Neutral Citation Number: [2020] EWHC 3104 (Ch)

Case No: BL-2020-001856

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building,
Fetter Lane,
London, EC4A 1NL

Date: 19 November 2020

Before :

MR RECORDER RICHARD SMITH
(Sitting as a Judge of the Chancery Division)

- -

Between :

ANTHONY CHARLES HARRIS	**Claimant**
- and -	
(1) MARTIN JOHN HOLLAND **(2) CHRISTCHURCH PROPERTY COMPANY LTD**	**Defendants**

- -
- -

William Edwards (instructed by DWF Law LLP) for the Claimant
Thomas Arnull (instructed by Prettys Solicitors LLP) for the 1st Defendant

Hearing date: Friday, 6 November 2020

- -

APPROVED JUDGMENT

The Judge:

Introduction

1. On 30 October 2020, Birss J ordered the expedited trial of this Part 8 claim. The trial took place remotely on 5 November 2020.

2. The claim concerns the proper construction of certain provisions of the Sale and Purchase and Settlement Agreement dated 24 July 2019 (the "SPSA") made following the dissolution of the partnership formerly conducted by the Claimant and the First Defendant.

3. As originally articulated, the Claimant, Mr Harris, raised six construction issues as set out in paragraph 14 of the details of claim annexed to the Part 8 Claim Form. By the time of the hearing, these had narrowed to three.

4. The First Defendant, Mr Holland (to whom I shall refer throughout simply as "the Defendant"), raises a preliminary argument, namely Mr Harris' non-compliance with the SPSA's dispute resolution provisions, requiring, he says, this claim to be stayed until compliance is achieved. The Defendant therefore proposed bifurcation of the trial so that this preliminary question could be considered first.

5. Although a logically prior question, I did not accede to that proposal. The Claimant maintains that the SPSA dispute resolution machinery had already been invoked in respect of the matters the subject of this Part 8 claim. It therefore appeared to me artificial to consider the non-compliance issue in isolation from, and without a proper understanding of, the substantive matters in dispute. The hearing therefore proceeded on a 'rolled up' basis.

6. At the hearing, the parties did not address me on the question of the appropriate form and terms of relief (if any). It was agreed that this aspect should be left over until after this judgment was handed down, allowing the parties' related submissions to be tailored to my actual findings rather than argued in the abstract.

Background

7. Mr Harris and Mr Holland were formerly engaged in business together conducted through different vehicles, namely (i) a partnership under the Partnership Act 1890 (ii) a limited liability partnership and (iii) 13 limited companies. The parties' relationship broke down and a number of disputes followed, as recorded in Recital C to the SPSA:-

> "*Numerous disputes have arisen between the parties over the past few years in respect of (without limitation) matters set out in all communications and correspondence to date between the parties' advisors*…."

8. A mediation was held on 5 July 2019, resulting in the conclusion of the SPSA on 24 July 2019. This provided for the winding down of the parties' joint business in four different ways.

9. First, a company owned by Mr Harris, TH Investment Holdings Ltd, bought (i) Mr Holland's shareholding in two companies, The Arches (Midlands) Ltd and Christchurch Land Ltd, and (ii) Mr Holland's 50% interest in A Harris & M Holland LLP (clauses 5 to 8). An overage provision was also included (clause 11).

10. Second, Mr Holland granted Mr Harris an option to acquire his shareholding in Colchurch Properties Ltd (Schedule 1, paragraph 1(f)).

11. Third, the ten "*Remaining Companies*" identified in Schedule 3 to the SPSA were to be managed by Mr Harris pending completion of their ongoing projects. Once those projects had concluded, the companies would then be wound up (clause 13).

12. Fourth, the SPSA also provided for the sale of the partnership assets, comprising five commercial and 71 residential freehold and leasehold properties (clause 12).

13. These partnership properties are owned either jointly by Mr Harris and Mr Holland or by Christchurch Property Company Limited ("CPC") as trustee for the partnership. CPC takes no active role in these proceedings but has been added as second defendant to ensure it is bound by my findings.

14. Despite the settlement of their differences in July 2019, further disputes arose during 2020 between Mr Harris and Mr Holland concerning the sale of the partnership assets and the construction of clause 12 of the SPSA, including whether Mr Holland's agreement was required for reductions to the asking prices for the properties as advised by the designated estate agents.

15. On 19 March 2020, Mr Harris served an "*Agreement Dispute Notice*" under the dispute resolution provisions in clause 21 of the SPSA ("the March ADN"). Since the parties were unable to resolve their differences between them, CEDR mediation was held on 10 June 2020. That mediation was unsuccessful.

16. In the meantime, Mr Holland served his own "*Agreement Dispute Notice*" on 24 April 2020.

17. The parties remain in dispute concerning the arrangements for the sale of the partnership properties, including a new argument from Mr Holland that, absent agreement between the parties, the residential properties can only be sold in the different 'phases' identified in Schedule 4 to the SPSA.

18. This Part 8 Claim Form was issued on 26 October 2020.

Substantive provisions of the SPSA

19. The material provisions relevant to the issues arising on this Part 8 claim are reproduced below.

20. Clause 1.1 contains the following definitions:-

> "*HB Commercial Properties*" means "*the freehold and leasehold properties set out in Part 1 of Schedule 4*" to the SPSA;
>
> "*HB Residential Properties*" means "*the freehold and leasehold properties set out in Part 2 of Schedule 4*" to the SPSA; and
>
> "*HB Properties*" means "*the HB Commercial Properties and the HB Residential Properties.*"

21. Clause 12 contains the main provisions for the sale of the partnership properties, with clause 12.1 providing that:-

> "*The parties acknowledge and agree that the Partnership has been formally dissolved and that the Partnership assets will be sold pursuant to this clause 12*."

22. Clause 12.2 addresses the sale of the "*HB Commercial Properties*":-

> "*Mr Harris and Mr Holland hereby agree and undertake to place, for open market sale, with Martin Reader, as sales agent, all of the HB Commercial Properties immediately at such sale price as, following prior consultation with Mr Harris and Mr Holland, Martin Reader shall advise ("**Relevant Commercial Sale Price**").*"

23. Clause 12.2 therefore provides for the immediate placing of the "*HB Commercial Properties*." This contrasts with Clause 12.3 of the SPSA which provides that the "*HB Residential Properties*" were to be placed "*as soon as reasonably practicable*", albeit a subset were to be placed for immediate sale:-

> "*Mr Harris and Mr Holland hereby agree and undertake to place, for open market sale, with Keystone Residential Agents (Ipswich properties) and Payne Associates (Coventry properties), as sales agent, all of the HB Residential Properties as soon as reasonably practicable and in such numbers and at such times as Keystone Residential Agents and Payne Associates shall advise (including those HP* [sic] *Residential Properties marked as Phase 1 in Schedule 4 which shall be placed for immediate sale) at such sale price as, following prior consultation with Mr Harris and Mr Holland, Keystone Residential Agents and Payne Associates shall advise ("**Relevant Residential Sale Price**").*"

24. Clauses 12.4 and 12.5 concern the appointment of designated estate agents and solicitors:-

> "*Mr Harris and Mr Holland undertake to immediately provide to each of Martin Reader, Keystone Residential Agents and Payne Associates letters*

> *of instruction and shall provide to Hayward Moon Solicitors (solicitors appointed by the Partnership to act on their behalf in respect of the sale of the HB Properties) a letter of instruction*." (clause 12.4)
>
> "*Any change in the sales agents (being Martin Reader, Keystone Residential Agents or Payne Associates) and/or the termination of their appointment as sales agents for the relevant HB Properties and any change in the conveyancing solicitors (being Hayward Moon Solicitors) and/or the termination of their appointment shall require the prior written consent of each of Mr Harris and Mr Holland. In the event that Mr Harris and Mr Holland cannot agree opn* [sic] *a replacement agent each shall be entitled to appoint an agent to jointly market the properties for sale*." (clause 12.5)

25. Clause 12.6 provides for the automatic acceptance of offers for the purchase of the "*HB Commercial Properties*" if a 95% threshold is met:-

> "*Unless otherwise agreed in writing between Mr Harris and Mr Holland in the event that an offer is made by a purchaser for any of the HB Commercial Properties which is no less than 95% of the Relevant Commercial Sale Price for the relevant HB Commercial Property then each of Mr Harris and Mr Holland irrevocably agree and undertake that such property sale shall be concluded as soon as reasoanbly* [sic] *practicable and that they shall promptly sign and execute all documentation necessary to effect such sale and that the proceeds of such sale received by Hayward Moon Solicitors shall, after discharge of all reasonable and properly incurred fees and expenses, be paid by Hayward Moon Solicitors as to 50% to Mr Harris and 50% to Mr Holland*."

26. Clause 12.7 provides in like terms for the "*HB Residential Properties*":-

> "*Unless otherwise agreed in writing between Mr Harris and Mr Holland in the event that an offer is made by a purchaser for any of the HB Residential Properties which is no less than 95% of the Relevant Residential Sale Price for the relevant HB Residential Property then each of Mr Harris and Mr Holland irrevocably agree and undertake that such property sale shall be concluded as soon as reasoanbly* [sic] *practicable and that they shall promptly sign and execute all documentation necessary to effect such sale and that the proceeds of such sale received by Hayward Moon Solicitors shall, after discharge of all reasonable and properly incurred fees and expenses, be paid by Hayward Moon Solicitors as to 50% to Mr Harris and 50% to Mr Holland*."

27. Clause 15 provides that:-

> "*The parties agree that they will (at their own expense) shall* [sic] *promptly execute and deliver such documents, perform such acts and do such things as the other party may reasonably require from time to time for the purpose of giving full effect to this agreement*."

28. Schedule 4 to the SPSA is divided into two parts. Part 1 identifies in tabular form the five "*HB Commercial Properties*" in the first column headed "*Property*", Martin Reader as the selling agent for each property in the second column headed "*Agent*" and the number "1" against each property in the third column headed "*Phase*".

29. Part 2 identifies in similar tabular format the 71 "*HB Residential Properties*", albeit the first column also identifies the city in which the relevant properties are located (Ipswich or Coventry) and the number shown against each property under the heading "*Phase*" ranges between 1 and 6 (inclusive).

30. An extract from the table is reproduced below for the first identified "*HB Residential Property*" in Part 2 of schedule 4:-

Property	**Agent**	**Phase**
Ipswich		
110 London Road (First Floor)	Keystone	1

31. Finally, the SPSA contains an entire agreement provision at clause 17.

SPSA dispute resolution provisions

32. Clause 21 sets out the SPSA dispute resolution provisions:-

> "*21.1 If a dispute arises out of or in connection with this agreement or the performance, validity or enforceability of it ("**Agreement Dispute**"), then the parties shall follow the procedure set out in this clause:*
>
> *(a) either party shall give to the other written notice of the Agreement Dispute setting out its nature and full particulars ("Agreement Dispute Notice"), together with the relevant supporting documents. On service of the Agreement Dispute Notice, the parties shall attempt in good faith to resolve the Agreement Dispute;*
>
> *(b) if the parties are for any reason unable to resolve the Agreement Dispute (save for any Agreement Dispute arising under clause 13.3 or clause 13.8 which shall be referred to the Expert (as defined in Schedule 7 for determination) within 15 Business Days of service of the Agreement Dispute Notice, the parties agree to enter into mediation in good faith to settle the Agreement Dispute in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 days of service of the Agreement Dispute Notice, the mediator shall be nominated by CEDR. To initiate the mediation, a party must serve notice in writing (ADR notice) to the other party to the Agreement Dispute,*

referring the dispute to mediation. A copy of the ADR notice should be sent to CEDR. Unless otherwise agreed between the parties, the mediation will start not later than 30 days after the date of the ADR notice.

21.2 No party may commence any court proceedings under clause 26 (Governing Law and Jurisdiction) in relation to the whole or part of the Dispute [sic] *until 15 Business Days after service of the ADR notice, provided that the right to issue proceedings is not prejudiced by a delay.*

21.3 If the Agreement Dispute is not resolved within 30 days after service of the ADR notice, or either party fails to participate or ceases to participate in the mediation before the expiry of that 30 day period, the Agreement Dispute shall be finally resolved by the courts of England and Wales in accordance with clause 26 (Governing Law and Jurisdiction) in this agreement."

33. As a preliminary point, the Claimant noted that reference to "*Dispute*" in clause 21.2 appears to be a drafting error. The Defendant did not demur. I agree. "*Dispute*" is a defined term in the SPSA at Recital C but one concerned with the compromise of the parties' existing disputes. By contrast, clause 21 is concerned with further disputes arising out of the SPSA. As used there, the word "*Dispute*" should therefore properly be read as "*Agreement Dispute*".

34. Finally, in terms of jurisdiction and governing law, clause 26 provides that:-

"*26.1 This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.*

26.2 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims)."

The 'live' issues in this Part 8 claim

35. Adopting the (re-ordered) formulation of the Defendant's skeleton argument (at paragraph [13]), the remaining 'live' issues in this Part 8 claim are set out below (and labelled numerically for ease of reference).

(i) **Issue 1: the 'pricing' issue**

"*Whether, having once been determined, the Relevant Commercial Sale Price can be altered absent an agreement to vary it between the parties.*"

(ii) **Issue 2: the 'phasing' issue**

"*Whether the Phases defined in Schedule 4 expressly and/or impliedly bind the parties not to commence the sale of properties belonging to subsequent phases prior to the sale of all properties belonging to Phase 1*."

(iii) **Issue 3: the 'consultation' issue**

"*Whether on its proper construction the term "prior consultation" in clause and* [sic] *12.3 applies to certain correspondence relating to the proposal by Keystone Residential Agents as to the prices for which various properties should be marketed, and consequently whether the contractual obligation in that clause to place, for open market sale at the price advised is engaged*."

The Defendant's arguments for a stay

36. As noted above, the Defendant asserts the Claimant's non-compliance with the dispute resolution process in clause 21 of the SPSA. The starting point for the Defendant's analysis was the use of the word "*shall*" in clause 21.1 connoting its mandatory application to disputes falling within its scope. In addition, the authorities show that such processes should be upheld if they are sufficiently certain in their terms and clearly defined (see *Wah v Grant Thornton International Ltd* [2014] 2 CLC 663 at [56] to [61]). Given its terms, I agree that clause 21 is binding on the parties and that the Court should ordinarily give effect to it. The Claimant did not suggest otherwise.

37. The parties' principal difference was whether an "*Agreement Dispute Notice*" had already been served in respect of the 'phasing' issue (Issue 2 above). Summarising the Defendant's arguments:-

(i) the dispute concerning 'phasing' of the property sales is clearly an "*Agreement Dispute*" within the meaning of clause 21.1 of the SPSA;

(ii) it is separate and distinct from the 'pricing' issue (Issue 1);

(iii) the March ADN does not concern the 'phasing' issue (Issue 2) nor the properties with which the 'phasing' issue is concerned;

(iv) it is not enough to characterise this Part 8 claim and the disputes the subject of the March ADN as both relating to the construction of clause 12 of the SPSA - the particular issues raised previously are not the same;

(v) this is reinforced by the 'phasing' issue implicating schedule 4 to the SPSA with which, again, the March ADN was not concerned;

(vi) the 'phasing' question is, therefore, logically independent of, and has no implication for, the matters raised in the March ADN;

(vii) accordingly, for the court to entertain a claim concerning the 'phasing' issue, it must first be the subject of a new "*Agreement Dispute Notice*"; and

(viii) until that occurs, and the clause 21 process otherwise exhausted, this Part 8 claim should be stayed.

The Claimant's arguments against a stay

38. In opposing a stay, the Claimant argues that the parties have been in dispute since early 2020 about the interpretation and operation of clause 12 of the SPSA. The Claimant relies on the terms of the March ADN which, he says, show the parties' core dispute then (as now) was whether:-

(i) the asking price of the properties can be varied without the agreement of Mr Harris and Mr Holland; and

(ii) the consent of Mr Harris and Mr Holland is required for the marketing of the properties.

39. As to that core dispute, the Claimant points, for example, to the following particulars in the March ADN concerning clause 12.3 of the SPSA and the "*HB Residential Properties*" (Claimant's emphasis in **bold**):-

> "*Nature and full particulars of the Agreement Dispute*
>
> ……
>
> *Clause 12.3*
>
> *Clause 12.3 states:*
>
> > *"Mr Harris and Mr Holland hereby agree and undertake to place, for open market sale, with Keystone Residential Agents (Ipswich properties) and Payne Associates (Coventry properties), as sales agent, all of the HB Residential Properties as soon as reasonably practicable and in such numbers and at such times as Keystone Residential Agents and Payne Associates shall advise (including those HP* [sic] *Residential Properties marked as Phase 1 in Schedule 4 which shall be placed for immediate sale) at such sale price as, following prior consultation with Mr Harris and Mr Holland, Keystone Residential Agents and Payne Associates shall advise ("Relevant Residential Sale Price").*"
>
> *HB Residential Properties are defined in Part 2 of Schedule 4 to the SPSA. These include (amongst others):*
>
> 1. *The Warren Levy;*
> 2. *All Burlington Road properties;*
> 3. *All 21 London Road properties*."

40. The March ADN then recites extracts from correspondence from (i) the agent proposing the commencement of marketing of certain of the "*HB Residential Properties*" at reduced pricing (ii) Mr Harris agreeing to this course (iii) the agent confirming Mr Holland's acknowledgement of the proposal but "*not the go ahead to market*" and (iv) Mr Holland's solicitors explaining that the "*Relevant Commercial Sale Price*" or "*Relevant Residential Sale Price*" is not a "*dynamic figure*" and that an offer of less than 95% of such price as is "*fixed*" at the time of placement could only be accepted with the parties' agreement.

41. The March ADN continued:-

> "*You are in breach of clause 12.3 by your actions and omissions:*
>
> 1. *You have failed to place, for open market sale, the HB Residential Properties as soon as reasonably practicable and in such numbers and at such times as Keystone Residential Agents and Payne Associates shall advise (including those HB Residential Properties marked as Phase 1 in Schedule 4 which shall be placed for immediate sale).*
>
> 2. *You have disagreed with the sale price, as following prior consultation with us, Keystone Residential Agents and Payne Associates shall advise.*
>
> *Further, your interpretation of clause 12.3 is wrong:*
>
> 1. ***You contend that your agreement (as to price and placing the properties on the market) is required. It is not: you provided your agreement in the SPSA.***
>
> 2. *We are bound to follow the advice of the agents following prior consultation and offer the properties on the open market at the price advised.*
>
> 3. *The price is not fixed and may change from time to time the agents advise following prior consultation with us.*
>
> *Further, even if clause 12.3 does not expressly state that the Relevant Residential Sale Price is dynamic (which is denied), there is an implied term to that effect*."

42. The Claimant also relies on the particulars in the March ADN corresponding to (i) clause 12.2 of the SPSA (concerning the "*HB Commercial Properties*") and (ii) the co-operation provisions in clauses 12.6 and 12.7 which, he says, are parasitic to clauses 12.2 and 12.3 respectively.

Stay – discussion

43. Based on the parties' submissions, it appears to be common ground that the March ADN encompasses the 'pricing' issue (Issue 1). Although the Defendant raised the point in oral submission that the March ADN concerned sales of properties no longer 'in play', I did not understand him to be saying that a new "*Agreement Dispute Notice*" had to be served if the 'pricing' issue arises again with respect to a different "*HB Property*."

44. If that contention were being made, in my judgment, it would not be sustainable since the 'pricing' issue concerns an issue of legal principle arising on the proper construction of clauses 12.2 and 12.3 of the SPSA that is not unique to a particular "*HB Property*" but implicates the entire portfolio. As such, it is sufficient for the purpose of clause 21 and, therefore, this Part 8 claim that it has already been raised in the March ADN.

45. The Defendant's principal contention was that the 'phasing' issue (Issue 2) has not been raised in the March ADN in like manner to the 'pricing' issue nor could it have been since it only arose following the agents' more recent proposal to take advantage of current favourable market conditions to place the entirety of the remaining portfolio on the market.

46. Although the Defendant is correct that the 'phasing' issue was not raised in the March ADN in the terms articulated in paragraph 35(ii) above, in my judgment, the approach he urges risks taking too narrow a view of what is, in fact, required to engage clause 21 of the SPSA. That clause is concerned with 'disputes', not necessarily with the underlying legal arguments which might go to support or undermine the parties' rival positions.

47. Standing back from those arguments, and considering the substance of the Claimant's contentions in the March ADN, what appears to me to have been in 'dispute' is the parties' obligations under clause 12 of the SPSA and, specifically, whether the parties' consent was required to (i) adjust the asking price of the "*HB Properties*" and (ii) place them on the market.

48. In my judgment, the same overarching 'dispute' arises in this Part 8 claim. The fact that the requirement for the parties' consent is now said to arise not merely on account of proposed adjustments to the asking prices of the "*HB Properties*" but by reason of new facts, the proposed accelerated marketing of the portfolio, allowing the Defendant to raise a new argument – the 'phasing' issue (Issue 2) - does not, in my view, alter the underlying 'dispute' as to whether the parties have, through the auspices of the SPSA, already agreed to relinquish control over the sale of the "*HB Properties*". On this basis, I would accordingly refuse a stay.

49. I should add, however, that the Defendant accepts that, even if clause 21 is engaged with respect to the 'phasing' issue, the court still retains the discretion to refuse a stay. In those circumstances, I would still have exercised that discretion to do so. First, it is common ground that the 'pricing' issue (Issue 1) has already been sufficiently ventilated in the clause 21 process and the Defendant does not suggest otherwise in relation to the 'consultation' issue (Issue 3) either. Accordingly, even if the Defendant were correct that Issue 2

remains amenable to the clause 21 process, it would still, in principle at least, be open to the Claimant to move forward in this Part 8 claim on these other two issues. This would likely lead to additional cost, delay and the disjointed resolution of the parties' disputes.

50. Second, although the Defendant has complained about this Part 8 claim being brought without proper adherence to pre-action procedures, this is not a case in which the Claimant has sought to 'leapfrog' the clause 21 process to gain some tactical advantage. To the contrary, the Claimant has engaged in that process and the new argument with which he is now met – the 'phasing' issue (Issue 2) – arises because of the emergence of new facts – a proposed new marketing strategy - not known prior to that process originally playing out.

51. Third, although for present purposes I have ignored the merits of the parties' substantive arguments, it does seem to me relevant to the exercise of my discretion that the 'phasing' issue (Issue 2) is a matter of pure construction which the court can deal with in short order, rather than one which might lend itself more readily to commercial settlement through the prior clause 21 procedures.

52. Fourth, although the Defendant argues that the benefit of the proposed accelerated marketing strategy is speculative, the agents' advice may yet prove to be prescient. If the Defendant is wrong on the merits of the 'phasing' issue (Issue 2) but the clause 21 process has to be re-engaged first, the resulting delay would be detrimental to both parties in terms of the less beneficial realisation of the partnership assets. If, however, the anticipated benefit did, in fact, turn out to be illusory, that would likely become readily apparent and the marketing strategy could be re-adjusted without any such detriment being suffered.

53. Accordingly, even accepting the Defendant's arguments on the stay question, and having considered both the public policy interest in upholding the parties' bargain in the SPSA and the furtherance of the overriding objective, I would still have come to the conclusion that a stay should be refused in the circumstances of this case.

The merits of Issues 1-3 - relevant legal principles

54. I now turn to consider the parties' arguments on the merits of Issues 1-3, as to which, they were both agreed that these fell to be determined as a matter of the proper construction of the SPSA. There was no debate about the relevant principles of construction and I have followed the approach indicated by the Supreme Court in *Arnold v Britton* [2015] AC 1619, keeping well in mind the guidance provided at paragraphs [15]-[23] and [76]-[77].

55. I should also add that both parties agreed that, despite the dissolution of the partnership and their subsequent agreement to the SPSA, they were still subject to ongoing duties, including of good faith and honourable conduct, until the winding up of the partnership has been achieved (see, for example, *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 WLR 605, at 613). The proper construction of the SPSA therefore falls to be considered in that light as well.

56. Finally, as an alternative to approaching the issues as a question of construction, both parties have also sought to rely on certain implied terms as a matter of obviousness and/ or business efficacy. Again, there was no dispute as to the proper legal basis for any such implication as explained in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742. Nor was there any dispute that terms can be implied notwithstanding the presence of an entire agreement provision such as that found at clause 17 of the SPSA (*JN Hipwell & Son v Szurek* [2018] EWCA Civ 674, at [27]).

Issue 1: the 'pricing' issue

57. Briefly stated, the 'pricing' issue concerns whether, for the purpose of clauses 12.2 and 12.3 of the SPSA, the asking price as advised by the relevant agent when the relevant "*HB Property*" is first placed on the market is 'fixed' at that point (as the Defendant contended at the hearing) or whether it is 'dynamic' and can be adjusted thereafter by the agent 'from time to time' (as the Claimant contends). The significance of the issue stems from clauses 12.6 and 12.7. These provide for the parties' automatic acceptance of offers to purchase the "*HB Properties*" at no less than 95% of the asking price. If that threshold is measured against a 'fixed' asking price at the time of original market placing, the agreement of the parties will be required for any reduction in asking price, at least if it leads to offers below the threshold level. If, however, that threshold is measured against a 'dynamic' asking price, as adjusted 'from time to time', the need for such agreement is less likely to arise.

Issue 1: the 'pricing' issue – Claimant's arguments

58. At the hearing, the Claimant accepted that, as a matter of language, the words in clauses 12.2 and 12.3 "… *to place, for open market sale, … at such sale price as* [the agents] *shall advise*" could mean (i) the sale price as advised by the agents when the property is first marketed or (ii) the sale price as advised by the agents 'from time to time'. However, the Claimant also says that the context is important here to show why the 'flexible' approach to the sale price is to be preferred.

59. First, the SPSA sets out a mechanism for the sale of the partnership assets. This was not intended to be a protracted process. On the Defendant's construction, it would be, consent having to be sought more regularly and, possibly, refused. Second, the parties entered into the SPSA to put behind them their prior disputes. On the Defendant's construction, such disputes are more likely to re-surface if one of the parties withholds his consent. Third, although clauses 12.2 and 12.3 require the parties to be consulted on the asking price, the SPSA deliberately delegates important decisions or steps in the marketing and sale of the "*HB Properties*" to independent professionals without the need for party consent. The Defendant's construction would undermine this. Fourth, if the agents can be trusted to advise on the initial asking price, they can also be trusted to advise on any adjustments. Fifth, the SPSA contains no mechanism for the formal valuation of the "*HB Properties*" as opposed to more informal

advice by the agents on proposed asking prices. The initial asking price will, therefore, necessarily be less accurate and more susceptible to adjustment once it is properly tested against the market. Sixth, such adjustment could be either way, depending on market sentiment, but will not inevitably be downwards. Seventh, there is no obvious commercial reason for locking the 95% threshold into the initial asking price.

60. The Claimant also noted that the SPSA contains no specific mechanism to resolve stalemate if the agent's advice as to price adjustment is not accepted by one of the parties. This contrasts with clauses 13.10 and 13.11 of the SPSA concerning the "*Remaining Companies*" which do provide a deadlock mechanism in the circumstances described there. Stalemate under clause 12 was unlikely to be intended but this would be the effect of the Defendant's argument.

61. Finally, on the construction contended for by the Defendant, a reduction to the asking price would require a formal variation under clause 18 of the SPSA (see *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119). The parties are unlikely to have required such formalities for something as unexceptional as a proposed change to the asking price.

62. Alternatively, the Claimant argues that a term should be implied into the SPSA that the agent's decision on adjustments to the asking price are final and binding on the parties. The whole point of the SPSA was to put into the hands of the agents, not the parties, the ultimate decision as to asking price. An approach leaving open to party agreement potentially controversial questions about reductions to the asking price would be inconsistent with that objective. If asked what should happen if the asking price is too high and the agent seeks to reduce this following consultation, the 'officious bystander' would say it was 'obvious' that the agents' decision is final. The same term can be implied as a matter of business efficacy, the test not being one of 'absolute necessity' but whether the SPSA would otherwise lack commercial or practical 'coherence' (*Marks & Spencer* at [21]). On the Defendant's interpretation, that is satisfied here given the absence of a deadlock mechanism.

Issue 1: the 'pricing' issue – Defendant's arguments

63. At the hearing, the Defendant argued that the "*Relevant Commercial Sale Price*" and "*Relevant Residential Sale Price*" for the purpose of the 95% threshold requirement is that advised by the agents when the properties are *placed* on the market. That is what clauses 12.2 and 12.3 say in terms. To allow them to operate by reference to subsequent adjustments to the initial asking price would be inconsistent with the agreed contractual mechanism. If the parties had intended the agreed threshold to operate as contended for by the Claimant, it would have been easy for the parties to frame clauses 12.2 and 12.3 by reference to the asking price as advised by the agents 'from time to time'. They did not do so. The purpose of the threshold was to ensure a predictable and orderly process for the realisation of the partnership assets but this would be undercut if the agreed machinery could be circumvented by price changes instigated by the agents rather than by party agreement.

64. The Defendant too made a number of contextual points. First, allowing the asking price to be adjusted from time to time so that offers could be made to comply with the 95% threshold requirement would be a recipe for dispute. Second, it is true that the SPSA does have the effect of taking decisions out of the hands of the parties, but only to a point. That point is the 95% threshold requirement as measured against the initial asking price. Third, it is not right to say that the winding up of the partnership and disposal of its assets would be delayed indefinitely as a consequence of any deadlock. The parties are still subject to their duties as former partners. Fourth, the parties have agreed to bind themselves in advance to a predictable process triggered only by satisfaction of the 95% threshold. That process would be rendered nugatory if the agents could revise the asking price from 'time to time'.

Issue 1: the 'pricing' issue – discussion

65. I first consider the wording of clause 12.3, as to which, the Defendant's principal textual argument at the hearing (see the Defendant's skeleton argument at paragraph [43]) was as follows:-

> "*It is clear on face of clause 12.3 that the "Relevant Commercial* [sic] *Sale Price" is defined as the price at which property is placed for open market for* [sic] *sale. A property is placed for sale on the open market when it is made available for sale, having immediately prior been unavailable for sale. The alteration of the price demanded for a property which is already available for sale on the open market, does not amount to "placing" that property on the market*."

66. Upon reviewing the SPSA further after the hearing, it occurred to me that the words "*to place*" in clauses 12.2 and 12.3 might not be concerned with 'placing' the properties *on the market*, rather than with 'placing' the properties *with the agents*. Since this textual point was not canvassed in those terms at the hearing, I invited the parties' further comment. Both provided brief supplementary submissions. The Claimant argued that this alternative construction supported his contention that the Defendant focused too narrowly on the 'placing' language rather than giving proper effect to the clause as a whole. The Defendant agreed that, on reflection, this alternative construction was to be preferred but argued that its effect was neutral for his argument on the 'pricing' issue (Issue 1) and supportive of that on the 'phasing' issue (Issue 2). I am grateful to the parties for their respective supplementary submissions and I have taken them fully into account when preparing this judgment.

The natural and ordinary meaning of clause 12.3

67. As a preliminary matter, I should note that, syntactically, clause 12.3 is not without difficulty. Nevertheless, having considered carefully the SPSA and the parties' related submissions, it appears to me that clause 12.3 does not have the textual meaning argued by the Defendant (whether at the hearing or in his latest written submissions) but that, even if it did, he still places too narrow an

emphasis on the words "*to place*" which, when considered in the context of the clause as a whole, do not bear the weight he ascribes to them.

68. First, the clause performs two quite different functions: (i) to supply the parties' authority for 'placing' all the "*HB Residential Properties*" and (ii) to set out the process for their marketing and sale in terms of their number, timing and price at which they are to be sold.

69. Second, the clause does not say "*to place on the open market*". It says "*to place, for open market sale, with* [the agents]." The first step chronologically is therefore "*to place*" the portfolio in the agents' hands. The words "*for open market sale*" describe the purpose of that placing, not the act of placing itself. (This is to be contrasted with the further words "*which shall be placed*" in parentheses later in clause 12.3 which are concerned with the 'placing' on the market of a subset of the "*HB Residential Properties*".)

70. Third, clause 12.3 provides for the 'placing' of "*all of the HB Residential Properties*". The later reference to "*in such numbers ... as* [the agents] … *shall advise*" is inconsistent numerically and cannot therefore also relate back to the words "*to place*".

71. Fourth, likewise, clause 12.3 provides for their 'placing' "*as soon as reasonably practicable*". The later reference to "*at such times ... as* [the agents] … *shall advise*" is inconsistent temporally and cannot therefore also relate back to the words "*to place*".

72. Fifth, these later references to "*in such numbers*" and "*at such times*" (both as the agents "*shall advise*") must, therefore, relate back to the "*for open market sale*" language. Since both are concerned with the second function of clause 12.3 - the marketing and sales process - this makes sense.

73. Sixth, since this merely describes another aspect of the marketing process, the same must also be true of the later reference in clause 12.3 to "*at such sale price as* [the agents] *shall advise*".

74. Accordingly, in my judgment, there is no textual warrant for limiting the meaning of "*Relevant Residential Sale Price*" to the sale price at 'placing'. Indeed, when such 'placing' is properly identified as the 'placing' of the portfolio *with the agents*, it seems stilted to say that this would occur at any particular sale price even if it were possible by that point for the agents already to have advised on the initial asking price (which seems an ambitious proposition).

75. Moreover, even if clause 12.3 did concern the 'placing' of the properties *on the market* (which I have found it does not), there would still be no warrant for limiting the meaning of "*Relevant Residential Sale Price*" to the initial asking price of the property. The agents' advice during the marketing process is necessarily iterative and may change as market conditions, sentiment and pricing are tested. It is perhaps an obvious point but provisions concerned with

a dynamic marketing process are unlikely to be constrained by reference to historical asking prices at or near to which the properties may never be sold.

76. Accordingly, on the proper textual analysis, I find that the ordinary and natural meaning of the words "*such sale price as* … [the agents] *shall advise*" in clause 12.3 is such advice as may be rendered by the agents '*from time to time*'. Although the Defendant points out that these further words were not used in clause 12.3, for the reasons I have given, there was no need to do so - the clause already bears that meaning.

The overall purpose of clause 12.3/ SPSA

77. Standing back from this close textual analysis, I am reinforced in my view by a number of further matters relevant to the construction of clause 12.3, some of which were canvassed by the parties at the hearing. I have already addressed the two functions of clause 12.3 (see paragraph [68] above) and how my findings are consistent with the second function with which the 'sale price' language is concerned.

78. I also agree with the parties that the three fundamental objectives of the SPSA more generally were (i) the settlement of the parties' disputes (ii) predictability and (iii) the orderly winding up of the partnership business. Those objectives were achieved by establishing a mechanism in the SPSA which (i) takes the marketing and sales process out of the parties' hands, putting it with designated professionals instead, and (ii) binds the parties to offers meeting the 95% threshold. If the threshold were applied to the initial asking price rather than the asking price as may be refined in response to the marketing process, fewer compliant offers are likely to be received if it turns out that the agents' initial views were too optimistic. The parties would then be stuck with that initial asking price for the purpose of the engagement of the threshold, leaving it open to one of them, however unrealistically, to hold out for a more ambitious offer.

79. In my view, this would undermine the above objectives: first, it would afford greater discretion to the parties on pricing and, therefore, greater scope for dispute; second, although a mechanism geared to the initial asking price would, in a limited sense, be 'predictable', it would be less predictable in the more important sense of knowing that the portfolio will be sold; third, if the portfolio could not be sold, or sale delayed because the threshold was set too high, the orderly winding up of the partnership would be undermined. These concerns would not be mitigated by the parties' ongoing duties as former partners. They were subject to those duties while engaged jointly in business together but they still fell into significant dispute.

80. Nor was I was persuaded by the argument that using the asking price 'from time to time' might result in the agents adjusting the price to conform with the threshold. The agents are independent professionals and their job is to secure the best sale price for their clients. This is also in the agents' best interests since they will be remunerated commensurately. Moreover, if the agents were willing to act in the way suggested by the Defendant, the Defendant's construction does not meet the concern since the agents could set the initial asking price

conservatively. However, I do not accept that they would act in this manner and I also note that the parties enjoy the protection of both the consultation requirement and the 95% threshold.

Commercial common sense

81. I have already mentioned that adopting the agents' advice 'from time to time' for the purpose of clause 12.3 makes commercial sense (see paragraph [75]). In this context, the initial advice received from the agents may also be revised upwards if, for example, market conditions turn out to be more favourable than originally advised. As the Claimant says, price adjustments are not a 'one-way street'. However, on the Defendant's approach, absent the parties' agreement otherwise, they would be presumably still be bound to accept offers based on the initial asking price even if the agents subsequently formed the view that higher offers might be achievable.

82. The point is also of broader significance than merely the sale price. Without pre-empting consideration of the 'phasing' issue (Issue 2), it appears to follow from the Defendant's argument that the number and timing of the property sales would also be constrained by the agents' initial advice. This too does not seem to make commercial sense.

Other provisions of the SPSA

83. Finally, I agree with the Claimant that, if the parties had intended clause 12.3 to operate in the manner contended for by the Defendant, they would likely also have agreed some further mechanism for resolving any differences arising concerning changes to the asking prices of individual properties with a view to avoiding deadlock, just as they did for the "*Remaining Companies*" under clauses 13.10 and 13.11. On the Defendant's case, however, the elaborate dispute resolution mechanism in clause 21 would presumably have to be invoked unless the parties agreed to the change in asking price. However, even if they did agree, this would still have to be recorded in writing and signed by the parties to be effective (see clause 18 of the SPSA). Both mechanisms seem unduly burdensome to address each and every proposed change to an asking price across a portfolio of more than 70 properties.

84. For these reasons too, I reject the Defendant's construction of clauses 12.2 and 12.3 and I hold that the construction contended for by the Claimant is correct. As a result of my findings, I also hold that there is no need to imply the term contended for by the Claimant in the alternative to his primary construction argument.

Issue 2: the 'phasing' issue

85. In short, the Defendant contends, as a matter of construction of Schedule 4 to the SPSA, read in conjunction with clause 12.3, alternatively by way of the implication of a term, that the sale of the "*HB Residential Properties*" is required to take place in the six separate phases indicated in Schedule 4.

Issue 2: the 'phasing' issue - Claimant's arguments

86. The Claimant says that the timing of any property sales falls to be decided as a matter of the proper construction of clause 12, not Schedule 4. Schedule 4 merely identifies the "*HB Properties*" as defined earlier in the SPSA, it is of no independent operative effect and cannot therefore act as an aid to construction. The identification of six phases in Schedule 4 is mere superfluity of language.

87. Clause 12.3 distinguishes between: (i) the overall position that the portfolio is to be placed "*as soon as reasonably practicable*", with the agents providing ongoing advice as to number and timing of the individual property sales and (ii) by way of limited exception to that, the immediate placing of those properties "*marked as Phase 1 in Schedule 4*". There is nothing in clause 12.3 to suggest that the portfolio is to be sold in 'phases'. To the contrary, the "*as soon as reasonably practicable*" language is inconsistent with 'phased' sales. There is, therefore, no basis for implying a term to the same end either.

88. Finally, the Defendant's construction would again lead to extensive delay if properties had to be held back from the market, particularly when coupled with his arguments on the 'pricing' issue (Issue 1). This would again be inconsistent with the fundamental objectives of the SPSA.

Issue 2: the 'phasing' issue - Defendant's arguments

89. The Defendant says it is evident from Schedule 4 to the SPSA, and its separation of the properties into different phases, that the properties are to be sold in a 'phased' manner. Such explicit separation would serve no useful purpose otherwise. If, as the Claimant contended, the purpose of Schedule 4 was the mere enumeration of the properties, this could easily have been achieved without any reference to 'phasing' at all. Moreover, clause 12 itself uses the words "*Phase 1*". As such, the operative provisions of the SPSA also contemplate the sale of the properties in a particular order.

90. The phased sequencing of the property sales is also consistent with the purpose of the SPSA. First, it ensured the orderly winding up of the SPSA by not deluging the market with all the properties, thereby avoiding sale price deflation. Second, it ensured the minimisation of disputes by setting out an agreed and predetermined order of sale, thereby avoiding any argument as to when the properties should be marketed.

91. Finally, even if the requirement for the phased sale of the properties could not be said to be an express term of the SPSA, this could nevertheless be implied. An 'officious bystander' observing the system of phasing envisaged by Schedule 4 would conclude that this particular order for sale of the properties should 'obviously' be followed absent contrary agreement by both parties.

92. Alternatively, a term to the same end could be implied by reason of business efficacy. The SPSA would lack 'practical coherence' if the first phase identified in clause 12 was of binding effect but the remaining phases identified in Schedule 4 were not.

Issue 2: the 'phasing' issue - discussion

93. As I have found under Issue 1, clause 12.3 provides that (i) the entire "*HB Residential Property*" portfolio shall be placed with the agents "*as soon as reasonably practicable*" and (ii) those properties will be sold "*in such numbers and at such times as* [the agents] *shall advise*". The only restriction on the agents in terms of the number and the timing of the sales concerns those properties "*marked as Phase 1 in Schedule 4 which shall be placed for immediate sale*". Accordingly, subject only to that one restriction, clause 12.3 vests in the agents a broad discretion as to the number and timing of sale of the residential portfolio. If the parties had intended that discretion only to be exercisable within a system of multiple 'phases', they could easily have said so in clause 12.3. They did not.

94. I cannot, however, consider clause 12.3 in isolation but must do so in conjunction with Schedule 4. It appears from the definition of "*HB Commercial Properties*" and the "*HB Residential Properties*" that the purpose of Schedule 4 is to identify those properties. Indeed, looking at Schedule 4, it comprises a list of the properties (and, for some, their location), the designated selling agent and a number between 1 and 6 under the column heading "*Phase*". The Schedule itself contains no substantive or operative provision or any explanation for the different 'phases'. Since the SPSA, construed as a whole, ascribes no significance to the six phases beyond how the properties "*marked as Phase 1*" are to be dealt with, it is not open to me to do so. To the contrary, the fact that the "*properties marked as Phase 1*" alone are singled out in clause 12.3 reinforces my view that the SPSA does not bear the meaning contended for by the Defendant.

95. That this outcome leads to a superfluity of language in Schedule 4 does not alter my view. That superfluity does not appear in the operative provisions of the SPSA but from a list which the parties used for identification purposes. The provenance of the list is unclear, although the Defendant suggested that the purpose of phases 1-6 was to avoid the market being deluged with the portfolio, thereby depressing prices. However, this is not apparent from the terms of the SPSA itself which, objectively construed, afford the agents the broad discretion I have described. Nor would it be open to me to have regard to the subjective intention of the parties in any event.

96. Nor is there any basis for implying the term contended for by the Defendant. Notwithstanding this superfluity of language, it would not strike the 'officious bystander' as 'obvious' that the phased sales of properties was required, nor does it render the SPSA 'practically incoherent'. To the contrary, such a term is inconsistent with the operative language of clause 12.3. In my judgment, this is fatal to the implication of such a term.

97. I therefore reject the construction (and the implied term) contended for by the Defendant on Issue 2 and I hold that the construction contended for by the Claimant is correct.

Issue 3: the 'consultation' issue - Defendant's arguments

98. The Defendant contends that the requirement in clauses 12.2 and 12.3 for "*prior consultation*" about the sale price of the properties is not satisfied if the parties are unable meaningfully to respond to it. So, when the Defendant failed to respond to the agent's (Keystone's) consultation because he was understandably coping with the profound impact of his mother's death, there was no "*prior consultation*" even though the agents had been unaware of the reason for his failure to respond.

99. Moreover, although the Defendant did not appear to be arguing for an implied term with respect to Issue 3, 'reasonableness' is routinely implied in many different contracts and, on its terms, the SPSA affords a similar flexibility to ensure that the person consulted is, *in fact*, given the opportunity to engage in dialogue with the agents as to the sale price.

Issue 3: the 'consultation' issue - Claimant's arguments

100. In this context, the Claimant pointed to the Defendant's acceptance of the correctness of the construction of the SPSA contended for at paragraph 14(2) of the details of this Part 8 claim (see paragraph 12(b) of the Defendant's skeleton argument), namely:-

> " … "*consultation" pursuant to clauses 12.2 and 12.3 takes place even if one or both of Mr Harris and Mr Holland refused or fails to respond to the relevant estate agent*; …."

101. The Claimant dismissed as hopeless the Defendant's 'refinement' to the effect that the existence of matters preventing the parties from responding to the agents meant that the "*prior consultation*" requirements had not been satisfied.

Issue 3: the 'consultation' issue - discussion

102. As I have noted, it is common ground that "*consultation*" takes place even if the parties fail to respond to it. I agree. As a general matter, a response from a 'consultee' is not required for proper consultation to have occurred. Clauses 12.2 and 12.3 do not say otherwise. However, I cannot accept the Defendant's suggested 'refinement' or qualification to this proposition. First, clauses 12.2 and 12.3 do not, on their terms, require a 'reasonable' or 'meaningful' opportunity to respond to the consultation, nor do they envisage that the parties' individual circumstances which prevent or delay their response, let alone circumstances unknown to the agents, might vitiate or suspend the consultation process. Second, if they were to be construed in this way, this might give rise to uncertainty as to whether the SPSA machinery has been effectively engaged simply because the agents had not heard back from one of the parties. Third, likewise, if one party later prays in aid of extenuating circumstances to explain their prior silence in response to the agent's consultation, this might well cause delay to, or the loss of, sales which had proceeded on the basis that the SPSA machinery was operative, only then to have that consultation negated by matters not disclosed until much later. These last two points would again render the

Defendant's construction of the SPSA inconsistent with its fundamental objectives already discussed under Issue 1.

103. I therefore reject the Defendant's construction on Issue 3 (and, to the extent it might be asserted, the implication of any term) and I hold that the construction contended for by the Claimant is correct.

Overall conclusions

104. For the reasons stated in this judgment, I reject the Defendant's construction on each of Issues 1-3 and I hold that the Claimant's construction is correct. I also hold that there is no basis for implying the terms contended for by the parties in the alternative to their primary construction arguments.

105. I will hear further from the parties as to any consequential matters, including the appropriate relief in light of my findings.