Neutral Citation Number: [2010] EWHC 1632 (TCC)
Case No: HT 09 - 464

IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice Strand. London. WC2A 2LL

Date: 1 July 2010

Before:

Deputy High Court Judge Mr Stephen Furst Q. C.

Between:

- -

Gold Group Properties Limited **Cla**

- and -

BDW Trading Limited (formerly known as Barratt Homes Limited) **Defe**

- -

- -

Mr Jonathan Acton Davis Q. C. (instructed by Field Seymour Parkes) for the Claimant Mr Nicholas Dennys Q. C. (instructed by Osborne Clarke) for the Defendant

Hearing dates: 25th, 26th May and 3rd June 2010

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JUDGMENT

Deputy High Court Judge Mr Stephen Furst Q. C.:

Introduction

1.
Following a hearing on 5th February 2010 of an application for summary judgment, Mr Justice Coulson, by order dated 16th March, gave conditional leave to defend upon the Defendant paying into Court the sum of £500, 000. The order further provided that there be a trial of the remaining issues of liability if payment was made. That sum was paid into Court and accordingly the trial on the remaining issues of liability proceeded before me.

2.
The learned Judge identified the remaining issues of liability in his judgment dated 3rd March 2010 ([2010] EWHC 323 (TCC)) but in order to understand them it is necessary to set out the background and the Judge's reasoning leading to him giving the Defendant conditional leave to defend.

Background and Judgment on Summary Judgment Application

3.
This dispute concerns a Development Agreement dated 10th August 2007 relating to land at Gadoline House, Godstone Road, Whyteleafe, Surrey entered into between Gold Group International Limited ("GGIL"), as the freeholder owner of the land, and the Defendant ("Barratt"), as the developer. The

Agreement was novated to Gold Group Properties Limited, the Claimant in this action, on 18th December 2007. I refer to both Gold companies as "Gold" without further differentiation.

4.
The Development Agreement required Barratt to develop the site by building approximately 100 houses and flats for private sale, 16 flats for social or affordable housing and a primary care unit ("PCFU") all of which would then be sold by Gold on long leases, with Gold and Barratt sharing the revenue generated by the sales. In the event the site was not developed by Barratt, leading to the present dispute.

5.
On the hearing of the summary judgment application the Judge held that Barratt was in breach of the Development Agreement. In particular that it breached:

5.1.
Paragraph 7.1 of the Second Schedule in failing to commence work on the development no later than early June 2008;

5.2.
Paragraph 7. 3. 7 of the Second Schedule in failing to proceed with the work with due diligence;

5.3.
Clause 5. 2 and Paragraph 7. 2 of the Second Schedule which required Barratt to complete the work within 30 months of commencement i. e. early January 2011. By January 2009, with demolition incomplete and no building work having been carried out, that date was simply unachievable.

6.
In the light of these breaches the Judge found that "It is clear beyond doubt that Barratt were in breach of contract by 12th January 2009. This was not ultimately disputed by Barratt. "

7.
The Judge went on to consider whether these breaches were repudiatory of the Development Agreement. He stated:

"106. On the face of it, Barratt wrongfully repudiated the Agreement no later than 12th January 2009, and possibly before. They failed to comply with their critical obligations under the Agreement, namely their obligations to commence, carry out and complete the building works on site. Those were conditions, not intermediate terms, because they were so important. In my judgment, Barratt's failure to comply with them went to the root of the contract. Thereafter, on 12th January 2009, they wrongly treated the contract as frustrated and did not carry out any further works on site. Two months or so later they put the keys through the letterbox on the hoarding, a sure sign that they did not intend to comply further with this Agreement. "

8.
The learned Judge also considered whether Barratt was not in breach of contract because the achievement of the minimum prices set out in Schedule 4 was a condition precedent to Barratt's obligation to carry out the work and secondly whether, because those minimum prices were most unlikely to be achieved, the Development Agreement was frustrated. Both those contentions were rejected. I put the matter in that way because Barratt contended before me that it did not put forward the first of these arguments.

9.
Although he rejected those arguments the Judge considered that it was arguable that Gold was in breach of contract in failing to renegotiate the minimum prices and that for this reason it was arguable that Gold were also in breach of the terms of the Development Agreement as at 12th January 2009. He noted that in order to decide this would require further evidence than was available to him on the application.

10.
The Judge summarised the position in this way:

"97. I consider that the following matters, which are in evidence, demonstrate an arguable breach on the part of Gold. Their letter of 17th December 2008 over-stated their contractual position and expressly failed to appreciate that the Schedule of Minimum Prices was not included in the Development Agreement solely for their benefit. It does not seem that they were aware of the principle that they were required to consider proposed changes to the Fourth Schedule. Furthermore, Barratt had made one proposal (albeit to amend the revenue apportionment) because of the gloomy forecast and, so it seems to me, it must at least be arguable that Gold's refusal to come back with any financial counter-proposal of any sort, given the co-operation clauses and the underlying nature of the Agreement, might constitute a breach of the Agreement.

98. I accept, as far as it goes, Mr Acton Davis' submission that Gold cannot be criticised for failing to agree to lower minimum prices, because such minimum prices had not even been suggested by Barratt. But I have already made the point that this Agreement envisaged much closer cooperation between the parties than an ordinary arm's length contract for the sale of land. It is plain that Barratt were proposing changes because of the drop in the market and, even if a change to clause 10 itself was not warranted, it might be argued that Gold should have been more proactive in their dealings with Barratt so as to ensure that the Agreement continued to operate..

99. Accordingly, it seems to me that, at least arguably, Gold were also in breach of the terms of the Development Agreement as at 12th January 2009. A final decision would require further evidence about the events between the end of October 2008 and 12th January 2009. This would in turn allow Barratt to search for the files of Barratt Thames Valley, and to interview Mr Tuthill (although it is unlikely that he will be able to offer much assistance, given that it was apparently Mr Lees-Uff who was dealing with Gold during the relevant period).

....

108. However, I have concluded that, although it is slender, there is one possible argument open to Barratt which I cannot at this point describe as fanciful. That is their argument to the effect that, because Gold were in breach of the Agreement (because they did not renegotiate or even contemplate renegotiation in November/December 2008), it was actually Gold who wrongfully repudiated the Agreement.

109. I do not regard this argument as having a strong chance of success. It seems to me that, if the problem was simply the need to agree lower prices, Barratt should have proposed them; they should not, without more, simply have treated the Agreement as being at an end. However, I have already said that I require further evidence as to the detail of the negotiations during that period and, until that evidence is considered, it is difficult for me to say whether or not Gold were in breach and, if they were, whether or not that breach could be said to be repudiatory.

110. For those reasons, although on the face of it Barratt were in repudiatory breach of the Agreement by 12th January 2009, I consider that there is one last element of their defence to that allegation still open to them which would require evidence to determine. In those circumstances, the alleged repudiation by Barratt ought not to be the subject of a judgment on liability under CPR Part 24. However, because of my doubts about the strength of this remaining defence, I would only grant Barratt conditional leave to defend the repudiation claim brought against them. "

11.
There was an additional problem. In short it was unclear as to whether and if so when Gold accepted Barratt's repudiatory breach, assuming it remained capable of acceptance after the 12th January 2009:

"111. The other reason why I am not presently prepared to give summary judgment on the repudiation element of the case is the muddle which exists, on the face of the documents, from 12th January 2009 onwards. Although it is clear that Barratt were no longer prepared to do any work on site, which would in normal circumstances give rise to the clearest possible evidence of repudiation, Gold's acceptance of that repudiation is surprisingly unclear. I note in particular:

.....

112. Accordingly, it seems to me that the events both before and after the letter of 12th January 2009 are not clear enough to warrant summary judgment on the repudiation claim. Barratt have also raised the point that, even if they were in repudiatory breach of contract, that repudiation was not accepted by Gold and that, on the contrary, Gold affirmed the continuing nature of the Agreement. I am again unable to resolve that issue without evidence. "

12.
Thus the remaining issues of liability were "whether Barratt or Gold (or both) were arguably in repudiatory breach of contract and, if so, whether that wrongful repudiation was accepted by the other party. " (Paragraph 101 of the judgment.) Gold also contends that if it did not accept Barratt's repudiatory breach then, by its letter dated 14th August 2009, it gave notice of its intention to terminate the Agreement pursuant to Clause 24 on the grounds of material breach by Barratt of its obligations under the Agreement and that since Barratt did not remedy that breach, the Agreement came to an end 20 working days after service of that letter, as confirmed in Gold's letter dated 21st September 2009.

13.
It is also relevant to note that Gold had argued on the application that the Schedule of Minimum Prices of the various units set out in the Fourth Schedule of the Development Agreement was inserted for Gold's sole benefit. The Judge rejected this contention holding that this Schedule was designed to apportion risk and benefit equally between Gold and Barratt. He pointed out that the Agreement provided that the minimum prices could be changed in appropriate circumstances and that there were other terms of the Agreement which imposed obligations of good faith, agreement between the parties, proposals by Barratt to be approved by Gold and so on. It will be necessary to consider these matters further as set out below.

The Terms of the Development Agreement

14.

Coulson J set out most of the terms of relevance to the issues I have to decide in his judgment but it is convenient to set them out here to avoid the need for reference back.

15.
Clause 3 of the Agreement provided:

"3.APPOINTMENT

The Freeholder [Gold] appoints Barratt:

3.1 to procure the design and build of the Development in accordance with this Agreement; and

3.2 as the agent to market the Property in accordance with this Agreement. "

16.
Barratt's obligations were set out in Clause 5. The relevant parts of that clause read as follows:

"5. 1 The principal services to be carried out by and at the cost of Barratt to be more particularly described in the remainder of this Agreement are:

5.1.1 The co-ordination superintendence and supervision of the carrying out of the Development;

5.1.2 Advising on promotional and marketing campaigns for the Disposal of Units at the Property and exchanging Agreements for Sale for the Disposal of Units at the Property as agent of the Freeholder each Agreement for Sale being at no less than the Minimum Price for that Unit; and.....

5. 1. 4 The maintenance and management of the Property to include the establishment and operation of any Management Company (including the payment of all outgoings until the Disposal of all the Units has occurred).

....

5. 1. 6 To do all such acts and matters and things as may be consistent with necessary for or incidental to the attainment of the foregoing services and to maximise the value of the Development.

5. 2 Barratt shall procure that the Development is begun and completed in accordance with the Development Plan, Requisite Consents and the requirements of all lawful authorities within 30 months from commencement of the Development

5. 5 In carrying out its obligations Barratt shall: -

5.5.1 comply with the Development Obligations in the Development Plan;

5.5.2 keep the Freeholder informed of the progress of the Development;

5.5.3 comply with the Marketing Plan;

5.5.4 keep the Freeholder informed of the progress of the marketing of the Units; and

5.5.5 in any case have due regard to the proper and reasonable requirements and representations of the Freeholder...."

17.
The "Minimum Sale Price" was defined as "the minimum Net Revenue of each Unit in accordance with the Minimum Price Schedule". The Minimum Price Schedule was itself defined as "the schedule of

minimum prices as set out in the Fourth Schedule or any schedules substituted therefor from time to time by agreement of the parties". The Schedule consisted of two pages of figures in which a minimum price was ascribed to every property to be built. The stated total was £23, 972,845, which included the private housing, the social housing and the proposed medical centre (referred to as the PCFU) whereas the equivalent market price was said to be £25,411,216.

18.
There were references in clause 5 of the Agreement to the Second Schedule. This contained a more detailed list of what were called Barratt's Development Obligations. At paragraph 2, the schedule made Barratt responsible for the appointment of the Building Contractor. At paragraph 4, it required Barratt not to vary alter add or remove anything from the approved specification without Gold's consent, such consent not to be unreasonably withheld. Paragraph 7 of the Second Schedule was in the following terms:

"7. THE BUILDING WORKS

7.1
Barratt will commence and proceed diligently with the Building Works as soon as is reasonably practicable and in any event within 12 weeks from the grant of vacant possession.

7.2
Barratt will complete the Building Works as soon as reasonably practicable but in any event within 30 months after the commencement date set out in paragraph 7. 1 of this Schedule.

7.3 Barratt will procure that the Building Works are carried out at its own cost:

7.3.1 In a good and workmanlike manner and in accordance with good building practice;

....

7.3.2 With good and suitable materials;

7.3.7 With due diligence... "

19.
Building Works were defined as:

".. all works of demolition clearance remediation and construction on the Property and all other works constituting the Development in accordance with the Relevant Planning Permission and the Requisite Consents and in accordance with the Development Plan together with all necessary ancillary works. "

20.
Clause 6 of the Development Agreement was entitled 'INFORMATION AND DEVELOPMENT PLAN'. The relevant paragraphs of that provision were clauses 6. 1 and 6. 4 as follows:

"6. 1 Following the approval of the detailed specification for the Development in accordance with the provisions of paragraph 4 of the Second Schedule Barratt will update the Development Plan to include a detailed programme of works and cash flow and projected dates for the issue of the certificates of sectional completion of the PCFU and will provide a copy to the Freeholder for their approval (such approval not to be unreasonably withheld provided the revised Development Plan is consistent with the Development Plan attached to this Agreement.

....

6. 4 Following the approval of the detailed specification for the Development in accordance with the provisions of paragraph 4 of the Second Schedule Barratt will produce a Marketing Plan for the Units to include a detailed programme of sales strategy for each phase or block within the Development the range of sale prices and the proposed Financial Incentives the timing of the sales campaign and will provide a copy to the Freeholder for their approval (such approval not to be unreasonably withheld). "

21.
The Development Plan was attached to the Agreement as the Third Schedule. It was defined in the Agreement as "the estimate of cash flow expenditure and the programme of works which are set out in the Third Schedule as varied from time to time by Barratt and approved by the Freeholder... " The Development Plan comprising the Third Schedule was a relatively simple programme bar chart with projected cash flow also shown. It showed each step in the process from vacant possession down to completion of sales. The projected construction period shown on this original Development Plan was 23 months after commencement.

22.
The reference to the Marketing Plan in clause 6. 4 was the subject of a definition in these terms: "a detailed plan setting out the sales strategy for each phase or block within the Development the range of sale prices the proposed Financial Incentives the timing of the sales campaign... to be prepared and updated in accordance with the provisions of this Agreement".

23.
Clause 7 was in the following terms:

"7 GENERAL DUTIES AND RIGHTS OF THE FREEHOLDER

7.1
The Freeholder will where necessary and appropriate co-operate with Barratt to enable Barratt to discharge its duties, and the Freeholder will respond promptly to requests properly made by Barratt for approvals, instructions, information or assistance.

7.2
The Freeholder hereby appoint Barratt as its agent to:

7. 2. 1 Sign and exchange Agreements for Sale SUBJECT TO the Net Revenue of each Unit being no less than the Minimum Price for such Unit

7.3
For the avoidance of doubt Barratt may commit the Freeholder to provide Financial Incentives in respect of Units SUBJECT TO this not resulting in the Net Revenue for any unit being less than the Minimum Sale Price for such Unit...."

24.
Clause 8. 1 provided that "Barratt and the Freeholder will observe and perform their respective obligations and the conditions set out in the Second Schedule and will at all times act in good faith ".

25.
Clause 10 dealt with the financial apportionment between the parties. It was in the following terms:

"10 FINANCIAL PROVISIONS

10.1 In consideration of the services provided to the Freeholder by Barratt pursuant to this Agreement the Freeholder shall pay to Barratt on each Completion Date

10.1.1 45% of the Net Revenue of each Unit and the PCFU received by the Freeholder for its services as contractor under clause 3. 1 of this Agreement plus a further 5% of the Net Revenue of each Unit and the PCFU received by the Freeholder for its services as agent under clause 3. 2 of this Agreement until such time as the aggregate payment of the Net Revenue of each Unit and PCFU equals £18, 000, 000

10.1.2 55% of the Net Revenue of each Unit and the PCFU received by the Freeholder for its services as contractor under clause 3. 1 of this Agreement plus a further 5% of the Net Revenue of each Unit and the PCFU received by the Freeholder for its services as agent under clause 3. 2 of this Agreement while aggregate payment of the Net Revenue and the PCFU equals a sum between £18,000,000 and £19,500,000

10.1.3 95% of the Net Revenue of each Unit and the PCFU received by the Freeholder for its services as contractor under clause 3. 1 of this Agreement plus a further 5% of the Net Revenue of each Unit and the PCFU received by the Freeholder for its services as agent under clause 3. 2 of this Agreement while aggregate payment of the Net Revenue of each Unit and the PCFU equals a sum between £19, 500, 000 and £26, 000, 000 ...."

26.
In other words, if the net revenue generated by the sales of the properties was £18 million (or less), Barratt would receive 50% of the total; if the revenue increased to £19. 5 million, Barratt's share of the total went up to 60% and, if the total revenue went beyond £19. 5 million, then Barratt essentially retained the entirety of the revenue generated between £19. 5 and £26 million. Clause 10. 1. 4 provided for a 60/40 split in Barratt's favour if the total revenues exceeded £26 million.

27.
Clause 11 was entitled "Good Faith" and provided:

"The parties mutually covenant and agree that:

11.1 during the continuance of this Agreement all transactions entered into between the parties shall be conducted in good faith and on the basis set out in this Agreement or if not provided for herein on an arm's length basis;

11.2 each of them shall at all times act in good faith towards the other and use all reasonable endeavours to ensure the observance by themselves of the terms of this Agreement and the agreements referred to in, or contemplated by this Agreement; and

11.3 neither will seek to increase its profit or reduce its loss at the expense of the other."

28.
Clause 12 made plain that the Agreement was not a partnership.

29.
Clause 17 gave the High Court of England jurisdiction to settle any dispute as to the construction, validity or performance of the Agreement.

Clause 18 was in these terms:

"18 SEVERABILITY

If any of the provisions of this Agreement is found by the Expert or court or other competent authority to be void or unenforceable, it should be deemed to be deleted from this Agreement and the remaining provisions shall continue to apply. The parties shall negotiate in good faith in order to agree the terms of a mutually satisfactory provision to be substituted for the provision found to be void or unenforceable."

31.
Clause 23 provided a dispute resolution mechanism which permitted a party to refer any dispute between to an Expert (referred to in clause 18, above). The clause provided a tight timetable of 45 days in total for the resolution of any such disputes.

32.
Finally, Clause 24 contained termination provisions exercisable by Gold if Barratt was "in material breach of its obligations under this agreement". The clause provided that, in such circumstances:

"... the Freeholder may, by notice in writing served on Barratt, serve notice of its intention to terminate this Agreement and in the event that Barratt does not remedy the breach complained of within 20 Working Days following service of such notice this Agreement shall terminate absolutely, the licence granted pursuant to clause 7.4 shall determine and Barratt shall vacate the Property. Any determination of this Agreement by the Freeholder shall be without prejudice to any right or claim that either party may have in relation to any antecedent breach by Barratt of its obligations under this Agreement. "

The Facts

33.
In 2006 Gold owned the site at Whyteleafe. On 19th January 2007 it obtained planning permission to develop the site. In order to obtain this permission it entered into a Unilateral Obligation on 12th December 2006 pursuant to Section 106 of the Town and Country Planning Act 1990 in favour of Tanridge District Council. Amongst other matters, by the Unilateral Obligation, Gold undertook to provide 16 Affordable Housing Units and a Primary Care Facility at the site. Subject to those matters Gold obtained permission to construct some 100 residential units.

34.
Gold did not intend to develop the site itself but entered into negotiations with developers and builders. Barratt was interested in the site and following a meeting between Bradley Gold, a director of Gold, and Martin Tuthill, the Development Director of the Southern Counties division of Barratt, Barratt wrote on 7th February 2007 in the following terms, subject to contract:

"Dear Mr Gold

Gadoline House, Godstone Road, Whyteleafe

Further to our meeting yesterday afternoon, I would like to confirm this Company's interest in the purchase of the above site and would further confirm that while I am happy to increase my offer of £7,700,000 to £8,000,000 (eight million pounds), subject to contract, this offer would be subject to vacant possession being available on completion.

I understand this might cause a tax problem, given that you have Ann Summers in occupation and likely to stay in occupation until alternative premises can be found/built.

As discussed I am happy to make the following proposal.

1. The Gold Property Group retains the freehold of the property and enters into a development agreement with Barratt Homes. Instead of a straightforward land purchase when one would normally exchange on such a purchase, Barratt Homes would enter into an Option to enter into the development agreement, the only condition being vacant possession.

2. On vacant possession, Barratt would complete the development agreement and would, under licence, construct on behalf of the Gold Property Group the properties with the benefit of the detailed planning permission.

3. In return for constructing the properties, the Gold Group of Companies would pay Barratt Homes:

45% of the first £18,000,000 of revenue and 5% of the first £18,000,000 as an agency fee for selling the properties

A further 55% of the next £1,500,000 of revenue for constructing the properties and 5% for sales and marketing

For revenues of £19,500,000 to £26,000,000 Barratt would be paid 95% of the revenue for constructing the properties and 5% for selling the properties

For any revenue beyond £26,000,000 Barratt would be paid 55% of the revenue for constructing the properties and 5% for selling the properties

In summary, the above proposal would enable the Gold Property Group to retain £9,000,000 from the first £18,000,000 of revenue, £600,000 from the next £1,500,000 of revenue and a 40% share of any revenue in excess of £26,000,000; therefore on current estimates the share to the Gold Property Group would total £9,600,000. Our current estimate of revenue from both the private residential, the affordable residential and the doctor's surgery is £25,600,000. In addition, the Gold Group would retain the freehold of the buildings and our estimation of the value of the ground rents for the private residential at £200 per annum for a one-bedroom flat and £300 per annum for two-bedroom flats, would be at 17 times (the current multiple that we are achieving for a standard Barratt lease) and would produce a further £457,000. The overall amount from this development, assuming sales only reach £19,500,000, would be £10,057,000.

The sums that we are working on assume that the social housing and the doctor's surgery will produce a combined income in excess of £2,500,000, giving private revenue of £23,000,000 or thereabouts. Therefore, not to achieve a total revenue of £19,500,000, the private housing revenue would have to drop from an estimated £23,000,000 to £17,000,000 (28%), a dip even the most pessimistic commentators would have trouble justifying.

As discussed at our meeting, the concept behind the above is that there is a perceived risk to the freeholder. However, as you can see from above we have tried to minimise the risk and of course you are at no risk to building cost overruns as the potential share is based entirely on revenue and not profit.

I trust that the above is of interest and look forward to hearing from you in due course."

35.
Coulson J. found that this letter constituted the background to the Development Agreement. It is important to note that the offer from Barratt sought to minimise the risk to Gold. However a further relevant feature, known to both parties and therefore also part of the background, is that the Development Agreement was deliberately drafted with a view to avoiding Stamp Duty Land Tax. For

this purpose the Agreement had to ensure that at least some of the risk in the development was borne by Gold.

36.
Gold gave Barratt vacant possession of the site on 1st March 2008 and accordingly the Development Agreement became unconditional. In terms of paragraph 7.1 of the Second Schedule, this meant that Barratt had to commence Building Works no later than 1st June 2008 and in terms of Clause 5.2 and paragraph 7.2 of the Second Schedule the Building Works had to be completed by January 2011, assuming the commencement date for the Building Works was 1st June 2008.

37.
In the event, apart from certain preparatory steps, little work was undertaken by Barratt on site. Thus whilst arrangements were made in relation to the services for the site, only very limited work was carried out. Certain design work was undertaken and a ground investigation of the existing basement undertaken in July 2008. In October 2008, following a fire started by vandals, one of the warehouses was demolished. A hoarding was erected around the site.

38.
Pursuant to the Unilateral Obligation various sums had to be paid to the County Council prior to the "Commencement of the Development" which was defined as a "Material Operation" within the meaning of Section 56(4) of the 1990 Act (but excluding certain operations). That Section defines a "Material Operation" as including the following:

"(a) any work of construction in the course of the erection of a building;

(aa) any work of demolition of a building;

(b)the digging of a trench which is to contain the foundations, or part of the foundations, of a building;

(c)the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b) "

39.
It is apparent from the fourth paragraph of Barratt's letter of 19th November 2008, as set out below, that Barratt did not consider that it had commenced the Development within the meaning of the Unilateral Obligation by that date. Subject possibly only to the demolition of the warehouse, Barratt were correct in that view and I find that no such work as referred to above was carried out by Barratt after that date.

40.
As early as February 2008 it had become evident that there might be difficulties in finding an occupant for the PCFU. This was a matter of importance since, pursuant to the Unilateral Obligation, the PCFU had to be constructed before the residential units could be occupied. This problem was discussed between Bradley Gold and Martin Tuthill at about this time, with Mr Gold suggesting that the planners be approached with a view to converting the PCFU to affordable housing. In May 2008 Bradley Gold introduced Mike Harrison of Turncliffe Limited (a company that specialised in fitting out medical centres and renting them to doctors' practices) to Martin Tuthill in the hope that he might have contacts who would be interested in the PCFU.

41.

At a project review meeting held on 16th July 2008 the problems relating to the PCFU were discussed and Bradley Gold offered Barratt the services of Brian Woods of W S Planning. Mr Woods had been involved on behalf of Gold in obtaining planning permission originally. After some delay Brian Woods attended a meeting with a representative of the planning department of Tandridge District Council on 29th October 2008, attended also by Michelle Lane, a planner in the employment of Barratt. At this meeting the Council representative indicated that permission might be granted to dispense with the need for the PCFU but in that event 30% of the residential units would have to be given over to social or affordable housing.

42.
This was discussed at the meeting of the 4th November 2008, referred to in more detail below, where it was recognised by both parties that this suggestion was a "non-runner". Thus as at that date, there appeared to be no potential user or occupant of the PCFU but it nevertheless had to be constructed if the residential units were to be sold.

43.
By the autumn of 2008 whilst Gold were beginning to become concerned at the lack of activity on site, no complaint had been made by it to Barratt. In part this was because in progress meetings prior to this it appeared to Gold that Barratt was taking preparatory steps to build out the development. However on 29th October 2008, prior to a planned meeting on 4th November Barratt sent Gold an agenda which indicated that it wished to discuss the minimum prices set out in the Development Agreement and the state of the market.

44.
The meeting of 4th November was attended by Bradley Gold, Stephen Todd (the Managing Director of a related Gold company), Rupert Lee-Uff (the Land Director of Barratt's Thames Valley regional office), Stephen Brownlie (the Land Manager of Barratt's Thames Valley regional office), Michelle Lane and Brian Woods.

45.
To set this meeting in context it must be recalled that by this date the credit crisis was having a significant impact on the economy, and in particular on property prices and therefore on Barratt. As the learned Judge recorded in his judgment (paragraph 30):

"It is plain that, at about the time the building works should have been starting in the Spring of 2008, the recession was beginning to bite. Barratt were particularly badly affected. The evidence shows that, in May 2008, the Barratt Group reported a 33% decline in the amount of sales agreed each week compared with the previous year. In June 2008, the Group's value fell from £488 million to £213 million in a week. This was accompanied by advice from some City brokers not to buy shares in the Group at any price. Mr Champion admits at paragraph 6 of his statement that, at this time Barratt "was in negotiations with its bankers to reschedule its borrowings."

46.
The meeting discussed the problems with the PCFU and the unsuccessful outcome of the meeting with the Council's planning officer. Bradley Gold offered to speak to Mr Harrison to see whether a further meeting could be arranged with Croydon PCT with a view to interesting them in the PCFU.

More importantly Barratt produced a marketing report. This reported that:

"Agents within the Whyteleafe area have indicated that property prices in the area have been affected by at least 20% in the last six months alone with the majority of reductions being seen to have a major impact on flatted and apartment schemes.

With regard to apartments in the area, agents have agreed that they would expect to achieve in the region of £160,000 - £165,000 for a one bedroom apartment and between £200,000 - £210,000for a 2 bedroom apartment. "

48.
According to Rupert Lee-Uff this placed the market value of the units at £22.5m as compared to a market value of £25.6m (in fact £25.4m) and a minimum price of £24m (in fact £23.9m) as set out in the Development Agreement. In short if this report were correct, and if the market had not recovered by the time the development was marketed, the units would have to be sold not only below the market price but also below the minimum prices specified in the Development Agreement.

49.
Relying on this report Rupert Lee-Uff suggested that the development be delayed until the market recovered and suggested an extension of some two years for the build period. Alternatively he suggested that the payment structure and cash flow of the Development Agreement be amended.

50.
Bradley Gold evidently was not particularly attracted by these suggestions and put forward a counter-proposal that the development be carried out in phases over a longer period than envisaged by the Development Agreement, with the PCFU and social housing at least being built. The meeting ended with Barratt agreeing to put its proposal in writing.

51.
I find that this was a business-like meeting where both parties were aware that the change in economic climate since the Agreement was signed might necessitate some alteration. However I also find that Barratt did not ask Gold to consider a reduction in the minimum prices set out in the Development Agreement.

52.
By 11th November 2008 Barratt had not written and so Stephen Todd wrote to Barratt:

"At our meeting on 4th November 2008 you tabled a proposal in that the project should be put on hold as a result of the current financial uncertainty. From memory you suggested that the decision to commence construction should be revisited in 2010. You kindly agreed to write to us setting down your proposal in detail for our consideration.

For the purposes of clarification and for the avoidance of doubt would you please clarify:

1. The precise events that you propose would trigger the commencement of the project.

2. Whether a phased scheme (PCT unit plus affordable housing) is workable.

3. The contractual basis of your proposal.

You will be aware of our extreme disappointment at the prospect of incurring considerable holding costs in the intervening period, not to mention not realising any profit from the scheme for an undefined period, and therefore I would greatly appreciate it if we could reach a firm understanding within the next ten days.

I look forward to receipt of your email and should there be any aspect which you may wish to discuss then please give me a call. "

53.
Barratt put forward its proposal by letter dated 19th November 2008:

"With regards to the market, of which our recent marketing report was tabled, it is clear that at present the sales values are considerably below that of the contracted minimum values. This would result in a loss making project in the event that the proposal was to be progressed at present and it was suggested that the build be delayed until at least December 2010, unless mutually agreed to commence earlier as a result of the market improving.

Bradley also raised the importance of obtaining a return from the site sooner by way of phasing. The possibility of bringing forward the PCT and Housing Association units, being a likely first phase has been investigated. The fundamental issues with regard to building out the PCT and Social units is the fact that £125,000 section 106, costs have to be paid prior to commencement of development, cost of the building itself including the remediation, services, and highways etc total £2,422,000. The current anticipated revenue for the PCT unit and social units currently totals £2,972,720. This sum would be split 50/50 in line with the existing development agreement and Barratt would receive a total of £1,486,360, which would give us a further loss of £1,060,640.

Unfortunately the expenditure in cash considerably outweighs the income to Barratt Thames Valley and therefore we are unfortunately unable to bring forward this first phase of the scheme.

The alternative which Barratt would be happy to explore would be to bring the build forward now by reviewing the current payment terms on the following basis

Gold Group to receive 30% of the first £15m of revenue (£4,500,000) Gold Group to receive 40% of the next £5m of revenue (£2,000,000) Gold Group to receive 10% of the next £2.3m of revenue (£230,000) Gold Group to receive 90% of the next £3.2m of Revenue (£2,880,000)

Any revenue over and above £25.5m to be split 50/50.

The above split would provide the Gold Group with its original land value of £9.6m if the Gross development value returns to the original expected revenue of £25.5m prior to the units being marketed in the later part of2009 and early 2010.

I trust that the revised payment term proposal would be acceptable in order to bring the development forward and to avoid the project being delayed as we have already discussed.

I look forward to hearing from you in order for us to clarify the way forward that has resulted from these unfortunate economic issues we are encountering."

54.
Gold responded by letter dated 17th December 2008:

"Regarding the prevailing market conditions.

We are of course aware of the current adverse market conditions and are very sympathetic to the effect that these are having on the development industry in particular. However you must also appreciate that we are suffering from the same market conditions. Irrespective of how and when the scheme goes forward we are already incurring significant holding costs and will inevitably experience a considerable delay in accessing the sales revenue.

You appear to be making the case that as the projected sales values fall below the contract minimum values then this gives you a valid and contractual reason not to build out. This is not the case as the benefit of the contract with regards to the minimum sales figures is solely for ourselves.

An early return

It is disappointing that Bradley's suggestion of building out parts of the scheme in advance of the remainder was not supported by yourselves. We had seen this as a positive suggestion to which we would have given full consideration in order to assist you in these difficult times. Upon reflection and in view of your own comments this is not now a route which we would wish to pursue.

Proposed review of the payment terms.

Under the circumstances and for the reasons amplified below we do not consider this suggestion to be appropriate.

Contractual Position.

While your letter does not appear to give any proper regard of the contractual position we are pleased to note that Steven Brownlie's covering email does allude to the salient points. These are briefly as follows:-

Firstly that you should commence work on site within 12 weeks of the granting of vacant possession (clause 7.1).

Secondly that you should proceed diligently with the Works (clause 7.1).

Thirdly that the Works should be completed within 30 months of the date of commencement (clause 7.2)

You have made a belated start on site in demolishing the main warehouse this past autumn. However in reality this was pre-empted by a fire and we note that the other buildings remain standing. In any event you clearly have failed to proceed diligently with the Works and appear to have little intention to complete within the stated 30 months.

There are of course various other actions and reports which ought to be undertaken and submitted to us on a regular basis but I do not see the need to go into these in detail at this stage.

In summary we wish to formally record that you are in breach of your contractual obligations and that this situation is causing, and will continue to cause us substantial losses. We hereby give you notice that we insist that this breach is remedied by 12th January 2009. To this end, and as an absolute minimum, we would expect by this date:-

1. Receipt of confirmation by yourselves that going forward you intend to fully commit to this project and honour your contractual obligations.

2. The demolition contractor to recommence work.

4. Preparation of a fully detailed construction programme, to be submitted to us for our approval, which demonstrates an intention to recover as much of the lost time as is possible.

Please be assured that we are most disappointed to feel it necessary to write this letter and it is still our wish to continue to proceed on an amicable and co-operative footing. However should you decide

not to positively address this situation then we shall have no alternative but to consider taking this matter further.

We look forward to receipt of your comments. "

55.
It will be noted that Gold rejected Barratt's proposals, withdrew the proposal that Bradley Gold had put forward at the meeting on 4th November and called on Barratt to remedy its breach. It is also to be noted that Gold appeared to believe that the minimum sales price as set out in the Development Agreement was solely for Gold's benefit.

56.
One might have anticipated some further negotiations or meetings following this exchange of correspondence but instead Barratt's solicitor's wrote on the 12th January 2009 arguing that the agreement was at end:

"We have advised Barratt that the Agreement is at an end and is therefore unenforceable. There are two alternative legal bases on which the Agreement has been brought to an end, both relating to the provisions of the Agreement as regards the Minimum Price for the leasehold units that were to be sold.

Firstly, it is very clear from the Agreement that the parties were proceeding on the common assumption that the future market value of the units would not be less than the minimum prices in Schedule 4. This common assumption as to future value made at the time the Agreement was entered into was mistaken and it is that mistaken assumption that has given rise to a mutual mistake between the parties. The legal effect of this mutual mistake is to render the Agreement void and unenforceable.

The alternative basis, which is equally compelling, is that the Agreement has been discharged by frustration. Frustration has arisen here because a supervening event, being a fall in property market values, has occurred which now renders performance of this fundamental part of the Agreement impossible as the parties are unable to sell the units at the minimum prices now or in the foreseeable future. This fall in the property market was not the fault of either party and the risk of such a fall is not catered for in the drafting of the Agreement. Consequently, as it is impossible for this contractual obligation to be performed, the Agreement has been frustrated and the parties' obligations under it discharged.

The result of either of the scenarios set out above is the same - the agreement is at an end (either as it is void or it has been discharged) and it is therefore unenforceable against our client.

It follows that we completely reject your statement at the top of the second page of your letter that the benefit of the contract as regards the minimum sales figures is solely yours as the Agreement does not provide for this. Clause 10 of the Agreement assumes that all of the units can be sold at the minimum prices and as they cannot the Agreement is frustrated.

Breach of Agreement by Barratt

We note the allegations of breach by Barratt under the heading "Contractual Position " in your letter. We reject entirely any such claims as the Agreement is unenforceable for reasons already stated.

Proposed Review of Payment Terms

Our client has a continued desire to build this development and sell these units for you but as the Agreement currently stands this is impossible. In this context the proposed review of payment terms set out in our client's letter of 19 November was a constructive proposal to find a way forward rather than our client just walking away from the Agreement as it is entitled to do.

Notwithstanding your rejection of those proposals, they remain on the table for discussion if you are open to proceeding with this project on new payment terms. However, the only way forward is a new payment structure to reflect current market conditions and current values for the units to be constructed, and so if you are not willing to discuss a revised payment structure our client will have no option but to treat the Agreement as at an end on the grounds set out above

....

Way Forward

The only way for our client to work with you in relation to the proposed development at the Property envisaged by the Agreement, is on new payment terms as clearly set out above. Our client is therefore ready to sit down to discuss this with you at the earliest opportunity so we await your response. If you do not respond positively to this offer to discuss revised proposals then our client's position is clear. In such circumstances our client will be seeking to recover damages from you equivalent to the value of any benefit you have received, or enhancement in the value of your interest in the Property, arising out of steps our client has previously taken under the Agreement in relation to the Property."

57.
The argument that the agreement was void on the basis of a mutual mistake was not advanced in the summary judgment application but, as noted above, the argument based on frustration was put forward and dismissed by the Judge.

58.
There was no response to Barratt's solicitor's letter of 12th January 2009 by the 13th March and on that day Barratt's solicitors wrote further stating that they took the lack of response to be an acceptance that the Agreement was at an end and putting forward a claim for damages in the sum of £395,665.36 on the basis that this was essential expenditure incurred by Barratt in relation to the development for the benefit of Gold.

59.
On 26th March 2009 Gold responded to the letters of 12th Januaiy and 13th March 2009:

"Contractual Position

Gold Group Properties ("GGP") does not agree that the Agreement is at an end and/or unenforceable by reason of any of the grounds cited in your letter of 12 January 2009. GGP holds the opinion of Leading Counsel who concurs with GGP's view that the grounds on which Barratt seek to rely are wrong as a matter of construction and in law.

Leading Counsel has advised that Barratt stands in material breach of the Agreement and that GGP is entitled to pursue a number of remedies in consequence. Currently, GGP is considering which of its remedies it will pursue, including the possibility of seeking declaratory relief under a declaration in the High Court by way of summary judgment.

Way Forward

Before taking steps to enforce its rights under the Agreement GGP has decided to make one final attempt to resolve the matter amicably. You will be aware that a meeting has been arranged between Mr Bradley Gold ("Mr Gold") of GGP and Mr Tuthill of Barratt which will take place on 31st March 2009.

In the event that the meeting does not identify a resolution to the matter, then GGP intends to pursue its remedies under the Agreement to the fullest extent.

For the avoidance of any doubt whatsoever, the claims made in your letter of 13 March 2009 are rejected in their entirety. The agenda for the meeting between Mr Gold and Mr Tuthill will be to identify a resolution under which either Barratt performs its obligations under the Agreement or, alternatively, tenders a financial offer acceptable to GGP to bring the Agreement to an end. Mr Tuthill should attend the meeting with this agenda in mind. "

60.
As foreseen by that letter a without prejudice meeting took place between Bradley Gold and Martin Tuthill on 31st March 2009. Whilst the parties have waived privilege in that meeting, I have not been told what was discussed; suffice it to say no progress was made or agreement reached.

61.
Nothing of any consequence then appears to have occurred as between the parties until 14th August 2009 when Gold wrote asking Barratt to provide certain documentation in relation to the development and also enclosing a copy letter.

62.
The copy letter alleged that Barratt was in breach of the Development Agreement and then stated:

"2. Remedy of Breach

2.1 Without prejudice to GGP's contention that BDW's letter of 12th January 2009 amounted to a repudiatory breach of the agreement which GGP was entitled to accept (and has accepted), GGP is prepared to allow BDW an opportunity to remedy its breach of the

Agreement identified in paragraph 1.7 above within 20 working days of the date of this letter.

2.2
Provided either the breaches are remedied within 20 working days or BDW demonstrates itself willing to remedy and confirms it will honour and perform the other terms of the Agreement, then GGP is prepared to allow BDW to complete the development within a reasonable period and for both GGP and BDW to perform the other terms of the Agreement within an adjusted timescale.

2.3
In the event BDW does not remedy the breaches within 20 working days of the date of this letter then that failure will have the consequences set out in clause 24 of the agreement. To the extent necessary, this letter is notice in writing under Clause 24 of the Agreement because BDW is in material breach of its obligations under the Agreement as set out above.

2.4
In the event that the Agreement has already terminated or terminates as a consequence of BDW's failure to remedy pursuant to paragraph 2.1 and 2.2 above, then GGP intends to commence proceedings in the High Court against BDW for breach of contract and to recover damages for its losses.

63.
The letter went on to deny that the Agreement was at an end because of mistake or frustration and that Gold had been advised that the purpose of the minimum sale price was to protect Gold. Again, an argument considered by the Judge and rejected.

64.
The letter also attached draft Particulars of Claim which it stated Gold intended to issue in the event that Barratt did not remedy the breaches alleged by Gold within 20 days.

65.
No steps were taken by Barratt in response to this letter save that its solicitors wrote on 2nd September 2009 stating that they remained of the view that the Development Agreement was at an end for the reasons set out in its letter of 12th January.

66.
Finally on 21st September 2009 Gold wrote to Barratt, the relevant paragraph of which read as follows:

"The pre action letter written to your clients on 14 August 2009 allowed your client a period to remedy their breach(es) of the Development Agreement in accordance with the provisions of Clause 24 of the Agreement. They have failed to take up that opportunity. Additionally, your letter of 2 September makes it plain that your client has no intention of performing the Development Agreement and that it continues to consider the Agreement to have already ended by reason of mistake and/or frustration of contract. Accordingly, the Development Agreement has now terminated absolutely and I have written to your client confirming that to be the case. This will assist in crystallising GGP's claim for damages.

67.
Since it is relevant to Gold's case I need to make certain further findings as regards the keys to the site.

68.
According to Bradley Gold he had asked his secretary to get hold of the keys sometime in February 2009 so that a valuation of the site could be carried out for Gold's accountant. It would seem that Gold did obtain the keys since a valuation was carried out on behalf of Gold, as recorded in a report from Atisreal dated 5th March 2009, which stated that the property was inspected on 24th February. It is unclear however as to whether the keys were returned in consequence of Bradley Gold's secretary's request or because Barratt had in any event returned the keys enclosed in an envelope attached to the hoarding as Bradley Gold records in his statement.

69.
Further confusion is created by Barratt's solicitor's letter dated 13th March 2009 which stated that their clients would be returning the keys to the property through the hoarding to the site.

70.
For the purposes of Gold's contentions it is sufficient to record that the keys were either returned by being attached to or put through the hoarding to the site for the purposes of enabling a valuation to be carried out by Gold. Alternatively the keys were returned in this manner by Barratt because in its view the Agreement was at an end. In either event the keys were not returned by Gold to Barratt.

Breach of Contract by Barratt

71.
I have heard more evidence than was before the learned Judge on the summary judgment application. In particular documents from Barratt Thames Valley were produced which were apparently not available at the earlier hearing. This shows that, in broad terms, Barratt undertook a certain amount of preparatory work but almost no work on site.

72.
I am bound by the Judge's finding that Barratt was in breach of the Development Agreement in the respects set out in Section 7 of his judgment. It is less clear whether he found that those breaches were repudiatory in nature.

73.
However, in any event, I have no doubt that Barratt's breaches were repudiatory. They manifested an intention no longer to be bound by the

Agreement by 12th January 2009. Apart from the matters set out in Section 7 of the earlier judgment I would draw attention to:

73.1.
Barratt's letter of 19th November 2008 which recorded that even by that date they had not commenced the development;

73.2.
The fact that that letter strongly indicated that Barratt were not prepared to proceed with the development unless the revised payment proposal was agreed;

73.3.
The assertion in the letter of 12th January 2009 that the Agreement was at an end (on two bases, one of which was not argued in these proceedings and the other found to be without substance) coupled with the statement that the only way in which in the development could proceed would be if new payment terms were agreed.

Barratt's Case

74.
Barratt contend that Gold was in breach of the Development Agreement, in particular Clause 11.2, in refusing to countenance any negotiation of or revision to the Agreement to address the difficulties caused by the fall in the property market in 2008 and in insisting that the minimum prices in Schedule 4 to the Agreement were inserted for its benefit alone.

75.
In particular Barratt assert that Gold was in breach of the obligation of good faith in refusing to contemplate any change to the revenue sharing provisions set out at Clause 10 of the Agreement and in indicating that it was not obliged to agree an adjustment to the minimum prices. Thus Barratt's contentions necessarily involve the proposition that the good faith obligations in Clause 11 (and Clause 8.1) impinge on Clause 10.

76.
Whilst this argument does not appear to have been considered by the Judge it is clear that he took the view that whilst there was a change mechanism in the Development Agreement as regards the minimum prices "such a change mechanism was simply not envisaged by clause 10 of the Agreement."

Thus he envisaged that, on this point, this hearing would be confined to a consideration of whether Gold refused to negotiate a revision of the minimum prices. The question therefore arises as to whether I can consider Barratt's contention or whether I am bound by the Judge's views.

Judgment giving rise to an estoppel

77.
An estoppel, per rem judicatam, arising from a judgment can take the form of a cause of action estoppel or issue estoppel:

"If a claim has been explicitly determined in previous concluded proceedings between the same parties, that claim cannot be raised again, other than on an appeal, unless there is fraud or collusion. If a necessary element of a claim has been explicitly determined in previous concluded proceedings between the same parties, that issue cannot be raised again, if, as is likely but not inevitable, it would be an abuse to raise that issue again. This may also extend to an implicitly necessary element of the previous determination. The previous determination may include a settlement. If a claim or issue has not been determined in previous concluded proceedings between the same parties, there may nevertheless be circumstances in which, as a matter of public and private interest on a broad merits-based procedural judgment, it would be an abuse for a party to raise that claim or issue. Such circumstances may, depending on the facts, exist where the litigant could and should have raised the matter in question in earlier concluded proceedings. There may in particular cases be other elements of abuse, including oppression of another party; but abuse of process is a concept which defies precise definition in the abstract. The court will only stop a claim as an abuse after most careful consideration. "

(Specialist Group International Ltd v Deakin [2001] EWCA Civ 777 at [23].)

78.
There is no doubt that whilst the Defendant was given conditional leave to defend, Coulson J's judgment was final and capable of giving rise to this type of estoppel. However for such an estoppel to arise the court in the first case must have necessarily determined the non-existence of the cause of action which is subsequently asserted or, in the case of issue estoppel, that the same issue relevant to the second action was necessarily determined in the first action.

79.
The law in this respect is helpfully summarised in Phipson on Evidence (seventeenth edition, paragraph 43-31):

"Although a wide range of materials can be looked at to determine what was necessarily decided, in a previous case the House of Lords has emphasised the danger of looking too carefully for estoppels based on matters which were not in issue, or not fully argued and decided. The cautious approach the House of Lords inculcated has since been accepted in Spens v IRC where Megarry J. observed that "a doctrine of estoppel per incuriam is one which I would regard with some caution", and that "one must inquire 'with unrelenting severity' whether the determination on which it is sought to found the estoppel is 'so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do'. " This cautious approach is also applied to default judgments. "

80.

In my view neither of the tests set out at paragraph 78 above is satisfied in relation to Barratt's contention as set out above. Assuming that the Judge's findings relating to Clause 10 were indeed necessary for his decision to give

conditional leave to defend, it is clear that the question of the inter-relationship between Clause 10, on the one hand, and Clauses 8.1 and 11.2, was not decided.

81.
Thus the Judge rejected the argument that Clause 10 was also subject to a change mechanism on the basis of the absence of any express mechanism and the absence of any linkage between Clause 10 and the minimum prices in Schedule 4. Further he decided that if he were wrong about that "then there would be an implied mechanism by which the revenue split could be adjusted, either by agreement or by the decision of the Expert. Even if (which I do not accept for a moment) Mr Dennys was right, and reductions to the prices in the Fourth Schedule meant that clause 10, in its present form, became inoperable, the clause would be severable pursuant to clause 18, and a replacement clause would either be agreed or determined by the Expert, as expressly envisaged in clause 18. Either way, clause 10 did not constitute any sort of difficulty or obstacle to the proper operation of the Agreement, even if the property market became more problematic. " (Paragraph 54)

82.
Since I have concluded that no cause of action estoppel or issue estoppel arises, the question still remains as to whether Barratt could and should have raised the contentions set out in paragraphs 74 and 75 above such that it would be an abuse of process to permit those arguments to be raised at this stage. (Johnson v Gore Wood & Co [2001] 2 W.L.R. 72 at pages 90 and 118.)

83.
In my view it would not be an such an abuse.

84.
First whilst I have summarised Barratt's argument above, it is clear that Barratt are contending that there is an interrelationship between, on the one hand, agreeing an adjustment between the minimum prices and, on the other, agreeing a change to the revenue sharing arrangements. The first element of this argument is explicitly within my jurisdiction and, at least on one view, the second element can be seen to be linked to the first.

85.
Secondly it is necessary to view the negotiations in the round. It would be artificial if I were constrained simply to considering whether Gold failed to agree or countenance a revision to the minimum prices without considering all aspects of those negotiations.

86.
Thirdly, whilst the concept of cause of action estoppel and issue estoppel applies in this case, it has to be applied with caution where it is difficult to determine with precision what was necessarily decided to arrive at the Judge's conclusion that conditional leave to defend should be granted.

Agreement of Minimum Prices

87.
The definition of the "Minimum Price Schedule" contemplates that the parties may by agreement substitute different and therefore lower prices for the properties to be sold under the Development Agreement. Both parties accept that this gives rise to an enforceable agreement following the obiter

dicta in Petromec Inc v Petroleo Brasileiro [2006] Lloyd's Rep. 121 at [115 to 121], Indeed it can be seen that it was an underlying assumption of the argument before and judgment of Coulson J that that obligation was indeed enforceable. I therefore express no view on that point.

Good Faith

88.
By Clause 8.1 and the opening words of Clause 11.2 there was a general obligation on both parties to act in good faith towards each other. Did this require Gold to agree to an adjustment of the revenue sharing mechanism under Clause 10 or at least indicate a willingness to negotiate such an adjustment either as a free standing obligation or as part of any negotiation of the minimum prices?

89.
In Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch) the Defendants agreed with the First Claimant that it would use its property development expertise to maximise the development potential of certain land in return for payment of a fee. The parties they agreed to "act with the utmost good faith towards one another..." The question arose as to whether the sale of property to a third party would be a breach of this obligation. Mr Justice Morgan, having reviewed the authorities, held that the good faith obligation required the parties:

"... .to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant. "

90.
There is considerable Australian authority on the meaning of good faith in this context. In particular there is a helpful review of authority in Automasters Australia Ptv Ltd v Bruness Ptv Ltd [2002] WASC 286. In that case Hasluck J cites the observation of Barrett J in Overlook v Foxtel (2002) Aust Contract R 90-143 at [65 -67]:

"It must be accepted that the party subject to the obligation is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) ... 'nugatory, worthless or, perhaps, seriously undermined' ... the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self- interest entirely which is the lot of the fiduciary ... The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms."

91.
Thus good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.

Alleged Breach by Gold

92.
It is clear that by the autumn of 2008 both parties appreciated that it might be in both their interests to reconsider their rights and liabilities under the Development Agreement in the light of the significant drop in the property market by that date. At the meeting of 4th November there seems to

have been no direct discussion of the minimum prices, however in the light of the report produced at that meeting it must have been evident that there was a real possibility that the market value of the properties was and would be when built, below the minimum prices. It was against that background that the offers were made.

93.
The discussion at that meeting appears to have been informal and both parties anticipated that any revision of the Development Agreement would be initiated by a written offer from Barratt.

94.
Under Clause 10 of the Development Agreement, provided that the Net Revenue of the properties and PCFU did not fall below £19.5m, Gold would receive £9.6m in profit. If the Net Revenue exceeded this figure, this would be of little interest to Gold since it received no further sums unless the revenue exceeded £26m. Since the market price of the development was placed at £25.4m as at the date of the Agreement with minimum prices at £23.8m it can be seen that there would have to be a substantial fall in the market before Gold's financial interest would be affected (even taking into account the deductions to be made from the sale proceeds to arrive at the Net Revenue figure). Indeed this was the very point made by Barratt in its letter of 7th February 2007. Conversely the market would have to rise, by comparison with the values included in the Development Agreement, before Gold received more than £9.6m.

95.
According to Rupert Lee-Uff the market value of the units by the date of meeting on 4th November was £22.5m although the report produced by Barratts at that meeting, indicating a drop of 20% in market value, would produce a figure of about £20.32m.

96.
Thus because of the revenue sharing arrangement set out in Clause 10, Gold's financial interest was unlikely to be affected by the predicted drop in the market.

97.
The letter of 19th November comprised two offers. Delaying the development until December 2010 (with an earlier commencement date to be agreed if the market improved) or a revision of the revenue share agreement under Clause 10.

98.
Delaying the development would be of little financial interest to Gold. It would merely defer its anticipated profit of £9.6m and in the meantime no income would be generated from the property. As regards the revised revenue sharing arrangement Rupert Lee-Uff accepted that in the state of the market as reported in November 2008 Barratt's offer would result in Gold receiving approximately £6.7m or, as it was put in evidence, Gold taking a "hit" of about £2.8m. It cannot be said that Gold were in breach of the good faith obligations in refusing to accept or even negotiate on the basis of these proposals.

99.
In any event, by Clause 11.3 of the Development "neither [party] will seek to increase its profit or reduce its loss at the expense of the other" but this is precisely what Barratt was seeking to achieve by its proposal. Approximately £2.8m of revenue would be transferred from Gold to Barratt thereby either increasing Barratt's profit or reducing its loss as compared to the position Barratt would be in under the revenue sharing arrangement set out in Clause 10.

100.
Gold's response to this proposal in its letter of 17th December 2008 rejected these proposals but in the final paragraph left open the possibility of further negotiations. However in that letter Gold wrongly asserted that the minimum prices were solely for its benefit. That argument appears to have been advanced, not in response to a request for an adjustment in the minimum prices, but to meet a contention that a drop in market value below the specified minimum prices justified Barratt's refusal to proceed with the development. In any event that argument was inconsistent with the obligation to agree a substitute schedule of minimum prices or the good faith obligations or both. On the basis of the figures set out above it would seem that a revision in the minimum prices might well have had to be agreed in order for the units to be sold. Had Gold refused to negotiate or agree a reduction in the minimum prices it might well have been in breach of the obligation to reach agreement on the schedule of minimum prices and the obligations to act in good faith since such a reduction would not have affected Gold's profit from the development but might have been necessary to permit the Agreement to be performed as envisaged. However, in the event, Gold's incorrect assertion was not causative of the breakdown of negotiations nor did it apparently influence Barratt's solicitor's letter of 12th January 2009 nor did it affect any subsequent steps taken or not taken by Barratt. As can be seen from Barratt's solicitor's letter it was not prepared to proceed with the Development Agreement unless revised revenue sharing arrangements were agreed.

101.
Gold was simply not asked to revise the minimum prices even though it was implicit that that might be necessary given the drop in market value. Nor is there any evidence that the change in revenue sharing arrangements was linked to a proposed agreement to adjust the minimum prices. Even if such a proposal had been made it would seem to me, for the reasons set out above, that Gold would not have been in breach of contract in agreeing to a change in

minimum prices whilst insisting upon retaining the revenue sharing arrangements set out in Clause 10.

102.
Finally it is to be noted that Barratt did not allege at any stage, until these proceedings commenced, that Gold was in breach of contract either as now alleged or at all.

103.
Accordingly Gold was not in breach of contract and insofar as Gold took the incorrect view of its obligations under the Development Agreement it was not causative of the termination of the Agreement.

Termination

104.
That leaves the question as to how the Development Agreement came to an end.

105.
Gold's case is that it accepted Barratt's repudiatory breach by not returning the keys to Barratt in about February or March 2009 or by its letter of 26th March 2009 or by its letters of 14th August and 21st September 2009. Alternatively or additionally it contends that the Agreement was terminated pursuant to Clause 24 of the Agreement.

106.

It is trite law that in order for a repudiatory breach to bring a contract to an end there must be a clear and unequivocal acceptance of that breach and that mere inactivity or acquiescence is generally not sufficient. On this basis it would seem to me that the fact that Gold did not return the keys to the site to Barratt in about March 2009 could not be a clear and unequivocal acceptance of Barratt's repudiatory breach.

107.
Similarly Gold's letter of 26th March 2009 does not qualify since it disagreed with Barratt's assertion that the Agreement was at an end and in the last sentence provided an agenda for a meeting at which it was anticipated that either Barratt would agree to perform its obligations under the Agreement or it would make an acceptable offer to Gold to bring the Agreement to an end. This letter therefore presupposes the continuing existence of the Agreement.

108.
Paragraph 2.2 of the copy letter of 14th August 2009 stated that provided Barratt, within 20 days, either remedied the breaches or demonstrated its willingness to remedy the breaches and confirmed it would honour and perform the terms of the Agreement, Gold would permit Barratt to complete the development within a reasonable period with an adjusted time scale for the remaining obligations. This was clearly intended to be a notice for the purpose of Clause 24 of the Development Agreement and therefore assumes the Agreement to be still on foot. It is true that paragraphs 2.1 and 2.4 left it open to Gold to contend that it had already accepted Barratt's repudiatory breach but since, on my analysis, it had not done so those paragraphs cannot retrospectively give rise to an acceptance of the repudiatory breach.

109.
Finally Gold wrote on the 21st September 2009 in the terms set out at paragraph 66 above. It is clear that the letter first of all relied upon the contractual right of termination, by referring to Clause 24 of the Agreement, and then, by reference to the letter of 2nd September, asserted that Barratt had no intention of performing the contract and that for that reason the Agreement "has now terminated absolutely".

110.
In my view therefore this Agreement came to an end on 21st September 2009 both by virtue of the exercise of the right of termination pursuant to Clause 24 of the Agreement and by Gold's acceptance of Barratt's repudiatory breach. Such an outcome was explicitly recognised as being possible in certain circumstances in Dalkia Utilities v Celtech [2006] 1 Lloyd's Rep. 599 at [143], In short the exercise of the contractual right of termination was not an affirmation of the Agreement.

Conclusion

111.
In short I conclude:

111.1.
Barratt was in repudiatory breach of the Development Agreement in the respects set out at paragraphs 5 and 73 above;

111.2.
Gold was not in breach of the Development Agreement in refusing to accept or negotiate on the basis of Barratt's offer as set out in the letter of 19th November 2008;

111.3.
Whilst the views expressed by Gold in its letter of 17th December 2008 as to the minimum price were not correct they had no causative effect;

111.4.
Gold terminated the Agreement by letter dated 21st September 2009 both pursuant to the Agreement and by its acceptance of Barratt's repudiatory breach.