Neutral Citation Number : [2016] EWHC 1597 (Ch)

IN THE HIGH COURT OF JUSTICE **B30BM076**
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham
B4 6DS

1 July 2016

Before :

HIS HONOUR JUDGE SIMON BARKER QC sitting as a Judge of the High Court

Between :

GLADMAN DEVELOPMENTS LIMITED

Claimant

-and-

(1) PATRICIA SUTTON
(2) JOHN ROGER SUTTON
(3) ANDREW JOHN SUTTON
(4) ROGER GREGORY SUTTON

Defendants

Representation :
Wilson Horne instructed by **Knights Solicitors LLP** appeared on behalf of the Claimant
Stephen Jourdan QC instructed by **Michelmores LLP** appeared on behalf of the Defendants

Hearing Dates 23 - 27 May 2016, 1 July 2016

JUDGMENT

I direct that pursuant to CPR APD.6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript

HHJ Simon Barker QC :

Introduction

1 The central issue in this case is whether or not a legally binding oral agreement was made between the Claimant ('GDL') and the Defendants (collectively 'Ds') for GDL to promote land owned by Ds for development. GDL's case is that an oral agreement was made at a meeting on 12.3.12 or in the course of a telephone conversation later that month, in the period 23.3.12 to 26.3.12. Ds' primary case is that no such agreement was made. Ds' fallback case, which was not pursued with any vigour, is that if such an agreement was made it was repudiated by GDL and terminated by Ds.

2 GDL carries on business as a property developer and promoter of land for development. It is based at Congleton in Cheshire but conducts its business nationwide. Since about 2008 GDL has concentrated on promotion of land for development. GDL's moving force is David Gladman ('DG') who is also based in Congleton and who has some 30 years experience in development and who formed GDL in about 1999. DG's unchallenged evidence was that GDL is the leading promoter of land for development in the UK.

3 One of GDL's witnesses, Kevin Edwards ('KE'), a director of and shareholder in GDL and a qualified town planner, described promotion as :

"*deliver[ing] strategic housing land through the planning system*".

DG's description of GDL's promotion business model was more direct :

" … *we normally only target local authorities whose planning is in relative disarray and vulnerable to a quick planning application for a suitable site. … [GDL] comes into its own where local authorities are in a state of flux whilst they either have no up-to-date local plan, or, temporarily, they do not have a 5 year supply of consented building plots*".

4 GDL undertakes promotion of land for development on the basis that it enters into a promotion agreement ('PA') with a landowner, or a series of PAs with a number of landowners. DG explained that under a PA GDL :

"*always [has] responsibility for all costs and risk, and in return receiv[es] a proportion of the eventual land sale receipts, if the land gained planning consent for housing and was then sold to a house-builder*".

Thus, promotion involves GDL in undertaking all necessary representations, planning applications and appeals for the landowner(s). GDL's evidence was that its reward, referred to as the Promoter's Proportion, was normally 25% of land sale receipts, but it is common ground that the percentage in this case was agreed at 20%.

5 It is common ground that a PA is not a contract for the sale or other disposition of an interest in land and is not subject to the terms of s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Nevertheless, as good business practice, GDL has a proforma PA which is modified to suit the particular promotion arrangement.

6 In the context of this case, the fact that a PA was not executed does not preclude the possibility that an oral agreement was made which was intended to be followed and superseded by a duly executed PA.

7 Ds are a family farming land known as Bent Farm. The Second Defendant's, Roger Sutton ('RS'), grandfather started farming part of the land now comprising Bent Farm shortly after the Great War. RS, now aged 69, has lived at Bent Farm all his life and succeeded his father in the farming business. RS married the First Defendant, Patricia Sutton ('PS'), in 1979. At that time PS was a college lecturer. After the birth of their first child, the Third Defendant, Andrew Sutton ('AS'), in 1981 PS ceased work as a lecturer and became the farm secretary. PS handles all Bent Farm correspondence, including emails. The Fourth Defendant, Gregory Sutton ('GS'), was born in 1983. RS and PS are the legal and beneficial owners of Bent Farm. AS and GS both work at Bent Farm and since 2011 they have been partners in the farming business with their parents.

8 Bent Farm lies to the south west of Congleton, Cheshire, and is just outside the green belt. In 2012 Congleton's town boundary to the south west was marked by Padgbury Lane which connected the A534 at the west of Congleton to the A34 at the south. There is an area of rural land between the south west side of Padgbury Lane and the north east boundary of Bent Farm which is also outside the green belt. By early 2012 GDL was promoting part of this rural land between Bent Farm and Padgbury Lane ('the Padgbury Lane Site') for development.

9 Bent Farm comprises some 183 acres, approximately one third of which was referred to by RS as the Field House Farm land (which forms the north west portion of Bent Farm); in addition, RS and PS own a further 112 acres some 3 miles away. The principal activity at Bent Farm is dairy farming. Bent Farm operates at a profit and, since becoming partners, AS and GS have received the majority of the annual profit. At the relevant time, March 2012, their respective capital interests in the Bent Farm partnership were relatively modest but were set to grow providing the farming business remained profitable. In oral evidence RS explained that a significant factor contributing to Bent Farm's success had been the availability of an income stream from adjacent land jointly owned by RS, PS and RS's brother, Peter Sutton ('Peter S'), and his wife, Helen Sutton (collectively 'the Plant Site owners'). That income stream had enabled RS and PS to invest in modern dairy plant. In addition Bent Farm's activities had been expanded to include selling feed for racing pigeons on a substantial scale.

10 This adjacent land, which abuts the south west corner of Bent Farm is leased as a plant site for sand quarrying ('the Plant Site') and quarry lagoons. In 2011 the tenant of the Plant Site informed the Plant Site owners that it was unlikely that the lease would be renewed upon expiry in 2022 and that quarrying might cease before then. This caused the owners to discuss alternative use by way of development.

11 Peter S is a qualified legal executive and has been a property lawyer for some 39 years. He is employed as principal regeneration lawyer by Warrington Borough Council. He is familiar with the processes of planning and development.

12 At all material times RS was vice-chairman of the Astbury cum Moreton Parish Council and had become familiar with development plans and with planning applications in the locality.

13 The local authority for the Congleton area is Cheshire East Borough Council ('CEBC'). GDL's directors' knew that CEBC did not have the supply of housing land required by government policy and was, therefore, vulnerable to planning applications by promoters such as GDL. Peter S and, through him if not otherwise, RS knew that CEBC was formulating a development strategy to run through to 2030 and that Congleton Town Council had a draft town plan which it intended to publish for consultation in the early part of 2012.

14 By 2012 DG had known each of RS and Peter S for many years. DG and RS had met several times a year over the preceding 20 years at shoots. DG and Peter S knew each other as members of the same lodge of freemasons.

15 Also by 2012, the Plant Site owners had decided to approach GDL as potential developers or to promote development of that site and Peter S arranged a meeting for himself and RS with DG at GDL on 3.2.12. At this time Peter S and RS were aware that DG had in mind "*pursuing his idea of a huge development accessed from Padgbury Lane*" which would inevitably require at least part of Bent Farm. It does not follow that RS had such development in mind and, at the time, Peter S acknowledged to RS in an email that such development "*may not, of course, be acceptable to you anyway*".

16 It is part of GDL's pleaded case, supported by statements of truth, that Ds approached GDL for assistance in promoting Bent Farm. That is factually incorrect and was accepted as such on behalf of GDL in oral evidence by KE but not by DG. Mr Jourdan QC, on behalf of Ds, relied on the pleadings and their dates, February and April 2015, as evidencing the unreliability of GDL's witnesses recollection. That is a fair and relevant submission. Although this instance related to GDL's evidence, I also bear in mind a more general underlying point, namely that recollections at some remove in time are prone to error and to confusing intention and fact, a submission made forcefully by Mr Jourdan QC, on behalf of Ds, and acknowledged by Mr Horne, on behalf of GDL.

17 What I take from this background is that by early 2012 GDL, by DG as its moving force, was keen to be involved in promoting land for development at Congleton and had a strategy in mind (promoting land to the west and south west of Congleton) which involved the inclusion of part, if not the whole, of Bent Farm. This, the fact that Congleton is DG's and GDL's home town, and the fact that DG knew both RS and Peter S may explain why DG was involved personally in negotiating on behalf of GDL. Whatever the reason, on the evidence before me DG's personal involvement in negotiations with landowners was a novel occurrence.

Meeting at GDL on 3.2.12

18 At the meeting on 3.2.12, which Peter S and RS attended, GDL was represented by DG and Kevin Edwards ('KE'), an experienced town planner and a director of GDL. They were also joined briefly by Martyn Twigg ('MT'), another experienced town planner. GDL's representatives made it clear that they were not interested in promoting the Plant Site, but were interested in Bent Farm, and were already promoting and seeking planning permission for Loachbrook Farm ('the Loachbrook Farm Site'), which is on the opposite side of

the A534 to Bent Farm and to the west of Congleton. There is cogent evidence that at this meeting DG made clear that GDL was interested in promoting a significant part of Bent Farm for development.

19 GDL's lack of interest in the Plant Site was a disappointment to both RS and Peter S. The meeting was doubly disappointing to Peter S because he also proposed for promotion by GDL a field he owned immediately to the east of Bent Farm and immediately south of the Padgbury Lane Site. That field lies just within the green belt and, for that reason, was also of no interest to GDL.

20 At the meeting, RS did not reject the possibility of GDL promoting land at Bent Farm for development and he or Peter S asked GDL to provide a copy of GDL's PA. It was understood by GDL that RS would take GDL's interest in promoting Bent Farm back to his family for discussion.

3.2.12 to 26.2.12

21 On the following Monday, 6.2.12, DG sent an email to Peter S attaching GDL's proforma PA. Peter S later forwarded the proforma PA to RS without comment.

22 In the email DG apologised to Peter S for " .. *putting the cat among the pigeons on Friday, but blunt talking is the best policy ..* ". Mr Jourdan QC submitted that no apology would have been necessary if, as DG had maintained in his evidence, GDL had made clear before the meeting that it had no interest in the Plant Site and that this was another example of unreliability on the part of DG's recollection. There is some force in this submission.

23 The proforma PA is a 35 page document. It sets out GDL's starting point for particular drafting. It is clearly indexed and formatted but it is technical and complex. A landowner would either require legal advice or have to give close attention with an enquiring mind in order to follow and understand its provisions. There are numerous blanks which, following an oral agreement or a negotiation subject to contract with a landowner, would or ought to be completed in order to create a draft PA; these include, but are not limited to, the amount of a payment to be made by GDL to the landowner on execution of a PA in consideration for which the landowner agrees to observe the obligations specified in the PA ('the up-front payment'), and the Promoter's Proportion.

24 Peter S continued a dialogue with GDL, seeking to persuade GDL to include the Plant Site in any promotion of land to the south west of Congleton, but to no avail. From this dialogue Peter S understood DG to have advised that during an impending consultation period the Sutton family, including Peter S, should submit a response identifying all the land which they were prepared to release for development. Peter S passed this on to RS as a new point for consideration.

25 At some point in this period, Peter S also discussed the proforma PA with RS and PS over the telephone. There were two main areas of concern in these discussions : the Promoter's Proportion and the landowner's contractual obligation to sell (which would be triggered by GDL making the up-front payment).

26 Ds decided to meet as a family, including Peter S, to discuss development of their land including the possibility of Bent Farm being promoted for development. Peter S prepared a list of points for discussion which served as an agenda for the meeting.

27 Mr Horne, for GDL, submitted that concern about the obligation to sell must have evaporated because there is no agenda item to that effect. He further submitted that Peter S's evidence that the agenda was dashed off and not necessarily comprehensive should be rejected, but that otherwise Peter S's evidence should be accepted. I agree that Peter S's evidence as to the agenda having been dashed-off is improbable; first, having observed Peter S giving evidence and having read his witness statement and contemporaneous written communications, it is plain that he is a careful and methodical man not prone to dashing things off; secondly, the structure and format of the email containing the agenda does not have the appearance of, nor does it read as if it had been, a dashed off document; and, thirdly, the meeting was of considerable importance to the Sutton family as a whole. I therefore accept Mr Horne's submission as to the preparation of the agenda.

28 The agenda identified for consideration the consultation process, the PA, the possibility of purchasing other land adjacent to the Plant Site and Bent Farm, continuing to press for the Plant Site to be promoted for development, and possible objectors. It also identified for separate consideration four areas of land : the Plant Site and three possible areas or parts of Bent Farm. What was not on the agenda for discussion was consideration of the whole of Bent Farm as actually or potentially available for development. This is consistent with Ds having appreciated that the terms of the PA would impose a contractual obligation to sell but it does not follow that Ds, or RS and PS, had made or, at the meeting, would or did make up their minds about what, if any, land to commit to development.

29 There is a further significance to the agenda for the 26.2.12 meeting. The agenda demonstrates that Peter S and, either independently or derivatively (and there is no material distinction for this purpose), Ds structured their intended dealings with GDL by reference to the proforma PA. They focused on land being divided into two categories : land committed to promotion for development and so-called Retained Land which might be required for promotion for development. This provides evidence for a finding that they understood or expected, at least at this point in time, that GDL operated on the basis that landowners were expected to enter into a written agreement based on the proforma PA when committing land to promotion for development. This does not rule out the possibility that an oral agreement might be made, but it is relevant background when assessing whether or not an oral agreement was in fact made.

26.2.12 (Sutton family meeting)

30 Peter S met Ds at Bent Farm on the evening of Sunday 26.2.12. On the evidence before me I find that Peter S effectively led or chaired the meeting and that the discussion covered the items on his agenda.

31 Ds evidence was that they already had a general idea as to the value of land in the area for housing development, some £500k-£600k per acre.

32 Ds were keen to ensure that consultation responses were submitted supporting development of Congleton to the west and south west, i.e. in the direction of the Plant Site and Bent Farm. The Sutton family's primary interest continued to be securing an agreement for development of the Plant Site with adjacent land if/as necessary. In furtherance of that objective Ds also decided to, or agreed with Peter S that they would, approach a Mr Painter, owner of land adjoining

Bent Farm's western boundary and the north west corner of the Plant Site, on the basis that Ds were looking to extend their acreage for dairy farming.

33 In relation to promoting land for development through GDL, Ds were interested in meeting with GDL. However, the most pressing matter was the preparation of submissions for a development consultation process which was known to be imminent.

27.2.12 to 12.3.12

34 On 27.2.12 Peter S sent an email to DG asking whether GDL would be willing to prepare a consultation response outwith any potential promotion agreement and, if not, whether DG could recommend a planning consultant. DG was not interested in a retainer to prepare a consultation response in isolation but, about a week later and at DG's instigation, KE recommended a planning consultant and provided the contact details. At or about this time DG also informed Peter S that GDL had engaged the same consultant to act in the planning application in respect of the Loachbrook Farm Site.

35 GDL relied on these events as effectively flagging up for Ds that any consultation representations made by GDL would only be made in the context of a binding promotion agreement. Mr Jourdan QC submitted that such reliance went too far and that the conclusion to be drawn from these events was no more than that GDL was not interested in a retainer as a planning consultant for the sole purpose of making representations as part of a consultation process. In my judgment Mr Jourdan QC's analysis is correct and GDL's case and Mr Horne's submissions in furtherance of that case went too far.

36 Also on 27.2.12 CEBC gave notice that it would be opening a consultation process over the period 2.3.12 to 2.4.12 in relation to strategies for the future development of specified towns, including Congleton, over the next 20 years as part of the Cheshire East Local Plan.

37 On 5.3.12 Peter S sent an email to RS suggesting that the choice of planning consultants for the purpose of a consultation response should accord with their intentions as to development. If the development intentions were to be limited to the Plant Site and land at the west of Bent Farm (i.e. part of Field House Farm land) then a consultant with particular knowledge of the Plant Site would be the appropriate choice; but, if the consultation response was to include Bent Farm land adjoining the Padgbury Lane Site the planning consultant recommended by GDL might be more appropriate. Peter S expressed his view that the choice depended on making a decision about the land to be the subject of the consultation response. Peter S had no interest in Bent Farm and by his email he made clear to RS that the extent of the consultation response was a matter for RS and his family; Peter S lamented the urgency with which a response and, as he saw it, a decision was required; and, Peter S advised RS that he "*should only submit a consultation response if you are sure about the amount of land to release (if any)*".

38 Mr Horne relied upon this email as justifying or supporting a finding that when seeking and attending a meeting with GDL Ds had already decided to commit land at Bent Farm to promotion for development.

39 In oral evidence RS maintained that the only rush was in relation to the consultation process and that he did not follow Peter S's advice because Ds wanted to hear what DG had to say about the consultation process without

putting forward for or committing to development any specific acreage at Bent Farm. RS's evidence is supported by another email sent by Peter S to RS later on 5.3.12 in which Peter S noted that their priority continued to be development of the Plant Site and to that end RS was prepared to commit two fields at the west end of Bent Farm; as to other development of land at Bent Farm, Peter S noted that RS wanted to "*get some more detail from [DG] about his ideas for linking*" some Bent Farm land with the Padgbury Lane Site.

40 PS said that she agreed that Peter S's advice was good advice, but she could not remember what they actually did.

41 Also on 5.3.12, and following up an item of the agenda for the family meeting, RS wrote to Mr Painter expressing an interest in buying his land to expand Bent Farm's acreage for dairy purposes. PS readily accepted in oral evidence that this letter was written with an eye to potential development. Mr Painter did not reply.

42 On 6.3.12 RS sent an email to DG requesting a meeting on behalf of Ds "*to consider promotion of the land adjacent to Padgbury Lane*". RS explained that he and PS were the landowners and that Ds were all partners in the farming business. That meeting was fixed for the afternoon of 12.3.12.

43 On the morning of 12.3.12 Peter S sent an email to RS suggesting that an area of land[1] at the west end of Bent Farm adjoining the A534 could be put forward both in the context of possible development of the Plant Site and in the context of possible development of land running through to the Padgbury Lane Site. Mr Horne described this as a "*key email*" that

"*finishe[d] off the Sutton witnesses in terms of any suggestion there was a doubt about the area of land agreed to be promoted*".

The underlying point is that inclusion of this area indicated that the land at Bent Farm for promotion by GDL was that lying between the Padgbury Lane Site and the line marked by Bent Lane and its extension to Dane Valley Way. I do not agree. Peter S's email preceded the meeting and, as RS observed in cross-examination, it was only what Peter S said to RS. RS maintained that he went to the meeting on 12.3.12 in order to listen to what DG would propose. I do not read into this email any statement or indication on the part of RS that he was committed to or would commit to agreeing to promotion for development of any particular area of land at Bent Farm.

44 There is no evidential basis for a finding of fact that Ds, or RS and PS, set off for the meeting with GDL on 12.3.12 already intent upon committing Bent Farm, or part thereof, to promotion for development by GDL. Further, GDL, by DG, KE and MT, could not sensibly have approached that meeting on the basis that it had been arranged to negotiate and agree terms for the promotion of land at Bent Farm for development.

12.3.12 (meeting at GDL)

45 This is the first of two alternative occasions at which, on GDL's case, a binding agreement was made orally.

[1] Described by Mr Horne as chiminea shaped and by Mr Jourdan QC as shaped like the trigger of a pistol, both fair and memorable descriptions of the shape of the particular area of land.

46 At this point I should remind myself of some principles of law helpfully cited by the parties' counsel. First, I remind myself that there is no requirement that an agreement for the promotion of land for development be made in writing. Next, I bear in mind that even though the parties may have reached agreement on essential matters, their agreement may be 'in principle' only and not, at that point, binding because there are further terms to be agreed. Further, and as appears from the judgment of Sir Andrew Morritt C in Cheverny Consulting Ltd v Whitehead Mann Ltd [2006] EWCA Civ 1303 at [42], in the context of commercial contracts, the courts will approach a dispute as to the formation or existence of a contract on the basis that the more complex the subject matter and terms the more likely the parties are to want refrain from committing themselves to being bound until they have a written document, prepared or reviewed by lawyers, which they have considered and executed. Sir Andrew Morritt observed that doubt may be easily avoided by conducting negotiations 'subject to contract'; however, such a preface would not be relevant unless the parties were engaging in negotiations. Analysis of whether or not there is a binding agreement depends not upon the subjective state of mind of the parties but upon whether, viewed objectively, the communications between them, by words and/or conduct, leads to the conclusion that they intended to create legal relations and had agreed upon all the terms essential for the formation of legally binding relations, RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14, Lord Clarke at [45].

47 I also bear in mind the authorities cited as to the approach to be taken to oral evidence where the witnesses are required to recall events from the past. Human memory is fallible. Outside the context of litigation, recollection of events from the past may be defeated or distorted by a variety of influences and circumstances. Recollection for the purposes of litigation is susceptible to the same and to additional influences and circumstances. In Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) Leggatt J, at [15] – [22], considered the impact of the trial process in civil litigation upon evidence to be given in respect of recalled events or circumstances and concluded that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance upon witnesses' recollections of what was said in conversations or transpired at meetings and to base factual findings on inferences to be drawn from the documentary evidence and known or probable facts. That is valuable guidance which reaffirms a practice long adopted in the Chancery Division.

48 Ds attended for the meeting at GDL's offices at the time arranged. GDL was represented at the meeting by DG, KE and, for part of the meeting, MT. The meeting lasted some time, probably in the order of two hours. PS made, but maintained in oral evidence that she had not retained, notes during the meeting. DG made notes or a note which he destroyed after he sent a follow-up email to Ds on 14.3.12 attaching an unsigned letter dated 13.3.12 said to reflect DG's contemporaneous note(s) made during the meeting. I shall return to this email shortly.

49 First, I should record that there were some striking differences between GDL's witnesses and Ds as to what occurred, or did not occur at the meeting. Five matters in particular were the subject of conflicting evidence : (1) whether there were negotiations as to the amount of the up-front payment to be made by GDL and/or the amount of GDL's commission, i.e. the Promoter's Proportion; (2) whether there was agreement as to the precise area of land to be promoted for development and/or any additional land to be included if required by GDL, i.e.

Retained Land as defined in the proforma PA; (3) whether Ds were left alone for a period to consider GDL's proposal as an offer and, if so, the significance of this event; (4) the basis on which GDL agreed or was to submit a consultation response to CEBC; and, (5) whether there was a formal handshake in the course of the meeting, as distinct from a customary round of handshaking at the end of the meeting, to symbolise or acknowledge the making of a binding oral agreement.

50 As to (1), I accept GDL's witnesses' evidence that the normal level of payment to a landowner was some £20k and that £100k was not immediately offered to Ds. DG's evidence was that Ds rejected a £20k up-front payment as totally unacceptable and that DG "*eventually*" agreed to a £100k payment because the Promoter's Proportion was likely to yield over £5million. KE was challenged on his evidence corroborating DG's evidence and maintained that £100k was the product of negotiation. RS, supported by AS, maintained in oral evidence that GDL's offer was in the sum of £100,000 and denied that RS negotiated an increase from £20k to £100k. PS and GS were not challenged in cross-examination on RS's evidence. I accept as inherently probable that DG would have introduced £20k as GDL's standard up-front payment. However, GDL would not make an up-front payment until a PA had been executed and by that point in time, on GDL's own evidence, GDL would have committed, at its own risk, a substantially larger sum in professional fees to promotion of land for development. Moreover, under the proforma PA the up-front payment was a non-refundable advance payment recoupable out of the landowner's share of the sale proceeds in the event that sale to a developer occurred. My impression from the evidence is that DG had no doubts about the prospects of finding a developer for the expansion of Congleton, would have regarded the payment of £100k to Ds as relatively small beer in the context of the potential value to GDL and to Ds of successful promotion by GDL of land at Bent Farm for development, and would not have needed much persuading to move to £100k upon rejection of £20k. I reject as unreliable RS's and AS's evidence that DG made an opening offer of £100k as the up-front payment.

51 As to (2), my impression from the evidence is that before the 12.3.12 meeting DG, KE and MT had decided upon an area of land that they wished to secure for promotion for development by way of housing and a further area of land that they wished to secure for amenity land and land available at GDL's option, i.e. Retained Land. However, they needed to establish the extent and boundaries of Bent Farm, and, at their request during the meeting, AS and RS provided this information by reference to the plans and maps tabled by GDL. RS was clear that GDL had in mind an area of 70 acres for housing which would have a value of £30[2]million to £42million, and it is common ground that sums of this order were discussed during the meeting. Thus, I am satisfied that in clear enough terms GDL was able to identify an area of land of primary interest for development and that it was understood that additional land would be required as Retained Land. There is no suggestion in the evidence that additional value of any significance would attach to Retained Land; rather it is common ground that DG explained that there would be an equalisation arrangement to compensate landowners whose land was not required for housing but was required for amenities without which planning approval would not be obtained. Thus, Ds understood at the meeting that they stood to lose a proportion of the £30million to £42million if they did not provide Retained Land in addition to the

[2] £30m rather than £35m because there might be some reduction as part of an equalisation arrangement to compensate other landowners whose land might be required for amenity purposes.

70 acres required for housing. I bear in mind that DG's written evidence was that the precise area of the Retained Land was a matter for future discussion. Moreover, it is an altogether different question whether Ds, or RS and PS, actually agreed to the promotion of such land for development by GDL. That question cannot be answered without reference to and consideration of the contemporaneous, albeit subsequent, documentation. I shall return to this question in that context.

52 As to (3), there is a straightforward conflict of evidence. DG and KE are clear that Ds were left alone to consider GDL's proposals and were called back into the meeting after a few minutes. DG is a very experienced and successful businessman. The matters under discussion were complex and of very considerable importance to both sides. It would not have been unusual for the host side to leave such a meeting so that the other side could confer. On MT's evidence, this occurred after he had made his contribution (which was to identify the relevant areas of land of primary interest for housing development and as Retained Land, to advise on the prospects of obtaining planning approval, and to advise on the consultation process) and after financial discussions (which were outside MT's role and to which he said he paid little or no attention) and at the point at which he left the meeting. GDL's representatives were operating as a team led by DG. It is likely that DG and KE would have wanted to leave the meeting with MT to check that he had obtained all the information he needed for planning and consultation purposes. It is also quite likely that DG would have sought to cover this exodus by suggesting that Ds might like a few minutes to themselves rather than admit that he and KE wanted to confer briefly with MT. It is also possible that Ds would not have attached any significance to being left alone. On the evidence before me I am willing to accept that there was a period of a few minutes when Ds were left alone. On the evidence considered so far I am not willing to make a finding that Ds were left alone in order to decide whether to commit to a binding agreement.

53 As to (4), I accept that the submission of a consultation response was discussed at the meeting and that GDL stated that it would undertake that task. It is common ground that GDL did submit a consultation response.

54 In the light of GDL's witnesses' oral evidence and having regard to the brevity and terms of the document itself, I am satisfied that its preparation was not expected to be and was not a time consuming or otherwise onerous or costly endeavour. GDL's case and evidence was that the consultation response was "*all about*" Bent Farm and was submitted because Ds had made an oral agreement with GDL for the promotion of their land for development. GDL's evidence was that Bent Farm was not mentioned expressly because Ds, RS in particular, were anxious not to publicise the possibility of Bent Farm being developed and because RS, as vice-chairman of the Congleton Parish Council, would or might become compromised in continuing to deal with planning matters. DG was adamant that land in a different direction would have featured in the consultation response and been the subject of promotion by GDL had Ds not agreed to the promotion of Bent Farm by GDL.

55 As to Ds persisting in an approach to GDL to submit a consultation response, RS's evidence was that he did not think that he would be able to persuade DG to change his mind about GDL making a consultation response outwith a promotion agreement but he thought that DG might decide that GDL should submit such a response in any event. RS's thinking is logical because he knew

that GDL was already involved in promoting the Loachbrook Farm and Padgbury Lane Sites.

56 I do not regard GDL's submission of a consultation response as probative or as being of significant weight on the issue of whether an oral agreement was made in March 2012. GDL's promotion of the Loachbrook Farm and Padgbury Lane Sites provided sufficient motive for the preparation of the response submitted by GDL and, even if there was no agreement between GDL and Ds, GDL had a realistic basis for taking a commercial view that such an agreement would shortly be made because it is clear that the outcome of the meeting was emphatically not that Ds had shut the door on and excluded any possibility of land at Bent Farm being made available for promotion by GDL for development. With so much to gain and so little to commit, GDL would not have failed to submit a consultation response relating to land to the west and south west of Congleton.

57 As to (5), I do not accept GDL's evidence that there was a formal handshaking ceremony to mark Ds acceptance of terms proposed by GDL and the making of a binding oral agreement.

58 First, DG's written evidence was internally inconsistent on handshaking. At paragraph 8 of his witness statement, addressing the making of a promotion agreement generally, he said

" *… we will commence our work and expenditure on the major research, searches, investigation and reports to enable [the landowners'] site to be promoted but only once they have agreed detailed heads of terms (normally we "shake hands" on the deal), confirming that our professional services have then been engaged for that landowner …* "

At paragraph 45, DG addressed what he told Ds at the 12.3.12 meeting and said

"*I clearly explained – as we do to all our landowner clients – that if we could agree the key terms of the promotion agreement and shake hands on it, then we would commit to commencing the work and the consequent spending. Both parties were entering into an agreement to engage us based on key terms put in writing (see below)*[3] *and a verbal commitment*".

Then at paragraph 55, referring to events shortly after DG and KE returned to the meeting on 12.3.12 after leaving Ds alone for a few minutes, DG said

"*[Ds] were in agreement that on the basis of those terms*[4] *they wanted us to start promoting their site immediately and submit a planning application in due course. [KE] and I both confirmed our agreement to them and said we would get on with the required representations immediately, but I said that for the avoidance of any confusion I would commit the several terms we had agreed (and I had noted them down) into a written summary to send to [Ds], which they would then confirm. … It was then said, I believe by [RS], that we should close the deal in the time honoured way with a handshake. There then followed a*

[3] This is a reference to a document dated 13.3.12 sent to RS as an attachment to an email on 14.3.12. This document is considered later in this judgment.

[4] Intended to be a reference to the points as noted in the document dated 13.3.12 referred to in footnote 3.

rather amusing and slightly surreal 30 seconds whereby the two from [GDL] shook hands with each of the [Ds]. After a few minutes small talk the meeting concluded".

Having referred to shaking hands on a deal in the context of GDL's general method of doing business and in the context of the 12.3.12 meeting as "*normal*", it is surprising that DG should go on to describe this activity, when, on his evidence, it actually occurs, as remarkable for being "*amusing*" and "*slightly surreal*". In my view, this renders GDL's explanation of why shaking of hands was memorable unreliable.

59 In his oral evidence DG said that he felt that the handshaking was "*almost awkward*". Again, this is difficult to understand if it is a normal procedure on the part of GDL when making a promotion agreement.

60 Even on DG's evidence the hand shaking occurred near the end of the meeting; Ds' evidence was that it occurred at the conclusion of the meeting. Having regard to the general fallibility of memories there would have to be cogent, rather than doubtful, evidence to enable me to make a finding that there was a formal shaking of hands to signify agreement to terms discussed over the course of 2 hours and to be put into writing by one party to the agreement subsequently.

61 Of much more significance to the central issue in this case is that in his written evidence DG linked the making of or entering into an agreement, both generally and in this case, with agreement of a contemporaneous written record : "*only once [landowners] have agreed detailed heads of terms*", "*entering into an agreement … based on key terms put in writing*" and "*written summary … which [Ds] would then confirm*".

62 Further, RS's oral evidence was that at the meeting Ds made clear that they would need tax and legal advice before committing to an agreement. Having observed RS as a witness and throughout the trial my impression is that it is in his nature or is an aspect of his character to take time to consider things and that he is not susceptible to being rushed into a decision. Ds' partnership had an existing retainer with accountants and it is entirely unsurprising that Ds would want to obtain tax and legal advice before committing to an agreement as proposed by GDL. It is also my impression that RS is not a man to put his cards on the table unless or until he perceives it to be absolutely necessary.

63 My conclusion on the evidence as to the 12.3.12 meeting itself is that without more, that is support or corroboration by contemporaneous, albeit subsequent, documents and events, no binding oral agreement was made at the meeting. Ds may well have appeared enthusiastic and have been encouraging and have conducted themselves in such a way that viewed objectively they had expressed 'in principle' agreement to the promotion by GDL of land at Bent Farm for development, but Ds had sought a meeting to "*consider*" promotion of part of Bent Farm. GDL, by DG and KE, may have been of the view and acted on the basis that no one in their right minds would or did do other than accept its proposal, but that is speculation and, anyway, it could not justify a conclusion that an agreement was reached.

13.3.12 to 23.3.12

64 On 13.3.12 Peter S sent an email to DG stating that RS had updated him on "*your discussions yesterday*". On a fair reading this signifies that RS did not tell

Peter S that an agreement had been made, rather he led Peter S to understand that all that had happened was that discussions had occurred. This did not prompt a response from DG to Peter S or an email to RS or Ds asserting that an agreement had been made.

65 Also on 13.3.12 Peter S sent an email to RS, which made clear that RS had reported the meeting to Peter S as being "*discussions*" on 12.3.12, that email also made clear that within the Sutton family they were still working on trying to make the Plant Site attractive for development, including by attempting to acquire Mr Painter's land. This demonstrates that Ds remained actively interested in the promotion of the Quarry Site with additional land.

66 On 14.3.12 DG sent an email to Ds attaching the letter he created from his notes taken at the meeting on 12.3.12.

67 The email is short, its text reads

"*Please find attached the more detailed offer letter we proposed on Monday*".

DG began the second paragraph of the attachment

"*The main points in our offer to promote your circa 70 acres through the Plan Process, with the aim of getting a major housing allocation are …*".

In his written evidence DG addressed the reference to "*offer*" and said that he required confirmation from Ds that it was accurate before GDL would proceed. He stated that he would have been "*extremely disappointed*" if Ds had said it was incorrect but acknowledged the, at least theoretical, possibility, and added that GDL would not commit to the work and expenditure required "*without the main points of our agreement being in writing*". Ds did not respond either in writing or orally.

68 In his oral evidence DG commented that his two references to "*offer*" were "*not my finest hour*" and "*an incredibly poor choice of words on my part*".

69 DG is an experienced business man. GDL's business is based upon the organisation and provision of a complex service to land owners. There is too much involved and too much at stake for a well run business to rely and act only on oral agreements. DG acknowledged this in his written evidence, as appears from the extracts from paragraphs 8 and 45 cited above. Viewed in this context, use of the words "*offer*" and "*proposed*" were no slip or accident. DG was setting out key terms to which he required a formal response.

70 The terms of DG's 13.3.12 letter, attached to his 14.3.12 email, referred to an agreement yet to be made. By clause 1 the £100k up-front payment was to be made "*on entering into the Agreement*". "*[T]he Agreement*" was not defined or explained but it could only have been a reference to a PA in final agreed form. It is clear from the proforma PA that this payment would coincide with execution of a PA. By the terms of the proforma PA Ds would become obliged to make land available for promotion upon receipt of the up-front payment. The other references to "*the Agreement*" in DG's letter are also obviously to terms in a PA and I reject DG's oral evidence to the contrary.

71 Not having received a response to his email of 14.3.12, DG sent a chasing email to Ds on 22.3.12. DG confirmed that a consultation response was being

prepared and that it would not identify specific land but would refer to the direction of growth. DG concluded by asking in terms

"*Have you had a chance yet to consider the proposal that we sent last week, and are you able to now confirm that we can now proceed to the next stage of a lawyer turning it into a legal agreement?*"

It is not insignificant that DG again made no reference to an existing agreement but instead referred again to GDL's "*proposal*" which was intended to be the basis for "*a legal agreement*" to be made subsequently.

72 On 23.3.12 DG sent an email to Peter S referring to approaches to other landowners which GDL would not make until after it had submitted a consultation response and "*until we have agreed terms with [Ds]*". This email was sent at 16.38. Thus, if between 22.3.12 and 26.3.12 DG had a telephone conversation with PS which gave rise to an oral agreement it must have occurred later on 23.3.12, over the ensuing weekend, or on Monday 26.3.12.

73 In respect of the period 13.3.12 to 23.3.12, on an objective consideration the documents and events provide neither support nor corroboration for GDL's case that a binding oral agreement was made at the meeting. Rather they point consistently and overwhelmingly to the contrary.

23.3.12 to 26.3.12

74 DG's evidence was that his telephone conversation with PS probably occurred on 26.3.12. PS agreed that there had been a telephone conversation but had no recollection of the date and little recollection of what was said.

75 DG's evidence was that PS had said that Ds had had "*cold feet*" about the effect of a sale on Ds, future generations and on their friends and neighbours but had gone on to confirm that the terms as set out in DG's 13.3.12 letter were correct and were agreed. DG also said that PS had used the phrase "*crossed the Rubicon*" and had also said that Ds would instruct their solicitors, Hibberts.

76 PS's written evidence was compatible with the tenor of DG's evidence

"*I explained that it had been a difficult time, because the proposal would affect so much of what we do. … My focus and that of the family has always been on farming. The only time we had thought about development was in respect of the Plant Site*".

However, PS maintained that she would not have made an agreement on behalf of Ds because Ds had not reached an agreement as a family. She also denied referring to "*cross the Rubicon*".

77 Neither DG nor PS made a note of this conversation and DG did not send an email to Ds to confirm that an agreement had been made.

78 Both DG and PS were cross-examined about the telephone conversation and about who, if either, used the phrase "*crossed the Rubicon*". Both DG and PS maintained that their written evidence was accurate. PS said that she had not known and, therefore, could not have used the phrase.

79 GDL also adduced evidence from another director of GDL, Jonathan Shepherd, who recalled an occasion, which he placed as between 23.3.12 and 29.3.12, when DG told him that

" *… he had some really good news. [DG] had been speaking with [PS] and [Ds] had agreed for us to go ahead and start to promote their land. DG said … that [Ds] had eventually "crossed the Rubicon" to make the decision to do so. I do not know whether the phrase "crossed the Rubicon" was one [DG] used to describe the process or whether it was one [PS] had used to [DG]*".

80 'Crossing the Rubicon' is a familiar phrase, but not one in everyday use. PS had been a college lecturer. She is an intelligent and articulate lady; however, for some 30 years the centre of her universe has been Bent Farm and her family. DG is also intelligent and articulate and, through his work and his senior position as a mason, he will have engaged in extensive social intercourse.

81 In terms of inherent probabilities, it is likely that DG would have been familiar with the phrase 'crossing the Rubicon'. I do not rule out as a matter of inherent probability that PS was also familiar with the phrase. What struck me about the cross-examination of DG and PS on this small, but not unimportant point, was PS's answer and demeanour in response to Mr Horne's follow up question. After PS said that at the time she had not known what the phrase meant, there was the following exchange

Mr Horne	"*Do you know now?*"
PS	"*More or less, yes."*
Mr Horne	"*I'm not asking for an exact definition or where the river is in Rome or north Italy, but yes*".

Mr Horne then moved on to a different aspect of the telephone conversation. PS looked somewhat anxious when asked whether she now knows the meaning of the phrase; her answer was delivered somewhat hesitantly; and, she appeared noticeably relieved when Mr Horne moved on. I have no reason to think that PS was putting on a show and this provides credible evidence to support PS's evidence that she did not use the phrase. This in turn casts doubt on the reliability of DG's evidence about at least this aspect of the telephone conversation.

82 Of course, it does not follow that DG's evidence is unreliable as to the remainder of the conversation. Again, I move on to the contemporaneous subsequent events and documents.

Communications between the parties' lawyers

83 GDL did submit a short consultation response on 28.3.12. It also commissioned a photographic survey or record of Bent Farm and the surrounding land by an ecologist. No further direct communication passed between GDL and Ds for some weeks.

84 Ds did instruct Hibberts solicitors and by letter dated 10.4.12 the solicitors notified GDL that they had received a copy of the proforma PA and DG's letter dated 13.3.12 and they asked for a copy of the plan referred to in the PA and for confirmation that GDL would pay their fees. This letter was headed "*Re : Land at Bent Farm, Astbury - Subject to Contract*" which heading was emphasised in bold and underlined. This demonstrated that Hibberts'

understanding was that DG's 13.3.12 letter did not contain the terms of an existing binding agreement.

85 DG saw the letter and sent an email to Ms Jody Phillips ('JP'), a solicitor and head of GDL's internal legal department, suggesting that in her reply JP should make clear that Ds had not supplied a plan of their exact holdings to GDL and should ask Hibberts for an overall plan. In oral evidence DG said that he would have scanned Hibberts' letter and not noticed the reference to "*Subject to Contract*".

86 JP replied on 16.4.12. Her letter was also headed "*Subject to Contract*" and confirmed that GDL would be responsible for Hibberts' reasonable fees in connection with the PA. JP also asked for a plan as suggested by DG. JP said that she had drafted the text but that her secretary would have incorporated the heading "*Subject to Contract*"; that may have been so, but the letter was signed and was sent as a letter from GDL's lawyer.

87 In oral evidence JP said that her understanding at the time was that there was an 'in principle' agreement between GDL and Ds which she "*was to put into a [PA]*". It was also JP's evidence that GDL's legal department's correspondence is not routinely sent out 'Subject to Contract'. I observe that a 'Subject to Contract' heading would have been appropriate for negotiations to finalise an 'in principle' agreement.

88 Hibberts wrote to GDL on 18.4.12 asking for an approximate plan of the 70 acres of Bent Farm land referred to in DG's 13.3.12 letter; Hibberts letter was not headed 'Subject to Contract', but it was a continuation of the chain of correspondence.

89 JP raised this request with KE who instructed JP first to obtain a plan from Ds showing the extent of their legal ownership. She replied by "*Subject to Contract*" letter dated 30.4.12 enclosing a draft PA, which was a development from the proforma PA (being in a consistent font and colour throughout and identifying the up-front payment as £100k and the Promoter's Proportion as 20% plus VAT, but not yet identifying the owners or the land for promotion). JP also said that before GDL provided a plan it needed a plan from Ds "*showing the full extent of their ownership*" and continued

"*and then by mutual agreement the parties will be able to determine the land to be included in the [PA]*".

Although this states that the land the subject of the PA is yet to be agreed upon, it is also consistent with GDL reasonably requiring Ds to identify precisely the land comprising some 70 acres identified at the 12.3.12 meeting and the scope of the remainder of Bent Farm so that the Retained Land may be finalised.

90 Hibberts wrote to GDL on 15.5.12, reintroducing the "*Subject to Contract*" heading and asking for an undertaking to cover their fees to the value of £5,000 plus VAT "*whether or not the matter proceeds to completion*".

91 JP referred this request to KE who advised that it was agreed that each party would bear its own costs. JP replied by letter dated 15.5.12, also headed "*Subject to Contract*", stating that the parties had agreed to bear their own costs of the transaction and declined to give the undertaking requested. JP and/or KE

appear not to have considered the terms of the draft PA sent to Hibberts by which, at clause 13, GDL agrees, as an obligation under the PA, to pay the landowner's solicitor's fees in a sum left blank in the draft at that stage.

92 DG was cross-examined about Hibberts' letter and the payment of fees. He said that he was aware of the request and involved in the instruction given to JP by KE. He maintained that it had been agreed at the 12.3.12 meeting that each side would bear its own legal costs because of the amount of the up-front payment. DG said

" .. in a normal situation, when we're only paying a fee of [£10k or £20k], often as part of the negotiation we'll end up paying a contribution to their costs, enough to – typically enough to pay the lawyers' costs [£5k].
When they had negotiated with us from our starting point of [£20k] up to [£100k], we made it clear that they would then be responsible for paying their own legal costs".

Mr Jourdan QC "*There wasn't any such discussion on 12 March, was there?*"
DG "*There was*".

93 In his witness statement, DG said nothing of agreeing such a term. Rather he made clear that he viewed an up-front payment of £100k in the context of GDL being likely to make more than £5million and, on that basis

"*In the round, I was happy with these variations of our normal key terms*".

I note here that there was no reference to this variation of GDL's standard terms as to legal fees in DG's 13.3.12 letter; further, and given the retention of clause 13 in the draft PA sent to Hibberts, it was obviously not communicated to JP.

94 DG's evidence on this point makes no sense. The £100k payment is not a fee in the sense of being an additional payment on top of the landowner's share of the proceeds of sale of the land, it is a sum paid in advance and to secure the landowner's agreement to the obligations under the PA, but it is to be recouped upon sale of the land out of those proceeds. In other words, provided GDL was confident that promotion would be successful, that is that planning approval would be obtained and a developer found, the payment of the £100k was merely a matter of cash flow.

95 In my judgment, DG was caught out in this exchange during cross-examination and I reject this evidence.

96 There is a further point to note from the exchange of correspondence between the solicitors. First, there were numerous letters written "*Subject to Contract*" and, secondly there was a request for an undertaking to pay fees irrespective of whether the transaction completed; communications in these terms served to emphasise Ds position that there was not, at that time, a binding agreement.

97 The final communication between the parties' lawyers appears to have been a telephone call from Hibberts to JP at GDL on 7.8.12 during which JP said that she had no instructions and that the parties should communicate directly.

98 If DG's original instruction to JP had been that there was an existing binding oral agreement, the course of dealing between the parties' solicitors is not easy to understand.

August 2012 onwards

99 JP probably reported the telephone call from Hibberts to DG. He sent an email to Ds on 14.8.12 containing a planning update. DG also informed Ds that a GDL project manager, Mike Heming ('MH'), would make contact to arrange an appointment to walk the land. This was arranged for 22.8.12 and, at about this time, GDL informed Ds that it had succeeded in its planning appeal in respect of the Loachbrook Farm Site.

100 MH visited Bent Farm on 22.8.12. He met and had a conversation with PS over coffee and he walked the land with AS. There was disagreement over whether MH did or did not meet RS but nothing turns on this and it has no bearing on my assessment of RS as a witness. Over the course of the visit MH clearly understood that Ds wanted to retain sufficient land to continue farming. This visit and/or land searches enabled GDL to create an ownership plan of the land comprising Bent Farm.

101 On 5.9.12 DG informed JP that Congleton Town Council had approved expansion by the building of 3,500 new homes to the west of the town and instructed JP to prioritise execution of a PA.

102 To make progress GDL requested a meeting to update Ds. This was fixed for 27.9.12 and was attended by Ds and by DG, MT, MH and Sam Gladman another of GDL's project managers. The meeting lasted some two hours.

103 DG made the point in evidence that Ds did not at any time assert that there was no promotion agreement. A common thread in GDL's witnesses' evidence is that there was discussion about which land from Bent Farm would be put forward and that Ds were uncertain about how much land to commit to development. In a contemporaneous internal GDL file note Ds are recorded as having been "*wary and want[ing] time to think the proposals over*". There was also discussion at this meeting about the route of a link road; MT's written evidence is that RS was against the link proposed by DG and suggested widening the main roads. I pause here to note the further reference to "*proposals*".

104 DG's evidence was that towards the end of the meeting he raised the issue of Ds' progress with their solicitors and PS agreed to chase them up. In oral evidence PS accepted that she might have said she would chase up the solicitors. By that time GDL already knew the details of Ds land, so the purpose of chasing up Hibberts would have been to progress negotiations on the draft PA. One matter for negotiation would have been agreement about the primary area of land for promotion about which GDL understood Ds were at least having second thoughts if not still considering.

105 Throughout all of this Peter S was pursuing an alternative development proposal using other planning consultants, Halletec, in relation to the Plant Site and areas of Bent Farm. Peter S kept RS and PS informed of developments.

106 There was a further meeting at GDL on 29.1.13, which PS, AS and GS but not RS attended for Ds. KE sent an email to Ds on the next day. KE was aware of

Ds concerns about committing land for development via a PA and sought to reassure Ds by stating

"*Any Agreement would ensure that you remain in total control of your land holdings and we would work together towards a common goal of securing a valuable planning permission whilst balancing the needs for the setting and function of your farm*".

Reassuring though that may have been intended to be, it is flatly at odds with the terms of the proforma PA sent to Peter S for onward transmission to RS and the draft PA sent to Hibberts. It also supports a finding that there was no concluded agreement

107 On 7.2.13 JP sent KE a copy of the draft PA, presumably for internal review.

108 Ds were giving the draft PA anxious consideration. They referred it to their farming consultant, KMT Farming & Consultancy ('KMT'), for analysis and advice. Based on Ds' instructions, KMT advised that the draft PA did not provide sufficient incentive to enter into a formal agreement at that time. KMT also provided a draft letter expressing that view which PS repeated verbatim in an email sent to GDL on 21.2.13.

109 This prompted a written response from GDL also dated 21.2.13 asserting that Ds were bound to the promotion of land at Bent Farm by the terms of the 13.3.12 letter. DG sent a further letter dated 6.3.13 asserting that Ds were bound by a negotiated agreement reached in March 2012.

Conclusion

110 In my judgment, there is no binding agreement between GDL and Ds. The 12.3.12 meeting was attended by Ds in order to hear and consider what GDL would propose. Prior to that meeting GDL had provided a proforma PA to Ds by the terms of which a landowner committed identified land to promotion for development as a consequence of executing and thereby entering into a PA. The record of the 12.3.12 meeting provided by GDL to Ds on 14.3.12 referred only to "*offer*" and "*proposed*" in the context of the 12.3.12 meeting and references to "*Agreement*" could only have been to an executed PA. The contemporaneous communications between the parties' solicitors were all conducted "*Subject to Contract*" and GDL's lawyer understood the agreement between GDL and Ds to have been "*in principle*". Even though 70 acres and its location at Bent Farm, £100k as the up-front payment and 20% as the Promoter's Proportion were agreed at the 12.3.12 meeting, the agreement was part of the negotiation of a PA not a free standing oral agreement; for there to have been a free standing oral agreement which bound Ds or RS and PS and GDL until superseded by a PA this circumstance would have had to have been made clear to and accepted by Ds; the evidence on this point falls far short of the standard of proof required to enable the court to make such a finding. The same applies to the telephone conversation later in March 2012 between DG and PS. There is nothing of sufficient substance throughout the whole course of dealings between GDL and Ds to justify a finding that GDL and Ds, or GDL and RS/PS, entered into an oral agreement as contended for by GDL.

111 There is no need to consider Ds' fallback case, which received little attention from either side in evidence or submissions.