IN THE HIGH COURT OF JUSTICE **CLAIM No. PT-2020-MAN-000198**

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

Property, Trusts & Probate List (ChD)

Before His Honour Judge Cadwallader sitting as a Judge of the High Court

10 March 2022

B E T W E E N:

UPTON ROCKS HEALTHCARE LIMITED

Claimant

- and -

HALTON BOROUGH COUNCIL

Defendant

Mr David Nicholls (instructed by Square One Law LLP) for the Claimant

Mr Wilson Horne (instructed by Weightmans LLP) for the Defendant

Hearing dates: 21 and 22 February 2022

JUDGMENT

HIS HONOUR JUDGE CADWALLADER

Works of development – payment under mistake – unjust enrichment - penalty

The following cases are referred to in the judgment:

Cavendish Square Holdings BV v Makdessi and *ParkingEye Limited v Beavis* [2015] UKSC 67

High Peak Borough Council v Secretary of State for the Environment [1981] J.P.L. 366

Malvern Hills DC v Sec. of State for Environment (1983) P&CR 58

Introduction

1. This was the trial of a claim to recover £240,000 from the defendant which the parties agreed before me at trial the claimant paid to the defendant in connection with an

agreement dated 3 December 2019 ("the 2019 Agreement"), and a development site of which the claimant is registered proprietor under title number CH 608464, being land on the south side of Lanark Gardens, Widnes ("the Site"), together with interest. The claimant also claims declaratory relief.

The trial

2. At the trial, I heard evidence for the Claimant from Paul Griffiths, an architect who had been concerned with the site and from Suhail Sharief, a pharmacist, and a director of Sharief Healthcare Limited ("SHL"), and a former director of Imaan Limited ("Imaan"), companies which are, in at least a broad sense, related to each other and to the claimant. I should say that, to the extent that Mr Griffiths' evidence included matters arising from his opinion as a professional architect, rather than matters of fact, I proceeded on the basis that I should ignore such evidence as inadmissible, rather than formally striking it out in advance, and that the parties agreed that I should proceed in that way.
3. For the defendant, the local planning authority and the former owner of the site, I heard evidence from Peter O'Donnell, a retired chartered surveyor, who was employed by the defendant at the relevant time as Group Manager of Asset Valuation. He retired and stopped working for the defendant in June 2017.
4. I do not refer extensively to this factual evidence in this judgment because as it turned out it was of very little assistance to me as compared with the documentation itself.
5. I also had the benefit of written, but not oral, expert evidence from Chris Jude FRICS, on behalf of the claimant, and from David Hollingsworth on behalf of the defendant, both chartered building surveyors.
6. I had the benefit of skeleton arguments and oral submissions from counsel on each side.
7. The trial was listed for 3 days but, in the event, evidence and submissions were concluded on the afternoon of the second day. Nonetheless, I reserved judgement in order to allow myself time for further reflection on some of the points raised.

History

Contract for sale

8. The history is as follows. By a contract for the sale of land ("the contract for sale") dated 23 March 2011 and made between the defendant as Seller, Halton Development Partnership Ltd, and Ladson Construction Ltd as Buyer ("Ladson"), the defendant

agreed to sell and Ladson agreed to buy certain freehold property on the east side of Prescot Road and Chapel Lane, Widnes, being part of the land in title number CH 366563, for £220,000

9. The contract for sale contemplated a development which included retail development of the land edged yellow on the plan (involving a convenience store in 5 two-storey retail units, subject to variation), land edged green as a public house, land edged blue as retirement apartments, a residential care home, or residential properties, or retail; and the land edged orange as either retirement apartments, or a residential care home, or residential properties, or retail. The blue and the orange land together composed the site with which this case is concerned.
10. The evidence was that this contract for sale was made in the context that the surrounding area had been developed for residential purposes, but lacked a centre and the usual amenities.
11. The contract for sale was effectively conditional upon the renewal (with or without variation) of a planning permission which had been granted in 2006, but which had since lapsed, and Ladson agreed that it must submit an application for outline planning permission accordingly, and use reasonable endeavours to secure that the council (that is, the defendant) should grant it free from unacceptable planning conditions. Once that had happened, completion should take place 20 working days thereafter.
12. Schedule 2 of the contract for sale provided for Additional Payments to be made to the defendant by Ladson if planning permission should be granted at any time during a long overage period of 50 years starting on the completion date. It provided for different payments to be made in different circumstances. In particular, it provided for a planning application to be made to develop the orange land and the blue land as retirement dwellings and/or a residential care home and/or development for private dwelling houses and/or commercial retail units. Paragraph 5 of that Schedule (which is later referred as "the Original Condition") provided that if planning permission were granted for retirement dwellings and/or a residential care home, a lump sum of £300,000 was to be paid after the grant of planning permission. If permission were granted for the development of private dwelling houses within use class C3, or if there were development of private dwelling houses, then there were 2 provisions. The first was that if Ladson built out the development, then within a 7 year period from completion of the contract for sale, on completion of sale of each residential unit, a lump sum of £20,000 should be paid; and after the end of that 7 year period, a revised

sum (effectively an index-linked increase in the £20,000) should be paid on each such completion. The second was that in the event of a disposal of the orange land to a third party, Ladson should pay 30% of the gross total sale price on completion of the disposal.

13. If planning permission were granted over the blue land for retail uses within use classes A1, A3 and A5, Ladson should pay an additional sum calculated by reference to the gross internal floor area.
14. As is to be expected, the contract for sale required Ladson to procure a direct deed of covenant reproducing these terms as to overage payments from any transferee of the land, and Ladson consented to the entry of a restriction against its title to the effect that no disposition was to be registered without the consent of the defendant.

The 2011 Transfer

15. The contract for sale was completed with a transfer ("the 2011 Transfer") between the defendant as Transferor and Ladson as Transferee dated 24 October 2011, for which the consideration was again expressed to be £220,000. The definitions of 'Transferor' and 'Transferee' were expressed to include their respective successors in title. The 2011 Transfer contains a covenant not to build on the property except in accordance with the detailed programme to approved by the Transferor and for which all necessary planning and building regulations approvals had been obtained. The Transferee covenanted to commence a development scheme within 3 months, and completed within 2 years: the scheme was for retail units and associated car parking on the yellow land, which was adjacent to and on the west of the site. The Transferee covenanted to erect temporary fencing around the property. It also covenanted, by cl.12.8.2, within 36 months to construct a new access road which was to run along the eastern edge of the site. There was a covenant for a Land Registry restriction preventing registration of dispositions without the consent of the defendant; and another for a restriction to the same effect without a certificate from the defendant that Schedule 2 of the contract for sale had been complied with or did not apply. Again there was a covenant not to dispose of any of the property without a direct covenant from the transferee to perform cl.12.8.2; and provision for a further Land Registry restriction to protect that obligation.
16. A suite of 4 documents was entered into on 4 December 2012.

The Supplemental Agreement

17. A Supplemental Agreement dated 4 December 2012 and made between the defendant and Ladson ("the Supplemental Agreement") was supplemental to the contract for sale

and recited that Ladson had requested that the contract for sale be varied so that the orange and the blue land could be sold subject to the Original Condition set out in paragraph 5 of Schedule 2 of the contract for sale, as varied by the Supplemental Agreement itself. The Original Condition was the one providing for overage to be paid in certain circumstances following the grant of planning permission for the development of private dwelling houses on the orange and blue land, or residential development on land, and to which I have already referred. The variation effected certain small changes to the original condition and to another provision of the contract for sale. Those changes are not material for present purposes. The consideration for the variation was the payment by Ladson of £12,600 to the defendant.

The Deed of Variation

18. By a Deed of Variation dated 4 December 2012 and made between the defendant (described as Seller) and Ladson (described as Buyer) ("the Deed of Variation") the parties agreed to vary the terms of the 2011 Transfer. In the usual way, the Deed of Variation recited that it was supplemental and collateral to that transfer, and the parties' agreement to vary it. It provided that references to the Buyer, that is, Ladson, included reference to its 'respective' successors in title (the word 'respective' seems otiose if it was intended to refer to only one party). By clause 2.1 it provided

> "from and including the date of this deed, the [2011 Transfer] shall be read and construed as varied by the provisions set out in the Schedule."

By clause 2.2 it provided

> "the [2011 Transfer] shall remain fully effective as varied by this deed and the terms of the [2011 Transfer] shall have effect as though the provisions contained in this deed had been contained in the [2011 Transfer] with effect from the date of this deed."

The variation, so far as relevant, was as follows:

> "Clause 12.8.2 of the [2011 Transfer] shall be deleted and replaced by the following clause:
>
> > "The transferee covenants with the Transferor that it will within 36 months of the date of this transfer commence development on that part of the Property shown hatched black on Plan 4 by the carrying out of a

material operation as defined in Section 56 (4) of the Town and Country Planning Act 1990 ("Development"). If the Transferee has not commenced Development on that part of the property hatched black on Plan 4 within 36 months from 24 October 2011 the Transferee shall pay to the Transferor the sum of £240,000 plus Value Added Tax thereon".

The part of the property is so referred to is the Site. This clause is the source of the obligation to pay £240,000 which forms the subject matter of this dispute.

The 2012 Transfer

19. By a transfer also dated 4 December 2012, Ladson transferred the Site to Imaan for £125,000.

The Deed of Covenant

20. By a deed of covenant bearing the same date and made between Imaan and the defendant, Imaan covenanted to observe and perform at all times the Covenants and the Overage Provisions insofar as they relate to or affect the Property [that is, the Site], and not to deal with it without procuring a direct covenant from the transferee to the defendant. Again there was to be a restriction preventing disposal from being registered without confirmation that this provision had been complied with. The Covenants were defined (rather unhappily) as "the covenants conditions restrictions and stipulations to which the Property is subject whether such covenants run with the property or are of a purely personal nature", and the Overage Provisions were defined as "the overage provisions set out in the Original Contract [that is, the contract for sale as varied by the Supplemental Agreement] insofar as they remain to be performed at the date of this covenant". This deed of covenant is therefore the source of the alleged obligation on the part of Imaan to pay the Defendant the £240,000 under the Deed of Variation.

The dispute

21. By letter dated 23 April 2015 from the defendant's solicitors to Imaan, the defendant pointed out that by virtue of the deed of covenant Imaan was bound by Clause 12.8.2 of the 2011 Transfer as varied by the Deed of Variation, and claimed that because no development had started within the requisite period, Imaan was obliged to pay the defendant £240,000 plus VAT if applicable. (It is agreed that it was not).

22. Solicitors for Imaan responded on 30 April 2015. They accepted that their client was bound by the covenant, but averred that Development (as defined) had been undertaken by Ladson before Imaan even purchased the Site. The letter set out the works relied upon in the following terms.

> "a. A site scrape and rock excavation/clearance of the excess earth to levels correct for housing development and prepared for foundations ("the Site Scrape");
>
> b. erection of perimeter fencing ("the Fence");
>
> c. The installation of land drains within the site to enclose the site with a finish in keeping with a housing site ("the Land Drains");
>
> d. Stripping the site of vegetation and perform a reduced level dig to prepare the land for houses ("the Strip and Dig");
>
> e. Re-contouring of the land and a reduction to a level roughly the same as the path surrounding the Morrisons site ("the Re-contouring");
>
> f. reducing the ground levels of the property to ensure houses would be the correct level for a new road into the site ("the Ground Level Reduction").

(The definitions contained within round brackets are those supplied on behalf of the claimant).

23. The defendant's solicitors did not agree, and a dispute arose which remained unresolved.

<u>The 2019 Agreement</u>

24. The next relevant document before the court is an agreement dated 3 December 2019 and made between Imaan, Sharief Pharma Limited, SHL, and the defendant. It recited the contract for sale, the 2011 Transfer, the Supplemental Agreement, the Deed of Variation, the 2012 Transfer (not very happily described) and the Deed of Covenant. It also recited arrangements said to have had the effect that by the date of the 2019 agreement, Imaan held the Site on trust for SHL, and the intention of Imaan, Sharief Pharma Limited and SHL (described as "the Connected Parties") to transfer the Site to the claimant so that a new health centre could be constructed on it. It also recited that in consequence of the dispute - the Connected Parties refuting the defendant's position and denying that monies were owed on the basis that clause 12.8.2 had been complied with - the defendant had refused to consent to a transfer to the claimant, and the parties had agreed the terms in the 2019 Agreement strictly on the basis that the construction

of the new health centre should be able to proceed before the dispute was resolved. It was also accepted that VAT was not payable on the £240,000, which was described as 'the Ex-Gratia Sum' and was to be paid on behalf of SHL without prejudice to the contention that there was no liability to pay any money to the Defendant.

25. On that footing, the 2019 agreement provided, in effect, that the parties comprehensively reserved their respective positions, but that the Ex-Gratia Sum should be paid to the defendant, and the defendant should complete the documentation required to permit the Site to be transferred to the claimant (which was not a party to the 2019 Agreement).
26. I should say that the copy of the 2019 Agreement before the Court shows only execution by the defendant, but it was accepted on both sides that it was executed by all parties.

Registration of the Claimant as proprietor

27. Following the execution of this document, it is accepted on both sides that the claimant paid the £240,000, which must have been accepted by the Defendant as discharging any liability of Imaan since in due course the claimant was registered as proprietor of the site on 5 March 2020. The price stated to have been paid was £850,000. I am told that the health centre was then developed and completed. The dispute remains however.

The issues

28. The claimant's case, in summary, is as follows (although for these purposes I take the points in my own order). Ladson did indeed carry out certain works on the site before the transfer to Imaan. Those works, or some of them, were works of a kind which, as a matter of law, were capable of satisfying the requirement to carry out Development as defined in the deed of variation. The fact that they had been carried out before the deed of variation did not mean that they could not satisfy that requirement. Accordingly, Imaan was never obliged to pay the defendant £240,000. But in any case, the supposed obligation to pay the £240,000 was unenforceable as a penalty. Either way, the claimant is entitled to recover the £240,000 which it paid to the defendant so that the site could be transferred to it as a payment made under a mistake of fact or law, namely, the mistaken belief that Imaan was liable to pay it.
29. The defendant puts the claimant to proof as to the works done, but in any event denies that they were capable as a matter of law of being works of Development within cl 12.8.2: none of them related to any particular planning permission; all of them must

have been unlawful because there was no relevant planning permission (as indeed the claimant accepted in submissions). Moreover, even if they had otherwise been works of Development within that provision, the fact that they had been carried out before the deed of variation meant that they could not satisfy it. The provision did not amount to a penalty. Finally, the claimant was not acting under any mistaken belief when it paid the defendant the £240,000.

The works

30. It seems to me that the place to start is with the facts. The burden of proof lies upon the claimant. In closing counsel for the claimant addressed me on the footing that the claimant relied upon the facts addressed in the experts' joint statement only where they agreed with each other. This sensibly reflected the fact that the experts did not attend to give oral evidence, and there was little direct oral factual evidence. On that footing, he relied only upon the Site Scrape, the Strip (but not the Dig), the Re-contouring, and the Ground Level Reduction. The experts' opinion that those matters occurred on the Site, as a matter of fact, is consistent with the evidence overall. So, for example, the email from Chris Bowman (the Land Director of Ladson) to Peter O'Donnell dated 6 June 2012 confirms that the disposal by Ladson then under consideration (to another company) was conditional upon Ladson's delivering a remediated and flat site. In his evidence, Mr O'Donnell did not dispute that they had done so. The email dated 20 January 2015 from Ashley Ladson of Ladson to Zubair Malik of Imaan was consistent with this and is of some evidential value, albeit I did not hear evidence from either of the parties to that email. The email dated 16 May 2016 from Mr Ladson to Mr Malik also provides some limited support to the contention that these works were carried out, and it appears from an email dated 18 November 2015 but Mr Ladson had confirmed as much to the defendant by telephone. On the balance of probabilities, I accept that these works were done.
31. Further, I accept that these works were done by Ladson, and before the transfer to Imaan. That is also supported by the evidence to which I have already referred, by the fact that Imaan did not claim to have done the works at any point, and by the fact that where the experts agreed as to the work done as matter of fact, they and Mr O'Donnell agreed that those works were done in 2012 (and must therefore have been done by Ladson, because it was the owner at the time), and, in a small way, by a photograph numbered 13 and appearing at page 91 of the trial bundle showing a site cabin being

delivered or removed, and the presence of an operative described (although it is not apparent from the photograph before me because of its scale) as wearing a Ladson-branded high visibility vest.

32. Accordingly, these works were done before the expiry of the time limit for which clause 12.8.2 provided.

Development

33. The question is then whether by these works the transferee had commenced development on the site by the carrying out of a material operation as defined in section 56 (4) Town and Country Planning Act 1990. I would accept that these works were not *de minimis*. *Malvern Hills DC v Sec. of State for Environment* (1983) P&CR 58 is authority for the proposition that very little needs to be done to satisfy the section.
34. The claimant contended that they fell within sub paragraphs (a) and (d) of that provision, namely, work of construction in the course of the erection of the building, or any operation in the course of laying out or constructing a road or part of a road. I accept that, as the Claimant argued, they were essentially necessary and preliminary stages for any such construction, and effectively nothing else could have been built had they not been carried out. That fairly common-sense proposition was reinforced by reference to *Malvern Hills DC v Sec. of State for Environment* (1983) P&CR 58 , 68. But I do not accept that it follows that they must have been works of construction in the course of the erection of the building, or operations in the course of laying out or constructing a road or part of a road. There was no evidence to that effect and it cannot simply be assumed.

Works pre-dating the obligation

35. The defendant further argued that works which predated the Deed of Variation could not satisfy cl. 12.8.2 in any event. It is clear to me, however, and the contrary was not argued, that this is not one of those cases where the terms of the deed of variation sets up an estoppel whereby the parties and their privies are effectively bound to treat the variation as having been in place from the outset.
36. Counsel for the claimant argued that because the variation referred to the Transferee, because the time limit was calculated from the date of the 2011 Transfer, and the £240,000 was payable if Development had not commenced within the period of 36 months from that date, work done at any time during that 36 month period might satisfy the provision, even before the Deed of Variation. I agree. The covenant to commence

development, and the covenant to pay, need to be read consistently with each other. The covenant to pay is in terms which contemplate work being carried out at any time within the whole of the 36 month period starting from the date of the 2011 transfer. It follows that the covenant to commence development is capable of being satisfied by work which predated it. Put simply, when asked to comply, the covenantor is entitled to say, "It has already been done". It is not right to say that there was no point in having such a covenant if the work might already have been done, without evidence that both parties knew it had already been done; and there is no evidence that the Defendant did, or accepted that it was Development. The point of this covenant is, so far as possible, to ensure that development is commenced, and to make it the responsibility of the covenantor and its successors to ensure that it is: commercially, nothing turned on when it was commenced within the 36 month period, or by whom.

Works amounting to development

37. It is plain from the character of the works undertaken that they were undertaken for the purpose of some kind of development. Counsel for the defendant argued that these could not be works of development within the meaning of the clause, because there could not be development until there was planning permission; and, moreover, since there was not, the works were unlawful, and the defendant, as a local authority, could not have been taken to have contemplated the carrying out of unlawful works in a covenant to which it was party. Neither of these points had been pleaded, but it seems to me that they were available to the defendant as they were, essentially, matters of law and construction.
38. The defendant's submissions appear to be correct. It cannot be right to conclude that either party to the deed of variation could have intended that the development requirement be satisfied by unlawful development, particularly given the role of the Defendant as planning authority. What was contemplated was plainly some lawful development within the meaning of the 1990 Act. What occurred was not lawful, as the claimant accepts. It follows that the works did not satisfy the clause in question.
39. Accordingly, for the reasons given in paragraphs 34 and 38 above, that part of the Claimant's case which depends on Development's having been carried out does not succeed.

Penalty

40. The question remains whether the payment provision was a penalty. As stated in Lewison, *The Interpretation of Contracts* 7th ed., at 17.01, a penalty clause is a clause which, in breach of the primary obligation of the contract, imposes upon a contract breaker a detriment out of all proportion to the injured party's legitimate interest in performance of the primary obligation. The ultimate question is whether the clause under attack goes beyond the legitimate interests of the injured party in performance of the contract: ibid., 17.02.

41. The Supreme Court considered the nature of penalties in *Cavendish Square Holdings BV v Makdessi* and *ParkingEye Limited v Beavis* [2015] UKSC 67. In that case their Lordships stated (para.28)

> "…we agree with Lord Radcliffe's observations in the *Campbell Discount* case [1962] AC 600, 622, where he said:
>
> > "I do not myself think that it helps to identify a penalty, to describe it as in the nature of a threat 'to be enforced in terrorem' (to use Lord Halsbury's phrase in *Elphinstone v Monkland Iron & Coal Co Ltd* (1886) 11App Cas 332, 348). I do not find that that description adds anything of substance to the idea conveyed by the word 'penalty' itself, and it obscures the fact that penalties may quite readily be undertaken by parties who are not in the least terrorised by the prospect of having to pay them and yet are, as I understand it, entitled to claim the protection of the court when they are called upon to make good their promises."
>
> Moreover, the penal character of a clause depends on its purpose, which is ordinarily an inference from its effect. As we have already explained, this is a question of construction, to which evidence of the commercial background is of course relevant in the ordinary way. But, for the same reason, the answer cannot depend on evidence of actual intention: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, paras 28—47 (Lord Hoffmann)."

Further,

> "A damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach. This must depend on whether the innocent party has a legitimate interest in performance extending beyond the

prospect of pecuniary compensation flowing directly from the breach in question."(para 28)

In a central passage (para. 31, 32), they state:

> "The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.
>
> 32 The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."

Lord Mance JSC stated at para 152

> "In my opinion, the development of the law indicated by the authorities discussed in paras 145 to 151 above is a sound one. It is most easily explained on the basis that the dichotomy between the compensatory and the penal is not exclusive. There may be interests beyond the compensatory which justify the

imposition on a party in breach of an additional financial burden. The maintenance of a system of trade, which only functions if all trading partners adhere to it (the *Dunlop* case), may itself be viewed in this light; so can terms of settlement which provide on default for payment of costs which a party was prepared to forego if the settlement was honoured (the *Cine Bes* case); likewise, also the revision of financial terms to match circumstances disclosed or brought about by a breach: *Lordsvale* and other cases. What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."

And Lord Hodge stated (para 255)

> "I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable."

42. It is plain, and it was not disputed, that the architecture of primary and secondary liabilities which form the foundation of a penalty was present in the present case. It is obvious from the clause itself that the interest of the defendant which it was seeking to protect was its interest in promoting prompt development of the site in one way or another, without specifying which, and in incentivising the landowner to do so (over and above the covenant to commence development) by obliging it to pay a fixed sum if

it did not. I did not need to hear the evidence of Mr O'Donnell to form that conclusion (if indeed it was admissible, since it was evidence of subjective intention), although his evidence was consistent with it. Those are, it seems to me, legitimate interests for a person in the position of the Defendant to protect.

43. He also added that it was his understanding that the defendant was seeking to protect its right to overage on development. While I am not convinced that that evidence was admissible either, as being evidence of subjective intention, I will nonetheless deal with it as well. While this might have been a legitimate interest to protect in respect of its pre-existing rights to overage, it went well beyond such protection, since it was not limited to development of the kinds which would give rise to a right to overage under the 2011 Transfer. I do not accept that this was an interest of the Defendant or, if it was, that it was a legitimate one.

44. I agree that the provision needs to be considered against the background that, as Mr Griffiths said and I accept, and as is apparent from the documentation, the defendant was in the dark about Imaan, which was not a developer but a pharmacist, and of which it knew nothing apart from having seen its accounts; but I do not consider that this adds anything to the interests which the defendant was legitimately entitled to seek to protect.

45. But in my judgment the provision was indeed extravagant, exorbitant or unconscionable. In the first place, because it merely required the commencement of development, but not its completion, it had restricted its protection of any interest of the Defendant to a very narrow compass, and one of very little utility or value if any, since development might be commenced but never completed, or not completed for many years (so it would not stop land banking, if that were relevant). The commencement might be of no benefit at all if it was simply undone again, as occurred in *High Peak Borough Council v Secretary of State for the Environment* [1981] J.P.L. 366. The overage provisions were already very extensive. If development were undertaken which engaged them (which it would not necessarily do, however), but only commenced after the 36 month period, the defendant would be entitled to be paid both overage and £240,000. If development were commenced only one day after the 36 month period, the £240,000 would be payable, whereas if it were commenced only one day before the end of that period, it would not: but the effect of the difference on the defendant's interests would be neither here nor there. Having regard to these considerations, there seems to be no discernible proportion between the sum to be paid and any of the interests of the defendant, in any of these circumstances.

46. This seems to me, therefore, to fall squarely within the law relating to penalties, and to render the payment provision unenforceable. The claimant did argue also that the defendant could not say it had a legitimate interest in enforcing the obligation to commence development when it regarded itself as having achieved best value already under the old arrangements. I do not accept that argument, since plainly circumstances had changed and time had passed. But it makes no difference to my conclusion.
47. Nor does it make any difference to my conclusion that the health centre which has actually been built on the Site would not have been caught by the original overage provisions. Cl.12.8.2 under the Deed of Variation was not imposing an additional overage payment for a share of increased development value, but a penalty for not commencing development at all.

The obligation of Imaan

48. It follows that when the claimant paid the defendant the sum of £240,000 on behalf of SHL, and in discharge of the purported obligation of Imaan, Imaan was actually under no such obligation, and the defendant received a payment from the Claimant to which it was not entitled. Nor was it entitled to refuse to release the restriction without such payment, as it plainly had: it follows from my conclusions that such refusal was a breach of contract on its part.

Unjust enrichment

49. The claimant characterises this as a mistake of fact or law, on the footing that there was no enforceable legal obligation. The defendant says that there was no such mistake: the claimant had merely chosen to make the payment so that the restriction would be removed and a transfer could be effected. That is obviously not an adequate response, however, since the parties (including SHL on whose behalf the claimant made the payment) had comprehensively reserved their position about the dispute over whether or not the £240,000 was payable. If the sum was not due and payable, there was no consideration for its payment. Plainly the claimant was not actually acting under a false apprehension that the sum was actually due and payable: there was a dispute over it. Equally, it is plain from the 2019 Agreement that if the dispute should be resolved on the footing that the sum was not actually due and payable, a claim might be made to recover it, though the 2019 agreement does not contain a term that the money is to be recovered if it was not due and payable, and it was not pleaded or argued that it did.

50. Although I was not referred to it, Goff & Jones *The Law of Unjust Enrichment* 9th ed. contains a useful discussion of the distinction between mistake and cases of doubt at 9-20ff . The present case is brought on the basis of mistake, not doubt; and in any event I do not know whether there was doubt or not in the present case. What there was, was a dispute. Nor was the case brought on the footing that the Defendant had applied illegitimate pressure to procure the payment. In particular, the case was not brought on the footing, for example, that in the face of a threat on the part of the defendant to do something which would amount to a breach of contract (namely, refuse to release the Land Registry restriction) payment had been made without prejudice to the payer's rights, so as to give rise to economic duress for which relief might in some circumstances be granted: consider Goff & Jones, *The Law of Unjust Enrichment* 9th ed., 10-61 ff. I cannot say whether it would have made a difference if it had been, because the point is not open to the Claimant on the statements of case and has not been argued, and the evidence is not directed to it.
51. However, it seems to me to be sufficient for the claimant's purposes that, as set out in the statements of case and the documentation, the payment was made in order to secure the defendant's agreement to release the Land Registry restriction which in any event it was not entitled to refuse to release, and without which a transfer could not be registered, and on behalf of a person which reserved its position. Accordingly, although there was no mistake, the elements of unjust enrichment set out Goff & Jones, *The Law of Unjust Enrichment* 9th ed., at 1-09 are made out: that is to say the defendant was enriched, at the claimant's expense, and its enrichment at its expense was unjust because the Claimant had been induced to pay money which it should not have had to pay.
52. Incidentally, I should make it clear that, sensibly, no point was taken over the fact that payment was made by the claimant, rather than SHL, or that the claimant seems likely to have paid on behalf of SHL rather than on its own behalf.

Conclusion

53. In those circumstances, the defendant must reimburse the claimant together with interest. I will also grant a declaration in appropriate terms to the effect that the obligation to pay the sum of £240,000 under clause 12.8.2 was unenforceable as a penalty.

54. If the parties are able to agree an order and any consequential matters, I may dispense with a further hearing. Otherwise the matter will be listed for a short hearing to deal with those matters.