Neutral Citation Number: [2021] EWHC 13 (Admin)

Case No: CO/3396/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre

Date: 5 January 2021

Before:

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

THE QUEEN (on the application of
(1) SENSAR LIMITED
(2) AZDAR LIMITED) **Claimants**

- and -

CHIEF LAND REGISTRAR **Defendant**

- -
- -

Adil Razoq in person for **the Claimants**
Richard Clarke (instructed by **Government Legal Department**) for **the Defendant**

Hearing dates: 29 and 30 October, and 18 December 2020

- -

Judgment Approved by the court for handing down

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 1030 on Tuesday, 5 January 2021.

Mr Justice Morris:

Introduction

1. By this application for judicial review, Sensar Limited and Azdar Limited ("the Claimants") challenge a decision of the Chief Land Registrar ("the Defendant") dated 26 July 2018 ("the Decision"). The Claimants claim to have rights relating to land at Springbank Garden, Platt Bridge, Wigan ("the Land"). By the Decision the Defendant decided that the objections to the Claimants' application for the entry of restrictions into the Land Register were not groundless for the purpose of section 73(6) Land Registration Act 2002 ("LRA 2002"). Those objections were made by lessees of plots 1, 3 and 5 at the Land. The Claimants also challenge the refusal to enter a restriction in respect of plots 2 and 4 at the Land.

The parties

2. Senada Ziga ("Ms Ziga") is director of the First Claimant; Adil Razoq ("Dr Razoq") is a director of the Second Claimant. Save where otherwise indicated, and for ease of reference, the terms "the Claimants" in this judgment, includes Dr Razoq and Ms Ziga together, as well as the two company claimants.

Summary of case brought

3. The case has a long history. The Land has been divided into at least 7 plots. Essentially, the Claimants contend that they had a contractual right to prevent disposal by the owner of the plots without their consent. In December 2014, they applied to register on the Land Register a restriction to that effect. Subsequent lessees and transferees of those plots have made objections to that restriction (on grounds, inter alia, that the Claimants have no such contractual right). Eventually the Defendant concluded that some of those objections are not groundless and as a result the dispute as to entry of a restriction has been referred to the First Tier Tribunal (Property Chamber) ("FTT"). The Claimants challenge that conclusion. There are six grounds of challenge as set out at paragraph 86 below

The Legal Background

Land Registration Act 2002

4. By section 40(1) LRA 2002 a *"restriction is an entry in the register regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register."* Section 40(2) provides that:

> *"A restriction may, in particular:*
>
> *(a) prohibit the making of an entry in respect of any disposition, or a disposition of a kind specified in the restriction;*
>
> *(b) prohibit the making of an entry indefinitely, for a specified period, or until the occurrence of a specified event"*

"Specified events" can include, for example, the giving of notice or the obtaining of consent: s.40(3)(a)-(b).

5. The effect of a restriction is provided for by section 41(1), which provides:

> *"Where a restriction is entered in the register, no entry in respect of a disposition to which the restriction applies may be made in the register otherwise than in accordance with the terms of the restriction…"*

The purpose of a restriction

6. Section 42(1), which governs the circumstances in which the Registrar may enter a restriction on the register, is of particular importance. It provides as follows:

> *"**Power of registrar to enter***
>
> *(1) The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of—*
>
> *(a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,*
>
> *(b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or*
>
> *(c) protecting a right or claim in relation to a registered estate or charge." (emphasis added)*

7. Section 42(2) provides: *"No restriction may be entered under subsection (1)(c) for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice."* Section 42(3) requires that the *"registrar must give notice of any entry made under this section to the proprietor of the registered estate or charge concerned, except where the entry is made in pursuance of an application under section 43."*

8. Section 43 governs applications for a restriction, as follows:

> *"(1) A person may apply to the registrar for the entry of a restriction under section 42(1) if—*
>
> *(a) he is the relevant registered proprietor, or a person entitled to be registered as such proprietor,*
>
> *(b) the relevant registered proprietor, or a person entitled to be registered as such proprietor, consents to the application, or*
>
> *(c) he otherwise has a sufficient interest in the making of the entry.*

(2) Rules may—

(a) require the making of an application under subsection (1) in such circumstances, and by such person, as the rules may provide;

(b) make provision about the form of consent for the purposes of subsection (1)(b);

(c) provide for classes of person to be regarded as included in subsection (1)(c);

(d) specify standard forms of restriction.

(3) If an application under subsection (1) is made for the entry of a restriction which is not in a form specified under subsection (2)(d), the registrar may only approve the application if it appears to him—

(a) that the terms of the proposed restriction are reasonable, and

(b) that applying the proposed restriction would—

(i) be straightforward, and

(ii) not place an unreasonable burden on him.

(4) In subsection (1), references to the relevant registered proprietor are to the proprietor of the registered estate or charge to which the application relates." (emphasis added)

9. Section 45 specifies the notice requirements for applications:

"(1) Where an application under section 43(1) is notifiable, the registrar must give notice of the application, and of the right to object to it, to—

(a) the proprietor of the registered estate or charge to which it relates, and

(b) such other persons as rules may provide.

(2) The registrar may not determine an application to which subsection (1) applies before the end of such period as rules may provide, unless the person, or each of the persons, notified under that subsection has exercised his right to object to the application or given the registrar notice that he does not intend to do so.

(3) For the purposes of this section, an application under section 43(1) is notifiable unless it is—

> *(a) made by or with the consent of the proprietor of the registered estate or charge to which the application relates, or a person entitled to be registered as such proprietor,*
>
> *(b) made in pursuance of rules under section 43(2)(a), or*
>
> *(c) an application for the entry of a restriction reflecting a limitation under an order of the court or registrar, or an undertaking given in place of such an order." (emphasis added)*

The section 73 regime: objections to an application

10. Section 73 makes provision for the making of objections to applications to the Registrar, providing, so far as is material, as follows:

> *"(1) Subject to subsections (2) and (3), anyone may object to an application to the registrar.*
>
> *...*
>
> *(4) The right to object under this section is subject to rules.*
>
> *(5) Where an objection is made under this section, the registrar—*
>
> *(a) must give notice of the objection to the applicant, and*
>
> *(b) may not determine the application until the objection has been disposed of.*
>
> *(6) Subsection (5) does not apply if the objection is one which the registrar is satisfied is groundless.*
>
> *(7) If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer the matter to the First-tier Tribunal.*
>
> *(8) Rules may make provision about references under subsection (7)." (emphasis added)*

Land Registration Rules 2003

Priority of applications

11. Rules 12 and 20 of the Land Registration Rules 2003 ("the Rules") make provision for the priority of applications. By rule 12(1), the Registrar is required to keep a record ('the day list') showing the date and time at which every pending application was made. Rule 12(3) provides that:

> *"where the registrar proposes to alter the register without having received an application he must enter his proposal on the day list and when so entered, the proposal will have the same effect for the purposes of rules 15 and 20 as if it were an application to the registrar made at the date and time of its entry". (emphasis added)*

12. By rule 20(1), an entry or removal of an entry from the register *"has effect from the time of the making of the application".*

The making of applications and objections

13. Part 3 of the Rules makes further provision for the making of applications to the Registrar, and objections to those applications. Rule 15 makes provision for ascertaining the date on which an application is deemed to be made. Rule 17, importantly, provides as follows:

> *"If the registrar at any time considers that the production of any further documents or evidence or the giving of any notice is necessary or desirable, he may refuse to complete or proceed with an application, or to do any act or make any entry, until such documents, evidence or notices have been supplied or given." (emphasis added)*

Standard forms of restriction

14. Schedule 4 of the Rules sets out the standard forms of restriction (s43(2)(d) LRA 2002 above and Rule 91(1)). Rule 91A provides the circumstances in which a standard form restriction may be varied (and remain a standard form restriction) as follows:

> *"(1) Subject to paragraphs (2) and (3), if a standard form of restriction is to affect part only of the registered estate, then, where it refers to a disposition, or to a disposition of a specified type, to which it applies, that reference may be followed by the words "of the part of the registered estate" together with a sufficient description, by reference to a plan or otherwise, to identify clearly the part so affected.*
>
> *(2) The words incorporated under paragraph (1) shall be in place of the words "of the registered estate" where those latter words appear in a standard form of restriction and are referring to a disposition, or to a disposition of a specified type, to which the restriction applies.*
>
> *(3) The registrar may alter the words of any restriction affecting part of the registered estate that he intends to enter in the register so that such part is described by reference to the relevant title plan or in another appropriate way…" (emphasis added)*

Giving of notice

15. Part 15 of the Rules provides for the giving of notice by the Registrar and the form of such notice. By Rule 197:

> *"(1) Every notice given by the registrar must–*
>
> *(a) fix the time within which the recipient is to take any action required by the notice,*
>
> *(b) state what the consequence will be of a failure to take such action as is required by the notice within the time fixed,*
>
> *(c) state the manner in which any reply to the notice must be given and the address to which it must be sent.*
>
> *(2) Except where otherwise provided by these rules, the time fixed by the notice will be the period ending at 12 noon on the fifteenth working day after the date of issue of the notice."*

Relevant Guidance

16. HM Land Registry "Practice Guide 19" provides guidance on notices, restrictions and the protection of third-party interests in the register. Section 3.2.1 (Restrictions entered at the registrar's discretion), after setting out the provisions of section 42(1) LRA 2002, provides as follows:

> *"The registrar may enter a restriction to fulfil one of these purposes whether or not an application is made to do so. However the registrar will always notify the relevant proprietor when a restriction is entered without an application having been made to do so.…*
>
> *It will usually be clear whether a restriction is necessary or desirable for one of the three permitted purposes, but this will not always be the case." (emphasis added)*

Section 3.3.1 (standard form restrictions), so far as is material, states:

> *"The effect of a restriction must be clear from its wording and its administration must not place us under an unreasonable burden. Schedule 4 to the Land Registration Rules 2003 prescribes a number of standard form restrictions that are intended to cover the vast majority of applications made.*
>
> *These are set out in Appendix B: standard form restrictions."*

Section 3.3.1.1 continues:

> *"Rule 91A of the Land Registration Rules 2003 allows the following amendments to the standard restrictions. They are:*

> - *where a standard form restriction is intended to affect part of a registered estate the words 'No [disposition {or specify type of disposition}] of the registered estate' [should be replaced by 'No disposition {or specify type of disposition} of the part of the registered estate]' followed by a sufficient description, by reference to a plan or otherwise, to clearly identify the part affected…*
>
> *…*
>
> *Any amendment not provided by rule 91A or which goes beyond those explained in Standard form restrictions will make the restriction non-standard. For example, the {name} field in the standard restrictions does not allow for additional descriptive text such as details of the particular office or function of the restrictioner. If a restriction is required in favour of, for example, 'X, the supervisor of …' application should be made for a non-standard restriction."*

Section 3.4.5 is headed "Notifiable applications" and provides:

> *"We will notify the relevant proprietor before we complete an application for a restriction … The notice will give the relevant proprietor 15 working days to object to the application…"*

Under the heading "3.5 How to apply for a restriction", section 3.5.1 is headed "Application form and fee" and provides, inter alia as follows:

> *"Most applications for restrictions must be made in form RX 1.*
>
> *…*
>
> *Form RX1 is intended to be used for applying for one restriction only <u>but we will accept an application if a single form RX1 is used to apply for different restrictions provided (a) the applicant and (b) the reason given as to the entitlement to apply for the restrictions, are the same</u>. If the applicant or the entitlement to apply are different, separate forms must always be used." (<u>emphasis</u> added)*

17. Practice Guide 37 provides guidance on "Objections and disputes". Section 2 offers the following guidance:

> *"<u>When we receive an objection we will first consider whether or not the objection has any chance of success. If it cannot possibly succeed, whether on the facts or the law, the objection will be considered groundless and will be cancelled, allowing the application to be completed</u>. This is because an application is not affected by an objection that is groundless (section 73(6) of the Land Registration Act 2002). <u>In some cases, we may</u>*

> *defer completion of an application to allow an objector to clarify their grounds of objection or provide further information to show their objection is not groundless.*
>
> *Once we have established that an objection is not groundless, we will give details of the objection to the applicant. At the same time we will put certain options to both the applicant and the objector.*
>
> *The 4 options open to the parties are:*
>
> - *the applicant may withdraw the application*
> - *the objector may withdraw the objection*
> - *the parties may decide to negotiate to see whether they can reach an agreement as to how the objection is to be dealt with and how the application is to be completed*
> - *one of the parties may decide to commence court proceedings – see Court proceedings*
>
> *If there is no prospect of the parties reaching agreement, the matter must be referred to the tribunal." (emphasis added)*

Section 4 of Practice Guide 37 states as follows:

> *"If we consider it to be appropriate, we will express our views on the relative merits of each party's case. We hope our experience and impartial position will to be helpful but the parties are free to accept, refute or ignore what we say"*

Summary of s.73 procedure

18. Thus, in summary, the regime for objections is as follows. Anyone has the ability to object to an application for a restriction (and not just someone notified of the application). When an objection is made, the Registrar decides first whether it is "groundless". Establishing that an objection is not groundless is a very low threshold: see *Silkstone v Tatnall* [2011] EWHC 1627 (Ch) per Mr Justice Floyd at §17. Thus at this stage the Registrar is performing a "gatekeeping" function.

19. Prior to so deciding, there is no duty upon the Registrar to notify the applicant of the objection; the scheme does not envisage that the applicant will be notified at this stage. On the other hand, as a matter of practice the Registrar may allow an objector to clarify its grounds of objection or provide further information to show that the objection is not groundless.

20. If the Registrar considers that the objection is groundless, that is the end of the matter. The objection will be cancelled and the Registrar may proceed to determine the application for the restriction. A question arises under Ground 3 below whether, in

those circumstances, the Registrar is bound to enter the restriction or retains a discretion not to do so: see paragraph 159 below.

21. On the other hand, if the Register is satisfied that the objection is not groundless, then the Registrar is under a duty to give notice of the objection to the applicant. If the objection cannot be resolved by agreement between the applicant and the objector, the Registrar is bound to refer the matter to the FTT and is not and cannot be involved in the determination of the disputed objection. Unless and until the objection is resolved (either by agreement or by the FTT) the application for the restriction cannot be determined.

22. I address below further legal principles relevant to particular grounds of challenge.

The Factual background

23. The Land is covered by two Land Registry titles: nos GM 514222 and GM 554260. For present purposes, there are 7 relevant plots on the Land: plots 1-5, 7 and 8. Most of those plots comprise land straddling the two titles. One plot - plot 1 - is wholly within title GM 554260.

The Joint Venture Agreements

24. On 22 July 2014, the First Claimant entered into three joint venture agreements ("JVAs") with Newbury Venture Capital Limited ("NVC"), each expressed to be for the purchase, redevelopment and onward sale of plots at the Land. In the case of each of plots 1, 2 and 3, the JVA consisted of (1) a cover letter from NVC to the First Claimant and (2) an agreement letter of the same date (again on NVC headed notepaper); the First Claimant paid £60,000 per JVA; and the investment was to be used by NVC for "the purchase and the Development" of the plot in question, with the original £60,000 investment together with £24,000 profit being returned to the First Claimant upon the onward sale of each plot; that was envisaged to occur within 14 to 26 weeks.

25. In particular each cover letter stated:

> *"Once our solicitors HSK solicitors are in receipt of your investment of £60,000 NVC Legal Services who act for you will write to you confirming when security of your investment has been registered against the property at HM Land Registry. HSK and NVC Legal will hold a copy of this agreement and the Loan Agreement on file. A CH1 will be registered as a First Legal Charge against the Property, which will protect your interest and stop the Property being sold without your consent. An updated schedule of profit will be provided to you for approval prior to exchange of contracts with any prospective purchaser*
>
> *Upon sale of your JV property we will transfer £24,000 to your Solicitors plus return of your original £60,000 capital. A property account detailing all expenditure and building work*

> *cost will be provided prior to exchange of any contracts." (emphasis added)*

26. Each accompanying agreement letter stated:

> *"Newbury Venture Capital will be entirely responsible for the Development, Completion and re-sale of the Property. They will report progress on the project to you each month or as otherwise agreed.*
>
> *In consideration of you today transferring the sum of £60,000 ("Investment") to NVC Legal it is hereby agreed that the Investment shall be used towards the purchase & development costs of the Property. The investment is to be securitised against the Property by a CH1 First Legal Charge at HM Land Registry until the Property has been sold or until 22nd July 2015 whichever is sooner.*
>
> *We hereby agree to pay you upon resale of the Property £24,000 and your original investment of £60,000."*
> *(emphasis added)*

27. The Second Claimant entered into a series of JVAs for plots 4, 5, 7 and 8. These were practically identical to those entered into by the First Claimant, save that the amounts of the investment and return were different for plots 7 and 8.

28. The CH1 charges referred to in the JVAs were never entered into. The central issue in the current dispute is whether each JVA imposed a contractual obligation upon NVC not to dispose of the plot in question without the relevant Claimant's consent.

The Claimants' application for a restriction

29. On 18 December 2014 (received by the Defendant on 23 December 2014) Ms Ziga applied, in Form RX1, for a restriction to be entered against titles GM 514222 and GM 554260 in respect of the property, expressly identified as plots 1-5, 7 and 8 ("the Application"). There was a single Form RX1. The Application for a restriction was made compendiously in respect of all 7 plots in that single application. It is expressed as being for a restriction in respect of the whole of the registered estate (and not just those 7 plots). New title numbers (starting "MAN..") were granted provisionally when application was made to register the dispositions subsequently made by the registered owner (see paragraph 162 below). The restriction sought was as follows:

> *"No disposition of the registered estate by a proprietor of the registered estate is to be registered without a written consent signed by either of the applicants (Adil Razoq and Senada Ziga ...) or their conveyancer"*

30. In box 13, the applicant's interest was described as follows:

> *"The applicants advanced monies to the registered proprietor under a joint venture with the registered proprietor to develop dwellings on the estate, on representations from the registered proprietor that the applicants' beneficial interest would be protected by a first legal charge on the estate, which has not yet been registered. I have seen the written JV documents which bear this out. The applicants are concerned that they will lose their security if this restriction is not entered."*

Dispositions of the plots

31. NVC purported to enter into transactions in relation to plots 1-5. In December 2014 and January 2015, NVC granted leases in respect of each of plots 1, 3, and 5. In each case, the lessees were two named individuals. On 5 January 2015 NVC transferred each of plots 2 and 4 to a company called Kalivera Limited ("Kalivera"). I refer to these five lessees/transferees compendiously as "the Purchasers".

32. Between 6 January 2015 and 17 February 2015, applications were made (by the relevant Purchaser) to the Defendant to register the leases in respect of plots 1, 3 and 5 and the transfers in respect of plots 2 and 4.

33. It appears that the NVC scheme was a fraudulent one in which many people were induced to invest money which they subsequently lost. Amongst those who lost their money are the Claimants. Subsequent litigation ensued, described in more detail in paragraphs 38 to 41 below. On 11 February 2016 NVC was made subject to a winding up order in the High Court under section 124A Insolvency Act 1986 on public interest grounds of lack of transparency and lack of commercial probity.

The Application: first phase

34. On 10 May 2016 the Defendant sought further information and evidence from the Claimants.

35. On 22 June 2016 Alison Abbott, assistant land registrar, wrote to Ms Ziga, explaining that, in the light of the latter's concerns about her impartiality, the application would be referred to her manager Mr Keith Hookway, the local land registrar. She added that she had not refused to accept that the contracts were binding. Rather she could not identify any part of the contract which indicated that the registered proprietor cannot dispose of the property without the Claimants' consent and that she was not aware that any breach of the contract would give rise to a requirement that their consent was needed for any disposition.

The July 2016 Decision

36. By decision letter dated 8 July 2016 from Mr Hookway, and following receipt of the further information, the Defendant determined to cancel the Application ("the July 2016 Decision"). The reasons for cancellation were stated to be as follows:

> *"The papers… do not show either specific consent from the registered proprietor for a Form N consent restriction, or documentation that specifies that such dispositions by the*

> *proprietor involving this land would specifically be in breach of contract or a breach of trust*
>
> *Additionally … you do not have a formal legal charge nor a subsisting and extant injunction in your favour. …..*
>
> *…*
>
> *Unlawfulness does not relate to simple breaches of contract; it goes far beyond this. … You would need to show specific documentation such as an act, or constitution of a company, or a specific agreement/consent that sets out clearly that the powers of disposition of the registered proprietor had been restricted in some manner. Further, that documentation would need to specifically relate to the land in title GM 514222 which is the subject of this application.*
>
> *In essence, powers to sell or mortgage the land in title GM 514222 would need to have been specifically limited as part of the transaction which was, I believe, a joint venture. You have not lodged any such documentation showing that your consent is formally required by the proprietor when dealing with the land and as such have not shown sufficient grounds for the type of restriction applied for." (emphasis added)*

37. After complaint by the Claimants in July 2016, Ms Emily d'Albuquerque (Land Registrar at the Hull Office) became involved. On 23 August 2016 Ms d'Albuquerque wrote to the Claimants, explaining that she was the local land registrar now responsible for the matters. She noted the Claimants' unhappiness with the way that the application had been processed. In October 2016 and December 2016, Ms d'Albuquerque wrote further letters to the Claimant about matters arising after the July 2016 Decision.

Litigation arising from the fraud claim: 2015 to 2018

38. Returning briefly to the litigation, on 28 January 2015, the Claimants obtained a freezing injunction against NVC. HH Judge Brown QC found that the risk of dissipation arose because NVC was already selling the properties without the agreed legal charge being on them and considering its conduct throughout the six months from the start and taking account of multiple claims of dishonesty raised by others.

39. On 21 May 2015 the Claimants each obtained summary judgment against NVC for sums in excess of £580,000 plus interest. On 14 August 2015 the Claimants obtained final charging orders against the interests of NVC in lands in Burnley and in respect of the Land.

40. On 3 August 2015 the Claimants brought proceedings in the Chancery Division in Birmingham against NVC and Kalivera to set aside transfers of plots 2 and 4 to Kalivera and to direct the Land Registry not to give effect to applications for those transfers to be registered. Mr Mark Anderson QC, sitting as a deputy High Court judge, gave judgment on that application on 29 September 2016. The Deputy Judge

cast significant doubt on the bona fides of the transfer to Kalivera, but proceeded on the basis that that allegations that Dr Sardar of Kalivera was improperly involved with NVC had not been proved before him. He concluded by ordering Dr Sardar and Kalivera not to dispose of the proceeds of sale of plots 2 and 4 for a period of time.

41. On 5 January 2018, His Honour Judge Cooke sitting in the High Court, Chancery Division made the following declaration:

- *"The agreements between [NVC] and the Claimant dated the 22nd and 23rd July 2014 give rise to equitable charges as of those dates in favour of the Claimants over plots 2 and 4 Springbank Gardens… registered at HM Land Registry under title numbers GM 514222 and GM 554260 respectively.*

- *Those equitable charges take priority over any interest that the Defendant may have acquired in the Property ("the Defendant's Interest"), insofar as the same remain unregistered."*

It is accepted by Mr Clarke for the Defendant that, in principle, the JVAs also gave rise to equitable charges over plots 1, 3 and 5 in favour of the Claimants.

First judicial review and the Judgment of Judge Barker QC

42. On 7 October 2016 the Claimants challenged the July 2016 Decision by way of judicial review. Permission was granted by HH Judge McCahill QC on 7 June 2017. In his observations he stated:

> *"… It is arguable that the Claimants had provided enough information to the Defendant… to show… that NVC could not sell Plots 1-5, 7 and 8 comprised within the registered titles without the consent of Adil Razoq and Senada Ziga … because NVC had contracted with and/or granted the Claimant an equitable mortgage (pending the formalities for a legal mortgage) which restricted the sale of the relevant land without their consent."*

In its skeleton argument for the substantive hearing, the Defendant essentially contended that there was nothing in the JVAs which required the Claimants' consent for NVC to deal with the Land.

Judge Barker QC's judgment ("the Judgment")

43. On 12 March 2018 His Honour Judge Barker QC allowed the application for judicial review and the July 2016 Decision was quashed.

44. In the Judgment, the judge referred back to the High Court's earlier declaration that the JVAs for plot 2 and 4 created equitable charges and that equitable charges are protected by notices, not restrictions. The judge noted that it was common ground that no CH1 ever came into existence; secondly, that the JVAs themselves are "not a legal charge"; thirdly that the arguments relied upon by the Claimant had been

reformulated such that the basis of the application was "primarily to prevent unlawfulness by breach of contract and fraud".

45. At paragraph 4, the judge pointed out that it was not easy to discern the reasons underlying the decision to cancel the Application. At paragraph 7, he recited that the application for the restriction was sought under section 42(1)(a) LRA 2002. At paragraph 14 the judge referred to concerns raised by staff within the Defendant that no part of the joint venture indicated that the registered proprietor could not dispose of the property without the Claimant's consent. At paragraph 18 the Judge referred to the second part of the passage in the July 2016 Decision set out in paragraph 36 above.

46. Importantly, at paragraphs 28 and 29, the judge referred to the court's function on judicial review as being to review the decision of the public authority to ensure that it was taken in accordance with public law. At paragraph 29, he stated:

> *"It is the review of a decision of a public authority by a judge. It is not a hearing at which the judge is in a position or has the power to substitute his own view of the correct decision for that of the decision-maker; the task of a judge is to review the decision in the light of the material and evidence and contentions on which it was based."*

47. At paragraph 32, the judge stated that nothing was said on the Form RX1 about the applicant having a contractual right to authorise or prohibit dispositions of the registered estate. At paragraph 34 he then turned to the joint venture documentation itself, and at paragraph 37 identified the key terms of the contract. At paragraph 39, the judge stated as follows:

> *"It is common ground that no CH1 form ever came into existence. Form CH1 is a standard form requiring details of the title of the property, title number and address, the date of the charge, details of the borrower, details of the lender, details of the lender's address for entry in the register, optionally the nature of the title guarantee (full/limited), optionally whether specified entries are sought on the register, and optionally any further provisions, and then execution by the borrower. This is the format of the CH1 form which is the basis on which the investment* ***was to be*** *securitised. These terms are all covered by the contents of the joint venture documentation.* ***(emphasis*** *added)*

48. At paragraph 42 to 47 the judge set out the Defendant's contentions. One of those contentions was that the appropriate method of protection was entry of a notice pursuant to section 42(2) and thus no restriction could be entered to protect an equitable charge. A further contention was that the unlawfulness in the present case was outside the unlawfulness which section 42 is designed to prevent. The judge rejected that because the language of section 42(1) refers to the unlawfulness by reference to dispositions and not to contract. He continued:

> *"48. I have not found this case an easy case to analyse or decide. In part this is because the joint venture documentation is unstructured. In part it is because the Form RX 1 as completed is unclear or imprecise. In part it is because the Land Registrar did not address the RX 1 and the material evidence supplied in any detail or with precision in either requisitions or in his decision. In part it is because the case has been the subject of proliferation of irrelevant and, to an extent, misconceived points taken by the claimants and then numerous written submissions and pursued in the oral argument.*
>
> *49. Turning to my view of the documentation, I read the five pages of each joint venture documentation as one agreement.…*
>
> *50. Certainly the agreement is not a legal charge, but the following are clear from the five pages of the documentation; … [*he then sets out the particular details of the identity of each plot, of the borrower, the lender etc*]… Where there is a restriction to be entered, the wording should have been entered; however, that could be derived from the letter which is not in the same form as the Form N restriction, but is nevertheless a form requiring consent in the following terms, "The property is not to be sold without the consent of either Senada Ziga (Sensar Limited) or Adil Razoq (Azdar Limited)"*

It is common ground that the quoted words in the last sentence are not a direct quotation taken from anywhere, whether in the JVA or otherwise. It appears to be that this is the judge's interpretation of what (or what the Claimants would contend that) the JVA letter says. This is relied upon by the Claimant to support the proposition that the judge considered that the JVA did provide, as a matter of contract, that there could be no disposition without consent.

49. The Judgment continued:

> *"52. In relation to execution, it is clear from the joint venture documents that NVC is the borrower and therefore the executing party and the letters bear a stylised signature of Mr Kiely. Thus, with a possible exception of a date, all the information required for the completion of a CH1 form is available from the joint venture documentation itself."*
>
> *53. The last sentence in the joint venture letter, "A CH1 will be registered as the first legal charge against the property which will protect your interest and stop the property being sold without your consent" does not mirror the language of the restriction applied for, <u>but it does focus on consent as a stipulation in the context of dispositions by the registered proprietor</u>." (<u>emphasis</u> added)*

The Claimants rely upon this paragraph and in particular the concluding words to support the proposition that the judge *decided* that it was a term of the JVA that the Claimant's consent was required for disposition by NVC.

50. At paragraphs 55 and 56, the judge was critical of the Defendant's failure to make further requisitions. Then, in the first part of paragraph 57, the Judge rejected the argument that section 42(2) excludes the entry of a restriction to prevent unlawfulness under section 42(1)(a) and concluded that "unlawfulness" applies to cases of breach of contract; and that unlawfulness is not defined in the statute. In a further passage relied upon by the Claimants, paragraph 57 continues as follows:

> *"Unlawfulness applies to cases of breach of contract. Unlawfulness is not defined in the statute. When a contract is made providing for a consent to be obtained before the registered proprietor disposes of a registered estate and the contracting party's consent is linked to some contractual interest of the contracting party in the disposition of that estate (such as here triggering a right to repayment of the loan or investment plus a defined profit) and further where there is a risk of breach of the contract by the registered proprietor in failing to seek or obtain consent, it is difficult to see why that should fall outside the scope of unlawfulness under section 42(1)(a) of the Land Registration Act 2002 and debar the contracting party from the entry of a restriction concerning the contracting party's consent" (emphasis added)*

51. The judge's conclusions were as follows:

> *"60. …in the final analysis, the question comes down to whether the particular restriction sought accurately identifies the consent terms agreed to. In my view, it is imprecise and so too is the basis on which the application is made. The joint venture is not a single venture but a series of joint ventures each the subject of a separate agreement, each concerning a specific plot, and different consents are required for different plots.*
>
> *61. The Form RX1 makes clear that the Land Registrar does not give legal advice. It is for the applicant for the restriction to specify the particular title and property affected and the basis on which the consent requirement arises and further, the particular consents required.*
>
> *62. A Form N restriction could, and probably should, have been framed differently to identify a particular consenting party for a particular plot under the title numbers against that. Had the Land Registrar and the junior colleague recognised and accepted as potentially valid the consent provision in the joint venture letters, the precise position might have been obtained by raising the requisition on the basis that the restriction sought appeared to be incomplete or wrongly drawn. Similarly,*

> *a review of the joint venture documents provided might have prompted a requisition. Further, the documents relating to plots 1 and 2 needed to support the underlying application were missing. These are points which highlight weaknesses in the application. They deserve proper evaluation in context, which includes the circumstances in which it is appropriate and usual to raise requisitions.*
>
> *63. Overall, the conclusion I have come to is that (1) as yet there has been no decision in relation to title number GM554260; (2) the consideration given to the restriction application by the Land Registrar was inadequate; and/or but (3) there appears to be a very strong likelihood that any entry of a restriction will be of limited practical value.*
>
> *…*
>
> *65. Given that, first, there is as yet no actual decision in relation to the application affecting title GM 554260; secondly that there is uncertainty as to whether and if so to what extent the entry applied for would be academic; and thirdly, it appears that the decision taken was not based on a sufficiently careful review of the documents lodged, supplemented by the raising of appropriate requisitions, the challenge to the decision to cancel the applications must succeed.*
>
> *(emphasis added)*

(In my judgment the word "it" in the second sentence of paragraph 60 is a reference to the wording of the proposed restriction.)

52. As to relief, the judge concluded as follows:

> *"66. … The most appropriate course is to remit the application to the Chief Land Registrar for the Chief Land Registrar to nominate a senior Land Registrar, not someone who has participated in the decision today, who is to give proper and urgent consideration to the application on the basis that the application was received on 23 December 2014 and in the light of the material before the Land Registrar on 8 July 2016, supplemented by copies of the joint venture documentation for plot 1 and 2."*

53. The Court's order ("the Order") consequential upon the Judgment provided inter alia as follows:

> *"3. The Chief Land Registrar or a senior land registrar nominated by him and having had no previous involvement with the Application… is (1) to give proper and urgent consideration to the Application by reference to…and (2) to make a decision on the Application that addresses the*

> *application in respect of both title number GM 514222 and title number GM 554260."*

54. The Order then set out "summary of reasons in judgment" in the following terms:

> *"(1) the decision of 8.7.16 ("the decision") did not purport to and did not address the application in respect of title number GM 554260; (2) the decision betrayed a lack of care and attention to and in consideration of the available material in making the decision; (3) the reasoning/explanation for rejecting the Applicants' contentions in relation to unlawfulness in the context of alleged breach of contract (s.42 (1) LRA 2002) and in relation to the conclusion that the applicants do not otherwise have a sufficient interest in the making of the entry sought (s. 43 (1) LRA 2002) is unclear;…" (emphasis added)*

Fresh consideration by the Defendant: the second phase

55. The Defendant reinstated for decision the Application pursuant to the terms of the Order. The Chief Land Registrar appointed Ms Louise Booth, Head of Corporate Legal and Indemnity Services, Land Registry Head Office to make the fresh decision, being a senior land registrar with no previous involvement with the Application. Ms Booth was based at the Defendant's Birkenhead office. On 1 May 2018, in a letter written on behalf of the Chief Land Registrar, the Claimants were informed that following the Order, he had appointed Ms Booth to conduct the review and that she had had no prior involvement in the registration application. On 9 May 2018, Ms Booth wrote to the Claimants pointing out that she is a senior land registrar with no previous involvement and nominated by the Chief Land Registrar to review the matter. She had re-considered the Application (including all relevant documents) and expressed the following provisional view:

> *"subject to clarification of point below, I consider that sufficient evidence has been shown to support an application for a Form N restriction on the basis that it is necessary or desirable to prevent invalidity or unlawfulness in relation to dispositions of the registered estate"*

56. As part of the clarification which she sought, she asked for "the name in whose favour the consent restriction is sought *in relation to each individual plot"*, noting that there were different parties to the JVAs for the different plots. She pointed out that, "as advised by Ms Abbott in her letter dated 22 June 2016", notice of the Application would be served on the registered proprietor of titles GM 554260 and GM 514222; on the liquidator of NVC; and, pursuant to Rule 17, on the lessees and purchasers respectively of plots 1-5 (i.e. the Purchasers). She further suggested that the Claimants discuss the implications of the Lancashire Mortgage in relation to plots 7 and 8 with legal advisors, "as advised in our letter dated 16 June 2016". That 16 June 2016 letter had also been written by Ms Abbott. She concluded by stating that, subject to the Claimants' responses to the points of clarification, she would arrange for "notice of your application … for consent restrictions to be served on …" NVC and others.

57. On 17 May 2018, the Claimants objected to the giving of notice of the Application to the Purchasers, contending that was no legal ground whatsoever for serving a notice of the application on the Purchasers, particularly since those purchasers did not exist at the date of the Application.

58. By notices dated 25 May 2018, the Defendant gave notice of the Application to NVC and to the Purchasers, requiring a response by 18 June 2018. The notices were given in a standard (albeit not prescribed) form and required the addressee to do one of two things: either object to the Application or consent to it. The letter pointed out that, if the addressee consented or did not reply by the deadline, the Defendant "may enter the restriction in the register". If the addressee's objection was groundless, the Defendant "may… go on to complete the application before the expiry of the deadline".

59. By letter dated 8 June 2018, Ms Booth acknowledged the Claimants' objection to the giving of notice to the Purchasers. However she set out the reasons why she considered that she was right to exercise her discretion under Rule 17 to give such notice. In that letter, again, Ms Booth referred to the Application as an application for "consent restrictions".

60. By email dated 8 June 2018 Dr Razoq raised a number of complaints including that the Purchasers had been given extension of time until 30 June 2018 to make their objections; and that that extension had been granted by Ms d'Albuquerque who had been extensively involved in the original application, reminding the Defendant that the Order specified that the application must not be handled by someone who had previous involvement in the case.

61. In fact by letter dated 7 June 2018 to the Claimants, a lawyer support manager at the Defendant explained that the matter was being considered by Ms Booth, but that because she was on leave until 11 June, Ms d'Albuquerque had acted as referral point in her absence and that the extensions of time until 30 June had been granted.

62. By email dated 13 June 2018, in response to Dr Razoq's email dated 8 June 2018, Ms Booth explained, amongst other things, that she had extended time for the Purchasers' response to the notices because the legal representatives of the relevant parties had not received copies of the notices. She had directed notices to be served on the Purchasers because they were persons who had already also asserted interest in the Land and that their applications were received after the Application, but before the latter was considered. In this email Ms Booth referred to the Claimants' "applications".

The Purchasers' first objections

63. By letters dated 26 June 2018, Nyland & Beattie solicitors ("Nyland") on behalf of the leasehold purchasers (i.e. the Purchasers of plots 1, 3 and 5) responded to the notices with objections. I refer to these objections as "Nyland 1". After raising a number of points, including pointing out that no legal charge was ever executed, Nyland contended (at paragraph 9), in relation to section 42(1)(a) LRA 2002 as follows:

> *"There is, however, nothing in the JVA which places any restriction on the disposition of the Property by NVC. Such a disposition would therefore not be a breach of contract on the part of NVC, even assuming that a breach of private contract is unlawfulness of a kind within the ambit of section 42(1)(a). The disposition would no doubt trigger the obligation to pay sums of money to Sensar Ltd and a failure to pay would entitle Sensar Ltd to sue NVC and (if judgment were obtained) subsequently to apply for a charging order over the Property, remedies which Sensar Ltd has in fact pursued. The disposition itself however would not be unlawful or a breach of any obligation owed to Sensar Ltd, nor the Applicants or either of them." (emphasis added)*

64. By letters dated 29 June 2018, Bryan O'Connor & Co ("O'Connor"), solicitors acting for Kalivera (i.e. the Purchaser of plots 2 and 4) also responded to the notices with objections, based on sections 42 and 43 LRA 2002. The heading of the letter referred to new and different title numbers for plots 2 and 4. In that objection, as far as relevant, O'Connor asserted, baldly, that "s.42(1)(a)) has no application presently".

65. On 2 July 2018, Mrs Miriam Brown, based at the Defendant's Peterborough office, informed Ms Ziga that three objections had been received and that until considered, it was not possible to say whether they were groundless or not. Those objections, Nyland 1, were then sent to the Claimants under separate cover. On 4 July 2018, the Claimants sent the Defendant a detailed response to Nyland 1, contending that it raised nothing new.

66. On 9 July 2018, Alan Humphreys, lawyer support manager at the Defendant's Birkenhead office, provided the Claimants with a copy of the O'Connor objection. On 10 July 2018, the Claimants sent Ms Booth and Mr Farrant of the Defendant their detailed response to the O'Connor objection.

The Defendant's initial response: 17 July 2018 ("the Provisional Decision")

67. By letters to Nyland and O'Connor, dated 17 July 2018, Ms Booth considered the objections and set out the reasons why she considered them to be groundless, pursuant to s.73(6) LRA 2002 ("the Provisional Decision"). She wrote separate letters in respect of each of the plots 1, 3 and 5. The letters were in practically identical terms. In her letter to Nyland in respect of plot 1, she stated, inter alia, as follows:

> *"Thank you for your letter of 26 June 2018 telling us you object to the application for registration of a Form N restriction affecting plot 1 … For the avoidance of doubt the application is to enter a restriction on the freehold title GM554260 affecting plot 1.*
>
> *…*
>
> *The application for a form N restriction has been accepted on the ground that sufficient interest has been shown why it is necessary or desirable for the Registrar to enter a restriction to*

> *prevent unlawfulness in relation to a disposition of the registered estate. The restriction applied for is to prevent unlawful breach of the contract agreement in the joint-venture documentation, not to dispose of the property without prior consent.*
>
> *…*
>
> *You also state at your paragraph number 9 that there is nothing in the joint venture documentation that places any restriction on the disposition of the property by NVC. However the joint venture documentation does contain an agreement to the effect that the property could not be disposed of without consent: there is an agreement to enter into a charge and to restrict the registered proprietor's powers of disposition as a result. The agreement in the joint venture contract documents provides for consent: "A CH1 will be registered… which will protect your interest and stop the property being sold without your consent". This consent is linked to the applicant's right to repayment on sale of the relevant property, and there is a risk of breach of contract by the registered proprietor not seeking or obtaining the relevant consent. This is what the restriction seeks to protect.*
>
> *…*
>
> *In this case the application is made under s.42(1)(a) to prevent unlawfulness in relation to a disposition of the registered estate: the application is for a restriction to prevent unlawfulness in relation to the agreement reached with NVC, rather than to protect the priority of an equitable charge. The contract with NVC provides for consent to be obtained prior to sale which is linked to the applicant's contractual interest in repayment of the loan together with a defined profit. The restriction seeks to protect against unlawfulness under s.42(1)(a) should NVC breach the contract and sell without seeking that prior consent. The Registrar may enter a restriction for the purpose of preventing invalidity or unlawfulness where it appears to him that it is necessary or desirable to do so.*
>
> *As a result, I consider your objection is groundless. You may have more information about this application that you have not yet sent to us. If so please send this to me by noon on the 24 July 2018, at the latest, otherwise we will complete the application." (emphasis added)*

In respect of plot 5, Ms Booth wrote to Nyland in identical terms, save that the opening paragraph stated as follows:

> *"Thank you for your letter of 26 June 2018 telling us you object to the application for registration of a Form N restriction affecting plot 5 …. I note you have referred to title GM514222 only, whereas application in respect of a restriction affecting plot 5 is made against both freehold titles GM514222 and GM554260 as the plot affects both titles".*

On the same date, Ms Booth wrote in similar terms to O'Connor.

68. On the same day, 17 July 2018, Ms Booth wrote to the Claimants explaining the position as regards Nyland 1 and O'Connor, characterising the objections received as "objections to your applications for restrictions affecting" each of the 5 plots. She explained that provisionally they considered the Nyland and O'Connor objections to be groundless and that she had informed the Purchasers that she intended to "complete the applications, subject to the Purchasers having a further opportunity to respond". Again, Ms Booth referred to multiple applications for multiple restrictions.

Plots 7 and 8

69. In that same letter, as regards plots 7 and 8, Ms Booth informed the Claimants that no objections had been received, *"so your application can be completed in respect of these plots. I have given instructions for this to be completed*".

70. Following the main hearing before me, the Defendant's solicitors provided to the Court the following further information in a letter dated 3 November 2020 ("the GLD letter").

71. The "instructions" referred to in the 17 July 2018 letter had in fact been given, on the day before, 16 July 2018, when Ms Booth sent internal instructions to Jayne Reid, lawyer support officer at the Birkenhead office, with copy to Ms d'Albuquerque and Ms Brown for information, to arrange completion of the restriction application in relation to plots 7 and 8. In her covering email Ms Booth referred expressly to each of the objections (three from Nyland and one from O'Connor) as an "objection to the restriction affecting" the particular numbered plot, (rather than the registered title as a whole). In the instructions themselves, Ms Booth clearly considered that there were multiple applications i.e. a restriction application for each plot individually.

72. On 19 July 2018 Ms d'Albuquerque responded by email to Ms Booth informing Ms Booth that a practical issue with completing the restriction for plots 7 and 8 had been pointed out to her. The "system" would not "*let us do that without marking off the dealing which relates to the restriction against all the plots*". She put forward four options as to how they might proceed; options 2 and 3 effectively suggested splitting off the application for plots 7 and 8 from the application for plots 1-5, allowing completion of the former, and leaving the latter "pending". Option 4 was to explain that "*our systems will not allow completion in respect of plots 7 and 8, until we are also ready to complete the restriction against plots 1-5*". She added that, under option 4, the Claimants could be told "*their interest is protected in the meantime*". (Option 4 is essentially the position which the Defendant now submits is the only permissible route as a matter of law). Ms d'Albuquerque recommended one of options 1 to 3; and positively took the view that option 4 was not the best way forward. Ms Booth then responded directly to Ms d'Albuquerque asking if they could "*chat this through*".

73. However, as can be seen in the Decision, in fact option 4 was taken. As to how that came about, in the GLD letter, it is stated that option 4 was taken "*following internal Land Registry discussion and advice taken from their legal team*". In her second witness statement dated 11 December 2020, Ms Booth has given a further explanation of the reasons for adopting option 4: see paragraph 145 below.

Nyland's second objection

74. By letters dated 23 July 2018 Nyland raised further objections in respect of plots 1, 3 and 5. I refer to these objections as "Nyland 2". Each letter was headed by reference to the particular plot in question, with the new title number specific to that plot in parentheses, and by reference to overall land registry titles i.e. GM 514222 and GM 5554260 (or in the case of plot 1, just the latter). Each letter commenced by stating as follows (in response to the initial point made in the Defendant's letter of 17 July 2018):

> *"Firstly we are aware that the Application for a Restriction affects the above title numbers and this and our previous objections to the application for a Restriction apply to all of those titles.*

(This is despite the fact that, in the letter relating to plot 1, there was only one "above title number"). Each letter then continued:

> *We make the following additional representations:*
>
> *...*
>
> *6.* ***The JVA does not state that the sale of the property will be restricted and will require the consent of the Applicants to any sale****. The JVA simply states that a CH1 Charge registered against the property will protect the Applicant's interest and stop the property being sold without the Applicant's consent. That would be the case with any CH1 Charge since if consent was not given the buyer would take subject to the mortgage and in any event the registered charge would appear on the register of title in the Charges Register.*
>
> *7. It is therefore quite evident that* ***the JVA is not either explicit or implied consent to a Restriction and further the JVA does not purport to restrict the sale of the land. The JVA simply states the position that would apply after the registration of a CH1 Charge****."*
>
> *9. ... [*s.42(1)(a) did not apply*] "because the JVA does not as a matter of simple fact state that consent would be required to sell the land. The JVA states that a CH1 Charge registered against the land would prevent a sale without the Applicant's consent but that is an entirely different thing altogether.*

> …
>
> *11. Further more the provisions of Section 42 (a) … which refers to unlawfulness does not relate to breaches of simple private contract between parties. In Keith Hookway's rejection of the restriction application he sets out some examples of what conduct might amount to unlawfulness and these appear in his letter dated 8th July 2016. The unlawfulness in the statute relates to actions whereby but for the Restriction there would be unlawfulness in relation to a disposition of the land in question. That is evidently not the case here.… The sale had nothing at all to do with the Applicants who on the date of sale did not have an executed CH1 Charge in place whether registered or not.*
>
> *12. All that the Applicant had was a simple private contract which mentioned that a CH1 Charge would enable the Applicants to be in a position to have to give consent to any sale but there was no CH1 Charge and consequently the applicant have nothing in relation to the land in question which enables them to have a Restriction under Section 42 (a)" (**emphasis** added)*

On 24 July 2018, Mr Humphreys sent Nyland 2 to the Claimants under cover of an email, stating that its contents "are yet to be considered". No further objection was received from O'Connor.

The Decision

75. By email dated 26 July 2018 - the Decision -, Ms Booth informed Ms Ziga and Dr Razoq that, having considered the further objections raised in respect of plots 1, 3 and 5, "*I have concluded that the objections raised are not groundless within the meaning of s.73 LRA 2002*" and that "*accordingly, pursuant to s.73(5) your application cannot be determined until the objections have been disposed of"*. She therefore set in motion the formal dispute procedure under s.73(7). Ms Booth provided no reasons at the time for the Decision. She has subsequently provided her reasons, as set out in paragraph 84 below.

76. In that email, and of particular relevance to Ground 3, Ms Booth also noted that:

> *"… the effect of this objection is that we cannot complete your application at this stage. Although no objection was received in relation to your restriction affecting Plots 7 and 8, and nothing further has been received from Bryan O'Connor solicitors who act for the purchasers of Plots 2 and 4, it is open to these parties and others to make representations until the application is completed and marked off. This is normal HM Land Registry procedure."*

She also referred to voicemail messages from Dr Razoq, where he had expressed his dissatisfaction with her handling of the matter; she rejected his charges of discrimination.

Subsequent Events

77. By email dated 31 July 2018 together with attachment, the Claimants asked Ms Booth's manager for an urgent review of the Decision. In the attached seven page document ("the 31 July Representations") the Claimants raised matters now the subject of Grounds 2 and 4 in these proceedings. The Defendant did not undertake the review which was sought, but suggests that it is apparent from an email dated 17 August 2018 that the Defendant had read the 31 July Representations. Subsequently in September 2018 the Claimants wrote to the Defendant inviting registration of the restriction in respect of plots 2 and 4 i.e. raising Ground 3 below.

78. By letter dated 29 August 2018, the Defendant informed the Claimants of the amendment it intended to make to the form of the restriction for which the Claimants had applied, in order to reflect more accurately the separate plots within each title (GM 554260 and GM 514222). The restriction was to be amended to read as follows:

> *"no disposition of <u>any part</u> of the registered estate edged blue and numbered 1, 2, 3, 4, 5, 7 and 8 on the title plan … is to be registered without, in respect of any disposition of any part of the registered estate edged blue and numbered 1, 2 and 3 … a written -consent signed by Senada Ziga… (on behalf of Sensar Limited) … <u>and</u> in respect of any disposition of any part of the registered estate edged blue and numbered 4, 5, 7 or 8 … a written consent signed by Adil Razoq … (on behalf of Azdar Limited) …"*

The effect now is, first, to confine the restriction to part only of the registered estate (the 7 plots) and, secondly, to identify, in respect of those 7 distinct plots, which of the Claimants' consent is required. Thus, as regards plots 1 to 3, there would be a restriction upon disposition without the First Claimant's consent; and in respect of plots 4, 5, 7 and 8, there would restriction upon disposition without the Second Claimant's consent. The Defendant stated that the amended restriction better reflects the terms of the Judgment and the position set out in the joint venture agreements. At the same time the Defendant notified, and invited comments from, the Purchasers.

79. On 30 August 2018 this claim for judicial review was filed and issued for service.

80. Subsequently the Defendant notified the Claimants and the Nyland Purchasers about the next steps in the dispute resolution procedure. If the Claimants did not withdraw the Application or the Purchasers did not withdraw their objection, then the dispute had ultimately to be resolved in the FTT.

First Tier Tribunal proceedings

81. On 21 December 2018, the Defendant referred the applications for restrictions and the objections thereto to the FTT. On 19 June 2019, the FTT stayed its proceedings

pending the outcome of the present case, on the basis that, if the current judicial review proceedings were successful, the decision to refer the matter to the Tribunal would be quashed at the same time. In the order for the stay, the FTT judge characterised the Application as "the applications to register restrictions".

Procedural history

82. On 17 December 2018 His Honour Judge Worster refused permission on the papers. In detailed observations, he concluded that the proper forum for the arguments raised by the Claimants as to why the objections are groundless is the FTT and that this claim would not resolve that issue. The determination of the issue by the FTT in line with the statutory scheme would be a better way forward. However Judge Worster made some observations critical of the Defendant. First he pointed out that Ms Booth did not give detailed reasons for her decision. Although it was very difficult to conclude that the Defendant's decision was irrational, it might have been better if Ms Booth had set out her detailed reasons. He added that "on one reading" the arguments in Nyland 2 "may amount to a reformulation of matters that had already been raised".

83. On 15 May 2019 His Honour Judge McKenna granted permission. At the same time he ordered Ms Booth to serve a witness statement setting out the reasons why she concluded that the objections put forward were not groundless.

The reasons for the Decision

84. In her witness statement dated 10 June 2019, Ms Booth pointed out that Nyland had lodged additional representations on 23 July 2018. She continued as follows:

> *"The additional representations stated that the… JVAs entered into by the Applicants… constituted a private contract between the parties and contain no explicit or implicit requirement for the Applicants' consent to deal with the land but did for the Applicants to have the benefit of a CH1 charge. A CH1 would have provided security for the Applicants' interest and would have been carried forward to the leasehold titles if the sum secured were not repaid. However, no CH1 charge was executed in relation to plots 1 3 and 5. The additional representations sought to draw a distinction between the effect of the contract and that of a CH1 charge.*
>
> *The application for registration of a restriction in Form N was accepted on the basis that the JVAs could be interpreted as containing a potentially valid consent provision to prevent unlawful breach of the contract agreement in the JVA which was linked to the applicants' right of repayment on sale of the relevant property. In objection to this, Nyland and Beattie argued that the wording of the JVA did not contain an express agreement to restrict the sale of the property without prior consent; any consent required would only arise on execution (and registration) of a CH1 charge.*

> *I took the view that the interpretation of the contract provisions in the JVAs put forward by Nyman* [sic] *and Beattie and the distinction that they drew between the contract and charge constituted an arguable case and could not be dismissed as groundless" (emphasis added)*

Further evidence and argument in relation to Ground 3

85. Following the main hearing, a number of questions arose concerning Ground 3, and from the GLD letter. Further written submissions ensued, and as a result, Ms Booth provided her second witness statement. I then heard further argument at an oral hearing on 18 December 2020. These matters are addressed at paragraphs 144 and 145 below.

The Grounds for judicial review

86. The Claimants' grounds have been put forward in a number of ways during the course of the proceedings. I have received a very substantial amount of written materials from both parties, and in particular from the Claimants. I have considered all the material. It is agreed that in substance there are six grounds of challenge, as follows:

Ground 1: the Defendant gave no reasons for the finding that the objections were not groundless.

Ground 2: the Defendant's finding that the objection was not groundless is irrational and/or unlawful:

(a) the objection is clearly groundless;

(b) the objection had previously been found to be groundless by the Defendant;

(c) the objection had been found to be groundless in the earlier proceedings.

Ground 3: the Defendant is irrational or unreasonable for failing to register the restriction against the plots for which there is no objection other than the one found to be groundless.

Ground 4: the Defendant acted unfairly and failed to take into consideration a material matter, by failing to provide the Claimants with an opportunity to respond to the further objection, before finding it not groundless.

Ground 5: in any event the Defendant acted unfairly by notifying the objectors of the Application, notwithstanding that they had no right to be informed.

Ground 6: the Defendant breached the Court order when re-considering the application by using staff with previous involvement with the Application.

Ground 1: Reasons

The parties' contentions

87. *The Claimants* contend that the Defendant should have given reasons, at the time, for the Decision and that the failure to do so was unlawful. They rely upon *Oakley v South Cambridgeshire District Council* [2017] 1 WLR 3765 (CA) and *Dover DC v Campaign to Protect England (Kent)* [2018] 1 WLR 108. They seek to rely upon the observations of HH Judge Worster when refusing permission and upon the fact that HH Judge McKenna ordered reasons to be given; and upon the failures found by Judge Barker QC in the first judicial review. If reasons had been given at the time and the Claimants given a right to respond, this second judicial review could have been avoided.

88. *The Defendant* contends that there is no public law duty to give reasons for a decision that an objection is <u>not</u> groundless; and under the scheme envisaged by section 73, fairness does not require the imposition of a common law duty to give reasons. The scheme envisages a decision on the threshold question of whether an objection is "groundless" to be taken in the absence of a rebuttal from the applicant. The view of the Defendant that an objection is *not* groundless is one which the parties are free to accept or to ignore.

89. In any event the reasons that have since been provided are rational, sufficient and otherwise lawful. The law allows reasons to be given ex post facto; it is only illegal where the court is not satisfied that they are a proper reflection of the true reasons for the decision. The question is whether the later provision of reasons causes any prejudice. Here there was none. The Defendant accepted in its Detailed Grounds of Defence that it might have been better if Ms Booth had set out her detailed reasons in the Decision email.

90. The absence of detailed reasons does not in any event vitiate in public law the Decision that the objection was not groundless. If there was a breach of duty in not giving reasons, that breach has been remedied by the later provision of reasons; the challenge on this ground should be dismissed. Alternatively, there is no basis to quash the Decision; and any remedy should be a matter for further submission.

Discussion

The relevant legal principles

91. Where, in any case, there is no express statutory duty to give reasons for a decision, there is no general obligation to give reasons at common law: *Oakley*, supra, at §29 and *Dover*, supra, at §51 (both citing *ex parte Doody* [1994] 1 AC 511 at 564 E-F). However in *Oakley*, Elias LJ said (at §29 and 30):

> *"However the tendency is increasingly to require them rather than not.*
>
> *… the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so"*

92. The approach in *Oakley* was approved by the Supreme Court in the *Dover DC* case (at §§52 to 54). Even where a public authority is not generally under a common law duty to give reasons, such a duty may arise in the particular circumstances of a particular case. Whilst reaffirming the principle that public authorities are under no general common law duty to give reasons for their decisions, fairness may in some circumstances require it even in a statutory context in which no express duty is imposed. A principal justification for imposing such a duty is to enable a court to intervene and to make effective the right to challenge the decision by way of judicial review. The giving of reasons is essential to allow effective supervision by the courts, and fairness provides the link between the common law duty to give reasons for an administrative decision and the right to the individual affected to bring proceedings to challenge the legality of the decision.

93. As regards reasons given after the event, and in the course of subsequent proceedings challenging the decision in question, the court will exercise caution before accepting reasons for a decision not articulated at the time, particularly where given after the commencement of proceedings: *De Smith's Judicial Review* (8th edn) §7.116.

Application to the present case

94. In the present case, there is no express statutory duty upon the Defendant to give reasons for a decision under section 73(5) or (6). As regards a decision by the Defendant that an objection *is* groundless, there is considerable force in the argument that fairness does require the giving of reasons. Such a decision is determinative, and the regime under section 73 might well envisage a challenge by way of judicial review to such a decision. Such a decision is one of those cases which falls within the category identified in *Dover* at §54.

95. As regards a decision by the Defendant that an objection is *not* groundless, then, *in general*, I do not consider that fairness requires the Defendant to give reasons for such a decision. Such a decision does not determine the issue; it is a gateway decision; and the procedure to challenge that decision, and in fact to resolve the underlying issue, is the statutory mechanism of a reference to the FTT. The applicant (nor indeed the objector) does not need to know the Defendant's reasons for its gateway conclusion, since those reasons will have no bearing on the outcome of the reference to the FTT; and, it might be added, in the normal run of cases, an application for judicial review of that gateway decision would be unlikely.

96. However, in the very particular circumstances of this case, I consider that fairness did require the Defendant to give reasons for, and at the time of, the Decision. First, the Application, by that time, had had a long history, including the remitting of the Application to the Defendant following the first, successful, judicial review, where Judge Barker QC had been critical of certain aspects of the Defendant's handling of the Application (see Judgment, paragraphs 62, 63 and 65 and reasons (3) in the Order). Secondly, once the matter was remitted, the Defendant had chosen to allow the Claimants to be involved in the reconsideration from the outset. It chose, but was not obliged, to notify the Claimants of the objections and to consider their observations in response. In the Provisional Decision, it reached a conclusion favourable to the Claimants, and did so based on very detailed reasoning. The Claimants were informed of this conclusion. The Defendant then chose to notify the Claimants of Nyland 2. Then, having done so, the Defendant changed its mind, but

on this occasion gave little or no reasoning. The Defendant has fairly accepted that it would have been better if Ms Booth had given reasons at the time. In these particular circumstances the duty of fairness required that the Claimants should know why the Defendant had reached the Decision.

97. As regards the reasons subsequently given by Ms Booth in her witness statement, although they are briefly stated, there is no reason not to accept them as being the true reasons for the Decision when made. I do not accept the suggestion made by the Claimants in oral argument that Ms Booth changed her mind in some way out of pique following heated exchanges with the Claimants. The reality is that upon consideration of the more detailed analysis in Nyland 2, she was satisfied that the objection was *not* groundless. As I find in relation to Ground 2 below, that conclusion was not irrational.

98. As regards the remedy for the breach of duty in not providing reasons, in my judgment the breach does not provide grounds to quash the Decision. The conclusion that the contention in Nyland 2 is arguable is not irrational. As to the Claimants' contention that if reasons had been given, these proceedings could have been avoided and/or time and expense would not have been wasted, I will hear further argument from the parties as to how this might be reflected in any final order, particularly in relation to costs.

99. I find therefore that the Defendant was in breach of a duty to give reasons, and to that extent only, Ground 1 succeeds.

Ground 2: Finding of "not groundless" irrational and/or unlawful

The parties' contentions

The Claimants' contentions

100. Ground 2 is put forward on three bases: see paragraph 86 above. I address basis (a) first, before considering bases (b) and (c).

(a) The objection is groundless and the decision that it was not groundless was irrational

101. The Claimants contend that the Nyland objection is clearly groundless because there has been breach of contract on the part of NVC and breach of contract is unlawfulness for the purposes of section 42(1)(a) LRA 2002. A number of breaches of contract are relied upon; most pertinently, that NVC was in breach of the JVAs by failing to register the CH1 legal charge. The contract provides for a legal charge; the legal charge provides for consent; it follows that the contract provides for consent. The very essence of the JVAs was to create security and prevent sale without the Claimants' consent. The Nyland Purchasers should not be permitted to rely upon NVC's breach of an obligation which would have imposed a requirement for consent, to argue that there was no requirement for consent. Their argument seeks to reward a breach of contract. Reliance is also placed on failure to provide a schedule of profit and a property account prior to sale as relevant breaches of contract. The Decision that the objection was not groundless is irrational as it "upholds" the argument in Nyland 2 which is flawed.

(b) and (c): The Defendant was bound by its previous determination of the issue and/or by the Judgment

102. The Claimants further contend that the argument that the JVA did not provide for consent was raised by the Defendant and dismissed by Judge Barker QC. It was raised again in Nyland 1 and dismissed by the Defendant in the Provisional Decision. It was then raised again in Nyland 2 and this time the Defendant changed its mind, going against their own earlier findings and against the evidence. This is unlawful and/or irrational. The argument that the Defendant is bound is considered under two separate heads.

103. First, as regards the Defendant's previous decision(s), by the Provisional Decision, the Defendant dismissed the argument in Nyland 1 and found that the JVA did provide for consent. The argument in Nyland 2 was essentially the same argument as made in Nyland 1 (as suggested by HH Judge Worster). The Defendant is not permitted to change its mind and was bound by its conclusion in the Provisional Decision; alternatively it was irrational for the Defendant to do so.

104. Further, the Claimants contend that the Defendant dismissed the argument in the July 2016 Decision, and was bound by that determination of the issue then.

105. The principle of res judicata, and issue estoppel, in particular applies to adjudications by a public body in public law; see *R (on the application of DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7 at §46.

106. As to *Henderson v Henderson* abuse, the Claimants contend that the case made in Nyland 2 ought to have been raised in the first judicial review, and the Defendant's failure to do so precludes the Defendant from deciding (in the Decision) that the objection is not groundless.

107. Secondly, as regards the effect of the Judgment, the Nyland 2 argument had been used by the Defendant before Judge Barker QC. As regards cause of action estoppel – the first set of proceedings is the first judicial review and the second set of proceedings is the reference to the FTT; the parties to both sets of proceedings are the Claimants and the Purchasers – the latter being privy to the first judicial review because they were provided with the documents at the time.

108. As regards issue estoppel, the "issue" is whether "the wording of the JVA did not contain an express agreement to restrict the sale of the property without prior consent; any consent required would only arise on execution (and registration) of a CH1 charge." In the Judgment, at paragraphs 53 and 57 (and 50, 60 and 62), the judge *decided* that issue in favour of the Claimants; the JVA did provide for consent.

The Defendant's contentions

(a) The objection is groundless and decision that it was not groundless was irrational

109. The Defendant contends that the "groundless" threshold is a very low one; which the Defendant here was entitled to conclude had been exceeded. The dispute between the parties is whether any contractual restriction on sale without consent arose immediately or only on execution of the CH1 charge. Ms Booth took the view that

the Nyland Purchasers' interpretation that it was the latter constituted an arguable case and could not be dismissed as groundless. That was a rational judgment and one which she was entitled to reach. The correct construction of the JVAs raised issues which do not admit of only one possible answer. The Defendant does not contend that the Nyland interpretation is correct; that is properly a matter for the FTT. Beyond assessing whether the Defendant could lawfully find the objection to be not groundless, the issue should not be resolved in these proceedings, which would be to circumvent the statutory dispute mechanism provided for by section 73(7) LRA 2002.

110. As regards the question whether the relevant "breach of contract" is the prior breach of failing to register the CH1 charge, the unlawfulness must be in relation to the disposition.

(b) and (c): The Defendant was bound by its previous determination of the issue and/or by the Judgment

111. The Defendant contends that, in so far as the Claimants place reliance upon the Defendant's favourable indication on 9 May 2018, that could not prejudice the Defendant from properly considering any objections which were made thereafter and assessing with an open mind whether or not they were groundless.

112. In so far as the Claimants rely on the Provisional Decision, Nyland 2 was materially different from Nyland 1. Ms Booth was entitled to reach a different conclusion. Even if it was the same objection, Ms Booth was entitled to change her mind, if, rationally, there is more than one answer to the issue. In any event there can be no "issue estoppel" as between the Provisional Decision and the Decision. There are no "proceedings between the Claimants and the Defendant". As to *Henderson v Henderson*, the Claimant's argument undermines the statutory scheme, because at the stage of the first judicial review there had been no objections. The Purchasers were entitled to make whatever point they chose; and the Defendant was bound to consider them; that cannot preclude the Defendant from carrying out its statutory duty.

113. As regards the Judgment, the Defendant was not bound by any previous court judgment to reject as groundless Nyland 2 nor to register the restriction. First, the "issue" was not "decided" by Judge Barker QC and so no issue estoppel is capable of arising. Judge Barker QC did not determine, nor seek to determine, the outcome of the Application. He remitted it to the Defendant for fresh consideration. The judge's observations at paragraphs 46 and 53, 56-57 on the issue do not resolve the later objection nor create any issue estoppel; and not one capable of binding the Purchasers who were not party to the judicial review in any event. At most, Judge Barker QC thought that there was a potentially valid consent provision in the contract which had not been properly considered by the Defendant. Paragraphs 53 and 57 are a judicial discussion of the construction issue, but there was no express finding as to the point in time at which the requirement for consent would arise. The judge did not finally determine the construction issue. If the case goes to the FTT, the Claimants can pray in aid the judge's analysis.

114. Secondly, even if Judge Barker QC did determine the issue of construction of the JVA, neither cause of action estoppel nor *Henderson v Henderson* abuse has any application; and issue estoppel ought not to arise in the circumstances of this case. As to cause of action estoppel, this is not a case of the Defendant pursing a cause of

action which has already been pursued - either in relation to the cancellation decision or in relation to the Provisional Decision.

115. As to issue estoppel, this would have the effect of restricting the points which the Purchasers could make; the Purchasers would be bound by a construction of the JVAs in proceedings to which they were not parties. This is borne out by the fact that, when the construction issue is referred to the FTT under section 73(7), the Claimants could not rely on an issue estoppel arising from the Judgment, to preclude the Purchasers from putting forward a construction different from that reached by the judge (on this hypothesis). The proceedings in the FTT would be between the Claimant and the Purchasers; the latter could not be bound by a decision on an issue in prior proceedings to which they were not a party. If an issue estoppel operated against the Defendant (in the Decision) or in these proceedings, it would have the same effect as if there was an issue estoppel against the Purchasers.

116. This illustrates the difficulties in reading across private law principles of issue estoppel into the exercise of public law statutory duties; in these circumstances, the scheme here and the position of Purchasers would constitute a "special circumstance" to allow the Defendant not to be bound by Judge Barker QC's decision.

Discussion

(a) Whether the objections were "groundless"

117. In order for this part of Ground 2 to succeed, I would have to find not only that the objection is groundless, but moreover that no reasonable Defendant could have concluded it was anything other than groundless i.e. was bound to conclude it was groundless. Whether an objection is more than groundless is a low threshold; to be groundless, it must be bound to fail. If it is not groundless, then ultimately the FTT is the proper forum for the resolution of the dispute.

118. The issue is whether disposition of the plot in question without the Claimants' consent would be unlawful for the purposes of section 42(1)(a) LRA 2020. The Purchasers' objection is that such disposition would not be unlawful.

119. It is common ground that breach of contact can amount to "unlawfulness" within section 42(1)(a). If a disposition of the plot in question without the Claimants' consent is a breach of contract, then that disposition would be unlawful.

120. But it is not clear that this is the case. It is arguable, that, as a matter of construction of the JVA, the contract itself does not impose a consent requirement; rather it imposes a requirement to register a CH1 which in turn, if and when registered, will impose a requirement of consent. I agree with Ms Booth's conclusion in her reasons, that the contention in Nyland 2 that the requirement of consent would only arise on execution of the charge (rather than by virtue of the JVA itself) is arguable. In any event such a conclusion is not one which she could not rationally have reached.

121. The Claimants then point to other breaches of contract as being the relevant unlawfulness. Some of these have no connection whatsoever with the disposition of the plot; and so cannot amount to unlawfulness. As regards breach of the terms in the JVA concerning the provision of accounts prior to exchange of contracts, it is at least

arguable that disposition without providing these accounts is not unlawfulness in relation to the disposition.

122. The Claimants' strongest argument that a disposition would amount to a relevant breach of contract is the contention that, because of the prior breach of contract in failing to register a CH1 charge, (and thereby failing to create a requirement of consent), a subsequent disposition by NVC without the Claimants' consent is itself a breach of contract.

123. That the failure to register the CH1 charge is a breach of contract seems to me to be very arguable indeed. But the question is whether disposition without the Claimants' consent, in circumstances where there has been a *prior* breach by failure to register the CH1 (and where, but for that breach, disposition without consent would have been impossible or a breach of the CH1 or otherwise unlawful) is itself a breach of contract. That is a contention which is not bound to succeed and certainly not one which no reasonable decision maker could find was bound to succeed. A contention that the breach of contract there relied upon has already occurred prior to the disposition (and was not constituted by the disposition itself) could not be regarded as hopeless. The point can be tested by asking whether the Claimants would have been entitled to an injunction to restrain the leases and/or transfers in the circumstances which happened, in reliance, not upon a contractual obligation to obtain consent, but rather in reliance upon the prior breach of a contractual obligation to register a CH1 which would have imposed such a consent requirement. That is a question which does not admit of an immediate and straightforward answer.

124. My own view is that, as a matter of construction of the JVA, the argument that a disposition without consent does not constitute a breach of contract is not groundless or hopeless. In any event, even if I were persuaded that, as a matter of construction, disposition without consent is a breach of contract, the point is not so clear that no rational decision maker could have concluded otherwise.

125. These are all arguments properly for determination by the FTT; and the Claimants will be able to make the arguments they have made to this Court in those proceedings. As HH Judge Worster said, the FTT is really the proper forum for the resolution of this disputed issue. For these reasons this part of Ground 2 fails.

(b) and (c) the Defendant was bound by its previous determination of the issue and/or by the Judgment

126. First, I set out the relevant legal principles concerning "res judicata". Secondly, I address the contention that the Defendant was bound by and/or could not rationally depart from previous conclusions which it had reached. Thirdly, I address the contention that the Defendant was bound and/or could not rationally depart from HH Judge Barker QC's conclusions in the Judgment.

(1) Res judicata: the relevant legal principles

127. The relevant law concerning res judicata is summarised by Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats UK Ltd* [2013] UKSC 46 at §17, where he identified a number of distinct principles, three of which are of relevance here:

(1) Cause of action estoppel: once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This precludes a party from challenging the same cause of action in subsequent proceedings.

(2) Issue Estoppel: even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both actions was decided on the earlier occasion and is binding on the parties.

(3) The principle in *Henderson v Henderson* (abuse of process) which precludes a party from raising in subsequent proceedings matters which were not, but which could and should have been, raised in earlier proceedings.

At §22, Lord Sumption explained that "except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully".

128. As far as issue estoppel is concerned, three conditions need to be satisfied:

(1) the same question must previously have been *decided*;

(2) the judicial decision which is said to create the estoppel must have been a *final decision* of a court of competent jurisdiction;

(3) *the parties to the prior judicial decision* (or their privies) must have been *the same persons as the parties to the subsequent proceedings* in which the estoppel is raised (or their privies).

See *Littlewood Retail Ltd v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch) at §152.

129. As regards issue estoppel in the field of public law, whilst in principle it applies, the scope of its application is not clear: see *Thrasyvolou v Secretary of State for the Environment* [1990] 2 AC 273 at 289 and *R (on the application of DN (Rwanda)) v Secretary of State for the Home Department*, supra, at §§27 and 28 (and the obiter observations of Lord Carnwath at §§44-57 relied upon by the Claimants). In *Thrasyvolou*, Lord Bridge stated as follows:

> *"in relation to adjudications subject to a comprehensive self-contained statutory code, the presumption … must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions" (emphasis added)*

130. Further issue estoppel can apply in the context of land registry proceedings in the FTT: see *Inhenagwa v Onyeneho* [2018] 1 P&CR 10 at §39.

(2) The Defendant's prior "decisions"

131. First, as regards the Provisional Decision and the Decision, in my judgment, Nyland 1 and Nyland 2 put forward essentially the same argument; namely that the JVA itself did not impose a contractual condition of consent. However, I consider that Nyland 2 put forward an elucidation of this argument, and most significantly, responded directly to the points made by the Defendant in the Provisional Decision, giving reasons why the Provisional Decision was wrong. As explained below, and as was appropriate, the Defendant invited such further observations and Nyland was entitled to make those observations in response. In summary, Nyland 2 contained a more developed analysis of their argument.

132. In these circumstances, the Defendant was not bound to follow the Provisional Decision; rather it was entitled, and indeed bound, to take account of Nyland 2, and on so doing, entitled to change its position. The Defendant did not accept the argument in Nyland 2; merely it came to the conclusion that the argument was not "groundless".

133. Moreover, even if, contrary to the above, Nyland 1 and Nyland 2 were essentially the same, then, unless it is clear now that the Nyland 2 objection was in fact groundless (which I have decided it was not), the Defendant was entitled to change its position from that set out in the Provisional Decision.

134. Neither cause of action estoppel nor *Henderson v Henderson* abuse have any application in this context. In so far as the Claimants' case here is put on the basis of issue estoppel as between the Provisional Decision and the Decision, then it is unfounded. Even assuming that it is possible for issue estoppel to arise in the context of this public law decision (and further that the issue (under section 73(6)) of whether an objection is "groundless" constitutes "proceedings"), the Defendant did not "decide" the issue in the Provisional Decision; it expressed its provisional view, subject to further representations. Secondly, there can be no estoppel on the issue as between the Defendant and the Claimants; there were no proceedings between the Defendant and *the Claimants* who had no right to participate at the stage of deciding whether the objection was groundless; if there were any "proceedings" at all at that stage, they were between the Defendant and the Purchasers. Thirdly, even if it could be said that there were proceedings between the Defendant and the Purchasers, the Purchasers are not seeking to contend that the Defendant is bound by the Provisional Decision; in fact they contend for the very opposite conclusion. Nor, in these circumstances, was it irrational for the Defendant to change its mind in the Decision.

135. Secondly, in so far as the Claimants contend that the Defendant was bound by the July 2016 Decision, this contention is unfounded. The July 2016 Decision was quashed by the Order and, by the time of the Decision, was not binding.

(3) The Judgment of HH Judge Barker QC

136. The first issue is whether, in the Judgment, Judge Barker QC "decided" the issue. Only if he did "decide" the issue, do issues of res judicata potentially arise.

(a) Did Judge Barker QC decide the issue?

137. I agree with Claimants that there are certain passages in the Judgment which suggest that Judge Barker QC considered that the JVAs themselves (and not merely the CH1 charge) impose a contractual requirement of consent. He expressed views which are consistent with the Claimants' construction of the JVA. At paragraph 50 he seems to be saying that the letter itself required consent; in paragraph 53, the letter, albeit by its reference to the CH1, "focusses on consent"; the second half of paragraph 57 is somewhat ambiguous; on the one hand the judge is making a statement of general principle ("when *a* contract … "); on the other hand, the words "such as here" suggest that he is considering *this* contract. However his conclusion there that "it is difficult to see why" is not definitive. At paragraph 60 the judge refers to "the consent terms agreed"; on the other hand, at paragraph 61, he refers to a "potentially valid" consent provision in the JVAs. As Mr Clarke accepted, the Claimants can rely before the FTT upon some of Judge Barker QC's views expressed in these passages.

138. However, in my judgment, Judge Barker QC did not "decide" (or determine) this issue. First, the varying passages above highlight that he made no clear and definitive finding. More importantly, whether or not the JVAs imposed a contractual requirement of consent was not the, or even an, issue which fell for determination by Judge Barker QC, nor was a decision necessary to resolve the issues which were before him. What fell for his determination was a public law challenge to the Defendant's decision to cancel the Application. Judge Barker QC made this clear at paragraphs 28 and 29 of the Judgment. He stated expressly that he was not in a position to substitute his own view of the correct decision. That challenge was raised, and upheld, on a number of different grounds. (In paragraph (3) of the reasons in the Order, Judge Barker QC found that the reasons for rejection the Applicant's contention were "unclear" – not that the reasons were, in any event, wrong). What he could do, and as appears from the Order what he did, was to remit the case for the Defendant to reconsider. That fact alone makes it clear that Judge Barker QC did not "decide" the issue. For this reason alone, the Judgment is not capable of giving rise to an issue estoppel (or other form of res judicata).

(b) Res judicata

139. Even if, contrary to the foregoing, Judge Barker QC did or had "decided" the issue, I would have concluded in any event that the Defendant was not precluded from making the Decision, nor from contending, in the present proceedings, that the Nyland 2 objection was not groundless.

140. First, on any view, no question of cause of action estoppel or *Henderson v Henderson* abuse arises here. As to the former, the "issue" relating to the construction of the JVAs is in no sense a "cause of action". As to the latter, the Nyland 2 view of the construction issue was, broadly, in fact raised by the Defendant in the first judicial review proceedings.

141. Secondly, as to issue estoppel, in this context, such a contention raises difficult questions as to the application of the principle in this particular public law context. My view is that the Defendant is correct in saying that there could not be an issue estoppel because it would prevent the Defendant from performing its statutory duty to consider objections raised to the Application under section 73, in a statutory process

which Judge Barker QC himself referred back to the Defendant to decide and where the potential objectors had played no part in the first judicial review proceedings. (I do not accept that the mere fact that the Defendant had notified Nyland/the Purchasers of the existence and content of those proceedings is sufficient to make them "parties or privy" to the Judge Barker QC's "prior judicial decision"). Moreover in so far as it is contended that the Defendant was estopped by the Judgment from reaching a different conclusion in the *Decision*, it is hard to see that the latter – a decision as between the Defendant and the Purchasers – was in "proceedings between the same parties". That this is so is confirmed by consideration of the position in subsequent FTT proceedings under section 73(6), i.e. proceedings between the Claimants and the Purchasers; the latter could not be bound by any decision in proceedings (the first judicial review) to which they were not party. Whatever the scope of the doctrine of issue estoppel in public law proceedings, the foregoing would in my view mean that, "as a matter of construction of the relevant statutory provisions", the Defendant would not to be bound by any decision of Judge Barker QC's on the issue.

Conclusion on Ground 2

142. In the light of the foregoing, it was not unlawful for the Defendant to conclude that Nyland 2 was not groundless; moreover, the Defendant was not bound by previous decisions, nor was it irrational of the Defendant, not to so conclude. There were good reasons for the Defendant to reach the conclusion it did, and not to follow Judge Barker QC's possible views, or its own earlier views. Ground 2 fails.

Ground 3: failure to register restrictions for plots 2 and 4

The parties' contentions

143. In view of the history of this matter, I start by setting out *the Defendant's* position.

The Defendant's explanations over time

144. In the GLD letter (see paragraph 70 above), the Defendant's position, and in particular its change of position, was explained, for the first time, in more detail. After explaining what had in fact happened between 17 and 24 July 2018 in relation to plots 7 and 8, the GLD letter asserted that a restriction cannot be physically added to the register until the restriction application as a whole is completed. The letter further explained that the plot transfers to the Purchasers contain easements which affect the whole of the title and therefore the Nyland objections (plots 1, 3 and 5) are necessarily made in respect of the entirety of the titles, and not just in respect of the plots affected. Further the Defendant took the view that the application cannot be viewed as "multiple applications". Judge Barker QC referred to "the application". Once the dispute in the FTT has been resolved, the restriction can be entered. If the FTT were to find in favour of the Nyland 2 objections, then the Defendant "would comply with the order of the FTT made taking account of all the facts before it". Finally the Land Registry blog relied upon by the Claimants takes the matter no further – it was the view of one person and not the view of the Defendant.

145. In her second statement, Ms Booth set out her reasons, as at 26 July 2018, for not adopting options 1 to 3 as suggested by Ms d'Albuquerque. She claimed that Ms d'Albuquerque was not aware of the specific details of the Claimants' application as

that was not part of her role. Ms Booth took internal legal advice into account and concluded that none of options 1 to 3 were possible. There was a single application only. There is no mechanism under the LRA 2002 and the Rules to complete part of a single application. Completion of an application means entry of the restriction. She relied on the fact that the Nyland objections "related to the whole of both titles and objected to the completion of the application". She then considered each of Ms d'Albuquerque's options 1 to 3. Options 2 and 3 involved entering an additional "application" in the day list and backdating it to before the existing application. She accepted that, in very limited circumstances, the Defendant can enter an application on the day list and backdate it. But that cannot be used for administrative convenience, nor where other parties may be affected unless a court so orders. When Ms d'Albuquerque put forward options 2 and 3, she "was not aware that the Claimants had made a single application and not multiple applications for multiple restrictions." (I observe that this cannot be correct; first, because it is clear on the documents at the time that Ms d'Albuquerque was fully aware of the fact that there was only one application and, secondly, because if there had been multiple applications, there would have been no need for her to put forward options 2 and 3). Following internal legal advice, Ms Booth judged that options 2 and 3 were not possible because the pending application was a single application and not a set of multiple applications. Options 2 and 3 would involve the creation of multiple applications. The Defendant does not have power to treat a single application as multiple applications. As regards the issue of easements in the leases for plots 1, 3 and 5, she did not consider this at all at the time of the Decision. Ms Booth also pointed out that, in relation to the Land, there are no "plot specific" restrictions on the register – even though there are "plot specific" charges.

The Defendant's case

146. Against this background, the Defendant's case is that, first, correctly interpreted, under s.73 LRA 2002, an objection to an application affects the application in its entirety, such that under section 73(5)(b), the Defendant cannot dispose of the application (or any part of it) until the objection is disposed of. Secondly, and more generally, an application cannot be "part-pending" and "part-completed". Thirdly, it follows that, as a matter of law, it is not possible to complete the Application in respect of those plots for which no non-groundless objections have been received. Completion of the application must await the resolution of the outstanding objections. It was the Claimants' choice whether to make a single application, as opposed to multiple applications each directed to a specific plot. In summary, as a matter of law, the Defendant cannot determine the Application, made as it was in respect of plots 1-5, 7 and 8 "until the application has been disposed of". (This primary argument, of construction, has been made by the Defendant since the outset of the proceedings).

147. The Defendant makes a further argument: namely that the Nyland 2 letters raised objections in respect, not merely of each Purchaser's own plot, but in respect of all the plots to which the Application related; relying upon the statement in those letters that the objections "apply to all of those titles" (see paragraph 74 above).

148. In the Detailed Grounds of Defence, the Defendant apologised for the contrary suggestion, which it accepted it had made in its letter of 17 July 2018 to the Claimants, that entering restrictions for plots 7 and 8 is possible under the regime. As regards the position relating to easements, despite what was said in the GLD letter,

Mr Clarke accepts that Ms Booth stated that this was not something that she considered at the time of the decision on 26 July 2018, and further that it was not advanced in the Detailed Grounds of Defence or the Defendant's skeleton argument. Mr Clarke ultimately placed little particular reliance upon considerations relating to easements.

The Claimants' case

149. *The Claimants* contend that, having found that the O'Connor objection was groundless, the Defendant was obliged, pursuant to section 73(6) to register the restriction in relation to plots 2 and 4. They make the following points:

(1) As a matter of construction of s.73, a single application can be "completed" in part. The Defendants' argument that this would result in the application being taken off the day list as regards the other plots is not supported by any provision, guidance or internal policy.

(2) A single application can be made for more than one restriction: Practice Guide 19, section 3.5.1. The restrictions sought in the Application were restrictions in respect of the individual plots and to be registered on each plot. The Claimants could not have made separate applications for each plot, because at the time of the Application, the plots were under one (or in fact two) titles covering all the plots. Subsequently the plots were given separate titles. Alternatively the Defendant could, and should, have treated the Application as an application for multiple restrictions.

(3) There is no need for an application at all. Practice Guide 19 section 3.2.1 provides that the Defendant can register a restriction even where there is no application to do so. This is borne out by Rule 12(3).

(4) The Defendant's reasons for its refusal to enter restrictions in relation to these plots are insufficient; its subsequent explanations are an impermissible reconstruction of reasons. The Defendant's position in relation to plots 2 and 4 (and 7 and 8) has chopped and changed; first, Ms Booth indicated that restrictions in relation to plots 7 and 8 could be entered; then since changing her position, Ms Booth has given four different and inconsistent reasons for doing so, namely: O'Connor and others can still make representations; impossibility of partial completion of a single application; Nyland 2 objected to all plots; and difficulties arising from easements.

(5) In any event Nyland 2 did not make their objections in respect of all of the plots on the Land.

(6) Ms Booth's second statement did not accurately state the position. No good reason has been advanced as to why Ms d'Albuquerque's options 2 and 3 could not have been adopted.

(7) The Claimants rely upon an exchange on a land registry blog in October 2020 which they say suggests that it is possible for one title to be updated before another title affected by the same application is updated.

(8) It was open to the Defendant to raise a requisition inviting a change in the application, by splitting it into multiple applications for individual plots; Judge Barker QC (at paragraph 62) suggested that it was open to the Defendant to raise requisitions in order to clarify the position.

(9) The Defendant has registered restrictions in respect of individual plots within the Land, regardless of the position concerning easements over different plots.

Discussion

150. This is a difficult issue, which has required further evidence and submissions. The Defendant's approach to plots 7 and 8 (and 2 and 4) has been confused and confusing. Its reasons, at the time, for not entering a restriction in relation to these plots have been various and inconsistent. The Claimants make a number of justified criticisms.

(1) The Defendant first indicated that it had decided to proceed to register the restriction in the absence of objection, and even though objections had been received in respect of other plots comprised within one and the same application. It appears that at that stage, Ms Booth was not aware that the Defendant's position is that, as a matter of law, this could not be done.

(2) Whilst apologising in the Detailed Grounds of Defence for its mistake in the letter of 17 July 2018, it only became clear after the main oral hearing that in fact Ms Booth had sought, and obtained on 19 July 2018, confirmation that she could and should go ahead with that course of action (registering in respect of plots 7 and 8), but then at some point between 19 and 24 July 2018, she had received legal advice to the contrary and changed her mind. It was only with her second statement provided on 11 December 2020 that she explained why there was a change of mind at the time and why it was decided not to follow Ms d'Albuquerque's view.

(3) The explanation given in the 26 July Decision is not clearly the same as the argument now relied upon.

(4) I do not accept the Defendants' alternative argument that the Nyland 2 letters indicate that each Purchaser was making an objection to a restriction in respect of all 7 plots. The statement that the objection "applies to all of those *titles*" was a clarificatory response to Ms Booth's email of 17 July 2018 where she queried why the original objection had referred only to one of the two *titles*; it was not concerned with which plots the objection was directed at. The heading to each Nyland 2 letter made clear that the objection related to the specific relevant *plot*.

(5) I also accept that there are inaccuracies in Ms Booth's second statement; particularly as regards Ms d'Albuquerque's knowledge at the time.

(6) The Defendant has put forward an "easement" argument, which is no longer relied upon.

151. In the light of the foregoing, there are grounds for concluding that the Defendant gave inadequate reasons, at the time, for refusing to enter restrictions in relation to plots 2

and 4. However the ultimate question is whether the decision to refuse to do so was irrational as alleged in Ground 3.

The issue of construction

152. First, there is key question of the proper construction of s.73(5)(b) LRA 2002. If the position is that, as a matter of law, it was (and is) not permissible for the Defendant to enter those restrictions, then in my judgment, regardless of the reasons given at the time and even now, the decision cannot be said to have been irrational; and even if it could be impugned for inadequacy of reasoning, I would apply section 31(2A) Senior Courts Act 1981 ("SCA") on the basis that the outcome would not have been substantially different if the conduct complained of had not occurred.

153. Turning, first, to the facts, whilst at various times, the Application has been described, by Ms Booth, by Ms d'Albuquerque and by the FTT judge, as "an application for restrictions" or "applications for restrictions", it is clear that there has only ever been one single application made. Moreover the Application sought a single compendious restriction.

154. As regards the Amended Restriction (amended after the Decision), in my judgment, this change very arguably amounts to an application for more than one restriction - for two restrictions: a restriction in relation to plot 1, 2 and 3 not to dispose without the consent of the First Claimant and a restriction in relation to the remaining four plots not to dispose without the consent of the Second Claimant. Nevertheless, despite this change, there is still only a single application: albeit one falling within Practice Guide 19, section 3.5.1.

155. The question of construction is whether the words "the application" in s.73(5)(b) mean "the application as a whole" (as the Defendant contends) or, alternatively, "that part of the application to which objection is taken" (or possibly "the application to the extent that and in so far as objection is taken") "The objection" in that sub-section refers back to s.73(1) – it is an objection "to an application"; not an objection to a particular restriction sought by that application nor to the effect of the restriction on a particular part of the registered title. "An application" in turn is referred to in section 43. In particular, s.43(3) envisages "an application" for the entry of "a restriction" – i.e. a single restriction. Section 45 then deals with notification of such a s.43 application. Importantly s.45(1) refers to "the right to object to it", - "it" being the application (and not, in terms, the restriction). S.45(2) imposes a bar on determining an application, unless all those notified have responded. Thus if, say, five persons are notified under s.45(1) and four of those respond in the time allowed indicating that they do not object, the Registrar cannot proceed to determine *the* application unless and until the fifth person responds. All of these provisions support the Defendant's construction. I conclude that the words "the application" mean "the application as a whole". On the facts, at the time of the Decision, there was only one application.

156. Further and in any event, as at the time of the Decision, the application related to a single compendious restriction. Whilst each of the Nyland Purchasers directed their objection to the restriction in so far as it would affect their own plot, it remained nonetheless an objection to the entry of a single restriction.

157. As regards the position where there is a single application, but for more than one restriction (Practice Guide 19 section 3.5.1), the position might be a little less clear. Nevertheless I accept the Defendant's submission that there remains only one "application" and for that reason s.73(5)(b) applies to the application as a whole. Sections 43, 45 and 73 do not contemplate a single application for more than one restriction. Rather this is covered by section 3.5.1. However it is significant that the case there contemplated is one where the underlying basis, or reason, for each restriction sought is "the same". Thus, if a person objects to only one of the restrictions sought in a single application, it makes sense that none of the restrictions sought should be determined until that objection is resolved, because that objection is likely to apply to all the restrictions, based as they are on the same reason. Indeed, even if the Application here could or should have been interpreted as an application for 7 separate restrictions, if the Nyland objections are upheld, and even though made only in respect of plots 1, 3 and 5, there is reason to consider that they might apply to plots 2 and 4, given the reason for the application for that restriction.

158. I conclude therefore that, as a matter of law, the Application is a single application and that the Defendant is not permitted to determine the Application or any part of it until the Nyland objections have been disposed of.

Discretion

159. If the foregoing construction is wrong, and it is possible to distinguish between parts of "an application", it might be said that because the O'Connor objection is groundless, s.73(6) disapplies s.73(5)(b). On this hypothesis, the effect of s.73(6), as a matter of statutory construction, is that the Defendant would be *permitted* to determine the Application in so far as it relates to plots 2 and 4. However it does not follow, at least as a matter of construction of LRA 2002, that the Registrar is *obliged* to determine the application, rather than await the outcome of the Nyland objections, where those objections undermine the basis for the restriction in general. (Moreover, I add that, even if he was bound to "determine the application", it is not clear to me that that necessarily means that he is bound to enter the restriction. In this regard, I raised with the parties the terms of the Registrar's general discretionary power in section 42(1) LRA 2002 to enter a restriction "if it appears to him" necessary or desirable for one of the statutory purposes. Mr Clarke however fairly did not contend that s.42 would in practice be a bar on entering a restriction where there is no effective objection). Nevertheless on this hypothesis I conclude that, under the statute, the Defendant had a discretion not to proceed to enter the restrictions for plots 2 and 4, pending disposal of the Nyland objections.

160. In final submissions, and on the hypothesis that the Decision in relation to the Nyland objections was upheld, the Claimants suggested the reason they pressed Ground 3 is that the entry of restrictions now in relation to plots 2 and 4 (and 7 and 8) is vital to protect their financial interests in those plots; and that if ultimately the Nyland objections were upheld by the FTT, then the proprietors could, if they wished, seek to have the restrictions disapplied. This argument seems to me to be misconceived. As Ms d'Albuquerque pointed out in relation to Option 4 (see paragraph 72 above), pending the determination of the Nyland objections (and thus the Application as a whole) the Claimants' position is protected, by the existing date of entry in the day list of the Application. If the Nyland objection is rejected, or if in any event, upon determination of those objections, the FTT or the Defendant conclude that restrictions

can nevertheless be entered in respect of Plots 2, 4, 7 and 8, those restrictions will take effect from the date of the Application: see Rule 20(1) at paragraph 12 above. In these circumstances, I conclude that, even if the Defendant did have a discretion to enter those restrictions now, its failure to do so is not irrational. There were good reasons to await the conclusion of the Nyland objections and the Claimants are adequately protected in the meantime.

161. As regards the Claimants' case that the Defendant could and should have treated the Application as multiple applications, the fact remains that at all times the Application was a single application, and that was what the Defendant was dealing with. I do not find Ms Booth's explanation as to why, if the Application had been split into separate applications, they could not have been backdated, particularly convincing – and Ms d'Albuquerque's proposals in options 2 and 3 seemed to work. On the other hand, the restriction sought was a single restriction applicable to the whole of the registered estate, and it might have been difficult to split up the restrictions**.** Nevertheless nothing would have been gained by such conduct – it would have given the Claimants no more protection than they have from the adoption of option 4.

162. Finally, as regards the Claimants' further arguments, first I do not accept their argument based on the fact that plots 2 and 4 (and 7 and 8) are now registered under titles which are separate from the titles relating to plots 1, 3 and/or 5. Whilst each of the individual plots may have had specific title numbers allocated to it, those title numbers are not operational until the applications to register the leases/transfers are completed; and I am told by the Defendant that that has not yet happened; not least because of the outstanding applications by the Claimants. Secondly, I do not place weight on an exchange on the Land Registry blog with an unidentified person speaking for the Defendant. Thirdly, there are no "plot specific" *restrictions* relating to the Land on the register.

163. Accordingly, I conclude that Ground 3 fails for the following reasons:

(1) As a matter of construction of s.73(5)(b) LRA 2002, the Defendant had no power to enter restrictions in respect of plots 2, 4, 7 and 8, pending disposal of the Nyland objections.

(2) In any event, even if the Defendant did have power to enter restrictions, its decision not to do so was not irrational.

Ground 4: Failure to provide opportunity to respond to Nyland 2

The parties' contentions

164. *The Claimants* contend that the Defendant failed to provide them with an opportunity to respond to Nyland 2. Moreover, when the Claimants did provide a detailed response in the 31 July Representations, after the Decision, the Defendant did not conduct a review. The Defendant accepted that it would have been preferable to have responded in greater detail to the points raised in that response. These failures amounted to breach of section 73(5) and to breach of the duty of procedural fairness. If the 31 July Representations had been considered, the referral to the FTT could have been avoided and time would not have been wasted. It was discriminatory to give Nyland and O'Connor the right and the time to respond to the application for a

restriction, but not to give the Claimants the same opportunity in respect of their objections.

165. *The Defendant* contends that, under the regime in section 73, there is no right to respond to a conclusion that an objection is not groundless. Effectively under the scheme in section 73 the applicant has no right at all to make representations on the question whether or not the objection is groundless. The applicant is notified only once it has been decided that the objection is not groundless. Notification prior to such a decision would invite satellite litigation which risks undermining the FTT process provided for by section 73(7). Assessing whether an objection is groundless is essentially a gatekeeping function and not in itself a form of dispute resolution requiring the involvement of the applicant. That Nyland 2 was found to be not groundless within 48 hours is not an indication of unlawfulness; the question for the Defendant was a simple one.

Discussion

166. First, on the facts, the Claimants' only complaint can be that they were not given the opportunity to respond to Nyland 2 before the Decision was taken. They were given the opportunity to respond to Nyland 1 and to O'Connor. They were also sent a copy of Nyland 2.

167. Secondly, in principle, I do not consider that a failure to give the applicant an opportunity, *prior* to the Defendant's decision on whether an objection is groundless, to make representations on an objection is a breach of section 73(5). Here, as pointed out in paragraph 19 above, the Defendant's analysis of the stages in the process and section 73(5)(a) and (6) is correct. There is no obligation even to notify the applicant of an objection before the decision under s.73(6) as to whether the objection is groundless.

168. Thirdly, however on the very particular facts of this case, I conclude that the Defendant should have given the Claimants the opportunity to comment on Nyland 2 before making the Decision. Those particular facts were the long history, including the first judicial review, which raised the central issue of the contractual requirement of consent, and more particularly the facts that (a) having been notified of Nyland 1, the Claimants *were* given an opportunity to respond to Nyland 1 and (b) in the Provisional Decision, the Defendants took account of the Claimants' representations on Nyland 1, and notified the Claimants of the Provisional Decision and its reasons in outline. Even if the Defendant wished to proceed to a decision promptly, the Claimants could and should have been given an opportunity to make further observations, where it was apparent that the Defendant was considering changing its mind. The Defendant accepts it would have been preferable for it to have done so. (In this regard, the indication, in the email of 24 July 2018 that Nyland 2 had not yet been considered, appeared to suggest that there was time for the Claimants to make such observations). In these circumstances, I find that the Defendant's failure to give the Claimants an opportunity to respond, or to consider the 31 July Representations, prior to making the Decision was a breach of the public law duty of procedural fairness.

169. However, I consider that the Claimants sustained no substantial prejudice as a result of this failure. The arguments made in the 31 July Representations have all now been made in these proceedings. As I have found in relation to Ground 2, those arguments

do not lead to the conclusion that the Defendant was bound to find the objections groundless nor that the Decision was unlawful or irrational. I am not satisfied that any breach of this duty of procedural fairness renders the Decision unlawful or irrational, and certainly does not provide a ground for quashing the Decision.

170. In these circumstances, I am satisfied that it is highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred (i.e. the Defendant had taken account of the 31 July Representations prior to the Decision). Accordingly under s.31(2A) SCA, I am bound to refuse any relief in respect of this ground. There are no reasons of exceptional public interest to exempt me from this course of action.

Ground 5: unfair notification to the objectors

The parties' contentions

171. *The Claimants* contend that the giving of notice of an application for a restriction is governed by section 42(3) LRA 2002; the person to whom notice is to be given is limited to the proprietor of the registered estate. Reliance is also placed on Practice Guide 19, section 3.4.5. Secondly, notice should not have been given to the Purchasers since their applications to register the transfers were made after the Application made in December 2014; to do was an irrational exercise of discretion in Rule 17. Thirdly, the Nyland Purchasers should not have been given a further opportunity to make representations by the Provisional Decision; to do so was an abuse of Rule 17. The Defendant's conduct was irrational and an abuse of process which delayed matters "massively". Further the Defendant should not have given the Purchasers more time to respond. Moreover, the Defendant's treatment of the Claimants, on the one hand, and the Purchaser, on the other, has been biased and not impartial. Mr Verdin of Nyland was involved in the fraudulent scheme and the Defendant has collaborated with him and favoured him.

172. *The Defendant* contends that the process by which the Decision was reached was fair. Under Rule 17, it had a wide discretion to decide who to notify of an application and the time in which to allow objections to be made. Section 73(1) provides that "anyone" may object. It was entirely proper to notify persons who would potentially be adversely affected by the Claimants' application. In so far as the Claimants complain about the extension of time given for the Nyland 1 objection there was no procedural unfairness in giving a short extension when the Purchasers' lawyers had not received copies of the notices. As to the suggestion that Mr Verdin of Nyland was involved in the fraudulent scheme, there was no decision to that effect, and certainly no evidence that the Defendant colluded with Mr Verdin.

Discussion

173. First, in addition to the case of the registered proprietor where notification is mandatory, the Defendant had a discretion as to the persons to whom it might notify the application for a restriction, where such notification is "necessary" or "desirable": see section 45(1)(b) LRA 2002 in combination with Rule 17. The fact that section 3.4.5 of Guide 19 confirms the *duty* to notify the registered proprietor under section 45(1)(a) does not in any way undermine the *discretion* to notify others. Secondly, in circumstances where anyone might object to an application (regardless of whether

notified or not), it was at least desirable for the Defendant to notify persons who would potentially be adversely affected by the Claimants' application. Here the Purchasers had purchased the plots in question; and the fact that the Claimant had applied for a restriction first in time, and before the leases/transfers to the Purchasers, was precisely why the Purchasers had a proper interest in the Application. In my judgment, the giving of notice to the Purchasers was not irrational, unfair or otherwise unlawful.

174. The Claimants' objection to the granting of an extension of time in which to make an objection is also unfounded. There was good reason to allow a further 12 days and the Claimants sustained no prejudice from the extension.

175. As regards the giving of the Nyland Purchasers a further opportunity to make representations in response to the Provisional Decision, this was a matter properly within the Defendant's discretion. The giving of such an opportunity to an objector is expressly referred to in section 2 of Practice Guide 37 (see paragraph 17 above). Here, the Defendant allowed Nyland "to clarify their grounds of objection and provide further information to show their objection was not groundless"; and, in Nyland 2, that is what Nyland did.

176. Finally, there is no evidence to support the allegation that the Defendant collaborated with and favoured Mr Verdin of Nyland.

177. In these circumstances, Ground 5 fails.

Ground 6: use of staff previously involved

The parties' contentions

178. *The Claimants* contend that the manner in which the Application was reconsidered after the Judgment was in breach of the terms of paragraph 3 of the Order, requiring independent consideration. First, Ms Booth was not a senior land registrar. Secondly, the Application was considered by persons who had previous dealings with it in the period leading to the July 2016 Decision ("the first phase"); Ms Booth based her decision on Alison Abbott's decision in the first phase and Ms Abbott remained indirectly involved in the second phase, as shown by Ms Booth's reference to her 2016 correspondence. Ms d'Albuquerque was heavily involved in the first phase (see her correspondence between August and December 2016) and in the second phase (see letter of 7 June 2018 and involvement on 19 July 2018). Ms Miriam Brown was involved in both phases. Thirdly, Ms Booth was involved personally in the first phase and leading up to the Judgment. Fourthly, Andrew Turek of the Treasury Solicitor has been involved in both phases. In summary, proper compliance with the Order required that the application should have been handed over to a completely new team. The involvement in the second phase of those from the first phase was bound to contaminate the reconsideration. For example Nyland 2 referred to the fact that their argument was very similar to the previous views of Ms Abbott and Mr Hookway.

179. *The Defendant* contends that the appointment of Ms Booth was in accordance with the Order; as is clear from the Defendant's email to the Claimants dated 1 May 2018. Ms Booth made the Decision. It was reasonable to keep the application with the local land registry, because there were a number of applications in respect of the plots and

all were being determined by the same office. The fact that Ms d'Albuquerque granted an extension of time was quite proper and did not result in any prejudice to the Claimants nor render the Decision unlawful. There was little or no evidence that any other member of staff involved in the first phase was substantially involved in the 2018 events leading to the Decision.

180. In response to a request at the oral hearing, in the GLD letter, the Defendant provided further information as to the staff that had been involved both in the first phase and then in the lead up to the Decision.

181. Ms Abbott, Mr Hookway (at the Fylde office) and Deborah Weaver (Mr Hookway's line manager based at the Coventry office) were involved in the July 2016 Decision. After 15 July 2016, Ms D'Albuquerque stepped in as someone independent of the July 2016 Decision to act as a referral point. That was done to ensure independence in the future handling of the matter, following the complaint which included allegations of bias against Mr Hookway.

182. Following the Judgment and Order, Ms Booth was appointed as the independent reviewer. She was appointed because she was completely independent of the casework/operational arm of the Defendant's legal directorate, where both Mr Hookway and Ms d'Albuquerque worked.

183. Ms d'Albuquerque had no involvement in the substantive decisions made by Ms Booth. The 16 July 2018 instructions concerning plots 7 and 8 were copied in to Ms D'Albuquerque for information only; the subsequent communications between Ms D'Albuquerque and Ms Booth, including emails on 19 July 2018, concerned the practicalities of processing the application and objections in accordance with Ms Booth's instructions. These took place after Ms Booth's substantive decisions had been made and did not influence the substantive decisions taken by Ms Booth independently and in accordance with the Order.

Discussion

184. The issue here is whether the Defendant has acted in breach of paragraph 3 of the Order. In view of the protracted and contentious history of relations between the Claimants and the Defendant, it is perhaps understandable that the Claimants have raised concerns about compliance with the Order, in spirit as well as in letter. It is clear now that there was no strict separation between those involved in the first phase and those involved in events leading to the Decision.

185. However in my judgment, first, the Order required a "senior land registrar" with no previous involvement (1) to give proper consideration to the Application and (2) to make a decision on the Application. Ms Booth is a senior land registrar; she had no previous involvement; and she was "nominated by" the Chief Land Registrar to carry out this task. That is what she did; she gave proper consideration to, and made a decision, on the Application. There is no evidence at all that Ms Booth did not take the decision after giving the matter her own distinct consideration. That she did so, is evidenced by the fact that, in the Provisional Decision, she took one view and was then persuaded the other way. She could have accepted (but did not accept) Nyland 1 as showing the objection was not groundless.

186. Secondly, there was no requirement in the Order for the Defendant to instruct an entirely new team of officials to deal with the Application nor for the Application to be moved to an entirely different office. The purpose of the requirement in the Order was to ensure that an independent mind was brought to bear on the final conclusion and was responsible for the decision. In any event there is no evidence that any of the individuals who had been involved in the first phase, and in particular in the July 2016 Decision, were involved in the Decision in 2018. As regards Ms Abbott, the reference, in Ms Booth's letter of 9 May 2018, back to her correspondence in 2016 does not show that Ms Abbott was involved at that later time. As regards Ms d'Albuquerque, she only became involved in 2016 after the July 2016 Decision; she was involved in the extension of time for Nyland objections in early June 2018 and she was involved again in the discussion, around 19 July 2018, concerning plots 7 and 8. Whilst the GLD letter is not strictly accurate in saying that this latter involvement came after the Decision, I am not satisfied that she was directly involved in the making of the Decision. As regards Ms Brown and Mr Turek, there is no evidence that they were involved in the Decision.

187. In my judgment, the Defendant complied with both the terms, and the spirit, of paragraph 3 of the Order. The Decision was taken by Ms Booth, who had been appointed in compliance with that paragraph. For this reason, Ground 6 fails.

Conclusion

188. In the light of the conclusions in paragraphs 99, 143, 163, 168-170, 179 and 187 above, Ground 1of the claim succeeds. In relation to Ground 4, there was a breach of the duty of procedural fairness, but no basis for the grant of relief. To this limited extent the claim for judicial review is well founded. The other grounds, and most particularly Ground 2 which is the heart of the Claimant's case, fail. In due course I will hear the parties on any issue of relief and other consequential matters.

189. The Claimants have a strong sense of grievance. They have lost significant sums of money, and have obtained a series of judgments in their favour, which appear to remain unsatisfied. They have raised detailed arguments with some skill. I realise they will be disappointed by this outcome. However, as Judge Worster pointed out, the real issue in this case falls to be determined by the statutory process provided for, namely through the First Tier Tribunal. The Claimants might have been better to have concentrated on this route.