ENFORCEMENT AND DEFENCES

By

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INTRODUCTION

1. Enforcement of planning obligations is dealt with by way of private law claim, either in court or by arbitration. It requires an understanding of private law remedies and defences as well as the statutory and public law context.

2. Although a planning obligation is a creature of statute, it is also normally a contract to which the Local Planning Authority is a party. It was held in *Stroude v Beazer Homes* [2006] 2 E.G.L.R. 115 at paragraph 38 that

> ".. first and foremost, the section 106 Agreement is a contract between the parties to it which, in my judgment, falls to be construed according to ordinary principles of construction. The fact that the section 106 Agreement is made in the context of the statutory provisions is, no doubt, part of the factual matrix against which it has to be construed; accordingly, it should be construed, so far as possible, in a way which enables the statutory provisions to operate. But I do not consider that there are otherwise any special canons of construction which apply to a section 106/section 38 agreement."

3. There may be no special canons of construction, but there is a clear willingness of courts to enforce obligations in s106 Agreements. Such obligations are normally entered into as a condition of the grant of planning permission, and are conditional on implementation of planning permission. If the developer has the benefit of the permission it is perceived as unfair that he should be able to escape the obligation. This attitude is apparent from the comment of Latham LJ in *J.A.Pye (Oxford) Ltd v South Gloucestershire DC* [2001] 2 PLR 66, CA at paragraph 26

> "Further, we were not asked to deal with the question of whether or not Pye should be entitled at this late stage to deny the validity of the 1979 agreement. The consequence of its argument is that it has obtained an invalid planning permission which has been treated as valid and has been implemented to Pye's benefit, on the basis of the 1979 agreement. Whilst no one can now challenge the planning permission, Pye submits that it is entitled to challenge the making of the agreement. It seems to me that this is precisely what Lord Hoffmann was saying was impermissible in the passage at page 779 which I have already cited."

METHODS OF ENFORCEMENT

4. Section 106 specifies two methods of enforcement: injunction and self help:

> "(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—
>
> (a) against the person entering into the obligation; and
>
> (b) against any person deriving title from that person.
>
> (4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.
>
> (5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.
>
> (6) Without prejudice to subsection (5), if there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the authority by whom the obligation is enforceable may—
>
> (a) enter the land and carry out the operations; and
>
> (b) recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so."

5. I will consider these, and other potential remedies such as debt and damages, together with potential defences.

SELF HELP

6. In my experience Councils are reluctant to use this power, as it requires it to carry out the work first, and then seek to recover the "expenses reasonably incurred". There is obvious scope for uncertainty as to whether costs were reasonably incurred, with the attendant risk of protracted and costly litigation. In *London Borough of Waltham Forest v Oakmesh Limited, Family Mosaic Housing* [2009] EWHC 1688 Ch the Court accepted these as reasonable objections to the use of this remedy.

7. In theory a Council could seek a declaration in advance of carrying out the works that the proposed works were reasonable, and the cost of carrying them out reasonable. Such litigation could also take time and money, and would not deal with the effects of building inflation, variations and unforeseen eventualities.

8. The question arises whether payment on account could be claimed. The Council can only claim expenses "incurred". There is scope for argument as to when an expense is incurred, but at the very least there needs to be a liability to pay, such as an architect's certificate. If that is sufficient, a claim could probably be made for that by way of summary judgment or an interim payment.

DAMAGES

9. In the case of an obligation to pay a sum of money, the claim is in debt, not damages.

10. In the case of a breach of a restrictive covenant, the normal remedy is an injunction. However, an injunction will not be awarded if damages are an adequate remedy, so it needs first to be considered what damages would be awarded.

11. An award of damages is intended to put the injured part in the position he would have been in if the covenant had been complied with. Normally the Council will suffer no loss. However, the Council could in an appropriate case be awarded damages representing what it could have charged for permitting a breach of contract. See *Pell Frischmann v Bow Valley Iran Limited* [2009] UKPC 45 at 46-48; *WWF v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445, CA.

12. In the case of a covenant requiring operations on land, the question arises whether a Council could be awarded the anticipated cost of carrying out the work itself. This might be seen as more attractive than self-help, where the work has to be done first.

13. At common law, the normal measure of damages for breach of a building contract is the cost of completing or carrying out the work following a breach. However, damages are normally only awarded to compensate a Claimant for loss suffered by him. If the Claimant does not own the land on which the work is to be carried out, he suffers no loss. Thus, prima facie, the Council could not recover damages because it will suffer no loss. The courts have developed an exception to this rule, in cases where the Claimant does intend to carry out the work. See *Alfred McAlpine Construction Ltd v Panatown Ltd* (No.1) [2001] 1 A.C. 518. However, in the absence of an express contractual right to carry out the work, the Council can only enter the land to carry out the work itself under section 106(6), and under that provision the Council can recover the expenses "incurred" in so doing. The Court is likely to decline to award damages under the exception to the general rule, on the ground that to do so would be inconsistent with section 106 which provides a self contained code for enforcement. There is a further conceptual problem, in that if damages were awarded to compensate the Council in advance of carrying out the work, it might well be said that the Covenant should be discharged, in which case the Council would not be able to exercise its power to enter the land under section 106(6). Damages are therefore unlikely to be recoverable at common law.

INJUNCTION

14. It is specifically provided in s106(5) that a planning obligation is enforceable by injunction.

15. In the case of negative covenants, an injunction can be granted to restrain a breach before it occurs, or to reverse the effect of a breach after it has occurred in appropriate cases.

16. A positive covenant is enforceable by specific performance, similar in effect to a mandatory injunction.

17. In the case of both types of injunctions, the court must first be satisfied that damages are not an adequate remedy? In the case of s106 obligations, they will generally not be an

adequate remedy for the reasons discussed above in relation to damages. In *Avon County Council v Millard* [1986] J.P.L. 21, the Court of Appeal saw an injunction as the normal remedy where a council is seeking to enforce a planning obligation, as damages would normally be inappropriate. That case was decided with reference to s.52 of the 1972 Act, but the position is re-enforced by the wording of s.106.

Delay

18. There are various equitable defences to either type of injunction. One of the most common is that there has been too much delay (laches). The court may refuse to exercise its discretion to award specific performance if the Claimant has been guilty of "laches", that is unreasonable delay in commencing proceedings after the Defendant refused to perform the contract, or ceased to do so. To amount to laches, the delay must be such as to be evidence of abandonment of the contract, or otherwise make it unjust to the Defendant to order specific performance. Delay will be disregarded if the parties are negotiating with each other over the problems that have arisen. See *Erlanger v New Sombrero Phosphate Co* (1873) 3 App Cas. 1218 at 1279; Jones and Goodhart on Specific Performance at p109.

Grampian covenants.

19. It is very common to find Grampian style covenants preventing commencement, or occupation, before something has been done, typically the transfer of land. It is relatively straightforward to obtain an injunction before the breach has occurred, but Councils often fail to take action before the breach has occurred, no doubt for good or pragmatic reasons.

20. For example, the Law Society's standard form includes the following

> "No more than […specify no. of dwellings/square metres as applicable…] within the Development shall be Occupied unless the Owner shall have transferred to the Council the Open Space Land on the terms set out in the Seventh Schedule and paid the Open Space Contribution to the Council
>
> 2 Prior to the transfer referred to in paragraph 1 the Owner shall carry out the Open Space Works to the satisfaction of the Council"

21. Assume there is a breach of this obligation. Can the Council obtain an injunction? It can no longer prevent the breach. An injunction undoing the breach by requiring the residents to give up occupation would not be sought or granted. The only alternatives are to grant an injunction requiring the carrying out of the Open Space Works, payment of the Open Space Contribution, and transfer of the Open Space Land, or award damages in lieu.

22. There is no case I am aware of where this has been considered. The Court has a wide discretion to award injunctions, and the merits on an injunction are fairly clear. It could be objected that an injunction should not be granted so as to turn a negative covenant into a positive one. Damages would be an adequate remedy, at least so far as the contribution is concerned.

Positive covenants

23. The enforcement of positive covenants raise particular issues and potential defences:

Supervision/certainty

24. The courts are reluctant to grant specific performance if constant supervision is required, or it is uncertain what is required. It has been held in *Co–operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297, at p304b, per Lord Hoffmann that the need for precision in the terms of the order is:

> "a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong; … it is, taken alone, merely a discretionary matter to be taken into account … It is, however, an important one."

25. This requirement is linked to the principle that the court is reluctant to order specific performance if constant supervision of the court is required, because of the undesirability of repeated applications for committal, which are likely to be expensive in terms of cost to the parties and the resources of the judicial system. There is, however, a distinction to be drawn between cases requiring a particular result and those requiring an activity to be carried on. In *Co–operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* Lord Hoffmann said at p303c

> "Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order… This distinction between orders to carry on activities and to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants (citing Wolverhampton Corp v Emmons [1901] 1 KB 515 (building contract) and Jeune v Queens Cross Properties Ltd [1974] 1 Ch 97 (repairing covenant))."

Building contracts

26. The circumstances under which specific performance of building contracts might be ordered are laid out in the case of *Mayor, Aldermen, and Burgesses of Wolverhampton v. Emmons* [1901] 1 Q.B. 515 by Romer LJ at page 525:

    a. "the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance." This is the first requirement discussed above.
    b. "that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages." This will normally be the case where a Council seeks to enforce a planning obligation for the public benefit;
    c. "the defendant has by the contract obtained possession of land on which the work is contracted to be done."

Impossibility

27. It was said in *Warmington v Miller* [1973] QB 877 at 886 that it is not the practice of the court to grant specific performance

> "… where the result would necessitate a breach by the defendant of a contract with a third party or would compel the defendant to do that which he is not lawfully competent to do: ..."

28. Where consent of a third party is required, the court will compel a party to seek such consent. If consent is refused, he may be required to take proceedings, at least if the claim is a clear on. See *Wroth v Tyler* [1974] Ch 30

Examples

29. The application of these principles can be seen in two cases concerning 106 agreements.

30. In *Wychavon v Westbury Homes (Holdings) Ltd* [2001] P.L.C.R. 13, the Council sought to enforce an obligation

> "That in compliance with the policy H16 of the Wychavon District Council Local Plan (Deposit Version) low cost affordable housing shall be provided at a ratio of ten per cent of the total number of houses on the land."

31. It was argued, among other things, that the expression "low cost affordable housing" was meaningless and therefore too uncertain to be enforced. The Judge held that

> " How that was achieved was a matter for Westbury, but in my judgment, the obligation was clear and certain. The only provision that needs to be implied into clause F1 of the 106 agreement is a requirement of reasonableness on both sides if there was a breakdown in negotiations between the developer and the local authority as to how F1 was to be satisfied."

32. In that case he granted a negative injunction

> "..restraining the Defendant from selling or transferring the 7 houses otherwise than in a manner that ensures that they are enjoyed as low cost affordable houses by initial and subsequent occupiers and that the property should be properly managed."

33. More recently in *London Borough of Waltham Forest v Oakmesh Limited, Family Mosaic Housing* [2009] EWHC 1688 Ch there was an obligation by the developer Oakmesh in a 106 agreement made in 1996

> "to provide at nil cost to the Council a footpath link through the said land to link Queen's Road and Walthamstow Central Station, provided that the detailed design of the bridge link to include method of construction, siting, surfacing, boundary treatment and lighting shall be submitted to the Council for approval prior to the construction of the road network serving the footpath link and the footpath link shall be constructed in accordance with the agreed details prior to the first

occupation of the final phase of the residential units to be constructed as part of the said development."

34. Oakmesh has submitted a design, which was approved in principle. The Council's engineer stated that he "look[ed] forward to receiving the design calculations, drawings and the design certificate in due course". They were never provided.

35. Before the work could be carried out, there was required
    a. further detailed design;
    b. the need to obtain approval from Network Rail, and possibly others;
    c. planning permission
    d. possibly a stopping up order.

36. Oakmesh was not worth pursuing. After 5 years the successor in title to most of the site, Family Mosaic Housing Association ("FHA"), applied to discharge the covenant under s106A. That application was dismissed. After further prevarication by FHA, the Council brought proceedings claiming a mandatory injunction to carry out the work. FHA argued that an injunction should not be granted because it was impossible to perform, too uncertain, FHA did not own the land on which the work had to be carried out, and the Council should be left to rely on its right to carry out the work under s106(6).

37. All these arguments were rejected.

    a. as to the need for planning permission, the Judge thought it likely that permission would be granted, but if it were refused, there would be no breach of the order;
    b. as to certainty, the Judge applied the test in the *Co-Op* case, and accepted that the court could ascertain whether the finished work complied with the covenant, and that a degree of imprecision was permissible;
    c. although FHA did not own the land, it had the right to enter, and Oakmesh had offered to transfer the land to it;
    d. It was reasonable for the Council to take the view that it did not have the resources, skills or manpower to be able to do the work and would not wish to be exposed to the risk of default by Family subsequently.

38. The Judge regarded it as relevant that

    "Oakmesh secured a planning permission on condition that it entered into the Agreement. Had it not been prepared to do so, it may well not have secured the permission. In the Agreement it covenanted that it would perform the Obligation, took the benefit but failed to fulfil its Obligation. Family also took the benefit and repeatedly undertook to perform the Obligation"

39. These cases demonstrate a willingness of the courts to enforce planning obligations, and not to allow technical arguments get in the way.

DEFENCES TO DEBT CLAIMS

40. The first issues to consider are
    a. whether the obligations fall within s106?
    b. if enforcement is required against a successor in title, have the formal requirements been complied with of identifying the land and stating the interest in it of the contracting party was interested. The obligation is only enforceable against a successor to such land. *Southampton City Council v Hallyard* [2008] EWHC 916 at [76]
    c. what do the obligations mean?
    d. what terms if any are to be implied?
    e. does the deed reflect the intention of the parties, and if not, is rectification available?
    f. what potential defences are there?
    g. has the planning permission been implemented so as to trigger the obligations?

41. Defences to contractual claims have included
    a. misrepresentation?
    b. mistake
    c. illegality
    d. duress
    e. waiver
    f. repudiatory breach

42. The law on these defences is to be found elsewhere. Section 106 agreements raise particular issues:
    a. Is it permissible to challenge the agreement for lack of sufficient nexus?
    b. Estoppel
    c. The effect of s106A
    d. Can a 106 agreement be rescinded?

Is it permissible to challenge the agreement for lack of sufficient nexus?

43. The Courts have repeatedly made clear that it cannot be alleged that a s106 Agreement, once enforceable, is illegal or invalid for lack of adequate nexus with the development. See for example *J.A.Pye (Oxford) Ltd v South Gloucestershire DC* [2001] 2 PLR 66, CA at paragraph 26: *Tesco Stores v Secretary of State* [1995] 1 WLR 759 at 779.

Estoppel

44. It will frequently be the case that the agreement is entered into, the development carried out, and only later does the owner seek to raise defences to the agreement. It may well be the case that the owner is estopped from asserting that the agreement is void or is not within s106. In *London Borough of Waltham Forest v Oakmesh Limited, Family Mosaic Housing* [2009] EWHC 1688 Ch, FHA the parties dealt with each other for many years on the

basis that the obligation was enforceable, and FHA even applied under s106A to modify it. It was held that it was estopped from denying that it was bound by the obligation.

The effect of s106A

45. Section 106A provides

> 106A.
> (1) A planning obligation may not be modified or discharged except—
>
> > (a) by agreement between the authority by whom the obligation is enforceable and the person or persons against whom the obligation is enforceable; or
> >
> > (b) In accordance with this section and section 106B.
>
> ….
>
> (3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the local planning authority by whom the obligation is enforceable for the obligation—
>
> > (a) to have effect subject to such modifications as may be specified in the application; or
> >
> > (b) to be discharged.

46. In *Patel v Brent* [2005] EWCA Civ 644, where the agreement required the owner to "deposit" £550000 which the Council covenanted "shall be solely attributable to paying for highway improvements… necessary to improve access arrangements to/from the site.." which it would use its reasonable endeavours to complete by a certain time. The Council agreed to deposit the sum in a designated interest bearing account which it could draw down in respect of expenses properly incurred and any surplus was to be repaid. After 7 years, the council had not even begun work. The owner alleged that the Council was in repudiatory breach and demanded a refund of the sum paid. It was held that the agreement could not be determined by repudiatory breach because of s106A(1), which precluded any other means of discharge.

47. Does s106A also preclude rescission? This is open to argument, but there is a conceptual difference between discharge under s106A, which relieves a party from extant obligations, and rescission which seeks to restore the parties to the position they were in before the agreement

Can a 106 agreement be rescinded?

48. Rescission is normally an available remedy for misrepresentation, economic duress, and equitable mistake. It is however questionable whether the remedy is available in claims to

enforce a s106 agreement because rescission cannot be ordered unless the parties could be substantially restored to their original position. *Molestina v Ponton* [2002] 1 Lloyd's Rep. 271. Once planning permission has been granted and implemented, it is hard to see how parties can be restored to the position they were in before the Agreement was entered into.

IMPLIED TERMS

49. The implication of a term is part of the overall examination by the court of what the instrument, read as a whole against the relevant background, would reasonably be understood to mean? See *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988. The normal tests for implying a term are

> (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

50. The courts have been willing to imply terms in appropriate cases. See for example *Hertsmere Borough Council v Brent Walker Group* [1994] 1 PLR 1, *Jelson Ltd v Derby* [1999] 3 EGLR 91.

51. The recent case of *Hampshire County Council v Beazer Homes Ltd* [2010] EWHC 3095 illustrates the impact of the public law context on this process. The section 106 Agreement required the defendant to make financial contributions to the claimant towards the cost of various highway works, schemes and/or improvements which the claimant intended to undertake as a result of the development. The relevant planning obligations were set out at Clause 4.14 and 4.16 of the Agreement.

52. By Clause 4.14, the defendant covenanted to make a financial contribution towards traffic management measures and improvements to a highway known as Cove Road, which was situated close to the development site. Clause 4.14 provided that the defendant agreed:

> "To pay to [the claimant] on occupation of 350 dwellings the sum of £125,000 as a contribution towards traffic management measures in the vicinity of the Development Site and improvements to Cove Road and for no other purpose".

53. By Clause 4.16, the defendant covenanted to make financial contributions towards the construction of the Fleet Inner Relief Road, the plans for which had been the subject of discussion and negotiation between the parties. Clause 4.16.1 provided that the defendant agreed:

> "(A) To pay to [the claimant] within 14 days of Implementation [a term defined elsewhere in the Agreement] the sum of £200,000 as a first instalment of a contribution towards the Fleet Inner Relief Road ("the Contribution").
>
> (B) To pay to [the claimant] within two years of Implementation the sum of £900,000 as a second instalment of the Contribution.

(C) To pay to [the claimant] within three years of Implementation the sum of £500,000 as a third instalment of the Contribution.".

54. It is clear that, at the time the Section 106 Agreement was made, the parties contemplated the possibility that the claimant might decide not to build the Fleet Inner Relief Road. Clause 4.16.2 provided for this possibility. It stated that:

> "(A) At any time prior to the completion of the Development [the claimant] may elect to use the Contribution or any part thereof towards such alternative transportation improvements in Fleet as [the claimant] considers to be of benefit to the public ("the alternative schemes") and [the claimant] shall account to [the defendant] for the cost of the alternative schemes PROVIDED THAT in any event the Contribution shall only be used for the Fleet Inner Relief Road or the alternative schemes and no other purpose."

55. Clause 4.16.2 (B) provided for the possibility that the Fleet Inner Relief Road project might for some reason be delayed or not pursued. It stated that:

> "In the event of works on the Fleet Inner Relief Road not being commenced before the occupation of 1700 dwellings the Contribution paid by [the defendant] shall be refunded save for any part of the Contribution which may have been expended on the alternative schemes."

56. Clause 4.16.2 (C) conferred on the defendant the right to the refund of any monies which were left unexpended after the completion of the Fleet Inner Relief Road or any schemes undertaken as an alternative thereto. It provided that:

> "[The claimant] shall following the completion of the Fleet Inner Relief Road or the alternative schemes as the case may be provide to [the defendant] such evidence of sums expended as [the defendant] may reasonable require and shall forthwith refund any unexpended balance of the Contribution to [the defendant]".

57. Beazer contended that the amount spent was excessive and unreasonable, internal costs should not have been charged, and inadequate information had been provided. It argued that terms should be implied that
    a. expenditure of its contributions must be reasonably and properly incurred;
    b. the Council was obliged to account for the cost of the relevant work under 4.14, provide evidence of expenditure and refund any excess.

58. It was held that the first of these terms should not be implied because it would impose wider duties than the Council's public law duties to act reasonably (in the Wednesbury sense), in good faith and for proper purposes. The proposed term was not sufficiently certain, and was not necessary because the Council was also subject to public law control.

59. The court was willing to imply terms in relation to the sums paid under 4.14 similar to that in 4.16(C). The contribution could only be applied for the purpose of those works, so there needed to be some provision as to how any surplus would be dealt with.

Covenants to transfer land

60. In *Wimpey Homes Ltd v Secretary of State for the Environment* [1993] 2 PLR 54 the developer in that case offered a unilateral undertaking under which it proposed to transfer land to the local authority with a commuted maintenance sum, which the local authority would then be obliged to keep as public open space. This was held to fall outside the scope of s106 because (i) an obligation to transfer was not itself a restriction on the development of land; (ii) " section 106(1)(a) was not intended to and does not enable a would-be developer to compel another person, particularly a statutory planning authority, to accept title to the subject land and so, by compulsion of the authority, to enable the developer at one remove to obtain the objective of restricting further development or use of the land." (iii), the object depended on the authority entering into covenants which it had not done.

61. However, in *R v S Northants ex p Crest Homes plc* [1994] 3 PLR 47, the Court of Appeal held that obligations to transfer land to be used as public open space could either be secured by means of a restriction on development (falling within (1)(a)) or could be assumed under (1)(c) as the transfer was to include restrictive covenants (see page 64G).

62. In *Hertfordshire County Council, North Hertfordshire District Council v Secretary of State for Communities and Local Government* [2011] EWHC 1572 (Admin) Ouseley J held that

> "That decision [Wimpey] is correct in the circumstances of that case, but it would be wrong to apply its words too broadly as if they prevented the offer of land in a unilateral undertaking. First, it is not suggested here, and could not be, that provisions for the transfer of land fall outside the scope of s106 . Transfer of land is permissible within a s106 agreement and the authorities would happily accept a transfer of land with facilities built on it for them to use for statutory functions such as the provision of education or public open spaces if the terms were agreeable. It follows to my mind that there is nothing inherently unlawful in a unilateral undertaking equally making provision for land to be offered to the authority on appropriate terms. The combination of positive and negative covenants, and the provisions for the transfer of land here are clearly all part of the restrictions on the development and use of land within s106 .

63. In *Jelson v Derby* [1999] 3 E.G.L.R. 91it was held that if a provision in a s106 agreement falls within s2 of the law of Property Miscellaneous Provisions Act 1989 the requirements of that section must also be satisfied. Section 2 provides that

> "(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
>
> (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

64. It was held that s2 applied to a provision requiring the developer to transfer land to a housing association at a discounted price.

65. However, that decision was held to be "open to question" in *Nweze v Nwoko* [2004] EWCA Civ 379, where it was held that section 2 only applied to a contract under which an interest in land is actually disposed of i.e. with a contract under which there is a vendor on the one side and a purchaser on the other, and with the terms of that sale or a disposition under which A disposes of the land or interest in favour of B, and with the terms of that disposition. Section 2 did not apply in Nweze where the agreement obliged one party to market a property, and if a buyer was found to enter a contract of sale with that party. As to Jelson, it was held that

> "It may be that in a situation such as existed in the Jelson case where A and B (the local authority) made a contract under which, B can call for property to be transferred to a nominated buyer C (its housing association) on terms provided for in the schedule to the contract, that would be a contract to which Section 2 would apply, because it is a contract for the sale or disposition of an interest in land rather as an option to purchase is such a contract. ... But the important point is that the "interest in land" is the actual subject of the contract or disposition."

66. It is very doubtful whether *Jelson* would be followed. The clear trend of the authorities is to regard obligations to transfer land as within s106. If a unilateral obligation can be enforceable under s106, it is hard to see why that does not "trump" section 2, even if that section were held to apply.

STATUS AND USE OF UNSPENT MONEY

67. Agreements make a wide variety of different provisions for use of monies paid over, and whether and in what circumstances they are to be repaid.

68. At one end of the spectrum was *Patel v Brent* [2005] EWCA Civ 644, where the agreement required the owner to "deposit" £550000 which the Council covenanted "shall be solely attributable to paying for highway improvements… necessary to improve access arrangements to/from the site.." The Council agreed to deposit the sum in a designated interest bearing account which it could draw down in respect of expenses properly incurred and any surplus was to be repaid. After 7 years, the council had not even begun work. The owner alleged that the Council was in repudiatory breach and demanded a refund of the sum paid.

69. It was held that the agreement created a trust of the money, so that the land owner remained beneficial owner of the money until it was drawn down. The effect of this was that the obligation remained extant, and could be varied under s106A.

70. This decision was considered in *Hampshire County Council v Beazer* [2010] EWHC 3095, where the provisions of the Agreement were as set out above. The judge held that the decision in *Patel* was inconsistent with the House of Lords decision in *Swain v Law Society* [1983] AC 599, where it was held that there is no remedy of breach of trust against a public authority acting in a public capacity. The remedy is judicial review. In any event, *Patel* was distinguishable, since it required the money to be deposited and held in a separate account. In *Beazer*, no trust was created.

71. In some cases it will be provided that the monies can only be spent for infrastructure required to mitigate the impact of the development. That opens the way for an investigation in a private law claim of whether the items on which the money is spent are so required. See for example *Millgate v Wokingham Borough Council* [2011] EWCA Civ 1062.

72. At the other end of the spectrum, the agreement may provide that a contribution will be made of £X as a contribution towards the costs of improvements to existing public open space in [town]. That leaves no scope for arguing about how the money can be spent, and no scope for seeking an implied term that any surplus should be refunded.