IN THE BRISTOL COUNTY COURT

Claim No C00BS142

BETWEEN

MR PAUL SMITH
MRS TRACY SMITH

Claimants

and

MR KEITH YARNOLD
MRS PAMELA YARNOLD

Defendants

JUDGMENT

1 This case involves an acrimonious family dispute over a farmhouse.

2 It came before me for trial on 6, 7, 8 & 9 February 2017. I heard 3 days of evidence and then closing submissions on the final day. This is my reserved judgment.

3 The trial bundle comprised 4 lever arch files, together with a file of medical records. In this judgment I shall refer to documents by file/divider/page.

4 The background and the issues between the parties are set out in some detail in the Re-Amended Particulars of Claim (1/A/3) and the Re-Amended Defence and Counterclaim. They are further summarised and refined in the skeleton arguments prepared by counsel for each party in advance of trial (skeleton argument of Leslie Blohm QC for the Claimants dated 2.2.17 and skeleton argument of Matthew Wales for the Defendants dated 3.2.17). There was further refinement of the issues on the first morning of trial, which I record here. The claim and counter-claim include a great many "conduct" allegations on each side, with associated claims for damages and injunctive relief. At the start of the trial, the parties indicated that they were not pursuing these claims and, if the court thought it appropriate, they would each be prepared to give cross-undertakings. That said, the conduct issues did remain relevant to the Claimants' claim for specific performance of Clause 4 of the Declaration of Trust, because the Defendants contend that as a result of their conduct, the Claimants do not have the clean hands required for the grant of this equitable remedy.

5 I heard oral evidence from Paul Smith, Tracy Smith, Keith Yarnold, Pamela Yarnold, Roger Benbow, Francis Budden, Chris Weston, Matthew Mulvale, Jane Mulvale and Christopher Yarnold.

6 There are a number of issues that require determination by me. I shall deal with them in chronological order.

The Validity of the Declaration of Trust

7 On 29 July 2008, the parties entered into the Declaration of Trust (1/A/21). It was one of three documents entered into on that day. The other documents were the TP1 (1/A/52) and the Loan Agreement (3/G/49).

8 There is an issue between the parties as to the validity of the Declaration of Trust.

9 The Defendants' contention (paragraph 16 of Mr Wales's skeleton argument) is that a declaration of trust of land must be in signed writing (section 53(1)(b) Law of Property Act 1925) and identify the trust property. A contract for the sale of land (e.g. an option) must also be made by writing signed by the contracting parties (section 2 Law of Property (Miscellaneous Provisions) Act 1989) and identify the property. The Defendants contend that the Declaration of Trust does not identify the property and consequently is void (unless rectified - see below). In oral submissions, Mr Wales submitted that the Declaration of Trust is defective in that it fails to comply with the formality requirements in the sections cited above. He further submitted that the Declaration of Trust cannot be made to work in its present form without rectification. He submitted that any attempt at construction of the document must be limited to a search for the definition of the property within the four corners of the document itself. He submitted that it is not possible, by this means, to identify accurately the property to which the document relates.

10 Mr Blohm, on behalf of the Claimants, submits that the issue is not one of formality, but one of certainty of objects. He submits that, for the reasons set out in his skeleton argument at paragraphs 9 to 12, and expanded upon in oral submissions, that the Declaration of Trust can, and should, be construed so as to insert the words "the Barn" in place of the unfilled square brackets in the Definitions section of the document.

11 In my judgment, the issue is rightly described as one of certainty rather than one of formality. The Declaration of Trust complies with the formality requirements: it is a written document signed by the parties. The issue is whether the Property that is the subject of the Declaration of Trust has been identified with sufficient certainty.

12 Within the Declaration of Trust, the property that is the subject of the trust is defined as follows: *""the Property" means the freehold property known as Lower Kingshill Farm Sandlin Malvern Worcestershire WR13 5DN registered at the*

Land Registry under title numbers WR106242 and [ ]." There is no dispute that there are words missing from the definition of the Property, as denoted by the unfilled square brackets. The question is what they should be.

13 Can the issue be resolved by construction? The law is helpfully set out in Chitty on Contracts (32nd edition) at 3-060. A mistake in a written instrument can be corrected as a matter of construction provided that the mistake is clear on the face of the instrument and it is also clear what correction ought to be made in order to cure the mistake. When conducting this exercise, the court is not confined simply to the document in which the mistake occurs, but may consider all the relevant documents.

14 In my judgment the issue can be resolved by construction of the Declaration of Trust itself. The Property means title number WR106242 and something else. The Definitions section provides that *""the Barn" means the barn and land adjoining the barn shown edged in green on the attached plan <u>being part of the Property</u>"* (my underlining). The Barn is therefore part of the Property, yet title number WR106242 does not include the Barn as defined. Accordingly, it is my judgment that the missing words must be "the Barn".

15 It is therefore unnecessary, in my judgment, to look at the other documents entered into on 29 July 2008 in order to construe the Declaration of Trust. However, it would be permissible to do so and when one does, the answer remains as clear as before. The TP1 (1/A/52) was executed on 29 July 20008. Paragraph 12 of the TP1 states that the transferees are to hold the Property upon the terms of a trust deed made by them and dated 29 July 2008. The Property comprises WR106242 and part of WR109238, which was shown edged in red on the plan attached to the TP1. This corresponds exactly to WR106242 and "the Barn" as defined in the Declaration of Trust, making it clear that the words missing from the definition of the Property in the Declaration of Trust are "the Barn".

16 Having set out my reasons for so concluding, I observe that the issue was rendered largely redundant (save as to costs) by the Defendants' concession that, if I had decided that the Declaration of Trust could not be so construed, the Claimants would nevertheless be entitled to rectification of the document. The parties' intentions at the time of signing the Declaration of Trust are clear and the position is neatly summarised by the Defendants' solicitor, Mr Anwan of Masefield Solicitors, in his letter to the Defendants dated 2.12.14 (4/HI/88). Had I not resolved the question of construction as I have done, I would have granted the Claimants' alternative claim for rectification.

<u>The Defendants' claim for rectification of the Loan Agreement</u>

17 The Defendants assert that the Loan Agreement that was signed on 29 July 2008 did not reflect the agreement that had been reached between themselves and the Claimants. They seek rectification of it. Their case is that the letter dated 11.9.07

from the Claimants' solicitors Pitman Blackstock White to the Defendants' solicitors Russell and Co reflects the agreement reached between the parties in relation to the Loan Agreement. They assert that that was the final agreement between the parties. They assert that their solicitor, Mr Croshaw, "mangled" his instructions to such an extent that when he drafted the Loan Agreement that he subsequently sent to the Claimants' solicitors under cover of his letter dated 5.10.07, it bore no relation to the agreement that had been reached between the parties. It is the Defendants' case that no one noticed the error at the time or subsequently, until 2015 when the Claimants spotted the error and sought to take advantage of it.

18 The Claimants assert that between 10.9.07 and 5.10.07 there were further face to face discussions between the parties in which the agreement evolved and changed, such that the draft agreement, that was sent by the Defendants' solicitors to the Claimants' solicitors under cover of the letter dated 5.10.07, was a true reflection of the agreement reached between the parties. The Loan Agreement, as signed on 29.7.08, was in that form.

19 It is the Defendants who assert that the document is not a reflection of the agreement reached between the parties and who seek rectification of the document. The burden of proof, to the civil standard, is on the Defendants (see Chitty at 3-089).

20 The evidence comes from the following sources:-

a. The witnesses, in particular Tracy Smith and Pamela Yarnold.

b. The Defendants' solicitor's file (i.e. Mr Croshaw's file) (2/E/1-172).

c. The Claimants' solicitor's file is not available, it having been routinely destroyed in the intervening period.

d. There is no evidence from Mr Croshaw himself. This is perhaps surprising, since he is still in practice at the same firm and easily contactable, as demonstrated by the fact that he was consulted in November/December 2014 by the Defendants' then solicitor, Mr Anwan, in connection with another aspect of the documentation, namely the words missing from the Declaration of Trust (4/HI/88). Mr Croshaw was able to answer that enquiry. However there is no evidence from him in relation to the Loan Agreement.

21 Turning to the assessment of the evidence, the position is quite finely balanced so far as the documentary evidence is concerned.

a. There is a document trail leading to the letter of 10.9.07. It is not disputed that that letter reflected the parties' agreement as at 10.9.07.

b. Thereafter there is no document trail in relation to any change in the agreement, until we get to an early draft of the final agreement, produced by Mr Croshaw (2/E/155). In particular, there is no attendance note in Mr Croshaw's file confirming any change in his instructions, nor anything in his letter of 5.10.07 to indicate that he has incorporated any change.

c. However, it is clear on the face of the documents at 2/E/155 that Mr Croshaw had worked on the Loan Agreement and in doing so he had clearly applied his mind to it, correcting typographical errors and drafting an additional clause for inclusion into the document.

d. By the time that Mr Croshaw wrote to the Claimants' solicitors on 5.10.07 (2/E/66), the Loan Agreement in its final form had been drafted and was sent under cover of that letter. Negotiations over the Declaration of Trust rumbled on for another 10 months before the documents were finally signed on 29.7.08. In that period, no one suggested that the draft Loan Agreement did not reflect the agreement reached between the parties and no objection was raised by anyone on 29 July 2008.

e. It seems to me that there are three possible explanations for the state of the documentary records. The first is that Mr Croshaw received instructions from the Defendants which he did not record. The second is that he received instructions which he did record, but this document is missing from the copy of his file that is available to us. The third is that he (to use Mr Wales's word) mangled his instructions, i.e. he erroneously turned the letter of 10.9.07 into the draft agreement at 2/E/155. All three possibilities are ones that Mr Croshaw could, potentially, have confirmed or denied. However, there is no evidence from him to assist on this point.

f. It would certainly be surprising if Mr Croshaw had received fresh instructions of this sort without recording them in an attendance note and, whilst I cannot exclude it as a possibility, it is, I think, the least likely explanation. However, simply by looking at the available documents, I cannot say which of the alternatives is more likely. There is no particular reason to think that there are documents missing from the file. But then there is no particular reason to think that Mr Croshaw, who appears to have conducted matters in a careful and diligent fashion, should have carefully drafted an agreement that was completely at odds with his instructions. In my judgment, the documentation does not provide an answer to this issue and I must therefore turn to the witness evidence.

22 So far as the witness evidence is concerned, there is a direct conflict as between the evidence of Tracy Smith and her mother, Pamela Yarnold over whether there were further discussions in September/October 2007 over the terms of the loan agreement and whether agreement was reached in the terms set out in the draft prepared by Mr Croshaw.

a. Mrs Yarnold said that the first time she realised that the Loan Agreement provided for 1% above base rate, capped at 2.5%, was when the Claimants reduced their payments in 2015. It was put to her that she and Tracy had had a discussion in September/October 2007 because Tracy was not happy about having a fixed rate and wanted a floating rate and that they had agreed what was then incorporated into the Loan Agreement. She said "no, she did not, she knows that that is not my area of expertise, she would have spoken to her father about these things."

b. The reliability of Mrs Yarnold's evidence was very much in issue. She was at times vague, saying that she could not recall events of the past. She was at other times keen to distance herself from the negotiations and dealings between the parties, asserting "I always left it to Keith, I am of the generation where the man has more control on these matters, I am of the housewife generation, I was not up to speed, I am of a different generation." But most striking of all, she insisted on asserting matters that were plainly contradicted by the documentation, the prime example being her insistence that service of the Clause 4.1 notice would entitle her and her husband to buy the Property. I shall consider this in more detail.

c. When relations deteriorated between the parties in Summer and early Autumn 2014, the Defendants consulted Masefield solicitors (4/HI/73). Under cross-examination, Mr Yarnold accepted that, at this time, they received legal advice from Masefields on the meaning of the Trust. On 29.9.14 Masefields wrote to the Claimants saying that if an agreement could not be reached regarding sale of the property, the Defendants would serve notice under Clause 4. The Clause 4.1 notice that the Defendants subsequently served had been drafted for them by Masefields (4/HI/88 & 1/C/228). In my judgment, given the involvement of Masefields in the period leading up to the service of the Clause 4.1 notice and indeed in the drafting of that notice, it is inconceivable that Masefields would not have advised the Defendants of the consequences of serving that notice. In any event, Clause 4 is not difficult to understand ("*if one of either Mr and Mrs Yarnold or Mr and Mrs Smith wish to sell the Property the other of them shall have the option to purchase the one's share of the Property,,,*") and I am satisfied that its meaning was clear to both Mr and Mrs Yarnold.

d. However by the time the case came to trial in February 2017, Mrs Yarnold was adamant that, all along, she had believed that by serving the Clause 4.1 notice, she and her husband would be able to purchase the property from the Claimants. I do not doubt the sincerity with which she gave that evidence at trial, but I find it to be wholly inaccurate.

e. In looking for an explanation for this perplexing inconsistency between her evidence and the reality of the situation, I have considered carefully a

document at 4/E/157 and Mrs Yarnold's evidence when shown it. It is an early draft of the Declaration of Trust, in which there was the following provision: "*5. In the event of a sale of the Property either party shall have the option to purchase the other party's share of the Property…*". In fact it was overtaken by later amendments and did not form part of the final version of the Declaration of Trust that the parties agreed and signed on 29 July 2008. In re-examination, Mr Wales took Mrs Yarnold to the document at 4/E/157 and to clauses 5, 5.1 & 5.3 and asked her what they meant. She immediately and accurately summarised their meaning. In answer to a question from me, she confirmed that she had no difficulty understanding them. I have reminded myself of the need to have regard not just to these answers but to the whole of her evidence. Nevertheless, I consider this part of her evidence offers a valuable insight into her evidence as a whole. Firstly, her ability to understand and explain these terms cuts across her portrayal of herself as someone who struggled to understand documents of this sort. I am satisfied that she is and was at all relevant times perfectly capable of understanding their meaning. Secondly, given the sincerity with which she gave her evidence at trial, I have come to the conclusion that her memory has played a trick on her, such that she now believes that she entered into an agreement in the terms of this earlier draft. Thirdly, that her memory now of what she did or did not agree in 2007/2008 is unreliable.

f. By contrast, Tracy Smith gave a clear and coherent account of how, she says, the change in the agreement came about. She dealt with it in paragraphs 21 and 25 of her witness statement dated 2.11.16 (1/C/140, 141). In her oral evidence at trial, she was cross-examined about this and she said that prior to the letter of 11.9.07 (2/E/70), everyone had been concentrating on the trust and they had not focused on the loan in any detail. However, once the Loan Agreement was actually drafted, she started to think about it in more depth and some of the things that had not registered initially became apparent to her. She said that she used to work for the Halifax and she was therefore familiar with mortgages. She had concerns over the loan, mainly because it was such a long-term loan and they would be committing themselves for 25 years, unlike a normal mortgage. She said that once she turned her attention to the loan agreement, she tried to build in as many protections as possible, which included an interest rate that operated a bit like a tracker mortgage. Another protection was the interest rate cap. A further protection was a move away from the large capital repayments envisaged at the time of the letter of 11.9.07. She said that she spoke to both her parents, but in particular her mother, over a long period of time about the loan. She said that these items were not contentious at the time and they agreed them. She assumed that her mother conveyed it to her solicitor. She said that the final draft of the Loan Agreement is what she had agreed with her mother. She said that she and Mr Smith paid 2.5% over the years. She said that when interest rates fell to such an extent that she was not required to pay as much as 2.5%, she and Mr Smith continue to pay at that rate because they could afford to do so and because it

meant that they were paying off a bit of the capital. She denied that the reason they continue to pay 2.5% was because they thought that interest was fixed at that rate. She said that she and her husband have other properties on a buy-to-let basis and they had done the same thing with those other properties, i.e. maintained payments that were in excess of the minimum required so as to pay off a bit of capital. Mrs Smith was a good witness. Her evidence was internally consistent as well as being consistent with the documentary records.

g. In my judgment, the witness evidence of Tracy Smith is to be preferred over that of her mother so far as the Loan Agreement is concerned.

23 When I now look at the overall picture, the documentary evidence is inconclusive and the witness evidence comes down firmly in favour of the Claimants. I therefore find, as a fact, that there were further discussions between Tracy Smith and her mother about the loan agreement in September 2007, leading to an agreement that was accurately reflected in the draft prepared by the Defendants' solicitor, Mr Croshaw, and sent to the Claimants' solicitors under cover of the letter dated 5.10.07. I therefore find that the Loan Agreement signed on 29 July 2008 accurately reflected the agreement reached between the parties. I refuse the Defendant's claim for rectification of the Loan Agreement.

Issues flowing from service of notice under Clause 4.1 of the Declaration of Trust

24 I now move forwards in time to 2014. The Defendants served a notice dated 4.12.14 on the Claimants under Clause 4.1 of the Declaration of Trust. On 8.12.14, the Claimants acknowledged receipt of the Clause 4.1 notice. It is common ground that a period of 6 weeks beginning on 8.12.14 would have ended on 19.1.15. After that date, a valuation was carried out by Colin Townsend on 26.1.15 and his report was sent to the parties the following day, 27.1.15. A number of questions arise.

25 The first question is the correct construction of Clause 4.2 and specifically whether a 6-week time limit applied to the fixing of the current market value by an independent valuer.

26 Clause 4.2 provides: "*within 6 weeks of receipt of the notice served pursuant to clause 4.1 the current market value such value of the Property shall be agreed or in default of agreement fixed by an independent valuer appointed by agreement or in default of agreement on the application of either of the parties to the President for the time being of the Royal Institute of Chartered Surveyors*"

27 It is common ground that the words "such value" add nothing to the clause and can be ignored.

28 Mr Wales contends that the 6-week time limit applies to all aspects of Clause 4.2. Mr Blohm contends that it applies only to the agreement of the value between the parties and that the remainder of the clause is without limitation of time.

29 I was initially minded to agree with Mr Blohm. However, on reflection I have come to the conclusion that this would be an incorrect interpretation of the clause. The difficulty with this interpretation is that, for it to be correct, it must be possible to separate out that part of the clause to which the 6-week time limit applies and for the remaining words to be capable of standing alone. That is not possible. To illustrate, if one divides the clause into two parts, it becomes:-

within 6 weeks of receipt of the notice served pursuant to clause 4.1 the current market value of the Property shall be agreed or in default of agreement

fixed by an independent valuer appointed by agreement or in default of agreement on the application of either of the parties to the President for the time being of the Royal Institute of Chartered Surveyors

30 The second part does not make sense unless, at least, the words "*the current market value of the Property shall be*" are inserted before the word "*fixed*". If they must be inserted, then why not the words that precede them, namely "*within 6 weeks of receipt of the notice served pursuant to clause 4.1*"?

31 I return then to consider whether the clause, as drafted, is coherent and if it is, whether the 6-week time limit applies to all aspects of the clause. The lack of punctuation in the original does not make it very easy to construe, but I conclude that it is coherent and that it does incorporate the 6-week time limit into all aspects of the clause. No additional words are required to come to this conclusion. It is easiest to demonstrate this construction of the clause visually as follows:-

within 6 weeks of receipt of the notice served pursuant to clause 4.1 the current market value of the Property shall be

agreed or in default of agreement

fixed by an independent valuer appointed

by agreement or in default of agreement

on the application of either of the parties to the President for the time being of the Royal Institute of Chartered Surveyors

32 In my judgment, Mr Wales is correct and the proper construction of Clause 4.2 required the current market value to be fixed by an independent valuer within 6 weeks of receipt of the Clause 4.1 notice.

33 The next question is whether time was of the essence in relation to Clause 4.2.

34 Time began to run on 8.12.14. The 6-week period expired on 19.1.15. The valuer's report was not obtained until 27.1.15, outside the 6-week period.

35 Mr Wales relies on the principle that "*time is of the essence in the operation of an option to purchase property*" (per Wilmer LJ in *Hare v Nicoll* [1966] 2 QB 130 at 141 and Emmet and Farrand on Title at 2.079).

36 Mr Wales contends that Clause 4, as a whole, provides for an option to purchase the Property and therefore time is of the essence in relation to each part of Clause 4, including the 6-week time period in Clause 4.2 and the 12-week time period in Clause 4.3.

37 Mr Blohm contends that an option to purchase only arises once notice has been given by the Serving Party under Clause 4.1 *and* the current market value has been ascertained in accordance with Clause 4.2. It is only at that point that the Receiving Party has an option to purchase and therefore time is only of the essence in relation to the 12-week time limit in Clause 4.3.

38 I shall adopt Mr Blohm's structured approach. In paragraph 17 of his skeleton argument, Mr Blohm starts with the question of whether Clause 4.2 is a condition of the exercise of the option. He submits that it is not a condition at all, because it is not implicit (nor explicit) that failure to comply with Clause 4.2 will terminate the Receiving Party's right to enforce his right of sale if he chooses to do so. I cannot agree with this analysis. Clause 4.2 provides for the agreement or fixing by an independent valuer of the "current market value of the Property". If there is failure to comply with Clause 4.2, there is no "determination of the current market value of the Property" as required by Clause 4.3 and the Receiving Party cannot serve written notice of intention to purchase under Clause 4.3. It is therefore implicit that failure to comply with Clause 4.2 will prevent the Receiving Party from exercising the option. Accordingly, in my judgment compliance with Clause 4.2 is a condition of the exercise of the option.

39 The next question is whether, notwithstanding my conclusion that compliance with Clause 4.2 is a condition of the exercise of the option, Clause 4.2 nevertheless falls outside the general rule that time is of the essence in the operation of an option to purchase property because it is not solely concerned with performance by the Receiving Party, but also involves the actions of third parties. Mr Blohm developed this argument in paragraph 20 of his skeleton argument and in his oral submissions. He referred me to the case of *United Scientific Holdings v Burnley* [1978] AC 904, 928G-929B per Lord Diplock and 962A-C per Lord Frazer. However, for my part I cannot see anything in the speech of Lord Diplock that precludes time being of the essence in relation to a contract term that involves, in part, the actions of a third party. Lord Diplock cited the earlier decision of Lord Denning MR in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 81 in which, speaking of options to purchase real or personal property or to renew a lease, Lord Denning said: "*In*

point of legal analysis, the grant of an option in such cases is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer." It seems to me that provided acceptance correspondents with the offer, it is irrelevant whether it is achieved by the offeree acting alone or with/through others. As a matter of practicalities, I can see that from the offeree's point of view it is much more desirable that such terms are drafted in a way that avoids the involvement of third parties, but as a matter of principle I can see no bar to them being drafted in this way.

40 In my judgment, Clause 4.2 is a condition of the exercise of the option and it falls within the general rule that time is of the essence in the operation of an option. I conclude that time was of the essence in relation to Clause 4.2.

41 The next question is whether the Defendants are estopped from relying on the 6-week time limit and/or whether the Defendants waived their right to rely upon the 6-week time limit.

42 The evidence on this issue comes from a number of sources:-

a. Paul Smith addresses this part of the evidence in paragraphs 74 to 85 of his witness statement (1/C/37-41). Paragraphs 83 and 84 are of particular relevance. There is corroboration of his account in the correspondence passing between the parties, in an email from Jason Thomson of Howard Pugh (4/HI/105) and in Mrs Yarnold's diary entries (4/JK/68). He was cross-examined and did not depart in any significant way from the account given in his witness statement. I accept his evidence on this issue.

b. Mr Yarnold was rather vague as to the details of the discussions with the Claimants in the run-up to Colin Townsend's valuation on 26.1.15. However, and importantly, under cross-examination he did say that at the time he had no objection to any valuer; that he had probably telephoned John Goodwin to arrange for Colin Townsend to come and value the property; that whoever arranged it, he (Mr Yarnold) agreed to it; and that he did not disagree with the contents of the Claimants' letter dated 20.1.15 (4/HI/120).

c. Mrs Yarnold gave limited evidence on this aspect of the case, although her diary entry for 19.1.15 (4/JK/68) provides contemporaneous confirmation of what Mr Smith said in his witness statement at paragraph 84. In that diary entry, Mrs Yarnold wrote: *"Keith told T about John G coming and she phoned P who was in Malvern and he went to John Goodwin. They came round and we agreed for him to come next week."* Under cross-examination Mrs Yarnold, like her husband, was rather vague, but she did say that in her recollection Pughs could not do the valuation and so they agreed that John Goodwin should do it.

43 I find as follows:-

a. On 12.12.14 (4/HI/89), the Claimants wrote to the Defendants reminding them, amongst other matters raised, of the 6-week time limit.

b. On 10.1.15 the Claimants "*made tentative arrangements*" for Howard Pugh & Co to carry out the valuation on 19.1.15 (4/HI/94) and wrote to the Defendants seeking their agreement.

c. On 13.1.15 (4/HI/96) the Claimants wrote again to the Defendants, seeking their confirmation that they agreed the instruction of Howard Pugh & Co.

d. On 13.1.15, the Defendants telephoned Howard Pugh & Co and rearranged the date of the valuation visit, putting it back to 22.1.15. They also wrote to the Claimants confirming their agreement to Howard Pugh & Co and notifying them of the new date. See 4/HI/97, 99 & 105. Therefore, within the 6-week time period and with knowledge of that time period, the Defendants agreed and arranged for the valuation to be carried out by Howard Pugh & Co outside the 6-week time period.

e. On 14.1.15, Howard Pugh withdrew, citing a conflict of interest (4/HI/104).

f. On 16.1.15 (4/HI/111), the Claimants wrote to the Defendants saying in terms that "*the deadline under the Trust for agreement of the market value of the property is 19th January 2015*". In the same letter, the Claimants proposed John Goodwin (4/HI/111).

g. On 18.1.15, the Claimants wrote again, repeating their proposal of John Goodwin (4/HI/115). That letter was hand delivered to the Defendants the same day, at which time the Defendants told Mrs Smith that they would contact John Goodwin the following day (1/C/41, para 83).

h. On 19.1.15 the Defendants contacted John Goodwin and arranged for Colin Townsend of John Goodwin to carry out a valuation on 21.1.15. Therefore, within the 6-week time period and with knowledge of that time period, the Defendants agreed and arranged for the valuation to be carried out by Colin Townsend outside the 6-week time period.

i. Later on 19.1.15, Mr Smith rearranged Colin Townsend's appointment for 26.1.15 (1/C/41, para 84). Still later on 19.1.15, the Claimants spoke to the Defendants and they all agreed that the valuation would be carried out on 26.1.15. Therefore, within the 6-week time period and with knowledge of that time period, the Defendants agreed to the valuation being carried out on 26.1.15, outside the 6-week time period.

j. The Claimants relied on the Defendants' words and actions, by which the Defendants twice arranged for a valuation to take place outside the 6-week time limit and agreed to the valuation taking place on 26.1.15.

k. Mr Townsend attended on 26.1.15 and provided his report the following day, 27.1.15 (3/G/58,66). The Claimants and the Defendants each paid half his fees.

44 I have been referred to Emmet and Farrand on Title at 2.079, in which the general principle that an option for the purchase of property must be exercised strictly within the time limited for the purpose is set out. The section continues thus: "*Nor will time still be of the essence, if the conduct of the grantor has been conducive to delay… or has constituted a waiver or estoppel in respect of non-compliance with any stipulated conditions…. However, any variation of the option, as by extending the period for its exercise, must be agreed by signed writing within s2 of the Law of Property (Miscellaneous Provisions) Act 1989 (as well as being for consideration) in order to be relied upon…*".

45 In my judgment the Defendants' conduct, in twice arranging for a valuation to be carried out outside the 6-week time limit and in agreeing to the date of 26.1.15, was conducive of the very delay that meant that the valuation took place outside the 6-week time limit.

46 Further, in my judgment that same conduct constituted a waiver by the Defendants of any entitlement to rely upon the 6-week time limit.

47 Further, in my judgment the Defendants are now estopped from relying upon the 6-week time limit. I am satisfied that by their words and actions, they represented to the Claimants that they were agreeing to the valuation taking place outside the 6-week time limit and that the Claimants relied upon those representations in not insisting that the valuation take place within the 6-week time limit, in agreeing to the valuation taking place outside the 6-week time limit and in subsequently paying their share of Mr Townsend's fees.

48 I was not addressed on whether the correspondence passing between the parties, some of it signed by the Defendants, could amount to an agreed variation of the option in signed writing. I come to no concluded view on that point.

49 In my judgment, each of delay, waiver and estoppel independently prevents the Defendants from now asserting that the valuation was obtained too late.

50 Colin Townsend's report was received by the parties on 27.1.15. The Claimants then had 12 weeks from that date in which to serve their notice under Clause 4.3. I find that their Clause 4.3 notice, which was served on 17 April 2015, was served in time.

51 The last question in this section of the judgment is whether Colin Townsend was "an independent valuer appointed by agreement", with the meaning of Clause 4.2?

52 There is no dispute that Colin Townsend was a valuer.

53 The Defendants contend that Mr Townsend received additional instructions from the Claimants which "*the Defendants were not party to and did not authorise or ratify*" (Re-Amended Defence & Counterclaim, 1/A/60). Mr Wales expanded upon the pleaded case in paragraph 29 of his skeleton argument, concluding that "*the parties were not ad idem as to the instructions given to John Goodwin and consequently the resultant valuation was not by "an independent valuer appointed by agreement" within the meaning of Clause 4.2 of the deed*".

54 The starting point is to consider whether the parties agreed to instruct Mr Townsend at all. I repeat my analysis and findings at paragraphs 42 and 43 above. I find as a fact that the parties agreed to instruct Mr Townsend to carry out a valuation of the property.

55 The next question is whether the parties agreed to provide Mr Townsend with the documents which can be found at 4/HI/117,118 and which, for ease of reference, I shall refer to as "the terms of engagement". The Claimants prepared the terms of engagement and hand delivered them to the Defendants on 18.1.15, together with a letter of the same date (4/HI/115). The Defendants were therefore in possession of the terms of engagement when they agreed to the instruction of John Goodwin/Colin Townsend. Did they also agree that the terms of engagement should be provided to Mr Townsend?

a. Mr Smith was cross-examined about this and his evidence was that there was a discussion with the Defendants at the time and the terms of engagement were agreed by the Defendants. This evidence is consistent with the letter written by the Claimants to the Defendants on 20.1.15 (4/HI/120), which states "*Following your instruction of John Goodwin yesterday and our subsequent meeting I write to confirm that we have re-arranged the valuation for Monday 26th January at 11.00am and provided a copy of the terms of engagement as agreed. The cost of the valuation is £200.00 plus VAT and have requested John Goodwin to divide the costs equally and invoice each party separately*" (my underlining).

b. Mr Yarnold was cross-examined on this letter and he said that he did not disagree with its contents.

c. In the circumstances, I find that the Defendants did agree to the terms of engagement being provided to Mr Townsend.

d. At trial Mr Yarnold sought to dispute the accuracy of the terms of engagement and specifically he asserted that, contrary to what was said in the terms of engagement, there was local authority approval for the conservatory. He was unable to point to any documentation that demonstrated the existence of approval at the time of the valuation. In my judgment, whatever the true position regarding local authority approval for the conservatory as at 27.1.15, the simple point is that, as I have found, Mr and Mrs Yarnold agreed to the terms of engagement being provided to Mr Townsend at the time.

56 That leaves the final question of whether further, oral instructions were given to Mr Townsend on the day of his visit to carry out the valuation. There was no dispute that when Mr Townsend visited the property on 26.1.15, the Claimants showed him around their part of the property and the Defendants showed him around their part of the property. There was, however, an allegation that was pursued at trial that during the time that Mr Townsend was in Mr Smith's company, Mr Smith gave further instructions to Mr Townsend such that he ceased to be "an independent valuer agreed by the parties".

a. This allegation was based on the contents of two letters from Mr Townsend dated 23 August 2016 (4/HI/270) and 28 October 2016 (4/HI/281). In the first letter, Mr Townsend commented that certain aspects of the property were emphasised by Mr and Mrs Smith during the visit. He appears to have been asked to give further details of what was raised during his visit and, in answering this question in his second letter, he comments that "*they were mainly passing comments only.*" Also in the second letter, he records his concern at finding himself caught up in the dispute between the parties, observing that: "*originally this matter seemed to be uncontentious when I visited the house in January 2015…*".

b. It is unfortunate that the letters from the Defendants to Mr Townsend that elicited these replies were not included in the trial bundle and were not available at trial. Absent these letters, it is difficult to know to what extent Mr Townsend's replies may have been affected by the way the enquiries were made of him.

c. In any event, Mr Townsend was not called to give evidence, nor was there any witness statement from him. His letters were admissible, but their contents were hearsay.

d. Their contents were put to Mr Smith in cross-examination. He said that during the valuation visit, Mr Townsend asked him about the heating system and about the staircase and he answered Mr Townsend's questions. He remembered Mr Townsend looking out of the window and looking at the oil tank and asking him about it. He said that he also remembered Mr Townsend having to duck as he went up the stairs and asking Mr Smith about it. It was put to Mr Smith that he had deliberately emphasised the heating system and

the staircase and he said that that was not true, that Mr Townsend was a professional valuer carrying out what Mr Smith described as a "red book" valuation. He said that Mr Townsend asked him questions which he answered.

e. It seems to me that there is relatively little difference between Mr Smith's evidence and the contents of Mr Townsend's letters. To the extent that there is a difference, I prefer the evidence of Mr Smith on the basis that he has given evidence before me on oath, it has been tested under cross-examination and I have found him to be a credible witness. I see no basis for rejecting his evidence in favour of untested hearsay evidence contained in Mr Townsend's letters.

f. However, the more important point is this. If, as seems to have been the case, aspects of the property were discussed during the visit, then as a professional valuer Mr Townsend was competent to decide whether they affected the valuation, and if they did, he was under a duty to take them into account in arriving at his valuation. In my judgment, even taking Mr Townsend's letters at their highest, the conversations that he describes would not undermine his status as "an independent valuer agreed by the parties".

g. The resulting valuation report was sent to the parties the following day, since when they have known the basis on which Mr Townsend valued the property. Indeed, when he sent the valuation report to the parties, he specifically recorded in his covering letter that "*I have also had to take into account some of the other issues raised during my visit which are highlighted in paragraph 14 of my report*". The Defendants made no complaint at the time. Mrs Yarnold made an entry in her diary on 28.1.15 (4/JK/71) saying only "*Colin Townsend sent valuation in. It was low, which we expected.*" Mr Yarnold, when cross-examined by Mr Blohm about Mr Townsend's valuation report, said that he "*read through it and thought "that's fine"*".

57 In my judgment, Mr Townsend was "an independent valuer agreed by the parties" and I reject the Defendants' contention to the contrary.

The Claimants' claim for specific performance of Clause 4

58 The Claimants bring a claim for specific performance of Clause 4 of the Declaration of Trust. The Defendants resist this claim on a number of grounds. First, they assert that the Court should refuse it on the basis that the Claimants lack the "clean hands" demanded by equity. Second, they raise the question of hardship, with which I shall deal briefly. Third, they put the Claimants to proof that they are ready, willing and able to exercise the option. They do not argue (correctly in my judgment) that there has been any delay in bringing these proceedings which could act as a bar to the grant of specific performance.

59 The first question, therefore, is whether the Claimants lack the "clean hands" demanded by equity.

60 The law is helpfully summarised in Snell's Equity (33rd edition) at 17-039 and Emmet and Farrand on Title at 7.022, sub-paragraph (4), to which I have been referred by the parties. Adopting the approach of Lord Brightman in the case of *Sang Lee Investment Co v Wing Kwai Investment Co* (The Times, 14 April 1983), I must "*first decide whether there has been any want of faith, honesty or righteous dealing on the part of the person seeking relief and then decide whether as a matter of discretion and in all the circumstances, which might include any relevant misconduct on the part of the person resisting, if it was right to grant or refuse specific performance*." The formula "*want of faith, honesty or righteous dealing*" is essentially interchangeable with expressions such as a party behaving "*improperly*" or a party's "*reprehensible conduct*", expressions which appear in the summary in Snell's Equity at 17-039.

61 The Defendants assert that the behaviour of the Claimants amounted to a concerted campaign intended "to coerce the Defendants into seeking a sale of the Property" (Re-Amended Defence & Counterclaim, 1/A/64). Mr Wales invites me to infer (it being accepted that there is no direct evidence of contrivance) that the Claimant's behaviour was "a contrived course of conduct designed to make [the Defendants'] lives difficult", which was "oppressive and led directly to service of the Clause 4 notice".

62 The conduct with which I am primarily concerned is the conduct that pre-dated December 2014, because the Defendants allege that this was the conduct that forced them to serve the Clause 4.1 notice. However the Claimants' conduct thereafter is also relevant, firstly to the extent that it sheds light on the pre-December 2014 conduct and secondly because it may, depending on its nature, be sufficient (independently or in combination with the pre-December 2014 conduct) to act as a bar to specific performance.

63 It was common ground between the parties that it is not necessary for the Court to make a determination in respect of each and every allegation of abuse, annoyance or nuisance and, consistent with this approach, counsel did not cross-examine on each and every allegation. However, the principal long-running issues were explored, together with a number of one-off incidents. These provided a sufficient cross-section of the allegations for me to be able to form a judgment on the existence or otherwise of the alleged contrived course of conduct and whether the Claimants lacked the good faith, honesty or righteous dealing required.

64 This exercise requires me to consider the witness evidence, in particular that of Paul Smith, Keith Yarnold and Christopher Yarnold who were the principal witnesses on the conduct issues. I start, therefore, with some general observations regarding the witnesses.

a. Mr Smith gave evidence before me at some length. There were three aspects to his evidence, which together formed a consistent overall picture. First, there were his extensive notes. They are at 3/F/80-187 and they consist of notes made by him of meetings, conversations and incidents involving Mr and Mrs Yarnold and other members of the Yarnold family and spanning the period 2007 to 2016. They were made contemporaneously in manuscript and typed up later. They reveal an almost compulsive need to record and document events (and I observe in passing that during the trial, when not giving evidence himself, he sat in court continually making notes). He said in his evidence that it was a hangover from his days working for Bristol City Council where he would produce a memo of everything he did. Whatever its origins, it has generated a very detailed record of events. I have considered the possibility that these notes are a fiction, generated with a view to supporting lies told against Mr and Mrs Yarnold. I reject that possibility. I do not judge them to be the result of any dishonesty or bad faith. There is, of course, the risk that his notes are (unconsciously) partisan. However, even making allowance for a modest degree of "spin", I judge his notes to be broadly accurate. Second, there was his witness statement. He was asked how it came to be produced and he replied that he had just been asked to prepare it, which he had done, without any guidance as to what to include and what to leave out. Left to his own devices in this way, he produced a statement that ran to 82 pages/178 paragraphs. Thirdly, when giving oral evidence, he emerged as a rather anxious witness who was prone to giving very long narrative answers to the questions that were put to him. I considered this to be borne of a concern that he might otherwise be misunderstood. In each of these aspects of his evidence, he was as different from Mr Yarnold as could be imagined.

b. Mr Yarnold was also in the witness box for some time. He suffered a mini-stroke in 2002, as a result of which he had some difficulty dealing with the documentation at trial. However, he was perfectly capable of following proceedings and understanding the issues. He was a man of comparatively few words who saw little need to explain himself or elaborate upon his answers. When it came to recalling past events, he was frequently vague and non-committal and in that respect I found him to be a relatively poor historian. He is a farmer and before that he was a builder. His daughter Jane described him as the patriarch of an old-fashioned rural family (2/D/194). Having seen him and members of his family give evidence, I consider this to be accurate and over the course of his evidence he emerged as a strong-willed man, confident in his opinions and in himself. What also emerged was that he never fully accepted the way in which the ownership of the property had changed in 2008. In my judgment, he continued to regard it as his farm (which was the impression that he gave to Christopher Yarnold – see below) and he regarded the Claimants as having got a good deal, at his expense (see, for example, the final paragraph on 4/HI/77) and as being ungrateful (in evidence he said that he told Mr Smith that he was very ungrateful for what he and Mrs Yarnold had done for him).

c. So far as Christopher Yarnold is concerned, I consider his evidence to have been subject to two significant influences. First, he is very close to his parents. He is now 56 years old, he has lived at home with his parents all his life and for many years he has worked with his father. He has a close relationship with his parents and thinks highly of them. Second, his understanding of who owned the farm was inaccurate. When cross-examined, he said that as far as he was aware, the farm was still owned by his parents. He said that whilst his parents were alive, the farm was theirs to do with as they wished. He said that if there was a disagreement between his parents and the Claimants as to who could do what on the farm, it was obvious that the Claimants should defer to his parents because his parents owned the farm. In my judgment these factors have led him to take his parents' side in their dispute with the Claimants and have predisposed him to misconstrue the Claimants' actions in and around the farm.

d. Christopher Yarnold also provided, no doubt unwittingly, a prime example of the way in which the parties lost their sense of proportion when it came to each other's actions. In paragraph 12 of his witness statement, he asserts that the Claimants "*embarked on a vicious campaign of harassment*" which, as he describes it, consisted of putting up a washing line on the front lawn, putting a table and chairs on the lawn and a sun lounger by the front door and cutting down a tree. Even without taking into account the Claimants' response, I struggle to see how, taken at its highest, this could properly be described as a vicious campaign of harassment and it seems to me that this well illustrates the way in which the breakdown in relations caused those involved to view relatively minor events as being of much greater significance and bearing much greater malice than could ever possibly have been the case in reality.

e. So far as Tracy Smith's evidence was concerned, it mostly related to the loan agreement as opposed to the conduct allegations. However, in relation to those conduct matters on which she gave evidence, I found her to be a reliable witness. I have already considered her reliability in paragraph 22 above and I repeat those observations here.

f. So far as Mrs Yarnold was concerned, she kept a diary and extracts from her diary are available to me. Like Mr Smith's notes, there is a risk that her entries are (unconsciously) partisan. But making due allowance for that, I find her diary entries to be broadly accurate. They offer some assistance on the issues I have to consider. So far as her oral evidence was concerned, I found her to be an honest witness, who was genuinely distressed by the way in which family relationships had broken down. However, I also found her evidence to be unreliable on important core issues. I have already considered this in paragraph 22 above. I repeat those observations here.

g. The remaining witnesses gave evidence about specific incidents or issues. They were all either family members or friends of the Defendants and Christopher Yarnold. They had each been exposed to the Defendants' and Christopher Yarnold's version of events over many years and I have no doubt that they had accepted what they were told. None of them could be said to be impartial or independent and therefore a significant degree of caution has to be exercised when considering their accounts and more importantly their interpretation of events.

65 I turn now to consider some of the specific allegations that the Defendants say are indicative of a deliberate campaign of harassment designed to make life intolerable for the Defendants and drive them away from the farm.

66 **The disagreements arising out of the use of the barn.** The barn appears to have been one of the primary sources of friction between the parties, especially in the Summer of 2014. In my judgment, in order properly to understand the disagreement over the barn, it is essential to understand some of the background. It is clear from the negotiations over the Declaration of Trust in 2007 and 2008 that the parties had concerns regarding the use of the barn and how that should be addressed in the Trust. However, the final version of the Declaration of Trust did not make explicit provision regarding the use of the barn and in my judgment Clause 5.3 (and in particular the meaning of the word "possession"), although perfectly serviceable in legal terms, was capable of honest misinterpretation by a layman. It seems that, for several years after the Declaration of Trust was signed, the parties were able to manage their use of the barn without falling out. However, when relations began to sour in 2014, it is my judgment that matters were significantly exacerbated by the fact that the parties did not have more explicit provisions in the Trust to fall back on.

67 **Specific incident involving an argument between Mr Smith and Christopher Yarnold in June 2014.** In paragraph 12 of his witness statement (2/D/185), Christopher Yarnold describes an incident in summer 2014 in which he alleges that Mr Smith accosted him over the use of the barn. He also describes a conversation the following day in which he alleges that Mr Yarnold told the Claimants "*that the new Trust gave [Mr Yarnold] control of the barn…*". This would seem to be the same incident that Mrs Yarnold describes in her diary entry for 24.6.14 at 4/JK/53 and Mr Smith describes in his notes at 3/F/187. I repeat my general observations on the evidence of these three witnesses. I prefer and accept the evidence of Mr Smith in relation to this incident.

68 **The dispute over the electricity supply to the barn.** The electricity supply to the barn was a particular point of contention between the parties. It frequently cut out when Christopher Yarnold was in the barn. There was a consumer board located in the Claimants' part of the house, from which the electricity supply ran to the various parts of the house and barn. This meant that someone with access to this consumer board could deliberately turn off the electricity in the barn. It also

meant that if the electrical supply to the barn "tripped", it would be necessary to turn it back on at the consumer board.

69 The Defendants and Christopher Yarnold accused Mr Smith of turning off the electricity supply to the barn so as to inconvenience them, with the result that they would have to go and ask him to turn it back on again. There is no direct evidence of Mr Smith turning it off, but the Defendants invite me to draw that inference from the surrounding evidence, including the evidence from other witnesses of the electricity going off in the barn and of Mr Smith refusing to turn it back on again.

70 Mr Smith denies the allegation that he was turning the supply off, saying that there had been times when he had been away from the property or even in the barn with Christopher Yarnold when the electricity had gone off and therefore he could not have been turning it off at the consumer board as alleged. His case is that the electricity supply was simply in the habit of "tripping" and, once tripped, it would have to be switched back on at the consumer board.

71 There was no expert evidence on the issue. This is not a criticism of either party, as they would almost certainly have been refused permission for an expert on the basis that the cost would have been disproportionate to the importance of the issue, but its absence does make the issue more difficult to determine.

72 I do not doubt that, with relations deteriorating between the parties, the requests to turn the electricity back on were not always made as politely as they might have been and they were not always answered as politely or as promptly as they might have been. In my judgment that is neither here nor there.

73 So far as the Defendants' underlying allegation is concerned, it seems to me that the Defendants' own evidence undermines the very conclusion they invite me to reach. Christopher Yarnold's evidence was that he solved the problem by plugging an extension cable into a socket in the conservatory, which is in his parents' part of the house, and running the cable from there to the barn in order to provide an electricity supply to the barn. However it was also his evidence that "*the supply from the conservatory ultimately goes back to the same consumer board in the Smiths' house*". That being so, and there being no secret about the cable from the conservatory to the barn, there was nothing to stop Mr Smith from continuing to interrupt the electricity supply to the barn. Yet the evidence is that the electricity supply has not been interrupted since the cable was run from the conservatory. This would seem to point away from Mr Smith being the cause of the interruptions and towards some aspect of the circuitry being to blame.

74 This fortifies me in my view that the cause of the interruptions was not Mr Smith deliberately turning off the electricity. As I have already stated, I found Mr Smith to be a credible witness and I accept his evidence on this issue.

75 **The disagreements over Mr Smith's Ford Ka.** Mr Smith owned a Ford Ka which he stored in the barn. Mr Yarnold and Christopher Yarnold assert that Mr Smith deliberately parked the car in positions that obstructed their use of the barn. Mr Smith asserts that they have broken into and moved his car without his permission and that on one occasion they have deliberately damaged it.

76 The arguments over the car went on for a long time. There was an incident in early October 2014 (see references at 1/C/33,34; 2/D/6; 2/D/186; and 4/JK/57). The arguments over the barn and the car were still continuing 16 months later in January 2016. On 25.1.16, Keith and Christopher Yarnold moved the car out of the barn and into the field (2/D/10,193). The car was damaged in the process and the same was photographed by Mr Smith (3/F/31). The police were called and both Keith Yarnold and Christopher Yarnold were prosecuted for criminal damage. The case was discontinued against Keith Yarnold and Christopher Yarnold pleaded guilty to causing criminal damage to the car. But even the circumstances of his guilty plea turn out to be controversial, with Christopher Yarnold now saying in evidence that he had been put under pressure to plead guilty by his own advisers and that the matter was to be the subject of an appeal, which had not yet been heard at the time of this trial.

77 There are photographs of the car in the barn, taken by Mr Smith, which show it parked to one side and not obviously causing any obstruction (1/C/91,92). However these are snapshots and it is of course possible that it was not always parked in this position.

78 On the available evidence, it is not possible to say where the car was on any given day and whether, on that day, it was or was not interfering with the Defendants' use of the barn. Still less is it possible to attribute any particular motive to Mr Smith in the positioning of his car on any given day. The most that I am able to say is that I accept that Mr Smith was entitled to store the car in the barn, I also accept that from time to time the Defendants thought that the car was in the way and I also accept that from time to time Mr Yarnold and Christopher Yarnold took it upon themselves to move it. In the midst of deteriorating relations and a strong tendency on both sides to assume the worst of the other, I place no weight on the suspicions of each side as to the motives of the other. On the evidence I have heard, I am not satisfied that Mr Smith deliberately obstructed the Defendants' use of the barn with his Ford Ka. By a similar process of reasoning, I also reject the Defendants' allegations that Mr Smith was obstructing their use of the barn with bicycles and other objects.

79 **The issue of access to the children.** Mr and Mrs Yarnold described how there came a time when the Claimants started to prevent them from having access to their grandchildren. There is no doubt that, as relations deteriorated, the Claimants did restrict the Defendants' access to their children. There is also no doubt that this has upset both Defendants, and in particular Mrs Yarnold. The Defendants say it is malicious. The Claimants say it is an appropriate response to

the behaviour of the Defendants. Unfortunately, in cases where family relationships break down, it is not uncommon for there to be disputes over access to children. These disputes are almost invariably distressing for those involved. However the fact that they are distressing does not prove that one side or the other is motivated by malice. In my judgment the evidence does not point to this being part of a concerted campaign by the Claimants designed to make life intolerable for the Defendants. Instead, it is my judgment that it was simply a very sad by-product of the breakdown in the family relationships.

80 **The dispute over the septic tank and sewage system.** The sewage system was a point of contention, with both Mr Yarnold and Mr Smith spending some time in their evidence trying to explain why their analysis of the problem was correct and the other's analysis was wrong. I am satisfied that there was a problem with the sewage system and I am further satisfied that Mr Yarnold and Mr Smith each genuinely believed that he was right and the other was wrong. They were unable to agree upon a solution and they became distrustful of each other's motives and actions. This was unfortunate, but Mr Smith's behaviour in respect of the sewage system was clearly not part of a contrived or stage-managed campaign against the Defendants, nor did it demonstrate any dishonesty or bad faith.

81 **The dispute between Mr Yarnold and Mr Smith over a retaining wall.** Mr Yarnold described a dispute between himself and Mr Smith regarding a wall (2/D/5, paragraph 13). There are photographs of the wall at 1/C/89,90 and 3/F/28. Mr Smith deals with it in his witness statement at 1/C/29,30. I heard oral evidence about this issue from them both in the course of the trial. I am quite satisfied that there was a genuine difference of opinion between Mr Yarnold and Mr Smith regarding the construction of the wall, which led to considerable ill feeling. However, in my judgment there are no grounds for inferring that Mr Smith's side of the disagreement was part of a concerted campaign against the Defendants or displayed any dishonesty or bad faith.

82 **Christopher Yarnold's shotguns.** Christopher Yarnold alleges in paragraph 14 of his witness statement that the Claimants complained to the police about Mr Yarnold and the access he may have to Christopher Yarnold's guns. Mr Smith disputes this, relying upon the account contained in his own notes made on 24.8.14 (3/F/184). I prefer and accept Mr Smith's notes at 3/F/184 as the explanation for the police interest in Christopher Yarnold's guns. I reject the suggestion that Mr Smith was trying to cause trouble for Christopher Yarnold and/or was trying to deprive him of his guns.

83 **The bonfire near the barn on 29.11.15.** I accept there was an incident in which Mr Smith lit a bonfire, which Christopher Yarnold believed was too close to the barn. I accept that Christopher Yarnold took steps to put it out, leading to an incident in which Mr Smith was soaked with the hose. I accept that Mr Smith was angry. However I reject the suggestion that this incident sheds any light on the matters that I have to decide, or that it is evidence of any concerted campaign to

drive the Defendants away from the farm, not least because I am quite satisfied that Mr Smith, as one of the owners of the barn, had no intention of damaging the barn or its contents.

84 **The incident on 3.4.16 involving the key to the barn.** To my mind, this incident and the way in which it was subsequently seized upon by both sides, epitomised the parlous state of relations between the parties. But at its heart it was no more than an incident involving a misplaced key and I am quite satisfied that it was not part of a concerted campaign to drive the Defendants from the property. I am quite satisfied that it has no bearing whatever on the issues that I have to decide.

Conclusions on "clean hands"

85 It is possible to continue in this vein, identifying squabbles and areas of dispute which the Defendants assert are part of a deliberate campaign, but which, on calm reflection, are no more than illustrations of the deteriorating relations between the parties. However, it is not necessary to do so. It is agreed that a determination is not required in respect of each and every allegation. I have considered all of the evidence that was presented at trial and, in this judgment, I have dealt in some detail with a representative cross-section of the Defendants' allegations.

86 In closing Mr Wales invited me to conclude that, at least by 2014, the balance of power at the farm had tilted firmly in favour of the Claimants. I do not accept that that was the case. In my judgment, Mr and Mrs Yarnold were perfectly well able to stand up for themselves, to seek legal advice when they needed it and to confront the Claimants when they saw fit. In my judgment this is not a case where one side or the other held the balance of power.

87 Having seen and heard both Mr Yarnold and Mr Smith give evidence at some length during the trial, I have come to the conclusion that they are indeed, as Mr Blohm suggested to Mr Yarnold, chalk and cheese. Mr Yarnold summed it up in part, saying that: "*Paul is very well qualified, but not practical. I have practical qualifications only, no academic ones*." However it seemed to me that their differences went very much deeper than that, as did the differences between Mr Smith and Christopher Yarnold. It seemed to me that relations were probably always rather strained and the situation was not made any easier by the fact that Mrs Smith and her sister Jane Mulvale, who is close to her parents and brother, fell out in about 2008 and that falling out continues to this day. On the basis of my brief exposure to all of these witnesses during the trial, and accepting that this is necessarily only a snapshot, I am surprised that they all managed to rub along together between 2008 and 2014. Conversely I am not surprised that when relations started to turn sour in 2014, that they did so very rapidly.

88 Thereafter it is clear that relations continued to deteriorate following service of the Clause 4.1 notice. The Defendants, who had earlier seemed indifferent to whether it was they or the Claimants who moved out (see for example their letter of

14.8.14 at 4/HI/61), and who had then chosen to serve the notice under Clause 4.1, now seemed horrified at the prospect of the Claimants exercising their option to purchase. The disputes over the option to purchase and the loan agreement ensued. The fact that the parties were continuing to live side by side meant that they could not avoid seeing one another and there were regular flash points. This was a recipe for ever-worsening relations. The litigation has done nothing to improve matters. Unfortunately Mr Budden was right when, in 2008, he predicted that it would all end in tears (2/D/217).

89 There is no doubt that this is a sad and unhappy state of affairs for all concerned. However, when I look at the evidence as a whole, I find no basis for inferring that the Claimants have engaged in a deliberate campaign designed to drive the Defendants from the farm. I do not find that the Claimants have displayed any "want of faith, honesty or righteous dealing", nor do I find that the Claimants have behaved reprehensibly or improperly. I reject the allegation that the Claimants lack the "clean hands" required by equity.

90 The second question is whether there is "great hardship" to the Defendants which acts as a bar to the grant of specific performance.

91 The law is helpfully summarised in Snell's Equity 33rd Edition) at 17-045.

92 This bar to rectification was touched upon only very briefly at trial. I shall deal with it similarly briefly. This is no "great hardship" here. In 2008 the Defendants freely entered into an agreement with the Claimants, which suited them at the time but which they have since come to regret it. In 2014, with the benefit of legal advice, the Defendants chose to serve a notice on the Claimants under Clause 4.1 of the Trust. The consequence of doing so was to hand to the Claimants the option to purchase the Defendants' share of the property. The Claimants have chosen to exercise that option and once again the Defendants have come to regret their actions. The Defendants, who are elderly and not in the best of health, find themselves in a position which they regret and which is causing them real sadness and unhappiness. The fact that they will have sufficient funds to move elsewhere is no consolation. Even though the situation is of their own making, it is impossible not to feel a great deal of sympathy for them. Unfortunately sympathy for their situation is not the same thing as a finding that there is great hardship. There is no great hardship here that could operate as a bar to specific performance.

93 The third question is whether the Claimants are ready, willing and able to exercise the option.

94 The law is helpfully summarised in Chitty on Contracts (32nd edition) at 28-144, to which I was referred. I was not referred to any case law. The Claimants are put to proof that they are "*ready, desirous, prompt and eager*", or to use a more modern formulation "ready, willing and able", to exercise the option.

95 I find as follows:-

a. I accept Mr Smith's evidence on this issue.

b. The Claimants hold a mortgage offer of £280,000.

c. The Claimants have approximately £100,000 available in cash.

d. The Claimants own at least one other property, in which they have approximately £90,000 in equity and which they could realise if necessary.

e. The Claimants hold an offer of a loan of up to £300,000 from Mike Etheridge Construction Limited (1/C/133A).

f. The Claimants are sincere in their desire to exercise the option to purchase the Defendants' share of the property.

96 In the circumstances, I find that the Claimants are ready, willing and able to exercise the option to purchase the Defendants' share of the property.

Conclusions

97 I give judgment in accordance with my findings and conclusions as set out above. The question now arises as to the appropriate form of the Order.

98 At the conclusion of the trial, I asked each party's counsel to provide me with his proposed Order in draft. There was insufficient time for me to hear submissions on these proposed Orders. I indicated to the parties that I would hand down my judgment electronically, together with a draft Order in which costs would follow the event. If the parties sought a different Order, they would be at liberty to agree the same, alternatively request a further hearing. However, it was (and remains) my hope that a further hearing, with its attendant costs, could be avoided.

99 I have set out my proposed Order at Appendix 1.

100 It is my intention that, once the judgment is handed down, the parties should have the opportunity to consider the form of the Order and either agree the Order in its present form, or agree a different form of Order if they so wish, or request a hearing as to the appropriate form of the Order. The timescale for the parties to do this takes account of the Easter break.

101 I have not included any provision as to cross-undertakings, although the parties may agree to include them if they so wish.

102 I therefore direct as follows:-

a. The parties, through their legal representatives, shall calculate the sum owing (if any) pursuant to the loan agreement and notify the Court of the same by 4pm 21 April 2017.

b. The parties shall, by 4pm 21 April 2017 and in writing, either:

    i. notify the Court that they agree to an Order being made in the form attached at Appendix 1; or

    ii. submit an agreed alternative Order for approval by the Court; or

    iii. request a further hearing as to the form of the Order.

His Honour Judge Ambrose
29 March 2017

APPENDIX 1

IN THE BRISTOL COUNTY COURT

Claim No C00BS142

BETWEEN

MR PAUL SMITH
MRS TRACY SMITH

Claimants

and

MR KEITH YARNOLD
MRS PAMELA YARNOLD

Defendants

Draft ORDER

Before HHJ Ambrose sitting at the Civil Justice Centre, Bristol on 6, 7, 8 and 9 February 2017

And upon hearing leading counsel for the Claimants and counsel for the Defendants

And upon reading the written evidence filed and hearing oral evidence

It is ordered that:

1 The Court declares:

a. that the sum presently due to the Defendants pursuant to the Loan Agreement between the parties hereto dated 29 July 2008 is £[…]

b. that the option contained in the Declaration of Trust dated 29 July 2008 and referred to at paragraph 11 of the Re-Amended Particulars of Claim ("the Option"), for the sale of Lower Kingshill Farm, Sandlin, Leigh Sinton, Malvern, registered at HM Land Registry under the title number WR119099 ("the Property"), was validly exercised by the service of a notice by the Claimants on the Defendants on 17 April 2015.

2 The Option be specifically performed.

3 The Claimants having accepted the title to the Property, the Claimant prepare and execute a transfer from the Defendants and the Claimants to the Claimants, to be approved by the Defendants, such document to be settled by the Court in case the

parties differ and execute such transfer as an escrow to be delivered to the Defendants as mentioned below.

4 The parties will on or by 4pm 25 August 2017 complete the sale and purchase of the Property pursuant to the Option.

5 The Claimants' claim for damages for harassment is dismissed.

6 The Defendants' counterclaim is dismissed.

7 The Defendants shall pay the Claimants' costs of the claim and counterclaim on the standard basis, such costs to be the subject of detailed assessment if not agreed.

8 The parties do have liberty to apply as to the working out of the above Order, and any further accounts or inquiries arising on the exercise of the Option.