Neutral Citation Number: [2024] EWHC 2550 (Ch)

Claim No: PT-2023-LDS-000134

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS & PROBATE LIST (ChD)
SHORTER TRIALS SCHEME

Fourth Floor, West Gate,
6 Grace Street,
Leeds, LS1 2RP.

Date: 11/10/2024

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

HARWORTH ESTATES INVESTMENTS LIMITED	**Claimant**
- and -	
WESTFIELD PARK LIMITED	**Defendant**

- -
- -

Paul de la Piquerie (instructed by **Freeths LLP**) for the **Claimant**
Nicholas Jackson (instructed by **Griffiths & Hughes Parry Solicitors**) for the **Defendant**

Hearing dates: 25-26 September 2024

- -

Approved Judgment

.....

HH JUDGE KLEIN

HH Judge Klein:

1. This is my decision following the trial of a debt claim by which the Claimant ("Harworth") seeks to recover the principal sum of £399,989.06 as an additional payment which it claims it is due under an agreement, dated 14 October 2021, for the sale and purchase of York Holiday Park Development which was made between it and the Defendant ("Westfield"). The main issue between the parties has been whether, on the proper construction of the relevant provisions of the agreement ("the Sale Agreement"), the additional payment is due. Harworth contends alternatively that, if the additional payment is not due on the proper construction of the Sale Agreement, the Sale Agreement should be rectified with the effect that the additional payment has become due.

2. York Holiday Park Development ("the holiday park") is the site of the former North Selby Mine and is located in Escrick in York. The freehold interest in the site was owned by Harworth and is registered at HM Land Registry under title number NYK223836. It was marketed for sale for Harworth, by Savills, as a holiday park comprising, amongst other facilities, a site for static caravans located on the part of the holiday park known as "the Bowl". Savills' sales particulars explained:

> "…The site provides an excellent opportunity to create a holiday park close to the historic city of York. The property is the site of the former North Selby Colliery which began operating in the late 1970s and ceased operation in 2004, since then it has been decommissioned with many of the structures having been demolished and removed. It now comprises 3 distinct areas of woodland to the western aspect, a level central bowl area which was the former industrial centre of the site and the landscaped valley to the south and east of the site. An application has been made for a mixed holiday park scheme for 323 static holiday, and touring caravans together with camping…
>
> Proposed indicative development (subject to planning):

Type of unit	Number of pitches	Area for development
Touring/ Camping	92	Woodland
Static caravans	231	Bowl
Total	323	

…

> The woodland area would predominantly accommodate touring caravans, the level bowl area would be developed for holiday static caravans and initially the valley would be a wildlife/recreational area which could perhaps be utilised for further accommodation by a future owner/operator…
>
> The site represents a substantial leisure development which would be amongst the largest in the region. The market is particularly strong in this region for camping, touring caravans, static holiday caravans, caravan storage and lodges…"

3. Outline planning permission was obtained from York City Council on 7 August 2020. The permission was for "redevelopment of the former North Selby Mine site to a leisure development comprising of a range of touring caravan and static caravans with associated facilities". The permission allowed static caravans to be sited in the Bowl on the following basis:

> "The number of static caravan pitches on site shall be restricted to no more than 231, to be sited in the area totalling 6.24ha that is marked as the Bowl and shown coloured lilac on the submitted Parameters Plan no.2356.02 Rev.03."

4. It is not disputed now that, whatever the position taken later by the Coal Authority on the question of whether it is appropriate to site static caravans in the Bowl, the effect of the permission is that static caravans may legally be sited there.

5. Savills invited closed bids for the holiday park by 20 May 2021. Flannigan Enterprises Ltd was the successful bidder, offering £3 million. The eventual purchaser was the Defendant. William Flannigan is effectively the owner of both companies, and he was the person giving instructions on the purchaser's behalf. He instructed Mairtin Breathnach of Griffiths & Hughes Parry solicitors to act for the purchaser in the transaction.

6. Mr Flannigan was concerned about risks that the purchaser might face because the holiday park is the site of a former colliery. He was particularly concerned, initially, about liabilities the purchaser might have to the Coal Authority under an indemnity in an earlier conveyance, and about public liability (in respect of which he was anxious to obtain insurance).

7. During the course of his investigations for the purchaser, Mr Breathnach discovered that there exists "a zone of influence" around both of the mineshafts of the former colliery. The heads of the two mineshafts are located in the Bowl.

8. A Coal Authority guidance note "Mine Entry Zone of Influence Metadata" (published on 9 October 2014) ("the CA guidance note") explains what a zone of influence is, as follows:

> "A Mine Entry with Potential Zone of Influence is the area of the ground that might be affected if subsidence of the mine entry was to occur.

> …
>
> Each mine entry has a zone of influence buffer around the mine entry calculated from the same algorithm used in producing a "Mine Entry Interpretive Report". The Zone of Influence (ZOI) highlights the area on the surface that could potentially be affected in the unlikely event a collapse was to occur. The calculation takes into account the size of the mine entry entrance, the geological "drift" deposits for the area and the original source from which the mine entry was captured.
>
> The layer shows a mathematical area, which may be affected and does not attempt to take into account the varying local geological conditions that may affect this. Where the calculated ZOI is less than 20m then a default value of 20m is used."

It appears from the CA guidance note that a zone of influence is designated simply by the application of a standard formula using standard inputs, being "the size of the mine entry entrance, the geological "drift" deposits for the area and the original source from which the mine entry was captured" (save in the case where the formula calculates the zone of influence as being less than 20 metres, when the zone of influence is then deemed to be 20 metres). It is important to note that the CA guidance note does not suggest that, in designating a zone of influence, the Coal Authority makes any case-by-case judgment at all, let alone by reference to geological, or other scientific, data. Indeed, the CA guidance note explains, in terms, that, in designating a zone of influence, "local geological conditions" are not taken into account and that the designation of an area as a zone of influence is "mathematical". It follows therefore that, unless a dataset used for the standard formula happens to be updated, a zone of influence appears, from the CA guidance note, not to be capable of being adjusted.

9. Mr Breathnach is uncertain about whether or not he saw the CA guidance note during the course of the transaction.

10. In any event, Mr Breathnach spoke with Mr Flannigan on 7 July 2021. His attendance note of the conversation records:

> "Telephone conversation with Willy Flannigan regarding this purchase. I explained that I had been liaising with the sellers and the Lender's solicitors this morning with a view to ensuring that they have all necessary documentation to proceed.
>
> I also explained to Willy that I had been going through the environmental search report and it is apparent that we will need the advice of an expert regarding the mineshaft and any issues flowing from its presence on site.
>
> Specifically, I explained that there have been historic claims made by adjacent property owners in connection with subsidence and other forms of damage to their property connected with the Selby mineshaft.

> Willy is of the view that he is only liable for damage which occurs within the vicinity of the property (i.e. the HM Land Registry red line) I explained that this is not my reading of the situation as all liability has been passed to him and particularly because of the provisions of the 2003 Conveyance between the Coal Authority and UK Coal Mining Limited.
>
> Willy feels that this liability is unacceptable in the circumstances. I said that I do need to get to the bottom of it as my view is that the Coal Authority has an indemnity from the owner of this site under the 2003 Conveyance in respect of any claims made under legislation.
>
> I explained to Willy that I would like Neil Catlow to review the diagrams we have for the infilling and capping of the mineshafts in the first instance, also advise upon the zone of influence we have to keep clear around the mineshafts and also to deal with contamination issues etc…"

11. Mr Breathnach sent an email to Mr Catlow (who provides advice to Mr Breathnach's firm about historic mining activities) the following day. It appears from the email that Mr Breathnach and Mr Catlow had spoken before Mr Breathnach spoke with Mr Flannigan on 7 July, and that Mr Catlow had mentioned that (i) there may be a zone of influence at the holiday park and (ii) it is not possible to carry out "development" in a zone of influence. The reference, in Mr Breathnach's 7 July attendance note, to "the zone of influence we have to keep clear" must be understood in that context. Mr Breathnach's email to Mr Catlow said:

> "…As discussed on the telephone, I would be grateful if you could kindly consider the adequacy or otherwise of infill works undertaken by the coal authority in 2000. We do only have diagrams to go by showing cross-sections of the materials used to undertake the said infill. There is also some reference to the works undertaken in the Environmental Search.
>
> You did also mention that a "zone of influence" may exist in the vicinity of the shafts and which would be undevelopable. If you have any views as to the likely zone of influence in this situation I would obviously be most grateful."

12. Mr Catlow replied by email the following day:

> "The Coal Authority require a "zone of influence" around treated mineshafts in which no building can be constructed. On this site though there may be some flexibility and I will ask the CA for their views.
>
> If the zone of influence is imposed then this would be an area extending 25m around each shaft because of the depth to rockhead here."

13. Having considered all of the evidence, I am satisfied that when, in his email to Mr Catlow and in later correspondence, Mr Breathnach wrote of the area of the zone(s) of influence being unsuitable for development, he only had in mind that such an area would not be suitable for development by the siting of static caravans there. On this issue, the following evidence in particular is relevant (as are Mr Breathnach's 28 and 29 July 2021 emails to which I refer below. Indeed, having regard to the language of the 29 July email itself, the terms of the planning permission and the 28 July email, I am satisfied that Ms Toolan (its recipient) would reasonably have understood that, in the 29 July email, when Mr Breathnach referred to undevelopable land, he had in mind land on which static caravans could not be sited).

14. The only development of the Bowl permitted by the planning permission is the siting of static caravans. Further, as Mr Breathnach repeatedly explained in cross-examination, the only development of the Bowl Mr Flannigan ever wanted to carry out, and had in mind, was the siting of static caravans there, and, as Mr Breathnach explained in paragraph 21(c) of his witness statement, in reference to his 29 July 2021 email to which I refer below:

> "Undevelopable to my mind meant…[the area of the zones of influence was] not suitable, for a multitude of reasons, to locate static caravans…"

He also said, at paragraph 34 of his witness statement:

> "…my client's main focus for the areas designated Zones of Influence was for the purpose of safely siting static caravans in accordance with the planning permission and for no other reason."

15. In any event, understanding from Mr Catlow that no building development at all could take place in a zone of influence but that the Coal Authority may be "flexible", Mr Breathnach emailed Katie Toolan of Pinsent Masons LLP, who was acting for Harworth in the transaction, under the supervision of Matthew Rowlands, on 28 July 2021 saying:

> "…my client has raised some concerns as to the proximity within which he can place static caravans in relation to the mineshafts.
>
> I believe that we need a definitive answer from the Coal Authority on this point…"

16. Mr Breathnach was then able to speak directly with David Parry of the Coal Authority on 29 July 2021. Mr Breathnach's attendance note of the conversation records:

> "Lengthy telephone conversation with David Parry at The Coal Authority regarding the mineshafts on site.
>
> He advised that there is a zone of influence comprising a radius of 27 meters from the centre point of each mineshaft.

> He said that within the zone of influence, development would be considered high risk.
>
> He also said that normally, any planning permission would be subject to the Coal Authority's requirements here which would obviously refer back to the zone of influence also.
>
> He did go on to say that the zone of influence may be reduced but they would need to consult the surveyor's abandonment report. This is however contained in the archives in Macclesfield which is currently [inaccessible] due to covid restrictions.
>
> I subsequently spoke with Willie Flannigan and explained the above to him. He does believe that this can significantly impact upon the development potential (i.e. the planning permission for the static caravans is within this zone). He said he would speak with Catherine at Savills and I confirmed that I would drop an email to the seller's solicitors on this issue and copy in all parties."

17. Following this conversation Mr Breathnach emailed Ms Toolan, also on 29 July 2021, saying:

> "…I have been liaising with the Coal Authority as regards their development requirements in the vicinity of the said coal shafts. They advise that there is a Zone of Influence of 27 meters from the centre of each shaft within which development is considered high risk.
>
> Moreover, they advise that they should be consulted by the Local Authority on the granting of any planning permission in or near mine shafts in order that they can make their requirements known. As far as I am aware there are not stipulations relating to the mine shafts within the existing planning permission (which there should be here).
>
> The net effect is that an area of approximately 4600 sq meters is undevelopable and this area falls within the zone within which the proposed static caravans can be situated.
>
> In the circumstances, can you urgently request that either your client or their planner confirm the status of the planning permission in light of Coal Authority requirements and what if any correspondence there has been with the Coal Authority on this issue?"

It seems, from this email, that, at this time, Mr Breathnach believed that, in practice, static caravans could not be sited in the area of the zones of influence in the Bowl (i) because to do so would (or might be) high risk and (ii) because the planning

permission might have been undermined because York City Council had not apparently consulted the Coal Authority.

18. Mr Flannigan is likely to have spoken with Savills (as Mr Breathnach's 17 August 2021 email suggests). The result of those (and any other) discussions was that the parties agreed in principle that the initial purchase price would be reduced to £2.6 million, but that an additional payment of a maximum of £400,000 (the reduction in the initial purchase price) would be payable in certain circumstances.

19. Mr Breathnach explained in cross-examination how Mr Flannigan calculated the £400,000 reduction in the initial purchase price, as follows: up to 40 caravans could have been sited in the area of the zones of influence. 40 caravans equated to about 13% of the static caravans permitted, by the planning permission, to be sited in the Bowl. £400,000 represents about 13% of £3 million. Mr Breathnach continued that his clients valued the holiday park on the basis that static caravans could be sited there. The reduction in the initial purchase price was calculated by reference to the "loss" of 40 static caravans from the area of the zones of influence.

20. Mr Breathnach emailed Ms Toolan on 17 August 2021:

> "…I did speak with my client subsequent to our conversation and I understand that discussions have been taking place [with] the agents in relation to the Zone of Influence issue.
>
> I understand that our respective clients are agreeable to a revised purchase price of £2.6m. Should the Zone of Influence prove not to apply and those areas prove developable within 12 months of completion then my client will pay an additional £400,000.
>
> This is on the basis that my client has unfettered use of the area currently classified as being a Zone of Influence. In the event that partial use of the Zone of Influence is allowed then my client will pay £10,000 per caravan pitch which can be located within these radiuses up to a maximum of £400,000.
>
> Perhaps you could take client instructions on the above and let me know whether this is agreed."

21. There was some discussion during the trial about how many proposals Mr Breathnach made in this email and what those proposals were. Taking into account what I have said, it is clear to me that Mr Breathnach made only one proposal to the effect that, for every static caravan which could be sited in the area of the zones of influence, an additional payment of £10,000 would be made up to a maximum of £400,000, and that Ms Toolan would have reasonably understood Mr Breathnach's proposal in that way.

22. Ms Toolan took instructions from Peter Massie, Harworth's asset manager, on Mr Breathnach's proposal, and responded on 20 August 2021, as follows:

> "I have spoken with my client on the mechanism and they have commented in the following:-
>
> > "I am broadly in agreement with this and happy for Katie [Toolan] and Martin [Breathnach] to draft something to reflect this. However I query the £10,000 per pitch which I think would be hard to quantify in practice, i.e., how many sq m is a pitch?
> >
> > I calculate the current zone of influence suggested by the coal authority to be 4,580.44m^2.
> >
> > Given the buyer bid £3M in the knowledge that they could not put a caravan directly on top of the cap I have deducted the area of the caps from the calculation…
> >
> > Total = …4,496.28m^2
> >
> > Therefore my favoured calculation method within the clause would be to include a price for m^2 'released' by the Coal Authority. i.e. £400,000 / 4,496.28 = £88.96 per m^2."""

23. Mr Breathnach replied on 25 August 2021:

> "Many thanks for your below email and I can confirm that I have taken client instructions on dealing with this issue on a square meter basis and this formula is agreed. I look forward to receiving your draft wording for insertion in the Contract in due course.
>
> In addition, can you or your client/their planning adviser please confirm that any reduction in the pitch/site numbers necessitated by the Zone of Influence will not impact upon the validity of the Planning Permission?"

24. As I have said, the parties entered into the Sale Agreement on 14 October 2021, by which Westfield made an initial payment of £2.6 million for the holiday park and covenanted, by clause 2.2, to pay "the Released Land Payment", defined as "a sum of up to £400,000…calculated in accordance with the provisions of Schedule 4 to the Sale Agreement [("Schedule 4")]".

25. Schedule 4, which was incorporated into the Sale Agreement by clause 1.4 of the agreement contains the following definitions:

> ""Long Stop Date" means the date 12 months from the date hereof
>
> "Released Land Value" means the price per m^2 'released' by the Coal Authority
>
> "Zone of Influence" means an area designated by the Coal Authority as a 27m zone of influence centred on each of the 2

> mine shafts at the Property less the area directly on top of the two shafts (which the parties acknowledge is not considered to be a suitable position to site a caravan) and being 4,496.28 m^2…"

It then provides as follows:

> "1.1 The Seller has requested the size of the Zone of Influence is reduced by the Coal Authority and continues to make representations to this end.
>
> 1.2 The Seller may but is under no obligation to use its reasonable endeavours to engage with the Coal Authority to reduce the Zone of Influence until the Long Stop Date.
>
> …
>
> 3.1 If prior to the Long Stop Date the Coal Authority confirm in writing that the Zone of Influence is reduced the Seller will provide evidence of such release to the Buyer and the Released Land Value will be calculated at a rate of £88.96 per m^2 or part thereof.
>
> …
>
> 4 The Released Land Value will be payable by the Buyer to the Seller within 30 days of written demand or of determination of the Released Land Value in the event of a dispute.
>
> 5 The Buyer will not locate any caravans erect any temporary or permanent buildings or park any vehicles within the Zone of Influence.
>
> …"

26. As the Sale Agreement contemplated, Harworth (in fact, RSK Geosciences, its geotechnical consultants) liaised with the Coal Authority in relation to the zones of influence. On 31 May 2022, the Coal Authority wrote to RSK Geosciences:

> "**North Selby Mine Shafts, Zone of Influence, North Selby Mine Leisure Park, off New Road, Deighton, Yorkshire.**
>
> …Our comments below are made in light of the proposed Leisure Park as received under the above [pre-planning application] enquiry.
>
> I can confirm that, as you state, no objection has been raised in regards to the siting of static caravans other than they should not [at] any point infringe on or over the mineshafts protective capping slabs.

> We note that you concur with our opinion that any permanent building structures should not be built within the calculated zone of influence, equating here to 25m from the centre of each recorded mine shaft. We would expect these no build areas to be defined as part of any detailed development layout in order to ensure that they accord with the most up to date guidance documents at the time."

27. Pinsent Masons demanded payment under clause 3.1 of Schedule 4 on 6 July 2022, relying on the 31 May 2022 Coal Authority letter. Mr Breathnach replied on 2 August 2022 to the effect that no payment was due because "we have not been provided with confirmation in writing from the Coal Authority that the Zone of Influence has been reduced or that it may be reduced in accordance with clauses 3.1 and 3.2…"

28. RSK Geosciences reverted to the Coal Authority in consequence, and, on 15 September 2022, the Coal Authority wrote:

> "…I can confirm that, as you state, no objection has been raised in regards to the siting of static caravans other than they should not [at] any point infringe on or over the mineshafts protective capping slabs.
>
> Following a review of the engineering appraisals completed and as reported in letters dated 1st October 2021 (ref 322879-PL01) and 4th May 2022 (ref 322879-PL02) the Coal Authority are in agreement with RSK that the calculated zone of influence, where temporary structures (i.e. static caravans) cannot be placed, can be reduced. Specifically, we confirm that the zone of influence is reduced from a radius of 27 metres centred on each of the 2 mine shafts at the Property to a zone of influence with a radius of 3.66 metres centred on each of the 2 mine shafts (with 3.66 metres being the radius of the caps).
>
> The agreement to reduce the zone of influence only applies to the siting of static caravans and does not include permanent structures. Caravans should not be placed in the zone of influence areas. Any change of use would require reassessment and Coal Authority approval…"
>
> ("the 15 September letter")

29. Pinsent Masons made a further demand for payment the next day, relying on the 15 September letter. (There is no dispute that, if the construction of clause 3.1 of Schedule 4 is as contended for by Harworth, this letter is sufficient evidence for the purposes of the clause).

30. Mr Breathnach was troubled when he received a copy of the 15 September letter. Indeed, in cross examination he suggested that the wording of the letter had been procured in bad faith (because RSK Geosciences had invited the Coal Authority to adopt the form of wording used "if this [was] acceptable to the [Coal Authority]"). Mr Breathnach emailed Leigh Sharpe of the Coal Authority on 13 October 2022:

> "Many thanks for your earlier call which was most helpful.
>
> I have been provided with a copy of your letter to RSK Geosciences dated 15th September 2022 which has created a bit of confusion here. I read it as possibly alluding to there being two Zones of Influence (i.e. one for permanent structures and one for static caravans). Having looked into this, I understand that there can only be one Zone of Influence and that an area of land is either within the Zone of Influence or it isn't.
>
> To allay any confusion and based on what we discussed on the phone, can you confirm that there is still only one Zone of Influence and that this remains at 27 meters, i.e. it hasn't been reduced?"

31. Mr Sharpe replied the same day:

> "Thank you for our discussion earlier.
>
> Just to confirm our understandings. I know there were various iterations of the letter before the final wording was agreed with RSK Geosciences.
>
> I can confirm that as you state there is essentially just one zone of influence for the shafts which is the 27m radius referred to, this has not been reduced, and reflects the possibility of minor residual settlements could still take place. The 3.66 radius refers to what is best described as an exclusion zone in which no built development should take place including placement of static caravans, temporary or permanent buildings, services or utilities. Beyond this exclusion zone the placement of static caravans is permissible but no permanent structures / buildings can be constructed within the 27m (radial zone of influence).
>
> I hope that clarifies matters satisfactorily, thank you."

32. The dispute about whether payment under clause 3.1 of Schedule 4 ("Clause 3.1") was due remained unresolved and, in due course, Harworth began the claim.

33. The construction dispute between the parties can be summarised, broadly, in the following way.

34. Harworth contends that an additional payment ("a released land payment") became due, by the 15 September letter, when the Coal Authority indicated that it did not object to static caravans being sited on the areas in question, so "reducing" the zones of influence in relation to certain development (using the language of Clause 3.1) (or, to put it another way, so "releasing" areas of the zones of influence for certain development (using the term expressed, interchangeably, elsewhere in Schedule 4)). Westfield contends that a released land payment did not become due by the 15 September letter, because one only becomes due if the Coal Authority reduces the zones of influence (or released land from it) for all development purposes.

Witness evidence

35. On the question of construction in particular, the witness evidence has been of limited assistance (although, to be clear, I considered it all, together with the documents to which I was referred, and counsel's submissions before I reached a decision).

36. For Harworth, I heard from Mr Massie and Mr Rowlands. For Westfield, I heard from Mr Breathnach (whose evidence, so far as it may be relevant, I have already set out). I also read Mr Flannigan's witness statement, which was admitted as hearsay evidence, because he is too unwell to attend court. (In fact, Mr Flannigan's witness statement did not add anything to Mr Breathnach's evidence).

37. The only relevant evidence Mr Massie gave was contained in paragraph 26 of his witness statement. It related to the agreement to reduce the initial purchase price. He said:

> "On or about 16 August 2021, Westfield proposed (via the agents) a £400,000 retention from the purchase price. On receipt of this proposal, I spoke to William Flannigan of Westfield over the telephone. I cannot quote word for word what was said between Mr Flannigan and I, but I certainly remember the gist of our conversation. I distinctly remember that Mr Flannigan's main concern was not being able to place static caravans within the zones of influence. In that conversation I agreed to the £400,000 retention in principle, subject to an appropriate mechanism for payment to Harworth in the event the Coal Authority confirmed it was happy for caravans to be placed within the immediate vicinity of the mineshafts. I specifically remember that the payment of the retention was linked to Westfield being permitted to place caravans within the zones of influence, except we expressly agreed that caravans should not be placed on top of each mineshaft cap. We finished the conversation agreeing we would both go away and think of an appropriate mechanism."

38. Mr Rowlands gave the following evidence in paragraph 18 of his witness statement:

> "From what I understood from Peter's instructions at the time, the objective of Schedule 4 was to create a mechanism by which an additional payment would become payable to Harworth in the event the land within the zones of influence was reduced so as to be useable for siting static caravans by the buyer. That is what I thought Schedule 4 of the sale contract said. If Schedule 4 does not say that, then it should as that was the intention of the parties, as communicated to me by Peter. That intention is also clear from the emails referred to above."

I do not attach any weight to this evidence from Mr Rowlands. Mr Rowlands did not make attendance notes, and it is clear to me, from his evidence (in particular about his workload and the time which has elapsed since the transaction), that he has no independent recollection of the transaction. Rather, he has, understandably,

reconstructed events in his own mind from the documents he has considered whilst preparing his trial witness statement. Those documents are in evidence and are a more direct source for Mr Massie's instructions at the time.

Construction – the correct approach

39. The parties agree how I should construe Schedule 4. They made only limited reference to authorities. Mr de la Piquerie (Harworth's counsel) set out the following in paragraph 22 of his skeleton argument:

> "Per Lord Hoffman in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896:
>
> > "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> >
> > (2) The background of fact was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything.
> >
> > (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in real life. The boundaries of this exception are, in some respects unclear. But this is not the occasion on which to explore them".
>
> In *Arnold v. Brittan* [2015] AC 1619 Lord Neuberger said, of a lease:
>
> > "The meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".
>
> He also said:
>
> > "The reliance placed in some cases on commercial common sense and surrounding circumstances… should not be

> invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision"."

Mr Jackson (Westfield's counsel) also referred me to the following two sentences from Gross LJ's judgment in *Al Sanea v. Saad Investments Co Ltd* [2012] EWCA Civ 313 at [31]

> "It is not for the court to rewrite the parties' bargain. If the language is unambiguous, the court must apply it."

40. Because there is a rectification claim in this case in addition to the construction dispute and because, understandably, the evidence on the construction dispute has not been presented separately from the evidence supporting the rectification claim, it is necessary for me to consider what factual background evidence is admissible on the construction dispute, even though the parties did not make submissions directed to this point.

41. I have found it helpful to have in mind the following material.

42. Lewison: The Interpretation of Contracts explains, in Chapter 3, Section 9:

> "Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties;…and to elucidate the general object of the contract…
>
> There are…some cases in which the court will admit evidence of pre-contractual negotiations. First, the court will admit evidence to establish the parties' state of knowledge of facts. In *Governor and Company of The Bank of Scotland v. Dunedin Property Investment Co Ltd*, Lord Rodger, having considered the English authorities, said:
>
> > "As these authorities demonstrate, the rule which excludes evidence of prior communings as an aid to interpretation of a concluded contract is well-established and salutary. The rationale of the rule shows, however, that it has no application when the evidence of the parties' discussions is being considered, not in order to provide a gloss on the terms of the contract, but rather to establish the parties' knowledge of the circumstances with reference to which they used the words in the contract."
>
> Likewise, in *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales*, Mason CJ said:

> "Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible."

This was confirmed by the House of Lords in *Chartbrook Homes Ltd v. Persimmon Homes Ltd*, Lord Hoffmann said:

> "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

In *Globe Motors Inc v. TRW Lucas Varity Electric Steering Ltd*, Beatson LJ reaffirmed the principle that:

> "the pre-contractual negotiations of the parties cannot be taken into account in interpreting its terms and determining what they mean. The exceptions are where a party seeks to establish that a fact which may be relevant as background was known to the parties or to support a claim for rectification or estoppel."

In *Q-Park v. HX Investments Ltd*, Kitchin LJ confirmed that:

> "the background knowledge may well include objective facts communicated by one party to the other in the course of the negotiations."

Thus evidence may be admitted in order to prove additional consideration to that stated in the written contract. It does not matter that the communication of the fact relied on was made in a "without prejudice" communication."

On the question of when evidence of pre-contractual negotiations is admissible to elucidate the general object of the contract, Leggatt LJ explained in *Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC* [2019] EWCA Civ 526, as follows:

> "51. In my view, the relevant principles of law are clear in the light of the decision of the House of Lords in the *Chartbrook* case and can be summarised as follows.
>
> 52. It is established law that, as stated by Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381 at 1384-1385, previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract. No doubt was cast on that

principle in the *Chartbrook* case and the passage from the judgment of Lord Wilberforce which includes this proposition was cited with approval in *Arnold v. Britton* [2015] UKSC 36…and *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24…at [10]…

53. The phrase "genesis and aim of the transaction" is a composite phrase taken by Lord Wilberforce from the judgment of Cardozo J in *Utica City National Bank v. Gunn* 222 NY 204 (1918), a decision of the New York Court of Appeals, which Lord Wilberforce described as following "precisely the English line" and as a judgment which "combines classicism with intelligent realism": see *Prenn v. Simmonds* [1971] 1 WLR 1381 at 1384F. The approach followed by Cardozo J was, by considering the circumstances which led to the execution of the contract, to identify the purpose of the transaction and to construe the language used in the light of that purpose. Cardozo J concluded (at 208):

> To take the primary or strict meaning is to make the whole transaction futile. To take the secondary or loose meaning, is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice."

54. Lord Wilberforce clearly saw no conflict between this approach and the rule, reaffirmed in *Prenn v. Simmonds*, that evidence of negotiations, or of the parties' intentions, ought not to be received…What is not permissible, as the decision of the House of Lords in the *Chartbrook* case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense. The exclusion of such evidence was justified in the *Chartbrook* case, not on the ground that it will always or necessarily be irrelevant, but because of the costs and other practical disadvantages that would result from relaxing the rule and because the "safety devices" of rectification and estoppel will generally prevent the exclusionary rule from causing injustice.

55. I would accept that there may be borderline cases in which the line between referring to previous communications to identify the "genesis and aim of the transaction" and relying on such evidence to show what the parties intended a particular provision in a contract to mean may be hard to draw…"

Discussion – the construction dispute

43. Schedule 4 cannot be given its plain meaning in two key respects.

44. First, it cannot be given its plain meaning when it contemplates the reduction or release (the words are used interchangeably) of the Zone of Influence. As I have explained, according to the CA guidance note there is no question of the area of a zone of influence being reduced, otherwise than by a dataset being updated. In particular, there is no question of the area of a zone of influence being reduced because of a case-by-case judgment made by the Coal Authority, for example because of local geological evidence and representations made to it by an interested party.

45. Secondly, on a plain reading of the restrictive covenant in clause 5 of Schedule 4, and taking into account the definition in Schedule 4 of the Zone of Influence, a definition which identifies the land in question as being that previously designated by the Coal Authority as a zone of influence, even if the Zone of Influence was removed (released) entirely, no development or parking could take place on the land which was, at the time of the Sale Agreement, designated by the Coal Authority as a zone of influence. Such a reading would defy commercial common sense.

46. A more purposive construction of Schedule 4 is therefore required.

47. In resolving the construction dispute, the following factual background evidence is admissible and relevant:

    i) the Bowl (the area of the zones of influence) was marketed as a site for static caravans;

    ii) the only permitted development of the Bowl was as a site for static caravans;

    iii) the parties believed (wrongly it appears, as I have explained) that:

        a) what areas of land are designated by the Coal Authority as zones of influence is a matter of judgment for the Coal Authority;

        b) the judgment of the Coal Authority is whether or not development in an area around a mineshaft is high risk;

        c) whatever a planning permission provides, development in a zone of influence cannot take place without the Coal Authority's consent (which had not been obtained in this case); and

        d) the Coal Authority has the power to re-designate land as not being a zone of influence even when the standard formula determines it to be such.

    Mr Flannigan is likely to have believed this because of what he is likely to have been advised by Mr Breathnach (particularly after Mr Breathnach spoke with Mr Parry), and Mr Massie is likely to have believed this because of what Mr Flannigan is likely to have told him during their conversation about the reduction of the initial purchase price;

iv) in circumstances where Mr Massie and Mr Flannigan had this same belief, the initial purchase price for the holiday park was reduced from £3 million to £2.6 million.

48. In the circumstances, I have concluded that, on the proper construction of Clause 3.1 in particular, a released land payment became due when the Coal Authority made a judgment that the siting of static caravans within the area of the zones of influence is not objectionable (save for on the mineshaft protective capping slabs) and confirmed that in writing, as it did in the 15 September letter.

49. A reasonable person, considering Schedule 4 in general and Clause 3.1 in particular, would appreciate that a general object of the transaction was a sale of the Bowl for the siting of static caravans. They would appreciate too that the parties understood, but only after the sale price was originally agreed, that static caravans could not be sited in the area of the zones of influence unless the Coal Authority did not object and that, after this became apparent to the parties, the sale price was reduced. They would understand that Schedule 4 provided for an additional payment if the Coal Authority made a written decision and they would conclude that the decision that was intended to trigger the additional payment was one which, as the parties understood, allowed static caravans to be sited in the Bowl.

50. I have also concluded that the restrictive covenant in clause 5 of Schedule 4 is likely to have been intended to reflect the position as the parties understood it; namely that, whatever a planning permission provided, development in a zone of influence which did not have the Coal Authority's consent was not permissible. That being so, the restrictive covenant was not intended to prohibit use of the area then designated as zones of influence for a purpose which was not objectionable to the Coal Authority from time to time. In short, on its proper construction, the restrictive covenant does not now prohibit any part of the Bowl being used to site static caravans, save for that area which the Coal Authority continues to maintain, by the 15 September letter, may not be developed in that way (that is, the area of the mineshaft protective capping slabs). In the circumstances, clause 5 of Schedule 4 does not undermine the construction I have placed on Clause 3.1.

51. Mr Jackson submitted in closing that, contrary to what the CA guidance note suggests, the Coal Authority can remove land from a zone of influence. He can point to what Mr Catlow said in his email to Mr Breathnach and to what Mr Breathnach records Mr Parry as having said in support of this submission. However, those reports have limited weight because they are, at best, second-hand reports and because they are at odds with the CA guidance note. They are also not obviously consistent with Mr Sharpe's 13 October 2022 email to Mr Breathnach. They do not cause me to depart from the conclusion I have already reached, that there is no question of the area of a zone of influence being reduced, otherwise than by a dataset being updated.

52. Nor does the decision I have reached, about the proper construction of Clause 3.1 in particular and whether a released land payment is due, change if Mr Jackson is right, because one of the relevant background matters I assumed in reaching my decision was that the parties understood that the Coal Authority can remove land from a zone of influence. In other words, my decision was reached consistently with Mr Jackson's submission.

53. In fact, my decision may be reinforced if Mr Jackson is right. Logically, if the Coal Authority can remove land entirely from a zone of influence, there is no obstacle to it permitting limited development of such land, so removing it from a zone of influence for particular purposes. This is an additional relevant background matter which would make it more difficult for Westfield to establish that, on the proper construction of Schedule 4, a released land payment only became due if the Coal Authority reduced (or released) the Zone of Influence for all purposes.

Rectification

54. I do not need to reach a decision on Harworth's alternative rectification claim, because I have concluded that it is entitled to a released land payment as a matter of construction of Schedule 4. Nevertheless, I will comment briefly on the rectification claim.

55. I am doubtful that the rectification claim could succeed.

56. I acknowledge that a broader category of evidence is admissible in a rectification claim than is admissible to resolve a construction dispute. I acknowledge too that I have concluded that Mr Breathnach's 17 August 2021 email, which is the first record of a proposal for an additional payment, was a proposal for an additional payment if static caravans could be sited in the area of the zones of influence.

57. However, the outcome of the rectification claim is likely to depend on Ms Toolan's 20 August 2021 email and Mr Breathnach's 25 August 2021 response. This email exchange is the best, indeed the only, evidence of what the parties actually agreed or intended before the Sale Agreement, and is the outward expression of accord necessary for a rectification claim (as to which requirements, see Snell's Equity (34th ed); paragraphs 16-013, 16-014). The emails establish that the parties' agreement and intention was that an additional payment would be made, at the rate of £88.96 per m^2, for land "released" from the Zone of Influence by the Coal Authority. That is literally what Clause 3.1 provides. Rectification is available in certain circumstances when an agreement or understanding is not reflected in the words of a later written document. As Snell explains:

> "16-015 …Rectification ensures that the instrument contains the provisions which the parties actually intended it to contain, and not those which it would have contained had they been better informed…
>
> 16-016 …Rectification is available where the "wording does not reflect what the parties agreed not merely what they or one of them thought it meant". What is required is a literal disparity between the language of the agreement and that of the instrument, and not merely a misunderstanding of the meaning of that language…"

Here, the parties' agreement and intention is reflected in the words of Clause 3.1. On this ground, the rectification claim is likely to have failed.

58. Harworth might argue that there is in fact a question of construction about what the apostrophised word "released" actually meant in Ms Toolan's email where it appears to have been used almost as a term of art, but, in the circumstances of this case, that matter would be likely to be resolved in the same way as the principal construction dispute between the parties. So, in any event, the rectification claim is unlikely to have taken matters further than the construction dispute.

Disposal

59. Westfield does not dispute the calculation of the released land payment if it is found to be due. Because I have decided that the released land payment became due following the 15 September letter, judgment must be entered for Harworth for the principal sum of £399,989.06. I will hear further from counsel on all costs and consequential matters.