Case No: TLC/530/07

**Neutral Citation Number: [2008] EWHC 916 (Ch)**
**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday, 25th February 2008

BEFORE:

**THE HONOURABLE MR JUSTICE MORGAN**

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BETWEEN:

**SOUTHAMPTON CITY COUNCIL**

Claimant

**- and -**

**HALLYARD LIMITED**

Defendant

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MR J RAMSDEN (instructed by Southampton City Council) appeared on behalf of the Claimant

MR C NEWBERRY QC and MR J LOPEZ (instructed by Messrs Kennedys) appeared on behalf of the Interested Party, AIB GROUP (UK) PLC

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**Approved Judgment**



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JUDGMENT

MR JUSTICE MORGAN:

Introduction

1. This case concerns the interpretation of three agreements and the application or possible application of section 106 of the Town and Country Planning Act 1990, as amended by section 12 of the Planning and Compensation Act 1991. It raises some interesting questions as to the interpretation and application of section 106.

2. The three agreements are as follows. The first was dated 26th August 2004 ("the Custom House agreement"); the second was dated 27th September 2004 ("the Cindan agreement"); the third was dated 22nd September 2005 ("the Hallyard agreement").

Procedural Matters

3. These proceedings were issued on 23rd January 2007. The claimant is Southampton City Council. The defendant is Hallyard Limited. In the Particulars of Claim , the City Council raised a number of questions which they wish the court to determine in relation to the effect of the three agreements to which I have referred, and in particular the effect of those agreements in the light of section 106.

4. Hallyard is the only defendant to these proceedings, but it has taken no part of any kind in this action.

5. On 9th October 2007, Master Moncaster on the application of AIB Group (UK) Plc ("AIB"), made an order whereby AIB was added as an interested party to the claim. The Master went on to direct that AIB was able to raise questions which the court would be asked to determine, which questions could be supplementary to those stated in the Particulars of Claim by the City Council. The costs of and occasioned by AIB's joinder were reserved to the trial.

6. AIB took advantage of the permission to raise supplementary questions. They served a witness statement of Mr John Reape and in paragraphs 16 and 17 of that witness statement, AIB, through Mr Reape, raised further questions, six in all.

7. The questions raised by the City Council and by AIB have been examined in the course of argument. The course of argument has led to the questions arising in this case being significantly refined. Some of the questions, on examination, fell away, but their place was taken by other questions which emerged in the course of argument. In these circumstances, I will not set out the original questions raised by the City Council and AIB, but I will in due course address what appear to me to be the extant questions, some nine

altogether.

Representation

8. Mr Ramsden appeared for the City Council, no-one appeared on behalf of Hallyard and Mr Newberry QC with Mr Lopez, appeared for AIB.

The Custom House Agreement

9. It is necessary to refer to the terms of the Custom House agreement in a little detail. The parties to the Custom House agreement were, first, Southampton City Council, second Barratt Homes Limited ("Barratts"), third, Cindan Land (Southampton) Limited ("Cindan"), and the British & International Sailors' Society. The coversheet of the Custom House agreement stated that it was made pursuant to section 106 of the Town and Country Planning Act 1990 and section 111 of the Local Government Act 1972 in relation to the development at Custom House, Orchard Place, Southampton. Hence the reference to this agreement as the Custom House agreement.

10. The agreement defined the City Council as "the Council", Barrett Homes Limited as "the developer", Cindan Land (Southampton) Limited by its own name "Cindan" and the British and International Saviour Society as "the Society". Recital A stated that the Council was the local planning authority for the purposes of section 106 of the relevant Act for the area within which the land is situated. Recital B began with the words, "In relation to ownership of the Land".

11. It is necessary at this point to state that the phrase "the Land", was defined in clause 2.1 of the Custom House agreement as a reference to "land shown edged red on the plan" which was referred to in other places as "the Custom House site" and which was the land which was to be developed by Barratts. There is no suggestion that Cindan had any interest in the Land as so defined. I will not read out recital B, but it is right to note that in recital B, the draftsman has taken care to identify the precise nature of the legal ownership of the various parcels which together made up the Land.

12. Recital C stated that a certain planning application had been submitted on behalf of Barratts and that the council had resolved to grant a planning permission pursuant to that application, subject to the completion of the Custom House agreement. Cindan is mentioned in Recital E in these terms:

> "Cindan is a third party developer which (subject to the provisions of this Agreement) may benefit from a financial contribution towards the provision of Affordable Housing on its development site and has agreed to enter into this Agreement for that purpose."

13. Clause 1.1 under the heading "statutory powers" states that the agreement is a

planning obligation for the purposes of section 106 of the Town and Country Planning Act 1990 and was entered into pursuant also to section 111 of the Local Government Act 1972. The clause goes on in these terms:

> "It is acknowledged by the parties the obligations contained within it are (subject to clause 1.2) enforceable by the Council as local planning authority against the developer and the Society and their successors in title in relation to their respective interests in the Land." [Quote unchecked]

I comment at this point that that reference to the agreement being enforceable against certain persons does not include a reference to Cindan.

14. Clause 1.2 is in these terms:

> "It is agreed by the Council that save for the covenants on the part of the Developer set out in paragraphs 5 and 8 of Schedule 1 no part of this Agreement shall be enforceable against the owners of individual residential dwellings forming part of the Development or their mortgagees."

Again I should explain that clause by stating that the Development is defined in clause 2.1 by reference to a development of the Custom House site. It does not extend to any land intended to be developed by Cindan.

15. Clause 2.1 then contains a large number of definitions, not all of which I need refer to. "Affordable Housing" is defined as follows:

> "Housing provided with subsidy for people who are unable to meet their housing requirements in the general housing market locally because of the relationship between the housing costs and their income."

The definitions clause also extends to a definition of "the application", "the developer", "the Development", "the Land" and "the Permission".

16. By clause 2.2 it is stated that references in the agreement to the Developer and the Society shall include their respective successors in title to the Land and their assigns. But that is save as otherwise provided. Clause 2.3 is in these terms:

> "References in this Agreement to "Cindan" shall include its successors in title to the development site referred to in paragraph 2.2 of Schedule 2 and its assigns."

Clause 3 provides that the obligations in the agreement are, unless otherwise specified, conditional upon the grant of the intended permission by the City

Council. The intended permission, of course, related to the Custom House site and not any site controlled or intended to be developed by Cindan. The obligations were not expressed, as is sometimes the case, to be conditional upon the implementation of the permission but upon the grant of the permission.

17. By clause 4, the developer, Barratts, covenanted with the City Council to observe and perform the covenants contained in schedule 1 to the agreement. Clause 5 provided that, subject to due performance by the developer of its obligations, the City Council covenanted with the developer that the City Council would observe and perform the covenants on its part contained in schedule 2 to the agreement.

18. Clause 6 contains two provisions potentially providing for the release of obligations or the lapse of obligations. Clause 6.1 contains a usual provision in section 106 agreements which provides that a party is not to be liable for a breach of its obligations under the agreement, save for antecedent breaches, after it shall have parted with all of its interess in the land. That is qualified to some extent in relation to Barratts. What I do draw attention to however, is that the release relates to an interest in the Land, that is the Custom House site, and does not refer to land intended to be developed by Cindan.

19. Clause 6.2 is a further provision providing for the lapse of the agreement. Mr Newberry, who appeared on behalf of AIB, did not contend that the agreement had lapsed or at any rate not yet lapsed under that provision. Clause 7.1 under the heading "Local land charge", stated that the agreement was a local land charge and should be registered as such by the Council. There was some argument, perhaps inconclusive in the event, as to whether this related both to the Custom House site and to the land intended to be developed by Cindan.

20. Clause 7.2 provided for the entry of the local land charge in the appropriate register to be removed on satisfaction of the terms of the agreement. It may be of significance that that was to happen at the request of the developer, Barratts. There was no provision for Cindan to request the removal of the local land charge from its land. Clause 8 imposed on the parties a duty to act reasonably in certain respects. Clause 9 provided that the agreement was not to operate as a fetter on the City Council's statutory rights, powers, discretions and responsibilities.

21. Clause 10 was a warranty by Barratts to the City Council that the title details referred to in Recital B were complete and accurate in every respect. There was no similar warranty from Cindan. Clause 11 provided that if any part of the agreement should be declared unlawful or invalid by a court of competent jurisdiction, then to the extent possible, the remainder of the agreement should continue in full force and effect.

22. The agreement contained other provisions to which it is not necessary to refer until I reach clause 17. Clause 17 is under the heading "Cindan's covenants"

and is in these terms:

> "Cindan hereby covenants with the Council and (as a separate covenant with the Developer) that it will observe and perform the covenants on its part contained in paragraphs 2.2 and 2.3 of Schedule 2."

It could be said that that provision is not wholly effective because when one examines Schedule 2, there are other obligations, apparently undertaken by Cindan which are not swept up in the cross-references in clause 17. Clause 18 deals with the Society and its position as the owner of an interest in the Land.

23. Schedule 1 contains the developers' covenants. Paragraph 1.1 provided for the developer to pay to the City Council a sum of £340,000 plus what was described as "the additional amount" and we will later see references to the sum of money under paragraph 1.1 of Schedule 1. Paragraph 1.2 of Schedule 1 is in these terms:

> "The Developer will pay to Cindan the sum of £632,000 plus the Additional Amount on the date which is the sooner of
>
> 1.2.1 12 months from the date of issue of the Permission;
>
> 1.2.2 20 Working Days after the date of grant of the planning permission referred to in paragraph 2.2 of Schedule 2."

Those subparagraphs are subject to the covenant on behalf of Cindan in clause 17.

24. It will be noted that that paragraph refers to the additional amount which was defined in the agreement, but nothing turns on that and I need not go into that in any more detail. Paragraph 1.2.1, when it refers to "the permission" is referring to planning permission for the Custom House site. Paragraph 1.2.2 when it refers to planning permission, is referring to planning permission for the site intended to be developed by Cindan.

25. Schedule 1 continues with a large number of further covenants to which I need not refer. It is possible to describe them in general terms as involving other obligations on the part of the developer which it was appropriate for the City Council to secure as a condition of the developer carrying out the development of the Custom House site. In the ordinary way, many of the obligations there expressed involve the developer, Barratts, paying a sum of money to the City Council.

26. Schedule 2 to the agreement is headed "Council's covenants". That in itself is not a particularly helpful heading, because as will be seen, and certainly so far as material in this case, the most important provisions in schedule 2, are not

covenants by the City Council but are covenants by Cindan. Paragraph 1 of Schedule 2 is a covenant by the City Council to issue the planning permission for the Custom House site.

27. Paragraph 2, which is divided into five subparagraphs, is headed "Affordable Housing Contributions". Paragraph 2.1 refers not to the sum of money to be paid to Cindan, but to the sum of money, some £340,000, which was to be paid to the Council under paragraph 1.1 of Schedule 1 to the agreement. In relation to that sum of money, in summary, the City Council covenanted with Barratts that it would not use the contribution otherwise than for a purpose which was spelt out and that purpose involved providing affordable housing on an entirely different site in Southampton.

28. I need, however, to read the remainder of paragraph 2 of Schedule 2, which is in these terms:

> "2.2 In relation to the contribution referred to in paragraph 1.2 of schedule 1, Cindan covenants with the Developer and (as a separate covenant) with the Council, that it will not use any part of the said contribution (other than to pay it into a separate interest-bearing account as required by paragraph 2.4.1 below) unless and until:
>
> > 2.2.1 Cindan has obtained planning permission for a residential scheme including not less than 25 per cent of the total number of units (unless otherwise agreed by the Council) for use for the purposes of affordable housing only on the site known as the Snooker Club, 106 to 113 St Mary's Street, Southampton, by the date on which the said contribution has been paid to Cindan; and
> >
> > 2.2.2 The Council has confirmed in writing to Cindan by the date which is 20 Working Days after the date of payment of the said contribution, that it is reasonably satisfied that provision of additional affordable housing units over and above the 25 per cent within that development by Cindan, will promote the Council's objectives for the provision of Affordable Housing.
>
> and in the event that either of these conditions shall not have been satisfied by the date which is 20 Working Days after the date of payment of the said contribution, then Cindan shall at the expiry of that period pay to the Council the said contribution together with all accrued interest (whether formally demanded or not).
>
> 2.3 In the event that (pursuant to paragraph 2.2 above) Cindan is entitled to use the contribution paid pursuant to paragraph 1.2 of Schedule 1 then Cindan covenants with the Council and (as a separate covenant) with the Developer, that it will not use the said contribution otherwise than on the following terms:

2.3.1 no part of the said contribution shall be used by Cindan otherwise than towards the costs of developing additional affordable housing units over and above the 25 per cent in the residential scheme referred to in this paragraph 2.2 (at the rate of £6,000 per extra habitable room provided); and

2.3.2 if any part of the contribution remains unexpended as at the date in which the said residential scheme is completed it shall be paid to the Council by Cindan, together with accrued interest."

29. Paragraph 2.4 deals with the way in which the money was to be put to the credit of Cindan, either in a joint account with the City Council, or in the sole name of Cindan. It is not necessary, I think, to read out paragraph 2.4. Paragraph 2.5 provides for what is to happen if either of the sums referred to in paragraph 1.1 or 1.2 of schedule 1, is not in the end put to use by a Housing Association in the case of the paragraph 1.1 money, or by Cindan in relation to 1.2 monies. In those circumstances, in the event of the monies going to the Council from Cindan, then the Council is entitled to use any part of the monies towards the provision of, or improvements to, affordable housing elsewhere within its administrative area.

30. Paragraphs 3, 4 and 5 of schedule 2 are covenants by the Council and not by Cindan, and they restrict the manner in which the Council may use other commuted payments received from Barratts pursuant to its obligations in Schedule 1 to the agreement.

31. I mention, but I do not refer in any detail to, a side letter dated 26th August 2004 between the City Council and Cindan which varied, in a way that is not crystal clear, some of the provisions of paragraph 2.4 of Schedule 2 to the agreement. Nothing at present turns on the terms of that side letter.

The grant of planning permission to Barratts

32. Although the planning permission is not in evidence, I was told, and it seems entirely probable, that immediately following the Custom House agreement of 26th August 2004, the City Council as planning authority did indeed grant permission to Barratts as contemplated by the Custom House agreement and that planning permission permitted the development of the Customs House site, in particular by the provision of a block of 218 flats.

The Cindan Agreement

33. I can go from there to the Cindan agreement of 27th September 2004. I can take the terms of this agreement altogether more quickly than the Custom House agreement. The parties to the Cindan agreement are the City Council, Cindan and Barclays Bank Plc, who had a charge on the land the subject of this agreement. The parties are defined as "the Council", "the owner" and "the

mortgagee" respectively. The recitals recite that the City Council is the local planning authority and for that matter the highway authority. Recital B is material in that it tells one the precise legal interest which Cindan had in the land the subject of this agreement, which was land at 106 to 113 St Mary's Street, Southampton.

34. Clause 1 of the Cindan agreement refers again to section 106 and the ability of the City Council to enforce the terms of the agreement against Cindan, defined as the owner, and indeed its successors in title in respect of its interest in the land. Clause 2.1 contains definitions. There is a definition of "affordable housing" and a definition of "affordable housing units", which refers to 16 residential units. "The development" was defined as a development to provide 63 units of residential accommodation. "Qualifying occupiers" are defined indicating persons who may occupy the affordable housing, and "residential units" is a phrase defined simply to refer to units to be used for residential purposes.

35. By clause 2.2 references to the owner include the successors in title of the owner and its assigns. By clause 3 the agreement is conditional upon grant of a planning permission by the City Council and the implementation of permission. Clause 4 is headed "Owner's covenants" and cross-refers to Schedule 1 to the agreement. Clause 6 deals with release and lapse of the obligations under the agreement. The Cindan agreement then continues with a number of provisions which have parallels in the Custom House agreement and to which I need not specifically refer.

36. When one comes to Schedule 1 to the Cindan agreement, one sees a list of obligations on the part of Cindan, many of which involve Cindan paying commuted sums for matters such as offsite highway works, an open space contribution and a play facilities contribution and matters of a similar character. Paragraph 7 of Schedule 1 relates to affordable housing, and it spells out the conditions to be satisfied by Cindan if there is to be affordable housing on the St Mary's site.

37. It is important to note that the principal way in which the affordable housing terms work is that Cindan as developer and its successors in title, are not able to occupy the units in the development which are not affordable housing units without having given the City Council what is required in relation to the affordable housing units. The Council's covenants are in the second Schedule to the Cindan agreement, and the covenant of particular relevance was the obligation to issue a planning permission for the St Mary's site after entry into the Cindan agreement.

<u>The grant of planning permission to Cindans</u>

38. Again, I have not seen the planning permission, but I understand that immediately following the Cindan agreement of 27th September 2004, the City Council did indeed grant permissions for a residential development comprising

some 63 units of which, of course, 16 were to be affordable housing units.

The period September 2004 to September 2005

39. The events which happened in that period are material to the operation of the Custom House agreement, but happily I can refer to them quite succinctly. On 19th November 2004, Mr Sterling, acting for a company called Landspeed Partnership which in turn was acting for both Barratts and Cindan, wrote to a senior housing officer at the City Council. Mr Sterling referred to the Custom House agreement. He referred to the need for there to be details of the "additional" affordable housing units, and he then spelt out in detail the terms which he proposed should apply to additional affordable housing units of 47 one bedroom flats. It will be seen at once that if one added the 16 affordable housing units required by the Cindan agreement to the 47 referred to in this letter, one gets the 63 units permitted by the planning permission granted to Cindan.

40. I was also shown four emails continuing the communications between Mr Stirling and the City Council and these emails passed on 25th November 2004. Mr Stirling pressed the City Council for its response to his letter. The City Council stated that his proposals were acceptable and then in later emails it said this:

> "The scheme as proposed in your letter is approved. There are obviously details we will need to discuss further but the basic heads of terms are approved."

41. Following those emails, Barratts provided the £632,000 to the City Council and the City Council paid that money over to Cindan and Cindan placed it in a bank account in its sole name. At least initially that is where the money went. The other significant event which happened in the period I have described is that, after the Cindan 106 agreement, after the exchange of emails, after the receipt of monies which came initially from Barratts, Cindan transferred its freehold title to the St Mary's site to the defendant in these proceedings, Hallyard. I have seen the form TR1 dated 7th December 2004 and the hearing proceeded on the basis that Hallyard did indeed become registered at the Land Registry in relation to that freehold title.

42. The earlier charge in favour of Barclays Bank Plc was redeemed, and it is at this stage that AIB came on the scene. They claim they have advanced a sum of money to Hallyard to effect the purchase of the St Mary's site and, to secure its repayment, they obtained a charge over the St Mary's site.

43. I ought to say a word about the circumstances as they appeared to AIB at that time. The Custom House agreement referred to the intention to register that agreement as a local land charge. I understand that the Custom House agreement was registered as a local land charge against the Custom House site, but it was not registered as a local land charge against the St Mary's site.

When AIB carried out their searches through their solicitors in relation to the St Mary's site, they did not become aware of the potential implications (if there are potential implications) of the Custom House agreement for the development of the St Mary's site. Indeed, AIB commissioned a valuation of the St Mary's site to assess its value for the purpose of the security, and the AIB valuation did not proceed on the basis that there were any implications of the Custom House agreement for the development of the St Mary's site. It also seems to be the case that Hallyard did not tell AIB about the possibility of the Custom House agreement impacting on the St Mary's site.

The Hallyard Agreement

44. The third agreement to which I ought to refer is the Hallyard agreement entered into on 22nd September 2005. This was made between the City Council, Hallyard and AIB. I need not go to the detail, as the form of the Hallyard agreement is very similar indeed to the Cindan agreement. The Cindan and Hallyard agreements obviously followed the City Council's standard form for section 106 agreements. I will, however, draw attention to the fact that Hallyard's freehold interest in the St Mary's site is correctly described in the recitals to the agreement. The development contemplated by the Hallyard agreement was slightly larger than that contemplated by the Cindan agreement. There were to be 66 flats rather than 63 flats and because of that, the affordable housing units contemplated by the Hallyard agreement have gone up from 16 in the Cindan agreement to 17. In other respects, so far as material for present purposes, the Hallyard agreement and the Cindan agreements contain the same or similar provisions.

The Local Government Act 1972

45. It will be remembered that the Custom House agreement referred to section 111 of the Local Government Act 1972. Subsection 111(1) provides:

> "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything, whether or not involving the expenditure of borrowing or lending of money, or the acquisition or disposal of any property or rights which is calculated to facilitate or is conducive or incidental to the discharge of any other functions." [Quote unchecked]

Section 106 of the Town and County Planning Act 1990 (as amended in 1991)

46. In view of the questions which have now arisen, it is necessary to set out some of the subsections of section 106 . Subsection (1) reads as follows:

> "Any person interested in land in the area of a local planning authority, may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as "a planning obligation")

enforceable to the extent mentioned in subsection (3):

(a) restricting the development or use of the land in any specified way;

(b) requiring specified operations or activities to be carried out in, on, under or over the land;

(c) requiring the land to be used in any specified way; or

(d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

(2) A planning obligation may –

(a) be unconditional or subject to conditions;

(b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and

(c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

(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.

…

(9) A planning obligation may not be entered into except by an instrument, executed as a deed which –

(a) states that the obligation is a planning obligation for the purposes of this section;

(b) identifies the land in which the person entering into the obligation is interested.

(c) identifies the person entering into the obligation and states what his interest in the land is; and

(d) identifies the local planning authority by whom the obligation is enforceable.

(10) A copy of any such instrument shall be given to the authority so identified.

(11) A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975, the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.

(12) Regulations may provide for the charging on the land of –

(a) any sum or sums required to be paid under a planning obligation; and

(b) any expenses recoverable by a local planning authority under subsection (6)(b), and this section and sections 106A and 106B shall have effect subject to any such regulations.

(13) In this section "specified" means specified in the instrument by which the planning obligation is entered into and in this section and section 106A "land" has the same meaning as in the Local Land Charges Act 1975."

I mention that, although subsection (12) refers to the possibility of regulations being made, none have been made.

Local Land Charges Act 1975

47. Finally, before turning to the nine questions which arise, I ought to mention briefly the Local Land Charges Act 1975. Both negative and positive obligations under agreements, such as section 106 agreements, come within the definition of local land charges in section 1(1)(b) and (d) of the 1975 Act. They are not in general excluded by section (2)(c) of that Act. Section 3 of the 1975 Act deals with the identity of the registering authority. Under section

5(1), in general terms, where the originating authority, which for these purposes is the local planning authority in the present case, is also the registered authority, it is its duty to register the charge in the appropriate local land charges register. Section 5(2) deals with the case where the originating authority is not the registering authority.

48. Section 5(3) gives further directions as to the way in which the register entry is to be made. Section 9 of the 1975 Act deals with official searches of the appropriate local land charges register in respect of any land. Section 10 is an important section. It begins in section 10(1) by stating:

> "Failure to register a local land charge in the appropriate local land charges register shall not affect the enforceability of the charge … ."

It goes on to provide for the possibility of compensation by a person who suffers loss by reason of his being unable to discover by a search the existence of a local land charge, such as a section 106 agreement applying to land.

49. Section 10 spells out in more detail the way in which compensation is to be approached, and I refer without discussing it to section 11, which deals with the specific case of a mortgagee of the land affected and the question as to compensation being payable to the mortgagor or the mortgagee and the way in which that compensation is calculated.

50. I refer to the Local Land Charges Act 1975 because Mr Newberry on behalf of AIB stressed that the Custom House agreement was not registered against the St Mary's site in the present case. His clients, AIB, had not become aware of it, and he suggested in a general way that that would have a bearing upon the questions which arise in this case. In fact, although the non-registration could conceivably give rise to a claim for compensation if the Custom House agreement does bind the St Mary's site, I do not for myself see that the fact of non-registration has any part to play when considering the nine questions which do arise.

The Questions

51. Having set the scene, I can now, I hope, deal with the nine questions which appeared to me at the end of the argument to be live questions to a greater or lesser extent.

The First Question

52. The first question is whether Cindan or Hallyard was under a positive obligation to provide affordable housing on the St Mary's site in excess of the 16 or 17 units referred to in the Cindan agreement or the Hallyard agreement as the case may be. I raised this question because the City Council has asserted several times in its pleadings, in a witness statement and in the

skeleton argument of Mr Ramsden, that Cindan was under an obligation, under the Custom House agreement to provide affordable housing on the St Mary's site over and above the figures in the Cindan and Hallyard agreements. However, having examined the Custom House agreement, it is plain that there is no such obligation to be found therein. The relevant obligations on Cindan under the Custom House agreement are expressed in terms of obligations as to a sum of money. They do not extend to a positive obligation to spend that sum of money, or any part of it, on providing affordable housing on St Mary's site.

The Second Question

53. The second question is whether there was any restriction placed on the development or use of the St Mary's site in the absence of the provision of affordable housing on that site in excess of the 16 or 17 units referred to in the Cindan agreement or the Hallyard agreement as the case may be. I raise this question for the sake of completeness. Again, it is plain that the answer to the question is no; there is no such provision in the Custom House agreement or anywhere else for that matter.

The Third Question

54. The third question is as to the operation of the provisions of the Custom House agreement in the events which have happened. It is accepted that the Custom House agreement was initially contractually binding on Cindan. It is not suggested that entry into this agreement was *ultra vires* the City Council. The question whether Cindan ceased to be liable for continuing performance under the Custom House agreement after it transferred its title to Hallyard on 7th December 2004 was not discussed. The release pursuant to clause 6.1 of the Custom House agreement of a contracting party after parting with its interest, applies only where the parting with the interest is in the Land. The Land is the Custom House site and not St Mary's site. *Prima facie* therefore, although this point was not argued, it seems to me that Cindan remain contractually liable on and after 7th December 2004. Mr Newbury accepted that clause 6(2) has not, or at any rate not yet, caused a release of Cindan's obligations.

55. Continuing with the obligations in the Custom House agreement, I do not believe I have to decide anything arising under clause 7 or 8, although as I say, Mr Newberry complained about the non-registration of the Custom House agreement against the St Mary's site. I have already referred to clause 17 of the Custom House agreement, which refers only to paragraphs 2.2 and 2.3 of schedule 2 to the agreement. It does not mention the other obligations on Cindan in schedule 2. However, in the events which have happened, that does not matter, as it looks to me as if the provision of particular relevance is that contained in paragraph 2.3 of Schedule 2.

56. Barratts have complied with their obligation to pay a sum of money imposed on them by paragraph 1.2 of Schedule 1. Paragraph 2.2 of Schedule 2 controls Cindan's use of the payment received from Barratts. Paragraph 2.2.1 was

complied with on 27th September 2004 when planning permission was granted in relation to the St Mary's site. On the exchange of emails on 25th November 2004, I hold, though the contrary was argued, that paragraph 2.2.2 was satisfied by the exchange of emails. The consequence was that Cindan was not obliged under paragraph 2.2 at that point in time to pay £632,000 to the City Council and so any obligation on Cindan to pay must be found in paragraph 2.3 of Schedule 2.

57. Paragraph 2.3.1 does not oblige Cindan to spend the money. What it does is it prevents Cindan spending the money on anything other than developing affordable housing on the St Mary's site. Contrary to suggestions which I think were put forward by Hallyard, paragraph 2.3.1 plainly does not allow Cindan nor Hallyard, if they are relevant, to use the money to create the 16 or 17 affordable units, as the case may be, referred to in the Cindan agreement or the Hallyard agreement. The position could not be more clear. Paragraph 2.3.1 refers to "additional", "over and above" and "extra".

58. On the incomplete evidence in this case, it looks as if Cindan has broken its obligation in paragraph 2.3.1 by using the money in question for an impermissible purpose, but I am not asked to make a specific finding on the evidence. Paragraph 2.3.2 provides for the sum of money or a relevant part of it to be paid to the City Council on the happening, or more accurately the non-happening of the defined event. As I understood the evidence, the relevant date for this non-event has not yet arrived. There was no argument before me as to whether the City Council were obliged to wait indefinitely to see whether the event would or would not happen at some point in the future. As I have explained, paragraph 2.4 need not be considered in the events which have happened. Paragraph 2.5 deals with what the City Council can do with the money if and when it gets it from Cindan.

59. That is a sufficient description of the operation of the Custom House agreement on the particular facts which have come about.

<u>The Fourth Question</u>

60. The fourth question is whether the Cindan or the Hallyard agreements in some way supersede or even qualify the obligations of Cindan under the Custom House agreement. This suggestion that the later agreements might supersede the earlier agreement, was raised by Hallyard in correspondence, and indeed, was one of the matters which caused the City Council to bring these proceedings. However, the answer to the question is straightforward. Once one understands the operation of the three agreements, and in particular the character of the obligations on Cindan under the Custom House agreement, it is clear that the later agreements do not supersede, nor even qualify, the earlier provisions. There is simply nothing which prevents the provisions of the Custom House agreement, including the Cindan obligations therein, continuing in full force and effect at the same time as the later agreements have affect.

The Fifth Question

61. The fifth question is whether, apart from the possible application of section 106, the obligations on Cindan under the Custom House agreement bind anyone else, and in particular whether they bind Hallyard and/or AIB. *Prima facie* the obligations on Cindan are contractual obligations which do not bind the successors in title. The fact that Cindan is defined to include its successors in title cannot affect the general law of contract as to privity of contract. Nor are the obligations on Cindan restrictive covenants affecting land and entered into for the benefit of other land. They are obligations, first, not to use money otherwise than for a specified purpose, and secondly, to pay a sum of money to the City Council, thus the rules of equity about the running of the burden of restrictive covenants do not apply here.

62. There may be scope for argument as to whether the money paid to Cindan was impressed with a Quistclose Trust, see Barclays Bank Limited v Quistclose Investments Limited [1970] AC 567. That point was not argued before me, but for the avoidance of doubt I should state that nothing that has happened so far prevents the City Council putting forward that argument hereafter. If such an argument were put forward and if it succeeded, it might enable the City Council to follow or trace the money, or even seek other remedies against third parties implicated in a relevant way in breach of trust. At present, there is no sign that AIB was in any way involved with the receipt or use of trust monies, if that is what they were. In saying that, I leave open any other claim not relying on section 106 of the Town and Country Planning Act, which might be available to the City Council in relation to the actions of third parties such as Hallyard in relation to what happened to the sum of money in question. I have in mind the possibility that Hallyard may be vulnerable to a claim that they have in some way placed Cindan in breach of its contractual obligations and thereby are answerable for that.

The Sixth Question

63. That clears the way for me now to address the various questions which arise under section 106 itself. The sixth question is whether the obligations on Cindan under the Custom House agreement are such as to come within the scope of section 106. For section 106 to apply to an obligation and to make it a planning obligation, the circumstances set out in section 106(1) must be satisfied and the obligation in question must come within paragraphs (a) to (d) of section 106(1). Starting with the opening words of section 106(1), Cindan was, at the relevant time, interested in land in the area of the City Council. It was the freehold owner of the St Mary's site. It is not necessary for present purposes to ask whether the covenants which Cindan entered into with the developer, Barratts, are within section 106, as the self-same covenants were entered into with the City Council.

64. Of the various obligations taken on by Cindan in the Custom House agreement, the only obligations that could come within paragraphs (a) to (d) of section 106(1) are the obligation in paragraph 2.2 and the further obligation in

paragraph 2.3 to pay a sum of money to the City Council. It seems to me that the reference in section 106(1)(d) to "a specified date or dates" is satisfied by the formula in paragraph 2.3. Mr Newberry did not contend otherwise and I find that that part of section 106(1)(d) is satisfied in that respect. I also hold that the reference to the obligation being subject to conditions in section 106(2) applies in this case.

65. What Mr Newberry did submit was that the obligation to pay pursuant to paragraph 2, and in particular paragraph 2.3 of the second Schedule to the Custom House agreement, was not within section 106(1)(d) because the obligation on Cindan in this case was to repay and not to pay. I do not accept Mr Newberry's argument. The words in the statutory provision "to be paid" naturally cover the obligation on Cindan in this case. It does not seem to me to matter that, if it were the case, the money came from City Council to Cindan in the first place and the obligation on Cindan was to pay or repay that sum or a part of it to the City Council.

66. Mr Newberry stresses that this case is unusual. He says what usually happens is that the section 106 agreement requires the developer to make a commuted payment to the local planning authority. In such a case, he points out, there is no question of the authority providing the money in the first place, with the contingent obligation on the developer to repay it. I am sure that Mr Newberry is right about the typical case. Indeed, the 106 agreements in this case contain provisions which match what he describes as the typical case, but the section does not say that it applies only to the typical case and to no other. What it applies to depends on a fair reading, in the statutory context, of the statutory wording. I do not therefore accept Mr Newberry's submission in this respect.

The Seventh Question

67. The seventh question is whether there is anything in the circumstances of this case to prevent section 106 applying as a matter of principle. There was discussion at the hearing as to whether the very unusual obligations undertaken by Cindan in this case were of a kind which could be within section 106. There was debate as to the purpose for which the statutory power was conferred and whether the obligations in this case could be imposed on Cindan within those statutory purposes, or whether the obligations fell outside the statutory purposes.

68. I reach my conclusion in this case by comparing the obligations undertaken by Cindan with, for example, a positive obligation on Cindan to construct affordable housing on the St Mary's site, or a restriction on Cindan's use of the St Mary's site in the absence of such affordable housing. There is no doubt that those obligations could be imposed under section 106. In my judgment, the obligations in the present case operate in a similar way in planning terms in that Cindan, as the intended developer of a block of flats, is provided with a sum of money which can only be used to provide affordable housing and, if it is not so used, must be paid over to the Council. The

obligations on Cindan are for the indirect purpose of bringing about the provision of affordable housing. I am therefore not prepared to hold that such obligations fall outside the boundaries of the statutory purposes of section 106 wherever precisely those boundaries are.

The Eighth Question

69. The eighth question which, in the circumstances becomes a most important question, is whether the formal requirements of section 106 were complied with in relation to the Cindan obligations in the Custom House agreement. I have referred to subsection 106(9) earlier in this judgment. The section 106 agreement is, in large part, in the City Council's standard form. The agreement was undoubtedly a section 106 agreement in relation to the obligations of Barratts as the owner and the intended developer of the Custom House site. The obligations of Barratts were planning obligations within section 106.

70. It is instructive to see how the formal requirements of section 106 were complied with in relation to Barratts. The agreement begins with Recital A, which refers to the role of the City Council as the local planning authority for the purposes of section 106. Recital B sets out in detail and with care the nature of the property interests of Barratts and the Society. The agreement continues with clause 1.1, which refers to section 106 and makes plain how the agreement was intended to operate under that section. However, clause 1.1 refers to Barratts and the Society but not to Cindan. So are the formal requirements met in relation to the obligations placed on Cindan?

71. Clause 1.1 stated the agreement was a planning obligation for the purpose of section 106. *Prima facie* that includes the parts of the agreement which impose obligations on Cindan. The contrary could be argued, but I will assume in favour of the City Council that section 106(9)(a) is complied with. As regards the obligations on Cindan, section 106(9)(b) is complied with: see in particular paragraph 2.2.1 of the second Schedule. Further, section 106(9)(d) is complied with. That leaves paragraph (c). The agreement identifies Cindan as the person entering into the relevant obligations, but does the agreement state what Cindan's interest is in the St Mary's site. In fact, I know from the evidence in this case that Cindan's interest in the St Mary's site was as freehold owner of it, but, in my judgment, that fact was nowhere stated in the Custom House agreement. A connection of some sort on the part of Cindan with the land is referred to, directly or indirectly, in Recital E, clause 2.3 and paragraphs 2.2 and 2.3 of the second schedule. Based upon the wording of the Custom House agreement alone, one could, of course, speculate as to what interest Cindan did have in the St Mary's site. One candidate in the course of that speculation would be that Cindan was the freehold owner of it, but that is very far from being the only candidate. My conclusion is that the Custom House agreement does not comply with section 106(9)(c) because it does not state what Cindan's interest was in the St Mary's site.

72. This point only emerged at a late stage in the argument. Mr Newberry did not indicate at the outset of the hearing, when I invited both counsel to define the real issues between them, that he intended to argue that the Cindan obligations were not within section 106. On the second day of the hearing he did make submissions to the effect that the words "to be paid" in section 106(1)(d) did not extend to this case, but he made no point on section 106(9). It was only when section 106 was examined in detail in the course of the hearing that I asked Mr Newberry whether the formal requirements of subsection (9) were complied with and this point then emerged.

73. In these circumstances, Mr Ramsden for the City Council, when he came to make his reply, had really no time to prepare himself to deal with this new point. Nonetheless, he did manfully address the point and in the end he invited me to decide it on the basis of the submissions made to me rather than for the matter to be adjourned for further argument on a later date. I now need to deal with Mr Ramsden's argument on section 106(9)(c). He submits that the reference to "his interest in the land" should be read consistently with the reference to "any person interested in land" in subsection (1). He next submitted that a person could be interested in land without having any particular proprietary interest in the land. He submitted that Cindan was plainly interested in the St Mary's site in that way, and it was not necessary for the Custom House agreement to state expressly whether Cindan had a proprietary interest in the land and, if so, what it was.

74. He drew my attention to the notes in the Encyclopaedia of Town and Country Planning at paragraph P106.11 dealing with section 106 and referring to Pennine Raceway Limited v Kirklees Metropolitan Borough Council [1983] QB 382. Even if I went part of the way with Mr Ramsden and held that "his interest in the land" in subsection (9)(c) did not require there to be a proprietary interest but could be satisfied by some other interest, my conclusion would still be that the Custom House agreement does not expressly state what that interest was.

75. It is not strictly necessary to decide whether the references to "interest in land" and similar references in section 106 require there to be a proprietary interest. The notes in the Encyclopaedia explain how this question may not matter very much in most cases. Indeed, even if the covenantor has to have a proprietary interest before he can enter into a planning obligation within section 106, the section says nothing about the nature or expected duration or assignability of that proprietary interest. That might, conceivably, call into question the notion that there has to be such an interest as a pre-condition to section 106 applying.

76. Nonetheless, my reaction to the language of section 106 is that it does require that the covenantor in relation to the planning obligation has a proprietary interest in the land. I regard the language of subsections (1), (3), (4), (9), (11) and (12) acting in combination, as strongly indicative of this intended meaning. I have considered the decision in Pennine Raceway Limited v Kirklees Metropolitan Borough Council. There is, as one would expect, much in the judgments which is interesting and potentially relevant. However, it is

not decisive of the meaning of interest in land in section 106 of the 1990 Act as amended by the 1991 Act. I can give my reasons succinctly as follows:

(1) As I read the judgments, all three members of the court held that the claimant in that case had a sufficient proprietary interest;

(2) Only one member of the court clearly rejected the idea that the section being considered in that case, namely section 164 of the Town and Country Planning Act 1971 required there to be a proprietary interest;

(3) Section 164 of the 1971 Act had a quite different purpose from section 52 of the 1971 Act, section 52 being the predecessor of section 106 of the 1990 Act;

(4) Eveleigh LJ's comment at page 389 on the operation of section 52 was obiter;

(5) Most significantly for present purposes, the wording of section 106 of the 1990 Act as amended by the 1991 Act, that is the wording to be applied in this case, is in many respects different from section 106 of the 1990 Act as enacted and from section 52 of the 1971 Act as considered in Pennine Raceways; the original section 106 effectively repeated section 52 which was considered by the Court of Appeal in that case;

(6) One of the ways in which the wording differs is in relation to further references being made in the new section 106 to "interest in land" in a way which suggests to me that the phrase refers to a proprietary interest; in any event, the widest reading of "interested in the land" in the Pennine Raceway case was that the claimant should have "a right in relation to the land", see at page 388G-H; even on that basis, paragraph 9(c) is not complied with here because the Custom House agreement does not state what that right is.

The Ninth Question

77. The ninth question is the consequence of the formal requirements of section 106 not having been complied with. Subsection (9) states that a planning obligation may not be entered into except by an instrument which states what the obligor's interest is in the relevant land. I have held that the Custom House agreement does not state what Cindan's interest is in the St Mary's site. It therefore seems to follow that the obligations placed on Cindan are not planning obligations and the City Council does not have the benefit of section 106 applying to them. The only way as I see it that one could avoid that result, would be to say that the requirements of subsection (9) are not mandatory but are directory only. The language of subsection (9) is not a promising start for a submission of that kind, and indeed, that submission was not advanced.

78. In these circumstances, my conclusion is that the obligations imposed on Cindan by the Custom House agreement are not planning obligations within section 106. It follows that section 106(3), which makes a planning obligation enforceable against persons deriving title from the obligor, cannot be relied upon by the City Council. Spelling that out, the City Council cannot rely on section 106(3) to say that Cindan's obligations are binding on Hallyard or on AIB.

Other matters

79. For the sake of completeness, I wish to mention one matter which was touched on in the course of argument. If Cindan's obligations had been planning obligations, they then would be enforceable against Hallyard as a successor in title and as a person deriving title from Cindan: see clause 2.3 and section 106(3). But would they be enforceable against AIB, who has not succeeded to Cindan's title, although it does derive title from Cindan for the purposes of section 106(3)? It could be argued that the obligation in paragraph 2.3 of the section schedule to the Custom House agreement is an obligation on Cindan or its successor in title to pay the sum of money in question, but there is no obligation on a person otherwise deriving title from Cindan to make a payment.

80. Mr Newberry showed no enthusiasm for this argument when I raised the question. Mr Ramsden suggested there were answers to it. His first suggestion was that as a matter of construction the phrase "successors in title" where it appeared in various places in the Custom House agreement, extended to persons deriving title from the obligor. He also suggested that one could not contract out of section 106(3) so that, even if the agreement said expressly that the obligation was personal to the obligor it could be enforced under section 106(3) against a person deriving title under the obligor, for example, a mortgagee or a chargee or even conceivably a weekly tenant of a part of the developed site.

81. I doubt if the second submission can be right. It would produce very unwelcome results if, for example, a weekly tenant of a flat in a completed development became liable to pay the full amount of a commuted payment due from the developer. I also draw attention to what the parties understood the operation of section 106 to be, when they agreed clause 1.2 in relation to the Custom House site.

82. In view of the fact that this point was not argued by AIB and the further fact that it does not in the event arise because of my earlier findings on section 106, I will leave the point there. However, I thought it right to mention it as I think it is worthy of consideration in a future case where it does arise.

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