Neutral Citation [2021] EWHC 2743 (Ch)

Claim No PT-2020-BHM-000053

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

Sitting at:
Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 21 October 2021

**Before**:

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

BETWEEN:

**Ms CHRISTINE MARGARET CHAPMAN**
**Claimant/First Part 20 Defendant**

**-and-**

**CLARENCE COURT EGGS LIMITED**
**Defendant/Part 20 Claimant**

**-and-**

**Mr MICHAEL RICHARD JOHN KENT**
**Second Part 20 Defendant**

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**Mr Mark Anderson, QC** and **Mr David Mitchell** (instructed by **Lyons Davidson Limited**) appeared for the Claimant/First Part 20 Defendant and the Second Part 20 Defendant

**Mr Rahul Varma** and **Mr Tom Coates** (instructed by **Forsters LLP**) appeared for the Defendant/Part 20 Claimant

Hearing date: 7 October 2021

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# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Marcus Smith:**

## A. INTRODUCTION

1. The Claimant, Ms Chapman, seeks to enforce as against the Defendant, Clarence Court Eggs Limited (**Clarence Court**[1]), an option agreement (the **Option**) dated 23 June 2006 relating to land to the south of Corby Road, Middleton, Market Harborough, Northamptonshire (the **Land**). The Option was granted by Clifford Kent Limited (the previous name of Clarence Court, but for present purposes the same entity) to the Second Part 20 Defendant, Mr Kent.[2]

2. The Land is described in the Option as follows:

> "...the freehold property known as two parcels of land lying to the south of Corby Road Middleton Market Harborough Northamptonshire registered at the Land Registry with title absolute under title number NN175198..."

3. The benefit of the Option was assigned by Mr Kent to Ms Chapman, his sister, by a deed of assignment dated 18 April 2019 (the **Assignment**). The Assignment is an assignment under section 136 of the Law of Property Act 1925, and notice of the assignment was given to Clarence Court (the debtor) by a letter dated 8 May 2019.

4. By a notice dated 25 February 2020, Ms Chapman exercised, or purported to exercise, the Option.

5. Clarence Court resists the enforcement of the Option by Ms Chapman, and Ms Chapman has served a notice to complete, which she seeks – by these proceedings – to enforce by way of an order for specific performance. By this application, Ms Chapman seeks summary judgment (or, given the defences articulated by Clarence Court, "reverse" summary judgment) in relation to her claim.

6. The grounds for Clarence Court's refusal to perform the Option are various, but they are all, to a greater or lesser extent, related to a merger investigation conducted by the Competition Commission (the **CC**) in 2007 and to the outcome of that investigation. That merger investigation involved Clarence Court and Mr Kent (amongst others), and resulted in Mr Kent giving various undertakings.

7. It is not pointful to set out the defences articulated by Clarence Court until I have described the relevant facts, including in particular the merger investigation, its outcome and what happened consequent upon that outcome. That description follows in the next section (Section B).

[1] The terms and abbreviations used in this Judgment are listed in Annex 1, which identifies the paragraph in which each term/abbreviation is first used.

[2] The Option was varied – but immaterially – by an (undated) deed of variation.

8. I am mindful of the fact that the applications before me are for summary judgment and/or "reverse" summary judgment.[3] My description of the relevant facts in Section B seeks, therefore, to be neutral and not contentious. To the extent contentious issues arise – and, of course, this is not a trial, so contentious factual disputes will generally mean an application for summary judgment will fail – are described and, as appropriate, resolved, elsewhere in this Judgment.

## B. THE RELEVANT FACTS

### (1) The merger investigation

9. The Office of Fair Trading (**OFT**) referred a completed merger to the CC for investigation and report under section 22 of the Enterprise Act 2002. A merger investigation was commenced by the CC and resulted in the publication of a final report on 20 April 2007 (the **Final Report**).

10. The merger under investigation was between Clifford Kent Holdings Limited (**Clifford Kent**) – the parent company of Stonegate Farmers Limited (**Stonegate**) – and Deans Food Group Limited (**Deans**). The resultant merged entity was Noble Foods Limited, a group of companies that I shall refer to as the **Noble Group**. The Final Report noted that both Stonegate and Deans were suppliers of shell and processed eggs, and that the merger of these two entities might result in a substantial lessening of competition (or **SLC**) in the markets for the supply and procurement of shell eggs. Various adverse effects of the merger were identified in the Final Report and it was concluded – amongst other things – that "the divestiture of Stonegate is likely to be the most practicable and effective, comprehensive and proportionate remedy for dealing with the SLC and the resulting adverse effects of the merger".[4]

11. I should be clear that when I refer to Clifford Kent, Stonegate and/or Deans, I include in that reference any relevant subsidiaries.

12. The divestiture was effected through certain undertakings, which I shall proceed to describe. These undertakings also make clear that where companies are referred to, the undertakings extend to subsidiaries.

### (2) The Undertakings

13. On 8 October 2007, the CC gave notice accepting various final undertakings pursuant to section 82 and Schedule 10 of the Enterprise Act 2002. These undertakings were given by the Noble Group (on behalf of itself and its subsidiaries), a Mr Dean and (most pertinently for present purposes) Mr Kent, collectively referred to as the **Vendors**.[5] The undertakings themselves are set out in writing (the **Undertakings**). They materially provide as follows:

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[3] I had my attention drawn to the relevant law, in particular, the decision of Lewison J in *Easyair Ltd v. Opal Telecom Ltd*, [2009] EWHC 339 (Ch) at [15] and the appellate authority approving this decision. It is unnecessary to set out the principles in detail in this Judgment.

[4] Final Report, Summary at 26(a).

[5] See clause 1.9 of the Undertakings.

(1) The Undertakings are to be governed and construed in accordance with English law.[6] They came into effect on the **Commencement Date**, which was 8 October 2007, the date on which the CC accepted the Undertakings.

(2) The principal undertakings are set out in clause 3, which it is appropriate to quote in full:

> "3.1 In order to remedy the SLC and adverse effects identified in the report, the Vendors together and separately undertake that they shall use their best efforts to satisfy the Disposal Obligations within the Initial Divestiture Period.
>
> 3.2 The Vendors undertake to use their best efforts to satisfy the Disposal Obligations, or to procure that the Disposal Obligations are satisfied, in accordance with the provisions of these Undertakings.
>
> 3.3 The Disposal Obligations are:
>
> 3.3.1 to agree Heads of Terms for Effective Disposal; and
>
> 3.3.2 to bring about Effective Disposal.
>
> 3.4 The Vendors undertake that they shall use all reasonable endeavours to ensure that the Stonegate Business is divested with at least the producer volumes and customer contracts as at the Commencement Date.
>
> 3.5 The Vendors undertake that they shall use their best efforts to ensure that Noble Group's financing arrangements do not prevent an Effective Disposal."

These provisions contain a number of defined terms:[7]

(a) The **Disposal Obligations** are the obligations described in clause 3.3.

(b) The **Initial Divestiture Period** is essentially a period of three months from the Commencement Date. That period can, in certain circumstances, be extended to a maximum of six months.

(c) **Effective Disposal** means "completion of the disposal of the Stonegate Business (which may be effected by the transfer of the entire share capital of Clifford Kent or the transfer of the property, assets and goodwill of the Stonegate Business) and may also include Deans Assets under an Approved Agreement to an Approved Purchaser".

(d) **Heads of Terms** means "an agreement in principle to acquire the entire share capital of Clifford Kent (which corresponds to the Stonegate Business) or the transfer of the property, assets and goodwill of the Stonegate Business that is reduced to writing, and that is expressed by all the parties to be final (1) subject to contract and (2) on all the issues that in the reasonable opinion of the parties will form the basis of a subsequent binding agreement".

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[6] Clause 23.1.

[7] Defined in clause 1.9.

(e) Clifford Kent and Stonegate have already been defined in paragraph 10 above (consistently with the terms as defined in the Undertakings). The **Stonegate Business** is defined as:

"...that part of the Noble Group which corresponds to the business carried on by Clifford Kent as at the Commencement Date and includes the business of procuring, packing and supplying shell eggs and related products to retailers and other customers being the rights, interests, assets and obligations of that business and including:

(1) all the tangible assets involved in the procurement, packing and supply of shell eggs to retailers and other supplies of goods or services ancillary or connected to the supply of eggs at the property owned or leased by Clifford Kent including all equipment (including packing machinery), fixed assets and fixtures, stock, office furniture, materials, supplies and other tangible property used in connection with those assets; and all contracts, agreements, leases, commitments, certificates and understandings relating to those assets including supply agreements; and all accounts; and all records relating to the assets set out in this paragraph (1);

(2) all intangible assets involved in the procurement, packing and supply of shell eggs to retailers and other supplies of goods or services ancillary or connected to the supply of shell eggs at the property owned or leased by Clifford Kent including all licences and sub-licences, intellectual property, technical information, computer software and related documentation, know-how, drawings, designs specifications for material, parts and devices, quality assurance and control procedures; and

(3) all rights, interests and obligations under agreements with suppliers (including producers of shell eggs), customers and employees..."

(f) An **Approved Agreement** is:

"...a binding agreement or agreements to enable an Effective Disposal approved by the CC; and the Vendors recognize that in considering whether to approve any agreement the CC shall consider whether (1) the terms of the agreement (and any other agreements or arrangements ancillary or connected to the agreement) are such as to give rise to a significant risk that the disposal of the Stonegate Business will not remedy the SLC and adverse effects (including risks as to the purchaser's ability to compete in the supply and procurement of shell eggs) and (2) the agreement includes a warranty, breach of which is actionable in damages or other compensation at the suit of the Purchaser, that each requirement of the Secondary Undertakings has been complied with..."

**Secondary Undertakings** are those set out in clause 6, or any one of them. They are not material.

(g) An **Approved Purchaser** is:

"...a purchaser or purchasers whom the CC is satisfied, following an application from the Vendors (in accordance with [clause] 4.7) or from the Divestiture Trustee, (1) is independent of, and unconnected to, any of the Vendors, (2) has the incentive, the financial resources and the expertise to operate the Stonegate Business as a viable and active business in competition with other buyers of shell eggs from producers and other suppliers of shell eggs to retailers so as to remedy the SLC,

(3) will obtain all necessary approvals and consent, including the consent of any regulatory or competition authority, for the acquisition of the Stonegate Business; and the Vendors recognize that the CC may require any such purchaser to provide the CC with such documents (including business plans relating to the Stonegate Business and information regarding the financing of the acquisition and the financing of the purchaser's existing business) and other material or information as the CC may require so as to be satisfied on the matters set out above..."

(3) There are a number of matters ancillary to the principal undertakings contained in clause 4:

"4.1 The Vendors each undertake that where the Undertakings or any one of them require the consent or approval of the CC (however that requirement is expressed in these Undertakings) they will seek the consent or approval in writing.

4.2 The Vendors each undertake that any application by them for the CC's consent or approval shall make full disclosure of every fact and matter that is relevant to the CC's decision.

4.3 The Vendors recognise that where the CC grants consent or approval on the basis of misleading or incomplete information, the consent or approval is voidable at the election of the CC.

4.4 In the event that the Vendors discover that an application for consent or approval has been made without full disclosure and is therefore incomplete the Vendors undertake to:

4.4.1 inform the CC in writing identifying the particulars in which the application for consent is incomplete within seven days of becoming aware that the application is incomplete; and

4.4.2 at the same time or as soon as possible thereafter, provide to the CC an application for consent that is complete.

4.5 The Vendors shall use all reasonable endeavours to make each application or to procure that each application for consent or approval is made so that it is received by the CC at least five working days, or such lesser period as the CC may allow, before the day on wjich the CC's consent or approval is necessary to avoid a breach of these Undertakings.

4.6 The Vendors recognize that the CC shall not be required to use more than its reasonable endeavours to grant or refuse any consent or approval within the five-working-day period referred to in [clause] 4.5.

4.7 Where in the Vendors' reasonable opinion it has identified a candidate purchaser with an active interest in the acquisition of the Stonegate Business, the Vendors will apply to the CC for a decision on whether or not the candidate purchaser is an Approved Purchaser."

(4) Clause 7 contains a series of "post divestiture undertakings". Although the undertaking principally of relevance is clause 7.4, it is appropriate to set them all out:

"7.1 The Vendors undertake that following an Effective Disposal the Noble Group, Mr Peter Dean and Mr Michael Kent will not:

- solicit Key Staff from the Stonegate Business or entice away from employment Key Staff from the Stonegate Business; or
- solicit any person who was a member of the Key Staff at the Stonegate Business at any time in the period two months prior to the Commencement Date,

for a period of two years from the date of Effective Disposal.

7.2 The Vendors undertake that following an Effective Disposal the Noble Group, Mr Peter Dean and Mr Michael Kent will not solicit customers and producers from the Stonegate Business for a period of one year from the date of Effective Disposal.

7.3 The Vendors undertake that following an Effective Disposal the Noble Group, Mr Peter Dean and Mr Michael Kent will not enter into a supply agreement for shell eggs with JG Bowler for a period of one year from the date of Effective Disposal.

7.4 The Vendors undertake that following an Effective Disposal the Noble Group, Mr Peter Dean and Mr Michael Kent will not acquire any interest in the Stonegate Business, without the prior written consent of the OFT.

7.5 The Vendors undertake that following an Effective Disposal, the Noble Group, Mr Peter Dean and Mr Michael Kent will not use the brand names of the Stonegate Business."

(5) Finally, clause 18 concerns the provision of information by the Vendors to the CC and the OFT:

"18.1 The Vendors undertake that they shall and will procure that each member of the Noble Group shall (insofar as they are able to) promptly provide to the CC such information as the CC may reasonably require for the purpose of performing any of its functions under these undertakings or under sections 82, 83 and 94(7) of the Act.

18.2 The Vendors undertake that they shall and will procure that each member of the Noble Group shall (insofar as they are able to) promptly provide to the OFT such information as the OFT may reasonably require for the purpose of performing any of its functions under these Undertakings or under sections 92, 93(6) and 94(6) of the Act.

18.3 The Vendors undertake that should they or any of them at any time be in breach of any provision of these Undertakings such of them as are in breach will write to the CC within five working days to advise the CC:

18.3.1 that there has been a breach; and

18.3.2 of all the circumstances."

14. The Undertakings, unsurprisingly, contain a wealth of detailed provision as to how divestiture was to be undertaken. These provisions are not set out here, but will (as necessary) be referred to later on in this Judgment. One point worth mentioning at this stage is that whilst divestiture was initially to be undertaken by the Vendors, the Undertakings made provision for the appointment, under certain conditions, of a

**Divestiture Trustee**, who would take over the divestiture process from the Vendors and who was a person independent of them.[8]

15. What the Undertakings sought to achieve was the sale of the Stonegate Business – whether by share sale or asset acquisition – in a commercial state, as the business stood at the Commencement Date, to a third party independent of the Vendors and on terms that would enable the purchaser of the Stonegate Business to compete with the Vendors, particularly in the markets for the supply and procurement of shell eggs, where the CC anticipated SLC. In other words, the point of the Undertakings was not merely divestiture of the Stonegate Business, but divestiture of the Stonegate Business in such a way as to establish the Stonegate Business as an independent and viable competitor of the Noble Group.

## (3) The divestment

16. The divestment process took rather longer than was envisaged by the terms of the Undertakings, and was conducted, from around April 2008, by Baker Tilly Corporate Finance LLP and Hammonds Solicitors, as Divestiture Trustee (pursuant to the provisions that I have referenced in paragraph 14 above), rather than by the Vendors.

17. The Vendors' solicitors (Lyons Davidson) circulated final draft documents in June 2008. Included in the circulation was the CC.[9] The divestiture was to be achieved by a share sale agreement and not an asset acquisition. As is clear from the definition of an Effective Disposal,[10] either method was permissible, and this was the method chosen.

18. The draft share sale agreement was an agreement for the sale and purchase of the entire issued share capital of Clifford Kent (the **Draft SPA**). The terms of the Draft SPA are long and detailed, and it is unnecessary to set them out in any detail. The only points to make are:

    (1) The sale was a substantial one. The consideration for the purchase of the shares was some £28 million.[11] The purchaser was a company – Acraman (474) Limited – which was the corporate vehicle of a Mr and Mrs Corbett.

    (2) Schedule 6 to the Draft SPA is a schedule of properties. Part 1 of the schedule lists a series of freehold properties, and the Land is listed in Part 1. The schedule provides the following information:

| Property | Tenure | Title | Company | Use | LD Certificate of Title |
|---|---|---|---|---|---|
| Land at Darnells Lodge Middleton Corby | Freehold | NN175198 | CK | Bare Land | No |

[8] See clauses 8 and 12 of the Undertakings.

[9] This can be seen from the email of Mr Acock of Lyons Davidson dated 9 June 2008, which was sent to a Mr David Peel of the CC.

[10] See paragraph 13(2)(c) above.

[11] Inevitably the provisions regarding payment – including amount – are complex. The detail is irrelevant. The only point I am making is that this was a substantial transaction.

"CK" is a reference to Clifford Kent. The properties listed in Schedule 6 are defined, in the Draft SPA, as the **Properties**.[12] They are relevant because – unsurprisingly – the vendor under the Draft SPA makes certain warranties (clause 8), which are specifically articulated in Schedule 3 to the Draft SPA. Clause 17 of Schedule 3 contains various warranties in relation to the Properties, including as to title.

(3) The Draft SPA makes express reference to the Undertakings, defined in the SPA as the **Final Undertakings**. The Draft SPA incorporates, in clause 10 (entitled "Restrictive Covenants") provisions similar to the post divestiture undertakings contained in clause 7 of the Undertakings, and provides that "Stonegate Business" "means the same as in the Final Undertakings".[13]

19. As is common in share sale and purchase agreements, provision is made for the disclosure by the vendor of material facts and matters. A disclosure letter (the **Draft Disclosure Letter**) drafted in June 2008 sought to provide (obviously only in draft form) "formal disclosure to the Purchaser for the purposes of the Agreement of the facts and circumstances which are or may be inconsistent with the warranties…". The specific disclosures made are set out in Schedule 1 of the Draft Disclosure Letter, which provides, in clause 17.1, as follows:

"Clifford Kent Limited has entered into an Option Deed dated 23rd June 2006 with Michael Kent relating to freehold property known as two parcels of land lying to the south of Corby Road Middleton registered at the Land Registry with title absolute under title number NN175198. You have been supplied with a copy of the Option Deed. The option provides for the property to be sold at a fixed price of £500,000 throughout the period of the option (until 2021)."

20. The Draft Disclosure Letter was circulated with the Draft SPA, and so would have been received by the CC.

21. On 17 June 2008, Mr Peel of the CC emailed the parties in the following terms:

"Dear All

This email is to confirm that the Competition Commission Remedies Standing Group (RSG) has now given its approval for Pam Corbett and Richard Corbett (through a wholly owned company, Acraman (474) Limited) (together the Purchasers) to purchase the Stonegate Business from the Vendors (expressions used are as defined in the Final Undertakings) under the terms (except for the proposed consideration for which see below), set out in the proposed sale and purchase agreement, the Takeover Offer and ancillary documents sent to the Commission on 9 June 2008 (together the Transaction Documents). The RSG is content that if entered into, the Transaction Documents will bring about an Effective Disposal and comply with the other terms of the Final Undertakings. This approval is based on all the information provided by the Vendors and the documents sent to the Commission on 9 June 2008 and the funding offer contained in the facility letter from Lloyds TSB, received by the Divestiture Trustee on 9 June 2008, which remains open until 31 July 2008. We also note that the consideration for the Stonegate Business with be £26.7 million.[14]

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[12] See the definitions in clause 1.1 of the Draft SPA.

[13] Clause 10.1 of the Draft SPA.

[14] This is difference in the consideration stated, for "£28.7 million" is the headline consideration in the Draft SPA. Whatever the reason, and I do not know what it is, the difference is, for present purposes, immaterial.

This approval is on the condition that the Divestiture Trustee is remunerated in accordance with the agreed mandate.

The Vendors and Purchasers shall use their best efforts to exchange Transaction Documents by 20 June 2008, but in any event this approval lapses on 30 June 2008."

22. This is obviously a carefully crafted and considered email. According to its express terms, the CC's approval was time limited. Unsurprisingly, the sale and purchase agreement was executed quickly and in materially the same form as the Draft SPA (the **Executed SPA**). The final form of the disclosure letter (the **Final Disclosure Letter**) made the same disclosure regarding the Option as the Draft Disclosure Letter.

23. On 25 July 2008, the Vendors provided a confirmation that the differences between the Executed SPA and the Draft SPA were not material in terms of meeting the requirements of the Undertakings.[15]

## (4) Subsequent events

24. On 22 November 2011, Mr Adrian Gott of AD Gott Ltd wrote the following letter to Mr Kent:

"Dear Michael,

I confirm the following agreement re: the Corby strategic land project:

There are some 120 acres of land at Corby, known as Land at Darnels Lodge, Middleton for reference LR title number: NN175198. It is my intention to pass planning here in accordance with the Corby Council major urban extension.

I will work to ensure that all of this land or parts of this land to the best of my ability are included within the Corby Urban Extension. You have an option to purchase which expires in 2021.

1. For the purpose of our arrangement we have placed a base value upon this land of £500,000.

2. You have agreed that I may reclaim all out of pocket expenses in relation to this site and charge a fee of £1,250/quarter as a contribution towards my time.

3. I will do this for a success fee payable upon sale for 10% of the uplift in value.

4. For clarity this is: 10% times net sale proceeds received (i.e., gross sale proceeds less purchase price of property at base value, less stamp duty and legal fees and costs/expenses incurred in obtaining planning permission or land allocation). NB. Costs and expenses include all fees paid to AD Gott under this agreement.

5. Such money will be paid to me 28 days on receipt of sale monies to you.

6. I will engage other consultants necessary as required with your written approval to work with me to obtain residential development on the land on whole and/or part of the 120 acres.

[15] The confirmation is rather longer and more convoluted: but its detailed terms are not particularly material.

7. I have the instruction to sell once the planning permission or a suitable allocation on the land is achieved.

8. Either party may terminate by giving one month's notice at any time. If A Gott Ltd gives notice the whole agreement ceases and then there is no liability by either party to each other. If M Kent gives notice the agreement remains as far as clauses 1, 3, 4 and 5 are concerned for 36 months after the date of the notice served. If the planning permission or allocation is achieved during the notice period then M Kent agrees to instruct an agent(s) to actively promote and market sale of the land in pursuit of willing purchasers without unreasonable delay. If a sale is agreed within the notice period then the success fee will be deemed payable."

**25.** The letter is signed by both parties, and it was not contentious between the parties that a contract, on these terms, came into effect. What was more difficult was when, if at all, the agreement ended. Apparently, the quarterly payments referenced in paragraph 2 of the letter were made for some time, but were then refused or not accepted by AG Gott Ltd. According to Mr Anderson, QC, counsel for Ms Chapman and Mr Kent, the agreement terminated in 2019, but I was shown no evidence of this.

**26.** In April 2016, Mr Gott purchased Clifford Kent (or, more accurately, parts of the group of companies of which Clifford Kent was a part) from the Corbett family. At this point, Mr Gott's interest in the Land shifted from a desire – indeed, an obligation – to redevelop it to a desire to use the Land for the development of Clifford Kent's business. Of course, this desire could only be sensibly carried forward if the Option were removed: it would make no sense to develop the Land, only for Mr Kent to exercise the Option to purchase. Mr Gott – both through his solicitors and through Stonegate Farmers Ltd (a part of Clifford Kent) – approached the successor to the CC, the Competition and Markets Authority (the **CMA**) with a view to drawing to the CMA's attention what was contended to be an improper retention of the Option by Mr Kent. It is unnecessary to set out very much of this correspondence, but Mr Gott's letter of 2 August 2017 to the CMA articulates very clearly the issues regarding the Option:

"I purchased Stonegate Farmers Ltd and associated group companies on 16 April 2016 from the Corbett family. The Company is an integrated egg producing, packing and marketing business and was the subject of divestment on 8 October 2007 following a merger with Deans Foods Ltd in June 2006, that was referred to the Competition Commission by the OFT on 13 October 2006.

We have recently decided to proceed with the redevelopment of one of our principal primary assets that has an extant planning permission for a large laying farm, rearing farm and a distribution centre under application No: CO92/c212 at Corby Borough Council.

The land can be identified as land registry number: NN175198, being two parcels of land c.120 acres, lying to the south of Corby Road, Middleton, Northamptonshire. The charge register shows an option to purchase in favour of Mr MRJ Kent dated 23 June 2006 for 15 years until 22 June 2021.

A Competition Commission Report dated 20 April 2007 and subsequent post divestiture undertakings provided by a Mr MRJ Kent (a previous owner) state that following the effective disposal they would not acquire any interest in the Stonegate Business, without the prior written consent of the OFT.

The uninterrupted use of this land is paramount to the organic growth and long-term sustainability of the business. Stonegate's effective use of this land to enable it to compete in the industry is hindered by the option agreement.

We believe that the option held by Mr MRJ Kent should have been relinquished at the time the Competition Commission ordered that the two businesses were divested.

As such, we would like to know whether express consent was granted by the OFT for Mr MRJ Kent to retain his interest in this parcel of land owned by the Stonegate Business?

27. Although both sides sought to rely upon, or draw inferences from, what was said or not said by the CMA in the course of what was lengthy correspondence between the CMA, Mr Gott, Mr Kent and/or their solicitors, I do not consider that I am in any way assisted by what the CMA has said or not said. The correspondence is irrelevant for the purposes of this application (and, I suspect, generally). There is, therefore, no point in setting out the detail of that correspondence.

## C. THE ISSUES

28. Ms Chapman's claim for specific performance of the Option was, essentially, defended on the grounds that the Option or its exercise was precluded because of various breaches by Mr Kent of the Undertakings. These alleged breaches fell into three categories:

(1) First, that by retaining the Option, Mr Kent breached clause 3 of the Undertakings, in failing to bring about an Effective Disposal of the Stonegate Business.

(2) Secondly, Mr Kent breached clauses 4.2 and 4.4 of the Undertakings[16] in failing to make "full disclosure of every fact and matter that is relevant to the CC's decision" under clause 4.2 and – having failed to do so – having failed, therefore, to have the CC's decision "ratified" (by the CMA) pursuant to clause 4.4.

(3) Thirdly, the assignment and exercise of the Option amounted to a breach of clause 7.4 of the Undertakings, in that Mr Kent would acquire, in exercising the Option, an interest in the Stonegate Business without the prior written consent of the OFT (now the CMA).

29. These allegations give rise to many difficult legal questions. For example, assuming a breach of the Undertakings, what is the effect of that breach on the Option? Clarence Court contended that this was a case of supervening illegality, and this was disputed by Ms Chapman. Equally, Mr Gott's position as a person interested in developing the Land for Mr Kent[17] and as a person interested in developing the Land as a person interest in Clarence Court[18] raises interesting questions that cannot possibly be dealt with on a summary application.

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[16] Clarence Court also relied upon a more general obligation to provide information to the CC, contained in clause 18 of the Undertakings. Clause 18 is undoubtedly more broadly based than clause 4, but clause 4 contains a more onerous obligation in terms of making "full disclosure" and, where full disclosure is not made, seeking subsequent CC (or, now, CMA) consent. I was not addressed separately on clause 18, but I consider it (in Section E) in conjunction with clause 4.

[17] Pursuant to the agreement described in paragraph 24 above.

[18] As described in paragraph 26 above.

30. Mr Anderson, QC, on behalf of Ms Chapman, submitted that these difficult legal questions did not and could not arise if the breaches of the Undertakings alleged by Clarence Court had not occurred. It was in relation to these allegations of breach that Mr Anderson confined Ms Chapman's claim for summary judgment. In other words, Mr Anderson's contention was that – applying the appropriate standard for summary judgment – there were no breaches of the Undertakings. In consequence, the difficult legal questions I have adverted to would be academic and would not arise. Counsel for Clarence Court – Mr Varma and Mr Coates, who each addressed me on different parts of Clarence Court's case – took no issue with this approach, although of course they contended (in contradistinction to Mr Anderson and his junior Mr Mitchell) that there was a "realistic" defence to Ms Chapman's claim as regards each of the alleged breaches of the Undertakings and that Ms Chapman's application for summary judgment must fail. Thus, although they were poles apart on the quality of Clarence Court's defence, it was common ground that Mr Anderson's approach – focussing on the existence of a breach of the Undertakings – had the effect of avoiding the need to consider what were, undoubtedly, triable issues not susceptible of a summary judgment application.

31. Accordingly, and subject to one point that needs to be addressed in addition, I proceed on the basis that the only questions before me on this application arise out of the alleged breaches of the Undertakings set out in paragraph 28 above. I consider the three distinct, but inter-related, alleged breaches of the Undertakings in Sections D, E and F below.

32. The additional point (referred to in paragraph 31 above) concerns the Assignment. I had, initially, understood that all parties accepted that the Assignment raised – for summary judgment purposes – no point in addition to those articulated in paragraph 28 above. Thus:

    (1) If (contrary to Ms Chapman's submissions) the alleged breaches of the Undertakings gave rise to a realistic defence as against Mr Kent's exercise of the Option, then that defence (for purposes of summary judgment) could not be defeated by the Assignment.

    (2) Conversely, if (contrary to Clarence Court's contentions) these defences all failed, then the Assignment could provide no additional defence to Ms Chapman's claims.

33. In the event, whilst the understanding expressed at paragraph 32(1) was correct, Clarence Court contended that even if all of the defences arising out of the alleged breaches of the Undertakings failed, there was nevertheless an additional point, arising out of the Assignment alone, that would preclude judgment being entered for Ms Chapman. I consider this, separate, point in Section G below.

## D. FAILING TO BRING ABOUT AN "EFFECTIVE DISPOSAL"

### (1) Introduction

34. Clarence Court contended that in retaining the Option, Mr Kent had breached clause 3 of the Undertakings. Specifically, Mr Kent (as well as the other Vendors) was obliged[19] to

[19] The obligation is, in fact, one of "best endeavours" or "best efforts", but Mr Anderson, quite rightly for purposes of an application for summary judgment, proceeded on the basis that the obligation was an absolute one.

satisfy the Disposal Obligations or to procure that they were satisfied. The Disposal Obligations involved an obligation to bring about Effective Disposal.[20]

35. Clarence Court contended that, according to its definition, an Effective Disposal needed to be:

(1) Of the Stonegate Business;

(2) Under an Approved Agreement; <u>and</u>

(3) To an Approved Purchaser.

36. No issue arose in relation to the second and third requirements. Clarence Court accepted that there had been a disposal under an Approved Agreement and to an Approved Purchaser. However, Clarence Court contended that the disposal (albeit under an Approved Agreement and to an Approved Purchaser) had nevertheless <u>not</u> been an Effective Disposal because what had been disposed of was <u>not</u> the Stonegate Business.

37. As is clear from the foregoing paragraphs, most of the terms I am using are defined terms, which I have already set out and which I do not repeat here. Ms Chapman disputed Clarence Court's contentions on two grounds:

(1) First, even if (which was not accepted by Ms Chapman) what had been disposed of was <u>not</u> the Stonegate Business, the fact that the Executed SPA, by way of which the de-merger or divestment had been achieved, had been approved by the CC, rendered any allegation that the Stonegate Business had not been disposed of by the Executed SPA moot and irrelevant. In short, Ms Chapman's primary contention was that <u>even if</u> the Stonegate Business had not been disposed of, that deficiency was, in effect, "cured" by the CC's approval of the disposal by way of its approval of the Executed SPA as an Approved Agreement to an Approved Person. Essentially, Ms Chapman placed great weight on the fact that the person giving approval was the CC.

(2) Secondly, what had been disposed of was, in any event, the Stonegate Business.

Clearly, the first point only arises if the second point is wrong. I will, therefore, deal with these points in reverse order.

### (2) Did the Executed SPA dispose of the Stonegate Business?

38. The Stonegate Business bears the meaning set out in paragraph 13(2)(e) above.

39. Clarence Court contended that the Land was part of the Stonegate Business and that the retention of the Option over the Land by Mr Kent flew in the face of the thinking behind the Final Report, which stressed the difficulty of obtaining land capable of being developed for the egg producing industry. This explained the value of land – like the Land – having an extant planning permission for this purpose.

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[20] Clause 3.3.2 of the Undertakings.

40. The significance of the Land for Clarence Court is clearly expressed in Mr Gott's letter, which I have set out in paragraph 26 above, and which explains the significance of the planning permission that has, at all material times, existed in relation to the Land.

41. Clarence Court submitted that the purpose of the Undertakings, and of the divestiture remedy in general, would be undermined if the Vendors were entitled to retain interests in the Stonegate Business, including options to purchase key strategic real estate.

42. In my judgment, having considered the arguments on both sides, it is not arguable that the Land comprised a part of the Stonegate Business. I find that the Land was not a part of the Stonegate Business, and I do not consider that any defence contending the contrary has a realistic prospect of success. I have reached this conclusion for the following reasons:

(1) Given that the Option was granted prior to the Commencement Date (the Commencement Date was 8 October 2007, and the Option is dated 23 June 2006), the Option (as well as the Land to which the Option relates) must be regarded as an aspect of the Stonegate Business. The Stonegate Business is defined as "that part of the Noble Group which corresponds to the business carried on by Clifford Kent as at the Commencement Date..." (emphasis added). It thus embraces both the Land and the Option encumbering it.

(2) There is, thus, a temporal aspect to the Stonegate Business, which must be assessed as at 8 October 2007. Thus, the Stonegate Business comprised *(i)* the Land and *(ii)* the Option. It is not possible – and not right, given the purpose of the divestment – to consider the benefit of the Land without the burden of the Option. It may very well be that, in strategic terms, Clifford Kent would have wanted – in order to develop its business in the future – unfettered use of the Land. But (as the CC found) Clifford Kent was operating an entirely viable business without using the Land which (as was common ground) has never actually been used by Clifford Kent to carry on its business at any time. The Land has throughout been unused. It is very likely – at least since the Option was granted – that this lack of use has been brought about by the very existence of the Option, which renders any serious development of the Land precarious, because the Option might be exercised. I proceed on the basis that this is indeed the case.

(3) The consequence of treating the Land and the Option as fundamentally intertwined means this: although Clifford Kent had the benefit of the Land (in the sense that it was the owner of the Land), that benefit was marginal at best, and probably nil (disregarding the exercise price of the Option). That is because the potential that the Option might be exercised rendered the Land essentially valueless apart from the exercise price, and so incapable of any form of development that would involve the expenditure of money.

(4) There was some criticism made of the description of the Land in the Draft SPA. As I have noted in paragraph 18(2) above, the Land is simply described as "Bare Land". There is no reference to the planning permission that had been granted in respect of the Land; and no suggestion that the Land had any strategic value to Clifford Kent's business. That, I have no doubt, was because of the existence of the Option.

(5) To describe the Land (as both Mr Gott and Clifford Court's counsel did) as "key strategic real estate" is simply wrong. I am prepared to accept that, without the Option, the Land is capable of amounting to "key strategic real estate". But that is not the point: at no material time did the Land in fact amount to "key strategic real estate", and that is because the Option – which, I remind myself, was extant at the Commencement Date – precluded that possibility.

(6) Clarence Court sought to contend that the potentiality of the Land was sufficient to make it part of the Stonegate Business. I disagree:

(a) As I have stated, the Stonegate Business only comprises assets (broadly conceived) corresponding to Clifford Kent's business as at the Commencement Date. In short, one looks at what Clifford Kent could and could not do, in business terms, as at that date. Because the Option existed as at the Commencement Date, it operated as an inevitable and unavoidable constraint on what could fall within the meaning of the Stonegate Business. In short, the definition of Stonegate Business is one rooted in the realities of the case, and one cannot expand the nature of the Stonegate Business simply by "wishing away" a constraint extant as at the Commencement Date.

(b) This reading of the opening words of the definition is confirmed by the first paragraph (paragraph (1)) in the definition of Stonegate Business, which seeks to provide greater definitional clarity as regards "tangible assets" – which would, of course, include the Land. Paragraph (1) makes clear that tangible assets includes "all the tangible assets involved in the procurement, packing and supply of shell eggs to retailers and other supplies of goods or services ancillary or connected to the supply of eggs at the property owned or leased by Clifford Kent...". Thus, paragraph (1) relates to tangible property actually being used in the procurement, packing and supply of shell eggs. Whilst I doubt that paragraph (1) could be used to narrow the opening words of the definition (the paragraphs are clearly included as elucidation and not as definitional restrictions) the wording of paragraph (1) (and the similar wording of paragraph (2)) confirms my reading of the opening words of the definition, as set out above.

Accordingly, I conclude that the Executed SPA did dispose of the Stonegate Business.

## (3) Significance of the Executed SPA being an Approved Agreement

43. Given the conclusion that I have reached, this point does not arise. However, I was addressed on the point in some detail by counsel, and it is right that I briefly deal with it. The essence of Mr Anderson's contention was that some weight had to be attached to the fact that – according to the Undertakings – the Executed SPA was an Approved Agreement, where the CC had specifically considered whether the agreement would enable an Effective Disposal to take place. In approving any agreement, the CC would specifically consider whether the SLC would be remedied by a disposal effected by the Approved Agreement.

44. In order to give due weight to the definition of Approved Agreement, and the fact that the Executed SPA was an Approved Agreement, Mr Anderson contended that even if the

disposal contemplated by the Executed SPA did not involve the disposal of the Stonegate Business, but something less than that, the failure to dispose of all of the Stonegate Business by way of the Executed SPA did not prevent an Effective Disposal.

45. I have some sympathy with this contention, because it attaches due weight to the meaning of an Approved Agreement and so to the involvement of the CC in approving the agreement effecting the Effective Disposal.

46. However, I consider the construction advanced on behalf of Ms Chapman by Mr Anderson to be incorrect, in that it fails altogether to attach sufficient meaning to the defined term "Stonegate Business". I consider the submission by Clarence Court that there are three, independent, elements that need to be satisfied before there can be an Effective Disposal within the meaning of the Undertakings to be correct. These elements are that the disposal be:

(1) Of the Stonegate Business;

(2) Under an Approved Agreement; and

(3) To an Approved Purchaser.

47. If there is a disposal – but of less than the Stonegate Business – then, even if that disposal has been under an Approved Agreement and to an Approved Purchaser, there can be no Effective Disposal because there has been no disposal of the Stonegate Business.

48. I appreciate that this involves the court in a granular review of what is, and what is not, the Stonegate Business, and that such a review may very well result in the court holding that that which the CC has approved as an Effective Disposal (by approving the agreement, which involves consideration of precisely this fact) is not, in fact, an Effective Disposal. That is an undesirable outcome, because it involves the court second-guessing an expert regulator, but I see no escape from that consequence given the very clear wording of the Undertakings.

### (4) Conclusion

49. For the reasons I have given, I conclude that there was an Effective Disposal of the Stonegate Business.

## E. FAILURE TO MAKE FULL DISCLOSURE

50. It is important to note that clauses 4 and 18 of the Undertakings operate very differently, and are concerned with very different types of disclosure obligation:

(1) Clause 18 is concerned with the provision of information to the CC (clause 18.1) and to the OFT (clause 18.2) that is reasonably required by the CC or the OFT (as the case may be). There is no obligation of disclosure independent of a request for the provision of information.

(2) By contrast, clause 4.2 obliges the Vendors to make full disclosure of every fact and matter relevant to the CC's decision where an application requiring the CC's consent or approval is made pursuant to clause 4.1. In this case, the application in

question was the application that the Draft SPA be approved as being an Approved Agreement to an Approved Purchaser.

51. Thus, clause 18 applies in relation to information requested during the course of the OFT's and CC's investigations. It is wider than clause 4, because it relates to information that may go beyond any particular application for consent or approval; but it is narrower than clause 4, in that information must be requested.

52. In this case, there was no suggestion that the Vendors had failed to provide information to either the CC or the OFT in response to a request from either body, and to this extent, therefore, clause 18 is strictly irrelevant to this application.

53. However, the information that was provided by the Vendors to the OFT and the CC – whether in response to a request or not – is plainly material to whether "full disclosure of every fact and matter that is relevant to the CC's decision" was made. It was not disputed that the following information was provided to the CC (whether indirectly via the OFT or to the CC directly):

    (1) A disclosure letter (pre-dating the Draft Disclosure Letter and the Final Disclosure Letter) stating the existence of the Option and describing it.

    (2) A one-page "property summary" of the Land, stating that it was inspected on 21 June 2004, and was valued at £500,000 with a valuation date of 20 April 2006. The land type was specified as "[l]and with Planning Permission for Poultry Farm" and the notes provided that "[t]he Farm is within the fringes of the western expansion area indicated by Corby Council".

    (3) The fact that the Land was being transferred to Clarence Court (this would have been evident from the Draft SPA), but subject to the Option (this would have been evident from the Draft Disclosure Letter).

54. It is worth stressing that this information will have formed a part of a vast amount of documentation provided by the Vendors to the CC. Indeed, both the Draft SPA and the Draft Disclosure Letter are voluminous documents, in which the disclosure that I have described in paragraph 53(3) featured, but only as a minor element. I would not want the fact that I have specifically referenced this material to detract from the point – rightly made by Clarence Court – that this disclosure would have been a part of a great deal of other material.[21]

55. Furthermore, according to the submissions on behalf of Clarence Court, whilst the fact of the planning permission was disclosed,[22] its significance was not. It was submitted that the existence of planning permission was a "critical fact" that required particularly careful highlighting to the CC in order for the disclosure to constitute "full disclosure".

56. No doubt – were these proceedings to proceed to trial – the material that was disclosed to the CC might be augmented in a manner that would favour Ms Chapman. I discount that possibility as entirely irrelevant for purposes of the present application. I must

[21] But for the implication of impropriety – which I am keen to avoid, for there was no such suggestion – the term "submerged" would be a good one.

[22] See paragraph 53(2) above.

consider whether or not there has been "full disclosure" on the basis of the material described in paragraph 53 above.

57. Conversely, it is possible – but not remotely realistic – that there was a form of disclosure to the CC that rendered the limited disclosure that I have described even less substantial in terms of the information conveyed to the CC. Anything is possible, but I consider any such suggestion that would derogate from the disclosure that I have described to be fanciful. I am therefore confident that I can properly determine the question of whether there has, or has not, been a breach of clause 4 on the basis of the disclosure described in paragraph 53 above.

58. I conclude that there was full disclosure by the Vendors within the meaning of clause 4.2, for the following reasons:

    (1) The starting point is to identify that which required the CC's "consent or approval". In this case, the matter requiring consent or approval of the CC was the question whether the CC should give the approvals that the Vendors needed in order to effect a disposal of the Stonegate Business.

    (2) The nature of those approvals is specified in the definitions of Approved Purchaser and Approved Agreement. In particular, the definition of Approved Agreement required the CC to satisfy itself that the risk of an SLC (that had triggered the requirement to divest) was remedied and that the Draft SPA would enable an Effective Disposal.

    (3) Clearly, what needed to be disclosed was each and every fact and matter going to the question of whether there would or would not be an Effective Disposal. Facts and matters going to the non-disposal of the Stonegate Business would, self-evidently, be particularly relevant, and require particularly careful articulation.

    (4) In this case, for the reasons I have given, I consider that the Land and the Option must be considered as flip-sides of the same coin. Viewing them as inseparable in that way, I do not consider that the Land did constitute a part of the Stonegate Business, and so I do not consider that any particular disclosure regarding the Land, the Option or the planning permission that had been obtained to have been necessary. Certainly, the disclosure that was made in the Draft SPA and the Draft Disclosure Letter went beyond what was required by clause 4. I reach this conclusion simply because – in terms of an Effective Disposal – what happened to the Land (given the existence of the Option) was an immaterial fact. I have no doubt that the CC would have wanted to know the precise terms on which the Stonegate Business was being disposed of, hence the disclosure to the CC of the Draft SPA and the Draft Disclosure Letter. But any disclosure beyond this was not called for.

59. Accordingly, for all these reasons, there was no breach of clause 18 of the Undertakings and no breach of clause 4.

## F. NO SUBSEQUENT ACQUISITION OF AN INTEREST IN THE STONEGATE BUSINESS

60. Clause 7 of the Undertakings contains, as I have described, a series of post divestiture undertakings given by the Vendors. These undertakings are, quite clearly, intended to maintain the integrity of the divestment, and to prevent subsequent dealings from undermining it.

61. The specific undertaking relied upon by Clarence Court was clause 7.4. This is an undertaking, not limited in time, not to acquire any interest in the Stonegate Business without the prior written consent of the OFT – now, the CMA.

62. Clarence Court contended that the purchase of the Land, pursuant to the Option, was the acquisition of an interest in the Stonegate Business and so Mr Kent was precluded from acquiring the Land (without consent). Of course, I recognise that it is now Ms Chapman, and not Mr Kent, who has the benefit of the Option. However, I proceed on the basis (for the purposes of this application only) that Ms Chapman stands in precisely the same position as Mr Kent, and that if Mr Kent is precluded from exercising the Option, so too is Ms Chapman. Given that I am proceeding on this basis, it is more straightforward to speak of Mr Kent exercising the Option.

63. Given the conclusions that I have reached, I hold that clause 7.4 is not, in this case, infringed, because acquisition of the Land is not an acquisition of an interest in or (to the extent different) the property of the Stonegate Business. I have set out my conclusions regarding the meaning of the Stonegate Business in Section D(2) above, and these conclusions are determinative of this point.

64. Mr Anderson, QC made two further points as to why (even if the Land was part of the Stonegate Business) clause 7.4 was not infringed:

(1) First, he stressed the significance of the words "interest <u>in</u> the Stonegate Business"[23] and suggested that this phrase drew a distinction between a mere asset purchase of something belonging to the Stonegate Business and the acquisition of an interest in that Business. There is force in this distinction, although it is not an absolutely clear cut one. Clause 7.4 is directed to preventing the Vendors from obtaining an interest in the business as a going concern or undertaking. The whole point of divestiture is to create a distinct and self-standing competitor to the Noble Group – and that aim would be undermined if the Vendors or any of them could insert themselves into this distinct and self-standing competitor. On the other hand, clause 7.4 is <u>not</u> directed at the mere acquisition of an asset <u>from</u> the Stonegate Business, provided that asset acquisition does not prevent the Stonegate Business from operating as a distinct and self-standing competitor to the Noble Group. I consider that Mr Anderson is right to identify this distinction and – given my findings as to the nature of the Land and its significance to the Stonegate Business – it is clear that the acquisition of the Land represents the acquisition of a "mere" asset and not an interest in the Stonegate Business.

(2) Secondly, Mr Anderson contended that because of the Option, which pre-dated the Commencement Date, there could be no subsequent acquisition of an interest in

[23] Emphasis added.

the Stonegate Business simply through the exercise of the Option. I reject this contention. Whilst, of course, the Option did pre-date the Effective Disposal of the Stonegate Business, the whole point of the Option was to give Mr Kent the ability to acquire the Land. It seems to me unarguable that – assuming (contrary to my conclusions above) the Land to be an interest in the Stonegate Business – acquisition of the Land pursuant to the Option was not the acquisition of such an interest.

**65.** I conclude that, for the reasons given above, clause 7.4 of the Undertakings was not infringed by the exercise of the Option nor would it be infringed by the acquisition of the Land pursuant to the Option.

## G. DOES THE ASSIGNMENT ITSELF CONSTITUTE A BAR TO SUMMARY JUDGMENT?

**66.** The Defence and Part 20 Claim provides:

> "38. ...the purported Assignment and the Claimant's purported exercise of the Option together constitute a scheme in breach of clause 7.4 of the Undertakings, or a scheme which has as its objective a breach of clause 7.4 of the Undertakings. This can reasonably be inferred from the following:
>
> (a) The Claimant is the Second Part 20 Defendant's sister, and was the Defendant's employee at the date of the purported Assignment and the date of her purported exercise of the Option;
>
> (b) The Deed of Assignment was made on 18 April 2019 – the same date on which Forsters wrote to Lyons Davidson in relation to claims against the Second Part 20 Defendant regarding his retention of the Option. By that time, there had been six months of correspondence between the same solicitors concerning such claims;
>
> (c) The Option Sum paid by the Claimant to her brother was £5 – a gross undervaluation of the Land.
>
> 39. The facts and matters set out in the preceding paragraph render the purported Assignment a sham which does not accurately reflect the Claimant and Part 20 Defendant's intentions and is thus of no legal or equitable effect, and/or void or unenforceable for illegality."

**67.** Clarence Court contended that – irrespective of my conclusions as regards the alleged breach of the Undertakings – the facts and matters pleaded in paragraph 38 of the Defence and Part 20 Claim were sufficient to render the Assignment a "sham". As to this:

**(1)** It is clear – given the conclusions I have stated – that the Assignment is not and cannot be a scheme in breach of clause 7.4, nor a transaction constituting a breach of clause 7.4. That is simply because the acquisition of the Land, pursuant to the Option, by Mr Kent (assuming, therefore, no Assignment) would itself not be a breach of clause 7.4. It seems to me that, on this basis, there can be no question of illegality, and no such contention was pursued before me.

**(2)** The furthest that Clarence Court can go is to assert that there was an intention – as it turned out, misconceived – on the part of Mr Kent and Ms Chapman to seek, through the Assignment, to avoid the effects of clause 7.4, if it applied. I am not

sure that such an intention is made out, but assuming that to be the case, I fail to see how this could constitute the Assignment a "sham".

**(3)** The law relating to shams is helpfully set out in the decision of Mr Kimbell, QC (sitting as a deputy judge of the High Court) in *Ross v. Misra*:[24]

> "14. It was common ground that the test I should apply when deciding whether documents signed by Mr Ross and Mr Misra were a sham or not is that set out in *Snook v. London and West Riding Investments Ltd*, [1967] 2 QB 786 at 802:
>
> "...it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities…that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."
>
> 15. In *Hitch v. Stone*, [2001] EWCA Civ 63, Arden LJ identified the following points as having emerged from the authorities which have considered and applied the Snook test:
>
> "[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
>
> [66] Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
>
> [68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding...
>
> [69] Fifth, the intention must be a common intention (see *Snook*)…""

**(4)** Clearly, whilst I might be prepared to find that the Assignment was an ill-advised attempt to circumvent clause 7.4 (I make it clear that I make no such finding: but I am prepared to proceed on the basis that such a point is arguable), there is no

[24] [2019] EWHC 20 (Ch) at [14] and [15].

realistic basis for suggesting that the Assignment is a "sham" in the *Snook* sense of the parties not intending the consequences of the Assignment, namely the transfer of the Option from Mr Kent to Ms Chapman. That was the aim of the transaction – and that aim was achieved.

**68.** There was some suggestion that Ms Chapman was not coming to this court with "clean hands" and that, for this reason, the remedy of specific performance should be denied her. Given the conclusions I have reached – no illegality and no sham – I do not consider that this contention can be maintained (if it was). The whole point about the "clean hands" doctrine is that there is such a nexus between the relief sought and the conduct complained of that it would unjust or wrong to grant the relief.[25] I can see no such conduct or nexus in this case.

**69.** I conclude that the Assignment does not give rise to any defence on the part of Clarence Court independent of the alleged breaches of the Undertakings.

## H. CONCLUSION

**70.** For the reasons I have given, there is no arguable defence to Ms Chapman's claim to have the Option specifically performed, and her application for summary judgment must succeed.

[25] See, e.g., McGhee (ed), *Snell's Equity*, 34th ed (2020), [5-010].

## ANNEX 1

## TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

| TERM/ABBREVIATION | FIRST USE IN THE JUDGMENT |
|---|---|
| Approved Agreement | Paragraph 13(2)(f) |
| Approved Purchaser | Paragraph 13(2)(g) |
| Assignment | Paragraph 3 |
| CC | Paragraph 6 |
| Clarence Court | Paragraph 1 |
| Clifford Kent | Paragraph 10 |
| CMA | Paragraph 26 |
| Commencement Date | Paragraph 13(1) |
| Deans | Paragraph 10 |
| Disposal Obligations | Paragraph 13(2)(a) |
| Divestiture Trustee | Paragraph 14 |
| Draft Disclosure Letter | Paragraph 19 |
| Draft SPA | Paragraph 18 |
| Effective Disposal | Paragraph 13(2)(c) |
| Executed SPA | Paragraph 22 |

| | |
|---|---|
| Disclosure Letter | Paragraph 22 |
| Final Report | Paragraph 9 |
| Final Undertakings | Paragraph 18(3) |
| Heads of Terms | Paragraph 13(2)(d) |
| Initial Divestiture Period | Paragraph 13(2)(b) |
| Land | Paragraph 1 |
| OFT | Paragraph 9 |
| Option | Paragraph 1 |
| Noble Group | Paragraph 10 |
| Properties | Paragraph 18(2) |
| Secondary Undertakings | Paragraph 13(2)(f) |
| SLC | Paragraph 10 |
| Stonegate | Paragraph 10 |
| Stonegate Business | Paragraph 13(2)(e) |
| Undertakings | Paragraph 13 |
| Vendors | Paragraph 13 |