Case No: HC11C02474

Neutral Citation Number: [2011] EWHC 3109 (Ch)
**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

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

Date: 28/11/2011

**Before** :

**MR JUSTICE HENDERSON**

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**Between :**

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| **PERSIMMON HOMES LIMITED** | **Claimant** |
| **- and -** | |
| **WOODFORD LAND LIMITED** | **Defendant** |

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**Mr Christopher Pymont QC** (instructed by **Walker Morris**) for the **Claimant**
**Mr John McGhee QC** (instructed by **Clifford Chance**) for the **Defendant**

Hearing date: 18 October 2011

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Judgment

**Mr Justice Henderson:**

## Introduction

1. On 18 October 2011 I heard an application by the defendant, Woodford Land Ltd ("Woodford"), asking the court to strike out, or alternatively to stay, the whole of the claim brought against it in the present action by the claimant, Persimmon Homes Ltd ("Persimmon"), with the exception of a claim for rectification which Woodford accepts should go to trial. This is my judgment on that application.

2. The present action, which Persimmon began by a claim form issued on 19 July 2011, is the latest instalment in a long-running dispute between the parties relating to the sale and purchase of a development site in Doncaster. Details of the background to that dispute, and the circumstances in which Woodford (as seller) and Persimmon (as purchaser) entered into an agreement dated 27 February 2006 ("the Agreement") for the grant of put and call options over the site, may be found in the judgment which I handed down on 15 April 2011 in a different rectification claim concerning the terms in the Agreement which dealt with the costs of providing affordable housing: see Woodford Land Limited v Persimmon Homes Limited [2011] EWHC 984 (Ch), particularly at [1] to [29].

3. For present purposes, it is relevant to note three features of those earlier proceedings.

4. First, neither side contended that the court lacked jurisdiction to hear and decide a claim for rectification of the Agreement, despite the apparent width of the dispute resolution clause in the Agreement which provides for any disagreement between the parties to be referred for determination to an expert.

5. Secondly, the question of the true meaning of the term which Woodford was asking the court to rectify, as a matter of construction of the Agreement in its unrectified form, had been referred to an expert (Mr John Male QC), who had decided it in favour of Persimmon (with the consequence that the costs of affordable housing were deductible from the purchase price, and thus fell to be borne by Woodford as the seller). The purpose of Woodford's rectification claim was to achieve the opposite result, namely that the costs of affordable housing would be both paid and ultimately borne by the purchaser, Persimmon.

6. Thirdly, although neither side had come to court expecting to argue the question of construction, because it had already been determined by Mr Male in a manner that was contractually binding on them, I took the view that the court still had to consider the question as an essential preliminary to the rectification claim, and that Mr Male's determination, although binding as a matter of contract between the parties, did not and could not bind the court. The reason why the court could not ignore the question of construction was that if the Agreement on its true construction already had the meaning for which Woodford contended, there would then be nothing for the court to rectify. By the end of the hearing, this analysis was common ground between the parties, and I therefore began my judgment by considering the question of construction. I decided it in favour of Woodford, and thus in the opposite way from Mr Male (before whom Woodford had, in effect, conceded that Persimmon's construction was correct). This had the unfortunate result, from Woodford's point of view, that the rectification claim then had to be dismissed, although I held (obiter)

that, if I were wrong on the question of construction, the rectification claim would have succeeded.

7. After I had handed down the judgment, and an order had been drawn up recording my decisions on construction and rectification, but before I had heard argument on costs and consequential issues, Woodford belatedly decided that it wished to challenge the analysis summarised above, and to contend either that the court was bound to deal with the rectification claim on the footing that Mr Male's determination on the construction question was correct, or (alternatively) that the equitable remedy of rectification could and should be granted in the particular circumstances of the case, even if the court would have decided the question of construction in Woodford's favour. I refused Woodford permission to reopen the matter at such a late stage, and also refused Woodford permission to appeal. However, permission to appeal was subsequently granted by the Court of Appeal, and the appeal is due to be heard in January 2012.

8. I have recounted this history because one of the grounds relied on by Persimmon for resisting the present application is its understandable wish to avoid the risk of falling between two stools in the same way as Woodford has done. The only way of avoiding this risk, says Persimmon, is to ensure that any question of construction associated with a claim for rectification of the Agreement is also heard and decided by the court.

9. The immediate background to the present action is as follows. On 23 February 2011, Woodford served an exercise notice exercising the put option under clauses 4 and 6 of the Agreement. On 2 March 2011 Persimmon paid the deposit of £1,891,400. The purchase price payable by Persimmon on completion is £22,064,000 less the deposit. On or about 11 July 2011, Woodford served Persimmon with what purported to be the Completion Report, Certificate and Satisfactory Technical Consents (in each case as defined in the Agreement) and called for Persimmon to complete the Agreement. However, the Agreement has not yet been completed and the parties remain in dispute about the terms and conditions of possible completion. Among other things, Persimmon contends that Woodford has not discharged all of the conditions precedent to the occurrence of the Completion Date under the Agreement.

10. The particular focus of the present action is on one aspect of the remediation works which need to be carried out on the site before housing development can begin. This aspect relates to the underlying alluvial soils, which lie above the bedrock and beneath the made ground where the former railway works had been constructed. One bone of contention is which party should bear the responsibility of improving the settlement characteristics of the alluvial soils. Another dispute concerns the adequacy of the Satisfactory Technical Consent from the NHBC tendered by Woodford in purported compliance with clause 27 of the Agreement. The position is again complicated by the fact that a number of issues which bear on these questions were referred to Mr Male for determination in September 2009, and he made his determinations on them in January and March 2010.

11. In barest outline, Mr Male decided that the specification for the remediation works in Schedule 4 to the Agreement, which Woodford was bound to procure its contractor carried out, did not oblige Woodford to improve the bearing capacity and/or the settlement characteristics of the underlying alluvial soils. Nor was Woodford required

to carry out a geotechnical assessment of those soils. Woodford's only obligation was to procure a minimum safe bearing capacity of 50 KN/m² at the level of 900 mm below ground level, and such capacity related only to the risk of shear failure and not to risk of settlement. Mr Male acknowledged that this construction of the Agreement produced "what some might consider to be an unusual result", but he also noted that there were at least two safeguards for Persimmon in the Agreement which reinforced him in the conclusion which he had reached. The first safeguard was that the Certificate required by clause 27 had to have annexed to it copies of all Satisfactory Technical Consents, which meant confirmation from the Local Planning Authority and Environmental Health Authority and the NHBC that they had no objection to residential development proceeding. The second safeguard was that the Agreement provided for the Environmental Consultant appointed by Woodford to give Persimmon a collateral warranty backed by professional indemnity insurance. Mr Male therefore said:

> "Accordingly, it seems to me that properly construed the Agreement does not require Woodford to deal with the settlement issues discussed in this Determination. As I observed at the hearing, it may be able to secure what it wants indirectly because of the need to get the Satisfactory Technical Consents. This is not however a matter for me but for the Local Planning and Environmental Health Authority and the NHBC."

12. The relief sought in the particulars of claim falls under five heads. First, the court is asked to declare that what Mr Male actually determined in January 2010 was as pleaded in paragraph 25 of the particulars. The gist of this is that:

    a) the provisions of clause 27 of the Agreement relating to the Certificate and the Satisfactory Technical Consents are separate and independent from the obligations set out in clause 27 and schedule 4 relating to the remediation works;

    b) Persimmon cannot be required to complete the Agreement unless and until it has received a Certificate and Satisfactory Technical Consents, the latter of which must confirm that the relevant bodies have no objection to residential development proceeding; and

    c) if the relevant bodies do not give their consent by reason of the settlement characteristics of the underlying alluvial soils, or make their consent conditional upon improvement of the soils or upon further testing or investigation of them, it is then for Woodford to address those concerns and thereby to render the Satisfactory Technical Consents unconditional.

13. Secondly, if Mr Male did not so determine, the court is asked in the alternative to declare that the true meaning of the Agreement is as pleaded in paragraph 25.

14. Thirdly, the court is asked to declare that a draft Land Quality Endorsement certificate dated 17 May 2010, which Woodford had tendered as an appropriate Satisfactory Technical Consent from the NHBC, does not qualify as such because:

a) it is not from the NHBC itself;

b) it does not confirm that the NHBC has no objection to residential development proceeding; and

c) even if it did, it is not the unconditional confirmation which must be available before Persimmon can be required to complete the Agreement.

15. So far, the relief claimed turns in part on the true construction of the Agreement, in part on an examination of the relevant sections of Mr Male's determination, and in part on the question whether the draft certificate tendered by Woodford qualifies as a Satisfactory Technical Consent within the meaning of the Agreement. The remaining heads of relief, however, depend on the contention that it was the common continuing intention of the parties, until the execution of the Agreement on 27 February 2006, that Woodford would be responsible for undertaking works to improve the settlement characteristics of the underlying alluvial soils. The factual basis for this contention is pleaded in paragraphs 30 to 54 of the particulars of claim. It is then pleaded that by mistake the Agreement does not reflect the common intention of the parties, and that it should be rectified to reflect their common intention. This is the fourth head of relief claimed. Alternatively, it is pleaded that the same facts give rise to an estoppel by convention to essentially the same effect. This is the fifth head of relief.

16. Woodford's defence dated 22 August 2011 takes issue with Persimmon's analysis of the relevant parts of Mr Male's determination, avers that the certificate dated 17 May 2010 is a Satisfactory Technical Consent by the NHBC, and denies that there was any agreement or continuing common intention in the terms alleged. These contentions are all subject to paragraph 2 of the defence, which reads as follows:

> "Clause 18 of the Agreement requires any disagreement between the parties to be referred to the determination of an expert. All of Persimmon's claims, save for its claim for rectification of the Agreement, ought to be determined by an expert in accordance with this clause. This Defence is served without prejudice to Woodford's right to apply to stay or strike out this claim (save for the claim for rectification) on this ground."

17. Woodford's application to strike out or stay the action (apart from the rectification claim) was issued on 18 August 2011. It is convenient at this point to deal with a possible procedural irregularity. CPR Rule 11(4)(a) provides that an application by a defendant who wishes to dispute the court's jurisdiction to try the claim, or to argue that the court should not exercise its jurisdiction, must be made within 14 days after filing an acknowledgment of service. There is nothing in the wording of Part 11 which confines its scope to proceedings with an extraterritorial element, and I see no reason to doubt that it applies in all cases where a defendant wishes to challenge either the existence or the exercise of the court's jurisdiction. On that footing, Woodford's application was made late, since Woodford acknowledged service on 22 July 2011 and the 14 day period therefore expired on 5 August, thirteen days before the application was issued. However, no point on the delay is taken by Persimmon, and no possible prejudice could have been caused because clear warning of

Woodford's intention to make the application was given in a letter from its solicitors, Clifford Chance LLP, dated 27 July. In the circumstances I am prepared to grant the necessary extension of time for making the application.

**The dispute resolution provisions in the Agreement**

18. Clause 18 of the Agreement is headed "Disputes", and provides as follows:

> "18.1 Any dispute arising between the parties will first be referred to a director from their respective ultimate parent companies for resolution. If those individuals cannot resolve any dispute the terms of clause 18.2 will apply.
>
> 18.2 Any disagreement between the parties (including reference to reasonableness) to be resolved under this sub-clause shall be referred for determination to a person of appropriate qualification and expertise ("the Expert") appointed jointly by the parties or in default of agreement within 5 Working Days by the current president of the Royal Institute of Chartered Surveyors or the current President of the Law Society (depending on the nature of the dispute) or a person acting on his behalf on the application of either party. The Expert shall act as an expert and not as an arbitrator. His decision will be final and binding save for any manifest error. The following terms shall apply:
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> (a) the expert's fee will be borne as the expert directs or otherwise equally;
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> (b) the expert will give written reasons for his decision;
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> (c) the expert will invite and will consider representations from both parties;
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> (d) the expert will comply with any time limits reasonably specified by the parties;
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> (e) the expert's decision will be within the range of the parties representations.
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> (f) If the Expert appointed under this clause dies delays or is unwilling to act or is incapable of acting the said President or a person acting on his behalf may on application of either party hereto discharge him and appoint another in his place."

19. Clause 33 of the Agreement is headed "Miscellaneous Provisions", and clause 33.2 provides that:

> "If there shall be any difference between the parties between [sic] the interpretation of any part of this Agreement the difference shall be referred for determination pursuant to clause 18 of this Agreement."

Apart from clause 33.2, there are at least a dozen other places in the Agreement where provision is expressly made, either directly or by reference to another provision, for disagreement on particular questions to be resolved pursuant to clause 18. So, for example, the definition of "Purchase Price" in clause 1.1 says that if the Purchase Price cannot be agreed between the parties within 10 Working Days, the question "is to be referred to the expert pursuant to clause 18 hereof". Similarly, clause 17.2 provides that the parties will work together to agree a joint road layout for the site as soon as practically possible, and "[a]ny dispute shall be referred for determination under clause 18".

20. I observe at this point that the words "Any dispute" at the start of clause 18.1 are general and unqualified. There is no limitation to disputes of a particular kind, and still less is there a limitation to disputes which are signposted to clause 18 elsewhere in the Agreement. On the contrary, the natural inference to draw is that the signposts are there for convenience and the avoidance of doubt. Further, any dispute which cannot first be resolved by reference to directors of the ultimate parent companies must then be resolved in accordance with clause 18.2, because that is what clause 18.1 expressly requires. It follows that, on a literal reading of clause 18, any dispute arising between the parties which the directors of the parent companies are unable to resolve must be referred for determination by an expert in accordance with clause 18.2. Such disputes include, but are not limited to, disputes about the interpretation of the Agreement (see clause 33.2), or disputes which are expressly referred for determination pursuant to clause 18 anywhere else in the Agreement.

21. Against this background, it is worth pausing to enquire why (as both parties agree) claims for rectification of the Agreement fall outside the scope of clause 18. I accept the submission of Mr McGhee QC for Woodford that the reason for this lies in the nature of the remedy sought. Rectification is a remedy that only the court can grant, and it is always discretionary in nature. Importantly, too, a decree of rectification has retrospective effect, with the consequence that the document in question "is to be read as if it had been originally drawn in its rectified form": see Craddock Bros v Hunt [1923] 2 Ch. 136 at 151 per Lord Sterndale MR and Snell's Equity, 32nd edition, para 16-027. This is a consequence that cannot be brought about by agreement between the parties or by the determination of an expert. It is something which it lies exclusively within the jurisdiction of the court to accomplish.

22. Mr Pymont QC submitted on behalf of Persimmon that the same reasoning would apply to claims for an injunction or specific performance, because again such remedies may only be granted by the court. He may well be right, but I prefer to leave the point open because there is a possible distinction between such remedies and the remedy of rectification. I see no reason in principle why an expert appointed pursuant to clause 18 should not direct one of the parties either to do, or to refrain from doing a particular act, or to complete the Agreement or perform any obligation contained in it. Thus a determination by the expert could replicate the substantive content of an injunction or a decree of specific performance. What it could not do, of course, is impose the same sanctions for disobedience (such as an order for committal or sequestration of assets) as a court order. By contrast, however, no determination by an expert could replicate the substantive content of an order for rectification.

**The rival submissions**

23. Woodford's submissions may be summarised as follows:

a) It is ultimately for the court to determine the jurisdiction of the expert under the Agreement, in the sense of the question whether he has a contractual mandate to determine the various heads of dispute between the parties: see Barclays Bank PLC v Nylon Capital LLP [2011] EWCA Civ 826 at [21] to [23] per Thomas LJ, with whom Etherton LJ and Lord Neuberger MR agreed.

b) If, on its true construction, the Agreement confers on the expert the exclusive mandate to determine a particular question, then in the words of Lightman J in British Shipbuilders v VSEL Consortium PLC [1997] 1 Lloyd's Rep 106, recently approved by the Court of Appeal in Thorne v Courtier [2011] EWCA Civ 460 at [16] per Moore-Bick LJ (with whom Sir Henry Brooke and Lady Justice Smith agreed):

> "… the jurisdiction of the Court to determine that question is excluded because (as a matter of substantive law) for the purposes of ascertaining the rights and duties of the parties under the agreement the determination of the expert alone is relevant and any determination by the Court is irrelevant. It is irrelevant whether the Court would have reached a different conclusion or whether the Court considers that the expert's decision is wrong, for the parties have in either event agreed to abide by the decision of the expert."

c) The wording of clause 18(2) of the Agreement is clear and unambiguous, and the only reason why it does not extend to a claim for rectification lies in the nature of the remedy sought: see paragraph 21 above. There is no warrant for confining the scope of clause 18 to cases where it is specifically incorporated by other provisions of the Agreement.

d) The possibility of the expert determining a question of construction (such as that raised in the second head of the relief sought) in one way, and the court then determining the same question in a different way in the context of a rectification claim, is one that the parties must be taken to have accepted in framing their bargain as they did, and is not so commercially unreasonable as to require the court to adopt a different construction of clause 18. Furthermore, any such conclusion would entail the consequences (i) that Mr Male lacked jurisdiction to determine the question about affordable housing, which Persimmon has never suggested to be the case, and (ii) that a question of construction of the Agreement would potentially move in or out of the expert's jurisdiction depending on whether (and when) a related rectification claim is advanced.

e) With the exception of the rectification claim, the other heads of relief fall clearly within the expert's remit. Head (1) is a dispute about what Mr Male actually decided, and is therefore particularly well suited to

determination by him, quite apart from the fact that it is covered by the wording of clause 18. Head (2) raises an issue of construction of the Agreement, and as such falls within either clause 18 or clause 33. Head (3) is again a dispute within the ambit of clause 18, and it also involves a question of construction within clause 33, namely whether the draft NHBC certificate is a Satisfactory Technical Consent within the meaning of the Agreement. Head (5), the estoppel claim, admittedly overlaps the rectification claim on the facts, but there is nothing in its nature which takes it outside the scope of clause 18, and the existence of the overlap is no reason for treating it differently from any other fact-sensitive dispute between the parties. Further, a quick and relatively cheap determination of the estoppel claim by Mr Male might well remove the need for determination of the rectification claim, or at least simplify its resolution.

24. For Persimmon, Mr Pymont QC argued as follows:

a) If Woodford's application is to succeed, Woodford must have the right to insist on reference of the pleaded disputes (other than the rectification claim) to an expert. Woodford can have such a right only if, on the true construction of the Agreement, the parties intended reference to an expert to be the sole and exclusive means of determining those disputes.

b) In contrast to an arbitration clause, when a dispute resolution clause in a commercial contract requires disagreements to be resolved by an expert there is no presumption that the parties intended all disputes to be resolved in that way. Reliance is placed on what Thomas LJ said in Barclays Bank PLC v Nylon Capital LLP, *loc. cit.*, at [27] to [28]:

"27. However, although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause. The rationale for the approach in *Fiona Trust* [*Fiona Trust and Holding Corporation v Privalov [2007] UKHL 40, [2007] Bus LR 1719*] is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.

28. In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of *Fiona Trust* does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement … The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert

conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way".

c) Construed in the context of the Agreement as a whole, clause 18 is not a general provision for alternative dispute resolution by an expert, but applies only where its provisions are incorporated by reference elsewhere in the agreement. Had clause 18 been intended to apply generally, the words "to be resolved under this sub-clause" would have been omitted from clause 18.2, and clause 18 would simply have referred to all disputes between the parties, without qualification.

d) The undisputed exception of rectification claims shows that clause 18 cannot be read literally, and the critical question is therefore the extent of the exception. There are no commercially sensible grounds for excluding rectification, but not excluding associated questions of construction (which the court will anyway have to determine in order to decide what the unrectified agreement means), or questions which turn upon an examination of the same facts (such as the estoppel claim). The extent of the exception should be construed accordingly.

e) Further support for this approach is provided by procedural considerations. Determination of the rectification and estoppel claims will require detailed factual evidence, full disclosure of documents, and cross-examination of witnesses. An expert would not have power to order disclosure in the same way as a court, or to hear oral evidence, or to compel the attendance of reluctant witnesses. Nor would an expert have available to him the same remedies for disobedience to his directions as a court would have. It follows that the parties could not reasonably have contemplated the resolution of such disputes by an expert pursuant to clause 18.

f) There is also a timing point which exposes the flaw in Woodford's argument. If the court were to hear a rectification claim before any associated question of construction had been referred to an expert, the decision of the court on such a question of construction would be binding on the parties and *res judicata*. Any subsequent reference of the question to an expert would therefore be impossible. But there is nothing in clause 18, or anywhere else in the Agreement, which requires an associated question of construction to be referred to an expert for determination *before* a rectification claim can proceed; and if there were such a requirement, it would give rise to the possibility of inconsistent determinations by the expert and the court (as happened in relation to the affordable housing dispute). That is not something which the parties could reasonably have intended, and it again points to the conclusion that, where a reasonable and properly pleaded rectification claim is brought before the court, the court should also have jurisdiction to decide any question of construction of the provisions sought to be rectified.

**Discussion**

25. As I have already indicated, I do not accept Persimmon's argument that the scope of the dispute resolution procedure in clause 18 of the Agreement should be confined to cases where it is incorporated by reference in other provisions outside clause 18. Such an interpretation would in my view place an unwarranted limit on the generality of the opening words of clause 18.1; and if that was what the parties had intended, I would expect them to have said so clearly. By contrast, the signposts to clause 18 elsewhere in the Agreement are readily explicable as having been inserted for convenience and the avoidance of doubt.

26. The clause 18 procedure has two stages: reference of the dispute to directors of the ultimate parent companies for resolution, followed (if that fails) by reference to an expert pursuant to clause 18.2. I cannot find any support for Persimmon's argument in the words "to be resolved under this sub-clause" in clause 18.2, because (in accordance with a common, if slightly redundant, drafting technique) I think that their sole function is to pick up and reflect the reference to clause 18.2 in the concluding words of 18.1. There might be some force in the point if the signposts elsewhere in the Agreement were specifically to clause 18.2, but that is not the case: without exception, the references are all to clause 18 as a whole. Thus the scope of clause 18 is defined by the very wide opening words of clause 18.1, and although the scope of 18.2 is narrower than that of 18.1, the only reason for this is that 18.2 excludes disputes which have already been resolved at the first stage in the procedure. That apart, the full generality of clause 18.1 carries forward into 18.2.

27. I do, however, agree with Mr Pymont that the admitted exclusion of rectification claims from the scope of clause 18 is significant. The existence of the exception shows that the words "[a]ny dispute arising between the parties" in 18.1 cannot be read literally, and that the question must therefore be where to draw the boundaries of the exception. It would in my view be wrong in principle to approach this question on the basis that any inroad into the generality of clause 18.1 should be confined as narrowly as possible, or as an exercise in damage limitation. The court should rather ask itself what the parties, as reasonable businessmen, should be taken to have intended. I also agree with Mr Pymont's submission, founded on the Nylon Capital case, that there should be no presumption in favour of resolution by an expert, although it is fair to add that the apparently unqualified width of the dispute resolution clause in the present case may be thought to provide a stronger indication in favour of expert determination than the corresponding clause in that case, which was confined to two highly specific types of dispute relating to the calculation and payment of sums due under a complex hedge fund investment agreement (the clause is quoted in full in paragraph [18] of Thomas LJ's judgment).

28. Adopting this approach, it seems to me that in most respects the construction which accords better with commercial common sense is that advanced by Persimmon. Given the existence of a rectification claim which is properly pleaded and has a reasonable prospect of success, I consider that the parties must be taken to have intended that the court should also be free to decide any questions of construction of the Agreement upon which the rectification claim depends, as well as any estoppel claim which turns on a detailed investigation of essentially the same facts. I think that, if the parties had directed their minds to the issue, they would have wished to avoid, as far as possible, the risk of conflicting decisions by the expert and the court

on such questions of construction. I am also influenced in reaching my conclusion by the procedural unsuitability of the estoppel claim for determination by an expert, and by the timing point relied on by Mr Pymont, to which Mr McGhee in my view had no convincing answer.

29. It is true that one consequence of my approach is that a question of construction may or may not fall within the mandate of the expert, depending on whether or not it is associated with a rectification claim. It is also true that the risk of conflicting decisions cannot be eliminated, because a question of construction could still be referred to an expert at a time when there is no related rectification claim, and the losing party might subsequently decide to seek rectification from the court. In those circumstances, the court would still have to consider the question of construction for itself, at any rate if my decision in the earlier rectification proceedings is correct: my analysis on this point is of course subject to whatever the Court of Appeal may decide when the appeal from my earlier judgment is heard next year. Nevertheless, the fact that the risk of conflicting decisions cannot be eliminated is not a reason for accepting it with equanimity in circumstances where a question of construction is linked with a rectification claim. It may also be said, in the example which I posited, that the losing party has only himself to blame if he decides to postpone making a rectification claim until after the related question of construction has been decided by the expert. By contrast, in a case of the present type, if Woodford's submissions are correct, the question of construction has to be referred to the expert, even though it is raised at the same time as the rectification claim, and even though the risk of conflicting decisions would then be unavoidable.

30. Turning now to the heads of relief, it follows from what I have already said that the question of construction in head (2) must go to trial, because it covers much of the same ground as the rectification claim, and the court would need to consider it in the context of the rectification claim. There would also be a clear, and unavoidable, risk of inconsistent decisions if this question of construction were now to be referred to Mr Male.

31. It also follows from what I have already said that the estoppel claim must go to trial, because its factual connection with the rectification claim is so close, and because it is inherently unsuitable for expert determination.

32. That leaves heads (1) and (3), where the position is less clear cut. My conclusion is that they both fall within clause 18, and outside the ambit of the exception, so they must still be referred to Mr Male. As to head (1), it raises the question of precisely what it was that Mr Male decided. He is the person best placed to provide any clarification or supplementary determination that may be needed, and in so doing he would in substance still be proceeding under the reference originally made to him on 3 September 2009. Any risk of inconsistency between his decision under that reference (whether in its original form, or following any clarification or supplement) and the decision of the court on issue (2) is in my judgment unavoidable, because the reference preceded the rectification claim.

33. As to head (3), it seems to me that the dispute about the NHBC certificate is a separate one, upon which the rectification claim is not in any way dependent, and which will need to be decided whether or not the rectification claim succeeds. I have

rejected the arguments for saying that the dispute does not fall within clause 18 at all. It must therefore be determined by the expert, not the court.

**Conclusion**

34. For these reasons I hold that Woodford's application succeeds in relation to heads (1) and (3) of the relief claimed, but that it fails in relation to heads (2) and (5).