Neutral Citation Number: [2009] EWHC 3333 (CH)

Claim No. 7MA30614

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

18 December 2009

Before:

HIS HONOUR JUDGE WAKSMAN QC

(sitting as Judge of the High Court)

BETWEEN

NOTIONDIAL LIMITED

Claimant

And

(1) BEAZER HOMES LIMITED
(2) BEAZER GROUP LIMITED

Defendants

Katherine Dunn (instructed by Haworth & Nuttall, Solicitors) for the Claimant
Christopher Pymont QC (instructed by Ward Hadaway, Solicitors) for the Defendant

Hearing dates: 5, 6, 7 and 20 and 21 October 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. In this action the Claimant ("Notiondial") seeks payment from the First Defendant ("Beazer") and its parent company, the Second Defendant ("Beazer Group") as guarantor, of monies due pursuant to a Supplemental Deed entered into between these (and other) parties on 13 March 2000 ("the Deed"). It is common ground that some monies were payable but the basis of calculation, and thus the overall sum due, are heavily in dispute. That is because the parties disagree as to the construction of Clause 6, the payment provision. This is triggered if planning permission was obtained for one part of the land ("Area J") which Beazer became entitled to purchase. That permission was obtained.

2. For determination by me at this stage is (a) the proper construction of Clause 6 and (b) if Notiondial is wrong as to its claimed construction, a claim for rectification, which is resisted by the Defendants. I am not assessing the precise amount due. That is for another day.

THE BASIC BACKGROUND

3. Before saying more about the particular issues arising it is necessary to set out the basic background. Notiondial is a subsidiary of Monarch Securities Limited ("Monarch") of which Mr Chris Morgan is the major shareholder. Both companies are engaged in the buying and selling of land for large scale-development. They sell, principally, to volume housebuilders of which Beazer is a well-known example.

4. The land in question here is at Ingleby Barwick in Teeside. In 1977, outline planning permission ("OPP") was granted for a very large residential and commercial development which was intended to create 7 new villages made up of some 8,000 houses – effectively a new town. It was the largest single development in the north of England. Building started in 1979 and Villages 1 – 6 have now been substantially created. Their location or intended location as at 1991 can be seen from the master plan at 1/144 (ie trial bundle volume 1 page 144). The plan at 1/145 shows the north part of the Ingleby Barwick site after much, but not all of it, had been developed. In particular, the "white" area in the top half corresponds broadly to the areas to be occupied by Village 6 (to the left of the road marked 669) and Village 5 (to its right).

5. The OPP had been granted to Yarmside Holdings Limited ("Yarmside"). By 1996, Monarch owned that company and Mr Morgan and his family owned Monarch. By the end of 1997 Yarmside owned or had options to purchase substantial parts of the land at Ingleby Barwick. This included a number of "ransom strips" so as to control access to areas proposed for development. Those strips, or some of them, are marked in red on the plan at 1/145. By this time, Yarmside had also undertaken significant infrastructure work at Ingleby Barwick. Its intention was not to undertake house-building itself but to sell off portions of the land to those who would, or who would sell on to other housebuilders. Such purchasers would have to pay in respect of the existing or proposed infrastructure works because they were within the control of Yarmside as a result of the OPP and agreements made with the planning authority at the time. In very broad terms this meant that any developer which wished to gain a foothold at Ingleby Barwick had to deal with Mr Morgan.

6. A more detailed representation of the areas comprising Villages 5 and 6 can be found on the plan dated June 1999 at 1/47 ("the June Plan"). Village 5 encompasses Areas A to F. Village 6 covers Areas G to P. The OPP did not cover Area J, the subject of Clause 6 of the Deed.

7. The area in the top half of the June Plan, bounded by yellow lines and straddling the northern parts of intended Villages 5 and 6 was known as Quarry Farm. By a contract made on 24 November 1997, the owners of Quarry Farm agreed to sell it to Notiondial (by then a subsidiary of Monarch) for £9.35m. £1m was paid at the outset with the balance being paid by two equal instalments on 31 May 2001 and 2002 ("the QF Agreements").

8. The area in the lower half of the June Plan, bounded by red -lines and straddling the southern parts of intended Villages 5 and 6 but also including Area J, was known as Barwick Farm. By a contract made on 2 December 1999, the owners of Barwick Farm, Mr William and Mr Charles Franks and Ms Smith ("the Franks") granted to Notiondial two separate options to purchase land at Barwick Farm ("the BF Agreement").

9. The land subject to the first option can be seen from the plan at 1/146. It lies within the blue lines in separate areas marked "Contract 1" ("the Option 1 Land"). The option had to be exercised by 30 November 2003 and the price payable was £5.5m. The land subject to the second option can be seen from the plan at 1/146. It also lies within the blue lines but in a separate area marked "Contract 2" ("the Option 2 Land") which includes Area J shown hatched in brown. This option had to be exercised by 30 November 2005 and the price payable was also £5.5m. The price paid by Notiondial for the options at the outset was £350,000 for each. A large scale representation of the land at Barwick Farm is shown in the plan annexed to the BF Agreement at 1/36. The area within the blues lines is the Option 1 Land and that within the green lines is the Option 2 Land. The triangle of land shaded in yellow is the "covenanted land" and the land bounded by yellow lines at the western edge of the plan is "retained land" both as defined in the BF Agreement. Notiondial was entitled to exercise one or both, or neither of the options. I will deal below with some of the detail of the BF Agreement.

10. On 13 March 2000, a number of agreements were executed: a substantive sale agreement between Monarch, Breakblock Limited ("Breakblock") and Notiondial, a share sale agreement between Monarch and Beazer relating to the share capital of Breakblock, and the Deed. The overall effect was the transfer by Monarch and its subsidiaries to Beazer of the following:

    (1) The benefit of the QF Agreements;

    (2) The benefit of the BF Agreement and in particular the two options;

    (3) Some ransom strips;

    (4) Further land adjacent to Whitehouse Farm to the immediate south of Area J .

11. The consideration payable was:

    (1) £9.032m for the benefit of the QF and BF Agreements;

(2) £1,096,200 for the ransom strips and

(3) A further sum of £1.9m in respect of costs already incurred in respect of the proposed developments.

12. In order actually to acquire the land the subject of the QF and BF Agreements, Beazer would of course also have to pay the £9.35m eventually due under the former and the £11m payable in total pursuant to the options under the latter. In addition, part of the Whitehouse Farm area transferred to Beazer was the subject of a contract of sale dated 1 February 2000 between Monarch and McLean Homes North-East Limited whereby 9.1 acres was to be sold at a price of £1.218m. In addition, Notiondial agreed to sell 13.3 acres which fell within the QF Agreement (Area C Village 5) to McLean Homes North-East Limited for £2.502m pursuant to a contract dated 2 March 2000 and a further 5.2 acres being Area D3 Village 5 to Harron Homes Limited for £1.118m pursuant to a contract dated 10 March 2000. Beazer took subject to, and with the benefit of, all of these contracts of sale.

13. It will be recalled that it was also agreed that there should be a further, uplift payment in the event that planning permission was obtained for Area J. This was provided for in Clause 6 of the Deed which states as follows:

> "Notiondial covenants with [Beazer] that they will consult with [Beazer] in negotiating and obtaining planning permission pursuant to application reference 00/0005/P ("the Additional Planning Permission") for the residential development of land outside of the [OPP]..and that in the event of such Additional Planning Permission being granted in respect of the land included in the [BF Agreement]..relating to Barwick Farm [ie Area J] [Beazer] will pay to Notiondial fifty per cent of the development value of such land such payment to be made within 28 days of such planning permission being granted or 29th November 2005 whichever shall be the later provided always that if the second option in the [BF Agreement].. is exercised prior to 29th November 2005 the date of such exercise shall be substituted for the said date of 29th November 2005. For the purpose of this clause **the development value shall be the best negotiated price on an arms length disposal of the land being sold as at the date of grant of such planning permission less the current value of the such land for agricultural purposes at such date.**" [emphasis in bold added]

14. On 3 March 2000 i.e. some 10 days before the Deed was made, planning permission was in fact granted for Area J, it having been sought in December 1999.

15. I should add that in 1999 and early 2000, the trading style of Beazer in the North-East was Leech Homes.

THE ISSUES

Construction

16. Notiondial claims that Clause 6 should be interpreted as follows:

Construction 1

(1) Development value is to be calculated by reference to the prices per acre being achieved at the time of the grant of planning permission for other sites at Ingleby Barwick where such sites were sold on a "fully serviced" basis and assuming that there are rights of access to such sites. "Fully serviced" for these purposes means

that the infrastructure for (but not on) such sites including the provision of services (including gas electricity, water) up to the boundary of the site was in place or would in due course be in place;

(2) Notiondial contends that at the relevant time, such sites were being sold at a price of about £220,000 per acre and as Area J occupied 19.81 acres of developable land the sum due on this construction is 50% of £4,358,200 (less agricultural value) being about £2.1m;

(3) On this basis it follows that there is no need for a valuation as such, merely a need to identify the "going rate" for other sites at Ingleby Barwick at the relevant time.

Construction 2

(4) If Notiondial is wrong about Construction 1 it contends for an alternative construction. On this basis a valuation is required. The starting point is the use of prices being obtained for other sites at Ingleby Barwick as above and, again, on the assumption that they are fully serviced (in the sense referred to above) and with rights of access.

17. The Defendants reject both Construction 1 and 2. They contend that a valuation process is required to arrive at development value which needs to take account not only of holding and abnormal costs but also the fact that taken by itself Area J itself is landlocked and is "ransomed" in the sense that it is to be regarded as having no rights of access for the purpose of being developed such that a significant deduction to its value must be made to account for the need to obtain access. That deduction could be as much as 50%. The Defendants had also contended that the valuation could not assume that the land was already fully serviced. However, in argument it became clear that Notiondial was contending for an assumption that the land was or would in due course be fully serviced (hence my definition of the expression above). The Defendants did not take issue with the latter save that the delay in obtaining a fully serviced position gave rise to, or contributed to, holding costs which were to be taken into account. The upshot of that is that the real issue between the parties on Construction 2 (ie as a matter of construction) is whether the valuation should or should not be discounted for the lack of access ("the Ransom Discount").

18. For the avoidance of doubt the following should be noted. The Claimant does not accept that as a matter of valuation principle or fact, any valuation conducted pursuant to Construction 2 should make any discount for holding costs due to any delay in obtaining the actual services. But the Claimant does not seek to rule it out as a matter of construction of Clause 6. Consequently, the question of whether any and if so what holding costs should be deducted, will be an issue within the valuation. Equally, there is the question of abnormal costs associated with Site J itself. The Claimant says that there are no or no significant such costs. The Defendants say that there are. But the Claimant does not say as a matter of construction of Clause 6 that such costs must be assumed not to exist. So the issue of abnormal costs will, again, form part of the valuation process.

19. If Notiondial is right on Construction 1, its total claim against Beazer is in the region of £2.1m. If it is right on Construction 2, that sum will fall to be reduced by effectively 50% of any abnormal and holding costs found hereafter to be deductible.

20. If Notiondial fails on Constructions 1 and 2, then, subject to rectification, the Defendants were liable to pay something in the order of £300-400,000 on the basis of a valuation reduced for holding and abnormal costs and the Ransom Discount. A valuation produced for Notiondial by Appletons on 17 January 2003 gave a development value figure of £4.869m. A valuation produced by Knight Frank on 13 June 2006 gave a figure of £657,657. A sum equal to 50% of that figure has been paid to Notiondial which holds it on account of the very much larger sum it seeks.

Rectification

21. If Notiondial fails to establish Construction 1 or 2, it seeks in the alternative, rectification of the Deed to the same effect as Construction 1, alternatively Construction 2. The claim in rectification is resisted by the Defendants. If Notiondial succeeds on Construction 2, it does not seek rectification even though a successful claim of rectification might be more advantageous to Notiondial (if granted in the form of Construction 1.) The Defendants also contend that even if Notiondial makes its case on rectification as against Beazer, it cannot establish such a case against Beazer Group (the Second Defendant) nor is there any other way in which Beazer Group could fall to be liable. They also maintain that if I now determine that rectification fails as against Beazer Group, it has the consequence of preventing any order for rectification even against Beazer alone.

Evidence

22. In this trial I heard much background evidence as well as evidence as to prior negotiations for, among other things, the Deed. Naturally, when considering the issue of Construction 1 disregard any evidence adduced in relation to rectification and which would be inadmissible on questions of construction.

23. I record here that I heard from the following witnesses. For the Claimant: Mr Morgan, David Hasling, who assisted Mr Morgan in respect of development at Ingleby Barwick at the time, Barry Richardson, then Managing Director of Beazer, Barry Miller, Managing Director of Bellway Homes North-East Limited (“Bellway") and John Richards, then Managing Director of the Newcastle division of Barratt Homes Limited ("Barratt"). For the Defendant: David Douglass, the solicitor acting for Beazer in relation to the transactions in question, David Jenkinson, present Chairman of both Defendants and Jeffrey Fairburn, a director of Persimmon Plc. Mr Jenkinson and Mr Fairburn both became involved with the affairs of the Defendants after they were taken over by Persimmon Plc or another Persimmon company in March 2001. I record that there was no evidence in written or oral form from Mr Bloom, Notiondial’s solicitor, for the unfortunate reason that he died some time ago. There are virtually no documents from his firm which assist.

24. The events with which I am concerned occurred back in late 1999 and early 2000, some 10 years ago. I bear that in mind when assessing the recollections of the witnesses. Fortunately there is a considerable body of contemporaneous documents which is of assistance to me including some notes of meetings which have also served to refresh the memory of some of the witnesses.

CONSTRUCTION

Factual Matrix Matters

25. The following matters appear to me to form part of the relevant factual or legal matrix.

(1) Since Area J is within Option 2 of the BF Agreement, it follows that if Beazer exercised that option it would have access to Area J from the rest of the Option 2 land in particular Areas H K and L. And if Option 1 was not exercised but Option 2 was, further rights were granted over the Option 1 land – see Clause 14 of the 8th schedule to the BF Agreement; further access was provided to Beazer through the sale of the ransom strips;

(2) If, on the other hand, Option 2 was not exercised, Area J would remain with the Franks together with the rest of the Option 2 land. If they wished to develop Area J there would be no problem of access as they owned the adjoining land;

(3) It is common ground that Beazer was purchasing, among other things, the rights under the BF Agreement with a view to developing itself the land to be transferred or selling it to others to develop; see also the spreadsheet at 2/163 referring to the onward sales;

(4) At the time when the Deed was executed there were other sales of particular sites at Ingleby Barwick which were on a "fully serviced" basis (in the sense indicated above) and where there were rights of access included. Such sales included the sales referred to in paragraph 12 above the details of which either appeared on the face of the agreement or would have been known to the parties in any event as they were contracts which bound Beazer; see in particular Mr Richardson's letter to Mr Bloom, Notiondial's solicitor seeking such details, at 2/70;

(5) By January 2000 Beazer contemplated that the deal with Notiondial would give it 265 acres of land of which 128 would be sold first to honour the existing Monarch contracts (see sub-paragraph (4) above) and then by way of further sales to provide Beazer with cashflow. Beazer estimated that it would receive £220,000 per acre on such sales. As they were dividing up the land that must have been on the basis that infrastructure and access would be provided to the sites and it has not been suggested otherwise; this can be seen from Beazer's internal note recommending the deal to its head office, signed by David Stobbs, Beazer's land director and Mr Richardson; pages 2/24, 25 and then 11 and 7-10 appears to me to form part of the same document which appears to have been made on 21 January ("the Beazer Report");

(6) The note compiled by Mr Westwood at the meeting on 17 February 2000 (see paragraph 60 below) attended by Mr Richardson, Mr Douglass, Mr Morgan, Mr Bloom and Mr Hasling makes reference to 5 "pending sales" to various housebuilders of sites at Ingleby Barwick and in two cases refers to prices of £220,000 per acre; see also a Beazer file note from Mr Stobbs dated 28 February 2000 referring to prevailing prices of £220,000 per acre;

(7) Beazer's overall aim by acquiring all of this land was to achieve a "stranglehold" over its supply thereby removing a number of its housebuilder competitors who

would now have to deal with Beazer if they wanted still to be involved at Ingleby Barwick. See the Beazer Report at p7.

Construction 1 - Analysis

26. On Notiondial's claimed construction the references to "such land" in Clause 6 prior to the highlighted clause which defines 'development value' can only be to Area J. Notiondial accepts this but says that "the best negotiated price....of the land being sold as at the date of grant..." is not a hypothetical price to be attributed to Area J on an arm's length basis but rather to the actual price then being achieved for other sites at Ingleby Barwick. It is accepted by Notiondial that if "land being sold" ("LBS") does not have this meaning but instead refers to Area J then Construction 1 cannot be correct. That is because there is then no way in which this definition of development value can tie in directly to the price or prices being achieved for other sales.

27. I do not think that LBS does refer to sales of other sites as opposed to Area J for the following reasons:

(1) There is no definition of which (other) land being sold is being referred to; moreover on this basis, best negotiated price would seem to refer to one sale only. And in fact if it is to one other sale it would not be the price as such but the particular price per acre, for it to be meaningfully used as the price to be paid for Area J;

(2) It is true that there is still a problem if LBS connotes Area J since, as at March 2000 it was not being sold to Notiondial but was merely the subject of an option not yet exercised. But I think that LBS can be interpreted broadly, but sensibly, to encompass Area J on the basis that there would be a sale to Beazer ultimately of Area J if the option were exercised. And while Beazer could conceivably decide not to exercise Option 2, I think that was unlikely for the reasons given in paragraph 34 below;

(3) Looked at as a whole it seems to me that "the best negotiated price on an arm's length disposal of the land being sold" connotes some form of valuation which proceeds upon the basis of what price Area J would attract if sold after a proper negotiation and in good faith (ie at arm's length) in other words, its market value; that would be an unsurprising conclusion; it also is consistent with the notion of a development value;

(4) In fact this part of Clause 6 bears a strong resemblance to the Owner's covenant to Notiondial contained in paragraph 2 of the 9th schedule to the BF Agreement. This provides that if planning permission for residential development was granted for land other than that the subject of Options 1 and 2, the Owner would

> "on the sale of the covenanted land or any part thereof pay to [Notiondial]..40% of the development value of the land being sold. For the purpose of this sub-paragraph, the development value shall be the best negotiated on an arm's length disposal of the land being sold less the current use value of such land for agricultural purposes."

(5) It is very difficult to avoid the conclusion that the drafting of Clause 6 owed much to the drafting of this provision and one reason why the expression LBS does not sit

easily within Clause 6 is because the drafting taken from elsewhere is not entirely apposite. In any event, whatever the drafting history, within paragraph 2 of the 9th schedule it is at least clear that LBS is the land being sold by the Owner and which itself is the subject of the uplift payment. That suggests that LBS should be viewed the same way under Clause 6. LBS under that clause should, as with paragraph 2, be viewed as the subject of the payment, not some other land;

(6) There is nothing absurd about the rejection of Notiondial's claimed meaning of LBS and if Construction 1 is rejected, it does not follow that there is no other construction which makes commercial sense. That then leads on to a consideration of Construction 2.

Construction 2

Introduction

28. As noted above, the real issue between the parties, if Construction 1 is rejected, is whether the valuation exercise which Notiondial accepts must be carried out if Construction 2 applies, must give a Ransom Discount. Neither side's position on this issue does violence to the actual language of Clause 6. That is because the provision is silent on the question as to the detail or ambit of the valuation exercise. All it prescribes is a valuation based on a price reached after proper and good faith negotiations. See paragraph 27(3) above.

29. In my judgment, Construction 2 as contended for by Notiondial is clearly the correct one. The valuation exercise here must not apply a Ransom Discount. I give my reasons below.

30. First, and looked at from the point of view of Beazer, if it exercises Option 2 it will in fact have access to Area J. Further, there is no reason to suppose on the face of it why the value to Beazer of Area J is not of the same sort of order per acre as the other sites being sold at Ingleby Barwick. If so, it is very hard to see why its value for the purposes of Clause 6 should be assessed on the basis that there is no access, when Beazer will be able to develop or sell it with access. That is especially so given that Beazer is not even paying full value but only 50%. If Beazer is correct here, it means that it is paying effectively 25% of the true value of the land to it (assuming a 50% Ransom Discount and ignoring the other disputed discount factors).

31. On the other hand, if Option 2 is not exercised, then Area J remains with the Franks and they have access to it. See paragraph 25(1) and 25(2) above. There is no scenario in reality where Area J will end up in ownership divorced from access to it. All of this must have been in the contemplation of the parties. This is itself a powerful contextual factor militating in favour of Construction 2.

32. It is true that the valuation required will be of a hypothetical sale, as with any valuation, but that does not mean that the hypothesis should be wholly divorced from reality. It would be absurd here to imagine a buyer who is seeking to buy land for development purposes which has the benefit if planning permission for such purposes but no rights of access. In that event the planning permission is useless. The hypothesis must assume developable land. This means that it must be assumed that the rights of access would be given. The expression "development value" (emphasis added) support this approach.

33. So do the words "best negotiated price" which assume negotiations between a willing buyer and seller in the development context. Any such negotiations would be bound to include provision for access and so would the price. And the price sets the value. Beazer's approach to Clause 6 postulates that the value entailed by the best negotiated price is reached (by the use of comparable sales which do include rights of access) and then the Ransom Discount is applied after the event as it were. In my judgment, this makes no sense.

34. It is pointed out that if Option 2 is not exercised, Beazer still has to pay the uplift under Clause 6 if planning permission is obtained. That is true but it does not alter the analysis in my view. First, in that event the fact remains that Area J is within the ownership of the Franks as part of the other Barwick Farm land with rights of access. Second, the point made in paragraph 32 above remains. Third, one is entitled to observe that given the factual matrix of the desire to take control of the whole area and the fact that Beazer was paying about £12m not for the Quarry Farm or Barwick Farm land itself but only the right to buy it, it must surely have been unlikely that it would choose not to exercise Option 2. It is true that the planning permission for Area J has now expired without, apparently, any commencement of development there sufficient to keep it alive. But there was no detailed evidence about this (the point came late in the day from Mr Jenkinson and did not feature in any WS). And in any event it cannot be denied that objectively, both sides must as at March 2000 have considered that the initial grant of planning permission was valuable, for in its absence, no uplift sum for Area J was payable at all. There is no objective evidence that any initial planning permission was thought to be of little use because it would inevitable expire before work could commence on Area J.

35. In my judgment this is not a case where "something has gone wrong" with the drafting on the face of the document (cf *ICS v West Bromwich* [1998] 1 WLR 896 per Lord Hoffman at p913 sub-paragraph (5) and *Chartbrook v Persimmon* [2009] UKHL 38 per Lord Hoffman at paragraphs 21-25) because Clause 6 does not state in terms that there is to be a Ransom Discount in any valuation. At best it is ambiguous as to whether there should be a discount or not. But in fact, for the reasons given above, a meaning of development value which excludes that discount is the one which "the parties using those words [of Clause 6] against the relevant background would have reasonably understood them to mean". See *ICS* (supra) per Lord Hoffman at p913 sub-paragraph (4). The language taken in its proper commercial context dictates the absence of a Ransom Discount and any other construction would be commercially absurd.

36. Accordingly I uphold Construction 2.

37. That conclusion would be sufficient to dispose of this trial in favour of Notiondial but in view of the extensive evidence adduced and submissions made on the question of rectification, I deal with that claim also below, on the hypothesis that Notiondial failed to establish Construction 2.

RECTIFICATION

The Law

38. I am assisted first by the helpful statements of principle set out in the judgment of Peter Gibson LJ in the case of *Swainland v Freehold Properties Limited* [2002] EGLR 71 as follows:

> "33. The party seeking rectification must show that:
> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
> (2) there was an outward expression of accord;
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
> (4) by mistake the instrument did not reflect that common intention.
>
> 34. I would add the following points derived from the authorities:
> (1) The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities.
> "But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself": Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505 at page 521 per Brightman LJ
> (2) Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained: Cooperative Insurance Society Ltd v Centremoor Ltd [1983] 2 EGLR 52 at page 54, per Dillon LJ, with whom Kerr and Eveleigh LJJ agreed.
> (3) The fact that a party intends a particular form of words in the mistaken belief that it is achieving his intention does not prevent the court giving effect to the true common intention: see Centremoor at page 55 A-B and Re Butlin's Settlement Trusts [1976] Ch 251 at page 260 per Brightman J."

39. Moreover if it be found that the document does not give effect to the common intention the court can then grant a remedy which puts the parties into the same position as between each other as they had intended. In some cases there may be more than one way to achieve the common intention. And equity is not to be prevented from giving relief merely because the parties had not agreed on the mechanics by which effect should be given to the clear and simple common intention. See *Swainland* (supra) at paragraph 43.

40. Further, in relation to proof of the common intention, the Court does not look to the inner minds ie subjective intentions of the parties who are alleged to have agreed to a document which mistakenly fails to record the common intention. It looks to their outward acts (what they said or wrote to each other in reaching their agreement) and compares them with the document. See *Chartbrook* (supra) at paragraph 60. But this does not means that the Court disregards what one party says he understood was agreed. It may be some evidence as to what was in fact, objectively, agreed. And where the alleged prior consensus was based wholly or partly on oral exchanges or conduct such evidence may be significant. In addition "a party may have had a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. Evidence of subsequent conduct may also have some evidential value. On the other hand, where the prior consensus is expressed entirely in writing ....such evidence is likely to carry very little weight. But it is not inadmissible." See *Chartbrook* (supra) at paragraphs 64 and 65.

The Evidence

41. This case is notable in that Mr Richardson, who was with Beazer at the time and acted on its behalf in the negotiations for the Deed, has given evidence for Notiondial, supporting its claim to rectification if needed. No doubt was cast on his general *bona fides* in cross-examination nor was it suggested that he had some interest of his own to serve in testifying for Notiondial. On the face of it there is no reason to suppose that he was lying. The same goes for Mr Miller of Bellway and Mr Richards of Barratts, both of whom were involved in negotiations at the end of 1999 when the proposed buyer of Notiondial's interests in the land in question was not merely Beazer but a consortium of all three housebuilders. They, too, gave evidence for Notiondial. Whether the evidence of these three witnesses, together with that of Mr Morgan meets the strict requirements for rectification (see above) is of course a separate matter.

42. It is also noteworthy that David Stobbs, involved with Mr Richardson at the time on this deal on behalf of Beazer, was an employee of the Defendants at the time of the trial. He had stayed with Beazer after its takeover by Persimmon and later left but rejoined at some point this year before the trial. Had the Defendants wished to call him to give his evidence about what had happened they could have done so. In evidence Mr Jenkinson said that he did not think it "appropriate" to call Mr Stobbs but it is difficult to see why. He supposed that they could have done. Mr Pymont makes the point that it was always open to Notiondial to serve a witness summons on Mr Stobbs. That may be so but the fact is that the Defendants have adduced no evidence from those at Beazer who were involved at the time apart from Mr Richardson (which is not merely Mr Stobbs but a Mr Foster and Mr Jordan both of whom stayed with Beazer after the takeover and remain today in Persimmon's employment) to counter the evidence adduced by Notiondial. This is all the more surprising given that Beazer did choose to apply at trial (successfully) to adduce very late evidence from Mr Jenkinson and Mr Fairburn.

The nature of the rectification claim

43. Notiondial argues for rectification at two levels: first the parties agreed that Notiondial and Beazer should share equally the benefit of Area J gaining planning permission which it is said entails rectification to the effect at least of Construction 2 ("Rectification A"). Second, the parties' actual agreement went further so as to require rectification to the effect of Construction 1 ("Rectification B") .

44. Beazer's position, broadly, is that while the parties undoubtedly spoke and wrote about sharing the benefit this does not entail any particular construction because the real question is how any such sharing is to be achieved, or put another way how the value to be shared is to be calculated. And as for the second level of rectification, Beazer says simply that this is not established by the evidence.

45. I make findings about this after considering the evidence generally.

The Ramside Hall Meeting 26 November 1999 and some later documents

46. At this point in time, a consortium of Beazer, Bellway and Barratt ("the Consortium") was interested in acquiring the Quarry Farm and Barwick Farm land from Notiondial together with relevant ransom strips. Now the essence of a deal whereby the Consortium would

acquire from Notiondial the rights under the QF and BF Agreements and ransom strips was in place. On 6 August the Consortium had offered £10m. This was rejected by Mr Morgan but prior to the regional housebuilders' dinner at Ramside Hall on 26 November he and his wife met with Messrs Richards, Richardson and Miller. Mr Hasling, Mr Morgan's consultant, was also there. The upshot was that it was agreed that the Consortium would pay £10.5m for the rights and ransom strip plus a further £1.9m in respect of its costs. This is set out in a letter written by Mr Morgan to the others on 29 November 1999. Paragraph 6 of that letter reads as follows:

> "In addition to the land which has the benefit of an "Outline Planning Permission" within Barwick Farm, there is the probability that we will obtain planning permission for residential development on a further 15 acres (approx), the benefit of which is to be shared equally between "Notiondial" and "the Consortium".

47. It is common ground that this was a reference to Area J and that this subject came up at the meeting.

48. Manuscript notes taken by Mr Richardson at the meeting record

"Cell 'J' 15 acres
50%50 planning by C Morgan."

49. In evidence Mr Morgan explained that the parties had with them at the meeting the June Plan which in fact was going to be the plan to be submitted along with the contemplated application for planning permission for Area J. At this time it was thought that there were at least 15 acres of developable land there. This is reflected in the acreage shown on the Plan itself. He said that at that stage he expected to get £1.5m at least for Area J if it received planning permission and that the parties at that meeting spoke about a going rate of £200,000 - £220,000 so that 15 acres at 50% would give something in the order of £1.5m. He did not mention figures in the letter because there was no need. All that needed to be recorded was the 50% basis. Everyone knew that the Consortium would be paying 50% of market value. Mr Morgan said that he could not recall all of the detail but recalled the thrust of what they were talking about as he would not forget it. The letter he wrote helped to refresh his memory but the matters were clear in his mind anyway. He also said that no access problems were foreseen – the access to Area J would come from the road shown on the Plan running in a semi-circle from between Areas G and H and L and M and then N and P which had not yet been constructed. There would be no problem about mains supplies to Area J save that a small pumping station might be needed. If some infrastructure cost arose as a result of some condition in the planning permission he denied that it would change the price to be paid. He agreed that carrying costs could become an issue for a purchasing developer but that was not to be factored into the price payable based on 50% of the going rate. He said that the same was true of the effective rate agreed to be paid for the rest of the BF and QF Land which was some £160,000 per acre. The risk of any carrying costs was already taken into account. He agreed that there was no discussion about the fact that Area J, taken by itself, was landlocked. But he would not have expected it in discussions between two developers dealing with sites at Ingleby Barwick. It would be absurd to negotiate here on the basis that what was being sold would be landlocked. Mr Morgan was also referred to a document he sent on 3 December 1999 at 2/18. This referred to 50% of 15 acres at Site J and the "= 7.5 acres" which he agreed meant that he was giving the buyers 7.5 acres, effectively free of charge.

50. Mr Hasling recalls Mr Morgan saying that he would pass on half the benefit of the land if planning permission was obtained and this would have been done on the basis of market value though he could not recall Mr Morgan saying the latter. He thinks the assumption was then that the parties would pay the full open market value for land at Ingleby Barwick. He "does not believe for a moment" that any of the parties believed that the value would be on a ransom basis. It was not ransomed at the time of negotiations and to assume it would have been "wholly artificial". He was not challenged on this latter point.

51. Mr Richardson recalled that they agreed that they would get Area J at half the development or market value. Mr Morgan spoke of "sharing equally" the benefit. He did not recall discussion as to how Mr Morgan would get his share of the benefit although the notion of the benchmark for the price being the last transfer at the time of the grant of planning permission may have been discussed at this meeting. He was sent a copy of the note from Mr Morgan at 2/18. He saw the reference to 7.5 acres in respect of Area J as being another way of expressing the fact that Area J would be acquired (with planning permission) for 50% of its "development or market value".

52. In general terms, Mr Richardson stated in paragraph 20 of his WS that at all times he believed that Beazer was agreeing to pay Notiondial 50% of the "fully uplifted" value of Area J when planning permission was obtained (and he said in evidence that he was aware that it was in fact obtained prior to the making of the Deed). The development value was to be assessed in the same way whenever the permission was obtained. "It was never the intention of Beazer (nor I believe Notiondial) that Site J would ever be valued on the basis that it would in some way be ransomed." There was no challenge to this last statement.

53. Mr Richards says that there was never any intention that the land would be priced on a ransom basis. It was not ransomed at the time and this formed no basis for their discussions. He said that at the meeting he was very pleased to have the opportunity to get Area J "at half price" if planning permission was obtained. He said they did not discuss the value if permission was granted but they had all developed at Ingleby Barwick and he knew that he would be paying half the going price. They all considered the going price and he had in his own mind £200-220,000 per acre which is what had been paid previously. He could not recall what exactly he had discussed with Mr Morgan but he must have had a discussion as Area J was on the table. Paragraph 6 of Mr Morgan's letter reflected what had been agreed, he said, but nothing more. He recognised that after purchase, infrastructure costs might go up but in agreeing to pay half the benefit he was prepared to accept that risk. Having paid "half price" he would still get more on a sale to a further purchaser.

54. Mr Miller recalls that at the meeting Mr Morgan said that if planning permission came in on Area J they would split the benefit. He commented on two internal Bellway documents. The first, dated November 1999 at 2/6 referred to "additional land" of 7.5 acres. He said that this was a reference to the Area J land and meant that they would get 7.5 acres effectively free because they would pay full price for a further 7.5 acres ie it reflected 50% of its value. A second document, faxed on 9 December 1999 at 2/19 is to the same effect. It refers to a revised deal from that agreed on 26 November but which included "..additional 7.5 acres Pod J..." And he saw Mr Morgan's note at 2/18 as saying the same thing. I accept that the inference here is that Bellway saw itself as having to pay an undiscounted price for 7.5 acres ie not one which was itself already reduced by a Ransom Discount.

55. All the parties agree that the letter dated 29 November correctly reflected what had been agreed at the meeting on 26 November.

Instructions to Mr Bloom of Jacksons

56. Mr Morgan instructed Mr Bloom to draw up contract documents straight after the Ramside Hall meeting and Mr Bloom received a copy of the letter of 29 November which he endorsed with some notes on the reverse. See 2/16-17. The notes do not elaborate upon paragraph 6 of the letter of 29 November. The first draft of the Deed was produced very shortly afterwards, around 1 December – see 2/4/1. The original version of Clause 6 was then Clause 7. The wording defining 'development value' was always the same throughout the drafts of the Deed. Mr Morgan recalls that he spoke to Mr Bloom one evening about this clause in particular, in December or January. He did not know if Mr Bloom had drawn it from the 9th Schedule of the BF Agreement which was only signed on 2 December but a draft of which must have been circulating for some time before then – not least because the discussions before and at the Ramside Hall meeting presupposed that Notiondial could indeed deliver the rights over the BF land (ie the BF Agreement was expected to go through). He said that he had agreed to share the benefit and expected a payment based on development deals they were then closing ie the price per acre of other ongoing contracts. Mr Bloom assured Mr Morgan that the clause would achieve what Mr Morgan wanted.

57. An example of one such other contract can be seen from the letter dated 20 December 1999 written by Mr Morgan to Mr Richards concerning the site at Village 5 D1. (Had this contract gone ahead it would have been a further contract to which the acquisition of Notiondial's rights under the BF and QF Agreements would have been subject). It was a parcel of land of 9.1 acres and was offered at a price per acre in the region of £220,000. That supports the evidence that something around that price would have been thought appropriate for the slightly larger parcel in Area J originally thought to be 15 acres. The letter says that the sale of Area D1 was obviously dependent on Mr Morgan being able to give access to the site which he thought would be around April/May 2000. That also supports the notion that deals being offered included rights of access.

Beazer recommendation to main board

58. By January 2000, Bellway had pulled out of the deal, leaving Beazer as sole "purchaser". As noted above a detailed paper recommending the deal to Beazer Head Office (ie Beazer Group) was produced on 21 January and signed by Mr Stobbs and Mr Richardson. See the Beazer Report at 2/25, 11, 7-10. Although this suggests that the only purchaser was now Beazer, in fact Barratts was still in the Consortium (see Mr Richardson's letter to Mr Morgan dated 21 January 2000 at 2/26) although it, too, pulled out in February leaving Beazer as the sole purchaser. The Beazer Report did not refer to the Area J position because, according to Mr Richardson, it could not be included in the land to be acquired as it did not have planning permission then – this is not entirely clear to me because the Plan set out the total acreage (including Area J) as 265 and the Beazer Report gives the same total but with 16 acres ascribed to the ransom strips. Be that as it may, it does not refer in terms to Area J and the same is true of Mr Richardson's further letter of recommendation dated 3 February 2000 at 2/35.

Note of 2 February 2000

59. Mr Douglass's file note for 2 February 2000 stated (at 2/33) that "B to take all land in Barwick Farm..if extra planning – benefit to be shared."

The Meeting of 17 February 2000

60. By now Beazer was the only purchaser. A meeting took place on 17 February 2000 at the offices of Ward Hadaway, Beazer's solicitors. From that firm Mr Douglass, a partner, attended on behalf of Beazer along with Mr Westwood, his assistant, and Mr Richardson and Mr Stobbs were also present. For Notiondial, Mr Morgan, Mr Hasling and Mr Bloom attended. The parties reviewed the draft documentation. They had available a version of the Deed dated 3 February. Mr Douglass made some brief notes, which included a reference to

> " - Guarantee / Bank – or Plc Con to consider
>
> - Issue of planning on Site J.."

61. But a much more detailed note was compiled by Mr Westwood. At 2/98 the note refers to "Pending Sales" of which six are listed and in respect of two of them the price of £220,000 per acre is given.

62. Clause 13 of the main transfer agreement warranted that Notiondial owned all land necessary to develop and gain access to the areas described as Villages 5 and 6 and that Notiondial would transfer such additional land as it owned and give such further rights as were necessary to carry out the development of Villages 5 and 6. In that context Mr Westwood's note said this at 2/104:

> "J area – no planning at moment & included in price we're paying.
>
> Beazer pay half value of that permission....
>
> Beazer accept the gamble that planning will go through for area J & is at risk on strength only of letter of comfort. There could be another s 106 agreement for that site but Chris Morgan believes won't any extra money required."

63. Then, when dealing with the Deed and Clause 7 (now Clause 6) at 2/106:

> "7. Beazer to pay 50% of planning value even if
> don't exercise option?
> Or grant the Notiondial right to exercise option.
> Date is date of last exercise.
>
> Development value – what is it?
> Beazer happy to rely on price of past
> transfers/ developments to determine dev. value."

64. Mr Richardson said in evidence that he could recall this meeting although his memory was refreshed by Mr Westwood's note. He recalled sitting there and going through the contract documents. He recalled looking at Clause 7 (as it then was), dealing with Area J and although it was put to him that he was making up that evidence I did not think he was. He said that he understood that Beazer would be paying 50% of market value for Area J with planning permission and he had discussed market value as being £220,000 per acre at some

point before this meeting. Given the number of deals or potential deals involving land at Ingleby Barwick at the time at around that price, this did not seem implausible to me. In general terms Mr Richardson thought the deal for Area J was a very good one, at a heavy discount and even if the land ended up say £5,000 or £10,000 per acre more than the rate implicit in the 50% paid to Notiondial, it was still worth doing and worth it in order to gain all the other land being acquired. He did not foresee any major infrastructure problems over Area J but if there had been abnormal costs he would "take them on the chin". He thought that if there was a large s106 expenditure attached to the permission he would not take that on the chin. That said the note at p104 clearly suggests that Beazer saw itself "at risk" in the event of an onerous s106 condition (which could only mean paying something more on top of the purchase price) but Mr Morgan believed that this would not happen.

65. The thrust of Mr Richardson's evidence was that he equated market value with about £220,000 per acre at the time and thought that 50% of market value is what Beazer would have to pay. There may be some risks attached but they were worth taking. (In the event of course planning permission was granted on 3 March and there were no significant s106 conditions.) He agreed that in valuing land one would look at location and also the cost of capital if not developing it immediately, and questions of access or drainage. But he would not look at Area J in this way here because it was part of an overall scheme and a global site. It could be developed at half market value and he was prepared to liken it to other Ingleby Barwick sites. In other words one would not do the kind of valuation one might normally do. He saw the acquisition of Area J with planning permission as a "windfall" in the context of a "great entrepreneurial punt".

66. Against that background one turns to the note at 2/106. The note is made against clause 7 of the Deed and clearly addresses the definition of development value. The note is, on an objective reading, clear. It is that Beazer would agree to take the price of past transfers to determine ie fix development value ie without more. The word "determine" supports this view. I do not think that these words mean an acceptance that Beazer was agreeing to look at past transfers simply as comparables to form the starting point for a valuation that then took account of and may have made a discount for, other features. And indeed if there was to be a conventional valuation exercise there would not be much point in stating it here anyway since comparables would always be required. Equally "Development- what is it?" would not really be answered by referring to comparables as a starting point for valuation.

67. Subjectively Mr Richardson saw this as reflecting Beazer's commitment to use the prices of past transfers as market (or development) value. He saw the market value (per acre) of a development and thought that for Area J they would take the last Ingleby Barwick sale as the benchmark.

68. For his part, Mr Morgan said that the note at 2/104 referred to Beazer being concerned that there might be a s106 condition but he agreed to give them a letter of comfort about that. On the note at 2/106, he recalled talking about development value as being represented by the market value then being paid for developable land at Ingleby Barwick and Beazer agreed this. It would be the highest price of any other sales in the area. The measure of the development value was the value of the last arm's length transaction at Ingleby Barwick. He recognised that the note referred to past sales (plural) but said that in any event a going rate had already been recognised at this point at £220,000. In re-examination he confirmed that he thought one would take the last sale.

69. There is therefore a congruence between the evidence of Mr Morgan and Mr Richardson as to what they discussed and agreed as to how to determine development value.

70. Mr Douglass was not able to offer any useful evidence as to the note at 2/106.

71. Mr Hasling was also at the meeting. He does not deal with it in his WS because he was not asked about it. But he was clear that he was there and there is no reason not to accept this. He thought that Mr Douglass did most of the talking for Beazer. He said that he recalled the wording of clause 7. He said that the note at 2/106 said what development value was. Here it had to be the last sale to Harron or Barratt at Ingleby.

72. Mr Pymont argued that the evidence of both Mr Morgan and Mr Richardson was unreliable such that I should not accept what they said in particular about the meeting on 17 February 2000.

73. In respect of Mr Morgan the point was made (as was the case) that he instructed Appletons in November 2002 to produce a valuation in accordance with Clause 6 and supplied him with a copy of the Deed and other information. This yielded a valuation albeit without any discounts save a modest £25,000 for works at the site (see Appendix 6 to the report). It was said that this contradicted Mr Morgan's evidence to the effect that what he agreed was a straight price per acre based on the last sale so that no valuation was needed at all. Mr Morgan agreed that the latter was his position but he commissioned a valuation report because there had by then already been problems with Persimmon (ie Beazer) failing to comply with other contractual provisions and he anticipated problems over those one too. He wanted a report for his own comfort and also something he could present to Beazer. He did not tell the valuer of his actual understanding. It was a "belt and braces" job. He accepted that some of the variables used by the valuer were not in accordance with his "last sale" understanding. I do not think that the obtaining of this report really undermines Mr Morgan's evidence. I think his reasons for wanting and sending to Beazer a report are plausible. And at the end of the day, apart from the £25,000 deduction and the use of some variables which raised the price per acre, there is not much difference between it and a "straight" application of a "last sale" figure. Generally I found Mr Morgan to be a straightforward and reliable witness.

74. In respect of Mr Richardson, although it was put to him at various points that he made up his evidence it is difficult to see why he should have done and no motive for him doing so was suggested to him or to the Court. Moreover, the note at 2/106 (properly read – see above) is corroboration that this was what he agreed. For these purposes he <u>was</u> Beazer at the meeting along with Mr Douglass.

75. However the veracity of his evidence was also challenged as a result of the evidence of Mr Jenkinson and Mr Fairburn of Persimmon. Mr Richardson accepted that he had a meeting with them both following the takeover of Beazer by Persimmon in March 2001.

76. Mr Jenkinson said that he spoke to Mr Richardson in late Summer 2001. He said that it was important that Persimmon knew exactly how Clause 6 operated so that it was aware of its obligations. His WS says in paragraph 5 that he expressed to Mr Richardson "my understanding of the meaning of the words used in Clause 6, this being that the

development value was to be based upon the price which was payable on an arm's length disposal." That does not in fact say very much. But in evidence he says that "arm's length" meant no special purchaser and he told Mr Richardson this. He also said that costs should be deducted. He had taken legal advice on the clause and had already formed a view as to what it meant and this is what he asked Mr Richardson to confirm. He said that Mr Richardson agreed with him and they discussed costings and the nature of the deductions ie for large costs like a bridge, and holding costs and a Ransom Discount. A document was later produced by Mr Tindale, a colleague of Mr Jenkinson after he had informed him of his understanding of Clause 6 following the discussion with Mr Richardson. This document has been produced. A calculation of the value of Area J is at 1/295h. Deductions are made for costs including a bridge, holding costs and then a Ransom Discount of 33% is applied. This left a figure of just over £1m. That figure is then contained in a costing sheet for all the land acquired against the heading "Add potential uplift payment to area J". But there was no deduction of 50% as required by Clause 6. Mr Jenkinson could not explain why Mr Tindale had not taken 50% since he had been given the former's understanding of the clause, unless he just made a mistake. Nonetheless Mr Jenkinson maintained that he told Mr Tindale correctly what the position was.

77. Mr Fairburn made a WS saying in essence that he agreed with Mr Jenkinson's. He said he could recall Mr Jenkinson going through his understanding of Clause 6 with Mr Richardson and made reference to deductions for infrastructure costs and a Ransom Discount. He said that it was a particularly important meeting but he made no note of it. He said that he commissioned the document to be produced by Mr Tindale and that estimated figures for all the deductions were actually gone through with Mr Richardson. He could not explain Mr Tindale's omission of the 50% other than to say it was a mistake.

78. For his part Mr Richardson agrees that he was asked about Clause 6. He did not recall discussing the deduction of abnormal costs. He agreed that he could have said to Mr Jenkinson that the development value was to be ascertained by reference to a headline rate and if he did not, he should have. He said that if Mr Jenkinson understood clause 6 to mean X then he may have said that if this was his understanding then "OK". Mr Richardson was not in an easy position here in that Mr Jenkinson was effectively his boss and was putting to him an interpretation of the clause which was not his own and which was much more favourable to Beazer. I do not find it implausible that Mr Richardson may to some extent have said what the others wanted to hear. Moreover I think one has to treat their evidence with some care:

    (1) Their witness statements were produced only days before the trial started, yet Mr Richardson's WS (on which their evidence is invoked to say that it could not be true) came in January 2009 and Mr Jenkinson accepted he would have seen it in February. He was regional director of Beazer and involved in this litigation. There was no good explanation as to why their evidence came so late. Mr Jenkinson said that he was only told much later that his evidence was even admissible, as it were, to refute Mr Richardson's account but I find that hard to follow. If Mr Jenkinson and Mr Fairburn had communicated the fact of their meeting with Mr Richardson in February I cannot see why it would not have made its way into a WS along with all the others from the Defendants;

(2) In fact the detail of the meeting only came out from Mr Jenkinson and Mr Fairburn in evidence. Mr Jenkinson's WS is very terse on the point – see his paragraph 5. And most of this detail was not put to Mr Richardson;

(3) There is the problem of Mr Tindale not deducting 50% and

(4) There is the absence of any note of the meeting.

79. I think that the evidence of Mr Jenkinson and Mr Fairburn was probably coloured by the document produced by Mr Tindale in terms of the deductions made. I do not think that the meeting was in the kind of detail as they now say and to the extent that Mr Richardson agreed with them it may well have been because of what he wanted them to hear. I do not consider that their evidence has the effect of creating a significant dent in the credibility of Mr Richardson whose evidence generally I found also to be reliable and straightforward.

80. Mr Pymont also relies on the way in which changes to Notiondial's pleaded case arose. Constructions 1 and 2 were always pleaded but the original rectification plea made no reference to the meeting of 17 February 2000 or the note at 2/106. That is true – see paragraph 33 and prayer 3 of the original Particulars of Claim. The amendments to those parts of the statement of case were made in March 2009 after disclosure of the Ward Hadaway note of the meeting. So it is said that the rectification plea now made, and the evidence in support, is an opportunistic construct, as it were. I do not accept that contention. First, Notiondial's case on construction was consistent with the rectification plea now advanced. Second, while the Further Information provided in February 2008 does state at 1/42 that it was not alleged that specific agreement was reached as to how the enhancement in value was to be valued or ascertained, it goes on to say that Notiondial believed that the parties assumed that this would be ascertained by reference to the "going rate" for serviced sites at Ingleby Barwick at the time. Thirdly, as Mr Richardson himself accepted he has refreshed his memory from the note. That does not mean that what he recalls cannot be untrue – especially when the fact remains that this is a solicitors note which in my judgment is clear in its terms.

81. It is also said that Clause 6's likely derivation from the 9th Schedule of the BF Agreement runs against rectification based on the note at 2/106. It is said that the 9th schedule contemplates some kind of valuation of the land there being sold. And since Clause 6 seems to have been lifted from this earlier provision (the BF Agreement was signed on 2 December and so the wording must have been available from some time before then) it must follow that some valuation process was contemplated for Clause 6 not just objectively (as I have found above on construction) but subjectively from the point of view of Beazer. That would be inconsistent with rectification to the effect of Construction 1 (though not Construction 2). This does not necessarily follow. First, when Mr Bloom was initially instructed he may have understood development value was indeed the market value of Area J. Mr Morgan says that at some point he discussed with Mr Bloom the notion that Clause 6 was to operate by reference to taking the latest market value (ie price) achieved at the time of the planning permission and Mr Morgan was looking at £220,000 at that time. In other words if they thought that Clause 6 would set the price by reference to market value *simpliciter* by adopting the going rate without any deductions for costs at all, then (on my findings) they were mistaken. But it would be a plausible mistake to make. It is then said that on any view one would expect the clause to be altered after 17 February

when it was clearly agreed (on Notiondial's case) that the development value would be fixed simply by taking the last sale of land at Ingleby Barwick. Since it was not, it should be inferred that there was no such agreement and the note at 2/106 should be read in the other way (see paragraph 66 above). I do not agree. Again given the particular wording used I can quite see that it may have been thought that the extant wording would cover the agreement to fix value by the last sale.

82. Indeed it was accepted by Mr Pymont that, assuming the necessary evidence of intention is there, the Court can rectify on the basis of what the parties intended and took an already drafted clause to mean where, when later construed by the Court it does not have the meaning intended. Because in such a case the clause does not reflect the common intention and that can only be as a result of a mistake.

83. Further, an agreement to fix directly to the price of other sales without any deduction is hardly implausible. First, it has the merit of simplicity. Second the context was that it was thought to be a good deal to acquire Area J at 50% of market value and in any event worth doing in order to secure the deal as a whole. Assuming market value at the time as £220,000 per acre this was significantly less than the effective price being paid for the rest of the land to be acquired in the deal with Notiondial.

84. It is also said that the agreement contended for by Notiondial by reference to the note at 2/106 cannot be right because it is inconsistent with the notion of sharing equally the benefit of planning permission, also contended for by Notiondial. I deal with this point in paragraphs 96 and 97 below.

Documents sent to Mr Low by Mr Stobbs on 28 February 2000

85. At this stage, Mr Stobbs sent a number of documents to Mr Low, the Chief Executive of Beazer Group, in relation to the proposed deal. Included was a detailed spreadsheet which included (at 2/162) Area J at 7.5 acres. This also suggests that Beazer saw itself as getting 7.5 acres for free but having to pay full price for the other 7.5 acres.

Findings: (a) Rectification on basis of sharing the benefit ("Rectification A")

86. It was not really disputed by Beazer that there was considerable evidence of the parties agreeing to share the benefit of the planning permission on Area J. See paragraphs 48-55 and 62-65 above. And that intention persisted throughout. But the question is what that meant. Mr Pymont said that it did not say very much because the question was how to value that benefit. Ms Dunn said it meant much more: if the commercial parties here agree to share the benefit between them, it must entail that they agree to share the benefit <u>to them</u> of having that land with planning permission. In the hands of Beazer there would be no problems of access. So to share the benefit it must follow that access is to be assumed. Otherwise Beazer would be paying much less than 50% of the value <u>to it</u>. I agree. All the evidence referred to above entails that conclusion including the positive evidence to the effect that the parties were <u>not</u> proceeding on the basis of a Ransom Discount. There was no material evidence going the other way.

87. Mr Pymont also argued that rectification along these lines would not amount to a true sharing of the benefit because the recipient, ie Beazer would still have infrastructure costs

in relation to Site J and thus once these were taken into account Notiondial would in effect receive more than Beazer. The same would be so for holding costs or abnormal costs. It was also said that Mr Morgan accepted that if specific matters like this were not taken into account then Notiondial would get more than 50%. I do not accept this. First, I have no note of Mr Morgan actually saying that. Second, the point does not in truth add up. Infrastructure costs in terms of adjoining land would have to be incurred anyway and insofar as there was a cost in bringing services specifically to the boundary to Area J (as opposed to abnormal costs) it is noteworthy that even on Beazer's case, it is not suggested that they should be deducted. Furthermore, purchasers of other sites at Ingleby Barwick would no doubt have some further costs (including holding costs) to incur in order to develop them. But that was in addition to the price per acre payable of around £220,000. It also has to be remembered that Beazer was only paying 50% and Mr Richardson's evidence was that in any event this was a good deal. And as an experienced developer Beazer simply did not think there were likely to be abnormal costs of any significance. I do not see that the fact that some other costs may be incurred in this context means that it is not meaningful to talk of sharing the benefit. Moreover, as matters have transpired, the rectification now sought as a result of the sharing of benefit is the simple exclusion of a Ransom Discount. In my judgment, on any view to apply such a discount would not be sharing the benefit equally and it is absolutely clear that no party expected it to be applied.

88. In my judgment there was a clear and common intention to share the benefit in the way indicated above, so that a Ransom Discount would not be applied.

89. Moreover there was an outward accord of this common intention. The expression "sharing the benefit" or an equivalent expression occurred many times in documents as set out above. It is clear that the parties understood this to have a particular meaning and used the expression on that basis, and indeed the meaning contended for by the Defendants is not commercially sensible in my view. Moreover the direct reference to the price of past transfers on 17 February 2000 is further evidence of the accord since it is clearly inconsistent with a Ransom Discount. Mr Pymont said that the fact that the parties did not expressly agree that there would be no Ransom Discount meant that there could be no rectification to that effect even though they all intended it. I do not see this as a bar here where it was plainly embodied in everyone's concept of sharing the benefit.

90. If (contrary to my findings above on construction) Clause 6 was to be interpreted as entailing a Ransom Discount then that would not reflect the common intention. The Court is entitled to refashion the clause so as to give effect to it even if the precise mechanics were not agreed by the parties, for example the specific exclusion of a Ransom Discount. Given the fact that the parties now agree that the only controversial issue on the construction of Clause 6 is the question of a Ransom Discount (holding costs and abnormal costs being deferred to the valuation stage) the Court would if necessary, have altered Clause 6 so as equate to Construction 2.

Findings (b): Rectification on the basis of the note of 17 February 2000 ("Rectification B")

91. Having regard to all the evidence set out above, I also find that there was indeed agreement between Notiondial and Beazer that development value should be calculated by reference to the going rate per acre of Ingleby Barwick land sales as at the date of planning permission. I use the expression "going rate" because although both Mr Morgan and Mr

Richardson referred to the last sale I see that as the way in which they would ascertain, first off, the going rate. At other parts of their evidence they did indeed refer to the going rate or current market value and they had in mind at the time that the going rate then was £220,000 drawn from a number of sales. This is particularly important because in fact, as both parties knew, planning permission was actually granted on 3 March, shortly before the Deed was made on 13 March 2000. Given that they spoke of rates at £220,000 in January and February 2000, there was actually an obvious figure to go for. There certainly was a concept of going rate and a term to this effect would be meaningful and clear. I do not think that a potential difference between the "last sale" and "going rate" of sales at the time would be significant nor do I regard it as a bar to rectification when on any view the parties were agreeing to a method of ascertaining the price of Area J which involved no valuation element at all but a straight reference to sales at the time at Ingleby Barwick. Hence I also do not regard the fact that the note referred to "sales" and Mr Morgan (and Mr Richardson) referred to a "sale" as really material.

92. And I find that the evidence to establish this is "convincing", not least because of course there is congruence between the evidence adduced from both contracting parties at the time, the evidence is really all one way, and there is documentary support in the form of the note at 2/106.

93. Equally there is outward accord of the common intention, because it was made manifest in discussions between Mr Morgan and Mr Richardson at the meeting on 17 February and by the note. Mr Morgan also said he had intended this before and Mr Richardson said he had discussed it with him at some earlier point.

94. In all of this it must also be remembered that the common intention alleged is not something which is clearly in conflict with the drafted words. On any view there is ambiguity as to how the development value is to be fixed.

95. Had I ordered rectification here it would be to the effect that the development value should be determined by reference to the prevailing rate per acre (to use slightly more formal language but it means the same as going rate) for other sales of land at Ingleby Barwick at the time of the grant of planning permission.

The two forms of rectification: The Defendants' general point

96. A point made by the Defendants against rectification in general here is that the two claimed forms of rectification are not consistent with each other and that in any event Rectification B conflicts with Rectification A. So there should be no rectification at all. I do not agree. It is very important, first, not to overstate the differences between Rectification A and Rectification B. Under Rectification B (as with Construction 1) there is no discount at all for holding or abnormal costs. Under Rectification A (as with Construction 2) there is that possibility in theory. Either way there is no Ransom Discount. In practical terms had this difference been put to the parties I doubt they would have been troubled by it. They did not think that there was a real risk of abnormal costs and as for holding costs, from Notiondial's perspective this is not likely to be a problem even if a valuation had to consider it because it would contend that it is already accounted for in the price (a matter which I am not determining at this stage). And the other witnesses were not really asked for their view on whether holding costs should be deducted. There was

certainly no evidence from Mr Richardson that holding costs were an issue as against Beazer at the time. After all, all purchasers of development land at Ingleby Barwick were likely to have some holding costs by virtue of the very scheme involved and its phased implementation. So while Rectification B requires no valuation exercise at all, and Rectification A does, in reality both would take the going rate of other land at Ingleby Barwick and then under Rectification A there would be some investigation of abnormal and holding costs and that would be it.

97. It obviously follows that Rectification B is in theory more favourable to Notiondial than Rectification A. Just as Construction 1 would have been more favourable than Construction 2. But if the parties did not see much risk of needing to discount for abnormal or holding costs, then moving to Rectification B is little more than concretising Rectification A and removing some uncertainty. It is a refinement. But it is not a huge step. It is not in my judgment inconsistent with the notion of sharing the benefit at all. If Rectification B is made out it certainly supersedes Rectification A but that is because it the latter is then rendered irrelevant, not because the evidence in support of it is untrue. In the factual context of this case the two respective contentions based essentially on different points of time, make sense.

If no Rectification B

98. If I were wrong about Rectification B, then I would have ordered Rectification A. Rejection of the former does not entail rejection of the latter which is dependent not an assessment of what was agreed on 17 February or its effect, but an analysis of the sharing of benefit which was undoubtedly agreed.

The Position of Beazer Group

99. I deal below with the contention that if I would not have ordered rectification as against Beazer Group, I should not have ordered rectification at all.

THE CLAIM AGAINST BEAZER GROUP

Preliminary Matters

100. Clause 8 of the Deed provides as follows:

> "The Plc [ie Beazer Group, the Second Defendant] joins into this Deed at the Developer's request to guarantee the performance of the Developer's covenants in this Deed."

101. This is the basis for Notiondial's claim against both Defendants. On the basis that I have found in favour of Construction 2, it obviously binds both Defendants and it is not suggested, nor could it be, that Beazer Group could have a defence distinct from that of Beazer if I were to find for Notiondial on construction.

102. But just as I have dealt with the question of rectification as against Beazer I now do so as against Beazer Group.

103. Ms Dunn contends as a preliminary point that "The Court is not required to adjudicate on a full-blown rectification application as against D2 because C is not seeking to rectify any

direct obligation undertaken by D2." See paragraph 23 of her final written submissions. I do not accept this. Albeit as guarantor as opposed to primary obligor, Beazer Group was nonetheless a party and a separate signatory to the Deed. And the scope of its liability as guarantor is obviously affected by the outcome of any question of rectification. It cannot escape the consequences of a ruling on construction which it considers adverse to it, because that is a matter of objective interpretation by the Court but the same does not hold true for rectification which requires evidence of common intention of the parties to the document in question.

104. After all, had Beazer Group (or some other company) entered into a separate contract of guarantee, it may well have been able to argue that rectification of the principal contract is akin to a material alteration or variation thereof, for the purpose of the rules of discharge of guarantors. As to that, Mr Pymont referred me to the well-known general principles about material alterations and variations (in Halsbury Vol. 49 paras. 1212, 1235 and 1236) although I was not cited any authority on the specific point as to whether rectification amounts to material alteration or variation. But that it does, cannot be excluded. And as a separate guarantor it is difficult to see that it would not have had a right to be joined in the proceedings.

105. On the face of it, therefore, if Notiondial had to rely on rectification and sought relief against Beazer Group, it would have to have shown that the Deed should be rectified as against it well. If it could not, there could be no claim as against Beazer Group. I deal here with a further argument made by Mr Pymont. He said that if any claim for rectification failed as against Beazer Group (for lack of common intention on its part) then the claim for rectification as a whole must fail, even if it were otherwise made out against Beazer. He said that a claim to rectification would affect both Defendants and therefore had to succeed against both Defendants. I agree that it would affect both Defendants but that is why I have already said that where the guarantor is a party, rectification must be made out against it as well, for it to be liable. In fact, Mr Pymont accepted in argument that if Notiondial had abandoned any claim against Beazer Group under the guarantee at the start of the trial, then the Court could order rectification as against Beazer if that was made out on the facts. But if Notiondial did not do that (and it did not) then once the Court has to adjudicate on the question of rectification as against Beazer Group, it was bound to dismiss the claim generally if it could not be made out as against Beazer Group. Or in the exercise of its equitable jurisdiction it should do so. He said that abandoning the claim against Beazer Group was different because then Beazer Group's position was rendered irrelevant. But I do not agree. If I were to rule on Beazer Group and found no case of rectification as against it, it then also would have been rendered irrelevant. The rectification claim would (still) not affect it. Just as it would not have affected it if the claim under the guarantee had been abandoned. The only difference is that it would have had to participate in a trial. And any costs consequences of that could be addressed after judgment in the usual way. What Mr Pymont did not submit was that the mere existence of Beazer Group as a further party to the Deed meant that whether Notiondial ever wished to proceed against it or not, the Court had to be satisfied that rectification could be made out as against it before it could order rectification at all. The absence of such a submission is not surprising. In truth, the Court is well able to deal with the consequences for Beazer Group if any claim for rectification would have succeeded against Beazer but not against it. If that situation arose, the document would be rectified as against Beazer but not Beazer Group. In that situation I do not think that it would have been right to preserve the unrectified Clause 6 as against

Beazer Group (for example so as to allow a lesser monetary claim against it) since either it is rectified or it is not. The outcome would be that the claim against Beazer Group would be dismissed altogether, the effect of which would be that it could never have any liability under Clause 6. Its guarantee, in respect of that obligation, would thus be discharged.

The Evidence

106. The question as to what was said about rectification as against Beazer Group was firmly raised in the statements of case (see the Defendants' request for Further Information about it and the reply thereto at 1/43). But on the facts, it was not really addressed in the evidence adduced by Notiondial in particular in the WS of Mr Richardson. The latter says that his Head Office was very involved in the transactions due to its financial implications and also that its principal concern was not Area J but the acquisition of the shares of Breakblock by which the sale was effectively to be achieved and the likelihood of any unforeseen or unexpected liabilities. He was not asked in chief to amplify his evidence so as to say what those at Head Office thought or knew about the working of Clause 6. Nor was there any clear evidence of what he told them about his understanding of it and his intention behind it.

107. Nonetheless I am invited to conclude that Beazer Group had the necessary common intention on the following bases.

Attribution

108. It is true that Mr Richardson was a director of Beazer Group as well as Beazer. So was Brian Armstrong, who was company secretary of both companies. Both of these individuals signed for Beazer and Beazer Group on the Deed. But I do not think that this is sufficient to attribute to Beazer Group, Mr Richardson's knowledge and intentions as far as Clause 6 is concerned even though this could be done in relation to Beazer (and it was not contended otherwise).

109. The written evidence and Mr Richardson's own evidence shows that whatever he thought, Head Office approval was required. Hence the various documents setting out in detail the proposed deal and in particular the Beazer Report which was in effect a recommendation, and the further documents from Mr Stobbs at Beazer to Mr Low and others at group level dated 8 and 28 February at 2/45 and 155. Indeed the former refers to a meeting to take place with Mr Douglass to provide more detail and give him an opportunity to raise concerns at group level.

Actual Evidence of Intention

110. Given the absence of direct evidence from Mr Richardson as to what Head Office was told and agreed to about Clause 6, Ms Dunn points to various other pieces of evidence from which it should be inferred that Beazer Group had the same specific intention as Beazer. She points to the fact that Head Office was very involved, the liaison between Mr Richardson and Mr Stobbs and Mr Armstrong, as exemplified by the documents I have already referred to and the notes at 2/136 and 144. I follow all of that but they give no hint as to any discussions about the particular meaning and effect of Clause 6. I take the point that Area J is mentioned in the costing schedule submitted by Beazer to Head Office at 2/162 and the reference to 7.5 acres. But that is too slim a basis for me to infer as against

Beazer Group, that it had been put fully in the picture as to how Clause 6 would work. Again, it is clear that Mr Douglass had various communications and meetings with Head Office as one would expect. Ms Dunn submits that it would be reasonable to assume that Mr Douglass would have reported to Head Office all of his understanding gleaned from the meeting on 17 February. But while he may have reported back he also said in evidence that Mr Armstrong would have received information from Mr Richardson and I do not think I can infer from Mr Douglass's position that he necessarily told Head Office about Clause 6 and the discussion and agreement on 17 February 2000, which, for his part he said he could not remember much about. And Mr Douglass was not asked in cross-examination directly whether he recalled going through Clause 6 with anyone at Head Office. The same is true about the role of Mr Armstrong. No doubt he did speak to Mr Richardson about the deal but it remains the case that there is no detailed evidence from Mr Richardson about that.

111. I take Ms Dunn's point that it might be thought surprising if Beazer Group did not share the intentions of Beazer in relation to this deal, given that its sanction was required, but we are not dealing here with its main financial aspects at all. It was, rather one relatively small part which imposed only a contingent financial obligation.

112. Nor do I think it open to Notiondial to argue that the requisite intention on the part of Beazer Group is something different to, or less than, that of Beazer. For example that it intended to guarantee whatever Beazer's liabilities might be, however unexpected. But for that to be enough there would still need to be specific evidence on the point and there is none. This intention is merely postulated as one possible intent. It is also said that if the Court cannot say what Beazer Group's intention was at all, it should presume it to be the same as Beazer's absent positive evidence to the contrary from the Defendants. I disagree. The burden remains on Notiondial in such circumstances to make out its case.

113. The upshot is that I am not satisfied that there is sufficient evidence to establish the necessary common intention on the part of Beazer Group to have allowed a claim for rectification as against it, had it been necessary.

CONCLUSIONS

114. My conclusions are therefore that:

(1) Notiondial succeeds in its claim on liability under Clause 6 as against both Defendants on the footing that Construction 2 applies. This means that the valuation exercise to take place will not apply any Ransom Discount;

(2) Had Notiondial failed on its construction arguments, it would have succeeded in rectification as against Beazer but not Beazer Group. In that event:

(a) I would have ordered, as against Beazer, that Clause 6 should have been rectified so as to provide that the development value was to be determined by reference to the prevailing rate per acre of other land being sold at Ingleby Barwick at the time of the planning permission, alternatively to the same effect as Construction 2;

(b) There would be no claim for any sum against Beazer Group under Clause 6, and its guarantee in respect thereof would have been discharged.

115. I am most grateful to Counsel for their conduct of this case and their most helpful oral and written submissions. I will hear them on the particular form of any order to be made and other consequential matters, upon the handing down of this judgment.