



Neutral Citation Number: [2021] EWHC 2045 (Ch)

Case No: PT-2020-000800

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

Remotely at:
The Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 23 July 2021

Before :

DEPUTY MASTER RAEBURN

Between :

(1) PRATHITHA HEWAVISENTI
(2) ANUJE WANNIARACHCHI

Claimants

- and -

(1) KOSALA WICKRAMSINGHE
(2) SHALINEE ABEYWICKRAMA

Defendants

Piers Feltham (instructed by Simons Muirhead Burton LLP) for the Claimants
Stephen Bishop (instructed by BDB Pitmans LLP) for the Defendants

Hearing date: 24 and 25 March 2021

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 23 July 2021 at 12 pm.

Deputy Master Raeburn:

Introduction

1. This is a claim under CPR Part 8 issued on 14 October 2020 to enforce the terms of a settlement agreement between the parties governing the winding up of their joint property venture. The Claimants seek orders for transfer and sale of four properties and an account for associated rents and profits.
2. The Claimants are a married couple who entered into a joint buy-to-let property venture with the Defendants, another married couple, pursuant to which the parties acquired a number of residential properties between 2002 and 2005 for letting purposes.
3. The parties' relationship broke down (the parties do not agree as to when this occurred) resulting in a dispute between them as to whether certain properties should be included within the terms of the joint venture or not, the manner in which the joint venture was to be wound up and whether there had been an appropriate account made by the Defendants for sums representing the rents and profits of certain of the joint venture properties.
4. The properties forming the basis of the parties' dispute are 114 Wood End Gardens, Northolt, Middlesex UB5 4QN ("**Wood End**"), 20 Linden Avenue, Wembley, Middlesex HA9 8BD ("**Linden**"), 7 Beechcroft Gardens, Wembley, Middlesex HA9 8EP ("**Beechcroft**"), and Flats 1, 5 and 11-15, 36 Penywern Road, London SW5 9SU ("**the Penywern Flats**") (together "**the Properties**").

The Settlement Agreement

5. Following mediation, the parties entered into a written settlement agreement dated 6 February 2017 ("**the Settlement Agreement**") with a view to winding up the joint venture.
6. The Settlement Agreement made the following declarations of trust:
 - i) The beneficial interest in the leaseholds of the Penywern Flats and 1/3 of the freehold of 36 Penywern Road held on trust for the parties in the shares 70% for the Defendants jointly and 30% for the Claimants jointly;
 - ii) The beneficial interest in Linden, Wood End and Beechcroft held on trust for the parties in the shares 50% for the Defendants jointly and 50% for the Claimants jointly.
7. The parties also agreed a mechanism for valuation and pre-emption or sale of certain of the Properties at clause 3 of the Settlement Agreement:

"(1) A valuer agreed between the parties or appointed by the President of the RICS on joint request of the parties by 13 February 2017 shall be jointly instructed by 20 February 2017 to value 114 Wood End Gardens, Northolt (valued as 3 separate flats with a common freehold), 20 Linden Avenue (valued as 2 separate flats with a common freehold), and 7 Beechcroft Gardens;

(2) Once each valuation is received each side shall have 14 days to offer to buy the other of its share of any of the houses at 50% of that price, with

the party holding the legal title to a house in his or her name having the prior right.

(3) If the right of pre-emption is not exercised in that period in respect of any house it shall immediately be placed on the open market for sale at the price advised by the valuer and thereafter shall be marketed and priced in accordance with the advice of agreed and jointly instructed estate agents."

8. In relation to the Penywern Flats, the parties agreed upon a method of sale in clause 4:

"The leasehold interests in Flats 1, 5, 11, 12, 13, 14 and 15, 36 Penywern Road London SW7 9SU and the 1/3 share of the freehold of 36 Penywern Road, London SW7 9SU (together the Penywern Flats) shall by 20 February 2017 be placed on the open market for sale and thereafter marketed and priced in accordance with the advice of agreed and jointly instructed estate agents until sale and upon sale the proceeds of sale shall be paid into an account of jointly instructed conveyancing solicitors for payment and division in accordance with this agreement."

9. In addition to the agreed method of sale outlined above, the parties both agreed to be subject to certain additional obligations with respect to the sale of the Penywern Flats, pursuant to clause 5 of the Settlement Agreement under a heading entitled "BEST ENDEAVOURS TO SELL AND PROFITS AFTER 6 MONTHS", which stated as follows:

"The parties shall use their best endeavours to procure the sale of Penywern Flats as soon as possible in accordance with the marketing advice of the estate agents and if the Penywern Flats or any of them shall remain unsold after 6 August 2017 Party B [the Defendants] shall account to Party A [the Claimants] for 30% of any net income from the Penywern Flats after that date."

10. The parties also agreed at clause 6 certain terms of payment as part of the settlement ("**the Payment Terms**") as follows:

"Party B [the Defendants] shall, in settlement of Party A's [the Claimants]' claim to payment of the balance due of net profits received from the Properties up until 23 May 2017, and from 3 Shepherds Court, Horsenden Lane, Greenford, Middlesex UB6 7QJ at any time, and any cross-claim by Party B [the Defendants] against Party A [the Claimants] in respect thereof, pay Party A [the Claimants], from Party B's [the Defendants]' 70% share of the net proceeds of sale of the Penywern Flats, as and when those proceeds are realised, and at the latest in full upon completion of sale of all the Penywern Flats, the sum of £160,000."

The Factual Background

Linden

11. On 16 August 2017, pursuant clause 3(1) of the Settlement Agreement, an expert valuer, Mr. M.S. Martin FRICS FCI Arb was appointed by RICS to value certain of the Properties, including Linden.

12. The parties' joint letter of instruction to Mr. Martin provided that: (i) he was to act as an expert valuer; (ii) his determination of the values of the relevant Properties was to be made in writing and included a statement that the parties agreed that his determination would be final and binding on them; (iii) he was to determine the market value of each Property on the assumption of a sale between a willing seller and a willing buyer with completion of the sale to take place within 3 months; (iv) in carrying out his determination he would prepare a building survey report.
13. On 6 November 2017, Mr. Martin emailed the parties' solicitors to say that he would value Linden as one house which was laid out as two flats because planning permission had not been obtained for division of the house into two flats and in his view, any such application was unlikely to be granted.
14. Mr. Martin produced his valuation on the Properties (other than the Penywern Flats) on or around 29 January 2018 ("**the January Valuation**") which valued Linden at £440,000. Having received the valuation of Linden, the Claimants' sought, in accordance with section 3(3) of the Settlement Agreement to exercise their right to buy the Defendants' share of Linden and sent notice to the Defendants on 6 February 2018. However, on 14 February 2018 the Defendants, through their solicitors contested Mr. Martin's approach to the valuation of Linden on the basis that it should have been valued as two flats.
15. On 5 June 2018, the Defendants' solicitors sent Mr. Martin by email, a number of express "clarifications" to the joint instructions which Mr. Martin was to observe when conducting his revised valuation. These "clarifications" represented the inclusion of three additional questions to be addressed in the

valuation report, namely: (i) whether work done in 2003 is outside the relevant enforcement period; (ii) what the impact certain information provided on 28 March and the answer to (i) above had on Mr. Martin's conclusions as to the basis on which Linden should be valued; and (iii) Mr. Martin's estimation of Linden's value as two flats. Those additional clarifications to the joint instructions were not challenged by the Claimants.

16. On 29 October 2018 Mr. Martin circulated a revised valuation to the parties, this time valuing Linden as two flats, at £480,000 ("**the October Valuation**"). The Claimants again exercised their right to purchase the Defendants' share of Linden at that higher valuation by way of notice on 2 November 2018.
17. The Defendants have since refused to transfer their share in Linden. They say there are a number of flaws in Mr. Martin's valuation reports, which were outlined in a letter sent by the Defendants' solicitors to the Claimants' solicitors dated 18 April 2019. In that letter, the Defendants assert that Linden should be properly valued at £642,000.

Wood End and Beechcroft

18. Mr. Martin valued Wood End and Beechcroft at £415,000 and £355,300 respectively, in the January Valuation.
19. On 8 March 2018, the Claimants gave notice to the Defendants seeking to purchase their share of Wood End. However, this was rejected by the Defendants on the basis that it was outside of the 14 day period prescribed by section 3(2) of the Settlement Agreement.

20. In their letter of 18 April 2019 and letter of claim dated 11 March 2020 the Claimants demand that Wood End and Beechcroft be placed on the open market for sale pursuant to clause 3(3) of the Agreement. The Defendants have not acceded to that demand on the principal basis that Mr. Martin's valuation of Linden was flawed and they take issue with his approach to the valuation.

The Penywern Flats

21. On 9 March 2018, the parties (through their respective solicitors) sent a joint letter of instruction to estate agents Stanley Chelsea.
22. The parties' joint letter of instruction provided that Stanley Chelsea were: (i) jointly instructed by the parties to market the Penywern Flats, with the overriding objective of securing the best possible price; (ii) to first, inspect and value the Flats within 21 days of receipt of the letter and then within a further 21 days, provide the parties with a proposal setting out, amongst other things, the price at which the Flats should be marketed ("**the Advertised Price**").
23. The letter of instruction also provides that in the event that Stanley Chelsea received a "subject to contract" offer to purchase the Penywern Flats which is equal to, or exceeds the Advertised Price, they were obliged to: (i) promptly notify the parties, and (ii) 7 days after providing such notification to the parties, accept the offer, unless both parties confirmed in writing that they wish to reject it.
24. A similar provision in the letter of instruction provided that if, while a "subject to contract" offer is being considered a higher offer was received, then Stanley

Chelsea should notify the parties and accept the higher offer (and reject the previous offer), unless both parties confirmed that they wish to reject the higher offer.

25. The letter of instruction also provides that any reductions to the Advertised Price, or changes in marketing strategy are to be made at Stanley Chelsea's discretion, subject to the parties being given 14 days' notice of the proposed changes (during which they can make representations), which Stanley Chelsea could consider or reject to the extent it considered appropriate, acting at all times in accordance with the overriding objective.
26. It would appear that there were a number of delays in procuring the sale of the Penywern Flats (which the Claimants contend represent breaches of the Settlement Agreement by the Defendants).
27. A number of offers were made for the purchase of the Penywern Flats (both above and below the Advertised Price) by third parties between January 2019 and February 2020, which the Claimants contend were, for the most part, either rejected by the Defendants, or the sale process was otherwise obstructed and/or delayed by them.
28. On 9 March 2020, the Defendants sought to buy the Claimants' share of the beneficial interest in the Penywern Flats as well as the original 400 shares of the Penywern Flats' freehold holding company for £1,587,223 in total. The Defendants claimed this was higher than the third party's £1.625 million offer after factoring in a deduction of £42,777 representing the First Defendant's additional 400 shares and should therefore be accepted. The Claimants rejected this offer.

29. In June 2020 a further offer was made by a third party to purchase the Penywern Flats, at £50,000 over the Advertised Price, at a sum of £1.65 million. On 23 June 2020, the Defendants sought to "match the offer" and buy out the Claimants' share in the Penywern Flats, which was again rejected.
30. On 23 July 2020, the third party buyer increased their offer to £1,657,500 which the Claimants sought to accept. However, the Defendants rejected that offer and instead offered £1,662,500 to purchase the Penywern Flats themselves.
31. In response, on 3 August 2020, the Claimants rejected the Defendants' offer, asserting it as invalid. The Claimants also asserted that the Defendants were in breach of the Settlement Agreement and the joint letter of instruction to Stanley Chelsea, by failing to accept previous third party offers over the Advertised Price which the Claimants had sought to accept.

The Issues

32. Despite the parties agreeing the terms of the Settlement Agreement in a bid to wind-up the joint venture, it is clear that in reality a number of obstacles have arisen which have prevented this occurring.
33. Against the factual background above, the parties agreed the issues for determination by this Court as set out below, which I shall decide in turn.

Issue 1: Linden - Are the Defendants bound by the October valuation and should an order for transfer be made?

34. The first issue before the Court is whether or not the Defendants are bound under clauses 3(1) and (2) of the Settlement Agreement by the October Valuation of Linden at £480,000 and are therefore bound to transfer their share of Linden to the Claimants at that valuation, pursuant to the 2 November 2018 exercise of the Claimants' right to buy it under the Settlement Agreement.

35. The Claimants' case is that as a matter of contract law, the parties agreed to be bound by the determined valuation which cannot be challenged unless the valuer departed from their instructions, or there is an element of fraud or collusion relevant to the valuation (which is not suggested in this case). In support of this proposition, Counsel for the Claimants relies upon the well-known judgment of the Court of Appeal in Jones v Sherwood Computer Services plc [1992] 1 WLR 277, upholding the following dictum of Lord Denning in Campbell v Edwards [1976] 1 WLR 403 at 284C-G:

"It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion of course it would be very different. Fraud or collusion unravels everything."

36. Counsel for the Claimant accepts that the first valuation conducted by Mr. Martin (i.e. the January Valuation) could have been challenged on the basis that Mr. Martin departed from his instructions by valuing Linden as one house

laid out as two flats, as opposed to as two flats, as he did for the purposes of the October Valuation.

37. Counsel for the Defendants contends that the October Valuation is a nullity, on the basis that Mr. Martin departed from his instructions by: (i) valuing Linden with reference to the net profits of sale of two flats after conversion of the house into two flats and the application of deductions for the costs of works and contingent risks (i.e. he should have instead valued Linden by looking at the likely price that the property would have achieved "as is"; not the net profit after development to a standard and specification proposed by Mr. Martin); and (ii) including in his valuation an assessment of whether enforcement action or the grant of a lawful development certificate were likely in respect of the works despite them being outside of the relevant enforcement period. Counsel for the Defendants says that this was outside of his instructions, which were to value Linden based on proper planning title; and (iii) not giving reasons for his assessments, including applying a 15% discount for profit and risk, a contingency of £15,000 to the sale price; and a deduction of £23,237 for the theoretical purchase costs of the "raw" unit without explaining what that is.

38. Counsel for the Defendants relies on Halifax Life Limited v The Equitable Life Assurance Society [2007] EWHC 503 (Comm) as supporting his submission that the valuation is not binding on the ground that Mr. Martin had materially departed from the agreed terms of reference by failing to provide any adequate reasons for his decision.

39. Counsel for the Defendants also relies upon Mr. Martin's standard terms and conditions as being incorporated into his contract to conduct the valuation which, in essence, state that one of his assumptions is that the property in question has "*proper legal and planning title*".
40. I reject the Defendants' submissions. In my judgment, the October Valuation is binding on the parties. It is clear that the parties agreed that the mechanism to be employed in winding up this aspect of the joint venture was to be in the form of a binding determination as to value by an expert valuer in accordance with the Settlement Agreement and joint instructions.
41. The joint instructions to Mr. Martin included a number of express assumptions which were to underlie his valuation. Given their brevity, I do not think that it could be reasonably said that those instructions were intended to be entirely prescriptive of the factors and issues he did or did not need to take into account when conducting his valuation. In my judgment, it is clear that the parties intended (and indeed accepted) that the valuer would exercise a degree of professional judgment in light of the express instructions they provided.
42. The alleged departures from those instructions contended by Counsel for the Defendants do not, in my judgment represent departures at all. His approach in valuing Linden with reference to the net profits of sale of two flats after conversion of the house into two flats and the application of deductions for the costs of works and contingent risks, does not mean he has not determined the "market value" of Linden on the assumption of a sale between willing seller and a willing buyer in accordance with the joint instructions.

43. Counsel for the Defendants' submission that Mr. Martin's standard terms and conditions require him to conduct his valuation based on an assumption of proper planning title for Linden ignores the fact that those standard terms and conditions did not form part of the agreed and binding joint instructions sent by the parties to the valuer, nor is that an agreed basis of valuation as prescribed by the Settlement Agreement.

44. I reject the submission that Mr. Martin departed from the agreed terms of reference by failing to provide any adequate reasons for his decision (i.e. his valuation of Linden). The obligation on Mr. Martin to provide reasons for his valuations was pursuant to section 17 of the joint letter of instruction which required him to:

"...determine the value of the property in question and notify such determination in writing to the Parties via their solicitors, together with reasons for the determination".

45. The decision in Halifax Life Ltd v The Equitable Life Assurance Society is an example of the Court exercising its power to order adequate reasons to be provided by an expert who has been instructed to make a binding determination. Cresswell J held at [60] that:

"A failure to give adequate reasons does not (generally and certainly not here) mean that the decision is not binding."

46. The Judge refused to set aside the determination in question and instead ordered that proper reasons be provided. In this case, I am not persuaded that inadequate reasons for the valuation of Linden have been given by Mr. Martin.

The October Valuation includes discussion and reasoning which forms the basis of his assessment, including reference to the available sales evidence of a number of comparable properties. Whilst the specific items identified by Counsel for the Defendants could benefit from some further expansion, taken as a whole, I do not regard the reasons provided by Mr. Martin for his valuation as lacking a basis for his conclusions on key or substantial points raised. In any event, the valuation itself remains binding on the parties and I do not regard it as appropriate in the circumstances to direct Mr. Martin to provide further reasons for his decision for these purposes.

47. For the reasons given, I am satisfied that the Defendants are bound under clauses 3(1) and (2) of the Settlement Agreement by the October Valuation of Linden at £480,000. It follows that the exercise of the Claimants' option to purchase the Defendants' share pursuant to section 3(2) of the Settlement Agreement by way of notice dated 2 November 2019 was validly exercised (which is within the relevant 14 day period prescribed by the Settlement Agreement).

Issue 2: Wood End and Beechcroft - Are the Defendants bound by the Settlement Agreement to place the properties for sale on the open market?

48. The second issue for determination by this Court is whether the Defendants are obliged under clause 3(3) of the Settlement Agreement to join with the Claimants in placing Wood End and Beechcroft on the open market following their undisputed valuations at £415,000 and £355,300 respectively on 30 January 2018, or are entitled to refuse to do so unless Linden is revalued.

49. The issue between the parties arises upon the proper interpretation of clause 3(3) of the Settlement Agreement. Clause 3(1) provides (at paragraph 7 of this judgment) that the valuer would value each of Wood End, Linden and Beechcroft. Clause 3(2) provides that:

"Once each valuation is received each side shall have 14 days to offer to buy the other out of its share of any of the houses at 50% of that price, with the party holding the legal title to a house in his or her name having the prior right."

50. Counsel for the Defendants submits that clause 3(2) should be interpreted as meaning that the 14 day period only runs from the date upon which the valuations for all three properties had been received by the parties. He contends that this interpretation is consistent with what he says is the intention of the Settlement Agreement, which was to value the 3 properties with a view to purchase by the parties, or sale if neither were interested, so as to end the trusts over those properties. He further submits that this approach would have allowed any purchase to be set off to the benefit of the parties, by avoiding additional financing, and that a party's decision on whether to offer to buy any individual property might depend on the valuations of other properties and any interest in purchasing it by the opposing parties.

51. In my judgment, the proper interpretation of clause 3(2) of the Settlement Agreement is that a 14 day period commenced once a valuation with respect to a particular property was received by the parties. The first few words of clause 3(2) of the Settlement Agreement give rise to the parties' ability to exercise their option rights. The right has been expressed as being triggered "*Once each*

valuation is received..." (my emphasis). The natural meaning of the word "each" used by the parties refers to the valuation of an individual property, to be regarded and identified separately. To accede to the Defendants' submissions would be to construe the word "each" as meaning "every", which is contrary to the language used.

52. That conclusion is supported by construing clause 3(2) in its context. Clause 3(3) (at paragraph 7 above) is expressed in the following way: *"If the right of pre-emption is not exercised in that period in respect of any house..."*. Again, that clause contemplates the right of pre-emption being exercised in respect of any individual house (in the singular).
53. Thus, I find that viewed in the light of the whole of the Settlement Agreement, a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made would understand clause 3(2) to mean that the time period within which a party could exercise a right of pre-emption under the Settlement Agreement would run from the date on which the valuation of each corresponding property was received by the parties; not from the date upon which all of them in the aggregate had been received.
54. No exercise of the pre-emption right was made within the relevant period following receipt of the valuation for Wood End or the valuation for Beechcroft and accordingly, the Defendants are obliged under clause 3(3) of the Settlement Agreement to join with the Claimants in placing Wood End and Beechcroft on the open market following their undisputed valuations at £415,000 and £601,550 respectively on 30 January 2018.

55. In light of my findings above, the Defendants are not entitled refuse to the operation of clause 3(3) unless Linden is revalued.

Issue 3: The Penywern Flats - Is there a constructive trust of the freehold shares?

56. This no longer arises as an issue as it was conceded by Counsel for the Defendants during submissions.

Issue 4: The Penywern Flats - Should an order for sale be made?

57. The fourth agreed issue for determination is whether this Court should order the sale of the Penywern Flats in order to enforce clauses 4 and 5 of the Settlement Agreement and clauses 11 – 18 of the parties' joint letter of instruction to their estate agents, Stanley Chelsea. It was agreed that the following sub-issues arise, which I shall decide in turn.

58. Issue 4(i): Whether the Defendants are entitled under the Settlement Agreement and the rules of equity to offer to purchase, and to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole.

59. Counsel for the Claimants advance three principal reasons as to why the Defendants are not entitled to buy out the Claimants' share. First, it is submitted that the Settlement Agreement provides an express procedure for the buy-out of the opposing parties' shares of Wood End, Beechcroft and Linden, but (it is said, deliberately) does not confer any such right in respect of the Penywern Flats, which under section 3 of the Settlement Agreement has been expressed as being sold on the open market. It is said that on this basis, the canon of construction *expressio unius exclusio alterius* applies; Continental Bank v Aeakos Compania Naviera SA [1994] 1 WLR 588.

60. Second, it is submitted that a sale of beneficial shares of the Penywern Flats by one set of parties to the opposing parties is not a sale on the "open market" for the purposes of section 3 of the Settlement Agreement and any contrary view would belie the deliberate omission referred to above and would create an unacceptable conflict with respect to the personal interest of the Defendant trustee between, on the one hand, their interest in deterring open market purchasers and keeping the value down in order to buy at a lower price, and the duty to maximise the sale price.
61. Counsel for the Claimant refers to section 3(1) and (2) of the Settlement Agreement which give the Defendants (as titleholders) the prior right to buy out the Claimants' share of Wood End and Beechcroft and the Claimants to buy out the Defendants' share of Linden, under a procedure which provided for a valuation and a right to buy out at that valuation, in default of which the property would be marketed for sale.
62. In contrast, Counsel for the Claimant submits that in relation to the Penywern Flats, the Settlement Agreement provides under clause 4 (to which I refer at paragraph 8 above) that the Penywern Flats were to be placed on the open market for sale and thereafter marketed and priced by the jointly instructed estate agents and that the parties were under an obligation to use their best endeavours to procure the sale of Penywern Flats as soon as possible.
63. He says this position is also supported by other references in the Settlement Agreement, including clause 4, on the basis that the marketing, pricing and sale referred to in that clause is of the whole of the Penywern Flats to a third party, not of the Claimants share to the Defendants. It is also submitted that

the Payment Provisions (which in broad terms state that the proceeds of sale shall be paid into an account of jointly instructed solicitors for payment in accordance the Settlement Agreement), clearly contemplate sale to a third party.

64. Third, it is submitted that aside from matters of construction under the Settlement Agreement, the Defendants are precluded by the rules of equity from competing as a buyer of the Penywern Flats on the open market due to the rule against "self-dealing". This was put on the basis that the First Defendant, as the legal titleholder, trustee and vendor of the Penywern Flats (who is also in control of them) cannot be permitted to let his personal interest in buying at the lowest possible price conflict with his fiduciary duties as trustee to promote sale at the highest possible price. In this regard, Counsel for the Claimant relies upon Re Thompson's Settlement [1986] Ch 99 to support the proposition that equity will not generally allow a person, who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest. He submits that the rule is prophylactic and precautionary, being designed to avoid both any risk of temptation and any need for investigation of whether the trustee has taken advantage.

65. The Defendants' submissions with regard to the construction of the Settlement Agreement can be summarised as taking the position that clauses 4 and 5 of the Settlement Agreement (to which I refer at paragraphs 9 and 10 above) do not prevent the Defendants from purchasing the Penywern Flats as they contain no contractual prohibition (express or implied) which prevents them

bidding on the open market and the purpose of the clauses was simply to achieve the best value for the parties.

66. As to the application of the self-dealing rule, Counsel for the Defendants contends that the rule is not engaged in this case. Counsel for the Defendants takes the position that the self-dealing rule is not that a trustee may not purchase trust property, but instead applies to confer a remedy where there has been a disposal of trust property. It is submitted that there has been no disposal and hence the self-dealing rule does not apply directly.
67. Counsel for the Defendants further submits that the true self-dealing rule results in a purchase of trust property by a trustee becoming voidable within a reasonable period of time at the instance of a beneficiary; but that the Court may sanction such a purchase. In support of these submissions, Counsel for the Defendants relies on the judgment of Danckwerts LJ in Holder v Holder [1964 H. No. 33] at 398D:

"The principle is repeated in Ex parte James. The subject is dealt with in Snell's Equity, 26th ed. (1966), p. 259, where it is pointed out that the true rule is not that a trustee may not purchase trust property; it is that a purchase of trust property by a trustee is voidable within a reasonable time at the instance of any beneficiary (citing Ex parte James and In re Bulmer).

It is said that it makes no difference, even though the sale may be fair and honest and may be made at a public auction: see Snell's Equity, p. 260. But the court may sanction such a purchase, and if the court can do that (see Snell's Equity, p. 219), there can be no more than a

practice that the court should not allow a trustee to bid. In my view it is a matter for the discretion of the judge."

68. Counsel for the Defendants also relies on Newgate Stud Co v Penfold [2004] EWHC 2993 (Ch) as authority for the proposition that a sale by a trustee to a spouse personally, is not automatically voidable by reason of the self-dealing rule, but the onus is on the trustee to demonstrate that the sale represents fair dealing.
69. In addition, Counsel for the Defendants says that there are exceptions to the self-dealing rule which are relevant in the context of this case, in particular, where: (i) the purchase is made with the concurrence of the beneficiaries, after a full and proper disclosure has been made to them; or (ii) where the purchase is made with the sanction of the Court.
70. Counsel for the Defendants says that the effect of the Settlement Agreement is that the Claimants have agreed to accept a bid from the Defendants, if it is the highest bid.
71. I accept the Claimants' submissions. For the reasons given by the Claimants, the Defendants are not entitled under the terms of the Settlement Agreement to offer to purchase, and to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole. I am satisfied that a sale to the Defendants would not constitute an "open market" sale in the manner contemplated by the Settlement Agreement.
72. Even if the Settlement Agreement could be construed as permitting the Defendants to purchase the Claimants' share of the Penywern Flats or the

Penywern Flats as a whole, in my judgment, in the circumstances of this particular case the rule against self-dealing would in any event prevent the First Defendant from competing as a buyer of the Penywern Flats on the open market.

73. It is clear that the First Defendant, as the legal titleholder, trustee and vendor of the Penywern Flats owes the Claimants fiduciary duties; his duty to the Claimants includes a duty to maximise the sales price. It would place the First Defendant at an unfair advantage which would not be designed to get the best price for the property, with the Defendants having both control of the property and knowledge of the third party offers.

74. I am satisfied that the rule against self-dealing as discussed in Re Thompson's Settlement plainly applies. As a general point of principle, a fiduciary has a duty of loyalty to its beneficiaries, which broadly prevents that fiduciary from putting itself in circumstances, which give rise to a risk of conflict between the fiduciary's duties and its personal interest. Clearly, that rule is not absolute and does not in all circumstances prevent a trustee from purchasing trust property. However on the facts of this case, the First Defendant is not so entitled. The fact that Holder v Holder permitted a trustee to purchase trust property in face of the self-dealing rule was on the very special circumstances of that case. This was explained in Re Thomson's Settlement by Vinelott J at 116C:

"The reason why, in the words of Harman L.J., the rule did not apply was that Victor, though he might technically have been made an executor notwithstanding the purported renunciation, had never acted as executor

in a way which could be taken to amount to acceptance of a duty to act in the interests of the beneficiaries under his father's will."

75. I consider that this case can be distinguished from Holder v Holder on the same basis as Re Thompson's Settlement. The First Defendant has expressly accepted a duty to act in the interests of the beneficiaries under the declaration of trust under the terms of the Settlement Agreement.
76. The Defendants submission that the self-dealing rule does not apply simply because a disposal has not yet occurred, is misconceived. Although the rule has been described as making the relevant transaction "*voidable by any beneficiary ex debito justitiae*" (see Tito v Waddell (No.2) [1977] Ch. 106 per Megarry V.C. at 241), it has been recognised that the Court can prospectively approve (or indeed refuse its approval) with respect to contemplated conduct in breach of duty; see Mills v Mills [2015] EWHC 1522 (Ch) per HHJ Cooke at [43]–[46]. A transaction does not therefore have to have "occurred" for the rule to apply.
77. I reject the Defendant's submissions that the effect of the Settlement Agreement is that concurrence of the beneficiaries has been given to the proposed transaction. Any such consent would require full and proper disclosure to have been made to the beneficiaries prior to such consent being given. As I have stated above, the Settlement Agreement did not contemplate sale to the Defendants. It cannot therefore be said that the parties' agreement to the terms of the Settlement Agreement constitutes full and proper disclosure of the circumstances of sale and their consent to a sale to the First Defendant. Further, the purchase has not been made with the approval of this Court and

for the reasons above I dismiss the Defendants' application for this Court to approve the proposed transaction.

78. Issue 4(ii): Whether the Defendants' offers are offers to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole. In light of my conclusions above, it is not necessary to decide this issue.
79. Issue 4(iii): If the Defendants are entitled under the Agreement and the rules of equity to offer to purchase, and to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole, whether the Defendants have offered to purchase the Penywern Flats at a price that matches or exceeds the third party offers.
80. Given my findings in relation to the preceding issues, this no longer arises as an issue. The Defendants are not entitled to offer to purchase and to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole.
81. Issue 4(iv): If the Defendants are entitled under the Agreement and the rules of equity to offer to purchase and to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole, whether the offer price by the Defendants should include the further one third share (i.e. further 400 shares) of the company holding the freehold of the Penywern Flats if held on trust as to a 30% share for the Claimants.
82. Given my findings in relation to the preceding issues this no longer arises as an issue. The Defendants are not entitled to offer to purchase and to purchase the Claimants share of the Penywern Flats or the Penywern Flats as a whole.

83. Issue 4(v): If the Defendants are not entitled under the Agreement and the rules of equity to purchase the Claimants' share of the Penywern Flats or the Penywern Flats as a whole, whether the Court can and should nonetheless under the rules of equity grant the Defendants permission to purchase the same and/or order the Claimants to sell the Claimants' share of the Penywern Flats or the Penywern Flats as a whole to the Defendants based on the price they have offered.
84. I am satisfied that this Court should not grant the Defendants permission to purchase and/or order the Claimants to sell the Claimants' share of the Penywern Flats or the Penywern Flats as a whole to the Defendants based on the price they have offered.
85. Under the terms of the Settlement Agreement, the parties have, in both the Agreement and the letter of instruction to Stanley Chelsea expressly agreed that the mechanism for winding up the joint venture in respect of the Penywern Flats is their sale on the open market, and not a buy-out of one or other side's share. It is well known that the Court will be slow to interfere with the commercially agreed terms between parties and I see no basis in the present case for the Court to make an order which would be contrary to the agreed scheme of the Settlement Agreement.

The Order Sought

86. In light of my conclusions above it is necessary for this Court to determine the order it should make on the claim.

87. Counsel for the Defendants makes the broad submission that specific performance is an exceptional remedy to order in this case on the basis that the Claimants' cause of action is breach of contract and damages are an adequate remedy, relying on Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] A.C. 1.
88. I remind myself that the Court has discretion as to whether to order specific performance as a remedy in a given case and that as expressed by Mr. Lawrence Collins Q.C. sitting as a Deputy High Court Judge, in Rainbow Estates Ltd v Tokenhold Ltd [1999] Ch 64 at 73:
- "Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy."*
89. The foundation of the Court's exercise of its equitable jurisdiction to order specific performance by way of relief will clearly be guided by the application of justice in a given case. In the context of this case, the parties have been in dispute in relation to the operation of the joint venture since at least 2011 and have not been able to successfully wind-up the joint venture since their entry into the Settlement Agreement in 2017. One good reason for granting the Claimants' order for specific performance would be to bring some degree of finality to what has been a hard fought and highly contested relationship between the parties.
90. Another reason for exercising the discretion of the Court to grant an order for specific performance of the Settlement Agreement is in light of the previous

conduct of Defendants in obstructing the sales process of certain of the Properties. In addition, damages would clearly be an inadequate remedy for certain breaches of the Settlement Agreement, including the Defendants' failure to use best endeavours to procure the sale of the Penywern Flats.

91. In my judgment, it is important that the Court ensures that valid settlement agreements are enforced according to their terms and it is therefore appropriate to make an order for specific performance that the Defendants do:
 - (i) assign their beneficial interest in Linden to the Claimants in accordance with the value ascribed to their share pursuant to the October Valuation;
 - (ii) cooperate in the sale of Wood End and Beechcroft;
 - (iii) cooperate in the sale of the Penywern Flats.

92. I will hear Counsel on costs and consequential matters, including the precise form of the orders to be made.