Neutral Citation Number: [2023] EWHC 2083 (Ch)

Case No: PT-2021-MAN-000059

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 15/08/2023

Before :

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

RICHARD EDWARD TOMLINSON	**Claimant**
- and –	
(1) BRIAN FREDERICK TOMLINSON **(2) BARRY TOMLINSON** **(3) MICHAEL TOMLINSON**	**Defendants**

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Mark Harper KC (instructed by **LLM Solicitors**) for the **Defendants**
Paul Lakin (instructed by **Aaron & Partners**) for the **Claimant**

Hearing date: 25 July 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Tuesday 15 August 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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HHJ CAWSON KC

HHJ CAWSON KC:

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Introduction

1. I am concerned with two applications:

   i) An application dated 15 March 2023 ("**the Application**") brought by the Defendants, Brian Frederick Tomlinson ("**Brian**"), Barry Tomlinson ("**Barry**"), and Michael Tomlinson ("**Michael**"), seeking an order enforcing the terms of a confidential Settlement Agreement and Release dated 16 December 2021 ("**the Settlement Agreement**") pursuant to the permission to apply contained in a Tomlin Order dated 26 October 2022 ("**the Tomlin Order**");

   ii) An application dated 7 July 2023 ("**Richard's Application**") brought by the Claimant, Richard Edward Tomlinson ("**Richard**") seeking a declaration that the sum of £600,000 plus contractual interest (£51,053.61 to date) is due to be paid by Brian, Barry and Michael to Richard pursuant to the terms of the Settlement Agreement. This, Richard's Application, also seeks a declaration that *"£X"* is due under a tax indemnity within the Settlement Agreement, and an order that the sums declared due be paid within 14 days. Any such liability arises under clause 15 of the Settlement Agreement.

2. In short, Brian, Barry and Michael allege that Richard has failed, as required by the Settlement Agreement, to execute transfers to transfer his legal interest in various properties to Brian, Barry and Michael, and/or has evinced an intention not to perform the terms of the Settlement Agreement by so transferring his legal interest in the relevant properties to Brian, Barry and Michael, such that they are entitled to call upon the Court's assistance in requiring him to do so by applying to the Court for an Order carrying the terms of the Settlement Agreement into effect.

3. In response, Richard alleges that Brian, Barry and Michael have acted precipitously, and that he is not obliged to transfer his legal interest in the relevant properties until Brian, Barry and Michael are in a position to provide him with a correctly prepared suite of documents providing for the effective transfer of his legal interests in all the relevant properties, which to date is said not to have happened, as well as executing a charge in favour of Richard over one of the properties.

4. So far as Richard's Application is concerned, it is common ground that the Settlement Agreement provided for the payment of an instalment payment of £120,000 to

Richard on or before the date 15 months after *"Completion"*, which if taken to be the date of the Settlement Agreement would be 16 March 2023. This sum was not paid, and Richard maintains that an accelerator provision under the terms of the Settlement Agreement means that he is entitled to immediate payment of an outstanding balance of £600,000 plus interest. Brian, Barry and Michael maintain that their obligation to pay this instalment was dependent upon the performance by Richard of his obligations under the terms of the Settlement Agreement, and that as Richard's obligation to transfer his legal intertest in the properties has not been performed, they were under no obligation to pay the £120,000 on 16 March 2023, and so the accelerator provision has not come into effect.

5. Brian, Barry and Michael were represented by Mark Harper KC, and Richard was represented by Paul Lakin of Counsel. I am grateful to them both for their helpful written and oral submissions.

6. I propose to consider whether Brian, Barry and Michael are entitled to an order carrying the terms of the Settlement Agreement into effect, before considering whether they have become liable to pay the balance of £600,000 plus interest to Richard under the terms of the accelerator provision in the Settlement Agreement.

Background

7. Brian, Barry, Michael and Richard are brothers. The Settlement Agreement compromised a long-standing family farming partnership dispute, and three sets of proceedings, namely a bankruptcy petition presented against Richard's wife, Claire Margaret Tomlinson ("**Claire**"), an appeal brought by Brian, Barry and Michael against the setting aside of a statutory demand served on Richard, and proceedings brought by Richard under the Trusts of Land and Appointment of Trustees Act 1996 against Brian, Barry and Michael.

8. The Settlement Agreement was made between Richard (1), Claire (2), Barry (3), Brian (4) and Michael (5).

9. The Settlement Agreement contains the following terms relevant for present purposes:

i) Clause 1 of the Settlement Agreement included the following definitions:

a) *"Byways"* as meaning *"the freehold land at Byways, Whitchurch Road, Broxton, Chester CH3 HJR, as registered at HM Land Registry with title number CH104318."*

b) *"Charge"* as meaning *"a legal charge in favour [Richard], to be registered over Byways on Completion, as security for the Deferred Payments."*

c) *"Completion"* as meaning *"the completion of this agreement in full and final settlement in accordance with clause 15 (sic) of this agreement."*

d) *"Completion Date"* as meaning *"the date of this agreement."*

e) *"Everest"* as meaning *"the freehold land at Everest, Chester Road, Broxton CH3 9JR, as registered at HM Land Registry with title number CH499044."*

f) *"Fairview"* as meaning *"the freehold land at Fairview, Old Coach Road, Barnhill, Broxton, Chester CH3 9JL, as registered at HM Land Registry with title number CH338436."*

g) *"Partnership"* as meaning *"the farming partnership as carried on previously by [Richard], [Brian], and [Barry] until 12th October 2020, following which date it has been carried on by [Brian], [Barry] and [Michael] only."*

h) *"Settlement Payments"* as meaning *"the payments totalling £1,100,000 owing and payable by [Brian], [Barry] and [Michael] in accordance with clause 3.1 of this agreement."*

ii) Clause 3.1 of the Settlement Agreement provided that Brian, Barry and Michael should together pay *"the Settlement Payments"* to Richard by way of bank transfer *"as follows"*, namely by way of a series of payments of (a) £250,000 *"on the Completion Date"*, (b) £250,000 within three months *"of the Completion"*, (c) £120,000 *"on or by the date 15 months following Completion"*, (c) £120,000 *"on or by the date 27 months following Completion"*, (d) £120,000 *"or by the date 39 months following Completion"*, (e) £120,000 *"on or by the date 51 months following Completion"* and (f) £120,000 *"on or by the date 63 months following Completion"*.

iii) Clause 3.2 of the Settlement Agreement provided that in the event of all or any part of the Deferred Payments referred to in clause 3.1 thereof not been paid within 30 days of *"when due"*, the whole amount which remained unpaid at that time should immediately become due and owing and attract interest from the due date until payment of the overdue sum, whether before or after judgment, at a rate of 4% per annum above the Bank of England's base rate from time to time.

iv) Clause 3.6 of the Settlement Agreement provided as follows:

> *"3.6 [Brian], [Barry], and [Michael] shall, on Completion, deliver (and/or procure to deliver) to [Richard] the Charge, duly executed by [Brian], [Barry], and/or [Michael] (as the case may be), such Charge to be registered over Byways until such time that the Deferred Payments have been fully paid."*

v) Clause 3.7 of the Settlement Agreement provided as follows:

> "3.7 *[Brian], [Barry], and [Michael] hereby consent to the entry of the following restrictions (Restrictions) against the title to both Everest and Fairview at HM Land Registry:*
>
> *"No disposition of the registered estate (other than a charge) by the proprietor of the registered estate is to be registered without a written*

*consent signed by **Richard Edward Tomlinson** of Agden Dairy Farm, Agden, Whitchurch, SY13 4RE or his conveyancer"."*

vi) Clause 6 of the Settlement Agreement provided as follows:

"6. ***Transfer of Assets and Land***

At Completion [Richard] shall:

(a) deliver, or procure delivery, to [Brian], [Barry], and [Michael] (acting together) physical possession of all the Assets capable of passing by delivery, with the intent that title in such Assets shall pass to the (sic) [Brian], [Barry], and [Michael] on such delivery; and

(b) transfer and relinquish any interest which he has in the Land to [Brian], [Barry], and [Michael]. [Richard] confirms and declares that from the Completion Date he holds the Land on trust for [Brian], [Barry], and [Michael]."

vii) By clause 7 of the Settlement Agreement, Richard, Brian, Barry and Michael each undertook that; *"on Completion, they shall enter into the Overage Agreement in the form annexed hereto at Annex E."* The Overage Agreement in the form annexed to the Settlement Agreement at Annex E was executed by the parties on 16 December 2021. It related to land known as Top Field, Clutton Hall Farm, Broxton Road, Clutton, Chester ("**Top Field**"). Contemporaneously therewith, Richard, Brian, Barry and Michael, by transfer dated 16 December 2021, transferred Top Field to Brian, Barry and Michael subject to the terms of the Overage Agreement.

viii) Clause 14 of the Settlement Agreement (incorrectly referred to as clause 15 in the definition of *"Completion"*) provided that: *"Completion shall take place remotely on the Completion Date, or in such place and by such other method as is agreed in writing by the parties."*

ix) By clause 15.2 of the Settlement Agreement, it was provided that Brian, Barry, and Michael should each keep Richard indemnified against:

"... all costs, losses, liabilities and damages (including legal and other professional expenses) however arising which [Richard] incurs or becomes liable in respect of:

(a) any liability for Tax which arises in connection with the Partnership; and

(b) any liability which arises in respect of the Partnership Finance and Hire Purchase and Lease Agreements."

x) Clause 24 of the Settlement Agreement provided as follows:

*"24. **Co-operation***

> *The parties shall deliver or cause to be delivered such instruments and other documents at such times and places as are reasonably necessary or desirable, and shall take any other action reasonably requested by the other party for the purpose of putting this agreement into effect."*

xi) Clause 27 of the Settlement Agreement provided as follows:

> *"27* ***Further Assurance***
>
> *The parties agree to take such steps as may be reasonably necessary to give effect to the terms of this agreement after the Completion Date, the costs of such actions to be paid equally by the parties."*

xii) Schedule 1 to the Settlement Agreement comprised a list of properties headed *"Land"*. The list included 18 registered titles including Byways, Everest and Fairview, and two unregistered titles (one of which is Fields Farm, CH3 9JR).

10. £250,000 was paid by Brian, Barry and Michael to Richard on the Completion Date (i.e., 16 December 2021), and a further £250,000 was paid by Brian, Barry and Michael to Richard on 16 March 2022, pursuant to clause 3.1 of the Settlement Agreement.

11. However, whilst Richard, by clause 6(b) of the Settlement Agreement declared that he held the Land, i.e. any interest of his therein, upon trust for Brian, Barry and Michael, Richard did not, as provided for by clause 6(b) of the Settlement Agreement, *"At Completion"*, execute any transfer or transfers to transfer and relinquish the interests that he had in the Land to Brian, Barry and Michael, the sole exception being the transfer dated 16 December 2021 relating to Top Field, the subject matter of the Overage Agreement referred to in sub-paragraph 9(vii) above.

12. I understand it to be common ground that, at least in respect of the registered titles, such transfer or transfers would necessarily have involved the registered proprietors, including Richard, executing a transfers or transfers to Brian, Barry and Michael which would then enable the latter to then be registered as proprietors in order to constitute them as legal owners.

13. It not entirely clear from the evidence why transfers were not executed at *"Completion"* on 16 December 2021, although I understand that this may have been because there was first a need to discharge monies due to Barclays Bank that were secured against some of the relevant properties.

14. Further, Brian, Barry and Michael did not *"on Completion"* deliver (and/or procure to deliver) to Richard *"the Charge"* duly executed by them registered over Byways, no doubt because it would not have been possible for Brian, Barry and Michael, save perhaps in escrow, to deliver or procure to be delivered the Charge until such time as Byways had been transferred into their names as provided for by clause 6(b) of the Settlement Agreement.

15. So far as the various registered titles comprising the Land, apart from Byways, are concerned, these were at the time of the Settlement Agreement, and remain, registered in the names of Brian, Barry, Michael and Richard, and so the relevant transfers to Brian, Barry and Michael, required to be executed by Brian, Barry, Michael and Richard.

16. The position is more complicated in the case of Byways because this property is registered in the names of Brian, Barry, Richard and their late mother Kathleen Tomlinson ("**Mother**"). Consequently, so far as Byways is concerned, it is first necessary for a Grant to be taken out in respect of Mother's estate before this property can be transferred into the names of Brian, Barry and Michael. Other solicitors than those acting for any of the parties to the present applications, namely Butcher & Barlow LLP, are acting in respect of the taking out of such a Grant.

17. So far as the unregistered land at Fields Farm is concerned, it can, as I understand it, be conveyed or transferred into the name of Brian, Barry and Michael without the necessity to join Richard. However, before Brian, Barry and Michael can be registered as proprietors of a registered title, it will be necessary for Richard to join with his other brothers in consenting to the removal of a restriction that he and his brothers registered against this property in or about 2004.

18. All the parties to the Settlement Agreement appear to have acquiesced in leaving the execution of transfers of the relevant properties to Brian, Barry and Michael, and the execution by Brian, Barry and Michael of the Charge over Byways, outstanding on *"Completion"* of the Settlement Agreement on 16 December 2021. However, it was clearly envisaged that steps would have to be taken in due course to put the Settlement Agreement fully into effect by, amongst other things, executing such transfers and the Charge.

19. In the circumstances, as I see it, it cannot seriously be disputed that clauses 24 and 27 of the Settlement Agreement are of particular importance in that these provisions specified what was required of the parties in order to ensure that the Settlement Agreement was carried fully into effect to the extent that this was required. As referred to above, thereunder, each of the parties agreed that:

    i) For the purpose of putting the Settlement Agreement into effect, they would:

        a) Deliver or cause to be delivered such instruments and such documents at such times and places as were *reasonably* necessary or desirable;

        b) Take any other action *reasonably* requested by the other party; and

    ii) Take such steps as may be *reasonably* necessary to give effect to the terms of the Settlement Agreement after the Completion Date.

Respective positions regarding carrying the Settlement Agreement into effect.

20. In broad terms, it is Brian, Barry and Michael's position that, by correspondence from their Solicitors, LLM Solicitors ("**LLM**"), dating from July 2022, they have reasonably required Richard to take the requisite steps to bring about the execution of the transfers necessary to transfer the Land into the names of Brian, Barry and

Michael, but that up to the date of the issue of the Application, he unreasonably declined to do so or to properly engage in bringing about such transfers otherwise than subject to a wholly unjustified and misconceived condition that Michael's name be removed from the title before any transfers were executed in favour of Brian, Barry and Michael. Further, it is Brian, Barry and Michael's case that after the issue of the Application, and even though by then represented by his current Solicitors, Aaron and Partners ("**AP**"), Richard has failed properly to engage in the process required to bring about the relevant transfers.

21. Consequently, it is Brian, Barry and Michael's case that Richard has acted in breach of the terms of the Settlement Agreement in failing to execute transfers pursuant to clause 6(b) of the Settlement Agreement, or at least has acted in breach of clauses 24 and 27 of the Settlement Agreement by failing to deliver or take other action reasonably requested by Brian, Barry and Michael for the purpose of putting the terms of the Settlement Agreement into effect, and by failing to take such steps as are reasoning necessary to give effect to the terms of the Settlement Agreement. In the alternative, if not actually in breach of the terms of the Settlement Agreement, it is submitted that it was necessary for Brian, Barry and Michael to issue the Application because Richard had evinced an intention not to comply with its terms, cf. *Hasham v Zenab* [1960] AC 316.

22. Brian, Barry and Michael ask the Court to make an order in the following terms, namely that:

> "1. The Claimant shall sign the Transfer documents annexed to this Order by no later than (tbc)
>
> 2. The Claimant shall not take any steps to interfere with the registration of any of the Transfers at HM Land Registry.
>
> 3. The Claimant shall, within 7 days of being required to carry out the same,
>
> 3.1 provide proper and sufficient authority to the satisfaction of HM Land Registry to remove the caution registered against the unregistered land at Fields Farm
>
> 3.2 sign any Transfer document relating to the property known as Byways (Title No)
>
> 4. On completion of paragraph 1 the Defendants shall instruct their solicitors to release immediately:
>
> 4.1 the sum of £120,000.00 (the 2023 annual payment)
>
> 4.2 the sum of £14,517.26 (the tax indemnity)
>
> 4.3 execute a form of legal charge attached to this Order and lodge the same when applying to register the transfer of the property known as Everest.

5. In the event that the Claimant fails to comply with Paragraphs 1 above, the Court (through a Judge of the Business and Business Property Court) shall, under the authority of Section 39 of the Senior Courts Act 1981, sign all documents necessary for the transfer of land, and the Respondents/ Applicants will only be required to release the sums referred to at Paragraphs 4.1 and 4.2 upon the Land Registry registering the last of the Transfers.

6. There be liberty to the Defendants to apply for further directions if so required in respect of any failure by the Claimant to comply with the paragraphs herein."

23. The draft order produced includes an additional paragraph 7 providing for Brian, Barry and Michael to have liberty to apply for directions in respect of their claim for damages. However, Brian, Barry and Michael now recognise that it would not be appropriate to pursue a claim for damages by the Application, and that this would now be a matter for separate proceedings, if appropriate.

24. In response, whilst it is now accepted on behalf of Richard that he was not entitled to require that Michael's name be removed from the title to the respective properties before they were transferred to Brian, Barry and Michael, it is submitted by Mr Lakin that Richard did not act unreasonably in adopting the stand that he did with regard to Michael's name being removed from the title, having made clear that he was, in principle, prepared to execute the relevant transfers.

25. Further, it is submitted on behalf of Richard that he has never been under any obligation to execute transfers of properties on a piecemeal basis, and that before being required to execute any transfer, he was entitled to insist that Brian, Barry and Michael had in place all the documentation in order that all the outstanding matters could be carried into effect, including the transfer of Byways, if necessary following the obtaining of a Grant to Mother's estate, and the execution by Brian, Barry and Michael of the Charge. As this stage has never been reached, then, so it is argued, Richard has never been in breach of the terms of the Settlement Agreement, and nor can it properly be said that he has evinced any intention not to perform its terms.

26. Mr Lakin submits that s. 27 of the Land Registration Act 2002 is of key importance. Ss. 27(1) provides that a disposition of a registered estate does not operate at law until the relevant registration requirements are met. Mr Lakin submits that there are a number of registration requirements that need to be resolved before the relevant transfers can be registered, and until those matters are resolved, the Court cannot be asked to carry the terms of the Settlement Agreement into effect.

27. In paragraph 65 of his Skeleton Argument, Mr Lakin identified the following issues that it is said still need resolving before all the transfers can be registered:

i) The correct form of transfers need engrossing;

ii) Correct plans need attaching (transfers (TR1) are by reference to land edged red). This is said to be more so in the case of transfers of part of a title, or that relate to previously unregistered land, where new HM Land Registry compliant plans are said to require to be draw up. It is said to be usual

conveyancing practice for the parties to sign plans to confirm that they are correct;

iii) Restrictions need adding to those transfers affected, i.e., Everest and Fairview as a result of clause 3.7 of the Settlement Agreement;

iv) The consent of mortgagees needs to be obtained where required;

v) The Charge, over Byways, that Brian, Barry and Michael were to provide on *"Completion"* needs to be executed and provided to Richard for registration against Byways;

vi) Personal Representatives require to be appointed over Mother's estate so that the transfer of Byways can be effected;

vii) The restriction against first registration of the unregistered land requires to be resolved.

28. On this basis, it is submitted on behalf of Richard that it is not appropriate to make the order sought, or indeed any order on the Application.

29. The Application is supported by the witness statements of Paul Humphreys ("**PH**") of LLM dated 15 March 2023 and 30 May 2023. In response, Richard relies upon the witness statement of his Solicitor, Carlianne White ("**CW**") of AP dated 15 May 2023. Richard's Application is supported by CW's witness statement dated 14 July 2023 that also deals further with the Application. In response to this latter witness statement, Brian, Barry and Michael rely on PH's witness statement dated 21 July 2023. The witness statements exhibit relevant correspondence, but largely consist of recitation of the correspondence and argument. Frankly they are, in themselves, of limited assistance in determining the case. However, it is necessary to consider the correspondence in some detail.

The evidence, and my findings in relation thereto

30. There was some initial correspondence between PH and Richard's then Solicitors in March 2022 at which time the £250,000 was potentially becoming due under clause 3.1(b) of the Settlement Agreement. In an email dated 16 March 2022, PH sought assurance that Richard would sign the transfer documents when required to do so. In response, by an email of the same date, Richard's then Solicitors replied to the effect that they had no indication that Richard would not do everything in his power to complete the transfers, and they enquired with regard to a timetable in respect of the relevant transfers.

31. On 6 July 2022, PH emailed Richard directly having been unable to obtain a response from his Solicitors. PH informed Richard that the position had been reached that arrangements had been made to ensure that Barclays Bank could be paid off so that the Land could be *"put into the three names of Brian, Barry and Michael."* PH said that he had all the necessary transfers prepared for approval *"by you or your advisers"*, and he asked Richard how he wished to proceed suggesting it might be appropriate for Richard to obtain legal advice. PH also flagged up the issue regarding Mother's estate. I note that no issue was subsequently taken by or on behalf of

Richard with regard to obtaining any consent from Barclays Bank until raised by AP in a letter dated 13 July 2023 sent shortly prior to the hearing, and it remains the position of Brian, Barry and Michael that this does not give rise to any issue so far as now executing the relevant transfers are concerned as arrangements have been made to pay off Barclays Bank as referred to in the email dated 6 July 2022.

32. Richard did not reply to the email dated 6 July 2022, and so PH sent a further email to Richard on 12 July 2022. This sought a response and stated that if Richard was not prepared to engage, directly or with the assistance of lawyers, then the other option would be to refer the matter back to court.

33. On 14 July 2022, PH's conveyancing partner, Terry McMahon ("**TM**"), emailed Richard and Claire stating that he had prepared draft property transfer documentation reflecting the transfer by Richard of his share in the properties to Brian, Barry and Michael, and he attached to his email copies of the transfers that he had prepared, including transfers of Byways and unregistered land to the north of Fields Farm, and unregistered disused railway track to the east of Fields Farm.

34. The email dated 14 July 2022 made clear that the documentation was supplied for approval purposes only and was not intended to be ready for signature. It identified a probable need to produce Land Registry compliant scale plans to deal with the transfer of the disused railway track, and also the fact that Byways was currently registered in the names of Brian, Barry, Richard and Mother, and that an application would need to be made to HM Land Registry to remove Mother's name from the title so that the transfer could then be dealt with by Brian, Barry and Richard. The email sought comments from Richard on what had been provided, flagging up that, ordinarily, the documentation would have been sent to Richard's Solicitors, but the understanding was that he did not currently have Solicitors acting for him.

35. Richard and Claire responded to TM's email dated 14 July 2022 by email dated 21 July 2022 making a number of comments regarding TM's email. TM responded to this email by an email dated 22 July 2022 that annotated comments in red against those in Richard's and Claire's email dated 21 July 2022. The following key points emerge from this exchange:

    i) Richard and Claire indicated that they may have further points upon further review. TM responded to say that he waited to hear from them following their further review, that his email of 14 July 2022 had been an attempt to pull things together given that he was initially just trying to ensure that the documents appeared to make sense and properly included all the relevant parcels of land. He welcomed Richard's and Claire's further review.

    ii) With regard to Byways, it was stated that Richard did not agree to an application being made to HM Land Registry to remove Mother's name from the title, suggesting that this would deprive Richard and Henry (another brother) of any of Mother's share in Byways. TM responded to say that this was not the intention, and that the removal of Mother's name was TM's own suggestion to facilitate the legal transfer. He set out his understanding that following transfer, Richard, Brian Barry would continue to hold Mother's interest for the beneficiaries of Mother's estate. TM suggested that this was a

situation where it would be good if he could speak to a legal representative acting for Richard to discuss how best this issue could be dealt with.

iii) Richard and Claire raised the omission of any mention of the Charge to be provided pursuant to clause 3.6 of the Settlement Agreement. TM responded to note that the Charge would be granted by Brian, Barry and Michael and submitted to HM Land Registry together with the registration of the transfer to them of Byways. He suggested that the form of charge would usually be prepared by the party having the benefit of it, and asked Richard and Claire to draft a form of legal charge for approval.

iv) Richard and Claire further raised clause 3.7 of the Settlement Agreement, and the requirement for restrictions as against Everest in Fairview. TM responded that this was noted and agreed and stated that an amendment could be made to the transfers relating to Everest and Fairview to include the restriction.

v) Richard and Claire sought confirmation that Michael was *"holding the properties on trust absolutely for the continuing partners' as stated in his retirement deed, 27th July 2007, section 5.2."* TM responded that he was dealing with the mechanics for transferring the property interests, and that he would leave it to PH to respond to this point.

36. It is important to note that although Richard and Claire did subsequently revert concerning the position of Michael and did seek copies of title plans and copies of registers of title as referred to below, they did not respond so as to engage with the detailed response provided by TM in respect of the other matters raised by Richard and Claire in their email dated 21 July 2022.

37. By email dated 26 July 2022, Claire sought copy title plans from TM. TM responded the same day by series of emails attaching copies of the title plans.

38. By email dated 29 July 2022, Claire sought a copy of the *"register of title as shown in the photo of Agden for each of the properties so we can cross reference to the TR1 forms."* TM responded the same day by series of emails attaching copies of the relevant registers of title.

39. By email dated 9 August 2022, Claire complained that there had been no response with regard to the enquiry regarding Michael's *"position on the land"*. The email stated that so far as Richard was aware, Michael's name had been removed from the title deeds because PH had sent a letter dated 16 May 2014 confirming that he *"was doing a transfer of property"*. The email referred to Richard making a formal complaint against PH and maintained that: *"the only way to proceed will be to remove Michael's name first then Richard will transfer his interest in the property to Brian, Barry and Michael as stated in the settlement agreement."*

40. TM responded to this email by email dated 10 August 2022, which Claire, in turn, responded to by email dated 15 August 2022. This latter email began by saying that Richard was willing to transfer and relinquish any interest which he had in the Land to Brian, Barry and Michael: *"but only with the correct transfer documentation."* The email went on to suggest that TM had: *"completely ignored to make any reference to Michael's deed of retirement"* and further suggested that TM had *"failed to*

acknowledge any wrongdoing of your colleague Paul Humphreys who has failed to complete the transfer of property for Michael." The point was then developed that, so it was alleged, Michael's name ought to have been removed from the title, and that that should be done before any transfer to Brian, Barry and Michael as provided for by the Settlement Agreement. It was suggested that asking Richard to sign transfer documents with Michael's name included as a transferor was asking him to commit a criminal act, which he was not prepared to do.

41. Claire, on behalf of Richard, continue to press the point regarding Michael's name being on the title in emails dated 12 September 2022 and 20 September 2022. Each of these emails repeated that Richard would transfer and relinquish any interest in the land to Brian, Barry and Michael as per clause 6(b) of the Settlement Agreement *"but only with the correct transfer documentation."*

42. PH responded to Claire in an email dated 30 September 2022. This stated that Michael had held the land to the order of Brian, Barry and Richard up to the Settlement Agreement, and that at that point Michael had become one of the owners of the land, along with Brian and Barry, and that Richard was required to sign the transfers to give effect to the Settlement Agreement, i.e. that there was no requirement for Michael's name to come off the title before matters could proceed. Confirmation was sought that Richard would now sign all the transfers.

43. Claire responded to PH by email dated 5 October 2022 maintaining the same position regarding Michael, and the alleged need for his name to be removed from the title. The email again repeated the mantra that Richard would transfer and relinquish any interest in the land *"but only with the correct transfer documentation"*.

44. PH responded by email dated 12 October 2022 asking that Richard take legal advice as a matter of urgency, stating that: "*Your repetition of matters which are not now relevant, and which did not bar Richard from negotiating a settlement with his brothers, amount to inappropriate and unnecessary obstruction on Richard's part."*

45. By email dated 18 October 2022, PH sought confirmation as to whether or not Richard was taking legal advice on the proposed transfers, whether from his former Solicitors or another firm.

46. By email dated 19 October 2022, Claire responded purporting to confirm that Richard was taking legal advice regarding the property transfers. However, the email continued to take issue with regard to Michael's name being on the title, and Michael being a party to the relevant transfers. PH responded by email the same day seeking confirmation as to who Richard was instructing. Claire responded by email asking PH to send correspondence to her email address, which she would then forward. In response to this email, PH sought an explanation as to why it was not possible to identify the Solicitor appointed.

47. By a further email sent the following day, on 20 October 2022, PH wrote to Claire stating that if Richard genuinely wished to comply with the terms of the Settlement Agreement, he would have appointed lawyers to assist with regard to the process so that he could give instructions and be given advice as to the most appropriate way to complete the process. Claire responded the following day, 21 October 2022. Her email included the following: *"No amount of money your clients spend on sending*

emails to either me directly or any appointed lawyer will change the fact that Michael has to remove his name from the land titles first before Richard can transfer and relinquish any interest in the land to Brian, Barry and Michael."

48. By email dated 7 November 2022, Claire chased a response to this last email, and in a further email dated 9 November 2022, Claire reiterated the position regarding Michael, repeating the mantra that Richard would transfer and relinquish any interest in the land, *"but only with the correct transfer documentation."* The letter again raised the matter of PH's alleged conduct with regard to Michael and the properties at the time of the latter's retirement from the family partnership, stating that documentation had been sent to the SRA and the Legal Ombudsman.

49. As is evident from these exchanges, matters did not progress because there was an impasse between the parties as to whether Brian, Barry, Michael and Richard ought to execute the transfers of the relevant properties to Brian, Barry and Michael, or whether Michael's name ought first to be removed from the title before those transfers were executed. After Richard subsequently obtained legal advice in March 2023, he ceased to maintain the position that Michael's name ought first to be removed from the title and, for the purposes of the Application, Mr Lakin did not seek to argue on behalf of Richard that he had been entitled to take the stand that he had taken with regard to Michael's name being removed from the title. This was, as I see it, entirely realistic given that the Settlement Agreement proceeds on the basis that Brian, Barry, Michael and Richard were the registered proprietors of the relevant properties, and ought therefore to execute the relevant transfers - as indeed was done on 16 December 2021 in the case of the land the subject matter of the Overage Agreement as referred to above.

50. However, what is, to my mind, clear is that as at March 2023, matters had not progressed because Richard had taken an entrenched position so far as the removal of Michael's name from the title was concerned, and that having become distracted with the misconceived position that he took with regard to this issue, had not properly or reasonably engaged with the process that TM had sought to initiate with his email dated 14 July 2022, otherwise he might reasonably have been expected to have responded to and engaged with TM's comments made in response to Richard's and Claire's email dated 21 July 2022 and annotated on that email.

51. I am thus satisfied that, by March 2023 if not earlier, Richard was in breach of the terms of the Settlement Agreement, if not by failing to actually execute transfers as required by clause 6(b) of the Settlement Agreement, then by failing in breach of clause 24 thereof to take action reasonably requested by or on behalf of Brian, Barry and Michael for the purpose of putting the Settlement Agreement into effect, and in failing in breach of clause 27 thereof to take such steps as may be reasonably necessary to give effect to the terms of the Settlement Agreement.

52. Certainly, I consider that Richard had, by March 2023, evinced an intention not to perform his obligations under the Settlement Agreement as evidenced by his above conduct.

53. Properly considered, and on any objective basis, I do not consider that Richard's actions in maintaining his position with regard to Michael's name being removed from the title can properly be described as reasonable as suggested by Mr Lakin. Had

he taken legal advice, at the time, he would have been advised that his approach was misconceived. On the other hand, I do consider that the requests and attempts made on behalf of Brian, Barry and Michael, though LLM, to get Richard to engage in a process leading to the execution of the relevant transfers were reasonable, and for that reason the failure to respond thereto, and engage therewith amounted to a breach of the terms of the Settlement Agreement.

54. On 8 March 2023, PH sent to Richard what was, in effect, a letter before action, or rather letter before application to enforce the terms of the Settlement Agreement through the permission to apply provided for by the Tomlin Order.

55. This letter:

i) Referred back to TM's email dated 14 July 2022, and the transfer document sent therewith, and alleged that Richard had refused to sign the same;

ii) Referred to the fact that, so far as Byways was concerned, Butcher & Barlow LLP, Solicitors, had been appointed to take out a Grant in respect of Mother's estate, but that PH's understanding was that Richard bore significant responsibility for the delay to date with regard to that;

iii) Raised an issue concerning unregistered land at Fields Farm which remained in the names of Frank Tomlinson and Mother, and referred to the fact that Butcher & Barlow LLP, having been appointed to deal with Mother's estate, had been asked to address the question of the transfer of this land to Brian, Barry and Michael;

iv) Alleged that the failure to sign the transfers sent on 14 July 2022 was unreasonable, taking the point that the refusal to do so was based upon *"a single item of historical correspondence over proposed transfers which did not proceed for reasons you are aware of and which did not prevent you from litigating to secure your position"*, i.e. the issue concerning Michael's name being on the title;

v) Stated that application would be made to the Court *"for appropriate Orders"* unless by 4 PM on 14 March 2023:

> "1. You sign the attached draft Transfers and provide evidence of such.
>
> 2. Appoint solicitors to act on your behalf so as to ensure that the Transfers are only completed when Barclays Bank is being discharged of all monies owed under the charges but otherwise those solicitors will hold the Transfers to this firm's order.
>
> 3. You unconditionally agree to sign all/and further documents provided to you for signature by i) LLM in respect of property transfers, ii) Butcher Barlow in respect of Byways and the unregistered land as set out above."

vi) Included a threat by Brian, Barry and Michael to seek damages for breach of the Settlement Agreement;

vii) Stated that Brian, Barry and Michael were aware that but for Richard's breaches of the Settlement Agreement a further sum of £120,000 would be payable on 16 March 2023, but that this sum would not be paid until Richard met his obligations under the Settlement Agreement; and

viii) Informed Richard that he should take immediate legal advice.

56. I consider that there were some outstanding issues concerning the transfers that required to be finessed, and no doubt would have been finessed had Richard engaged properly with the process, and so I am not convinced that Brian, Barry and Michael were entitled to insist that Richard sign transfers in the terms attached to the letter dated 8 March 2023, and nor do I consider that they were entitled to insist that Richard *"unconditionally"* agreed to sign all/and further documents provided to him for signature without qualification in respect of property transfers, and insist that he instruct Solicitors.

57. Nevertheless, I do consider that Brian, Barry and Michael were entitled to maintain that Richard was in breach of the terms of the Settlement Agreement for the reasons that I have referred to above, entitled to insist that he acted reasonably in cooperating with the process of giving effect to the terms of the Settlement Agreement, entitled to insist that he properly and reasonably responded to Brian, Barry and Michael's reasonable requests that he engage in carrying the terms of the Settlement Agreement into effect, and thus entitled to apply to the court to enforce the terms of the Settlement Agreement if he continued to fail to cooperate and engage.

58. Unfortunately, in response to PH's email dated 8 March 2023, by email dated 14 March 2023, Clare doubled down on Richard's behalf. The mantra was repeated with regard to Richard being prepared to sign the correct transfer documentation, but the point maintained that the correct documentation had not been provided because it included Michael as a transferor. The complaints with regard to PH's conduct were repeated, and it was suggested that the impasse been caused by PH and suggested that he needed to accept responsibility for his actions. Confirmation was sought that: *"LLM will complete Michael's transfer documentation to remove his name from the land titles so that Richard can then complete his land transfer."*

59. Richard had, by then, instructed CW of AP to act on his behalf because, later that day, CW wrote to PH informing him that Richard had passed on the letter of 8 March 2023, and that AP was reviewing the same, together with the extensive correspondence that preceded it. She stated that she would *"revert substantially (sic) in due course"*. The email referred to PH's threat to make an application to Court, and maintained that such action would be precipitous, stating that it was trusted that an application would not be made without Richard having had the opportunity to provide a substantive response to the letter dated 8 March 2023.

60. PH responded to CW later the same day, referring to the email received directly from Claire/Richard earlier in the day. The email suggested that there was an urgent need for a sensible course to be taken which avoided great cost and further acrimony, but that the onus was on CW and her client to engage and not obstruct, the only other

option being to go back to Court. PH suggested that a discussion with CW may be appropriate, saying that he would be available from 9 AM the following day.

61. CW replied at 12:30 PM the following day, 15 March 2023, noting PH's email, and stated that she would *"revert substantively as soon as we are able to."* Bank account details were provided by CW for the payment of £120,000 on the basis that it was due pursuant to clause 3.1(c) of the Settlement Agreement the following day.

62. In response to CW's email, by email dated 15 March 2023 (16:18 PM), PH said that he had attempted to speak to CW four times during the course of the day, and had left messages with a secretary and on CW's mobile, one of the calls being made only minutes after CW had sent her email that day. PH said that the Application had been prepared, and that it would be CE filed with the court imminently. The email went on to maintain that as Richard had not fulfilled his side of the Settlement Agreement, he could not seek to enforce the terms of the same Settlement Agreement, i.e., clause 3.1(c).

63. The Application was, in fact, CE filed at 11:56 AM on 16 March 2023.

64. I regard it as unfortunate that PH did not wait rather longer for a substantive response from CW before the Application was issued, bearing in mind the limited time provided to CW to take instructions and respond. Having said that, Richard continued to act in breach of the terms of the Settlement Agreement through Richard's and Clare's email of 14 March 2023, and I consider that it was open to Brian, Barry and Michael to seek the assistance from the Court in enforcing the terms of the Settlement Agreement at that point if not earlier. Further, AP did not respond substantively until 21 April 2023 despite CW, in an email sent on 16 March 2023 at 9:23 AM, having said that there would be response *"in a matter of days"*.

65. On 21 March 2023, Layla Barke-Jones ("**LBJ**") of AP wrote to PH to inform him that CW was on leave until 4 April 2023. The email sought confirmation that there was no conflict in PH acting on behalf of Brian, Barry and Michael, and took a new point with regard to the draft transfers that had been provided, suggesting that they did not comply with the Settlement Agreement which provided only for transfers to Brian, Barry, and Michael, and not to them *"as continuing trustees"* or *"as continuing trustees operating as a property partnership under the name of the Tomlinson Property Partnership"*. Corrected transfer documents were requested.

66. In response, by email dated 22 March 2023, PH rejected any conflict point, and welcomed the fact that there was now some legal input into the transfer process. PH suggested that the Settlement Agreement did not prescribe the form of transfers, and asserted that as only Richard's interest was being transferred, it was correct to describe the three others as continuing trustees, something that was required to clarify for Stamp Duty Land Tax purposes that the whole value of the relevant properties was not being transferred, only Richard's share.

67. In an email dated 24 March 2023, LBJ pressed her point with regard to how the transferees ought to be described in the relevant transfers. The point was further pressed in an email dated 30 March 2023 when it was asserted that there was *"no agreement to pass entitled to a Partnership"*. In response, by email dated 31 March 2023, PH maintained that it was not a matter for Richard to stipulate how Brian, Barry

and Michael would hold the relevant properties. PH said that if AP considered that the draft transfers required amendment, they should amend the same, and consideration would be given to their amendments.

68. On 19 April 2023, PH wrote by email to LBJ expressing concern that she/Richard had still not:

i) Approved the draft transfers provided, or provided draft transfers for review;

ii) Set out Richard's position in respect of Byways;

iii) Set out Richard's position in respect of the unregistered land;

iv) Address the other matters raised in the Application; or

v) Providing details of Richard's Counsel's availability for the Application.

69. CW did respond with a lengthy letter dated 21 April 2023. This letter, amongst other things:

i) Provided amended transfers for LLM's consideration, and confirmed that AP held signed copies thereof, CW referring to the fact that Brian's name had been corrected, and that reference to trusts, trustees and property partnerships had been removed from the transfers.

ii) Raised the point that, pursuant to clause 3.6 of the Settlement Agreement, an executed Charge over Byways was to be delivered to Richard *"on Completion"*, but that no Charge had been delivered whether *"on Completion"* or otherwise. Prior to this, the last reference to the Charge had been in TM's annotated comments on Richard's and Claire's email dated 21 July 2022 which had not been responded to.

iii) Complained that pursuant to clause 3.7 of the Settlement Agreement, restrictions should have been entered against the titles of both Everest and Fairview, it being suggested that this required to be addressed urgently and concurrently with the transfers. The draft transfers provided by AP relating to Everest and Fairview did not, however, contain any reference to the entry of a restriction.

iv) Went on to deny that Richard had acted in breach of contract, and to maintain that Brian, Barry and Michael had acted in breach of the Settlement Agreement, namely clause 3.6 thereof relating to the Charge, clause 15.2(a) relating to Brian's Barry's and Michael's obligation to indemnify Richard against certain tax liabilities; and clause 3.1(c) relating to the further instalment of £120,000.

70. PH responded to CW's letter dated 21 April 2023 by letter dated 24 April 2023. This provided a draft of the Charge for approval on the basis that AP were now engaging on behalf of Richard in respect of this issue, but PH made the point that the Charge could only be granted and registered once Byways had been transferred to Brian, Barry and Michael. So far as Everest and Fairview were concerned, PH made the point that restrictions on the titles could only follow the completion of the transfers of

these titles, and that clause 3.7 of the Settlement Agreement itself confirmed that Brian, Barry and Michael consented to the entry of restrictions against these titles, and that it was therefore for Richard to apply for restrictions to be entered following completion of the transfers.

71. PH's letter went on to deny that Brian, Barry and Michael were in breach of contract, making the point in relation to the obligation to indemnify in respect of tax liability that Richard had failed to engage, and that, in any event, being in breach of the Settlement Agreement himself, he could not legitimately raise any complaint in respect thereof.

72. CW responded to PH by letter dated 26 April 2023. This expressed Richard's position as being that he was, and remained, prepared to complete the transfers when correct documentation was provided in accordance with the Settlement Agreement, and that as, so it was contended, LLM had been unable to provide complete and correct transfer documents, AP had amended the documents to enable matters to be completed. The letter continued to complain of an alleged failure to deliver the Charge (over Byways) *"on Completion"*, noting that a draft charge had been *"belatedly provided on 24 April 2023."*

73. PH responded by letter dated 28 April 2023 that included further draft transfers, the terms of which reinstated that the transferees were to hold the relevant properties in accordance with the provisions of a Property Partnership agreement, this being the preferred course for Stamp Duty Land Tax purposes, PH observing: *"we simply fail to understand how or why your client can object to a factual declaration as to how our client will hold the property."* PH further stated that he awaited comments on the draft of the Charge that had been provided.

74. Richard's position in the period leading up to the hearing of the Application was subsequently set out in a letter dated 13 July 2023.

75. Mr Harper KC, on behalf of Brian, Barry and Michael, submits that it is important to consider how the position rests following the sending of PH's letter dated 28 April 2023, namely:

i) Transfers have been sent for execution by Richard, but confirmation has not been received that they will be signed by Richard. There has been a dispute as to how Brian, Barry and Michael should be described as transferees given their desire to be described, for Stamp Duty Land Tax reasons, as holding the property transferred to them: *"in accordance with the provisions of a Property Partnership Agreement made between [Brian], [Barry], and [Michael]."* Objection had been taken to this on behalf of Richard up to and including by AP's letter dated 13 July 2023. However, in submissions Mr Lakin confirmed, in my judgment quite sensibly, that this was no longer relied upon as an objection to signing the transfers. However, the point was first taken in LBJ's email dated 21 March 2023, and has clearly delayed matters and taken up much correspondence being the only apparently outstanding issue up to the date of the hearing with regard to the transfers to be executed by Brian, Barry, Michael and Richard.

ii) So far as the transfer of Byways is concerned and the granting of the Charge thereover:

a) Mother's estate clearly needs to be involved before the transfer to Brian, Barry and Michael can be executed, and a Grant is awaited, matters in that respect being handled by other Solicitors, Butcher & Barlow LLP.

b) The issue of the Charge was not responded to by Richard following TM's email of 22 July 2022, until CW's letter dated 21 April 2023. A draft Charge was then speedily provided for approval. CW made some comments thereon in her letter dated 13 July 2023, but did not raise any issues that cannot be relatively easily resolved, subject to the issue of the transfer and Mother's estate.

iii) So far as Everest and Fairview are concerned, having previously produced draft transfers under cover of her letter dated 21 April 2023 that did not make reference to restriction out over these properties, in her letter dated 13 July 2023, CW takes the point that the transfers of these properties should include reference to the restrictions, pointing out that this had been suggested by TM in his comments on Richard's and Claire's email dated 21 July 2022. Brian, Barry and Michael's response is that clause 3.7 of the Settlement Agreement provides that Brian, Barry and Michael consent to the entry of the relevant restrictions, and that is open to Richard to rely on this in order to ensure, himself, that the restrictions are entered.

iv) There may be an issue so far as certain plans to unregistered titles are concerned, and how those titles are held, but these are issues, as I see it, readily capable of resolution, and that can be resolved with reasonable cooperation. There is a requirement to remove a restriction against first registration of certain unregistered land, but with the cooperation of the parties, there ought to be no difficulty in achieving this.

v) So far as any consent of Barclays Bank to the discharge of existing security over the properties is concerned, this was not raised as an issue until CW's letter dated 13 July 2023. In his email dated 6 July 2022, PH had referred to arrangements having been made to ensure that Barclays Bank could be paid off, and there was no challenge in respect of this until very recently. There is, as I see it, no reason to believe that this is an issue that will prevent the Settlement Agreement being carried into effect.

76. I am not persuaded that Richard is entitled to insist that the transfers of all the properties comprising the Land, and the Charge over Byways, are all in apple-pie order and ready for execution before he is obliged to execute any transfer. Given the discrete difficulties in relation to Byways, and possibly some of the unregistered titles, given the involvement of Mother's estate, I am satisfied that the process of giving effect to the terms of the Settlement Agreement must be regarded as an iterative process as evidenced by the fact that, for example, the land the subject matter of the Overage Agreement was transferred contemporaneously with the Settlement Agreement.

77. Stepping back, and looking at the position in the round, I consider the position to be reasonably clear to the effect that as from TM's email dated 14 July 2022, Brian, Barry and Michael have, through their Solicitors, LLM, made reasonable requests of Richard to take the necessary action to carry the Settlement Agreement, and in particular clause 6(b) thereof, into effect, and to take such steps as might be reasonably necessary to give effect to the terms of the Settlement Agreement in accordance with Richard's obligations under clauses 24 and 27 thereof. However, Richard has consistently, as I see it, sought, unreasonably, to place objections in the way of achieving this, taking the bad point with regard to Michael having to be taken off the title, and then, after Solicitors have been instructed, refusing to agree to the wording concerning how Brian, Barry and Michael would hold the relevant properties transferred to them as referred to in paragraph 75(ii) above. Further, whatever the merits as to how the restrictions on Everest and Fairview ought to be dealt with, CW's letter dated 13 July 2023 does not serve to assist in resolving the outstanding issues between the parties.

78. In the circumstances, I am satisfied that Richard's breaches of the Settlement Agreement have continued beyond the issue of the Application, and that even if they have not, he has so evinced an intention not to fully comply with his obligations under clauses 6(b), 24 and/or 27 of the Settlement Agreement, that it is appropriate for the Court to intervene by making an order to give effect to the terms of the Settlement Agreement in so far as they still require to be carried into effect, i.e. to make what is, in effect, an order for specific performance in respect of the Settlement Agreement.

79. In providing suggested corrections following the circulation of this judgment, Mr Lakin made the point that it had not been suggested on behalf of Brian, Barry and Michael prior to the hearing that Richard was in breach of either clause 24 or clause 27 of the Settlement Agreement, and that the case had been advanced solely based upon a breach of clause 6(b). Further, Mr Lakin identified that my judgment does not expressly deal with which documents Richard should have executed and when they were provided to him, yet paragraph 9 of Mr Harper KC's Skeleton Argument had complained that the transfers as sent on 14 July 2022 were yet to be executed. Although it is true that Mr Harper KC's Skeleton Argument does not in terms allege that Richard was or is in breach of clause 24 or 27 of the Settlement Agreement, it does allege that Richard has: *"not taken any steps to comply with clause 6(b) and the position is that he is evincing an intention not to comply with the same promptly or at all. The Applicants are therefore entitled to insist on actual performance of the same by way of court order"* (see paragraph 18). I do not consider it necessary for Brian, Barry and Michael to have to show that Richard has failed to execute some specific document when requested to execute that specific document, and I consider that, for the purposes of the Application, there is no substantive distinction between whether Richard is in breach of clause 24 or 27 of the Settlement Agreement, and whether he had evinced an intention not to comply with his obligations under clause 6(b). Consequently, on the basis of my finding above that Richard had, prior to the issue of the Application, evinced an intention not comply with his obligations under clause 6(b), Brian, Barry and Michael were, as I see it, entitled to apply to the Court by the Application for an order carrying the terms of the Settlement Agreement into effect irrespective of any breach of clause 24 or 27.

Conclusion regarding an order carrying the Settlement Agreement into effect.

80. Mr Lakin, on behalf of Richard, takes the point that Brian, Barry and Michael have not applied to lift the stay provided for by the Tomlin Order. However, I do not consider this to be necessary. The Tomlin Order stayed the relevant proceedings except for the purpose of carrying the Settlement Agreement into effect, for which purpose the parties have permission to apply without the need to issue fresh proceedings. Thus, the stay is not sought to be lifted as such. By the Application. made in accordance with the permission to apply, Brian, Barry and Michael seek an order as provided for by the terms of the stay that the terms of the Settlement Agreement be carried into effect. The Application does not specifically seek permission to apply, but I consider it implicit in the Application that such permission is being sought.

81. For the reasons given above, I consider that it is appropriate to make an order carrying the terms of the Settlement Agreement into effect insofar as they remain to be performed, such order being, in effect, an order for specific performance of the Settlement.

82. Unless the parties are able to reach agreement, I will need to hear further submissions as to the precise form of order to be made. However, I consider that the order should broadly follow paragraphs 1 to 6 of the order sought by Brian, Barry and Michael referred to in paragraph 22 above, subject to the following points:

i) Paragraph 1 should, as I see it, extend to all the relevant properties that are presently held in the names of Brian, Barry, Michael and Richard, i.e., those apart from Byways and the unregistered properties that are in the name of Frank Tomlinson and Mother. Further, it will be necessary to check that there are no issues concerning the filed plans in respect of these properties, and if there are, to resolve them.

ii) Although Brian, Barry and Michael are probably right that Richard is sufficiently protected by clause 3.7 Settlement Agreement, and the consent of Brian, Barry and Michael thereby provided in respect of restrictions against Everest and Fairview, in order to minimise the scope for future dispute, I can see little harm in reference to the restrictions being mentioned in the relevant transfers as TM had suggested in his comments on Richard's and Claire's email dated 21 July 2022.

iii) So far as paragraph 3.2 is concerned, and Byways, the Order might provide for all parties to use the best endeavours to do what is necessary to facilitate the obtaining of a Grant in respect of Mother's estate, and to ensure that Mother's estate is dealt with in such a way as to enable Byways to be transferred into the names of Brian, Barry Michael as soon as possible.

iv) Further, the Order might provide for Brian, Barry and Michael to now execute the Charge over Byways in escrow, pending execution of a transfer of Byways, and for them to lodge the Charge with HM Land registry when applying to register the transfer of Byways.

83. Mr Lakin has questioned how what is equivalent to specific performance can be ordered in relation to a document *"that still has to be agreed"*, and how any order made *"can be drafted with the required precision in the circumstances"*. I do not consider there to be any difficulty in this respect once it is understood that the purpose of the Order that I will make is to carry into effect the terms of the Settlement Agreement. There is no suggestion that the terms of the Settlement Agreement itself lack sufficient certainty. If that is the case, then there is nothing further to agree, and it is for the Court, with the benefit of the parties' submissions, to come up with a form of words sufficiently precise to carry the terms of the Settlement Agreement into effect.

Effect of the non-payment of the £120,000 Settlement Payment on 16 March 2023

84. As identified above, the issue that arises is as to whether the non-payment by Brian, Barry and Michael, on or before 16 March 2023, of the £120,000 expressed to be due *"on or by the date 15 months following Completion"* pursuant to clause 3.1(c) of the Settlement Group means that, pursuant to the accelerator provision in clause 3.2 of the Settlement Agreement, the whole outstanding balance of £600,000 payable pursuant to clause 3.1 has become due and payable with interest as contended by Richard.

85. If one takes *"Completion"* as being the date of the Settlement Agreement (16 December 2021), then, on a strict reading of clauses 3.1(c) and 3.2 of the Settlement Agreement, the whole £600,000 has become due. However, Mr Harper KC on behalf for Brian, Barry and Michael, submits that, as a matter of strict construction of the Settlement Agreement, the obligation to pay pursuant to clause 3.1(c) was a dependent obligation, dependent on Richard performing his own obligations under the terms of the Settlement Agreement, rather than an independent obligation that was not so dependent. Consequently, as Richard has not performed his own obligations under clause 6(b) of the Settlement Agreement, the obligation to pay under clause 3.1(c) has, it is submitted, not arisen, and so the accelerator provision under clause 3.2 has not come into effect.

86. As Mr Harper KC puts it, on an objective construction of the Settlement Agreement, it was not contemplated that Richard could receive the Settlement Payments but not transfer his interests in the Land to Brian, Barry and Michael.

87. Mr Harper KC relies upon the decision of the Court of Appeal in *Doherty v Fannigan Holdings Ltd* [2018] EWCA Civ 1615, [2018] BCLC 623, at [32] – [36] and [41] – [44], per Sir Colin Rimer, as distinguished in *Mulville v Sandelson* [2019] EWHC 3287 (Ch), [2020] BPIR 392, (see in particular, Roth J at [18] – [20] and [23] – [31].

88. In *Doherty v Fannigan Holdings* (supra) the appellant and the respondent had entered into an agreement under which the appellant was to acquire from the respondent its 90% shareholding in a company. The shares were to be transferred in eight tranches over six years for a total price of £14 million payable in tranches over the same period. The appellant failed to pay £2m in respect of one of the tranches, and the respondent served a statutory demand based upon the liquidated amount of £2m without having transferred the relevant tranche of shares. It was held that, as a matter of true construction of the relevant agreement, the obligation to pay, and the obligation to transfer the shares, were dependent obligations, rather than independent obligations. Consequently, whilst the respondent might have been able to sue the

appellant for specific performance or damages, he could not sue him for the price or serve a statutory demand.

89. At [33], Sir Colin Rimer said that he:

> "regard[ed] it as clear from the terms of the agreement that their respective obligations of payment and delivery were intended to be dependent. The intention was that completion of the sale and purchase of Tranche E shares was to take place on the same day and at the same time; and that the making by [the appellant] of his payment was dependent upon his receiving the transfer documents in exchange, just as the performance of [the respondent's] obligation to transfer the documents was dependent upon receiving the price. That, in my judgment, is how the reasonable person would interpret the parties' obligations under the agreement."

90. At [34], Sir Colin Rimer added:

> "The critical question is as to the sense and intention of the operative part read in the context of the whole agreement."

91. *Sandelson v Mulville* (supra) concerned a settlement deed settling a number of disputes between the parties. The settlement deed included provision for payment by Mr Sandelson of a settlement sum of £1.25m, and a requirement by Ms Mulville to deliver an executed stock transfer form. However, the settlement agreement included another party, and there were a number of other obligations imposed on the parties including that Ms Mulville would release any claims or demands which she might have against Mr Sandelson, assign any benefits or sums which she was entitled to receive under loan agreements entered into in connection with a joint venture, resign as director of the companies set up in connection with the joint venture, as well as transferring her shares in the relevant companies.

92. At [4], Roth J referred to the fact that the terms *"dependent"* and *"independent"* obligations or promises were explained in *Chitty on Contracts* (33rd edn), Vol 1, at 24-036[1], as follows:

> "Promises are said to be independent when the obligation of one party is absolute and not conditional upon the performance by the other of his part of the bargain. They are said to be dependent when the obligation of one party depends on the performance, or the readiness and willingness to perform, of the other."

93. Further, at [4], Roth J referred to *Tito v Waddell (No.2)* [1977] Ch 106 at 297, where Sir Robert Megarry V-C had explained the position as follows:

> "If an instrument grants rights and also imposes obligations, the court must ascertain whether upon the true construction of the instrument it has granted merely qualified or conditional rights, the qualification or condition being the due observance of the obligations, or whether it has granted unqualified rights and imposed independent obligations. In

[1] See now 34th Edn , Vol 1, at 24-025. of

> construing the instrument, the more closely the obligations are linked to the rights, the easier it will be to construe the instrument as granting merely qualified rights. The question always must be one of the intention of the parties as gathered from the instrument as a whole."

94. As Mr Haper KC identifies, Roth J, on appeal from Chief ICC Judge Briggs, found that, on true construction of the terms of the settlement deed in question, the payment obligation in respect of the £1.25m was an independent obligation, essentially because:

i) The settlement agreement provided that the payment of the settlement sum was to be paid by no later than 31 January 2019: *"without any set-off, deduction, counterclaim, reduction or diminution of any kind of nature"* – see [26];

ii) The settlement agreement also provided that the payment of the settlement payment was to arise without any prior or concurrent steps to be taken by Ms Mulville, there being a significant interval between the time for payment and the transfer of the shares - see [27] and [28]; and;

iii) If payment of the settlement sum was not received, then Ms Mulville could retain her shares, and this was not contrary to the common intention of the parties ([29] – [31]).

95. Specifically, at [30], Roth J found that the share transfer obligation was *"essentially an ancillary obligation"*, and at [31], that the payment obligation under clause 2.1 created *"a prior and unqualified obligation … to pay the £1.25m."*

96. Mr Harper KC submits that, given the basis upon which *Mulville v Sandelson* (supra) was decided, the present case is readily distinguishable and more closely analogous to *Doherty v Fannigan Holdings* (supra), albeit that the present case concerns a settlement agreement, as in *Mulville*, and not a straight share sale, as in *Doherty*.

97. Specifically, Mr Harper KC submits that:

i) In the present case the Settlement Agreement provided for the transfer of Richard's whole interest in the Land to take place *"At Completion"* thereby coinciding with the first instalment of the Settlement Payments.

ii) It therefore follows that at the date when the further instalments fell due, Richard ought to have effected that transfer. There were therefore steps to be taken by Richard concurrent with the obligation to make the first instalment and prior to the remaining instalments.

iii) It would be contrary to the common intention of the parties and very surprising that Richard could not transfer his interests in the Land yet still receive the Settlement Sums, in that that would mean Brian, Barry and Michael paying Richard, yet not have the benefit of full title to the Land.

98. The essence of Mr Lakin's case on behalf of Richard is as follows:

i) The Settlement Agreement was not simply an agreement under which Richard agreed to transfer his interest in the Land to Brian, Barry and Michael in return

for the Settlement Payments, and on this basis, *Doherty* falls to be distinguished. Rather, the obligation to make the Settlement Payments pursuant to clause 3 of the Settlement Agreement was simply one feature of an overall settlement, thus making the case more closely analogous *Mulville*.

ii) In particular, Mr Lakin pointed to clause 15 under which various indemnities were given, and he posed the question as to whether, given default on the part of Richard in dealing with the title, Brian, Barry and Michael could refuse an indemnity, suggesting obviously not. Other provisions of the Settlement Agreement, apart from the payment obligation under clause 3 and the obligation to transfer title in the Land under clause 6, include the release of the Loan (clause 4), the assignment of claims against a firm of accountants (clause 5), and an agreement not to sue (clause 11).

iii) In the circumstances, Mr Lakin submits that the payment obligation under clause 3 of the Settlement Agreement is properly to be regarded as a stand-alone obligation. As to this, Mr Lakin would no doubt pray in aid authority to the effect that the court is more likely to interpret an obligation as a dependent obligation if the obligation constitutes the whole or a substantial part of the consideration for the contract – see *Lewison, The Interpretation of Contracts*, 7th Edn, Introduction to Chapter 16, Section 15, and the authorities there referred to.

99. Richard might also seek to rely upon a line of argument to the effect that in the case of the contract, which is not wholly executory, the court is less willing to hold that obligations are dependent – see Lewison (supra) at 16.117 referring to the *Carter v Scargill* (1873) LR 10 QB 564. In the latter case, at 566-567, Field J said:

> "Now, whatever might have been the question if it had been raised while the agreement was executory, we are clearly of opinion that, the defendant having received a substantial portion of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent."

100. In the present case, the Settlement Agreement was not wholly executory. Under its terms, clause 6 ought to have been fully performed by Richard *"At Completion"*, as ought the obligation under clause 3.6 by Brian, Barry and Michael to deliver the Charge over Byways, *"on Completion"*. However, by apparent agreement between the parties, elements of these obligations were left outstanding on 16 December 2021, being the *"Completion Date"* as explained above. It might be argued that having received a substantial proportion of the consideration under clause 6 of the Settlement Agreement, Brian, Barry and Michael cannot complain about having to pay the £120,000 otherwise due on 16 March 2023, even though Richard might not have fully performed his obligations under clause 6.

Conclusion regarding the non-payment of the £120,000 on 16 March 2023

101. The present case is, potentially at least, complicated by the fact that although the Settlement Agreement provided that Richard would perform his obligations under clause 6(b) *"At Completion"*, by apparent agreement between the parties, and for the reasons considered above, this did not happen with the obligation to transfer legal title

being left outstanding, along with Brian, Barry and Michael's obligation under clause 3.6 to deliver the Charge over Byways. However, notwithstanding, Brian, Barry and Michael did pay the £250,000 payable *"on the Completion Date"*, and also the £250,000 payable within three months of *"the Completion"*. However, referred to in paragraph 30 above, the second payment was only made after LLM had received some assurance in March 2022 from Richard's then Solicitors as to Richard's intentions so far as the transfer of the legal title to the Land was concerned.

102. It is common ground between the parties that the question as to whether the respective obligations in respect of transfer of title and payment were dependent, or independent, depends upon the proper construction of the relevant provisions of the Settlement Agreement.

103. As Lord Neuberger identified in *Arnold v Britton* [2015] AC 1619 at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context."

104. Further, it is trite that in construing a contractual document, it is not generally appropriate to have regard to the parties' pre-contract negotiations, subjective intentions, or subsequent conduct in relation to the performance of the contract – see e.g., see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913.

105. Crucial to the decision in *Mulville v Sandelson* (supra) was the finding that the share transfer obligation was *"essentially an ancillary obligation"*, and that the payment obligation under clause 2.1 of the settlement deed in that case created *"a prior and unqualified obligation ... to pay the £1.25m."* I do not consider that the provisions of clause 3 and 6 of the present Settlement Agreement can be regarded as so detached from one another. The key point is, as I see it, that clause 3 presupposes that clause 6(b) of the Settlement Agreement has been fully performed as at *"Completion"*, because that is what is provided for by clause 6(b) given that clause 6 provides that *"At Completion"*, Richard should transfer and relinquish <u>any</u> interest which he has in the Land to Brian, Barry and Michael. This is, as I see it, made clear by the fact that the obligations under clause 3.1 to make the Settlement Payments in instalments, including clause 3.1(c) are all expressed to arise either on the *"Completion Date"* or a specified time after *"Completion"*, i.e. when, under the terms of clause 6(b), Richard ought to have performed <u>all</u> his obligations thereunder with regard to the transfer and relinquishment of his interests in the Land.

106. Absent some claim to rectification or the existence of an estoppel by convention, which is not suggested, I do not consider that the question of construction can be affected by the way that the parties subsequently chose to perform the terms of the Settlement Agreement, or their pre-contract discussions that led to them performing in the way that they in fact did.

107. Given that clause 3 of the Settlement Agreement presupposes that clause 6(b) thereof was to be, or would be fully performed by Richard *"At Completion"*, I consider that a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language of clauses 3 and 6 to mean that the obligations under clause 3 were dependent upon Richard having performed his obligations under clause 6. Consequently, as he has not done so, I consider that the £120,000 payable pursuant to clause 3(c) has not become due, and therefore that the acceleration provision provided for by clause 3.2 has not taken effect.

108. I agree with Mr Harper KC that on an objective construction of the Settlement Agreement, it was not contemplated that Richard could receive the Settlement Payments but not transfer his interests in the Land to the Brian, Barry and Michael, including his legal interest.

109. I take Mr Lakin's point with regard to other terms of the Settlement Agreement, including, in particular, clause 15 regarding indemnities, and the point that clauses 3 and 6 of the Settlement Agreement cannot be regarded as the whole of the consideration for the Settlement Agreement. However, these obligations do, as I see it, constitute a substantial part of the consideration for the Settlement Agreement, and indeed provide the principal components of the arrangement under which Brian, Barry and Michael, under the terms of the Settlement Agreement, are buying out Richard's interest in the Land and other partnership assets. Other provisions can, as I see it, properly be regarded as subsidiary or ancillary, which is rather different than the obligations that arose under the settlement deed in the *Mulville* case.

110. Further, in answer to Mr Lakin's rhetorical question regarding clause 15, and the obligation to indemnify, clearly the obligation to indemnify arose *"on Completion"*, but that is, as Mr Harper KC pointed out, different from a liability to indemnify becoming due for payment as a debt, which might depend upon Richard having performed his obligations under the terms of the Settlement Agreement. In that event Richard's remedy for non performance would be to seek specific performance of the Settlement Agreement when he would need to show that he was ready, willing and able to perform his own obligations.

111. As to the executory contract point, the position here is not that the contract was substantially performed in accordance with its terms, but rather that terms of the contract that ought to have been performed *"on Completion"* (i.e., at the date of the Settlement Agreement) were left unperformed. In those circumstances, it is, as I see it, hardly apt to say that Brian, Barry and Michael, having received a substantial portion of the consideration, ought no longer to be able to rely upon the non-performance of that which may originally have been a condition precedent. In many situations where a substantial proportion of the consideration has been received, one can well see why, looking at the matter objectively, it may be difficult to see that remaining obligations under the contract of the respective parties were dependent. However, here, we are concerned with obligations on the part of Richard which, in accordance with the terms of the Settlement Agreement, ought to have been performed *"on Completion",* i.e., on the date of the Settlement Agreement.

112. In the circumstances, as a matter of proper construction of the Settlement Agreement, I consider that Clause 3 thereof falls to be construed such that the payment obligations

thereunder are dependent upon Richard having fully performed his obligations under clause 6(b) of the Settlement Agreement, and in any event not being in breach of the terms of the Settlement Agreement, and that because such obligations have not been performed, the £120,000 has not become due for payment pursuant to clause 3.1(c) so as to trigger liability for the outstanding balance under clause 3.2.

113. It follows from what I have said in paragraph 110 above, that I consider that whilst Richard might be entitled to invoke the provisions clause 15.2 of the Settlement Agreement to claim a tax indemnity, his entitlement to payment is likewise dependant on the performance by him of his own obligations under the Settlement Agreement. Consequently, I do not consider that he is entitled to the declaration and order that he seeks in relation to the tax indemnity. However, I do consider it appropriate that any such entitlement is reflected in the order enforcing the terms of the Settlement Agreement that I propose to make, and I note that this is provided for in paragraph 4 of the order that Brian, Barry and Michael seek as set out in paragraph 22 above.

Overall conclusion

114. Richard having acted in breach of the terms of the Settlement Agreement prior to the issue of the Application, alternatively having at least evinced an intention not to comply with his obligations under the terms of the Settlement Agreement, I consider that Brian, Barry and Michael are entitled to apply under the permission to apply contained in the Tomlin Order to enforce the relevant terms of the Settlement Agreement. I therefore consider that, on Brian, Barry and Michael's Application, the Court should make an order essentially along the lines considered in paragraph 82 above granting what is, in effect, specific performance of the Settlement Agreement.

115. I consider that the obligation of Brian, Barry and Michael to pay the sum of £120,000 falling due under clause 3.1(c) of the Settlement Agreement Terms is, as a matter of true construction of clause 3 of the Settlement Agreement, dependent upon performance by Richard of his obligations under clause 6 of the Settlement Agreement given that those obligations were obligations that, under the terms of the Settlement Agreement, were to be formed *"on Completion"*, i.e. on 16 December 2021. On this basis, and as a matter of true construction of clause 3.2 of the Settlement Agreement, I do not consider that a liability to pay the outstanding balance of £600,000 due under clause 3.1 of the Settlement Agreement has arisen. Nor do I consider that he is entitled to declaratory relief as sought or an order for payment in respect of the tax indemnity, his remedy in respect of a tax indemnity being under the order enforcing the terms of the Settlement Agreement that I propose to make. On this basis, I consider that Richard's Application should be dismissed.

116. No attendance will be required at the hand down of this judgment. I will adjourn all consequential matters, including as to the form of order, any application for permission to appeal, and costs to a short consequentials hearing to be listed as soon as possible. I will extend the period for lodging an appellant's notice with the Court of Appeal to 21 days after the consequentials hearing.