Neutral Citation Number: [2011] EWHC 2888 (Ch)

Case No: HC10C03883

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2011

Before :

MR. RICHARD SNOWDEN QC

(Sitting as a Deputy Judge of the High Court)

Between :

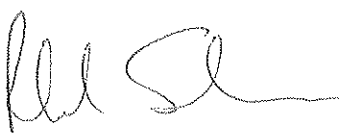
WILKY PROPERTY HOLDINGS PLC	**Claimant**
- and -	
LONDON & SURREY INVESTMENTS LIMITED	**Defendant**

Mr. Philip Rainey QC (instructed by **Charles Russell**) for the **Claimant**
Mr. Harry Matovu QC (instructed by **Berg Legal**) for the **Defendant**

Hearing date: 24 October 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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MR. RICHARD SNOWDEN QC

RICHARD SNOWDEN QC:

1. On 17 August 2011 I handed down a judgment [2011] EWHC 2226 (Ch) in relation to the application by the Defendant, London & Surrey Investments Limited ("LSI") for a stay, pursuant to the Arbitration Act 1996 or the inherent jurisdiction of the Court, of the Part 8 Claim issued on 18 November 2010 by the Claimant, Wilky Property Holdings plc ("Wilky"). I adopt the same abbreviations as in that earlier judgment, to which reference should be made for the background to this dispute.

2. In my first judgment I held that a dispute resolution provision in clause 22 of the Agreement between the parties dated 1 November 1996 is a provision for expert determination and not an arbitration clause to which the Arbitration Act 1996 applies. Having thereby decided that a mandatory stay of Wilky's Part 8 Claim was not required, I left over for further argument the question of whether it would be appropriate to stay the Part 8 Claim in whole or in part under the inherent jurisdiction of the Court as now reflected in the CPR Part 3.1(2)(f). That jurisdiction was recently considered by the Court of Appeal in Barclays Bank plc v Nylon Capital LLP [2011] EWCA Civ 826.

3. As part and parcel of the arguments that were addressed to me on the nature of clause 22, I also determined as a matter of interpretation of the Agreement that an expert appointed under that clause would have jurisdiction to determine any dispute or difference referred to him (i) as to the calculation of any Profit Shares or Compensatory Payment under clauses 16 or 17 of the Agreement, and (ii) as to the interpretation of any terms of the Agreement independently of the calculation of any Profit Share or Compensatory Payment.

4. The parties have now considered their respective positions following my judgment. LSI has served a revised Statement of Case dated 22 September 2011 for the purposes of the expert determination by Mr. Pye. This seeks a calculation of (i) the Profit Share to which LSI claims to be entitled in respect of the Aldershot Scheme and (ii) the Compensatory Payment to which LSI claims to be entitled in respect of the Gatwick Green Scheme. LSI is not currently pursuing, but has expressly reserved its rights in respect of, any other claims arising out of or in connection with the Agreement, whether in relation to the Aldershot Scheme and the Gatwick Green Scheme, or in relation to any other projects, investments or development proposals.

5. For its part, Wilky has acknowledged that with the exception of (i) LSI's claim under paragraph 18(3)(d) of the revised Statement of Case to 20% of the net profits that Wilky receives from any subsequent sale of the Aldershot Scheme (which Wilky says is premature because there has been no such sale), and (ii) an allegation by LSI in paragraph 23 of the revised Statement of Case that Wilky was in repudiatory breach of the Agreement (which Wilky denies and contends falls outside the scope of clause 22), all of the claims made in LSI's revised Statement of Case of 22 September 2011 can be the subject of a reference to Mr. Pye.

LSI's Application for a Discretionary Stay

6. As I indicated in my earlier judgment, Wilky's Part 8 Claim Form was issued at a time at which LSI had made a considerably wider claim for expert determination than is now formulated in the revised Statement of Case dated 22 September 2011. The

Part 8 Claim Form reflected the wider scope of LSI's claim and sought the determination by the Court of a large number of questions which ranged far and wide over the interpretation of the Agreement and the proper scope of any expert determination under it.

7. The parties were agreed that according to the judgments in Barclays Bank v. Nylon Capital, and in particular the observations of Thomas LJ at paragraph 42, the questions for the Court are whether the individual paragraphs of the Part 8 Claim Form raise a real (as opposed to a hypothetical) dispute; and if so, whether it is in the interests of justice and convenience that the Court should proceed to determine that dispute rather than allowing Mr. Pye to conduct his expert determination first.

8. I therefore turn to the individual paragraphs of the Part 8 Claim Form. There was some common ground between the parties.

9. Paragraphs 8 and 9 These paragraphs seek declarations that the expert could only determine disputes or differences concerning the meaning or effect of the terms of the Agreement as were necessary for the calculation of the Profit Share or Compensatory Payment; and a further declaration that no dispute or difference had in fact arisen that was capable of valid reference to an expert under clause 22. Mr. Rainey QC, for Wilky, accepted that in light of my earlier judgment, Wilky could no longer pursue the claims under paragraphs 8 and 9 of his Part 8 Claim Form, because both declarations would be flatly contrary to my earlier decision. Mr. Rainey therefore accepted that the claims in those paragraphs should be dismissed.

10. Paragraphs 2-6, 11, 12(i), 13(i) and (iii), 19 and 20-22 These paragraphs raise points that will or might well arise in the course of Mr. Pye's expert determination. In accordance with the general approach of the Court as described by Lord Slynn in Mercury Communications v. The Director General of Telecommunications [1996] 1 WLR 48 at 59C, whilst the Court might have ultimate jurisdiction to determine the legal issues arising in relation to the Agreement, the parties are agreed that it should not give its own ruling on such points before Mr. Pye has had the opportunity to do so. Such paragraphs should therefore be stayed.

11. The parties were not, however, agreed as to what ought to happen to the remainder of Wilky's Part 8 Claim. Although LSI's application was only for a stay, Mr. Matovu QC, for LSI, contended that the balance of the paragraphs of the Part 8 Claim Form should be dismissed summarily on the basis that they were, as formulated, unsustainable in light of my earlier judgment. Mr. Rainey responded that a number of the issues raised by the Part 8 Claim could in fact be decided summarily in Wilky's favour; that many of Mr. Matovu's objections were essentially drafting points; and that since the substance of the issues raised were likely to feature in Mr. Pye's determination or might subsequently become live if LSI was to try to proceed with claims that are the subject of its reservation of rights, it would be appropriate to stay rather than dismiss those claims. Wilky could then seek permission to lift the stay and proceed to have the claims determined (in suitably amended form if necessary) should the need arise.

12. I turn to consider the disputed paragraphs of the Part 8 Claim Form.

13. Paragraph 1 Paragraph 1 seeks a declaration that the right to refer disputes to expert determination under clause 22 is limited to (i) disputes arising in respect of schemes which were "Approved Schemes" under the Agreement; and (ii) disputes as to quantification of a Profit Share and a Compensatory Payment if and when (and only if and when) entitlement to Profit Share has accrued on completion of an Approved Scheme.

14. Mr. Matovu objected that in light of my earlier judgment it could not be said that the right to refer disputes to expert determination under clause 22 was limited those two matters. As a matter of strict wording that is undoubtedly right, but Mr. Rainey submitted that such defect in the drafting did not really go to the central thrust of the relief sought, that the defect could easily be cured by the addition of words such as "Save as to matters of interpretation of the Agreement..", and that a claim which could be saved by amendment should not be dismissed.

15. I think Mr. Rainey is right, and that it is appropriate to approach this question as a matter of substance. The substance of the issue raised by this paragraph - defining the right to a Profit Share or Compensatory Payment by reference to the completion of an Approved Scheme – are matters which are potentially live between the parties. They seem to me to fall into the same category as those paragraphs which have been agreed should be stayed in order to permit Mr. Pye to proceed with his determination. I therefore propose to stay paragraph 1.

16. Paragraph 7 Paragraph 7 of the Part 8 Claim Form is a difficult paragraph to understand. It seeks,

> "A Declaration that any decision as to the basis for assessment of Profit Shares is not a matter which can be referred to an expert for determination under clause 22 of the Agreement and a Declaration that any expert appointed pursuant to clause 22 of the Agreement has no power to make, determine or force an election under clause 16(i) of the Agreement."

17. Mr. Rainey accepted that the drafting of this paragraph left something to be desired. He explained, however, that this paragraph was intended to seek a declaration that the expert could not make a decision as to which of the various different bases of assessment of Profit Share that are referred to in clause 16(i) of the Agreement was applicable in the events that have occurred, and could not force Wilky to make an election as between those bases. I have some sympathy with Mr. Matovu's contention that the wording of this paragraph comes perilously close to suggesting that the expert cannot do precisely what I have held that he can do, namely to interpret the provisions of the Agreement and to calculate the amount of any Profit Share due.

18. I am, however, aware that the precise meaning and/or effect of clause 16 of the Agreement is likely to be raised in the course of the determination to be undertaken by Mr. Pye, and that the parties are agreed that I should simply stay paragraphs 4-6 which also deal with various issues arising under clause 16. In these circumstances I think that the correct approach for me to take is also to stay paragraph 7. I thereby signify no view one way or another as to the contents of paragraph 7, or as to the

meaning and effect of clause 16. I will simply observe that if any attempt is made to lift the stay in respect of paragraph 7 in light of a determination by Mr. Pye, that paragraph will need amendment to clarify what is actually being sought.

19. Paragraph 10 Paragraph 10(i) seeks a declaration that there is no right under clause 22 or otherwise to refer to expert determination "a global accounting of all sums due between the parties"; and paragraph 10(ii) seeks a declaration that an expert determination of Profit Share or Compensatory Payment cannot validly purport to determine that any particular sum must be paid by Wilky to LSI.

20. So far as paragraph 10(i) is concerned, Mr. Rainey submitted that it was obvious that clause 22 was limited and provided no authority for an expert to conduct a global accounting (by which I understood him to mean a determination of all disputes) between the parties. He further pointed to paragraph 51 of my earlier judgment in which I rejected a suggestion that clause 22 was an "any disputes" clause. I did not understand Mr. Matovu seriously to dispute this argument. However, Mr. Matovu's point was that it might be appropriate or necessary for the expert acting under clause 22 to take into account in his calculation of Profit Share, any amounts paid by Wilky to LSI as an advance on Profit Share.

21. So far as paragraph 10(ii) is concerned, although each party seemed to have understood the wording differently, it became apparent at the hearing that Mr. Rainey and Mr. Matovu in fact agreed (i) that an expert appointed under clause 22 could not make an enforceable order for payment of any sum from Wilky to LSI, and that (ii) any sum determined by an expert under clause 22 and in accordance with the Agreement would be due and payable as a contractual debt, subject to any valid defences, counterclaims or rights of set-off in the ordinary way.

22. Although I have reservations about whether the issues apparently raised in paragraph 10(i) are really likely to become live between the parties, I think that it is appropriate to stay that paragraph rather than deal with it in any other way. I will, however, make the same observation as in relation to paragraph 7, namely that if an attempt is made to lift the stay, the "global accounting" wording ought to be clarified to describe more accurately precisely what is in dispute.

23. On the assumption that I have correctly encapsulated the common position reached at the hearing in relation to paragraph 10(ii), it ought to be possible to reflect that position in an agreed recital to my order. Assuming that can be done and there is no real dispute between the parties, I cannot see what continued purpose would be served by paragraph 10(ii) remaining on the Part 8 Claim Form. It should therefore be dismissed.

24. Paragraph 12(ii) Paragraph 12(i) seeks a declaration that the trading and sale of a pharmacy was not part of the Approved Scheme at Aldershot under clause 8 of the Agreement and therefore fell outside the scope of the Agreement. Paragraph 12(ii) seeks a declaration that any difference or dispute arising in respect of these matters is not capable of valid reference to expert determination pursuant to clause 22.

25. Mr. Matovu contends that paragraph 12(ii) is plainly too wide as drafted, on the basis that it must at least be possible following my earlier judgment for a dispute or difference as to the interpretation of the Agreement in respect of this matter validly to

be referred to Mr. Pye. I certainly accept that I have decided that Mr. Pye has the authority under clause 22 to determine any dispute as to the meaning or effect of the Agreement and to that extent can determine whether the pharmacy in question was or was not part of an Approved Scheme as defined by the Agreement.

26. But Mr. Pye's determination of that issue may be open to subsequent challenge, and the parties are agreed that paragraph 12(i) - which expresses the substance of the matter - should be stayed to allow Mr. Pye to give his expert determination in the first instance. I therefore propose, for similar reasons to those outlined in relation to paragraph 1(i) – of which this seems to me to be a particular example – simply to stay paragraph 12(ii).

27. Paragraph 13(ii) Paragraph 13(i) concerns arrangements between Wilky and Prudential in relation to the management of the Gatwick Green scheme and seeks a declaration that they fall entirely outside the scope of the Agreement. Paragraph 13(iii) seeks a declaration that the payments received by Wilky from Prudential were in any event reimbursement of management expenses and not profits. The parties were agreed that these paragraphs were or might be live issues and that they should be stayed pending Mr. Pye's determination.

28. Mr. Matovu's objection to paragraph 13(ii), which seeks a declaration that a dispute or difference in relation to these matters is not capable of valid reference to expert determination under clause 22, falls into the same category as those in relation to paragraphs 1 and 12(ii) above. Accordingly I propose to stay rather than to dismiss that claim.

29. Paragraphs 14 and 15 These paragraphs concern the interpretation of clauses 18 and 19 of the Agreement.

30. Clause 18 opens with the words,

> "Our [i.e. LSI's] entitlement to the Profit Share shall be reduced if on a pro-rata basis we cannot match your [i.e. Wilky's] financial share or otherwise provide the same security as you provide for any one or more of the following commitments (the Commitments)..."

Clause 18 then goes on to specify a number of "Commitments" and concludes that,

> "...the amount of such pro-rata reduction which we shall suffer against our Profit Share shall be equal to what a prudent Investor might reasonably require for providing the Commitments on the same terms as provided by you."

31. Clause 19 contains a provision for LSI to have proper and reasonable access to Wilky's financial records for the purposes of determining how the Profit Share is made up (to which I shall return later in this judgment), and then continues to provide that if any Approved Scheme produces a loss, that should be carried forward (with interest) and set off against any net Profits realised from any other Approved Scheme.

32. Wilky has indicated that it may wish to invoke clause 18 and to contend that there should be a reduction to LSI's entitlement to a Profit Share on account of what are, as yet, unspecified failures by LSI to provide "Commitments". Quite apart from any disputes over the substance of these alleged "Commitments", or LSI's alleged failure to meet them, the parties are at odds over whether any such reduction as provided for by clause 18 is a matter which falls within the scope of an expert determination of Profit Share under clause 22, or whether it is a reduction to be determined by a Court separately from and subsequent to a calculation of Profit Share under clause 22.

33. This seems to me to be a matter of interpretation of the Agreement which can, at least in the first instance, be addressed by the expert. Moreover, in contrast to the narrow questions concerning clause 22 which I decided in my earlier judgment, this is a question which may be significantly influenced by detailed consideration of the factual matrix against which the Agreement was entered into. Such evidence may also go some way to assist in the understanding of the provisions of clause 18 which are, at least on the face of it, somewhat obscure. It is likely that a good deal of such material may be considered by Mr. Pye as part of his expert determination in any event, which reinforces a decision to permit him to express his view on the point first.

34. Mr. Rainey submitted, however, that any argument about a pro-rata reduction under clause 18 was akin to a claim that LSI had breached the Agreement. He said that I had already implicitly decided that this could not be included in an expert determination under clause 22 when I had observed in paragraph 51 of my earlier judgment that,

> "I do not think that the expression ["any difference or dispute as to the meaning or effect of the terms of this letter of appointment"] was intended to include disputes and differences as to whether, in the events that have occurred, the Agreement has been properly performed, breached or terminated, so that, for example, claims for damages for breach of the Agreement could be made and resolved under Clause 22."

35. I reject this submission. I have not decided any point concerning clause 18, and it is important that my words in paragraph 51 are not taken out of context. In making the observations that I did, I was not addressing clause 18 and I did not intend in any way to pass judgment upon whether the pro-rata reduction mentioned in clause 18 could be regarded as a claim for breach of the Agreement; or whether it was, for example, properly to be regarded as component element of the calculation of the contractual entitlement to Profit Share.

36. In these circumstances I think that if Wilky wishes to raise issues concerning clause 18 of the Agreement (and I reiterate that as things stand at present it has not done so clearly or with any particularity) the question of whether such issues fall within the scope of the an expert determination under clause 22 is something which should first be considered by the expert, who will already be seized of the other matters in dispute, and is therefore likely to be able conveniently to consider how to deal with this issue in its wider context.

37. Mr. Rainey further objected to this course on the basis that as this was a question which went to the scope of the authority of the expert, any decision by the expert on this matter would inevitably be subject to review by the Court on the basis outlined in Barclays Bank v Nylon Capital. He submitted, referring to the observations of Thomas LJ at paragraph 44, that it would therefore be wasteful of time and expense for the Court not to decide it now, or at least give directions for it to be decided by the Court first.

38. I do not accept that argument, and I do not think that Thomas LJ was intending to lay down a prescriptive rule in paragraph 44 of his judgment in Barclays Bank v Nylon Capital. In the circumstances of this case, it is in my view important first to clarify whether, and if so on what basis, Wilky intends to run a point under clause 18 at all. I think that the obvious and convenient forum for that to occur is in the expert determination by Mr. Pye. Mr. Pye, who is an experienced dispute resolver, has indicated his intention to hold a directions meeting with the parties as a first stage in the process leading to his expert determination. I see no reason, for example, why he should not be entitled to request that Wilky clarify whether, and if so, on what basis, it contends that clause 18 affects a determination of any Profit Share or Compensatory Payment due to LSI. I also see no reason why that cannot be done entirely without prejudice to any contention by Wilky that the application of clause 18 is not a matter for expert determination.

39. Having identified the true scope of any issue regarding clause 18, and its relationship to the other matters that are indisputably before him for determination, Mr. Pye will then be able to decide what steps to take in relation to the clause 18 issue. As Mr. Matovu reminded me, Mr. Pye and the parties will have a wide variety of procedural options open to them in relation to any such clause 18 issue, including in particular those identified by Lord Neuberger MR in paragraph 71 of his judgment in Barclays Bank v. Nylon Capital,

> "After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue. If they do not, they may also think it sensible to try and agree whether the expert's decision on the point will be treated as final and binding or whether the disappointed party should have the right to refer the issue to the court. If the latter, then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision, and it may also assist the parties in arriving at a settlement."

40. Although it was suggested at the hearing that this approach might give rise to an undesirable form of "hokey-cokey" in which the parties moved in and out of litigation and expert determination, I do not think that is right. Mr. Pye is definitely seized of the main issue of determination of any Profit Share and Compensatory Payment. If a clause 18 issue is raised, the views of Mr. Pye as to how the resolution of that issue can best take place in a co-ordinated, timely and cost-effective manner which assists his expert determination are likely to be of some relevance to the Court. In contrast, for the Court simply to decide to proceed to determine the nature and scope of clause

18 may cause further delay to the expert determination of the main issues and risks allowing a presently undefined tail to wag the dog.

41. Accordingly, I decline to decide or give directions for the decision by the Court at this stage of the matters raised in paragraph 14 of the Part 8 Claim. I propose to stay that paragraph.

42. Similar considerations apply to the issue raised by paragraph 15 concerning what were referred to in argument as "rights of set-off". I will therefore also stay that paragraph.

43. Paragraph 16 Paragraph 16 seeks a declaration that differences or disputes concerning amounts paid to LSI (or Mr. Webb) personally by Wilky between 1996 and 2010, whether as an advance of anticipated Profit Share or otherwise, are not capable of expert determination under clause 22. In the absence of any clear delineation of the dispute in this regard or how it relates to the expert determination, I think that this question falls into the same category as paragraphs 14 and 15, and propose to deal with it in the same way by a stay.

44. Paragraph 17 Paragraph 17 raises the issue of whether the Profit Share can include profits which might have been, but were not actually, made by Wilky. This stems from a point made in LSI's original claim to the effect that the Aldershot Scheme had been mismanaged by Wilky with the result that its profits were reduced. Wilky seeks a declaration that the Profit Share does not include such notional profits, a declaration that the right to refer the quantum of the Profit Share to expert determination under clause 22 is limited to disputes as to profit actually made, and a declaration that disputes concerning the alleged mismanagement of the Aldershot Scheme are not capable of valid reference under clause 22.

45. The allegations of mismanagement are not included by LSI in its revised Statement of Case, but as I have indicated, LSI has purported to reserve its position on the making of further claims. It is therefore not possible to say at this stage that these are entirely hypothetical issues which may not become live between the parties.

46. Mr. Rainey again encouraged me to decide, following my comments in paragraph 51 of my earlier judgment, that any such allegations by LSI of mismanagement by Wilky were akin to allegations of breach of contract which did not fall within the scope of clause 22. However, I reiterate that for similar reasons to those set out in relation to paragraph 14 of the Part 8 Claim and the clause 18 issue (see above), my comments in paragraph 51 of my earlier judgment were not directed to this issue.

47. I consider that the issues raised by paragraph 17 fall into the same category as those in relation to paragraphs 13 and 14 above, and for the same reasons I also propose to stay paragraph 17.

48. Paragraph 18 Paragraph 18 raises further questions concerning the meaning of clause 16 of the Agreement, and in particular the question of whether there is any right to refer to expert determination a valuation of future rents and profits in certain circumstances. Among other things a declaration is sought that there can be no dispute or difference as to LSI's Profit Share of rents and profits which is capable of being referred to expert determination until after receipt of such monies by Wilky

from time to time. Paragraph 18(iv) also seeks the determination of whether there is any right to refer to expert determination the net present value of the Aldershot Scheme.

49. As I have already said, issues concerning the meaning and effect of clause 16 of the Agreement and its application to the facts of this case are likely to be central to any determination by Mr. Pye. Accordingly it seems to me to be just and convenient to stay these claims to enable Mr. Pye to conduct his expert determination first. There is no good reason or advantage in the Court deciding to try the issues itself at this stage.

Disposal

50. In the result, with the exception of paragraphs 8 and 9, which must be dismissed, and paragraph 10(ii) which I think can be dismissed on the assumption that the parties can agree a form of words to record their common understanding, I will order that the remainder of Wilky's Part 8 Claim Form be stayed. Any application to lift the stay will have to be made on notice by an application under CPR Part 23 in the ordinary way. I request counsel to agree a suitable form of order providing (if thought fit) for a specific period of notice to be given of any such application.

LSI's application for disclosure of documents

51. After I had given my earlier judgment, and following correspondence between the parties, on 20 October 2011 LSI issued an application notice in Wilky's Part 8 Claim which was listed for hearing before me on 24 October. By paragraph 1 of that notice, LSI seeks an order that Wilky,

> "...disclose by list and produce to [LSI]...all financial records and up-to-date financial information in its possession or control from January 2008 to the date of this Order relating to the Aldershot and Gatwick Green Schemes referred to in the Statement of Case [dated 22 September 2011]."

There then follows a list of 9 categories of documents and information which are said to be included within the general scope of the order sought.

52. Paragraph 2 of the application notice seeks an order that Wilky give LSI and its advisors,

> "immediate access to all material on the dedicated website which [Wilky] and/or its agents have established for the marketing and sale of the Aldershot Scheme."

53. Mr. Matovu submitted that LSI had an entitlement to these orders on the basis of enforcement by the Court of clause 19 of the Agreement which provides that LSI,

> "...shall have proper and reasonable access to [Wilky's] financial records for the purposes of determining how the Profit Share is made up."

Alternatively, Mr. Matovu submitted that LSI had a right to the orders sought on the basis of an implied obligation on Wilky to co-operate in the conduct of the expert determination by giving access to relevant documents. In this regard, Mr. Matovu relied upon the decision in Smith v Peters (1875) LR 20 Eq. 511 in which the Court of Appeal ordered a vendor of the fixture and fittings of a public house to provide access to his premises to a valuer appointed under the sale contract to conduct an expert determination of the value of the items to be sold.

54. Mr. Rainey accepted that the Court could, in an appropriate case, make an order enforcing clause 19. However, he disputed that there was any wider implied obligation upon Wilky to give disclosure to LSI, and in particular he submitted that there was no basis upon which Wilky could be obliged to draw up a list of documents in the form sought, which resembled an order for disclosure under CPR Part 31. Mr. Rainey pointed out that the Agreement contained an express clause dealing with the matter of giving LSI access to Wilky's documents which made it unlikely that there could be implied a term to different or wider effect. He also observed that Smith v Peters was only authority for the proposition that a party to an expert determination had an implied duty to co-operate to enable the expert (i.e. the valuer) to perform his determination, and that the decision was not authority for the existence of an implied duty to give assistance to or co-operate with requests for information or documents from the other disputing party.

55. Mr. Rainey further submitted that since LSI's application was in effect seeking an order for specific performance of clause 19, the Court would have to be satisfied both that there was a relevant obligation, and that Wilky had breached (or was threatening to breach) it. He submitted that the Court could not be so satisfied on the limited evidence before it, and in particular that there was no basis upon which Wilky could be ordered to give LSI access to the website containing information relevant to the sale of the Aldershot Scheme. Mr. Rainey also pointed out, for example, that it was disputed that LSI had any entitlement under the Agreement to a Profit Share based upon a sale of the Aldershot Scheme unless and until such sale was actually completed, and hence that until that point of interpretation of the Agreement had been resolved, the Court could not reach any view that there was any obligation to provide material relating to a prospective sale, still less that there had been any breach of such obligation.

56. Finally, Mr. Rainey submitted that when one looked at each of the categories of information and documents sought, it was apparent either that LSI already knew the relevant figures, or had already been provided with the relevant information and documents (including in three lever arch files of documents provided under cover of a letter from Wilky's solicitors dated 14 October 2011), or that what was sought was not a "financial record" within the meaning of clause 19, or that the information and documents sought were only relevant to parts of LSI's claim for a Profit Share or Compensatory Payment that it was disputed that the expert had authority to determine.

57. I think that there is force in most of Mr. Rainey's submissions as to the limitations on the scope of the Court's powers and to the appropriateness of exercising them at this stage on the available material. I should indicate that at the hearing I was not inclined

to make the order sought by Mr. Matovu, and I was certainly not attracted by the suggestion that LSI had any contractual entitlement to be provided with access to the Aldershot Scheme website.

58. However, I do not need to decide these issues, because in the course of argument, an alternative *modus operandi* emerged which was acceptable to the parties. As I understand it, what is proposed is that I should simply adjourn LSI's application generally, so as to enable LSI, after considering the documents and information with which it has been provided, to send to Wilky a list of specific documents and/or information which it contends should be provided to it. It is intended that the parties will then have a meeting at which that request can be explored. It may be that such meeting takes place before or after a meeting with Mr. Pye, and it may also be that Mr. Pye will be in a position to express his own view as to whether such documents are necessary for the purposes of his expert determination and/or as envisaged by clause 19 of the Agreement. Whilst Mr. Pye's views would obviously not bind the Court, they might be of some assistance to it.

59. If, following this process, LSI wished to pursue an application to the Court to enforce its rights under clause 19, the parties were agreed (of course without prejudice to any arguments that might be advanced on such application) that it would make procedural sense that such application could be made by application notice under CPR Part 23 rather than requiring LSI to issue a fresh claim form under CPR Part 7 or 8. In that regard, although Mr. Rainey had an ingenious suggestion as to how the Court might order such an application to stand as originating process, I think that the simplest route would be for the order staying Wilky's Part 8 Claim to be on terms that permit LSI to have its current application relisted (in an amended form and with a further supporting witness statement if so advised) on a specified number of days' notice. I see no reason why such an order is not within the Court's powers under CPR Part 3.1(2)(f) and I request counsel to agree an appropriate form of order.

Consequential matters

60. At the conclusion of the hearing I indicated to the parties that in the interests of saving time and costs I would be willing to deal with any consequential matters concerning the precise form of order and the question of costs on the basis of written submissions. That offer remains open, and assuming that it is to be taken up I would ask that written submissions be exchanged and sent to me electronically by close of business on Friday 11 November 2011, with any reply submissions provided by close of business on Tuesday 15 November 2011. If, however, either or both parties wish to have a further hearing, then they should make that desire known, with brief reasons, as soon as possible so that arrangements can be made through the usual channels.