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Case No: CA-2021-003255 & CA-2022-00167

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Mr Justice Marcus Smith
[2021] EWHC 2743 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2022

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

Between:

Clarence Court Eggs Limited
- and -
(1)Christine Margaret Chapman
(2)Michael Richard John Kent

Appellant

Respondents

Thomas de la Mare KC, Rahul Varma & Tom Coates (instructed by **Forsters LLP**) for the **Appellant**

David Mitchell (instructed by **Lyons Davidson Ltd**) for the **Respondents**

Hearing Date: 29 November 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. Introduction

1. By his judgment dated 21 October 2021 ([2021] EWHC 2743 (Ch)), Marcus Smith J (“the judge”) concluded that there was no arguable defence to the claim of the first respondent (“Ms Chapman”) for specific performance of the Option that lies at the heart of this case. Clarence Court Eggs Ltd (“Clarence Court”, the appellant) appeals against that decision with permission of the judge. The judge said that the principal issue “was a pure question of construction, on which I reached a clear view”, but went on to grant permission to appeal, noting that “it is often the case that equally firm - but contrary - views are taken on appeal on matters of construction, and I consider this to be such a case.”
2. I set out the background facts in Section 2 below. It is longer than I would have liked in order to do justice to the wide-ranging references to the documents made by Mr de la Mare KC (who did not appear below) on behalf of Clarence Court. I summarise the main arguments before the judge in Section 3 and the relevant parts of his judgment in Section 4. I identify the issues on appeal in Section 5. I deal with the primary issue of construction in Section 6. I address the consequences of my construction of the Stonegate Business for Clarence Court’s various defences in Section 7. It will be noted that no Section of this judgment separately addresses the applicable legal principles because this is one of those rare appeals where there is no disputed law at all. The court is grateful to both parties for that happy position, and for the clarity of their written and oral submissions.

2. The Background Facts

2.1 The Option

3. On 23 June 2006, Clarence Court (in its previous name of Clifford Kent Limited) granted an option in favour of the second respondent, Mr Michael Kent, in relation to a parcel of land (“the Corby Land”) in Northamptonshire. The Option allowed Mr Kent up to 15 years (until 21 June 2021) to buy the Corby Land for £500,000. The Corby Land was described as:

“...the freehold property known as two parcels of land lying to the south of Corby Road Middleton Market Harborough Northamptonshire registered at the Land Registry with title absolute under title number NN175198...”
4. At all material times from February 1993, the Corby Land had the benefit of planning permission for the development of a laying and rearing poultry farm for shell eggs together with associated distribution site. It is common ground that at no time since 1993 have any steps been taken to act on that planning permission and develop such a poultry farm on the Corby Land (save for the “token amount of work” done in 1998 to prevent the planning permission from lapsing, referred to at paragraph 10 of the statement of Mr Twiselton).
5. On 18 April 2019, Mr Kent assigned the benefit of the Option to his sister, the first respondent, Ms Chapman. The assignment was an assignment under s.136 of the Law

of Property Act 1925, and notice of the assignment was given to Clarence Court by letter dated 8 May 2019. No issue now arises as to the validity of that assignment. On 25 February 2020, Ms Chapman exercised the Option. Clarence Court refused to comply with its terms and, on 2 July 2020, Ms Chapman commenced these proceedings seeking specific performance of the Option agreement. The claim was defended, and there was a Part 20 claim based on the arguments noted in Section 3 below. It was on the issues raised by the Defence and the Part 20 claim that the judge granted summary judgment in favour of Ms Chapman.

2.2 The Savills Report

6. The granting of the Option followed a report by Savills dated 28 April 2006, which provided an updated valuation of the properties owned by Stonegate Farmers Limited (“Stonegate”) and Clifford Kent Group Limited, both wholly owned subsidiaries of Clifford Kent Holdings Limited (“CKHL”). The properties were listed in the table at section 4 of the report. The Corby Land was the only property there referred to as “Bare Land”. A market value of £500,000 was put on it. That became the purchase price identified in the Option.
7. The report dealt in detail with each of the CKHL properties being valued. In respect of the Corby Land, Savills noted the address, the inspection and valuation dates, and expressly referred to it as “Land with Planning Permission for Poultry Farm”. Savills went on to note that “the Farm is within the fringes of the western expansion area indicated by Corby Council”.

2.3 The Merger

8. Both the Savills Report and the Option were apparently triggered by the merger, which took place in June 2006, of CKHL and Deans Food Group Limited. By that merger a new egg production company, Noble Foods Limited, was created.

2.4 The Competition Commission Report

9. The completed merger was referred to the Competition Commission (“CC”) for investigation under s.22 of the Enterprise Act 2002. The judge found that, during their investigation, a good deal of information was provided to the CC, including the Savills Report (see [50] – [59] of the judgment, in particular [53]).
10. The final report of the CC on the merger was dated 20 April 2007. Although the court was referred to large parts of the report during the appeal hearing, I consider that it is unnecessary to set them all out in this judgment. The essential conclusions, noted below, were clear-cut.
11. The CC concluded in summary that:
 - (a) Prior to the merger, Deans had a turnover of £314m and an operating profit of £7.2m whilst Stonegate had a turnover of £103m and an operating profit of £2.4m (paragraph 2 of summary). I note that, in its report, whenever the CC refer to Stonegate, they are actually referring to all the CKHL companies.
 - (b) Both companies were profitable before the merger and both showed that they had strong prospects as independent companies. There was nothing to suggest that, in the

absence of the merger, Deans and Stonegate would not have continued as separate companies and to compete with each other (paragraph 3 of the summary).

(c) The CC had received concerns expressed by some retailers that “there would be difficulty in switching due to limited availability of eggs and to no other suppliers having sufficient capacity to provide an alternative to Noble (the merged business)”. Hence there would be a loss of competition and adverse effects on prices and innovation (paragraph 4 of the summary).

(d) As a result of the merger, Noble accounted for over 60% of sales of shell eggs to retailers (approximately 45% from Deans and 15% from Stonegate). The next-largest supplier was significantly smaller than the merged companies. The potential for customers switching “would appear likely to have been much reduced” as a result of the merger (paragraph 11 of the summary).

(f) Other suppliers to retailers would need to expand significantly and rapidly for retailers to have confidence that they had adequate sources of supply and to replace the lost rivalry between Deans and Stonegate. Sufficiently rapid expansion in sufficient timescale to prevent the merged company increasing prices or worsening quality was considered, on balance, to be unlikely (paragraph 13 of the summary).

(g) Many farmers had raised concerns regarding the upstream bargaining power of the merged entity, fearing that its increased bargaining power in relation to its producers would result in lower prices paid to producers and/or reduction in the quantity of eggs produced. These concerns were shared by the CC (paragraph 21 of the summary).

12. In their conclusions at paragraphs 22-24, the CC concluded that the merger might be expected to result in a substantial lessening of competition (“SLC”) in the supply of eggs to retailers and the procurement of shell eggs from producers in the UK. A number of adverse effects were noted at paragraph 23 including:

“(d) the merged entity could use its market power in the purchasing of eggs to buy from producers on less favourable terms, including, for example, reducing the prices paid to them, or making the purchase of other products (pullets, animal feed, spent hen processing etc) a condition of its supply contracts, reducing the number of eggs produced and raising prices to retailers; and

(e) by long term contracts with producers, the merged entity could jeopardize the position of other suppliers and/or limit the opportunities for entry thereby or in other ways, for example, by pricing policies, price discrimination or own-branding of eggs.”

13. As to the possible remedies, at paragraph 26 of the summary, the CC concluded that:

“the divestiture of Stonegate is likely to be the most practicable and effective, comprehensive and proportionate remedy for dealing with the SLC and the resulting adverse effects of the merger”

A process for divestiture was set out in detail at paragraph 8.50 of the Report.

14. The body of the CC report provided a more detailed analysis to support the conclusions which I have summarised. Amongst other things, at paragraph 6.46, the CC said that entry and expansion by suppliers of eggs “appears to be constrained primarily by the availability of eggs to pack”. At 6.50 they noted that entry or expansion was constrained by various factors such as delays, upfront costs, and local protests, and these were then considered in detail at paragraphs 6.51-6.59. At paragraph 6.59, the CC concluded that “actual entry or the threat of entry by new participants and expansion by smaller participants are unlikely to be sufficient to offset any reduction in competition resulting from the merger in supply to retailers of any of the three shell egg categories”.

2.5 The Undertakings

15. The divestiture of Stonegate required by the CC was effected through the giving of undertakings. They were set out in writing (“the Final Undertakings”). The link with the CC Report was made plain on the front page:

“The [CC] report concluded that:

(a) the merger between Deans and Stonegate was the creation of a relevant merger situation;

(b) the creation of that relevant merger situation may be expected to result in a substantial lessening of competition within the market(s) of the supply of cage and barn eggs, of free range eggs and of organic shell eggs to retailers in Great Britain and in the procurement of shell eggs from producers (the SLC). This may in turn be expected to result in the adverse effects of producers receiving less favourable terms (including price), the reduction in the quantity of eggs produced, higher prices being faced by retailers and ultimately by the final consumers of shell eggs (the adverse effects);

(c) the CC should take action to remedy the SLC and the adverse effects flowing from it;

(d) undertakings should be required to be given to the CC by Noble on behalf of itself and its subsidiaries, Mr Peter Dean and Mr Michael Kent to give effect to the remedies identified by the CC in paragraphs 8.41 to 8.54 and 8.78 of the report.

Noble on behalf of itself and its subsidiaries, Deans, Clifford Kent, Stonegate, Mr Peter Dean and Mr Michael Kent give to the CC the following undertakings under section 82 of the Act for the purpose of remedying the SLC and the adverse effects resulting from it identified in the report.”

16. The Final Undertakings referred to a number of defined terms. For the purposes of the appeal, the following definitions are relevant:

“**Approved Purchaser** means a purchaser or purchasers whom the CC is satisfied, following an application from the Vendors (in accordance with paragraph 4.7) or from the Divestiture Trustee, (1) is independent of, and unconnected to, any of the Vendors (2) has the incentive, the financial resources and the expertise to operate the Stonegate Business as a viable and active business in competition with other buyers of shell eggs from producers and other suppliers of shell eggs to retailers so as to remedy the SLC (3) will obtain all necessary approvals and consents, including the consent of any regulatory or competition authority, of the acquisition of the Stonegate Business; and the Vendors recognise that the CC may require any such purchaser to provide the CC with such documents (including business plans relating to the Stonegate Business and information regarding the financing of the acquisition and the financing of the purchasers existing business) and other materials or information as the CC may require so as to be satisfied on the matters set out above;

Clifford Kent means Clifford Kent Holdings Limited...

Commencement Date means the date on which these Undertakings are accepted by the CC. [That was 8 October 2007].

Effective Disposal means completion of the disposal of the Stonegate Business (which may be effected by the transfer of the entire share capital of Clifford Kent or the transfer of the property, assets and goodwill of the Stonegate Business) and may also include Deans Assets under an Approved Agreement to an Approved Purchaser.

Principal Undertakings means all of the obligations in paragraph 3 or any one of them.

Stonegate Business means that part of the Noble Group which corresponds to the business carried on by Clifford Kent as at the Commencement Date and includes the business of procuring, packing and supplying shell eggs and related products to retailers and other customers being the rights, interests, assets and obligations of that business and including:

(1) all the tangible assets involved in the procurement, packing and supply of shell eggs to retailers and other supplies of goods or services ancillary or connected to the supply of eggs at the property owned or leased by Clifford Kent including all equipment (including packing machinery), fixed assets and fixtures, stock, office furniture, materials, supplies and other tangible property used in connection with those assets; and all contracts, agreements, leases, commitments, certificates and understandings relating to those assets including supply agreements; and all accounts; and all records relating to the assets set out in this paragraph (1);

(2) all intangible assets involved in the procurement, packing and supply of shell eggs to retailers and other supplies of goods or services ancillary or connected to the supply of shell eggs at the property owned or leased by Clifford Kent including all licences and sub-licences, intellectual property, technical information, computer software and related documentation, know-

how, drawings, designs specifications for material, parts and devices, quality assurance and control procedures; and

(3) all rights, interests and obligations under agreements with suppliers (including producers of shell eggs), customers and employees...”

17. It should also be noted that clause 1.2 of the Final Undertakings provided that:

“In these Undertakings the word ‘including’ shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word, and the word ‘include’ and its derivatives shall be construed accordingly.”

18. The Principal Undertakings, as defined, were set out in clause 3. They provided:

“3.1 In order to remedy the SLC and adverse effects identified in the report, the Vendors together and separately undertake that they shall use their best efforts to satisfy the Disposal Obligations within the Initial Divestiture Period.

3.2 The Vendors undertake to use their best efforts to satisfy the Disposal Obligations, or to procure that the Disposal Obligations are satisfied, in accordance with the provisions of these Undertakings.

3.3 The Disposal Obligations are:

3.3.1 to agree Heads of Terms for Effective Disposal; and

3.3.2 to bring about Effective Disposal.

3.4 The Vendors undertake that they shall use all reasonable endeavours to ensure that the Stonegate Business is divested with at least the producer volumes and customer contracts as at the Commencement Date.

3.5 The Vendors undertake that they shall use their best efforts to ensure that Noble Group’s financing arrangements do not prevent an Effective Disposal.”

19. Clause 4 was entitled ‘Matters Ancillary to the Principal Undertakings’. Clauses 4.2 – 4.4 provided as follows:

“4.2 The Vendors each undertake that any application by them for the CC’s consent or approval shall make full disclosure of every fact and matter that is relevant to the CC’s decision.

4.3 The Vendors recognize that where the CC grants consent or approval on the basis of misleading or incomplete information, the consent or approval is voidable at the election of the CC.

4.4 In the event that the Vendors discover that an application for consent or approval has been made without full disclosure and is therefore incomplete the Vendors undertake to:

4.4.1 inform the CC in writing identifying the particulars in which the application for consent is incomplete within seven days of becoming aware that the application is incomplete; and

4.4.2 at the same time or as soon as possible thereafter, provide to the CC an application for consent that is complete.”

20. Clause 7 was entitled ‘Post Divestiture Undertakings’. For the purposes of this appeal the relevant undertaking was at clause 7.4:

“The Vendors undertake that following an Effective Disposal the Noble Group, Mr Peter Dean and Mr Michael Kent will not acquire any interest in the Stonegate Business, without the prior written consent of the OFT.”

2.6 The Divestiture

21. The divestiture process resulted in a final draft document dated June 2008. Although the documents (and the judge) indicated that the divestiture was achieved by the share purchase agreement (“SPA”), Mr de la Mare argued that it was not, because he said that the SPA related to Clifford Kent Ltd, not CKHL. He said it was instead a disposal of property, assets and goodwill, relying (amongst other things) on the definitions of ‘CK Shares’ and ‘Company’ in the SPA. This is not a point identified in the Grounds of Appeal. Moreover, I do not find it necessary to decide the point, since either was permissible according to the definition of ‘Effective Disposal’ in the Final Undertakings. The gross purchase price for the shares was stated in the SPA to be £28.7m subject to some reductions. The purchaser was a corporate vehicle of a Mr and Mrs Corbett.
22. Schedule 6 to the draft SPA was a schedule of properties. Part 1 of the schedule lists a series of freehold properties, including the Corby Land. The Corby Land is referred to in the schedule as follows:

Property	Tenure	Title	Company	Use	LD Certificate of Title
Land at Darnells Lodge Middleton Corby	Freehold	NN175198	CK	Bare Land	No

Part 2 of the same Schedule listed 14 other properties which Stonegate held on a leasehold basis.

23. A draft disclosure letter drafted in June 2008 provided “formal disclosure to the Purchaser of the purposes of the Agreement of the facts and circumstances which are or may be inconsistent with the warranties...”. Clause 17.1 of schedule 1 of the draft disclosure letter related to the Corby Land and was in these terms:

“Clifford Kent Limited has entered into an Option Deed dated 23rd June 2006 with Michael Kent relating to freehold property known as two parcels of land lying to the south of Corby Road Middleton registered at the Land Registry

with title absolute under title number NN175198. You have been supplied with a copy of the Option Deed. The option provides for the property to be sold at a fixed price of £500,000 throughout the period of the option (until 2021).”

24. As the judge noted at [20] of his judgment, the draft disclosure letter was circulated at the same time as the draft SPA and so would have been received by the CC.
25. On 17 June 2008, Mr Peel of the CC emailed its formal approval to the parties in the following terms:

“Dear All

This email is to confirm that the Competition Commission Remedies Standing Group (RSG) has now given its approval for Pam Corbett and Richard Corbett (through a wholly owned company, Acraman (474) Limited) (together the Purchasers) to purchase the Stonegate Business from the Vendors (expressions used are as defined in the Final Undertakings) under the terms (except for the proposed consideration for which see below), set out in the proposed sale and purchase agreement, the Takeover Offer and ancillary documents sent to the Commission on 9 June 2008 (together the Transaction Documents). The RSG is content that if entered into, the Transaction Documents will bring about an Effective Disposal and comply with the other terms of the Final Undertakings. This approval is based on all the information provided by the Vendors and the documents sent to the Commission on 9 June 2008 and the funding offer contained in the facility letter from Lloyds TSB, received by the Divestiture Trustee on 9 June 2008, which remains open until 31 July 2008. We also note that the consideration for the Stonegate Business will be £26.7 million.

This approval is on the condition that the Divestiture Trustee is remunerated in accordance with the agreed mandate.

The Vendors and Purchasers shall use their best efforts to exchange Transaction Documents by 20 June 2008, but in any event this approval lapses on 30 June 2008.”

26. Following the CC’s approval, the SPA was executed quickly, and materially in the same form as the draft SPA. The final form of the disclosure letter was also materially in the same terms as its draft; in particular, the wording in relation to the Option was precisely the same.

2.7 Subsequent Events

27. Thereafter, Mr Kent engaged Mr Adrian Gott of AD Gott Limited to obtain planning permission to develop the Corby Land and to endeavour to ensure that the Land was included within the Corby Urban Extension. That possible course of action had been highlighted in the Savills Report (paragraph 7 above). In his letter acknowledging his engagement, dated 22 November 2011, Mr Gott said that “for the purpose of our arrangement we have placed a base value upon this land of £500,000.”

28. Mr Gott failed to obtain planning permission to develop the Corby Land. It is not clear why he failed and when his relationship with Mr Kent came to an end. But in April 2016, Mr Gott purchased from the Corbetts those parts of the group of companies which had once been CKHL. His new company was Clarence Court. Thereafter, instead of seeking to redevelop the Land for housing, as he had done when he had been Mr Kent's agent, Mr Gott now decided that he wanted to use the Corby Land for the development of Clarence Court's egg production business. As the judge correctly noted at [26] "this desire could only be sensibly carried forward if the Option were removed: it would make no sense to develop the Land, only for Mr Kent to exercise the Option to purchase".
29. Mr Gott therefore developed a new tactic. He approached the successor to the CC, the Competition and Markets Authority ("the CMA") to draw to their attention what he said was Mr Kent's improper retention of the Option. In his letter to the CMA of 2 August 2017, Mr Gott said of the Corby Land:
- "The uninterrupted use of this land is paramount to the organic growth and long-term sustainability of the business. Stonegate's effective use of this land to enable it to complete in the industry is hindered by the Option Agreement.
- We believe that the Option held by Mr MRJ Kent should have been relinquished at the time the Competition Commission ordered that the two businesses were divested."
30. Although Mr Gott put a certain amount of pressure on the CMA to conclude that the retention of the Option was contrary to the CC's original requirements, the CMA did not do so. But in their letters of 14 March 2018, 3 May 2018 and 21 December 2018, the CMA was consistently clear that, in respect of clause 7.4 of the Final Undertakings (explored below), the Option could not be exercised without Mr Kent having first obtained their consent.
31. It was in those circumstances that, following the assignment to Ms Chapman and Clarence Court's refusal to meet their obligations under the Option agreement, proceedings for specific performance were commenced.

3. The Main Arguments Before The Judge

32. Clarence Court originally relied on a raft of points in defence of the claim for specific performance, many of which were abandoned before or at the hearing. Others were rejected by the judge in his judgment and have not been resurrected on appeal.
33. For present purposes, it is relevant to note that, at the hearing, and in his judgment, the judge distilled Clarence Court's defence and Part 20 claim into three categories of complaint. The first was the allegation that Mr Kent was in breach of clause 3 of the Final Undertakings because, by retaining the Option, he had failed to bring about an Effective Disposal of the Stonegate Business. The second was the allegation that Mr Kent had breached clauses 4.2 and 4.4 because he had failed to make full disclosure and, having failed to do so, had failed to have the CC's decision ratified by the CMA. Thirdly, there was the allegation that the assignment and the exercise of the Option

amounted to a breach of clause 7.4 because Mr Kent was seeking to acquire an interest in the Stonegate Business without the prior written consent of the CMA.

34. The judge went on to deal with each of those allegations. However, as he noted, common to all three was the definition of the Stonegate Business. If the Corby Land was not part of the Stonegate Business then it was accepted that none of these three allegations could succeed.

4. The Judgment

35. Between [34]-[49], the judge addressed the allegation that Mr Kent had failed to bring about an “Effective Disposal”, as defined in the Final Undertakings. He rejected Clarence Court’s submission that the disposal had not been an Effective Disposal because the retention of the Option meant that what had been disposed of was not the whole of the Stonegate Business.

36. The judge dealt with whether the Corby Land was part of the Stonegate Business at [42]:

“42. In my judgment, having considered the arguments on both sides, it is not arguable that the Land comprised a part of the Stonegate Business. I find that the Land was not a part of the Stonegate Business, and I do not consider that any defence contending the contrary has a realistic prospect of success. I have reached this conclusion for the following reasons:

(1) Given that the Option was granted prior to the Commencement Date (the Commencement Date was 8 October 2007, and the Option is dated 23 June 2006), the Option (as well as the Land to which the Option relates) must be regarded as an aspect of the Stonegate Business. The Stonegate Business is defined as “that part of the Noble Group which corresponds to the business carried on by Clifford Kent as at the Commencement Date...” (emphasis added). It thus embraces both the Land and the Option encumbering it.

(2) There is, thus, a temporal aspect to the Stonegate Business, which must be assessed as at 8 October 2007. Thus, the Stonegate Business comprised (i) the Land and (ii) the Option. It is not possible - and not right, given the purpose of the divestment - to consider the benefit of the Land without the burden of the Option. It may very well be that, in strategic terms, Clifford Kent would have wanted - in order to develop its business in the future - unfettered use of the Land. But (as the CC found) Clifford Kent was operating an entirely viable business without using the Land which (as was common ground) has never actually been used by Clifford Kent to carry on its business at any time. The Land has throughout been unused. It is very likely - at least since the Option was granted - that this lack of use has been brought about by the very existence of the Option, which renders any serious development of the Land precarious, because the Option might be exercised. I proceed on the basis that this is indeed the case.

(3) The consequence of treating the Land and the Option as fundamentally intertwined means this: although Clifford Kent had the benefit of the Land (in the sense that it was the owner of the Land), that benefit was

marginal at best, and probably nil (disregarding the exercise price of the Option). That is because the potential that the Option might be exercised rendered the Land essentially valueless apart from the exercise price, and so incapable of any form of development that would involve the expenditure of money.

(4) There was some criticism made of the description of the Land in the Draft SPA. As I have noted in paragraph 18(2) above, the Land is simply described as “Bare Land”. There is no reference to the planning permission that had been granted in respect of the Land; and no suggestion that the Land had any strategic value to Clifford Kent’s business. That, I have no doubt, was because of the existence of the Option.

(5) To describe the Land (as both Mr Gott and Clifford Court’s counsel did) as “key strategic real estate” is simply wrong. I am prepared to accept that, without the Option, the Land is capable of amounting to “key strategic real estate”. But that is not the point: at no material time did the Land in fact amount to “key strategic real estate”, and that is because the Option - which, I remind myself, was extant at the Commencement Date - precluded that possibility.

(6) Clarence Court sought to contend that the potentiality of the Land was sufficient to make it part of the Stonegate Business. I disagree:

(a) As I have stated, the Stonegate Business only comprises assets (broadly conceived) corresponding to Clifford Kent’s business as at the Commencement Date. In short, one looks at what Clifford Kent could and could not do, in business terms, as at that date. Because the Option existed as at the Commencement Date, it operated as an inevitable and unavoidable constraint on what could fall within the meaning of the Stonegate Business. In short, the definition of Stonegate Business is one rooted in the realities of the case, and one cannot expand the nature of the Stonegate Business simply by “wishing away” a constraint extant as at the Commencement Date.

(b) This reading of the opening words of the definition is confirmed by the first paragraph (paragraph (1)) in the definition of Stonegate Business, which seeks to provide greater definitional clarity as regards “tangible assets” - which would, of course, include the Land. Paragraph (1) makes clear that tangible assets includes “all the tangible assets involved in the procurement, packing and supply of shell eggs to retailers and other supplies of goods or services ancillary or connected to the supply of eggs at the property owned or leased by Clifford Kent...”. Thus, paragraph (1) relates to tangible property actually being used in the procurement, packing and supply of shell eggs. Whilst I doubt that paragraph (1) could be used to narrow the opening words of the definition (the paragraphs are clearly included as elucidation and not as definitional restrictions) the wording of paragraph (1) (and the similar wording of paragraph (2)) confirms my reading of the opening words of the definition, as set out above.

Accordingly, I conclude that the Executed SPA did dispose of the Stonegate Business.”

37. The judge went on to find at [46]-[48] that, if he was wrong about that, and there had been a disposal of something less than the Stonegate Business, Ms Chapman and Mr Kent could not rely on the fact that the disposal had been under an Approved Agreement to an Approved Purchaser to defeat the defence. There could be no Effective Disposal if what had been disposed was something less than the Stonegate Business, regardless of the CC's approval.
38. The judge next dealt with the alleged failure to make full disclosure at [50]-[59]. He said at [57] that he was confident, on the material which he had, that he could properly determine the question of whether there had or had not been a breach of clause 4. He made plain that the disclosure which had been provided to the CC included: i) the Savills Report identifying that the Corby Land had planning permission for a poultry farm: ii) the existence of the Option; and iii) the fact that the benefit of the Corby Land was being transferred subject to the burden of the Option.
39. The judge concluded at [58] that full disclosure had been provided. He said:
- “58. I conclude that there was full disclosure by the Vendors within the meaning of clause 4.2, for the following reasons:
- (1) The starting point is to identify that which required the CC's “consent or approval”. In this case, the matter requiring consent or approval of the CC was the question whether the CC should give the approvals that the Vendors needed in order to effect a disposal of the Stonegate Business.
- (2) The nature of those approvals is specified in the definitions of Approved Purchaser and Approved Agreement. In particular, the definition of Approved Agreement required the CC to satisfy itself that the risk of an SLC (that had triggered the requirement to divest) was remedied and that the Draft SPA would enable an Effective Disposal.
- (3) Clearly, what needed to be disclosed was each and every fact and matter going to the question of whether there would or would not be an Effective Disposal. Facts and matters going to the non-disposal of the Stonegate Business would, self-evidently, be particularly relevant, and require particularly careful articulation.
- (4) In this case, for the reasons I have given, I consider that the Land and the Option must be considered as flip-sides of the same coin. Viewing them as inseparable in that way, I do not consider that the Land did constitute a part of the Stonegate Business, and so I do not consider that any particular disclosure regarding the Land, the Option or the planning permission that had been obtained to have been necessary. Certainly, the disclosure that was made in the Draft SPA and the Draft Disclosure Letter went beyond what was required by clause 4. I reach this conclusion simply because – in terms of an Effective Disposal – what happened to the Land (given the existence of the Option) was an immaterial fact. I have no doubt that the CC would have wanted to know the precise terms on which the Stonegate Business was being disposed of, hence the disclosure to the CC of the Draft SPA and the Draft Disclosure Letter. But any disclosure beyond this was not called for.”
40. Finally, the judge dealt with the alleged breach of clause of 7.4 of the Final Undertakings at [60]-[65]. He held that clause 7.4 had not been infringed. That, he

said, was because of his conclusions as to the meaning of the Stonegate Business [63]. He went on at [64] to say:

“64. Mr Anderson, QC made two further points as to why (even if the Land was part of the Stonegate Business) clause 7.4 was not infringed:

(1) First, he stressed the significance of the words “interest in the Stonegate Business” and suggested that this phrase drew a distinction between a mere asset purchase of something belonging to the Stonegate Business and the acquisition of an interest in that Business. There is force in this distinction, although it is not an absolutely clear cut one. Clause 7.4 is directed to preventing the Vendors from obtaining an interest in the business as a going concern or undertaking. The whole point of divestiture is to create a distinct and self-standing competitor to the Noble Group – and that aim would be undermined if the Vendors or any of them could insert themselves into this distinct and self-standing competitor. On the other hand, clause 7.4 is not directed at the mere acquisition of an asset from the Stonegate Business, provided that asset acquisition does not prevent the Stonegate Business from operating as a distinct and self-standing competitor to the Noble Group. I consider that Mr Anderson is right to identify this distinction and – given my findings as to the nature of the Land and its significance to the Stonegate Business – it is clear that the acquisition of the Land represents the acquisition of a “mere” asset and not an interest in the Stonegate Business.

(2) Secondly, Mr Anderson contended that because of the Option, which predated the Commencement Date, there could be no subsequent acquisition of an interest in the Stonegate Business simply through the exercise of the Option. I reject this contention. Whilst, of course, the Option did pre-date the Effective Disposal of the Stonegate Business, the whole point of the Option was to give Mr Kent the ability to acquire the Land. It seems to me unarguable that – assuming (contrary to my conclusions above) the Land to be an interest in the Stonegate Business – acquisition of the Land pursuant to the Option was not the acquisition of such an interest.”

5. The Issues on Appeal

41. There are two Grounds of Appeal. The first is the construction point, namely that the judge was wrong to find that the Corby Land did not fall within the definition of the Stonegate Business. The second is that, in coming to his conclusion as to the construction of the Stonegate Business, the judge had been wrong to find that the existence of the Option rendered the Corby Land of nil or marginal value to the Stonegate Business. In this way, Ground 2 raised a subsidiary argument as to the proper construction of the Stonegate Business, rather than a separate issue.
42. As I will explain below, I consider that the two Grounds of Appeal proceed on something of a false premise. Clarence Court’s arguments before the judge focussed on the proposition that the Corby Land was part of the Stonegate Business, and appeared to assume that, if they were right about that, there had been no Effective Disposal of the Stonegate Business in accordance with the Final Undertakings. That explains why the judge dealt with the issue of construction by reference to the alleged breach of clause 3 (Effective Disposal). But Clarence Court never addressed the possibility that the transfer of the benefit of the Corby Land with the burden of the

Option (via the Corbetts) to Clarence Court amounted to Effective Disposal of the Stonegate Business, such that there was no breach of clause 3.3. I consider that some of their difficulties on appeal stem from this omission.

43. One consequence of this was that there was no reference anywhere in the Grounds of Appeal to the potential consequences for Clarence Court's defence based on the alleged breach of clauses 4.2 – 4.4 and clause 7.4 if they were right that the Corby Land (with the Option) was within the Stonegate Business but had nevertheless been the subject of an Effective Disposal under clause 3.3.
44. By way of a Respondent's Notice the respondents seek to revive their submission that there was an Effective Disposal because the divestiture had been approved by the CC. However, that point would also fall away if this court concluded there had been an Effective Disposal anyway, with the benefit of the Corby Land transferred to Clarence Court, albeit encumbered by the burden of the Option.
45. For those reasons, I consider that it is sensible to consider the construction issue first and, having reached a conclusion on that point, to see what effect that has on Clarence Court's three separate allegations of breach, on which their defence and Part 20 claim relies.
46. I should also note at the outset that Mr Mitchell complained, courteously but firmly, that "hardly any of Mr de la Mare's submissions were before the judge". He was right about that. Much of Mr de la Mare's submissions addressed matters which were not identified, or even hinted at, in the Grounds of Appeal. However, notwithstanding that, in accordance with the principles governing applications for summary judgment, this court must give Clarence Court a reasonably wide latitude to raise all the points they want, provided they are open to them on the documents before the court. The only limit of potential relevance to this appeal is that Clarence Court cannot now raise positive allegations of breach of the Final Undertakings that have never even been pleaded.

6. The Proper Interpretation of the "Stonegate Business"

6.1 The Issue on Appeal

47. It was Mr de la Mare's submission that the Corby Land was part of the Stonegate Business. He relied on three particular matters of fact. First, he said that the Corby Land had (and had always had) planning permission for use as a poultry farm. Clarence Court said that, in consequence, the Corby Land amounted to "key strategic real estate" for their egg-producing business. Secondly, he said that the Corby Land was one of three properties which were used as security for raising a loan from TSB Lloyds. That loan had first been raised in February 2003, some years before the Option, the merger and the subsequent divestiture. Thirdly, he noted that the Corby Land was leased to a farmer, Mr Pain, who he said paid around £12,000 a year by way of rent.
48. As to the proper construction of the Stonegate Business, as defined in the Final Undertakings, Mr de la Mare said that the judge had been wrong to take the artificial cut-off of the Commencement Date as constraining what was or was not within the Stonegate Business. He also argued that, as a matter of construction, the judge had

been wrong to limit the Stonegate Business to the procuring, packing and supplying of shell eggs because the words used in the definition plainly went wider than that.

49. Mr Mitchell argued that, on the plain words of the definition of the Stonegate Business, the Corby Land was not within it. In essence, he said that it was 'Bare Land' which was not and had never been used in the business of procuring, packing and supplying shell eggs and related products, and that those concepts lay at the heart of the definition of the Stonegate Business in the Final Undertakings.

6.2 Analysis

50. I should first deal with the reference to "the Commencement Date" in the definition. The judge said that what was inside or outside the Stonegate Business, as defined, had to be assessed as at the Commencement Date. Although Mr de la Mare criticised that approach, saying that it led to an unrealistic snapshot of the business which could lead to absurd results, I consider that the judge was right to reach that conclusion. The words of the definition are plain. The Stonegate Business had to be defined by reference to the business at that date. No alternative reading of the words is possible: that is what the definition said. Moreover, that makes commercial sense. A business changes from day to day, and from month to month. Without some form of temporal anchor, it would be impossible to define any business with any accuracy.
51. However, even with that qualification, I am in no doubt that the Corby Land was part of the Stonegate Business. There are a number of reasons for that.
52. The first and most obvious reason stems from the facts: the Corby Land was actually being used by Stonegate, as a part of their business, at the Commencement Date. On the one hand, it was being used (along with two other properties) to provide security to Lloyds TSB for the loan that had first been obtained in February 2003. On the other, it was being leased to Mr Pain, and the rent he paid must have been accounted for in Stonegate's balance sheet.
53. Mr Mitchell was quite right to say that the point about the tenancy and the rent was not made to the judge. Neither was there any evidence in the papers about the actual amount of the rent paid by Mr Pain. But the fact of the lease of the Corby Land was included in the draft and final versions of the disclosure letter, and it is a reasonable inference that at least some money was paid by way of rent. Indeed, I note that at paragraph 17.2 of the draft disclosure letter (paragraph 23 above), repeated in the final version, it was stated expressly that the Corby Land was occupied by Mr Pain as a tenant under a Farm Business Tenancy Agreement.
54. I cannot see, therefore, that the Corby Land was any different to any other properties identified in the documents which were owned by Stonegate at the Commencement Date and which were leased to tenants. There is no debate that such properties, whatever they were used for, were part of the Stonegate Business as defined. There is no reason to distinguish the Corby Land from any other properties, owned by Stonegate, which were also rented out.
55. The argument that found favour with the judge was that the Corby Land was not being used at the Commencement Date for the purposes of procuring, packing and supplying shell eggs and related products to retailers and other customers. That is

true: the Corby Land was not so used, either prior to the Commencement Date, at the Commencement Date, or at any time thereafter.

56. But in my judgment, that is irrelevant to the definition of the Stonegate Business set out at paragraph 16 above. The Stonegate Business ‘corresponds to the business’ carried on by CKHL as at the Commencement Date. For the reasons that I have already given (security for the loan, source of rental income), the Corby Land was plainly part of that business.
57. Furthermore, the reference to “procuring, packing and supplying shell eggs” is not a definition of the Stonegate Business; it is simply one of the things which is included within that business. That is plain from the natural meaning of the words (“and includes”): those words do not limit what has come before. And in case there was any doubt about that, the word “includes” must be read in accordance with clause 1.2 of the Final Undertakings (paragraph 17 above). The word has to be construed without prejudice to the generality of the words that come before it, and the relevant general word here is “business”.
58. I consider that Mr de la Mare was right to say that in [42(6)], the judge was adopting an *ejusdem generis* approach to construction, by noting the lengthy description of the procuring, packing and supplying of eggs in the definition, and concluding that this specificity narrowed the general words like ‘business’. But I consider that such an approach was expressly prohibited by clause 1.2.
59. Although perhaps of less weight, I also consider that Mr de la Mare was right to point to the various ways in which the definition of Stonegate Business shied away from too literal or specific a meaning, by using words and phrases like “includes”, “including”, “ancillary or connected to”, “in connection with”, and “relating to”. Those are all words or phrases used to widen, rather than narrow, that which is being described or referred to (see, for example, *Ashville Investments v Elmer Contractors* [1989] QB 488, C.A. about the width of the expression ‘in connection with’).
60. For these reasons, therefore, I have concluded that the judge was wrong to say that the Corby Land was not part of the Stonegate Business. In my view, it was. That therefore means that I would allow Ground 1 of the appeal, and Ground 2 becomes otiose. But for the reasons that I have already indicated, that is far from the end of the appeal. What effect, if any, does that have on the order that the judge made granting Ms Chapman summary judgment?

7. The Consequences of that Interpretation

7.1 The Issues

61. The critical issues that now arise concern the consequences of my construction, that the definition of the Stonegate Business included the Corby Land. The judge said at [42(3)] that it was not permissible to consider the benefit of the Corby Land without the burden of the Option. He said that the lack of use of the Corby Land was probably brought about by the very existence of the Option, which rendered any serious development of the land precarious. He went on to treat the Land and the Option as “fundamentally intertwined”.

62. I agree with that. What CKHL had by way of property, assets and the like corresponded to the Stonegate Business. A purchaser of the entire share capital of CHKL would obtain the Stonegate Business. That would include all the properties that CKHL owned, including the Corby Land. In the event, the benefit of the Corby Land was legitimately transferred to Clarence Court (via the Corbetts), but it was encumbered with the burden of the Option. In that way, the consequences of the Corby Land (with the burden of the Option) being part of the Stonegate Business need to be considered by reference to each of the three sets of allegations of breach raised by Clarence Court.

7.2 Effective Disposal and the Alleged Breach of Clause 3

63. On the assumption that the benefit of the Corby Land was transferred with the burden of the Option, Mr de la Mare was asked if he accepted that that amounted to Effective Disposal of the Stonegate Business within the definition set out in the Final Undertakings. He accepted that, on that analysis, there had been Effective Disposal of the Stonegate Business, and that he could not rely on the alleged breach of clause 3 of the Final Undertakings.
64. In my view, that concession was rightly made. The fundamental connection between the benefit and the burden was the point that the judge himself had made, although its significance was apparently overlooked because of the limited basis of the arguments advanced before him. As soon as it is accepted that the Corby Land, together with the Option, was effectively transferred to Clarence Court, then the argument that Mr Kent failed to effectively dispose of the Stonegate Business under clauses 3.2 and 3.3 must fall away. By the end of the hearing, I did not understand Mr de la Mare to dispute that analysis.
65. That also disposes of the cross-appeal. Mr Mitchell raised the cross-appeal as an argument in support of the contention that there had been an Effective Disposal of the Stonegate Business in 2008, regardless of the precise definition of that business. But since it is now conceded, on the basis set out above, that there had been Effective Disposal in any event, it is unnecessary to consider the cross-appeal further.
66. For that reason, therefore, I would uphold the judge's ruling that Ms Chapman and Mr Kent are entitled to summary judgment in their favour in respect of the appellant's allegations relating to the Effective Disposal of the Stonegate Business and the alleged breach by Mr Kent of clause 3.

7.3 Disclosure and the Alleged Breach of Clauses 4.2 – 4.4

67. I have set out in paragraph 39 above the relevant part of the judge's judgment. The judge said that he had sufficient information to decide the issue as to whether or not there had been proper disclosure. He found that there had been proper disclosure. Although his erroneous construction of the Stonegate Business was a part of his reasoning, it was only a part. It is not at all apparent from the remainder of his judgment that, even if he had been wrong as to the construction of the Stonegate Business, but right (as he undoubtedly was) about the fundamental connection between the Corby Land and the Option, he would not have given summary judgment in favour of Ms Chapman and Mr Kent in relation to this part of the case.

68. As a result of my conclusion as to the Effective Disposal of the Stonegate Business, it is necessary to reconsider this part of the case in greater detail. For the five reasons noted below, I have concluded that the judge was right to grant Ms Chapman summary judgment in relation to disclosure and the allegations of breach by Mr Kent of clauses 4.2-4.4.
69. First, it is necessary to pinpoint what it is that Clarence Court say was not disclosed. The pleaded breach of clause 4.2 at paragraph 37(a) of the Part 20 claim, is that Mr Kent “failed to disclose or make any adequate disclosure of the Option”. In addition, at paragraph 5 of Clarence Court’s Reply to the Defence to the Part 20 claim, the suggestion is made that neither the disclosure letter nor the Option referred to the planning permission.
70. The only breach alleged in the Part 20 claim – the non-disclosure of the Option – must fail on the facts found by the judge: the Option was plainly disclosed to the CC, as the judge found at [53(1)]. As to the point in the Reply, there are two insurmountable difficulties with that. First, it is not permissible to plead a breach in a Reply rather than a Particulars of Claim (see the judgment of Mance LJ in *Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd* [2001] EWCA Civ 369 at [34]). Second, to the extent that the allegation in the Reply suggests non-disclosure of the planning permission, it must also fail on the facts found by the judge, because the existence of the planning permission for a poultry farm on the Corby Land was disclosed to the CC: see paragraph [53(2)].
71. So, although Mr de la Mare repeatedly said that the existence of the planning permission was a “poison pill” which Mr Kent had not disclosed to the CC, that argument was not open to him on the judge’s findings. There was nothing in the pleaded allegations of breach of the disclosure obligations which survives the judge’s judgment.
72. Secondly, Mr de la Mare hinted that what was not disclosed was the size and/or significance of the poultry farm that was the subject of the planning permission, because the Savills report did not give details. But that is not a pleaded allegation (not even in the Reply), and there was no application to amend the Part 20 Claim. It cannot therefore, at this late stage, ‘save’ Clarence Court’s case under clauses 4.2-4.4. In any event, it was entirely unsubstantiated: there was no evidence from anyone that the size and/or significance of the notional poultry farm was not known to (or reasonably capable of being discerned by) the CC in 2008. There was also nothing to say that size or significance would or could have made any possible difference to the CC.
73. Mr de la Mare argued that the various references in the CC Report to the difficulties for and constraints upon those who might want to compete in the egg production business, particularly the difficulties in obtaining planning permission, demonstrated the potential significance of the large poultry farm for which planning permission had been granted on the Corby Land. I have set out above many of those references. But I consider that they work against his submission on this point: given the centrality of those matters in the CC report, and given that they knew i) the size of the Corby Land, ii) the existence of the relevant planning permission, and iii) the existence of the Option in Mr Kent’s favour, it is plain that there was more than enough information for CC to raise this as an issue, if that is what they thought it might be.

74. That leads on to my third reason for upholding the judge's conclusion. I have referred at paragraph 30 above to the correspondence with the CMA. Clarence Court repeatedly asked them to say that there had been, or may have been, a breach of clauses 4.2 – 4.4. There is nothing in their replies to suggest that the CMA had any concerns in relation to disclosure under clauses 4.2-4.4. The focus of their letters is on clause 7.4, which I address below. The CMA have had ample opportunity to say, if it is the case, that they have any concerns about disclosure in 2008. They have not done so.
75. My fourth reason for upholding the judge's rejection of the allegations as to non-disclosure arises from the construction of clause 4 of the Final Undertakings. The disclosure obligations in clause 4 are expressly said to be "ancillary to the Principal Undertakings". Those are themselves defined as the undertakings set out in clause 3, which were concerned with Effective Disposal. Since it is now conceded that Effective Disposal took place, the disclosure undertakings have nothing left on which to bite. I consider that clauses 3 and 4 of the Final Undertakings must be read together, as providing that, if Effective Disposal (as defined) occurred under clause 3, the disclosure obligations in clause 4 fell away.
76. That makes sense from a commercial perspective too. If, as part of the divestiture, something had been held back and its retention had not been disclosed (be it property or confidential information or any other asset), then there would not have been Effective Disposal of the Stonegate Business. If, on the other hand, everything had been the subject of an Effective Disposal (as Mr de la Mare rightly now concedes occurred here) there could have been no non-disclosure of anything of any relevance.
77. Fifth and finally, there is the question of proportionality. It would, in my view, be disproportionate and contrary to the overriding objective to allow this unpleaded and unsubstantiated disclosure allegation to be advanced at trial, particularly in circumstances where there had been Effective Disposal. It would impose a huge disclosure burden on the CMA. It would require the CMA to provide all the information with which they were provided 14 years ago, and to have that picked over, to see whether or not it could be said that full disclosure was not given, even when it is accepted that Effective Disposal occurred. In civil litigation in the 21st Century, the court must be prepared to step in and have regard to the practical and proportionate ways of resolving the real disputes between the parties.
78. In undertaking the balancing exercise required by any consideration of proportionality, I also take into account that, on my analysis, Clarence Court are not left without a remedy. For the reasons set out in Section 7.4 below, I consider that they are entitled to pursue to trial their claim by reference to clause 7.4. That, so it seems to me, is where the gravamen of their claim lies in any event. On a proper analysis of their case, it is the exercise of the Option for the future that matters, not the events of the past.
79. So for all those reasons, I would dismiss the appeal insofar as it affects the judge's rejection of Clarence Court's allegations about disclosure under clauses 4.2-4.4.

7.4 The Consent of the CMA and the Alleged Breach of Clause 7.4

80. I have set out the judge’s conclusion in respect of this aspect of the case at paragraph 40 above. At [62(2)], he said that, if he was wrong about the definition of the Stonegate Business, he would conclude that it was unarguable that the acquisition of the Corby Land pursuant to the Option was not the acquisition of an interest in the Stonegate Business.
81. On the face of it, the exercise of the Option seems to me to be precisely the sort of post-divestiture event with which clause 7.4 was concerned, particularly given the extracts from the CC to which I have referred above. The CMA would have wanted to avoid any suggestion of a rebuilding of the merged company which they took such time and trouble to decouple. That is doubtless why the CMA said in their letters that they would expect to be given notice of the exercise of the Option under clause 7.4.
82. Mr Mitchell argued that it did not follow that, even if there had been Effective Disposal of the Corby Land with the burden of the Option, clause 7.4 was triggered. His argument was based on [62(1)] of the judgment, and the potential difference between “interest” and “assets”. The high watermark of this argument was to the effect that the exercise of the Option amounted to the acquisition of an asset of, rather than an interest in, the Stonegate Business.
83. There are a number of problems with this specific aspect of the appeal. For one thing, neither the Grounds of Appeal nor the Respondent’s Notice address [64]. For another, it seems to me that any distinction between “interest” and “assets” was not apparently regarded by the judge as determinative: if it had been, he would not have said what he said at [64(2)]. In any event, I would conclude that, to the extent that there is anything further in that point, it can be argued at trial.
84. Accordingly, if my Lady and my Lord agree, I would allow the appeal against the judge’s order of summary judgment in respect of the consent of the CMA to the exercise of the Option and the alleged breach of clause 7.4. That issue should proceed to trial. For the reasons that I have explained, I would dismiss the remainder of this appeal.

LORD JUSTICE NEWEY

85. I agree.

LADY JUSTICE KING

86. I also agree.