme of the transfer. I reject this argument too.

42. Mr Horton advanced a further argument, directed at excusing the development on the *overspill areas* from an overage obligation. He suggested two alternative implied terms directed at this, the thrust of them being that if planning permission for the building of all 37 houses on the hatched land could not be obtained, then it was implicit that in so far as the excess fell to be built on the blue land, the excess should be overage-free. Once more, I see no basis - whether on grounds of business efficacy, obvious inference or otherwise - for the implication of such a term, which contradicts the clear scheme of the transfer. This is simply another attempt to re-write the bargain, and I reject it. It ignores the fact that CMH voluntarily assumed the planning risk on which the argument is based.

43. Mr Horton's final construction argument reverted to the clause 5.13.6 point. He asked the court to make a declaration that, if the village shop and flat were *hereafter* to be demolished (so resulting in all the buildings on the brown land being demolished), the final act of demolition would thereupon release CMH from any liability to overage payments in respect of the hatched land to which it may at present be subject. I have earlier set out clause 5.13.6 and will not repeat it. Mr Horton relies on the fact that the clause provides that the effect of demolition is that "[the hatched land] shall forthwith be released from Overage Payments." He points out that "Overage Payments" can only become due *after* a planning permission has been implemented, and says that the clause in terms envisages that the hatched land can be released from such payments even after the liability has accrued.

44. I accept that the language of clause 5.13.6 enables Mr Horton to advance the argument, but the argument is not one I can accept. If right, it would appear to lead to surprising anomalies. For example, Mr Horton accepted that, once the overage was actually *paid*, it could not be recovered following a subsequent demolition: he said that the most that a demolition could do would be to prevent a liability arising in the first place, or else to release an unsatisfied liability which had arisen. It would follow, therefore, that a bad payer of an accrued liability could take advantage of his breach of contract in not paying promptly by using the time so gained to procure a belated demolition and, with it, a release. I regard it as improbable that the clause was intended to enable bad payers to benefit in such a way.

45. There is also an inherent illogicality in Mr Horton's argument. If, as he suggested, "Overage Payments" can only arise *after* a planning permission has been

obtained and acted upon, what is the effect of a *prior* demolition of the buildings on the brown land? According to clause 5.13.6, such demolition “forthwith” releases the hatched land from “Overage Payments”. But on Mr Horton’s argument no payments, or payment obligations, have yet arisen which are capable of being released, whereas the clause appears to intend that a relevant release will be effected immediately upon demolition. Moreover, it can also be said that if the clause is to be construed as strictly as Mr Horton’s argument suggests it does not actually do all the work he asks of it. That is because, on the language of the clause, all that happens upon demolition is that the *land* is released from overage payments. The land is of course charged by clause 5.10 with any accrued overage liability, and on the face of it therefore all that the demolition achieves is the release of the land from that charge. But it does not also release CMH from the personal covenant to which it is subject under clause 5.2.

46. Having suggested that last point, I do not myself regard it as correct. That is, I do not regard the language of clause 5.13.6 as directed to drawing distinctions between the personal liability of CMH and the liability charged on the hatched land. It appears to me that, in the respects giving rise to this particular argument, something has almost certainly gone slightly wrong with the language of clause 5.13.6. The task of the court is to extract from it the parties’ true intention. I find it impossible to deduce from it that it was their intention that, once an overage liability had accrued due in respect of the hatched land, that liability could be subsequently extinguished by a demolition exercise on the brown land. In my view, the true sense of clause 5.13.6 is simply that, once such a demolition exercise has taken place, no overage liability can arise in respect of any development on the hatched land. But if such a liability does arise in respect of the hatched land, I regard it as irreversible (save by agreement), and I reject the argument that a later demolition exercise could operate to release it. In any event, all the buildings on the brown land have not been demolished and if the MoD is now entitled to a judgment for payment of the unpaid overage, I would propose to give it such a judgment. I cannot see how any future demolition of the remaining buildings would entitle CMH to be excused from satisfying it.

47. I record that, until Mr Horton’s closing speech, it was also part of CMH’s case that the MoD’s signature of an agreement under s. 106 of the Town and Country Planning Act 1990 provided a further reason why it was not open to the MoD to contend that the clause 5.13.6 condition had not been satisfied. For reasons I need not set out, this contention always looked to be an unusually unpromising one, and Mr Horton gracefully abandoned it.

### **B. The rectification claim**

48. CMH’s alternative pleaded case is that the October 1996 transfer, as executed, contained a fundamental mistake which both sides overlooked and which resulted in a failure to reflect in it their true common intention. The alleged error, as pleaded, was a mistaken belief on both sides that a settlement of 300 houses would be established along the lines of the layout reflected in Plan No. 2, including 37 houses on the hatched land. There is also an allegation that there was a similar mistaken belief that the planning authority “would not resist the demolition of all the dwellings” on the brown land. The latter point at least appears to me to be inaccurate. The planning authority did not raise any obstacle to the demolition of all the buildings on the brown land, which could have been achieved without planning permission. What it did require was the provision of a shop on the brown land, although the evidence does not

even establish that it was immovable on that. But even if it had been, CMH could still have provided the required shop there once it had first demolished the buildings and so satisfied the clause 5.13.6 condition.

49. By a late amendment, CMH alleged in the alternative a case based on unilateral mistake, namely that the MoD knew that CMH was labouring under the pleaded mistakes but said nothing to alert it to them. The days of evidence yielded not the glimmer of a suggestion that there was any basis for such a case, and Mr Horton abandoned it in his final speech. It was an irresponsible claim, which CMH should not have made.

50. Turning to the claim based on alleged common mistake, rectification is a discretionary equitable remedy. Its function is merely to enable the correction of the mistaken manner in which a written instrument has purported to record the terms of the parties' transaction. The need for the remedy is because it is a fact of life that mistakes sometimes arise in the drafting of documents, which the signatories do not spot before they sign. There is, however, a strong presumption that a signatory intends to sign the document as it is in its executed form and so the jurisdiction to rectify documents is "cautiously watched and jealously exercised" (*Whiteside v. Whiteside and Others* [1950] 1 Ch. 65, at 71, per Sir Raymond Evershed MR). In *Swainland Builders Ltd v. Freehold Properties Ltd* [2002] EWCA Civ 560 [2002] 23 EG 123, Peter Gibson LJ summarised the essentials of what a claimant seeking rectification must prove. This case was not cited to me, but the principles so summarised, and which are relevant to this case, were not in dispute before me. The Lord Justice said at paragraphs 33 and 34:

"33. The party seeking rectification must show that:

- (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
- (2) there was an outward expression of accord;
- (3) the intention continued at the time of the execution of the instrument sought to be rectified;
- (4) by mistake, the instrument did not reflect that common intention.

34. I would add the following points derived from the authorities:

- (1) The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities:

"But as the alleged common intention *ex hypothesi* contradicts the written instrument, convincing proof is required to counteract the cogent evidence of the parties' intention displayed by the instrument itself. ..."

(See *Thomas Bates & Sons Ltd v. Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 521 per Brightman LJ).

(2) While it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if, in substance and in detail, the common intention can be ascertained: *Co-operative Insurance Society Ltd v. Centremoor Ltd* [1983] 2 EGLR 52 at p54, per Dillon LJ, with whom Kerr and Eveleigh LJJ agreed. . . .”

51. The rectification which CMH seeks is the inclusion in the transfer of a new clause 5.2.1 in the following terms;

“[The MoD] and [CMH] hereby agree that it is the intention of the parties that no Overage Payment shall be payable in respect of any Planning Permission obtained the effect of which is to enable there to be lawfully on the Property [meaning the site] not more than 300 Residential Units (including existing Residential Units) and upon any such planning permission or Permissions being granted [the MoD] hereby agrees forthwith from time to time upon receipt of a written request from [CMH] accompanied by a copy of the relevant Planning Permission or Permissions and a plan or plans identifying the part of the Overage Land upon which any new Residential Units are permitted to be constructed pursuant to such Planning Permission to supply [CMH] with a duly executed form of discharge in respect of the charge contained in Clause 5.10 releasing such part of the Overage Land from such a charge and in such circumstances the Purchaser shall thereupon be released from its obligations hereunder so far as they relate to such part of the Overage Land. For the avoidance of doubt an Overage Payment will be payable in respect of every Residential Unit in addition to the number of 300 mentioned above.”

52. The suggestion that the parties’ true intention was that the transfer should include some such provision is, on the face of it, surprising. It involves a fundamental re-writing of the scheme of the transfer. The claim suggests that the lawyers on both sides, who had carefully agreed its form, had wholly misunderstood the true nature of the bargain their clients had made; and also that neither client had given even the most cursory consideration to the final form of transfer before signing the contract in August 1996. If they had, it seems inconceivable that both of them could have failed to spot the fundamental error which CMH says it contained.

53. I have earlier explained the scheme underlying the executed transfer, which is apparent from a consideration of the transfer read together with Plan No. 2. At the risk of unwanted repetition, I will, however, summarise it again in order to illustrate the effect of the proposed rectification. In doing so, I will ignore the fact that the hatched land was designated as overage land. It was always within CMH’s power to procure it to become non-overage land, and it is one of the mysteries of this case why CMH chose not to do so. It was, however, plainly the expectation of both sides as at the date of the transfer that CMH could and would do so, and that is the basis on which the parties executed the transfer.



54. The scheme of the transfer is simple. Read together with Plan No 2, it reflected an expectation that there were to be at least 300 (existing and new) dwellings on the site; and, in particular, it reflected the hope – but not the certainty - that planning permission would be obtained for all 300 to be sited on the non-coverage land. At the date of the transfer there were 249 houses on the land: 212 on the BPT land and 37 on the brown land. The inference is that CMH’s plan was to demolish the 37 houses, and turn that land into open space, so reducing the stock of houses to 212; and to build 88 new houses so increasing the stock to 300. Plan No. 2 identifies the layout for all 88 proposed houses.

55. The land on which the 212 existing houses stood, and on which the 88 new houses were proposed to be built fell outside the land identified by the transfer as “Overage Land”, and it is only development of the latter that can trigger a liability to overage. If CMH’s planning hope materialised, no overage would be paid in respect of any of the 88 new houses it built. Moreover, if it could squeeze any additional houses on to the non-coverage land, so taking the total on it to over 300, it would still not pay any overage. This is because no overage was to be payable in respect of developments on non-coverage land.

56. This last point is not an academic one, and nor was it at the time of the execution of the transfer. That is because, although Plan No. 2 only contemplates the creation of a total of 300 houses on the non-coverage land, Mr Wicks had spotted the possibility of putting an extra six houses on the BPT land, and had come to an arrangement with BPT under which CMH would be able to exploit that opportunity for its own benefit. He did not volunteer that information to the MoD during the negotiations (nor is it suggested that he should have done), and the MoD’s own assessment of the development potential of the non-coverage land was that it could probably not accommodate more than 300 houses in total.

57. The scheme was, therefore, that CMH was being given the benefit of an area of non-coverage land, on which the MoD contemplated that it would be able to create a total of 300 dwellings, whilst CMH had its eyes on a possible 306. Whatever development CMH carried out on that land would be overage-free. The other side of the overage coin was dealt with by the overage land. The position in relation to that was that *any* residential development on it – and regardless of the number of houses by then existing on the non-coverage land – would be liable to overage. In commercial terms, the transaction was one under which CMH was paying £8m for land comprising (i) an area on which it expected to be able to create a total of at least 300 houses (perhaps up to 306), without paying any overage, and (ii) an area on which it could carry out other development, including residential development in respect of which it would have to pay overage.

58. I have set out the legal scheme of the transfer, and have indicated to what extent the parties’ expectations as to the development of the non-coverage land can be derived from it and from Plan No. 2. But there was of course nothing certain about the fulfilment of those expectations. At the date of the transfer, CMH had no planning permission for the building of *any* houses on the non-coverage land and it could not be certain that it would obtain a permission which would enable it to carry out precisely the type of development it wanted. But the risks as to that were all squarely on CMH. If it were unable to obtain a permission to create as many as 300 dwellings on the

non-coverage land, then the transaction would not have turned out as well as it had hoped. If it obtained permission to build a total of more than 300 houses on that land, then it would have turned out to be a rather better one than it had originally hoped for. There is no suggestion that the parties were labouring under any mistake as to the allocation of the planning risks.

59. The intended effect of the suggested rectification is somewhat obscure, and it perhaps raises more questions than it attempts to answer. It would appear to have the potential for some surprising consequences. Assume that CMH duly demolished all 37 houses on the brown land, and then, as a result of a change of plan, sought, obtained and acted upon a permission to build 50 houses on the overage land. The total number of houses on the site would only be 262, and so the wording of the proposed clause would appear to suggest that no overage would be payable on the 50 new houses, even though they were built on overage land. This is directly contrary to the scheme of the transfer.

60. If, having built such 50 houses, CMH then sought, obtained and acted upon a permission to build 88 houses on the non-coverage land, that would take the total number of houses on the site to 350. That figure exceeds the magic 300, but I cannot see how the additional houses could be subject to overage, because they would all be on the non-coverage land. There would also appear to be no basis for claiming a retrospective overage payment in respect of the first 50 houses which had been built on the overage land, because the scheme of the proposed clause 5.2.1 is that they would earlier have been released from overage. The final sentence of the clause would not enable any of the houses on the non-coverage land to be subject to overage. That is because an “Overage Payment” is only payable in respect of a planning permission granted in respect of overage land.

61. The rectification sought is therefore a pretty one-sided one, which would appear to be of benefit exclusively to CMH and which fundamentally changes the commercial balance of an apparently rational, and carefully worked out, scheme.

62. I heard days of evidence about the course of the negotiations leading to the transfer as executed. I will not rehearse the story in the closest detail, because it is unnecessary. The factual issues relevant to the claim fall within a narrow compass. I must, however, outline the course of events.

63. The principal personnel involved were, on the MoD’s side, Derrick Hockney, the MoD’s land agent, who was involved in the sale and gave instructions to the MoD’s agents, although the ultimate decisions about sales as major as this one were made by his superiors, one of whom was Mr Watchman; Robert Stenhouse, who was employed at the material time by the Government Property Lawyers and who acted as the MoD’s solicitor on the transaction; and Gerald Allison, a chartered surveyor with DTZ. All bar Mr Watchman gave evidence.

64. On CMH’s side, the individual primarily involved was Stephen Wicks. He is the chief executive of the defendants’ ultimate parent, Country and Metropolitan Plc (a company listed on the London Stock Exchange), the group managing director of PLC and a director of CMH. David Foster, another director of each defendant, played a minor role in the transaction, as did Peter Yull, although Mr Foster played a major

role in the development of the CMH land after the purchase. All three gave evidence, but it was Mr Wicks who was making the decisions and giving the instructions in relation to the transaction and it is his evidence which is the most important. CMH's solicitors were Nelson Cuff. They did not give evidence.

65. At the outset of its marketing campaign, the MoD invited offers for the site, and provided the potential bidders with a sale information pack. This referred to the planning brief and identified its objectives. The information pack indicated that the MoD was prepared to consider offers conditional on the grant of planning permission, although the tender submitted by CMH was not so conditional. There was initially some uncertainty as to the precise number of existing houses on the site, but the final figure, which was known before exchange of contracts, was 249.

66. On 7 February 1996, Mr Wicks wrote to Mr Allison with CMH's first offer for the site. He enclosed a brochure setting out its proposals for it, which he described as broadly in line with the planning brief. He stated expressly that the offer was not conditional on the grant of planning permission.

67. On 12 March 1996, DTZ invited CMH to make its highest offer by 21 March. It was to include a fixed purchase price and CMH's proposals for the payment of overage on any development of the land by the creation of more than 300 dwellings. Mr Wicks submitted a revised offer on 20 March 1996 of £7.45m for the site. That offer was made on the basis that the site had the clear potential for the development of a community of at least 300 dwellings. But Mr Wicks, like Mr Hockney, regarded the site as offering the prospect of an even more intensive development, and his offer volunteered that CMH was prepared "to be bound by a contractual obligation to maximise further residential development" and offered to pay the MoD, by way of overage, 70% of the increased market value created by further residential development beyond 300 units. He wrote that he regarded the site as having the potential for up to 500 units, and he estimated the overage payable if that potential could be realised as being £3m.

68. On 10 April 1996, Mr Wicks made an increased offer. He raised the price to £8m and the overage percentage from 70% to 75%, which he said could result in an overage payment of £3.15m. CMH had already worked out its plans for the development of the site, which were broadly as reflected in what became Plan No 2.

69. Other tenders were submitted from other proposing purchasers. In order to decide which to accept, interviews were held by the MoD with the tenderers, and DTZ prepared an agenda listing the matters to be discussed. One of the headings was "Confirmation of the total number of residential units that would be created" and another was "The way in which the prospective purchaser can make provision for additional payments by way of overage if further development or disposals take place." In CMH's case, the threshold beyond which overage would be payable was 300 units. Mr Hockney attended the interviews, and emphasised in evidence that an offer of overage was very important to the MoD.

70. The MoD accepted CMH's offer. There is no dispute, and I find, that the basis on which the offer was made and accepted was that the £8m price was (in part) for the opportunity to develop a total residential community (including existing houses) of

300 houses. The development of such a community was not to attract overage. Overage was only to be payable on the development of residential units *above* 300. Of course, so far there was no planning permission even for 300 houses, but the approval of the planning brief by the local planning authorities (giving the brief the status of supplementary planning guidance) meant that in practice planning permission was likely to be obtained for such a community. There was, however, no certainty as to its conditions and no certainty that any planning permission would be obtained for more intensive development. But CMH was prepared to take the risk involved in that uncertainty. Its offer was not subject to any conditions in relation to planning.

71. On 13 May 1996, Mr Stenhouse sent Tom Cuff of Nelson Cuff a draft contract together with a draft form of transfer and plan. Clause 5 of the transfer represented the first attempt to deal with the overage obligation. Its form was very different from that ultimately contained in the executed transfer. Put summarily, it recorded that the £8m price represented the value of the site on the basis that it could be used (and developed) in accordance with the planning brief. It then provided that if during the period of 10 years any planning permissions were to be obtained increasing that value, CMH would pay the MoD 50% of the increase in value. Clause 5.2(a) charged the land with the payment of all sums becoming payable by way of such overage.

72. Two points need to be made about that draft. First, although it did not in terms refer to the 300 threshold, this was implicit in the reference to the uses permitted by the planning brief. Its scheme was therefore that the first 300 houses on the site (wherever built) were to be overage free, but planning permissions for development of any part of the site beyond this would carry an overage obligation at 50% of the increased value. Although the draft was very much a first draft, it gave (subject to the next point) essential effect to the commercial bargain which the parties had struck.

73. The second point is that the 50% figure is a surprise, because CMH's accepted overage offer was for 75% of the increased value, and it had even offered to submit to a contractual commitment to maximise further development. The draft included no such commitment, and the reduction to 50% was a significant change of the agreed terms in CMH's favour. There is no evidence as to how that came about, but I regard it as probable, and find, that the 50% figure found its way into the draft because that was the standard government clawback percentage and no-one had told Mr Stenhouse that in this case a 75% figure had been agreed. He said he received no instructions from the MoD that the figure should be other than its standard one of 50%

74. On Mr Wicks's own calculations in his offer letters, that change represented a potential saving by CMH of perhaps £1m of overage. He immediately noticed the change, but chose to remain silent about it. He was subjected to what he appeared to regard as a painful cross-examination as to why he did so, and he was hard put to provide an explanation. He admitted that he recognised it was possible that the MoD had simply made a mistake, but he said he also regarded it as possible that they had deliberately chosen to reduce the percentage so as to give CMH a greater incentive to maximise development – and this even though CMH had volunteered to assume a contractual commitment to do so. I regarded Mr Wicks's explanation as disingenuous, and find that he recognised that the MoD had probably made a mistake but deliberately chose not to raise the matter with it, for fear that it might hold CMH to

the true bargain. I regard that as sharp practice by Mr Wicks, for which he deserves no credit. He hoped his silence might save CMH about £1m.

75. Mr Cuff had a meeting with Mr Wicks to discuss the draft and responded to Mr Stenhouse on 30 May 1996. He made some points about the drafting of the overage clause, whose essence was directed at clarifying the point that no overage was to be paid on the first 300 houses, which was in no sense controversial. He then made the point – which proved to be of material significance to the course of the negotiations – that the proposed *charge* for overage over the site “would make the project unfundable and we must find another way.” He was referring to the fact that the MoD wanted CMH to give it a charge over the site securing the payment of any overage which might become due (clause 5.2(a) of the draft). On 3 June 1996, Mr Morris of Nelson Cuff took the matter over from Mr Cuff.

76. On 27 June 1996, there was a meeting in London about the transaction. Mr Hockney says he was not there. Mr Stenhouse was, but had no recollection of what was discussed or agreed. Mr Morris was also there, but did not give evidence. Mr Wicks was there, and did. He said that Mr Hockney and Mr Yull were also there, but I do not accept his evidence that Mr Hockney was there. No note of the meeting is in evidence.

77. Mr Wicks’s evidence in chief about this meeting is a little imprecise. He said various matters were discussed, and a major topic was the overage provision. CMH’s lender was apparently concerned about the proposal that the site should be charged to the MoD to secure any overage liability. He said that “we were all in agreement that the overage provision would only be triggered if the total number of dwellings on the site exceeded 300.” By then, CMH had found BPT as a sub-purchaser for £6.5m of the BPT land, comprising the 212 existing houses, all of which were to be retained; and CMH’s plan was to build 88 new houses on the CMH land, after demolishing the houses on the brown land. He said that the parties discussed a proposal that “our lender’s charge would have priority over the MoD’s charge to a given level. We were looking for that level to be set at £2.5 million but with no charge at all on the housing to be sold to BPT.”

78. Pausing there, that suggests that what CMH was proposing was that the BPT land should be sold free of any continuing charge to the MoD by way of security for overage (and I anyway question whether a sale of the BPT land subject to such a charge would have been a practical proposition); but that the remainder of the site (comprising the CMH land) should remain subject to a charge to the MoD to secure any overage. The level of priority that CMH’s lender was to enjoy still remained to be agreed.

79. Mr Wicks says that CMH then proposed that overage would only be triggered by a permission for more than 88 new houses on the CMH land. Implicit in that was that the BPT land was to be regarded as accounting for 212 of the original 300 threshold, but (save only for this) was to be treated as excluded from overage.

80. Mr Wicks then said this in paragraph 74 of his witness statement:

“74. To allay our lender’s concerns further it was then proposed that if we could identify the areas of land on which the 88 new houses were to be built that land could then be released from *the overage charge completely leaving within the overage charge in favour of the MoD the land upon which any new houses in excess of 88 new build ... would be located*. My recollection is that Mr Stenhouse believed that that arrangement might work.” (My emphasis of key words).

81. For reasons to which I shall come, I did not find Mr Wicks to be a witness on whose evidence I feel able to place confident reliance, but even accepting (as to which I have some doubts) that he raised some such proposal as he there asserted, I would make two points about it. First, I regard his description of what he says he was proposing as ambiguous. In particular, was he proposing that the site of the 88 houses was to be free from overage liability altogether? Or was he suggesting that it should remain subject to overage liability, but should simply be unencumbered by any *charge* for such liability in favour of the MoD? Secondly, however, whatever he may have meant, and however he may have been understood, it is plain that he is not suggesting that the MoD agreed this particular proposal there and then.

82. The best evidence of what was agreed at the meeting is, I find, reflected (at least in part) in the new draft overage clause which Mr Morris produced immediately afterwards. Mr Morris sent a copy of his draft to Mr Stenhouse on 28 June, although Mr Stenhouse was in fact departing on his annual leave the following day. The draft was not sent to Mr Hockney. On the same day, Mr Morris also sent a copy to Mr Yull of CMH. Mr Morris advised Mr Yull that CMH should discuss the proposed overage and charge arrangement with its lender, so as to ensure that it was happy with it. On 2 July, and in the absence of Mr Stenhouse on leave, Mr Redgrove (a colleague of his) returned to Mr Morris a revised version of his draft containing Mr Stenhouse’s observations.

83. Clause 5 of the Morris draft is in large part the forerunner of the final version. It incorporates similar definitions, and in particular uses the phrase “Overage Land”. It does not define “Overage Land”, although I infer, and find, that it was intended to mean the site other than the BPT land (i.e. it meant simply the CMH land). It reflected an agreement to exclude the BPT land from the overage arrangements, in line with the point I have referred to in paragraph 79, and which I find had by then been agreed in principle. The scheme of the draft was to the effect that no overage was to be payable on the first 88 houses built on the overage land, but was to be payable on developments of it beyond that. Clause 5.10 subjected the site (apparently including the BPT land, but I suspect this was a mistake) to a charge in favour of the MoD to secure any overage, but CMH’s lender was to be entitled to a priority over the charge to a maximum of £2.5m (a level of priority which I find had *not* been agreed). I should quote clause 5.2.2:

“[The MoD] and [CMH] hereby agree that it is the intention of the parties that no Overage Payment shall be payable in respect of any Planning Permission obtained permitting the construction and erection of the first 88 Residential Units on the Overage Land and upon any such Planning Permission or Permissions being granted [the MoD] hereby agrees forthwith from time to time upon receipt of written request from [CMH] accompanied by a copy of

the relevant Planning Permission or Permissions and a plan or plans identifying the subject land to supply [CMH] with a duly executed form of discharge in respect of the charge contained in clause 5.8 releasing the subject land from such charge and in such circumstances [CMH] shall automatically be released from its obligations hereunder so far as they relate to the subject land.”

84. The draft contained nothing reflecting anything of the nature referred to in paragraph 74 of Mr Wicks’s witness statement.

85. Mr Hockney’s reaction to the draft, as shown by a letter he wrote Mr Redgrove on 5 July 1996, was that clause 5.2.2 required especial care: he acknowledged that it was CMH’s intention to demolish some of the existing houses on the CMH land, and was anxious to ensure that this happened. He did not want those houses to be retained, and CMH then to claim that the 88 new dwellings (which would take the total stock over 300) should all be overage-free.

86. On 10 July 1996, Mr Morris responded to Mr Redgrove with his comments on (inter alia) the amendments to and observations on the overage clause. His letter made clear that he was still awaiting instructions from CMH and its lender on the proposed overage arrangements. Later the same day he wrote further to Mr Redgrove, enclosing two plans he had received from CMH showing the existing 212 houses on the BPT land “which are to be excluded from the proposed overage arrangements.”

87. On 16 July 1996, Mr Stenhouse, by now back from leave, responded to Mr Morris’s letter of 10 July. He enclosed a fresh draft of the contract and said he would write separately with regard to Mr Morris’s observations about the draft transfer. He did so on 17 July. He made various points which are not directly relevant, but in particular said that the MoD was not prepared to agree to a priority for CMH’s lender greater than £1.5m. He enclosed a fresh draft of the transfer, highlighting the amendments he had made.

88. This draft, dated 17 July 1996, is an important one. It defines the “Overage Land” as meaning the site less the areas coloured red on two annexed plans. The reference was not to two different areas, but was simply to the BPT land as identified in two plans Mr Morris had sent Mr Redgrove on 10 July. Clause 5.2.1 contains the basic overage covenant by CMH. Clause 5.2.2 and 5.2.3 were modelled on Mr Morris’s draft, but amended them quite materially. Clause 5.2.2 is in the same terms as the clause (already quoted) that CMH now seeks to introduce into the executed transfer by way of rectification, and I will not repeat it. Clause 5.2.3 was ancillary to it and was a complicated provision directed at imposing area limits on any proposed residential units which were either intended to fall within the 300 exemption or were to be subject of overage. It is not an easy clause to summarise, but its general purpose was (in part) probably directed at the concern that the scheme of clause 5.2.2 might enable CMH to obtain a permission for a low density development, obtain the release of the relevant land from overage, and then apply for a different, overage-free development of the same land at a higher density. It reads:

“5.2.3 [The MoD] and [CMH] further agree that if Planning Permission is obtained the effect on [sic] which is to permit there to be lawfully on the

Property [meaning the site] a number of Residential Units exceeding 300 [CMH] shall be entitled by notice in writing to [the MoD] accompanied by a plan to identify the part or parts of the Overage Land the subject of such Planning Permission and the Residential Units it proposes to construct thereon and which are to be treated as falling within the 300 Residential Units specified in Clause 5.2.2 but so that the total area of such part or parts shall not exceed an area equal to the number of Residential Units to be constructed multiplied by one tenth of a hectare and in such circumstances the provisions of Clause 5.2.2 shall apply to such land so identified and the provisions of Clause 5.2.1 shall apply to the remainder of the Overage Land the subject of such Planning Permission.”

89. Clause 5.10 charged the overage land to the MoD with the payment of any overage, and clause 5.14.4 reduced to £1.5m the level of priority to be allowed to CMH's lender.

90. Mr Hockney said in cross-examination that he had no recollection of whether clause 5.2.2 was shown to him first, but that he anyway would not have disagreed with the intention reflected in it. I cannot see why he should have. The deal was still essentially the same. It had been varied by the fact that the 212 houses on the BPT land were going to be sold to BPT as a sub-purchaser, and the BPT land was going to be excluded from any potential for overage liability. But otherwise it remained the same. The CMH land was still to be subject to the like overage obligation to which it was always intended to be subject, and the 300 limit still operated, with 212 of the 300 threshold being accounted for by the houses on the BPT land. In practice, this meant that the first 88 houses on the CMH land - wherever built - would be overage-free, and overage would only be payable on units in excess of 88.

91. Mr Morris responded to Mr Stenhouse's re-draft of the transfer by his letter of 18 July. He did not agree it (or, therefore, clauses 5.2.2 and 5.2.3) unequivocally. He said he was awaiting instructions on the £1.5m point, and that the overage provisions were being considered by CMH and its lender. He said he hoped “shortly to let you have any further comments or observations they may have.” He never came back saying that CMH had unequivocally agreed the terms of the draft, nor did anyone from CMH suggest that to Mr Stenhouse or the MoD. That is of some significance because Mr Wicks's main point in support of the rectification claim is that clause 5.2.2 of Mr Stenhouse's draft was and remained part of the continuing common intention of both the MoD and CMH. He said that that clause was in a draft he saw on about 26 July, which was the last one he read, and he said he regarded it as fundamental to the transaction. He knew that a further draft had been produced since then, but he did not bother to read it even though he had the opportunity to do so. He said no-one told him (as was the case) that the provisions of clause 5.2.2 had been removed from the further draft. The contract was ultimately signed by Mr Yull, Mr Wicks's co-director, because by then Mr Wicks was away on holiday. But Mr Yull did not bring any independent consideration to bear as to what he was signing. He signed because he understood that Mr Wicks was happy with the final form of transfer annexed to the contract.

92. There was, however, at no point any overt agreement – or outward expression of accord - between either the solicitors or the parties as to the terms of clause 5.2.2.



Instead, there was a very significant change of course on 19 July 1996 – one proposed by Mr Wicks. His proposal, and the reason for it, appear from his letter to Mr Hockney of 19 July. He wrote:

“The main outstanding point, however, is with regard to the overage provision and your ‘priority level’ of £1,500,000 is not enough to give comfort to the funders.

Could we please suggest a scenario whereby the 212 houses which we are going to retain and the 88 building plots (300 units allowed in the brief) *are excluded from overage* and we have shown edged red on the attached plan the area concerned.

The balance of the site is edged blue and *we would be able to accept the overage provision* providing that there is a priority before the equitable charge comes into place of £2m.

I believe that this would enable both parties concerns to be taken into account and provides a practical way forward.

Perhaps you could let our solicitors know if we can move forward on this basis as soon as possible.” (My emphasis of key phrases).

93. The enclosed plan identified as proposed non-overage land the area comprising the 212 houses within the BPT land and also the area within the CMH land on which the 88 new houses were proposed to be built. What became known as the brown land (areas shown on the plan as intended for open space, but on which at that stage there stood the 37 houses that CMH intended to demolish) was also shown as within the non-overage land. On the same day, 19 July, Mr Morris wrote to Mr Stenhouse in similar terms. He referred to the difference over the priority figure and said:

“... my clients have suggested that it may be able to satisfy its lenders if we were, at this stage, to identify an area of land in respect of which my clients would be permitted to apply for and obtain planning consent for 88 residential units. This area could be *free from the overage provision and therefore from the lender’s point of view, be unencumbered*. The remainder of the site could then be subject to the overage provision but with a figure of £2 million to be dealt with by way of priority.”

Please would you let me know whether this principle is agreed, subject to Contract.” (My emphasis)

94. Mr Morris wrote a further letter on the same day indicating that the overage provision still needed to be approved by CMH’s funders and that there was to be a meeting to discuss them between Mr Wicks and Mr Hockney. In fact, no such meeting (or even a telephone discussion between them) took place.

95. The nature of Mr Wicks’s proposal was, in my view, clear. He was proposing that an area of the site should be identified which comprised both the 212 existing

houses (which were to remain) and the area on which CMH intended and expected (subject to planning permission) to be able to build the 88 new houses. That area was to be, in his words “excluded from overage”. The natural meaning of that was that no overage was to be payable in respect of any development on it, even if CMH managed (as in fact Mr Wicks hoped) to build *more* than 300 houses in total on it (I have explained that he had identified the possibility of creating a total of 306 houses). Overage was only to be payable on the remainder of the land, which he identified edged blue on the plan.

96. Mr Wicks’s evidence was that, in referring in his letter to the red land being “excluded from overage”, he meant that it should be subject to overage but free from the equitable charge to the MoD. I do not accept that he meant that, because it seems to me improbable that, if he had, he could have expressed himself so badly. In paragraph 81 of his witness statement he had similarly said that his intention was that the red land “would be outside overage and would be unencumbered”, although in cross-examination he again said that all he had really meant was that the red land was to be unencumbered. Again, I do not accept that that is what he meant to say. His evidence in cross-examination was that his intention was that the entirety of the *site* was to be potentially subject to overage, and all that he was seeking to propose by his letter was that the site designated for the 88 houses should be free of the MoD charge. I do not accept that assertion either. It became clear in his cross-examination that his case was also that he regarded the BPT land as potentially subject to overage, but free merely of the charge securing any overage. But if he really understood that, when was that agreed? And why did Mr Morris’s draft of 28 June (immediately following the meeting) proceed on the basis that 88 had become the magic number? That could only be on the basis that Mr Morris regarded the BPT land as “excluded from the proposed overage arrangements” – to repeat the language of his letter of 10 July.

97. But what Mr Wicks may have *meant* to convey by his letter of 19 July is anyway irrelevant. There is no evidence of any post-27 June meeting or conversation between the parties themselves as to the nature of the arrangement he was proposing in his letter, and I have set out above what I regard its plain meaning to be. It is that meaning which the MoD and its lawyers derived from it, and I consider that they could not sensibly have read it as meaning anything else. I find that it is also how Mr Morris understood it, as is apparent from his letter of 19 July. The negotiations thereafter proceeded on that basis. If anyone had thought that all that Mr Wicks was proposing was to remove certain land from the MoD *charge*, then the obvious, and simple, way to give effect to that in the drafting would be to add an appropriate proviso to the clause imposing the charge. Neither Mr Morris nor Mr Stenhouse proposed any such amendment. Instead they agreed clauses whose purpose and effect was to remove areas from the overage liability altogether.

98. Mr Stenhouse was immediately sensitive to the possibility that Mr Wicks’s proposal might enable CMH to build *more* than 300 houses in total on the proposed non-overage land, and so escape overage on the excess. He said in evidence that he also understood from it that the effect of the proposal was that if CMH could only build *less* than 300 houses in total on the non-overage land, they would still have to pay overage on all houses built on the overage land: but that was a risk for CMH to worry about, not the MoD. He wrote to Mr Day, Mr Hockney’s assistant, on 24 July and pointed to the potential difficulty in identifying an area on which only 88 units

“AND NO MORE” could be accommodated. He also pointed out that Mr Wicks’s proposal did not appear to take account of the 37 houses then standing on the brown land. Mr Wicks’s plan did not show the houses then on the brown land, and on 25 July Mr Stenhouse wrote to Mr Morris asking him to identify on the plan where the balance of existing houses were. There were at that stage a total of 249 houses on the site, and the BPT land accounted for only 212. (Mr Stenhouse referred to slightly different figures, because he thought the total number of existing houses was 251). It was put to Mr Hockney in cross-examination that the proposed non-coverage land was identified as being an area on which there was no scope for more than 300 houses in total (following demolition of the brown land houses). Mr Hockney agreed, but said he had to satisfy himself that that was the limit of the scope for development. At the time Mr Horton put this point to Mr Hockney, he did not know about Mr Wicks’s plan with regard to the extra six houses on the BPT land – Mr Wicks had kept that a secret from his own advisers until part of the way through the trial. Mr Hockney’s assessment, however, was that in practice no more than 300 houses could be accommodated on the proposed non-coverage land and so the proposal so to designate that land is one to which he felt able to agree.

99. On 26 July, Mr Wicks wrote a further explanatory letter to Mr Morris in response to the clarification Mr Stenhouse had sought in his letter of 25 July. He expressed his intentions very clearly by reference to an enclosed plan, and it is worth setting out what he said:

“1. *The area edged red* is the land that we are requesting *is outside the overage provisions* and includes 212 existing houses and 88 new ones (300 in total in accordance with the brief).

2. The area edged blue should be *within the overage provision* and we are requesting a £2m priority level for our funders with the equitable charge above that level.

3. The area edged green is the subject of our joint venture subsale [that is, to BPT].

4. The area edged brown is the site of 39 [in fact 37] existing houses which will be demolished and laid out as public open space. ...

To assist Mr Stenhouse *we have coloured the proposed new houses yellow* in order to differentiate them from existing ones.” (My emphasis of key phrases).

100. In paragraph 100 of his witness statement, Mr Wicks said, with reference to that plan:

“... one can see that, if the houses on the brown land were demolished, there was little room or scope for achieving a total of houses exceeding 300 houses on the areas of land edged red on that plan. The house plots were fairly tightly packed as it was. Upon a study of the plan I do not believe that the MoD’s advisors could have harboured any real concern that more than 300 houses might be built on the land edged red.”

101. That proved to be an embarrassing paragraph for Mr Wicks, because he had already foreseen the possibility of a total of 306 houses on the red land. His belated revelation of this at the trial cast an unattractive light on his paragraph 100. He sought to extinguish it by saying that in paragraph 100 he had really only intended to say that there was no scope for building more than 88 houses on the area which the plan designated for those houses, and that in the final words he had really intended to refer to the 88 houses shown on the areas coloured yellow. I do not accept that explanation, which I regard as disingenuous and untruthful.

102. Mr Wicks's letter of 26 July was sent to Mr Stenhouse and Mr Hockney saw it as well. Mr Stenhouse and Mr Hockney had a telephone conversation on 29 July in which they agreed that the overage provisions were to apply only to the areas shown blue and brown on Mr Wicks's plan. The brown land was the land on which stood the 37 houses which CMH intended to demolish. Mr Hockney said that his concern about that was the possibility that CMH might rebuild new houses after such demolition. On 30 July Mr Wicks wrote to Mr Hockney and said in the last paragraph that "A revised plan is going back in the DX tonight which hopefully is now agreed showing the areas marked blue and brown as being in charge for overage."

103. On 30 July, Mr Stenhouse wrote to Mr Morris saying that he believed that overage was only to apply to the land shown blue and brown on the plan he had received, and he enclosed a new draft transfer which was intended to reflect the revised overage arrangements. Clause 4(iii) imposed a covenant on CMH "forthwith to demolish" the buildings on the brown land and not to erect anything in their place. It is not entirely clear to me what the thinking behind that was. The brown land was to be overage land, but a covenant of this nature ought in practice to prevent the possibility of any overage becoming payable in respect of it. Mr Hockney accepted in evidence that CMH's then intention was to devote the brown land to use as public open space, and he accepted also that he did not foresee any overage as ever becoming payable in respect of the brown land. A covenant of that sort might perhaps have made more sense if the brown land were *not* defined as being overage land. In the event, no such covenant was ultimately included in the transfer as finally executed. Clause 5 dealt with the overage provisions. It was substantially in the form of that which the final version took, but it did not include provisions in the form of either clause 5.2.2 or 5.2.3 of the prior draft. Mr Stenhouse's evidence was that, now that the transaction had changed to one under which CMH was instead to be given a non-overage area on which it proposed to and, so it expected could, build up to 300 houses there was no continuing need for such provisions. He said they were inconsistent with them, and I find that his decision to remove them was a deliberate one, although Mr Stenhouse accepted that he did not receive specific instructions from Mr Hockney to remove them. I comment that his draft did not show, on its face, that they had been withdrawn. Nelson Cuff made no suggestion that such clauses should be reinstated, and it is worth noting in this context that clause 5.2.2 had itself been modelled on a clause which Nelson Cuff had introduced immediately after the meeting of 27 June. The draft still retained a priority figure of only £1.5m as regards the charge over the overage land.

104. Also on 30 July, Mr Stenhouse wrote to Mr Hockney, sending him copies of what he had sent Mr Morris. He said that the alterations he had made to the draft transfer were in clauses 4 and 5. He closed his letter by saying that:

“I assume that you are satisfied that no part of the land which is not within the blue and brown edging is capable of development for either practical or planning reasons.”

It was common ground that that sentence did not mean what it appeared to say, but meant, and was understood as meaning, “I assume you are satisfied that CMH cannot put more than 300 houses on non-coverage land.”

105. Mr Morris responded to Mr Stenhouse on the same day, 30 July. He made various points about the draft transfer, including that the £1.5m figure should be £2m. As for clause 4(iii), he said the obligation must be subject to CMH first obtaining any necessary planning permissions and consents required. Mr Stenhouse wrote to Mr Hockney on the same day with his comments on Mr Morris’s letter. He agreed (although he was in error) that planning permission would be required for the demolition of the 37 houses, and suggested that if permission was not obtained within 12 months after the use of best endeavours, then CMH should pay the MoD some figure, perhaps for each undemolished house. The logic behind that was that CMH ought not to have the benefit of being able to put a total of 300 coverage-free houses on the non-coverage land, and *also* to retain any of the houses on the brown land without paying something broadly equivalent to coverage in respect of them.

106. On the same day, 31 July, Mr Stenhouse had a telephone conversation with Mr Hockney. Mr Hockney had by then considered the new draft transfer, and Mr Stenhouse recorded that “He [Mr Hockney] is content that the coverage provisions now proposed protect MoD sufficiently.” The note records that Mr Hockney had found out that CMH’s sub-purchaser was BPT – whom he regarded as “very good people.”

107. There is no need to detail all that happened over the next few days, which was complicated by the fact that there was an uncertainty as to whether there was ultimately to be a transfer direct to BPT of the BPT land, or a transfer of the whole to CMH, a feature leading to the need for three draft transfers to be prepared. A further material change to the arrangements was, however, introduced by CMH during this period, and is reflected in point 5 of Mr Morris’s letter of 8 August to Mr Stenhouse. He wrote:

“I have been instructed by my clients, that reference to “the Brown Land” on Plan No 2 is to be substituted with reference to the land shown hatched red, edged blue on Plan No.2. Shortly, the Brown Land is to be taken out of the coverage arrangements, and to be substituted by the hatched red land. I am instructed that following demolition of all buildings on the Brown Land the hatched red land will be released from the coverage provisions.”

108. What CMH was proposing was that the brown land (with its 37 existing houses) should be designated as non-coverage land and the hatched land (the site of 37 proposed new houses) as coverage land. But since the latter 37 were to form part of the 300, the hatched land was to become non-coverage land immediately upon demolition of the 37 houses on the brown land. That is the origin of the arrangement reflected in clause 5.13.6 of the transfer as executed. The covenant which Mr Stenhouse had included in clause 4(iii) of his draft of 30 July was removed by Mr Morris. Mr

Hockney said in cross-examination that he would have been made aware of the changes introduced by Mr Morris's letter of 8 August. He said he did not consider what the position would be if the houses on the brown land were not demolished because he did not contemplate it happening. He said it was in CMH's interest to demolish and build on the hatched land. It is common ground that, at the time, no-one contemplated the possibility that the planning authority would require a village shop to be provided on the brown land.

109. On 9 August 1996, Mr Morris sent Mr Stenhouse a draft of the transfer of the BPT land (comprising the 212 houses) which was to be executed in favour of BPT. He pointed out that "The subject land will be free from the overage provisions, and therefore Clause 5 has been deleted in its entirety."

110. On 9 August Mr Stenhouse made a note of a telephone conversation in which he had been told by Mr Bidder of Nelson Cuff that Mr Wicks had measured the overage land at 48.66 hectares. Mr Stenhouse told Mr Hockney of that and, on the basis that CMH was paying £1.5m for the CMH land, this resulted in a base value per hectare of £30,826.14. The note records that Mr Hockney suggested that a base value of £30,825 should go into the transfer. Mr Stenhouse passed this on to Mr Morris, who was to pass it on to Mr Wicks. On the same day, Mr Morris responded that the 48.66 figure included the hatched land and that the transfer should provide a base value figure of £30,826.14, increasing to £32,750 per hectare once the buildings on the brown land had been demolished (this was because that would release the 2.86 hectares of hatched land from overage and so reduce the area potentially subject to overage to 45.8 hectares). Mr Hockney agreed these figures, and they went into the transfer as later executed. I add that, for the purposes of this action, the parties have agreed measurements for the hatched land and overspill areas of 2.29 and 0.78 hectares respectively.

111. Contracts were exchanged on 14 August 1996. The contract provided for the sale to CMH to be completed by a transfer in the form of that later executed on 10 October 1996.

112. Although not relevant to the rectification claim, I will, for completeness, refer briefly to the correspondence passing between the parties during the months prior to the grant on 17 July 1998 of the planning permission which triggered the MoD's claim for overage.

113. On 4 March 1998, Mr Stenhouse asked Nelson Cuff when CMH proposed to demolish the buildings on the brown land. He repeated the inquiry on 27 March. By a letter dated 13 May, Denny Sutton & Swan ("DSW") came on the scene as solicitors for CMH. They said that all the buildings would not be fully demolished "because our Clients have consent for the conversion of the [sic] two of the units into the villa [sic] shop." On 15 May, Mr Stenhouse replied, asked again when all the buildings on the brown land were to be demolished and pointed out that such demolition triggered the release of the hatched land from overage. He referred to clause 5.13.6 of the transfer. On 29 May, he wrote again, referred in terms to what DSW had said about demolition in their letter of 13 May and pointed out that the failure to demolish all the buildings would mean (a) that the base value would never be increased in accordance with clause 5.1.1 of the transfer and (b) that the hatched land would not be released from

overage payments under clause 5.13.6. DSW responded on 8 June, writing that CMH sought “the express consent of [the MoD] to the [hatched land] being sold without payment of overage on the basis that [CMH] have now demolished the buildings on [the brown land] as referred to in Clause 5.1.1 and 5.13.6 in the Transfer notwithstanding that there is a semi-detached block remaining which at the request of the Local Authority and the residents association on the site is to be retained as a village shop.” Mr Stenhouse replied on 11 June, pointing out that the omission to demolish all the buildings on the brown land would leave the base value unchanged and the hatched land subject to overage. On 1 July, Mr Allison of DTZ wrote to Mr Folbigg of CMH referring to a meeting the previous day in which CMH had apparently requested a variation of the transfer. He said the proposal would involve the MoD in forfeiting substantial overage, and that it would expect a cash compensation for any such concession. He invited CMH to submit a proposal, but pointed out that “without a variation you would be asked to pay overage on the area that you are currently developing” (i.e. the hatched land and the overspill areas). No proposal was submitted, the planning permission for the relevant development was obtained and acted upon on 17 July 1998, and the rest is history. The MoD could not have spelt the position out more fairly.

#### **Conclusions on the rectification claim**

114. The original bargain the MoD and CMH had struck in April 1996 was that the whole site was to be overage land, but with overage only payable on houses in excess of the 300 threshold. There is no doubt about that. But a material two-stage change was deliberately introduced to that arrangement following the meeting on 27 June.

115. First, the BPT land (with its 212 existing houses) was to be excluded from the overage arrangements; and, secondly, (ignoring the complications in relation to the brown land and the hatched land) the area designated for the 88 new houses was also to be excluded from them. The first change was agreed at the meeting of 27 June, and was reflected in the draft produced by Mr Morris of Nelson Cuff immediately afterwards. The second change was introduced following Mr Wicks’s proposals in his letter of 19 July.

116. What was the nature of those changes? I regard it as clear. This does not involve making factual findings as to what was said in the course of any disputed conversations, because there were none. In order to understand what was happening, it is not necessary to look beyond the documents passing between the both sides after 27 June.

117. The effect of the first change was that any development on the BPT land over and above the existing 212 houses would not attract overage. On the other hand, those 212 houses were to be brought into account in calculating whether the subsequent development of the CMH land would push the total number of houses on the site over 300, in which event overage would be payable in respect of any such development. That gave CMH the opportunity to build 88 overage-free houses on the CMH site, an opportunity reflected in Mr Morris’s first post-27 June draft and which led to Mr Stenhouse’s clauses 5.2.2 and 5.2.3. Down to this point, however, and apart from the variation in relation to the BPT land, the scheme remained much as it had always been, save that in practice the relevant numerical threshold on the CMH land was now 88 houses.

118. But CMH apparently still had difficulties with its funders, and so Mr Wicks introduced his new proposal in his letter of 19 July. He spelt out his proposal unambiguously, namely that the area of the CMH land that CMH had designated for the 88 houses should *also* be excluded from overage, and overage should only apply to the remainder of the CMH site.

119. The sense of that was clear enough too, or at least was so regarded by the MoD, Mr Stenhouse and (I infer) Mr Morris of Nelson Cuff – namely, that the “numbers” based overage arrangement was now to be wholly replaced by an “area” based overage system. In short, an area was to be identified as the site of the 300 houses CMH intended to create (212 existing plus 88 proposed), which was to be excluded from overage. The remainder of the CMH land was to be subject to overage.

120. The MoD had no difficulty in understanding one particular risk inherent in that proposal. It was that CMH might squeeze *more* than 300 houses on the non-overage land, and so escape having to pay overage on the extra (“the overdevelopment risk”). However, having recognised it, Mr Hockney’s assessment was that in practice the non-overage land could not be developed with more than a total of 300 houses, and so he regarded the risk as relatively immaterial. I have no doubt, and find, that he fully understood this was the effect of Mr Wicks’s proposal.

121. But what if things so turned out that CMH could *not* put as many as 300 houses on the non-overage land (“the underdevelopment risk”)? Would this mean that, to the extent of the shortfall, any development of the land Mr Wicks had designated as overage land would be *free* of overage? If not, then this was the reverse of the overdevelopment risk, and would be a risk to which CMH was subject.

122. Mr Wicks’s letter did not spell out what was to happen if this were to be the way the story developed. However, the natural inference from his new area-based proposal was that, just as the MoD was bearing the overdevelopment risk, so CMH was bearing the underdevelopment risk. I regard that as implicit in the nature of the scheme he was proposing. I regard it as also implicit in the fact that the non-overage area had been defined by Mr Wicks as one on which he apparently had complete confidence he could put a total of 300 houses; and since he was not suggesting that he had any doubts about this, why should it be assumed that his new proposals were subject to some unexpressed proviso intended to cater for his confidence proving to be misplaced? Moreover, if he had intended that CMH was *not* to bear the underdevelopment risk, his scheme would have had to include elaborate provisions as to how the point was to be catered for. It would, for example, have had to cover the possibility that the overage land might be developed before the development possibilities of the non-overage land had been fully exploited, since otherwise there might have arisen the type of problem to which I earlier referred in relation to the practical operation of the clause CMH now seeks to introduce by way of rectification.

123. However, Mr Wicks’s did not spell any of this out. Instead he proposed a scheme in which the natural inference as to the allocation of risk was as I have outlined it. It is also quite plain that Mr Stenhouse did not interpret Mr Wicks’s proposal as one in which CMH was somehow to be excused from bearing the underdevelopment risk. I should comment briefly on Mr Stenhouse’s evidence. He



was a careless and unimpressive witness. He had obviously done little or nothing in the way of preparatory homework about this transaction prior to giving oral evidence, and if he believed he had a clear memory as to its precise course, his cross-examination quickly showed that he did not. But as the cross-examination proceeded, and he was reintroduced to a story that I have no doubt he fully understood at the time, it all came back to him. I say simply that I have no doubt that he fully and properly understood the form and effect of the final form of transfer – of which he was the primary architect – and that he regarded it as reflecting the MoD's intentions. I find also that Mr Hockney similarly understood the nature of the transaction as reflected in the final form of transfer, and that the MoD intended to execute a transfer in precisely that form. The MoD rightly regarded its form as reflecting precisely what Mr Wicks had proposed, and I have no doubt that it also assumed that he too fully understood it, and that he also intended CMH to execute a transfer in that form.

124. In my view, those findings are fatal to CMH's claim for rectification. That is because it has to show not just that CMH was mistaken about the form and effect of the transfer, but that so also was the MoD. But I anyway do not accept that even CMH was in any manner mistaken about the form or effect of the transfer. Mr Wicks's evidence was, as I followed it, that all he ever intended to propose was (a) that the land he identified as being excluded from overage should be subject to the overage provisions, but (b) that it should not be the subject of the MoD *charge* securing overage. I do not accept that evidence. I find that he understood perfectly well what he was proposing and that he intended to convey to the MoD by his letters exactly what the MoD and Mr Stenhouse understood him to be conveying. I infer that Mr Morris of Nelson Cuff understood his intentions in the same way, which is no doubt why no-one from Nelson Cuff felt able to give evidence in support of CMH's case.

125. If, however, I am wrong on my findings as to Mr Wicks's intentions, then it still makes no difference. Even if his true intentions were as he now asserts them to have been, he wrote them down in language which could not sensibly have been interpreted otherwise than in the way in which the MoD and both sides' lawyers read them. Mr Wicks's unexpressed intentions are simply irrelevant. What counts in the present context are the outward expressions of accord passing between the parties and leading up to the final form of transfer. Those outward expressions are to be found in the correspondence passing between the parties, whose meaning I regard as clear, and I regard the final form of transfer as fully in line with that meaning.

126. I have indicated that Mr Wicks placed great reliance in his evidence on an assertion that he always regarded clause 5.2.2 of the draft of 17 July as part of the true bargain between the parties, and it is a clause in that form that CMH seeks to introduce by way of rectification of the transfer. I found that assertion wholly unconvincing too. First, there is no evidence that that clause was ever agreed by *anyone* on CMH's side. Secondly, it was in a draft which was intended to give effect to the transaction which pre-dated the change introduced by Mr Wicks on 19 July. That change moved the transaction from a numbers-based overage provision to an area-based one. Mr Stenhouse said that, in the light of that change, he regarded clauses 5.2.2 and 5.2.3 as no longer appropriate and so he took them out in the next draft. I consider he was quite entitled so to conclude, and Mr Morris does not appear to have taken a different view. A point was made that Mr Stenhouse did not first seek Mr Hockney's instructions before doing so. But he did not need to. His task as a

solicitor was to exercise his own judgment as to the form the draft should take in order to reflect its changing nature, and he did so. Of course, he would have to be sure that his client fully understood the final form of draft and agreed to it, but I have no doubt that Mr Hockney did both these things. CMH's difficulty is, however, that there is simply no evidence that there was ever any agreement between the parties that a clause in the form of clause 5.2.2 should be included in the new "area-based" overage arrangement.

127. It was a recurring theme of Mr Horton's presentation of CMH's case that CMH paid £8m for the right to build a total of 300 houses without paying any additional money to the MoD and that it was therefore unconscionable for the MoD now to demand the payment of the overage. I record that, to a question in cross-examination as to whether it was conscionable for CMH now to have to pay more for up to 300, my note of Mr Hockney's response was that he said "Put like that, no." However, I have set out my finding that Mr Hockney fully understood the final form of the transfer, and intended it to be in that form. With respect to Mr Horton, I regarded his theme as a misplaced one. It begged the central question raised by the rectification claim, and was of no assistance in its determination. It is correct that, at the outset, the bargain was that CMH was paying £8m for (inter alia) the right to build 300 overage-free houses. But, because of its difficulties with its funders, CMH proposed a new and different bargain, to which the MoD agreed. That was to identify a particular area on which it was confident it could build a total of up to 300 houses (in fact, it secretly thought it could build 306 on it) and to designate that as overage-free. The remainder of the site was to be subject to overage. That proposal involved a change although, if CMH's confidence as to its ability to carry out its particular development proposals had proved to be justified, it would have had just as valuable a bargain as it had made at the outset (in fact, because of the extra six houses, more so). If its confidence proved ill-founded, then the bargain might prove to be less valuable. The change, therefore, involved new risks on both sides, of which I find both were fully aware, although CMH appears to have regarded the risks to which it was subject as immaterial.

128. The short answer to Mr Horton's theme is, therefore, that by 19 July CMH was *not* proposing to pay £8m for the right to build 300 overage-houses. It was proposing to pay £8m for the right to buy a designated area of non-overage land on which it hoped, but could not be certain, that it would be able to build a total of 306 houses; and a further area of overage land which would be subject to overage whatever happened on the non-overage land. In the event, things have not turned out for CMH as it might have hoped simply because (a) its confidence as to its own development plans proved misplaced and (b) it chose to bury its corporate head in the sand with regard to the satisfaction of the clause 5.13.6 condition. If it regrets how things have turned out, it has no-one to blame but those responsible for the business decisions it made. I dismiss the claim for rectification.

### **Breach of warranty and misrepresentation**

129. As a further attempt to escape its obligations, CMH advanced, but did not develop, a case that the MoD had given a warranty to it that it could build up to 300 houses on the land without any liability to overage. It is said that if, contrary to all its arguments, CMH is liable to pay the claimed overage, then the MoD has breached that warranty.

130. When, how, and by whom that warranty is alleged to have been given was not explained or shown and the allegation was another unjustified and irresponsible one that should not have been made. There is nothing in it. This case is about a conventional (albeit relatively complicated) sale and purchase agreement in the course of which the MoD gave and breached no warranties. For good measure, CMH also alleged that the MoD made a misrepresentation to it about its right to build up to 300 overage-free houses, but Mr Horton had the judgment to abandon that argument, whose quality was of the same order as that of the breach of warranty case.

**Result**

131. I reject CMH's construction arguments and dismiss its rectification claim. The MoD's claim succeeds. I will hear counsel as to the form of the order.

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