

Neutral Citation Number: [2025] EWHC 878 (Ch)

Case No: PT-2022-NCL-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE-UPON-TYNE
PROPERTY, TRUSTS AND PROBATE LIST

Trial conducted remotely using CVP

Date: 17 April 2025

Before :

HER HONOUR JUDGE CLAIRE JACKSON

Sitting as a Judge of the High Court

Between :

**ALAN GREGORY FREEMAN, HUGH FELL
TRUSTEE COMPANY LIMITED AND SIMON
ROGER KIRKUP BEING THE TRUSTEES FOR
THE TIME BEING OF LADY BELINDA
GADSDEN'S 1997 CHILDREN'S SETTLEMENT**

Claimant

- and -

HOME FARM ELLINGHAM LIMITED

Defendant

Ms Catherine Taskis KC (instructed by **Womble Bond Dickinson (UK) LLP**) for the
Claimant

Mr Neil Mendoza (instructed by **Thackray Williams LLP**) for the **Defendant**

Hearing dates: 25, 27 and 28 March 2025

JUDGMENT

**This judgment was handed down remotely by circulation to the parties or their
representatives by email and release to The National Archives.**

Her Honour Judge Claire Jackson :

1. By a Transfer dated 26 July 2017 (“the Transfer”) the Claimant, the present Trustees of the Lady Belinda Gadsden’s 1997 Children’s Settlement, sold a parcel of land (“the Land”) at Home Farm, Ellingham, Chathill, Northumberland, including land now registered with title number ND189680, to the Defendant. The Claimant owns further land at Home Farm, registered with title number ND159175 (“the Retained Land”), which is adjacent to the Land. This claim arises out of the terms of the Transfer.
2. Prior to marketing of the Land, two planning permission processes were successfully conducted at the instigation of the Claimant in relation to the Land (“the Planning Permissions”). Prior to the first formal planning permission application being made, George F White, the agent of the Claimant, entered into discussions with the relevant local authority, being Northumberland County Council (“NCC”). During those discussions representations were made by the Claimant’s agent to NCC that the Claimant would not seek for the roads in the development, or at least part thereof, to be adopted by NCC, being the relevant highway authority.
3. The first planning permission was for a development of 10 houses. It was granted in 2013 and related to a development to the north of the Land. It included an initial stretch of road from the local highway, U2029, leading to a cul de sac around which the houses would be constructed. The initial stretch of road would also allow access to a farmhouse and office on the Retained Land.

4. The second planning permission, which also related to a development of 10 houses, was granted in 2016. This development was to the south of the Land with access to its houses being by way of a spur from the initial stretch of road to be constructed under the first Planning Permission leading to a second cul de sac.
5. Adoption of the estate roads was expressly addressed in the second planning permission application. In the Planning Statement George F White, agents of the Claimant, stated that the immediate stretch of road from the U2029 would be built to an adoptable standard but the cul de sac would be a shared surface which was not proposed for adoption.
6. Having obtained the Planning Permissions the Claimant wished to sell the Land. In a sales strategy meeting held on 22 March 2016 at which the Trustees, George F White, and the Claimant's solicitors were in attendance it was agreed to put the Land on the market. The meeting noted that there was potential for part of the Retained Land to seek future planning for five properties, this was to be further investigated. In relation to the sale of the Land it was agreed at the meeting that:
 - i) the roads in the developments would be sold, subject to a right of access for the Reserved Land;
 - ii) the road would be the subject of an obligation on the purchaser to procure adoption;
 - iii) there would be a reservation for the Claimant to upgrade and use the roads for access, including access to a garage unit, and;

- iv) the purchaser would be prevented from fencing along the boundary.
7. It was noted that there was a difference in the plans for the north and south site regarding the access route. This was to be investigated. It was also agreed that the sale was to be on the “*basis that the developer builds in accordance with the plans unless otherwise agreed in writing by the trustees, such approval not to be unreasonably withheld.*”
8. The Land was then marketed for sale.
9. Pursuant to a heads of terms document dated 24 February 2017 and marked “*subject to contract*”, the sale of the Land to the Defendant was agreed at a price of £950,000 plus VAT. The heads of terms noted that the Defendant was to develop the Land in accordance with the Planning Permissions: Any amendments would need to be approved by the Claimant, such approval not to be unreasonably withheld. The Defendant was to be responsible for any future consents or amendments. The Defendant was to undertake its own due diligence as part of the purchase process. Condition 14 of the heads of terms provided that the Defendant would be under an obligation to ensure the estate roads were adopted by NCC. Rights of way were to be reserved for the Claimant.
10. In due course the Land was sold to the Defendant pursuant to the Transfer for the sum of £950,000 plus VAT. There is no dispute between the parties that this sum was paid by the Defendant and the Land duly transferred to the Defendant.
11. The Transfer included the following terms:

Additional Provisions

12.1 In this Transfer unless the context otherwise requires the following expressions have the following meanings respectively:-

“Access Roads” the roads on the Property in the positions shown coloured green on Plan 2

...

“Plan 2” Means the plan attached hereto and labelled plan 2

...

“the Planning Permission” means the planning permission issued by Northumberland County Council on 2nd April 2013 and 17 June 2016 with reference numbers 12/02781/FUL and 15/03731/FUL and any subsequent planning permission issued by Northumberland County Council in respect of the Development

“the Property” means the property described in panel 3 above which includes all the boundary structures marked with an inwards T on Plan 2

“the Retained Land” means the land comprised in title ND159175 with the exception of the Property

...

12.2 The property is transferred together with the Rights and subject to the Subjections.

...

Schedule 2

The Exceptions and Reservations

4. The right for the Transferor and its successors in title to pass and repass with or without vehicles at all times and for all purposes over the Access Roads.

5. The right for Transferor and its successors in title to pass and repass with or without vehicles over the part of the Property shown hatched pink on Plan 1 to access the parts of the Retained Land shown hatched blue and hatched yellow on plan 1

6. The right for the Transferor and their successors in title to enter on to the Access Roads and such other parts of the Property as are reasonably necessary (with or without vehicles plant or equipment and together with contractors workmen and other persons engaged in such works so far as reasonably necessary) in order to carry out works to connect into cleanse maintain repair inspect renew replace or upgrade the Access Roads.

...

Schedule 3

Transferee's Covenants Restrictions and Stipulations

1.To complete the development in accordance with the Planning Permission within 5 years of the date of this Transfer.

...

3. Not develop the Property save in strict accordance with the Planning Permission.

...

6. To procure the adoption of the Access Roads and pathways on the Property by the relevant highway authority as soon as reasonably practicable following the date of this Transfer and in the event that any necessary agreement for adoption of the Access Roads has not been entered into within 7 years of the date of this Transfer the Transferee grants the Transferor power of attorney to enter into any such documents on its behalf.

12. Plan 2 shows the Access Roads as comprising the roads shown in both of the Planning Permissions and therefore including that part of the road surface directly leading from U2029 and the cul de sacs. The Access Roads as defined, and as subject to paragraph 6 of Schedule 3 to the Transfer, therefore included all the internal roads to be constructed on the Land. When referring to Access Roads in this judgment I adopt the definition in the Transfer.
13. The Defendant has, following the Transfer, constructed the development and sold all twenty houses constructed thereon. It is not in dispute that the Defendant has constructed the Access Roads but that these have not been adopted by NCC. The Access Roads therefore continue to be held by the Defendant, being the only part of the Land retained by the Defendant.
14. By way of this claim the Claimant seeks an order for specific performance so as to enforce the Defendant's obligation at paragraph 6 of Schedule 3 to the Transfer. In the alternative the Claimant seeks damages. The Defendant disputes the claim.

15. I note at the outset of this judgment that the adoption of the Access Roads is the sole issue before the Court. Following production of the Claimant's expert report other issues have arisen between the parties. However, an application to amend the Claim to include reference to the additional disputes was refused by District Judge Philips on 5 November 2024. The claim therefore proceeds solely in relation to the failure to procure adoption of the Access Roads.

The Claimant's Case

16. The Claimant contends that paragraph 6 of Schedule 3 to the Transfer is a valid and binding contractual obligation requiring the Defendant to procure adoption of the Access Roads, whilst allowing the Claimant step in rights but not requiring the Claimant to use those rights. The Claimant contends that adoption of the Access Roads (or at least part thereof) is still possible and that without such adoption the Retained Land has been diminished in value.
17. Given the Claimant contends that adoption is possible, the Claimant seeks as its primary remedy specific performance, alternatively damages in lieu of specific performance, alternatively damages for the breach of the contractual obligation. By way of its Reply the Claimant relates its damages to the diminution in value of its Retained Land. The diminution in value in part relates to an area of the Retained Land for which the Claimant has obtained Outline Planning Permission for a 3-unit residential development. The balance of the diminution in value relates to the remainder of the Retained Land. The Claimant, through its expert, Mr Garland, values the diminution in value at circa £24,000.

The Defendant's Case

18. The Defendant asserts that the Claim is misconceived. The Defendant relies on correspondence with NCC which the Defendant asserts makes clear that the Access Roads will not be adopted as a public highway. Performance of the Defendant's contractual obligation to procure adoption is therefore said to be impossible as at the very least, given the completion and sale of the residential houses, it is not possible to alter the design of the cul de sacs. Accordingly, the Defendant maintains that the Claimant's remedy, if any, is in damages. The Defendant however denies the Claimant is entitled to a remedy given the background to the making of the contract which the Defendant says results in paragraph 6 of Schedule 3 to the Transfer being unenforceable either as a result of mistake or an estoppel.
19. The Defendant maintains that any damage suffered by the Claimant is no more than nominal and that the lack of adoption makes no tangible difference to the Claimant. In this regard the Defendant in part relies on the rights given to the Claimant under paragraph 6 of Schedule 3 to the Transfer.

The Law

20. At the outset of the trial I asked Counsel to discuss the relevant legal principles on which they each relied so as to establish, before closing submissions, if there was any disagreement between them as to the applicable law. Counsel confirmed that the law was broadly agreed between them.

21. On this basis and therefore applying the principles set out in Counsels' opening skeleton arguments, the agreed legal principles in the claim are:

- i) Specific performance is a discretionary equitable remedy by which a defendant may be compelled to duly perform their obligations in a contract, rather than being required to pay damages for their breach.
- ii) It is a precondition of an order for specific performance that damages for breach of contract would be an inadequate remedy: Co-Operative Insurance Society Ltd v. Argyll Stores (Holding) Ltd [1998] 1 AC 1, at 11G.
- iii) As a matter of principle, damages are inadequate where there is grave doubt about whether they will put the claimant into as good a position as if the contract had been performed: Tesco Stores Ltd v. Union of Shop, Distributive and Allied Workers [2024] UKSC 28 at [80].
- iv) Difficulty in quantifying damages may justify the conclusion that damages are an inadequate remedy, if the circumstances are such that the minimum condition of "*a legitimate interest extending beyond pecuniary compensation for the breach*" required for an award of specific performance is met: Cavendish Square Holding BV v. Makdessi [2016] AC 1172.
- v) If a party has received the entire benefit under a contract but has only part performed their obligations and the damages for such may be no more than nominal this may itself render an award of damages an inadequate remedy. "*The Claimant has received all the property:*

justice demands that he pay the price and this can only be done in the circumstances by equitable relief": Beswick v. Beswick [1968] AC 58, at 81, 102. See also Chitty on Contracts, 35th edition, at paragraph 31-022.

- vi) Exceptionally, impossibility not amounting to frustration [of which there is no suggestion here] may be taken into account in refusing specific performance as the Court will not compel a person to do what is impossible: E. Johnson & Co (Barbados)Ltd v NSR Ltd [1997] AC 400; but for this purpose there must be “*cogent and unequivocal*” evidence that performance would be impossible: Folgender Holdings Ltd v Letraz Properties Ltd [2019] EWHC 2131 (Ch) at [56]-[59]
- vii) If the Court finds that it is impossible for the Defendant to comply with paragraph 6 of Schedule 3 to the Transfer the Court cannot order specific performance or damages in lieu of specific performance. The remedy of the Claimant in such circumstances will be damages at common law.

22. It is to be noted that the majority of the authorities and legal propositions placed before me dealt with the issues of impossibility or adequacy of damages. No authorities were provided in relation to the principles applicable to the defences of mistake or estoppel or as to the assessment of expert witnesses. Counsel did, in relation to the assessment of expert witnesses, refer to the principles of impartiality, including not acting as an advocate, although without referring me to the authorities. Counsel made full submissions on this issue in closing. In writing this judgment it has been necessary for me to

remind myself of the relevant principles on mistake, estoppel and expert witnesses. Where I have done so I have used reputable practitioners' texts and/or well-known cases and referred to the sources in this judgment. Given my conclusion on issues 3 and issue 5 (as set out below) I have not reverted to Counsel to ask for further submissions on these issues as I do not consider that submissions on developed areas of law will assist me or would have affected the outcome of this case.

23. The relevant provisions of the Highways Act 1980 (“the Act”) were also not produced for my attention. I have therefore accessed the provisions that were referred to during the case (sections 37, 38 and 278) myself and have read them. Having read the provisions I am satisfied that given the Access Roads are not presently adopted highway and that they have been completed the relevant provisions for the purpose of assessing issue 3 in the case as at the date of this judgment (which is the relevant date: *E. Johnson & Co (Barbados)Ltd v NSR Ltd*) are sections 37 and 38.

The Issues

24. The parties agree that the issues in the case are:
 - i) Is the Defendant bound by the relevant covenant in the Transfer?
 - ii) Is the Claimant able to act under a power of attorney granted under the Transfer to seek adoption of the Access Roads itself? If so, does this reduce or release the Defendant from any liability?

- iii) Is it impossible for the Defendant to perform the relevant obligation?
 - iv) What is the appropriate remedy: Specific Performance, Damages in Lieu of Specific Performance or Damages at Common Law?
 - v) If an award of damages is the appropriate remedy, what should the quantum of that award be?
25. The parties agree that on the first three issues the burden of proof rests on the Defendant, whilst for the final two issues it rests on the Claimant. The parties agree that the relevant standard of proof is the balance of probabilities.

The Lay Witnesses

26. The Claimant relies on the evidence of Hugh Fell. The Defendant initially sought to rely on the evidence of three lay witnesses: Tom Bell, Jeremy Ellis and Peter Blewitt. Before the commencement of the trial I dealt with an application by the Defendant for relief from sanction so as to enable it to rely on a fourth lay witness. A separate judgment was given in this regard. I granted the application and gave permission for the Defendant to rely on the evidence of Craig McClen.
27. The only witness whose evidence was questioned by Counsel, for the Claimant, during closing submissions was Mr McClen. As a result, I set out below my assessment of Mr McClen as a witness. I have in reaching my assessment of his evidence taken into account all the submissions made by Ms Taskis KC in relation to Mr McClen.

28. Having heard the remaining witnesses give evidence at trial I am satisfied that none of the witnesses attended Court with the intention to deceive or to tender untrue evidence. I am satisfied that they all appeared with the intention of fulfilling their affirmation to the Court. I therefore accept their oral evidence as given at trial when they answered the questions (which Mr Fell did not always do) and when the evidence consisted of facts and not assumptions (which Mr Bell had a habit of offering as his evidence), save where it conflicts with contemporaneous documents. In the case of such a conflict I prefer to rely on the contemporaneous document as such records the facts at the time as opposed to the facts as remembered through the lens of a long running dispute.
29. Craig McClen is the director of a company, Tantallon Homes (Longframlington) Limited, which was wholly unconcerned with the Transfer. However, it was both the purchaser and onward seller of land referred to within the Claimant's expert report as an example case in support of his valuation method. Mr McClen's evidence was that both in relation to his company's purchase of phases 2 to 4 of that land on 27 August 2020 and its onward sale to a well-known construction and development company the same day, the lack of adoption of roads on that development did not affect the price and would not have delayed the purchase, save for the actions of the Claimant's expert who was acting as agent for the vendor on that sale.
30. Having heard the evidence of Mr McClen and had the opportunity to observe him give evidence he was a plainly and obviously credible witness. He engaged with the Court and with the barristers in a polite, concise way. He answered the questions asked of him without obfuscation or delay. He did not

question why he was asked questions: He simply engaged with the process and answered the questions in a straightforward and natural manner. I accept his evidence in its entirety. I therefore accept that not only does Mr McClen know what effect the lack of adopted roads made to his company's decision to purchase the three phases of the land but also that he has discussed and is aware of the impact of that issue on the ultimate purchaser's decision.

31. For the avoidance of doubt on the example case I prefer Mr McClen's evidence to that of Mr Garland, the Claimant's expert, given Mr McClen would know what influenced his company in its purchasing decisions and he has spoken to the onward purchaser to check the influences on their decision. This was in contrast with Mr Garland who gave evidence as to what affected the purchasers in the example case, but which evidence was plainly an assumption by Mr Garland who had no facts or enquiries on which to base his "evidence". For these reasons I prefer the evidence of Mr McClen on the example case to that of Mr Garland.

The Experts

32. Mr Garland, who is a partner in George F White, was instructed to act as an expert for the Claimant in this matter. Mr Mendoza raised concerns as to the impartiality of Mr Garland submitting that Mr Garland was partisan in his evidence and failed to therefore comply with his duties as an expert. Ms Taskis KC had the opportunity to respond to those concerns in her closing submissions. In preparing this section of the judgment I have considered CPR Part 35 and the notes in the White Book on experts.

33. As noted in the introduction to this judgment, and as is evident from Appendix A hereto, which sets out communications between the parties, their agents and NCC regarding the Land and the Retained Land, George F White were heavily involved in the Planning Permissions and sale process for the Land and in the Outline Planning Permission application for the Retained Land. Mr Garland was directly involved in the first Planning Permission application (in which a representation was made to NCC on 15 November 2012 that part of the Access Roads would not be widened as they would not be adopted). The team Mr Garland manages conducted the second Planning Permission application (in which a Planning Statement referred to the cul de sacs remaining private), and the Retained Land planning permission application.
34. This does not of itself prevent Mr Garland from acting as an expert for the Claimant in the proceedings (White Book, paragraph 35.4.3). Indeed, any challenge to Mr Garland acting as an expert on the grounds of a conflict of interest should have been brought well before the trial. It is, however, of note that in the section of his Report where he deals with prior involvement with the Claimant Mr White limits himself to recording “*Employees of my firm have been involved in the provision of advice to the Claimant for a number of years, including advice relating to the Property*”. This rather underplays the detailed involvement of George F White, and Mr Garland, with the Claimant in relation to the Land, the Retained Land and the Transfer.
35. Mr Mendoza does not however challenge the evidence of Mr Garland on the basis of a conflict of interest or a pre-existing relationship. He challenges the

evidence on the ground that Mr Garland did not act impartially as an expert and therefore he did not comply with his duties to the Court.

36. The role of an expert was summarised by Lord Hodge in Griffiths v TUI UK Ltd [2023] UKSC 48 at [36]:

“It is trite law that the role of an expert is to assist the court in relation to matters of scientific, technical or other specialised knowledge which are outside the judge’s expertise by giving evidence of fact or opinion; but the expert must not usurp the functions of the judge as the ultimate decision-maker on matters that are central to the outcome of the case.”

37. In Kennedy v Cordia (Services) LLP [2016] UKSC 6 at [44], the Supreme Court confirmed that there are four considerations which govern the admissibility of expert evidence. Given that District Judge Hambler gave permission for expert evidence to be adduced I consider that the first consideration is fulfilled. Further I am satisfied having considered Mr Garlands’ CV that he has the necessary skill and experience to assist the Court. I do not consider that the fourth consideration assists me in this case. The issue raised by Mr Mendoza engages with the third consideration: Whether the expert is impartial in their presentation and assessment of the evidence (see also CPR 35.3 and Practice Direction 35, paragraph 2.1).
38. This duty is highlighted for experts at paragraphs 10, 12 and 49 of the Guidance for the Instruction of Experts in Civil Claims 2014. Paragraph 12 of the Guidance (and Practice Direction 35, paragraph 2.2) make clear that experts should not “*engage in the role of advocates*”.

39. The Supreme Court made clear at paragraph 51 of *Kennedy* that an expert's failure to comply with their duties of independence and impartiality may render their evidence inadmissible. This is further confirmed at paragraph 91b of the 2014 Guidance.
40. Having considered the above guidance, read the report of Mr Garland and seen and heard him give evidence at trial I am satisfied that Mr Garland was a partisan witness who both wrote his report and gave evidence at trial for his client in a non-impartial way. As part of this Mr Garland did not act simply as an expert in the case, he acted as an advocate for the Claimant. This was obvious both from his written report and his oral testimony, where frequent criticism can be made of Mr Garland for the tenor, tone and content of his evidence. Examples of my concerns with the evidence of Mr Garland (other than his presentation as a witness at the trial) which have led me to form the above view include:
- i) Mr Garland was instructed to act as an expert within these proceedings. These proceedings are clearly limited to the issue of non-adoption of the Access Roads: This is clear from the pleadings. I accept that the Defendant asserted in its Defence that it had constructed the development according to the Planning Permissions, however this only required the experts to consider if the road had been built in accordance with the Planning Permissions. Pursuant to paragraph 12 of the 2014 Guidance "*Experts should confine their opinions to matters which are material to the disputes*". (See also *Edwards v Hugh James Ford Simey (A Firm)* [2019] UKSC 54).

- ii) Despite this clear guidance Mr Garland did not so limit himself in his evidence. Instead, Mr Garland considered other issues and valued these. This part of Mr Garland's report could have led to a delay of the trial but for the refusal by District Judge Phillips of permission to the Claimant to amend their claim. The Claimant's application in this regard of itself of course highlights that Mr Garland in preparing his report went well beyond matters which were material to the dispute. I am unclear as to why or how this happened as the instructions to Mr Garland are not attached to his report. However, if Mr Garland was unclear as to whether he should have dealt with the Planning Permissions beyond the Access Roads he could of course have sought direction from the Court in this regard. He did not do so. Instead, he sought to raise new issues for the Claimant to rely upon and in doing so acted as an advocate for the Claimant and did not remain impartial.
- iii) Further, in his report Mr Garland sought to place a value on the Retained Land other than the 3-house development for which the Claimant has received Outline Planning Permission. That, I accept, was a necessary consideration for the application. However the consideration needed to proceed on the basis of the facts before the experts.
- iv) The Retained Land is currently used for agricultural purposes and the Claimant has no fixed plans for it as confirmed by Mr Fell. However, the Claimant hopes that it can be developed in the future. No proposals have been made by the Claimant in this regard. Yet despite this being

the accurate factual position Mr Garland chose to value the Retained Land on the basis of a 20-house development over and above the 3-house development. The experts have since agreed that a 20-house scheme would be appropriate. However in his report Mr Garland went further than this as he then instructed architects in his firm to draw up plans for the additional development. Those plans purported to show Mr Fell as the client, even though Mr Fell had no involvement in the commissioning of the design.

- v) Mr Garland therefore orchestrated the production of what appears to be factual evidence, but that evidence was entirely self-generated by him, and his firm. There is in fact no design (fixed or otherwise) for a 20 house scheme on the Retained Land. Above and beyond the production of the plan, Mr Garland did not ensure that this was shared with the Defendant or its expert until Mr Garland's report was served.
- vi) Having decided on the development which his firm considered should take place on the balance of the Retained Land Mr Garland then only valued the Retained Land on that basis. He did not value it on any alternative hypothesis or on the factual case that a 20-house scheme may be appropriate but there was no fixed plan for this, that despite the clear prospect that the Claimant would not pursue the scheme Mr Garland had designed.
- vii) In this regard Mr Garland wholly failed to comply with paragraph 58 of the 2014 Guidance. He plainly acted as an advocate of the Claimant and ignored his duty of impartiality.

- viii) Further the use of the example case addressed at paragraphs 29 to 31 above in Appendix M of his report led to Mr Garland providing the Court with incorrect assumptions which he presented as evidence. I have already set out why I prefer the evidence of Mr McClen to Mr Garland in accordance with *Armstrong v First York Ltd* [2005] EWCA Civ 277. By way of summary, Mr McClen gave evidence as to what he did know or had established upon enquiry from the relevant third party. Mr Garland gave his evidence based upon assumption as to what influenced Mr McClen, his company and the onward purchaser of the site. Presenting (ill-founded) speculation as fact and then building a calculation hypothesis on this ill-founded speculation does not accord with the obligations of an impartial expert witness.
- ix) Further Mr Garland utilised a valuation method in his report that necessarily would include within it ranges of figures and calculations. Yet despite this Mr Garland on each occasion inputted a single figure into his calculations and thereby reached a single figure for the diminution in value of the Retained Land. In his cross-examination Mr Garland accepted that the input figures would have presented a range. He could not properly explain why he had not used relevant ranges in his calculations. Nor could he explain some of the figures he had used including a vital 5% figure he utilised. In failing to utilise the range of figures in his calculations Mr Garland presented a misleading valuation to the Court.

- x) Finally Mr Garland during his oral evidence insisted on answering questions that he had himself posed even when asked by the court not to. Whilst this occurred on more than one occasion during his evidence the most noteworthy example was at the end of Mr Garland's evidence when the Court sought to clarify some matters with Mr Garland. I asked Mr Garland a straightforward yes or no question. He answered the question and then asked should he elaborate. I firmly stated no. Mr Garland then chose to elaborate of his own accord. From this interaction it was clear to me that Mr Garland did not listen to the instructions of the Court and was acting as an advocate for the Claimant and not as an impartial witness willing to assist the Court.
41. I am therefore satisfied that Mr Garland was not impartial but rather acted to prefer the interest of the Claimant as his client and to advocate a case for it. This lack of impartiality affected both the preparation and presentation of Mr Garland's evidence, his assessment of the evidence and his findings.
42. I have considered in the light of this conclusion whether Mr Garland's evidence should be admitted as expert evidence, noting the negative effect on the Claimant's damages claim if the evidence is not admitted. Having considered the guidance in the White Book and the number of ways in which Mr Garland's evidence concerned me, I have determined that Mr Garland's partiality and desire to act as an advocate for the Claimant has permeated his entire report and his oral evidence and therefore it is not on this occasion appropriate to admit Mr Garland's report or oral testimony as admissible

evidence in the case. To the extent needed I therefore revoke the permission granted to the Claimant to rely on the report and evidence of Mr Garland.

43. If I am wrong in that regard and the report and testimony should be admitted then I note that, in my judgment, it would be inappropriate to place any reliance on Mr Garland's evidence given my concerns as noted above. I have therefore placed no weight on his evidence in this judgment. Alternatively, given my conclusions on the Defendant's expert, Mr Beeby as set out below, I would have preferred the evidence of Mr Beeby in any event.
44. Mr Beeby has had no previous dealings with the Land or the Retained Land. He accepts in his report that he has had prior dealings with the Defendant.
45. I have in forming my view of Mr Beeby taken into account all the criticisms made of him and his evidence by Ms Taskis KC in her submissions. However, in my judgment Mr Beeby's report was a straightforward analysis of the effect of non-adoption of the Access Roads on the value of the Retained Land. He did not step outside the issues in the case. He stated when the Defendant had not complied with the Planning Permissions (e.g. paragraph 4.8 of his report). He relied on the evidence supplied to him or on published guidance. He did not procure the production of new "evidence" within his report. In the Joint Statement he made concessions where he felt they were appropriate.
46. At trial his evidence was given in a straightforward manner (subject to the need to find a charger at one point), answering the questions asked of him politely and confining his answers to the question asked. He made reasonable concessions and accepted where his report contained errors.

47. Mr Beeby presented as an independent witness dealing with the issues in the case on an impartial basis. At trial he presented as a credible witness willing to engage with the trial process to assist the Court. I therefore accept Mr Beeby's report as the report of an impartial expert which is admissible at trial and which is credible, and upon which I can rely as expert evidence on the diminution in the value of the Retained Land as a result of the non-adoption of the Access Roads.

Findings on the Issues

Is the Defendant bound by the relevant covenant in the Transfer?

48. The parties accept that the Transfer was validly executed by them such that it is legally effective. The parties further agree that following execution of the Transfer the Land was transferred to the Defendant. There is no assertion in this case by the parties that the Transfer as a whole is not effective, nor is there any claim before the Court to rescind the Transfer.
49. Rather this issue arises from two points taken by the Defendant in its Defence. Those both arise out of what is said by the Defendant to be a mistake in relation to the ability to comply with the terms of the Transfer. In particular the Defendant asserts that paragraphs 1, 3 and 6 of Schedule 3 to the Transfer are incompatible. The Defendant asserts that it was not possible for the development to be constructed on the Land in accordance with the Planning Permissions and at the same time for the Access Roads to be constructed in such a way that they were capable of adoption by NCC. On this basis the

Defendant asserts that paragraph 6 of Schedule 3 to the Transfer should not be enforced by the Court because either the parties were acting under a mutual mistake or the Claimant is estopped from enforcing paragraph 6. I shall consider these defences in turn.

Mistake

50. As to the defence of mistake I am satisfied that the defence cannot succeed. First the defence as pleaded is wrong in law. The defence is said to be “*the parties acted under a mutual mistake of fact, not appreciating that by reason of the agreed layout of the development and the Access Road, it would not be possible for the Access Road to be adopted*” (paragraph 23 of the Defence). Whilst the parties referred to this as a mutual mistake, this is more commonly known as a common mistake (see Chitty on Contracts, 35th ed, para 5-001).
51. The Defendant then states that as a result of this mistake “*the covenant at paragraph 6 of Schedule 3 of the Transfer is void and is of no effect and/or the Defendant ought to be treated as released from the same*”. However, this is not the legal consequence of a common mistake. The consequence of an operative common mistake is that the contract is at common law void ab initio, not that a clause of the contract is void (see Chitty, paragraphs 5-009 and 9-008). No such defence has been pleaded, nor has a counterclaim for rescission been asserted. The defence as pleaded is therefore wrong in law.
52. The defence is also bad in equity as equity does not void a contractual term for a mistake. Rather the relevant remedy in such situation would be for the Defendant to counterclaim for rectification of the Transfer (see Chitty, paragraph 9—009). Rectification is not raised by way of either defence or

counterclaim. Even if therefore the parties acted under the mistake alleged, without rescission of the Transfer or rectification of the terms of the Transfer, neither of which the Defendant seeks, paragraph 6 of Schedule 3 to the Transfer remains effective. I fully accept however that if the Defendant is correct and the parties acted on the basis of a mistake as alleged that this is a matter I must take into account on the fourth issue as a common mistake may lead to the Court refusing specific performance as a matter of discretion, limiting the Claimant to pursue a claim in damages at common law (see Chitty, paragraph 9-010).

53. If I am wrong on the above analysis, then in any event the Defendant has not satisfied me that its defence of mistake satisfies the relevant principles for such a defence to succeed. The principles relevant to the issue of whether contractual documents are void for common mistake were set out in the judgement of Peter MacDonald Eggers KC sitting as a Deputy High Court Judge in Triple Seven Msn 27251 Ltd v Azman Air Services Ltd [2018] 4 WLR 97. In paragraph 76 the Judge set out the elements of a common mistake which must be present so as to have the effect of rendering a contract based on a common mistake void. One of the elements was: “*By reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract; alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption. In other words, there must be a fundamental difference between the assumed and actual states of affairs.*”

54. The judge had earlier stated at paragraph 67: *“The doctrine of common mistake is not meant to apply to those cases where the shared assumption is not sufficiently fundamental and/or where the difference between the assumed and actual state of affairs is anything less than fundamental or essential or radical. If it were otherwise, the value of certainty attached to a contract would be unjustifiably undermined.”*
55. It is clear in the case before me that if one compares the Transfer as written to the Transfer as relied upon, at least at this time by the Defendant, neither performance of the Transfer would be essentially and radically different nor is the Transfer impossible as a whole to perform. The Transfer provides for the transfer of the Land for a price and for the Defendant to then construct the development on the Land. The Land has been transferred, the price has been paid and the Development constructed (in general) as per the plans attached to the Planning Permissions. Performance of the Transfer has, save for the adoption issue, taken place and has essentially been the same as per the written document.
56. If therefore the Court could declare a term of a contract void as opposed to the contract itself, a necessary element of the defence of common mistake is missing. The defence must fail on this basis.
57. Even if I am wrong in classifying this case as one of common mistake and the case is properly classified as a mistake as to terms by the Defendant which was known to the Claimant then the relief sought is again wrong. The remedy would be rectification of the Transfer (see Chitty, paragraph 5-034). Such a claim has not been advanced by the Defendant.

58. In my judgment paragraph 6 of Schedule 3 to the Transfer is not therefore void on the basis of mistake.

Estoppel

59. The Defendant denies that the Claimant is entitled to rely on paragraph 6 of Schedule 3 to the Transfer as a result of an estoppel. The defence in this regard is pleaded at paragraphs 17 to 22 of the Defence. The paragraphs refer to the Planning Statement prepared on behalf of the Claimant and then to the Planning Permissions, as granted. The Defence states that there is an obvious conflict between the matters set out in the Planning Statement and paragraph 6 of Schedule 3 to the Transfer and that this conflict is entirely the fault of the Claimant. Paragraph 22 of the Defence assert: *“Given that the Defendant has complied with its covenant to “Not [to] develop the Property save in strict accordance with the Planning Permission” it is averred that the Claimant is now estopped from seeking to enforce the covenant at paragraph 6 of Schedule 3 to the Transfer or alleging that the Defendant is in breach of the same”*.
60. These paragraphs do not set out what form of estoppel is relied upon by the Defendant in its defence. Nor was this detailed in Mr Mendoza’s opening submissions. In his closing submissions however Mr Mendoza stated that this defence was based upon an estoppel by representation (no reference was made to estoppel by convention). He further developed his case to state that he was in fact now relying on estoppel by representation on two grounds. I will deal with these in turn.

61. First as to the pleaded defence of estoppel in my judgment the matters relied upon by the Defendant cannot found a defence to enforcement of the relevant term of the Transfer based on estoppel by representation. I fully accept that there is a conflict between paragraph 7.46 of the 2015 Planning Statement and the covenant at paragraph 6 of Schedule 3 to the Transfer however that is not sufficient to found a defence of estoppel by representation especially given that it was not argued before me that a duty to disclose arose on the part of the Claimant in this case such that silence as to any potential incompatibility could amount to a representation (see Chitty, paragraph 7-008).
62. A defence based on estoppel by representation requires a defendant to show that there was a clear representation intended to induce the defendant to adopt a particular course of conduct, an act of the defendant reasonably taken in reliance on the representation and that the defendant will suffer detriment if the claimant is not held to their representation (see Chitty, paragraph 7-005).
63. In this case there is no representation to the Defendant pleaded. The only representation pleaded is the statement made in the Planning Statement. However those were representations made to NCC. Those representations were not repeated in the Planning Permissions. Indeed as set out at Appendix A hereto neither Planning Permission contains any condition as to adoption of roads. The only representation relied upon is therefore a representation made to a third party and not communicated to the Defendant (which was the evidence of Mr Ellis in this case). This is not an operative representation on which the Defendant can rely.

64. To the extent that the Defendant may assert that in referring to the Planning Permissions in the negotiations for the Transfer (as is shown by the heads of terms document and the solicitors' emails regarding drafting of the Transfer which are before me in the trial bundle) the Claimant made an implied representation, or a representation by conduct, to the Defendant that the terms of Schedule 3 to the Transfer were compatible, then in my judgment referring to the Planning Permissions in this case cannot amount to a clear representation of an existing state of affairs (Chitty, paragraphs 7-006 and 7-009). This is due to the definition of Planning Permission in the Transfer which permitted the Defendant to make applications to vary or amend the Planning Permissions. Hence, compatibility of the development with the requirements for adoption was not clear at the time the Transfer was entered into and could not be assessed until the plans were finalised and the development was constructed. As a result, on the face of the Defendant's pleadings a defence of estoppel by representation does not arise.
65. In his closing submissions, Mr Mendoza sought to raise a second ground of estoppel by way of representation. The first and most obvious objection to this defence is that it is not pleaded and that it is not appropriate for a new line of defence to be raised for the first time in closing submissions. In my judgment that alone is a good ground to refuse to consider the second ground of estoppel.
66. If I am wrong in that regard however Mr Mendoza's new ground of estoppel was also stated to be an estoppel by representation which arose as a result of the Claimant presenting to the Defendant as part of the contractual process the

plans for the development which had been approved in the Planning Permissions and then requiring inclusion in the Transfer of paragraphs 1 and 6 of Schedule 3 to the Transfer. Mr Mendoza says that in presenting the plans as it did the Claimant represented that the development, if carried out in accordance with the plans, would result in adoptable roads. In my judgment this proposed estoppel fails for the same reason as the pleaded estoppel and as set out at paragraph 64 hereof: The representation relied upon was not clear and was not a representation of existing fact or existing law.

67. In my judgment therefore no estoppel arises in this case. Therefore I find that paragraph 6 of Schedule 3 to the Transfer is effective and binding.

Is the Claimant able to act under a power of attorney granted under the transfer to seek adoption of the Access Roads itself? If so, does this reduce or release the Defendant from any liability?

68. In answering this issue I leave to one side the issue of impossibility.
69. The second part of paragraph 6 of Schedule 3 to the Transfer provides to the Claimant a power of attorney in relation to the adoption of roads. The relevant part of the contractual provision reads

“in the event that any necessary agreement for adoption of the Access Roads has not been entered into within 7 years of the date of this Transfer the Transferee grants the Transferor power of attorney to enter into any such documents on its behalf.”

70. There is no dispute between the parties that the seven-year time limit has elapsed and that any powers the Claimant has under the clause could therefore be utilised by it.
71. It is therefore clear from the face of the Transfer that the Claimant is able to execute documents on behalf of the Defendant in order to enter into an agreement for adoption of the Access Roads with NCC. However, that is the extent of the power of attorney. The Claimant does not have the right to undertake works on the Access Roads in order to secure their adoption and/or to make applications to vary planning permission for the Land in order to allow work to take place to enable adoption.
72. At best the provision permits the Claimant to seek to reach an understanding with NCC and to then execute an agreement with it. The clause does not permit the Claimant to draft and serve a section 37 notice on NCC or to make or appear in any application to the Magistrates Court which may follow, as this is not a process of reaching an agreement (cf sections 38 or 278 of the Act). Given NCC has refused to reach an agreement, the use of the power of attorney by the Claimant would result in no progress in this case.
73. Further and in any event the power in the relevant clause is permissive. The Claimant can do these things. It is not obliged to do so. The Claimant can therefore under the clause choose whether to take up the rights afforded to it or can seek to enforce its rights against the Defendant. In choosing as the Claimant has, not to exercise the rights under the contractual provision the Claimant is not, in my judgment, prevented from bringing a claim before the Court for the Defendant's failure to procure adoption of the Access Roads.

Therefore the decision of the Claimant not to act would not in any event reduce or release the Defendant from liability.

Is it impossible for the Defendant to perform the relevant obligation?

74. In the brief details of claim in its Claim Form the Claimant states that its claim is for “*specific performance in respect of the Defendant’s failure to procure adoption of an estate road at Home Farm, Chathill*”. The Claimant’s claim is more fully set out in the Particulars of Claim. In this the Claimant seeks specific performance of the obligation “*to procure the adoption of the Access Roads in accordance with Paragraph 6 of Schedule 3 to the Transfer*”. The term “*Access Roads*” as used in the Particulars of Claim is a defined term. Paragraph 4 of the Particulars of Claim states that the Defendant “*retains ownership of the Access Roads (as defined within the Transfer)*”.
75. As has already been noted the Access Roads are defined in the Transfer as being the roads shown on plan 2. The roads shown on plan 2 are the entrance road by which the estate is accessed from U2029 and the two cul de sacs around which the 20 houses have been constructed. By way of the Particulars of Claim the Claimant therefore seeks specific performance of the Defendant’s contractual obligation to procure the adoption of the entrance road to the estate and the cul de sacs, as this is the contractual obligation of the Defendant. Mr Fell confirmed that was the basis of the claim during his evidence.
76. In her closing submissions, Ms Taskis KC raised an alternative claim for specific performance on behalf of the Claimant. Ms Taskis KC contended that if the Court was not satisfied to order specific performance of the entire obligation at paragraph 6 of Schedule 3 to the Transfer due to impossibility,

then the Court should order specific performance of part of the obligation to procure the adoption of part of the Access Roads on the Land.

77. I therefore deal firstly with the pleaded claim for specific performance, i.e. an order that the Defendant do comply with its contractual obligation to procure adoption of the entrance road to the estate and the cul de sacs. In order to understand this issue, which is an issue of fact, it is necessary to first consider the policy of NCC on road construction and adoption.

78. The relevant published guidance by NCC is dated January 1980 and is entitled Residential Roads and Footpaths in Northumberland. At chapter 14, NCC sets out its guidance for adoption. So far as is relevant for this case this provides:

“14.1 It is intended that roads and footpaths forming the primary means of access to housing developments should become publicly maintainable highways upon satisfactory completion of the works.

The Highway Authority will adopt as highways maintainable at public expense those areas which are in accordance with these standards and are necessary for public access or passage including:-

- roads, cycleways, footways and footpaths which are of real use to the general public;*
- highway verges between the footway and the carriageway normally up to a maximum of 3 metres or where a footway is absent up to a maximum of 3 metres;*
- visibility areas necessary for the safe use of the highway;*

- lay- bys and turning areas
- communal visitors parking spaces parallel and adjacent to the highway which are clearly not for the regular use of any specific dwellings;
- a 2 metre strip beside Shared Surfaces where required for the accommodation of public utilities' services providing conditions regarding notification to occupants and demarcation of the highway boundary have been met.

Additionally, the highway authority will adopt the lighting equipment and drainage system required to light and drain those areas listed above.”

79. The guidance notes that further details of standards for highways for adoption are contained in the technical appendix.
80. The minimum technical requirements specified by NCC for the design, construction and maintenance of adoptable roads, footways, footpaths and cycleways are now the subject of the Specification for Highways Works version 1.1. This guidance confirms that the standards apply for the highways adoption process administered under the Act and include therefore applications under sections 37, 38, 228 or any other recognised power. The document notes that it is a guide and that a developer has the responsibility to ensure that the development will be constructed safely and to the latest standards and regulations. Standards are then set out in relation to construction and material as opposed to design, geometry or layout.
81. Therefore in its published policy NCC is clear that only surfaces which are a primary means of access to a housing estate, which are required for a means of public access and passage and which are of real use to the general public will

be adopted. Further to be adopted, surfaces must be constructed to required standards.

82. Next it is necessary to consider the correspondence between the parties, their agents and advisors, and NCC. A chronological summary of the correspondence is attached to this judgment at Appendix A hereto.

83. In my judgment when one stands back and considers the policy of NCC on the adoption of roads and the whole chain of correspondence regarding adoption of the Access Roads it is clear that NCC has made its position clear: It will not be adopting the Access Roads. This is not simply an initial push back by NCC on the first occasion adoption was sought. It is a sustained refusal since 2012 at the outset of the first part of the development plans, and more pertinently since October 2019, during and since the construction phase. The refusal has continued despite changes of personnel at NCC, and during which the same or similar grounds have been continuously raised in accordance with NCC policy and despite the actions of the Defendant to seek to deal with the objections. Further those grounds of objection have been raised by NCC whether or not the individual dealing with the enquiries and (informal) applications have been aware of the statements of the Claimant during the planning application process or not.

84. I accept that the Defendant has not made a section 37 application. However, in my judgment a party does not need to take every conceivable step in order to show that it is impossible as a matter of fact to comply with a contractual obligation. What the Court requires is cogent and unequivocal evidence as to the possibility of compliance or otherwise so as to consider its equitable

jurisdiction. If this can be obtained without a party doing everything conceivable to show impossibility then the party need not waste time and money of both itself, and in this case, NCC and a Magistrates Court, in proving what is already clear.

85. NCC has for over 5 years refused adoption providing reasons for its refusal, and referring back to the representations made by the Claimant's agent during the planning phase. On the evidence before me the Defendant has resolved one of the initial issues raised by NCC being the method of construction of the roads as I accept the evidence of Mr Blewitt. However, the remaining reasons given by NCC are clear: incorrect geometry and layout of the surfaces and lack of public utility. Albeit as NCC makes clear in its last correspondence the decision is taken on a holistic basis and not on individual factors. I accept that is correct and in line with NCC policy as several witnesses before me confirmed that NCC have an element of discretion in their decision-making dependent on all the facts. Looked at as a whole NCC have taken a stance in accordance with their policy and which (for the reasons set out below) is justifiable in fact.

86. To understand why NCC's position is justifiable in fact one needs to look at the continuing objections on an individual basis. The first of the continuing objections, raised during the planning phase and then since October 2019, through both Mr McSparron and Ms Brooker raising issues in this regard is the layout and design of the surfaces. NCC has raised concerns about the turning heads of the cul de sacs, the width of the roads, the lack of pavements and the lack of a 2m service strip. The Defendant has managed to obtain a

variation to planning permission to allow the construction of a pavement on the Claimant's land for the entrance to the estate from the highway. However this does not address the other matters related to the cul de sacs.

87. The Claimant's agent accepted as long ago as 2012 that the cul de sacs would not comply with the width requirements of NCC for adoption. Mr Bell in his evidence accepted the roads were too narrow in the cul de sacs (being 4.5m to 4.7m in width and therefore less than NCC's adoptable standard of 5m). He was correct to do so given the weight of evidence before the Court. NCC is therefore correct: The Access Roads do not comply with their requirements in terms of geometry. This is a point Ms Brooker raises in her last communication when referring to the ability of vehicles to pass one another.
88. In her closing submissions Ms Taskis KC questioned how issue could be raised by NCC about the turning heads given that NCC were satisfied with the design and layout of the turning heads for the purposes of granting planning permission. She submitted that as a result the turning heads must be sufficient for adoption. Leaving to one side that this submission is of course in direct contradiction of the Claimant's position in relation to issue one, I do not accept that this is an answer to the point raised by NCC given the representations of the Claimant and its agent, George F White, during the two Planning Permission processes.
89. In both processes George F White, on behalf of the Claimant, were extremely clear with NCC that adoption of the cul de sacs would not be sought. In therefore considering the plans for planning permissions NCC's highway department were considering whether the surface layout should be approved

for planning permission for non-adoptable roads. They were not considering whether planning permission should be given for adoptable roads. It therefore does not follow that the fact that the turning heads were approved for the purposes of planning permission means that construction according to the plans would result in the turning heads meeting the requirements for adoptable roads. Therefore the simple fact that the turning heads, or the road layout more generally, were approved for planning permission does not mean that the road layout meets the requirements and specification of NCC regarding adoption of roads.

90. In any event even if the turning heads are suitable for adoption and NCC are wrong in this regard it does not follow that they are wrong in relation to the other geometry and layout issues they raise. They are, as already stated, correct on the road width. Having considered NCC policy on adoption and the evidence presented to the Court at trial, I am satisfied that a further issue on geometry and layout is also correct and when taken with the road width issue would entitle NCC to refuse adoption of the Access Roads, whether under section 37 or section 38.
91. This further issue is the lack of a 2m service strip to run alongside the shared surface. NCC policy refers to this. NCC are therefore entitled to rely on it in their objections. The cul de sacs are unarguably shared surfaces as there is no footpath provided within the cul de sacs. No 2m service strip has been constructed. Therefore given NCC policy the road layout at this time does not satisfy their construction requirements.

92. Further the plots of each house runs down to and abuts the shared surface of the cul de sac. Therefore, given the dimensions of the roads as admitted by Mr Bell and the sale of the land abutting the cul de sacs, the roads cannot be widened and a 2m surface strip cannot be constructed. These legitimate concerns of NCC cannot therefore be overcome.
93. As noted I accept that NCC appear to have some discretion in the area of adoption and indeed Ms Brooker in her final email refers to such. However, the objection on the ground of geometry and layout has persisted since 2012 and there is no suggestion on the evidence before me that NCC will change their stance in this regard, nor that they are being unreasonable or irrational in relying on this ground of objection given the geometry and layout was approved for planning by them on the express representation by the Claimant's agent that adoption of the cul de sacs would not be sought.
94. In my judgment therefore NCC are entitled to refuse to reach an agreement under section 38 of the Act with the Defendant on this ground in line with their published policy. Further, NCC would have a defence to any application for certification pursued by the Defendant in the Magistrates Court (section 37(3) of the Act) as the Access Roads have not been properly made up.
95. Turning to the second objection raised by NCC, they rely on lack of public utility in refusing adoption of the Access Roads. In this regard I return to NCC's published policy that they will consider adoption of roads which are a primary means of access to a housing estate, which are required for a means of public access and passage and which are of real use to the general public.

96. In my judgment the Access Roads do not fall within this category of road. The Access Roads only serve the development constructed by the Defendant, the farmhouse and an office. They are not through routes and their use is not required by the general public by way of access or passage. Even if the Claimant's development for which they have outline planning permission is to be constructed this does not change.
97. Whilst I fully accept therefore that the roads are of use to those accessing the properties which can be accessed from the Access Roads NCC are entirely correct in concluding there is no real use for the roads to the general public. Again in my judgment therefore NCC are entitled to refuse to agree adoption of the Access Roads under section 38 of the Act on this ground and NCC could validly object to any section 37 application made by the Defendant pursuant to section 37(2) of the Act.
98. Both of the objections raised by NCC are therefore factually correct and have been continuously raised, in line with NCC policy since, at least, 2019. NCC's objections are also in accordance with the provisions of sections 37 and 38 of the Act.
99. I am therefore satisfied that there is clear, cogent and unequivocal evidence before me that NCC will not change its position and permit adoption of the roads. I do not consider that Ms Brooker's offer in her final email to discuss NCC's refusal with Mr Fearon means that the position of NCC is not fixed as a matter of fact. Further, I am satisfied that in taking the stance it has NCC is acting within its policy guidance for good and proper reasons. This is particularly so given, as both Mr McSparron and Ms Brooker have raised in

correspondence, George F White when seeking both planning permissions expressly stated that at least the cul de sacs would not be adopted by NCC.

100. Therefore, in my judgment, it is as a matter of fact impossible for the Defendant to comply with its contractual obligation at paragraph 6 of Schedule 3 to the Transfer. Specific performance of that clause, and therefore damages in lieu of specific performance, must be refused as a result.
101. I therefore turn to the alternative claim sought to be raised by Ms Taskis KC in her closing submissions, i.e. that the Court should grant specific performance of the obligation to procure adoption of part only of the Access Roads. In this regard I note that first, it is clear from the papers that no such claim has prior to closing submissions been asserted by the Claimant. Certainly, no such claim has been pleaded. In my judgment that alone is a good ground to refuse to consider the second specific performance “claim”.
102. Second, I am satisfied that it would be wholly inequitable for me to grant the “claim” in any event given it was formulated for the first time in closing submissions and on the basis of a plan prepared for other purposes and which has not been put to the witnesses (either lay or expert) or NCC as an appropriate plan for the purposes of specific performance.
103. Third, in my judgment, the Court has no power to grant the order now sought. The Court has power to order specific performance of a contract and its obligations. In the Transfer there is a single obligation regarding adoption, that being an obligation to procure adoption of the Access Roads as defined. There is no obligation to procure adoption of part of the Access Roads. The parties could have agreed this if they had wanted to do so. They did not.

104. I fully accept that when considering a claim for specific performance a court may sever terms from the agreement so as to enforce part of the agreement but not the whole (Snell's Equity, 35th ed, paragraph 17-025). However, this is not what the Claimant seeks in its alternate claim. The Claimant is seeking enforcement of part of a singular contractual obligation. This would not fall within the orders granted by the Court on such a claim: *Where the subject-matter of the obligation does not involve the acquisition or disposal of rights of ownership by the claimant, the appropriate form of order will generally be an injunction that the defendant do the thing that was contracted for, normally coupled with an award of damages.* (Snell's Equity, paragraph 17-050.)
105. I do not accept that in making the alternative order now sought by the Claimant that the Court is being invited to act flexibly as a result of a slight misdescription or the like. The alternative claim as asserted in closing submissions is an attempt to reformulate the Transfer and its contractual obligations, without a claim to rectification, and then to enforce the reformulated obligation by way of specific performance without allowing the Defendant a proper opportunity to address this claim.
106. Ms Taskis KC sought to justify her alternative claim by comparing her position with that of a party who seeks damages of £100,000 but is only awarded £50,000. That situation and the position of the Claimant before me are, in my judgment, entirely different and not analogous:
- i) A claim to damages is not a claim to enforce a contractual provision. It is a claim for relief arising out of a breach of a contractual provision.

The remedial jurisdiction to assess damages is not therefore analogous with the equitable jurisdiction to order specific performance.

- ii) In any event in so far as a court finds it has jurisdiction to assess damages in a contract claim the Court when doing so is granting a singular remedy: It is assessing damages for breach of contract. The fact the court may assess the damages on a different basis to that claimed by the Claimant and/or may say part of the loss claimed is irrecoverable does not mean that the court is granting part only of an obligation in the contract or even that it is enforcing part only of such an obligation. The Court is dealing with the breach of contract as pleaded and as arising from the contractual obligations. It is not rewriting the bargain between the parties.

107. In my judgment therefore the alternative claim as asserted by Ms Taskis KC is wholly misconceived and I would have refused to grant specific performance on the terms sought even if the alternative claim had been pleaded, which it has not.

108. Even if I am wrong on both of the above objections to the alternative claim I am as a matter of fact satisfied that it would in any event be impossible for the Claimant to comply with an obligation to procure adoption of part of the Access Roads given that NCC have legitimately objected to this on the grounds of lack of public utility on 13 December 2022 and as to which I repeat my findings at paragraphs 95 to 97 above.

What is the appropriate remedy: Specific Performance, Damages in lieu of Specific Performance or Damages at Common Law?

109. Given my conclusion above and the agreement of the parties as referred to at paragraph 21(vii) hereof the only relevant remedy which the Court can order is damages at common law. As I am not considering the grant of a remedy pursuant to the Court's equitable jurisdiction I do not need to consider whether it is more appropriate to grant specific performance or damages in lieu thereof. Nor is it necessary for me to consider the effect of the clean hands maxim which in my judgment would be engaged in this case given the representations made by George F White, as agent of the Claimant, during the planning processes.

If an award of damages is the appropriate remedy, what should the quantum of that award be?

110. The starting point in assessing damages in a case is the pleaded case of the receiving party. In this case the Claimant's claim to damages is at paragraph 12 of its Particulars of Claim which provides:

"Further, by reason of the Defendant's breach of contract the Claimant has suffered loss and damage full particulars of which will be provided in due course."

111. Whilst an application was made to amend the Particulars of Claim which was refused by District Judge Phillips the application did not include any proposed amendment to paragraph 12. No schedule of loss has been produced by the Claimant in this case. So far as the Particulars of Claim are concerned therefore the only pleaded claim is one of general damages. I raised this with Ms Taskis KC in opening: No application to amend the Particulars of Claim was made.

112. In its Reply the Claimant denied that the damage it had suffered was nominal. At paragraph eight of the Reply the Claimant pleaded “*the Defendant’s breach therefore affects the viability of the future development and consequently the value of the Claimant’s retained property, resulting in a diminution in value which will be properly quantified by reference to expert evidence at the appropriate time*”. It appears that this was an attempt by the Claimant to provide the further particulars promised in the Particulars of Claim. It however required expert evidence on the issue of damages at common law.
113. Permission to rely on expert evidence was given by District Judge Hambler on 17 June 2022 at a hearing at which the Claimant was represented. At paragraph 4 of his Order of that date, although the order was not sealed until 4 April 2024, the District Judge gave permission for the parties to rely on expert evidence relating to the issue of the “*quantum of loss suffered by the Claimant (if damages are to be awarded in lieu)*”. No expert evidence has therefore been ordered nor do the parties have permission to rely upon expert evidence in relation to the question of damages at common law.
114. This may seem like a technicality however it is for a party seeking damages to first plead that and second produce the necessary evidence in support of its claim. Here the only particularised claim by the Claimant to damages in the Particulars of Claim is a claim for general damages. At its highest taking the Particulars of Claim and Reply together there is an assertion that there is a special damages claim relating to diminution in value but that expert evidence is needed in that regard. However no expert evidence has been permitted to be adduced on the issue of damages of common law. On the face of the pleadings

and the Court's Orders the Claimant is therefore limited in its claim to general damages. Again I raised this with Ms Taskis KC in opening but no application was made to the Court.

115. Following my findings on the earlier issues the Defendant is in breach of paragraph 6 of Schedule 3 to the Transfer. The Claimant is therefore entitled to general damages. General damages in a case such as this are nominal and therefore I award the Claimant £1 for its loss as a result of the breach of contract by the Defendant.
116. If I am wrong in paragraph 114 above and the Claimant is entitled to pursue a claim for special damages then bearing in mind my comments in relation to the experts and in particular my conclusions regarding Mr Garland and/or my preferring the evidence of Mr Beeby then either the Claimant has no evidence of a diminution in value of the Retained Land or the expert evidence I accept is that the diminution in value is nominal only.
117. As a result, given the Claimant accepts the burden of proof rests on it on this issue the Claimant's special damages claim is not supported by any evidence. Rather the credible evidence in this regard is that the Retained Land has only been diminished in value nominally by the failure of the Defendant to obtain adoption of the Access Roads.
118. Any special damages claim would therefore also only result in an award of nominal damages. (I do not therefore need to consider an issue I raised with Counsel at trial being the relevant date for the assessment of damages at common law given the decision of the Privy Council in E. Johnson & Co (Barbados)Ltd v NSR Ltd). As a result even if I am wrong in my judgment

that the Claimant is restricted to general damages as a matter of fact the only damages claim made out by the Claimant is for nominal damages. Therefore judgment will be entered for the Claimant for the total sum of £1.

Conclusion

119. As a result of the matters set out herein, I refuse the Claimant's claim for specific performance of paragraph 6 of Schedule 3 to the Transfer (and the unpleaded claim to specific performance of part of that obligation). I give judgment for the Claimant for the sum of £1 by way of damages for breach of contract at common law.
120. This judgment has been handed down at a hearing without attendance. I invite the parties to agree an order dealing with all matters arising out of this judgment. If the parties are unable to do so, then the matters arising will be considered at a hearing on 12 May 2025 at 10:30 am. Such hearing will be a remote hearing using the Court's video platform. Given there is a delay between the handing down of this judgment and that hearing I confirm that the time from which permission to appeal in relation to this judgment will run will be the earlier of the date of the Court approving and sealing an order agreed and submitted by the parties or 12 May 2025.

Appendix A

Relevant Communications Between the Parties and NCC regarding Planning Permission and Adoption of the Access Roads

1. 2012 (date unknown) - the Claimant submits an application for planning permission to NCC.
2. 15 November 2012 - In an e-mail Jenny Waddell from George F White notes that a site visit had taken place the day before with amongst others, the Senior Planning Officer for the North area of NCC. The discussion during that site visit focused on the roads and footpaths within the development. In her e-mail Ms Waddell provided a written confirmation to NCC that “*at the entrance, the estate road will be widened to 5.5m with a footpath of 2m in width to the left side to approximately 10m into the site. The remainder of the estate road will be left private and consequently does not need to be widened from the current proposals.*” The plans for planning permission were to be amended to incorporate the points made in the e-mail.
3. 12 December 2012 – Ms Waddell emailed NCC several documents, including documents seeking to overcome the issues regarding highways that had arisen doing the site visit. In her e-mail Ms Waddell repeats the assurance above.
4. 24 January 2013 - An internal e-mail from Anthony Lowe, the Senior Planning Officer at NCC, to Chris Thompson with subject 12 /02781/FUL - Ellingham Home Farm, Ellingham:

“I refer to the amended details received with your re-consultation letter dated 19th December 2012 and to the additional details added to the public access system on 27th December 2012, in respect of the above proposal.

- *The details have been examined and it is acknowledged that the estate road serving the site is to remain private and will not be adopted by the Council.*
- *The swept path analysis of the refuse collection vehicle indicates the turning area is too small and should be increased to prevent over-run of the verge and plot boundary areas.*
- *The new footways at the junction of the estate require extending 3 metres to allow straight sections of dropped kerbs for the cross-over areas to each side*

of the road. Ensure that the dropped kerbs line up with the dropped kerbs opposite.

- *The field access opposite the site access will need to be constructed up to the gateway and not just the width of footway. Dropped kerbs will be required for the access crossing but this detail can be provided to discharge an appropriate condition.*
- *No additional information has been provided regarding accessibility for pedestrians to walk between the site and village school and/or assisting in the existing parking issues at the school site.”*

5.25 January 2019 - The internal e-mail was forwarded to Ms Waddell for her action or comment.

6.31 January 2013 – Reply from Ms Waddell stating that she had asked individuals to look into making the required amendments and would be in touch further in due course.

7.8 February 2013 – Ms Waddell sends to Mr Lowe amended plans to address Mr Thompson's comments with regard to the swept path analysis of a refuse vehicle in the turning head. She noted that the turning head had been increased in size to accommodate the refuse vehicle and to ensure it would not overrun the verge or plot boundaries. The amended site plan also addressed the comments on footways and dropped curbs.

8.2 April 2013 - Planning permission granted with conditions. The relevant conditions for this claim are:

“2. The development hereby permitted shall not be carried out otherwise than in complete accordance with the approved plans. ...

7. No work shall commence on the development site unless a scheme to provide a footway between the site access leading westward to link in with the existing footway, including accommodation works to the adjacent field access, has been submitted to and approved in writing by the Local Planning Authority. Thereafter, the approved scheme shall be fully implemented to the satisfaction of the Local Planning Authority prior to the occupation of the first dwelling.

8. *No dwelling shall be occupied unless the vehicular access to the county road U2029 has been widened and re-constructed/resurfaced in accordance with Type 6 of Northumberland County Council specifications.*

9. *The development hereby approved shall be completed in strict accordance with a fully dimensioned layout plan including road drainage, street lighting and landscaping together with a longitudinal section of the new roads and details of construction of the carriageway and accesses, which shall first have been submitted to and approved in writing by the Local Planning Authority.*

10. *The proposed roads and turning spaces where applicable, shall be constructed in such a manner as to ensure that each dwelling before it is occupied shall be served by a properly consolidated and surfaced carriageway to at least binder course level, between the dwelling and existing highway. All manhole covers and gully frames shall be set to the level of the temporary running surface until immediately prior to the laying of the final wearing course which shall be prior to the occupation of the last dwelling on the site”*

9.2014 (date unknown) - Pre-planning permission inquiry was made by George F White on behalf of the Claimant to NCC.

10. 2014 (date unknown) Meeting between George F White and NCC regarding the pre-planning permission inquiry.

11. 2 March 2015 – Mr Lowe on behalf of NCC writes to George F White setting out the written response of NCC to the inquiry. This included comments from the Highways Department as follows:

“The details of the application have been reviewed and whilst I have no objection in principle to residential development on the site, it will be necessary for certain matters to be incorporated within the scheme including:

1) Red line boundary will need to include junction with public highway and visibility splays;

2) Estate road junction with public highway to be a minimum 5.5 metre entry width and 6 metres radii, incorporating dropped kerbs on footway alignments;

3) Visibility splays at junction with public highway (and internal junction to cul-de-sac) to be in accordance with Manual for Streets standards;

- 4) Junction into new cul-de-sac to be minimum of 25 metres from public highway junction;*
- 5) Access road from public highway to be 5.5 metres wide up to and beyond the new junction serving the proposed cul-de-sac;*
- 6) Turning head to be adequately sized to accommodate a refuse vehicle (swept path analysis of 10.5 metre long refuse vehicle required to prove suitability);*
- 7) Cul-de-sac to be shared surface development with carriageway width of 4.8 metres and 2 metre service strips around the perimeter;*
- 8) 2 no. visitor parking spaces required in cul-de-sac;*
- 9) On-plot parking to be in accordance with NCC parking standards;*
- 10) Parking spaces to be 5 x 3 metres for single space and 5 x 5.5 for double width spaces. Spaces to be increased in width where between boundaries or buildings.*

Additional length required in front of garage door;

- 11) 2 metre service strip required along the frontage of plot 1;*
- 12) Orientation of garage on plots 1 and 4 makes manoeuvring difficult for cars;*
- 13) Garage for plot 3 is close to the adoptable highway and the garage door should not open out across the highway area;⁷⁴*

In respect of off-site works, it will be necessary to accommodate the following:

- 14) A footway linking the site to existing footways into the village, as well as toward public transport bus stops;*
- 15) How will children be expected to walk to the village school given poor pedestrian connectivity?."*

12. 23 June 2015 - Stephanie Linnell of George F White emailed Chris Thompson of NCC regarding the proposed 2015 planning permission application. In her e-mail she noted "*The proposal is to seek adoption of the access and road up to the cul-de-sac which is 5.5 metres wide with a 2 metre footpath (as previously approved) and then have a 4.5 metre shared surface (not adopted) for the 10 dwellings including the service strip. As this was acceptable for the site to the north, could you confirm that this is ok, before I finalise plans and submit?*".

13. October 2015 – Planning Application submitted by George F White, on behalf of the Claimant, to NCC supported by a Planning Statement including the following statements:

3.1 This application is in 'Full' including details of access and junction improvements.

3.3 The proposal includes for an improved access and footpaths and incorporates the proposed access for the consented residential development to the north.

7.34 Detailed highways advice was provided in response to the pre-application. The proposed Site access incorporates the approved road layout and access for the site to the north, ensuring that this can be served from the proposed access to the Site.

7.35 Road improvements are proposed at the Site access with the junction of the U2029 including a reduction in the existing wall height to provide for vision splays and an extension of the existing footpath, to include the provision of dropped kerbs on both sides of the U2029. Provision is also made for an improved private drive to Home Farm, farmhouse.

7.45 A simple layout allows each house to be provided with good garden areas, in curtilage parking for 3 cars and a shared surface within the development including visitor car parking.

7.46 An access road from the U2029 will be provided to an adoptable standard will also provide access to the approved site to the north. A shared surface is proposed to serve the 10 new properties. The shared surface is not proposed for adoption and will be maintained through a management agreement.

14. 2015 (date unknown) - Comments of the Highways Authority. No objection in principle. Recommend conditions 7, 8, 10, 12 and 14 as attached to ref:

12/02781/FUL, a construction method statement and an informative.

15. 6 November 2015 - George F White, on behalf of the Claimant, contact NCC regarding a proposed application to vary condition 11 of the 2013 Planning Permission. This was proposed to relate to a footpath. (Application was in fact made by the Claimant and approved by NCC on 15 January 2016).

16. 17 June 2016 - Planning permission in relation to the 2015 application. The relevant conditions of the planning permission include:

- 2. The development hereby permitted shall not be carried out otherwise than in complete accordance with the approved plans and documents ...*
- 9 No dwelling shall be occupied unless the vehicular access to the county road U2029 has been widened and re-constructed/resurfaced in accordance with Type 6 of Northumberland County Council specifications.*
- 10 The proposed roads and turning spaces where applicable, shall be constructed in such a manner as to ensure that each dwelling before it is occupied shall be served by a properly consolidated and surfaced carriageway to at least binder course level, between the dwelling and existing highway. All manhole covers and gully frames shall be set to the level of the temporary running surface until immediately prior to the laying of the final wearing course which shall be prior to the occupation of the last dwelling on the site.*
- 12 No dwelling shall be occupied unless the scheme approved by application reference 15/03732/DISCON to provide a footway between the site access leading westward to link in with the existing footway shall be fully implemented.*
17. 2018 (date unknown) – Application made to vary Planning Permission regarding construction of an extension at one of the dwellings to be constructed.
18. 9 October 2018 - Planning Permission granted for the variation of condition 2 of the 2016 Planning Permission. The variation related to the construction of plot 7 on the southern cul de sac. Whilst the variation included clauses related to vehicular access (condition 9), to the method and timing of construction of the Access Roads (condition 10) and in relation to the construction of a footpath not within the Land (condition 12) no clause relevant to the issue of adoption was detailed therein.
19. 11 April 2019 - Variation of condition 2 regarding plot 7 on the northern cul de sac was approved. Similar conditions to 9 October 2018 variation included in this Planning Permission.
20. 12 June 2019 – NCC, acting by Kevin McSparron, Highways Development Officer, wrote to Sandbay Construction Limited confirming that works within the adopted highway to facilitate and fulfil associated planning conditions for planning permission 12/02781/FUL [the 2013 planning permission] had been agreed and technically approved by Highways Development Management.

The works were to be carried out in accordance with Drawing Number 64/17 Revision 1.

21. 24 September 2019 - Variation in planning granted as per the 2018 application. Conditions 9, 10 and 12 as per 9 October 2018.
22. 7 September 2019 - Morley, an agent of the Claimant, emails NCC regarding adoption of the Access Roads.
23. 1 October 2019 - Mr McSparron replies to Ms Morley *“In response to your email which mentions adoption of the internal road network at the above location; The roads within the estate could not be built to adoptable standard and were outside of required criteria to be offered for adoption. The roads within the estate will therefore remain private.”*
24. 29 October 2019 – Ms Morley replies referencing the above email and a conversation [date unknown]:

“... I understand that the issue is that the roads are not wide enough to be adopted and the turning heads are not sufficient. Following our discussion I spoke to the developers of the site and they said that they are still planning to get the roads adopted and will make the application for adoption once they have built the final house and finished the surfacing of the road.

I am therefore just slightly nervous about what the developers are telling us following our conversation, as you were quite clear they couldn't be adopted. Are the roads wide enough/turning areas sufficient on the approved plans for the two applications 15/03731/FUL and 12/02781/FUL to be adopted or not? i.e if they built the roads in accordance with the planning consent will that be sufficient to be adopted? I have attached some of the drawings for ease of reference.

I really appreciate your help in this matter. We just want to make sure it is all done properly given there are going to be 20 new different homeowners on that site!”

25. 29 October 2019 –Mr McSparron emailed Mr Bell and Mr Ellis:

“Gents,

I have had an email regarding future adoption of the above.

Anna Morley has emailed to say that developer (Who I assume to be you) has stated that you intend to apply to have the roads adopted on completion of the site?

This comes as news to me as you have already been told no adoption will take place. The internal roads will not be adopted for reasons of geometry, however, in addition to that the construction details and specifications and shoddy workmanship with hand laid base and binder course mean the roads are unadoptable.

Alan, you will remember a discussion we had when Blewitts were putting your base in and I said I would have condemned the whole thing. That still applies. Your internal roads will not be adopted and maintainable at public expense. "

26. 29 October 2019 –Mr Bell reply to Mr McSparron:

" ...

Reference the road adoption this is still something that we feel we may pursue. We are currently in discussion with a specialist consultant about the possibilities and looking at previous cases where a president has been set for this kind of situation. I appreciate your comments regarding the geometry of the road and this is of course something we are aware of. Reference the construction details and specification the road has been designed and built to an adoptable standard and we have photographic evidence to support this. I again appreciate your comments regarding sub standard workmanship and having spoken to Alan the particular area you are referring to was situated at the entrance of the site. Alan has assured me that your comment at the time was taken on board and as a result the works were rectified. Reference your comment about the hand laid base and binder course this simply isn't true and again we have photographic evidence to support this."

27. 30 October 2019 - Mr Ellis replies to Mr McSparron asking for all future communication to be sent to him and stating:

" ...

I note your comments on the geometry issue and will take further advice but, for the time being, please be advised that this was approved in the planning permissions granted by Northumberland County Council - 12/02781/FUL and 15/03731FUL - as were the hammerhead turning circles which were subsequently discharged as conditions. Both permissions contain similar conditions presumably recommended by the Highways Department dealing with the requirements for completion of the estate roads and footpaths as set out in conditions 9,10,11 and 12 of the 2015 permission.

Otherwise, and as a matter of record, may I take issue with your slightly pejorative description of the work. Allow me to offer some clarification:

- The binder course was certainly not laid by hand. The small area you saw on your visit to the site (point E on the attached plan entitled 'Road Layout') was approximately 3m² of backfill around a Milton ring at the junction of two main drains. Alan Wood, our site foreman, also saw this and agreed that it was unacceptable. The relevant area was subsequently dug out, the muddy stone removed and replaced with clean hogging.*
 - You have not inspected the rest of the site and, as far as I am aware, have only seen the area between the entrance and the site office, immediately to the west of point F on the Road Layout plan.*
 - None of the road base has been hand filled. Any claim to the contrary is false, has not been cross checked and is easily disprovable. All areas have been machine rolled and built up to and beyond MoT standards. If this is in any doubt we can provide photographic evidence and would be happy for confirmatory trial pits to be dug at the appropriate time.*
 - We have also built in strict accordance with the attached cross sectional drawings which are consistent with the specification provided by NCC.*
- Notwithstanding the above comments, please note that no formal application for adoption has yet been made, nor will be made until the site has been satisfactorily completed in accordance with the Planning Permissions, notably condition 10, which states that the final wearing course shall be laid prior to completion/occupation of the last dwelling on site.*

Until such times I feel it is unhelpful to either prejudge the matter, discuss openly with third parties, rely on factual inaccuracies or - perhaps most importantly, make unwarranted comments that could be referred to in future correspondence.”

28. 30 October 2019 - Mr McSparran confirms to Mr Bell he had not replied to Ms Morley. He further comments:

“The area of binder was a large stretch of road at least up the Vp bay, as I walked it, pointing to the kerbs and the surface specification which was outwith specification for compaction and levels. It was hand laid and they had at least 40t on that day (too much to be done without a paver). Blewitts lads were hand laying it. I was there.

My principal engineer advised me that no footpath provision and geometry of highway led to no adoption.

You have no testing of materials, NCC have not been to inspect formation, had CBR's, you do not have a specification that was approved by Northumberland County Council. Notwithstanding the fact I saw the base/ binder being hand laid and rolled. Alan asked them to try rolling it again as the surface was undulating so badly..... the material had already gone off and rolling was not an option. The roads will remain private.”

29. 5 November 2019 - Mr McSparran replied to Ms Morley's email of 29

October 2019 *“I am in discussions with the developer regarding this matter”*

30. 5 August 2020 - The Claimant makes an application for Outline Planning

Permission for a development of three houses on the Retained Land. This was accompanied by a Planning Statement dated July 2020 noting:

4. 3 The principle of vehicular access to the site is sought from the newly constructed road serving the Home Farm development located to the east of the site and currently under construction.

6.9 A number of access options have been considered for the site. The principle of vehicular access is sought from the newly constructed estate road which serves the development east of the site, on the former Home Farm Steading. The illustrative site plan demonstrates that a vehicular access of 5.5 metres in width, with 2 metre footpaths on either side could be provided to serve the site. The

illustrative site plan demonstrates that the site layout could accommodate a shared surface of 4.8 metres in width to serve all three properties, with a turning head provided for vehicles to exit the site in a forward direction. The private drive for the existing property of Home Farm and access to the existing small site office would be retained.

6.10 The principle of access is sought under this application. Further details will be submitted as part of a reserved matters application in respect of the site layout, car parking, refuse storage and collection, and boundary treatments.

31. 12 August 2020 – Mr McSparron emails Mr Bell and Mr Blewitt regarding planning ref 19/00723, confirming that the works done within the highway had been completed to a good standard and that the Defendant was discharged from its obligations by Highways Development Management as part of planning conditions related to planning permission 19/00723/FUL.

32. 30 September 2020 – NCC Highways Department submitted a consultation response in relation to the 5 August 2020 Outline Planning Permission application. The response noted that “*The site layout plan referenced 328-1004_B, whilst indicative, details the proposed vehicular access arrangements into the site which would see the creation of a vehicular access into a private road measuring 5.5m wide for the first section which holds no dwellings and this subsequently reduces width to 4.8m, all of which are accompanied by 2m footways which connects to the external private road.*

Whilst, we understand the need for pedestrian connectivity and sufficient carriageway widths, the proposed development is solely for three dwellings off a private road which will be remaining private due to not being constructed to NCC Standards.”

33. 17 August 2021 - NCC granted Planning Permission in relation to the 5 August 2020 application. No conditions required the roads or access roads in or to the 3-house development to be adopted. Rather condition 6 provides: “*The development hereby approved shall not commence until details of proposed arrangements for future management and maintenance of the proposed streets within the site have been submitted to and approved in writing by the Local Planning Authority. Following occupation of the first*

dwelling on the site, the streets shall be maintained in accordance with the approved management and maintenance details.”

34. 14 March 2022 –Ms Morley, as agent for the Claimant, again contacted NCC.

“ I am the agent for Ellingham Estate who sold off Home Farm in Ellingham village for the development of 20 houses which have now been built (application numbers 12/02781/FUL and 15/03731/FUL).

When the Estate sold the site it was agreed with the developer that the developer would ensure that the road servicing the development was built to an adoptable standard and then adopted.

I am aware that the developer has failed to do that although they have been discussing that with you recently. Please could you let me know the current position in relation to that and the reasons given as to why it could not be adopted, as the Ellingham Estate are looking to potentially sort out all the issues.

Please could you also let me know what process the Estate would need to undertake if they wanted to start from scratch and build the road to an adoptable standard – would they need to rip up the entire road and start again having consulted with yourselves regarding the plans, specifications etc? And are the plans of the road attached of sufficient dimensions to enable the first section to be adopted as an “Access Road” and the hatched areas as “Shared Access”?

I would be very grateful for any assistance you can give and look forward to hearing from you as soon as possible.”

35. 21 March 2022 – By reply NCC confirmed they had not received any section 38 or section 278 application in relation to the development. They directed Ms Morley to the relevant portals,

36. 22 March 2022- Ms Morley replied directing NCC to her previous discussions with Mr McSparron.

37. 23 March 2022- NCC reply

“Kevin has now left NCC. Unfortunately, we have no record of these conversations apart the email you have provided so could not comment further.

As per Kevin's email, the roads and turning heads were not wide enough and thus not built to NCC specification and therefore could not be adopted.

You may wish to submit a pre-application enquiry below in the first instance to answer your enquiries as these cannot be answered over the telephone.”

38. 9 November 2022 – A pre-application inquiry submitted to NCC by the Defendant regarding part of the Access Road. NCC inform the Defendant to submit a non-material amendment application which they do

39. 9 December 2022 – Highways respond to the non-material amendment application:

“the applicant wishes to make minor changes to the permitted development, to include the provision of a private footway from within the private site connecting to the existing adopted footway network.

• The provision of this section of footway is welcomed in terms of providing amenity to residents, however the works proposed do not warrant the formal adoption of the footway or roads. The private road currently does not provide utility to the wider public, over and above immediate residential amenity, and does not connect elsewhere to the wider public highway nor provide any through movements. It is therefore unlikely that the provision of a section of footway to the south-east of Maxwell Drive as shown on the submitted drawings will be eligible for adoption through any agreement with the Highway Authority. The footway will remain private and will not be publicly owned or maintained.”

40. 13 December 2022 - Non-material amendment application granted.

41. 17 February 2023 – Mr Fearon, solicitor for the Defendant emailed NCC in an email headed *“Application for s 278 agreement for Home Farm Ellingham”* seeking adoption of that part of the Access Roads which are used to access the Claimant’s land. In the email Mr Fearon sought copies of the objections which had been raised at the time of the 2012 and 2015 planning permissions applications by the Highways Department and sought to address the 2022 non-material amendment comments:

“we are aware from the pre application response to [the non-material amendment application] it was stated “this site (Maxwell Drive) does not provide benefit to others than those who live there”. As you will be aware this road serves several other properties apart from the 20 units at Maxwell Drive and Carnaby Drive, including an existing farmhouse, commercial unit and the site for three new houses for which Outline Planning Permission has been granted. Clearly there is a wider public benefit over and above that that existed when the original consideration of the road’s utility was undertaken in 2012.

As we are only seeking partial adoption of the roads serving our development, we consider this is a reasonable proposal and satisfies the requirements for adoption of Northumberland County Council.

Accordingly we wish to proceed with our application for adoption of the road.

Please advise what next steps are required if any.”

42. 3 March 2023- Reply from Hannah Brooker, NCC Principal Highways

Development Management Officer. Her e-mail included a copy of the response to the 2015 planning permission application. In relation to the 2012 application Ms Brooker informed Mr Fearon that he would need to contact Mr Lowe, the case officer, to check if comments were made. Ms Brooker further confirmed NCC’s recommendation is *“based on current guidance at the present time and under new adoption criteria by the DfT in 2022. In consultation with the agreements officer, these roads have not been constructed to Northumberland County Council standards in terms of required dimensions and the roads proposed for adoption must provide utility to the wider public, over and above immediate residential amenity and it needs to be consistent with the local authority’s design standards. The road in question does not serve any through movements and would not be suitable for adoption in this instance.”*

43. 9 March 2023- Mr Fearon confirmed to Ms Brooker that he had checked with the construction manager who assured him that the section of road for which the Defendant was seeking adoption was constructed to NCC standards as to required dimensions when read in conjunction with 2022 non-material amendment. Mr Fearon sought contrary evidence. He also raised questions over the public utility objection noting that the road was to be used by 70% more residential/commercial users than originally envisaged in 2012. He questioned why that was insufficient and what the criteria for making the determination was, in particular how many houses or commercial units were necessary for adoption.

44. 13 March 2023- Miss Booker replied noting that if the planning department had not kept the 2012 submission by Highways then there was probably not a copy of the report as she could not find a copy in their records. She then provided further information on the adoption request noting *“the evidence of*

why it is not sufficient public utility is because residential cul de sacs would have limited if any utility that they only benefit the residents who live there and no third parties or through movements and the road is too narrow and there is no two metre service strip with stone walls observed, with plot boundaries right up to the carriageway”

45. 20 March 2023 - Mr Fearon replied. He stated that the design issues arose due to the conditions of NCC's two planning permissions as recommended by highways development management. He then noted that the major obstacle appeared to be that in Ms Brooker's opinion the section of road wished to be adopted does not have enough wider public benefit. He noted that he was in the process of instruction of surveyor in connection with that and he needed to know when a road did meet that criteria. He requested NCC's policy on this and then asked a series of four questions

- “1. How many users does there have to be to constitute wider public benefit over and above residential users?*
- 2. How many other types of users does there need to be to overcome the limitation of only benefiting residential users?*
- 3. How many through movements and where must they go to constitute sufficient “wider public benefit”?*
- 4. Is this a question of location and are you saying because this is in a village other criteria apply to that in a more built up area”.*

46. 30 March 2023- Mr Fearon chased a reply to his above email, noting that “... if we cannot resolve this issue shortly I will have to consider whether to serve a Notice under section 37 of the Highways Act 1980 as we need to bring this matter to a conclusion.

In addition I have not heard anything from your agreements officer”

47. 31 March 2023- Ms Brooker replied to the 20 March 2023 email, attaching a copy of the email dated 24 January 2023 and commenting:

“ In relation to your queries about criteria for adoption against each of the questions it is not solely against these questions in which the determination of intention to adopt or not adopt is made as our team make comments under the DfT 2022 guidance. The reasons why the site does not meet any NCC's criteria to be adopted is a combination of multiple factors -principally it has not been built to an adoptable standard given the lack of 2m service strips to accommodate public

utilities services and lack of suitable geometry to facilitate sufficient turning facilities -there would be further concerns if vehicles parked on the access route would obstruct access such as for the emergency vehicles.

I trust this helps provide some more clarification, if you want to discuss further please don't hesitate to get in touch."

48. 13 August 2004 - Reserved matters application for the 3 house development received by NCC which notes at paragraph 4.3 *"The proposed access road to serve the three dwellings within the site is proposed to be formed of tarmac and is to remain in private ownership. A Management and Maintenance Company and Agreements will be formed prior to the occupation of the dwellings to secure its future management and maintenance. The terms of the Management Agreement will include the road (which is to remain private) and the open green spaces indicated on the landscaping plan. The details of the future management and maintenance agreement is required in fulfilment of the outline pre-commencement condition no:6."*

49. 25 September 2024 - NCC Highways Development responded to the reserved matters application. This noted that the scheme, internally, is considered acceptable in highway terms. No issues are raised about the Access Roads not being adopted.