
KB-2023-BRS-000012

Neutral Citation Number: **[2024] EWHC 2275 (KB)**

IN THE HIGH COURT OF JUSTICE,

KING'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

Between:

LISA OTTER-BARRY & CHRISTOPHER HUMPHRIES — Claimants

-v-

BRADFORD-ON-AVON TOWN COUNCIL — Defendant

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**Mr. Paul Wilmshurst** (instructed by **Richard Buxton** Solicitors) for the **Claimants**

**Mr. Jay Jagasia** (instructed by **Womble Bond Dickinson** Solicitors) for the **Defendant**

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JUDGEMENT

1. Becky Addy Wood is an area of ancient woodland some 10.5 acres or so in size, which has been recorded as long ago as the 10th century. It lies to the South of the Kennet and Avon

canal, in the Cotswold Area of Outstanding Natural Beauty. Natural England has designated and registered it as an ancient and semi-natural woodland. It is in the core zone of the Bath and Bradford on Avon Bat Special Area of Conservation. It is subject to a Woodland Tree Preservation Order made under the Town & Country Planning Act 1990; and I refer to it in this judgment as 'the Wood' or 'the Woods'. It is roughly rectangular in shape, being (as viewed on the map) wider than it is deep.

1. The Wood is accessed by a public highway which runs to the western boundary and runs alongside half the length of that boundary. The Wood is traversed by a public footpath running from the western boundary off of the public highway. It runs through the middle of the Wood on the western side; on the eastern side it runs along the northern boundary of the Wood. Inevitably the footpath runs by and under a large number of trees. The Wood is also crossed by informal paths, one of which is referred to in the documentation as the 'goat path'. It is unclear whether any of these informal paths had acquired the status of public footpaths.

2. This dispute concerns a disagreement between the Defendant, Bradford on Avon Town Council ('the Council'), the present legal owner of the Wood, and the Claimants who are local residents who are concerned about the local environment in general and the Wood in particular. They are also officers (chairperson and treasurer respectively) of an unincorporated association known as the Friends of Becky Addy Wood ('FROBAW') which came into being in 2020 as an entity of interested locals when the Wood was put up for sale by its previous owner. As will be seen although the Claimants bring their claim in a representative capacity, they do not represent all of the members of FROBAW. That is not to say that those other members of FROBAW who have chosen not to participate in this dispute in this litigation necessarily disagree with the Claimants' aims, although some may.

3. By DJ Woodburn's case management order of 4 September 2023, the Claimants were directed to notify all persons they alleged to represent of the proceedings, and to give them an opportunity to opt out of the proceedings. I understand that to have been done, and some people on that list have opted out. But it has not been contended that the Claimants are not duly appointed officers of FROBAW, who are entitled to bring a claim to vindicate FROBAW's rights as an unincorporated association.

4. The Claimants have been represented before me by Mr. Paul Wilmshurst of counsel, instructed by Richard Buxton, solicitors. The Defendant is represented by Mr. Jay Jagasia of counsel, instructed by Womble Bond Dickinson. I am grateful to counsel for the care and detail with which they have made submissions and assisted me in this trial.

5. There are a number of varieties of tree in the Wood, and some of them are ash trees. Ash trees have, for some years, been susceptible to Ash Dieback Disease ('ADD'). This is a relatively widespread fungal disease that affects ash trees causing leaf loss and crown dieback. It can lead to the tree dying completely. The approach to dealing with ADD is not universally agreed. The death of the tree is not necessarily of itself a particular matter of concern; all trees have their life cycle, long or short. What is of concern is, first, that ADD causes rapid and unwanted changes to an ancient environment, and secondly that as the tree suffers the effect of ADD it will become weaker and more fragile. When subject to significant or even relatively insignificant force the tree or branches may fall, with potentially hazardous consequences for any person in its vicinity.

6. Landowners owe those lawfully on their land a duty of care, and that requires them to take reasonable care to ensure that the land is safe for those lawfully upon it. Indeed there is a limited duty of care owed to those foreseeably on the land, even if their presence is unlawful.

This case concerns in part the consequences of the perception of a difference in approach towards dealing with ADD. In the present case the Defendant wishes to fell and/or pollard a number of trees in the Wood. It asserts that there is a risk to the public from falling trees if this is not done. It considers that it is acting reasonably and appropriately in so doing. The Claimants maintain that the Council's intention is defensive and overdone, and would if carried out inappropriately damage a valuable part of the local environment.

7. The dispute has not been fought on the ground of the factual appropriateness of the Council's planned works. The court has directed that no expert evidence be adduced on the ground that it is not necessary (Order DJ Woodburn 12 September 2023). Instead the dispute has revolved around the ability of the Council to make its own decision without the consent of the Claimants, or more broadly FROBAW, and the behaviour of the Council in coming to the decisions that it has reached from time to time. Although such claims are often brought by way of judicial review, seeking to enforce regulatory provisions relating to the environment, this dispute is concerned solely with the private rights of the parties. That has involved a detailed consideration of the circumstances and terms of the acquisition of the Wood by the Council, and particularly the nature of the rights and obligations arising out of the Memorandum of Understanding entered into between the Claimants on behalf of FROBAW, and the Council, and the surrounding negotiations, as well as the steps taken by the Council after acquisition of the Wood and the consequences arising from what are said to be ineffective agreements and breaches of agreements on the part of the Council.

8. The Memorandum of Understanding and Purchase was signed on 27 April 2020. In its introduction it set out the environmental matters pertinent to the Woods; that it was intended to bring the Woods into public ownership for the benefit of the public. It then provided as follows:

"2.0 **The purpose of this Agreement ('the Agreement')** is to set out the basis of the arrangements between FROBAW and the Council in the future and to facilitate the immediate transfer of **donations**, both from FROBAW and from individual community donors, to the Council, which the Council can hold **exclusively** for the purpose of purchasing the Woods.

**It is hereby agreed that:**

**3.0 The Council undertakes:**

3.1 That it will use all reasonable endeavours to purchase the Woods in its name in order to protect conserve and enhance the Woods for their ecological value and public amenity. It will provide the necessary funds to add to the funds that FROBAW has raised.

3.2 That to this end it will:

a) adopt measures to protect the woods for conservation of its biodiversity in perpetuity, including setting up a robust arrangement for the future management of BAW with members including BOATC and FROBAW, details would be drawn up after purchase.

b) seek the designation of the wood by Natural England as a statutory nature reserve, and the implementation of a restrictive covenant to protect the wood in perpetuity.

c) support the implementation of an Article 4 Direction a process which will ensure that damaging leisure activities such as motorcycle, mountain-biking or paint-balling events will not be allowed in Becky Addy Wood.

d) ensure that, whatever future management structure is agreed for Becky Addy Wood, FROBAW, as a major contributor to the cost of purchase, will be a partner in the production of BAW Management Plan and any revisions to that plan which will guide all important management decisions affecting the wood, such as the management of trees that should become infected with Ash Dieback, and ways to best promote the natural regeneration of the woodland following best practice as recommended by expert bodies. If any other significant decisions are required on areas not covered by the plan, the Council will consult FROBAW in advance of any decision, unless there is a requirement to take immediate action in an emergency, e.g. safety reasons.

3.3 that, in the event that the Council intends to sell the Woods at some future date, FROBAW will be granted the right of first refusal to buy the Woods.

In these circumstances, the parties would attempt to agree the Purchase Price but, if they failed to agree, an expert would be appointed by the Royal Institute of Chartered

Surveyors to determine the Purchase Price which would be binding. FROBAW would have a period of 2 months from the agreement of the purchase price to purchase the Woods. In calculating the amount that FROBAW would have to pay, the 'FROBAW percentage' would be calculated; this is the percentage of the current purchase price provided by FROBAW and its supporters. The FROBAW percentage would be applied to the Purchase Price and this amount would be deducted from the Purchase Price.

3.4 that, should the Council be unsuccessful in purchasing the Woods (for example due to insufficient donations), it will be under a legally enforceable obligation to reimburse the full value of the donations to FROBAW and donors introduced by FROBAW within 7 days of either the date the purchase fails, or 23rd. of April, whichever is later.

**4.0 FROBAW undertakes:**

4.1 that it will provide the Council by 5 pm on Tuesday 21st. April 2020 with a redacted copy of FROBAW's bank statement showing donations (but not donor names) received towards the purchase of the Woods, from the date its bank account opened on April 18th, as evidence that it has the necessary funds,

4.2 that it will provide the Council with funds, up to a maximum of £30,000 (reducing to £25,000 pro rata if the price falls from the expected £45,000 to £40,000) once this agreement has been approved and signed by the Council.

This agreement will end if either party ceases to exist or if its termination is agreed by both parties."

9. I turn first to the common ground and chronology. There is no dispute but that prior to April 2020 there was significant local concern about the use being made of the Woods. A number of people were concerned that the use being made of it, in particular by motor cyclists, was damaging it and destroying its ecology. These locals were keen to protect the environment of the Woods, as they saw it, and sought to do so by administrative means, such as removing entitlements to carry out developments under the Town and Country Planning (General Permitted Development) Order 2015. They also contemplated the possibility of purchasing the Wood in some way or other.

10. In Mid-March 2020 it became known that the Woods had been placed for sale in the catalogue of local auctioneers, Messrs. Cooper and Tanner, at auction on 23 April 2020. A group of locals formed FROBAW, an unincorporated association, for the purpose of raising money and buying the Woods, by private sale prior to the auction. The co-founders were Lisa Otter-Barry, Chris Humphries and Jackie Hayes. They were contacted by Cllr Alex Kay from the Council, and the Council Green Spaces Officer, who indicated that the Council wished to help in the acquisition.

11. The time prior to the auction was limited. The two main technical issues that were discussed were the raising of sufficient funding for the purchase, and what the basis of the acquisition of the Woods and the relationship between the Council and FROBAW were to be at and after acquisition.

12. As far as the funding was concerned, FROBAW obtained both pledges of money and donations. There is an issue as to precisely what the legal basis of those donations was when made by a contributor to FROBAW and thence provided to the Council as part of the purchase, and a substantial part of the evidence was taken upon with a consideration of the donation form provided by the Council to FROBAW for use by its contributors; why the Council proposed the use of that form, and the effect of the form in fact used by FROBAW. The bulk of the purchase price was provided via FROBAW. The Council agreed to make some contribution to the purchase price of the Woods.

13. As to the basis on which the property was to be acquired and the on-going relationship between the parties, which both parties envisaged as a collaborative one, some were discussed only to be rejected. So in early April the Council informed FROBAW that it would not agree to joint ownership of the Woods. If the Council was to be involved in the acquisition, it would be as sole owner.

14. Councillor Kay was and is chair of the Council's Environmental and Planning Committee. On the 8 April 2020 it resolved:

> "To approve Officers to make appropriate enquiries and actions to acquire Becky Addy Wood in order to protect them, for the community and (in principle), to seed a community fund and/or seek grants and donations as available. The Council would work in partnership with other Councils and organisations towards this aim."

It also resolved to 'seed' or make available a fund of £3,000 from the Environmental and Planning budget towards the purchase; that was the largest sum that the Committee could pledge.

15. On 9 April 2020 Chris Hogg the Council's Green Spaces Officer emailed Lisa Otter-Barry following the Environmental and Planning Committee meeting as follows:

> "The town council's intentions for the site would be for the permanent preservation of the site through its ownership and management of it as a nature reserve and to enhance it for nature conservation."

16. On 16 April Councillor Kay emailed Ms Otter-Barry as follows:

> "The intent of BOATC is to secure the woodland for the community and maintain it as a green space in perpetuity, fully respecting the TPO already on it. Measures to ensure this would likely be to put a legal covenant on the woods. Further a trust could be set up, with members including BOATC, Westwood Parish Council and representatives from FROBAW. Details of such a Trust would be drawn up after purchase. Future management of the Woods would involve FROBAW."

17. The Council and FROBAW discussed the basis upon which the Wood was to be acquired. The Council indicated that it was not willing to agree to shared ownership of the Woods.

18. The Council held a full council meeting on 21 April 2020 albeit virtually. That meeting resolved:

> "In recognition of the tremendous public fundraising in support of the purchase of Becky Addy Woods and in order to ensure the maximum community participation and involvement to protect and enhance this wood's ecological integrity and public amenity in perpetuity [the Council] will proceed to make purchase [sic] from the vendor will continue to raise funds in the interim period up to completion of the purchase."

The Council also resolved to 'seed' a fund of £3,000 from the Environment and Planning Committee budget.

19. FROBAW received both donations and pledges of donations in respect of the acquisition of the Woods. The Council provided a donation form for FROBAW to use with those who wished to make donations to FROBAW; FROBAW declined to utilise it, and used its own. This small fact has acquired significance in the current litigation, in specific terms because it was part of FROBAW's case that the Woods were acquired in part with FROBAW's money, and hence that FROBAW has or may have acquired an interest in the Woods under a resulting trust; and more generally because there appeared to be a present suspicion on the part of FROBAW that the Council were trying to persuade FROBAW to utilise a form that would have the effect of divesting any interest that FROBAW might have in the Woods to the benefit of the Council, and that this was underhand.

20. FROBAW sent the Council a 'Heads of Terms' document, which was intended to set out the terms of the relationship between the parties. The Heads of Terms document formed the basis of the Memorandum of Understanding finally executed, albeit with significant alterations. The significant points here are that the Heads of Terms document was originally created by FROBAW; it is not legally sophisticated, although it uses legal terms. There is no application to rectify the Memorandum of Understanding so as to reflect the Heads of Terms, and counsel agree that the Heads of Terms cannot be considered with a view to construing

the Memorandum of Understanding (see Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 per Lord Hoffmann at [41]). However the changes between the documents may be material insofar as the Claimants are contending that the Council acted unconscionably in respect of its dealing with FROBAW. The significant differences were to be found in paras 1.2(a) and (d) of the Heads of Terms, which became clauses 3.2(a) and (d) of the Memorandum of Understanding.

> "1. The Council undertakes
>
> 1.1 that it will use all reasonable endeavours to purchase the Woods in its name in order to protect, conserve and enhance the Woods for their ecological value and public amenity. It will provide the necessary funds to add to the funds that FROBAW has raised.
>
> 1.2 to this end it will
>
> a) seek measures to ensure a legal covenant to protect the woods for conservation of biodiversity in perpetuity, including the setting up a Trust for the future management of BAW with members including BOATC, FROBAW and Westwood Parish Council. Details of such a trust would be drawn up after purchase
>
> .....
>
> d) ensure that, whatever future management structure in agreed for Becky Addy Wood, FROBAW, as a major contributor to the cost of purchase, will be a partner in said management and that FROBAW's approval will be sought for all important management decisions affecting the Woods, such as the management of any tree that should become affected with Ash Dieback, and ways to best promote the natural regeneration of the woodland as recommended by Cotswolds AONB."

21. On the 27 April 2020 the Council through Sandra Bartlett, the Town Clerk and Ian Brown, the Director of Operations and FROBAW through Lisa Otter-Barry, Chair and Christopher Humphries, Treasurer, signed the Memorandum of Understanding. This is the critical document that purported to regulate the future dealings with the Woods. I have set it out above at paragraph 9.

22. The Council acquired the freehold of the Woods on 1 May 2020. The price was £45,000 of which £30,000 came from FROBAWs contribution, FROBAW having transferred £30,000 to the Council on 30 April 2020. The Council provided £7,000, £5,000 came from the Wiltshire Area Board grant funding and the Bradford on Avon Preservation Trust provided £ 3,000.

23. I turn next to the steps taken after the acquisition in respect of the management of the Woods. This work was not limited to Ash Dieback Disease. So, in November 2020 a bat species survey in the Woods was started by a bat ecologist, Ellie Hack, with the approval of the Council.

24. In July 2020 the Council commissioned a preliminary ecological appraisal report from Ecosulis Ltd in respect of the Woods. They delivered a draft in September 2020 and a final report on 25 January 2021. The purpose of the study was to provide information on the existing ecological conditions on the site, and to recommend how the site could be managed for biodiversity through changes in management and/or habitat creation (para. 1.2). It noted:

> "2.4 Throughout the woodland, there is substantial deadwood, including fallen and standing deadwood. A public right of way runs along the northern boundary of the woodland and appears to be well used with high disturbance levels. This is especially true within the eastern half of the woodland which has informal footpaths, potential cycling tracks, and recreational fire pits. Disturbance in the woodland appears to be lower in the western half, likely due to increased structural diversity."

As to its recommendations, it said this:

> "Due to the potential presence of ash dieback and the likely impact this would have on the condition of the Wood, it is recommended that some forward planning of tree replacements is undertaken. A management strategy that includes the planting of more rapidly growing species to preserve the canopy and therefore conditions for notable ground flora may be beneficial."

25. The Ecosulis report was supplied to FROBAW in February 2021. Mr. Hogg proceeded to draw up a Woodland Management Plan (WMP). There is a dispute as to whether he consulted with

FROBAW, appropriately or at all, before producing it, and indeed whether the document he produced is a WMP within the meaning of the Memorandum of Understanding.

26. There were discussions between FROBAW and Mr. Hogg. Mr. Hogg attended the FROBAW AGM in July 2021 and ADD was discussed. The minutes of that meeting show the contradictory and conflicting forces affecting any decision making, as between felling and not felling trees:

> "4. Ash Dieback
> Question:
> What do we do about the threat of ash dieback to public safety?
>
> Solution:
>
> - Keep monitoring developments on BAW over the next few years and take action where it is deemed to be necessary. C Hogg said [Forestry Commission] initially advised felling and now advises to wait and monitor. C Hogg reiterated [the Council's] policy of minimum intervention. This policy was noted and appreciated. He contrasted this with Avon Wildlife Trust's policy of clear-felling of ash alongside paths near Brown's Folly
> - Several members spoke in favour of diversion to protect trees at risk. SH said that for her the whole point in buying the wood was to save trees. Others concurred. C Hogg warned that it would cost £1,500 and that any proposed diversion could be stopped if even one person objects. DG suggested the possibility of a permissive path to skirt a particular tree. AK felt a lot of people would understand if they were asked to walk a little further if the alternative was felling.
> - It was agreed that any heavy-handed overzealous felling of ash dieback is not necessary given:
>
> (1) Unlikelihood of potential injury and death caused by falling trees. It was pointed out that you have a 1 in 10 million chance of being killed by a falling tree in the UK every year
>
> (2) Obvious damage that mass felling would inflict on BAW
>
> (3) Growing awareness of ash dieback among general public
>
> (4) People become more aware of safety issues in woods in high winds

(5) Such action would be contrary to the spirit underlying the campaign to save and purchase BAW."

27. Mr. Hogg then gave a presentation on the current and prospective management of the Woods. Of the nine points recorded I refer to two:

> "The prospective drawing up of a management plan together with FROBAW
>
> The prospective drawing up of a tree survey which will include identification of any ancient/veteran trees and any emergency work."

28. Mr. Hogg emailed the officers of FROBAW on 18 August 2021 in respect of ADD. He said:

> "When I visited the woods last week to deal with the fallen willow tree and again at the weekend installing bat boxes, it was obvious that the effect of Ash Dieback has become rapidly prominent on some trees during the summer. I am ordering a tree survey now (with a very ecological brief) but our theoretical plans for our approach will be tested sooner than I had hoped.
>
> There are significant effects on trees along the lower path from the road to the end in a mid section of the woods (between where the lower path joins the [Permissive Right of Way] and the squeeze/step in the path between rocks.
>
> The survey will include advice on limited intervention of ash, pollarding rather than felling etc.as well as succession advice, and I intend to specify ecological as well as arboricultural credentials. One option to consider might be to close the lower path to mitigate any safety risk."

29. Mr. Hogg forwarded his specification for the intended report to FROBAW two days later, and the Council instructed Conservation Contractors Ltd. They surveyed the Wood between 8 and 12 October 2021 and reported on 21 October. That report assessed the trees on site as being in five categories, the fourth of which was 'dangerous' and the fifth was 'dead'. It also graded the priority of the work that it recommended, from '0' (no work required) to 1 (within 2 weeks) with other designations for more deferred work. It recommended the felling of a significant

number of trees referred to as ‘dangerous’ particularly where they were in proximity to the road or a public right of way.

30. Mr. Hogg did not share the report with FROBAW (he said that he considered that it had been provided to and for the Council, and that he intended to provide it to FROBAW when he shared it with the Environmental and Green Spaces Committee), and the degree to which it was discussed at this stage is not agreed. Mr. Hogg said that he discussed the general recommendations with the officers of FROBAW. On 21 October 2021 he emailed Ms Otter-Barry to inform her that diversion of the public footpath was unlikely to be feasible economically, and that he doubted it was legally possible. On 11 November he emailed Ms Otter-Barry, and others and attached his report to committee for the Environmental and Green Spaces Committee meeting of 16 November 2021, inviting them to share it with FROBAW members.

31. His report set out the history of the Wood, its status, its acquisition and work that was being carried out there. It then set out the cause and effect of ADD and stated as follows in respect of the ‘Proposed approach to trees’:

> “We have monitored the progression of [ADD] in the woods and the additional risk has informed this approach. Visible signs of [ADD] have been present in the woods for at least three years, increased during 2020 but in the summer of 2021 the extent of the visible impact of [ADD] has become extensive.
>
> This responsibility means the Town Council has to survey trees on our land to ensure that risks from them to users and property are kept below an acceptable level. This is based on assessing the risk to ‘targets’ - the people or property that might be hit from a falling tree or part of a tree, and for how long those people or property are exposed to that hazard. This dictates the need for surveys and the frequency of those surveys. Once risks are identified by this process they need to be addressed. We have zoned the woodland in terms of risk. Broadly, in Becky Addy Wood the zones have identified

areas that require the surveying of trees, and areas where there are negligible levels of access so full ground level surveys will not take place.

In terms of ash trees, rather than take overall assessments of the woodland, the survey was instructed on the basis of 50% of canopy leaf loss in each ash tree, surveyed individually, with recommendations based in the professional expertise and experience of the tree surveyor at the time of the survey. The tree surveys were carried out by LANTRA qualified arborists, approved by the Arboricultural Association and with relevant British Standard accreditations, with the survey undertaken to British Standards.....

The principal targets in the wood are the public footpath, the adjacent road, the path along the western edge known as 'the goat track' and informal paths within the wood. There is also an area where there is evidence of a pit fire where people gather. The survey zones of the wood were defined as the fall distance of trees from the targets.....

It is proposed to close the informal path, rather than be required to carry out extensive tree felling. This, with appropriate signs, will mitigate the risk in this area. A similar approach is proposed for other informal paths in the woodland....

This leaves the risks to users of the public footpath and the road, as well as the 'goat track' at the west of the wood. Risks here cannot be mitigated by removing users or by advising them that access is at their own risk, as the use of the path and the road is as of right. ....

The resulting survey .... is shown on the map below. Unfortunately, a significant number of hazards have been identified in the survey. The map shows further work necessary on approximately 128 trees. ....This work needs to be done within 6 months. Many of these trees will need felling or significant reduction....

**Proposed resolution**

To close the informal footpath in the north-western sector of Becky Addy Wood.

Prepare sign on site and communications to explain the approach.

To commission forestry and arboricultural work to address the hazards associated with the use of the public footpath, based on the survey carried out in early October 2021.

To arrange ecological surveys, gain approval for works to trees covered by Tree Preservation Orders, to obtain a Felling License, traffic regulation orders and to meet regulations and legal responsibilities to enable the works.

To fund the above work, following the Council's financial regulation to appoint appropriate contractors for the works."

32. The meeting of the committee on 16 November 2021 was attended by (amongst others) Cllr Kay, Mr. Brown, Mr Hogg, Ms. Otter-Barry and Mr. Humphries and 37 other members of the public. The minutes referred to Mr. Hogg's report, and then stated the following:

> "Becky Addy Woods (BAW) Update by Green Spaces Officer – Full report attached)
> Chris explained that it was a tragedy that nationally Ash Dieback (ADB) was not a native disease and as such trees aren't resistant to this. He explained that the meeting tonight was for Town Councillors to establish the Town Council's approach to this matter before going forward. He had worked closely with the Committee of Friends of Becky Addy Wood (FROBAW) on an approach to surveying trees in the woodland. He added that Bradford on Avon Town Council who as the public body and landowner are legally obliged to carrying (sic) out the work for public safety reasons, following professional advice after surveying each tree to identify hazards. The survey administered in October 2021 had assessed the risk and had suggested limiting some access to the woods to reduce risk and to minimise tree works as part of our approach, as described at the meeting. BOATC are committed to managing this ancient woodland in the interest of biodiversity when addressing ADB whilst maintaining its responsibilities as landowner particularly regarding safety when planning this necessary work. Questions and discussion took place between Councillors and the public with Chris Hogg answering questions from FROBAW."

It noted that Ms Otter-Barry gave a report on FROBAW's concerns.

33. At the Committee meeting the following was resolved:

> "- To close the informal footpath in the north-western section of Becky Addy Wood
> - To prepare signage on site to communicate and explain the approach, in conjunction with FROBAW....
> - For the Green Spaces Officer to arrange ecological surveys, gain approval for works to trees covered by the Tree Preservation Order, to obtain a felling license, Traffic Regulation Orders and to meet regulations and legal responsibilities to enable the works to proceed

- To commission forestry and arboricultural work to address the hazards associated with the use of the public footpath, the road and the goat track, based on the tree survey carried out in October 2021
- To fund the above work, following the council's financial regulations to appoint appropriate contractors for the works
- Commissioning of works will not take place until [the Council] had undertaken detailed consultation with FROBAW and the tree survey is to be sent to FROBAW leaders."

34. Mr. Hogg sent the survey to the FROBAW committee members on 17 November 2021. The email included this line:

> "Given the message the Council has received this morning, please can you not forward the survey results beyond the committee members of FROBAW as the report contains the personal details of the surveyors."

This apparently referred to a threatening email that had been received. The more sensible way forward may have been to have redacted the surveyor's personal details. In any event, temperatures were undoubtedly rising. It was evident that the committee members of FROBAW and Mr. Hogg viewed these matters entirely differently. FROBAW considered that Mr. Hogg's report was not a product of consultation as required by the Memorandum of Understanding. Mr. Hogg contended that it was, having consulted beforehand and having given FROBAW an opportunity to comment afterwards. Whoever was right or wrong about this, this also marked the start of the breakdown in the relationship between the Council and FROBAW.

35. The Council commissioned a Ground Level Tree Assessment of the Wood in January 2022 from Darwin Ecology Ltd.

36. The Wood was subject to storm damage in February 2022. The Council carried out works to the damaged trees, pursuant to their forestry license and under the exceptions to the restrictions contained in the Tree Preservation Order.

**37.** On 14 March 2022 Councillor Kay, Mr Hogg, Ms Otter-Barry, Mr. Humphries and others met to discuss matters concerning the Wood. The Council raised the issue of their potential liability for mishap, and in particular the possible loss of insurance cover. Ms Otter-Barry raised the concept of 'acceptable risk', and the absence of a footfall survey. Mr Hogg said that an ecologist would inspect each tree prior to work being carried out. The meeting broke up with the Council and FROBAW agreeing to meet regularly in future.

38. In late March 2022 FROBAW decided that it would seek to buy the Woods from the Council, through a not-for-profit company limited by guarantee. In the event those negotiations would be unsuccessful because the parties could not agree a price, terminating in September 2022. The Council considered that it would include in the price the costs that had accrued to it by reason of ownership of the woods, such as the cost of surveys. I note that although the Memorandum of Understanding had conferred a right of pre-emption on FROBAW, it did not have an option to purchase at market value. If FROBAW was to seek to buy the Woods otherwise than under the right of pre-emption, it would have to negotiate such price as the Council were willing to sell for.

39. In May 2022 the Council arranged for a further tree survey to be carried out. FROBAW was notified of this survey in August 2022.

40. A meeting of the Environmental & Green Spaces Committee on 7 June 2022 contained, as confidential business, a decision to fell 17 trees that it was recorded had been identified as an

immediate safety risk. On the day the tree surgeons arrived to carry out the work, members of the public including Ms Otter-Barry and members of FROBAW were also at the Woods, and the work was not carried out. These trees were felled on 6 September 2022.

41. In August 2022 the Council produced a third or combined survey of trees in the Wood.

42. The Council applied for a felling license for 152 trees from the Forestry Commission. This was granted on 29 September 2022. It did not oblige the Council to fell that number of trees, but gave them permission to do so.

43. The parties were unable to reach agreement as to the appropriateness of the Defendant's intended works, and in February 2023 the Defendant commenced work of tree felling in the Wood. On 10 February 2023 on the Claimants' without notice urgent application HHJ Russen KC granted an order restraining the Defendant from (inter alia) cutting down any tree set out on an attached plan.

44. The Claimants subsequently served their Particulars of Claim and the Defendant its Defence. Both of these documents have been substantially amended. The injunction returned before HHJ Russen KC on 3 May 2023 and the parties agreed a consent order, which in summary provided for the interim injunction to continue until varied or discharged, and the parties were to deal with matters according to an agreed schedule, which the parties undoubtedly hoped would provide a resolution to the dispute. That schedule required the parties to appoint a joint arborist with specific qualifications; and a joint ecologist who were to carry out various enquiries and produce various reports. The intention was that this would 'hold the ring' for a significant period, as well as produce an independent and qualified third party opinion that might assist the parties more broadly. Unfortunately the parties have been unable to agree a

way forward, or indeed to agree on the appointment of a suitably qualified expert who is not conflicted (in the eyes of one or other party) and thus able to provide a resolution that each party could and would accept, and so the litigation has continued.

45. Before I turn to the evidence and the parties' legal contentions I shall set out the approach taken by the parties to this litigation, at the risk of over-broad generalisation. FROBAW consider that the arrangement they reached with the Council provided for FROBAW to have a meaningful input into the decision-making concerning the care and cultivation of the woods; and that the Council has failed to honour that agreement, has wilfully failed to do so and did not intend to do so from the outset. Insofar as the Memorandum of Understanding is not a binding agreement, the Council holds the Woods on an informal trust for itself and FROBAW. It claims remedies in contract and equity (trust), the purpose of which is to require the Council to cede control of the Woods to FROBAW so that as FROBAW see it the Woods can be properly administered by reference to sound legal, ethical and practical principles.

46. The Council perhaps surprisingly by its pleadings does not admit that a binding agreement exists (a contention which whether or not legally sound has undoubtedly intensified the dispute between the parties), but that insofar as it does, maintains that it has adhered to its contractual obligations. It contends that FROBAW has failed to appreciate that as a local authority it has to abide by the expert advice that it receives, whether or not that advice is accurate, and that it has acted in good faith throughout.

47. I will also mention that I received one skeleton argument from counsel in preparation for the hearing that ran to 57 pages. The Practice Direction provides that skeletons should not be more than 25 pages long save in exceptional circumstances and in any event with the Court's permission. The problem caused by an over-long skeleton argument (besides the time

required to read it) is that it is typically full of unnecessary narrative and recitation of evidence, and that in consequence it does not focus as it should on the critical issues of the case. I did not require an oral opening in the case because I had pre-read the witness statements and the lengthy pleadings. In particular, where those documents are substantial, the skeleton should in my view be more focussed if it is to be more helpful, and in consequence more persuasive, to the judge.

48. Although I shall refer in this judgment to the evidence that I have heard and read, I shall not set all of it out. For one thing, the bundles in this case extend to more than six thousand pages. Although there has been discussion as to whose fault it is that the bundles are so voluminous it must be apparent to all that vastly more have been produced that were ever necessary to refer to. Not only has this caused a waste of time and expense in preparation, it makes it more difficult to navigate the documents.

49. The Claimants adduced evidence by witness statement from the Claimants Lisa Otter-Barry and Christopher Humphries, who are committee members of FROBAW and at the forefront of negotiations with the Council to acquire the Woods; James Crawford who gave evidence as to the nature of the risk-based dispute between FROBAW and the Council, and Janet Hudson, a committee member who gave evidence as to the footfall count which FROBAW used for the purpose of its assessment of risk. The Defendant adduced evidence by witness statement from Christopher Hogg, the Council's Green Spaces Officer since January 2020, Ian Brown, the Council's Chief Executive, Councillor Alex Kay and Katherine Nottage, a retired teacher.

50. All gave oral evidence and were cross-examined. I found all witnesses were doing their honest best to recall matters, and insofar as they were discussing their motivation behind certain

decisions they gave evidence that sought to be accurate. Where I consider I need to make specific comment, I do so where I deal with that witness' evidence.

51. One aspect to the evidence that did become apparent was that on review of the paper and electronic record, some witnesses were surprised as to their stance or attitude immediately prior to the purchase of the Wood. This has I consider been a likely consequence of an intransigence and divergence of views over time between the parties. This will be relevant when I come to consider issues of unconscionability and bad faith. What is perceived now as bad faith may derive from a mis-recollection of the motivation behind the parties' agreement.

52. Lisa Otter-Barry is the chair of FROBAW. Since 2016 she has been a Westwood Parish Council Tree Warden for the Westwood District, as part of the Wiltshire Council network of tree wardens. She and others were concerned about motorbike rallying in the Wood as destructive of the habitat. In 2018 she and some other locals formed a group, Westwood WATCH, to protect the Wood. Between 2018 and 2020 Westwood WATCH lobbied the County Council for the imposition of an Article 4 direction in respect of the Woods. This direction, made under the Town and Country Planning (General Permitted Development) Order 1995 would have had the effect of restricting permitted development rights over the land.

53. In mid-March 2020 Ms Otter-Barry became aware that the then owner of the Wood was intending to sell it by auction on 23 April 2020. A new group, FROBAW, was formed with a constitution providing for decision-making by management committee, and FROBAW considered making an offer for the land. Councillor Alex Kay contacted Ms Otter-Barry and others to suggest raising money for the purchase by crowd-funding, and Ms. Otter-Barry discussed the purchase with Chris Hogg.

54. By the end of March FROBAW had received pledges of £30,000 in funding for the purchase. Cllr Kay told Ms Otter-Barry that the Council might only be able to contribute a small amount to the purchase, not thousands of pounds. During discussions with Mr. Hogg they considered buying the land jointly with the Council, but the Council rejected this option in early April. The possibility of buying the woods as a Community Asset was considered but was rejected in view of the time constraints, an application leading to a 28 days consultation period.

55. On 9 April FROBAW discovered that the auctioneers had received a bid for the Wood. They then discovered that this bid appeared to have come from the Council making an expression of interest at £40,000. This appeared to be an example of the left hand of the Council not knowing what the right hand was doing. It appears to have worried FROBAW that someone else might be bidding. On 16 April Mrs. Otter-Barry had a conversation with Cllr Kay who pledged the Council's commitment to honouring FROBAW as a formal partner in a trust and for the environmental protections and covenants FROBAW wished to see. Cllr Kay emailed Ms Otter-Barry that day. It recounted that the Council's Environment & Planning Committee had recently met and had resolved:

> "To approve Officers make [sic] appropriate inquiries and actions to acquire the Becky Addy Wood in order to protect them, for the community and (in principle), to seed a community fund and/or seek grants and donations as available. The Council will work in partnership with other Councils and organisations towards this aim."

Cllr Kay said that the committee had approved £3,000 towards the fund, which was the maximum her committee could approve. After setting out the Council's environmental aims, the email continued:

> **"The intent of BOATC is to secure the woodland for the community and maintain it as a green space in perpetuity, fully respecting the TPO already on it. Measures to ensure this would be likely be to put a legal covenant on the woods. Further a trust could be set up, with members including BOATC, Westwood Parish Council and**

**representatives from Friends of BAW. Details of such a trust would be drawn up after purchase. Future management of the woods would involve Friends of BAW"** (emphasis in original)

Cllr Kay went on to say:

> "BOATC has also offered their bank account to harbour the purchase money if the Friends of BAW bank account is too difficult to set up and will provide assurance monies will be returned if we are not successful. We can also seek legal advice to allow for gift aid, which I think the Council could do whereas this might not be possible with Friends a/c. We have a draft legal note for donors should this be required.
>
> …..
>
> I realise this is all moving very fast due to the auction date. There have been lots of discussions, but it is difficult to do business in the strange lockdown situation we are in currently. I hope this note reassures you of our intent and commitment."

56. On 17 April 2020 Cllr Kay sent FROBAW a donation agreement. This recited the introduction from the Heads of Terms and Memorandum of Understanding, and then referred to the decision of the Environmental and Planning Committee of 8 April 2020 (at which it agreed to pledge £3,000 and to seek to buy the Wood). The Council agreed to hold the donation 'in escrow expressly and exclusively for the purpose of purchasing the Wood'; and to use its best endeavours to purchase the Woods 'in its name in order to protect, conserve and enhance the woods for their ecological value and public amenity'. If the purchase was unsuccessful then the Council would have reimbursed the full value of the donation within seven days of the purchase failing or 23 April if later. Subject to the obligation to repay the sum on the failure of the purchase the donation would be the property of the Council.

57. The association rejected that agreement and drafted their own. That provided for a range of options, comprising full repayment if the purchase failed; partial repayment if the donations exceeded the purchase price; or a simple donation to FROBAW and its purposes come what may. The donation would have been the property of FROBAW subject to any obligation to

repay. The rejection and the differences are relied on by the Claimants as part of their case to establish the trust they assert.

58. FROBAW also drafted the 'Heads of Terms' agreement which on 21 April they sent to Ian Brown together with evidence of the funds they held. The Council met on 21 April and considered the proposal. Ms Otter-Barry considered that it was clearly intended that FROBAW's contribution was conditional upon the Council setting up a clear structure for the management of the woods that included FROBAW and committed to the highest level of protection for the woods and the least intervention possible, as reflected in the constitution of FROBAW and what was to become clause 3.2a of the Memorandum of Understanding.

59. Ms Otter-Barry contended that the Council had not agreed a Woodland Management Plan with FROBAW, and that no Woodland Management Plan had been produced by the Council. Although the Council contended that Mr. Hogg's report to committee dated 16 November 2021 was such a document, Ms Otter-Barry contended that this was a three-page document dealing with the felling of trees, rather than a document covering a five-year period at least. Thereafter FROBAW considered that it was being ignored or kept insufficiently involved by the Council in respect of the intended works to the Woods.

60. The Council commissioned the October 2021 tree survey but did not share it with FROBAW until 17 November 2021. She had had a 'walk through' of the Woods with Chris Hogg on 5 November 2021 during which she was asked not to consult with the members of FROBAW about the Council's proposals for felling trees. FROBAW considered that the October report was factually, and as to its methodology of assessment of risk, flawed. It required the felling of 147 trees. FROBAW drafted a proposal that was placed before the meeting of the Environment and Green Spaces Committee of the Council. That proposal was read out at the

meeting but not discussed. Ms Otter-Barry's email to Cllr Kay suggested that a second opinion be obtained from a tree surgeon with QTRA qualifications (this stands for Quantified Tree Risk Assessment) who was on the Ancient Tree Forum recommended arboriculturists list, with winter and summer footfall counts to be carried out with more in-depth ecological surveys including of Ash resident/dependent species.

61. In December 2021 Ms Otter-Barry met with Mr. Humphries, Mr. Crawford and Cllr Kay to discuss FROBAW's concerns and consider a risk assessment document that Mr. Crawford had produced. FROBAW's efforts were directed at showing the Council the error of its surveyor's ways. Ms Otter-Barry told me that 'We tried patiently and tirelessly to question the Town Council's surveyor's assessment of tree works needed from November 2021 to March 2022. We backed up our queries with huge amounts of research and consultation with many different experts on the subject of Ash Dieback Disease (ADB) and risk assessment of the irreplaceable wildlife habitats of ancient woodlands trees – Chris Humphries even consulted in Danish with Europe's leading [ADD] expert Iben Thomsen'.

62. Although FROBAW tried to persuade the Council to consider their concerns and to obtain a second survey, Mr. Hogg repeatedly told them that there could be no consultation on the plan to fell the trees. FROBAW had a meeting with the Council on 14 March 2022 at which the Council did not appear to take FROBAW's concerns seriously.

63. Although FROBAW had indicated an intention to purchase the Woods, the Council refused permission for access to the Woods for the purposes of tree surveys and risk assessments which Ms Otter-Barry said were necessary to establish its value. The impression that Ms Otter-Barry gave (although not her expressed evidence) was that the Council was seeking to make

progress difficult, or were being unreasonable, and not quite playing fair with FROBAW, bearing in mind the terms of the right of pre-emption in the Memorandum of Understanding.

64. In May and June FROBAW carried out a footfall survey which showed 1.9 people per hour, and which was substantially less than the Council's estimate of between 8 and 72 persons per hour.

65. The Claimants then engaged an arboricultural survey from Barton Hyett Associates (Ian Monger) on 7 June 2022. This was carried out from the public footpath as the Council had refused access elsewhere in the Woods. He carried out a Tree Inspection and Risk-Benefit assessment and a VALID Tree Risk Benefit Policy & Risk Management Strategy document at the end of August. As I understand it VALID is an organisation that provides risk assessment. The Claimants had received the Council's second survey, dated May 2022 on 25 August 2022. This alleged (or admitted) more than 50 significant errors in the October 2021 survey. Notwithstanding this, the Council used the October 2021 survey when applying for a felling license. This survey itself was wrong in that it contained an excessive assessment of footfall which (according to the originator of this system) would amount to a moderately to very busy urban street usage, and level of use that was plainly wrong. Notwithstanding this, the Council unilaterally began tree work and felled or 'monolithed', which is the reduction of the tree to an elongated stump, 19 trees by the end of August.

66. On 9 January 2023 the Council sent Richard Buxton, the Claimants' solicitors, a further version of the survey which described some of the trees as 'dangerous'. Ms Otter-Barry critiqued that document as containing illogical and inconsistent value judgments. As she put it 'To us, the risks to people appeared so low that the environmental cost associated with the Town Council's plans made no sense at all'.

67. A mediation took place on 23 January 2023 but that failed to produce agreement. Although the mediator offered a further meeting by Zoom the Council decided to fence off the site in preparation for further felling work. That led to the present litigation.

68. My view of Ms. Otter-Barry's evidence is that she is an honest witness who gave her evidence very clearly. I am of the view that her evidence is to a degree coloured by the outcome that she considers desirable. So concerned is she with the wrong-ness as she sees it of the Council's basic stance, whether to fell trees or to assess risk, that she has tended to interpret the Council's communications before the arising of the dispute as consistent with her view of the tenor and purpose of their agreement, and their acts after it as evidence of bad faith. That is not to say that her overall assessment is necessarily wrong, but I am therefore cautious about accepting Ms Otter-Barry's oral evidence where it is in direct conflict with that of the Council.

69. Christopher Humphries is the treasurer of FROBAW, and a committee member. He described the background to the campaign to preserve the Woods from inappropriate use as he saw it, in particular usage by motor bikes. The Woods were put up for auction a few days before the commencement of the Covid lockdown. FROBAW was formed shortly beforehand. Its purpose was very broadly stated to preserve and protect the Woods, together with ancillary powers to fundraise and to buy the Woods.

70. A drive was started to raise funds to buy the Woods, and by the end of March they had been pledged £30,000. They considered the possibilities of buying the Woods outright; buying it as part of a consortium or of contributing towards the purchase by another who was willing to give the absolute assurance that it was committed to the best ecological interests of the Woods. The members were concerned that they would not be able to raise the purchase price

in the short time available; but were also concerned about the possible liabilities arising on ownership.

71. Concerns were raised as to whether it was appropriate for FROBAW as an unincorporated association to purchase the Woods. FROBAW Limited was set up to avoid these difficulties.

72. Mr. Humphries produced the draft Heads of Terms agreement between FROBAW and the Council which was intended to ensure that FROBAW's interests and the ecological interests of the Woods were protected. These were sent to the Council on 21 April 2020. That day the Council held a meeting and passed a motion approving the purchase of the Woods, recognising the significant contribution of FROBAW and its place in the management of the Woods.

73. On 22 April the Council decided to approve the purchase of the Woods. It informed FROBAW that it wished to exchange contracts the next day and complete the purchase within a week; provided a draft press release and sought to arrange a photoshoot in the Woods. Mr. Humphries commented that the Council was more interested in publicity than in dealing with FROBAW's draft agreement. He also commented that fundraising was the reason that the Council were interested in partnering with FROBAW, or at least giving the impression that they intended to partner, and telling FROBAW what FROBAW wanted to hear.

74. On 24 April Chris Hogg emailed Lisa Otter-Barry expressing reservations about the use of the term 'trust' in the Heads of Terms; suggesting it might cause unintended legal consequences and liabilities for the members of FROBAW and renaming the Agreement as a 'Memorandum of Understanding'.

75. FROBAW wanted to agree the purchase of the Woods but only if it had a 'watertight' management agreement, and it was satisfied that it had a joint and equal partnership with the Council. In discussing the Council's correspondence with FROBAW over the terms of any agreement between the Council and FROBAW, Mr. Humphries has stressed the facts that the members of FROBAW did not have ready access to professional legal advice to assist in the drafting; that they did not fully understand the ramifications of the alterations to the agreement made by the Council; that the alterations were made in the Council's interests, and that the circumstances were such that FROBAW did not have the time opportunity or means to investigate these changes. FROBAW were not invited to take part in the Council's decision making as to the Wood's purchase or its future management. He said that it was fundamental that FROBAW should have a significant part to play in the management of the Woods thereafter.

76. Two potential donors (pledging £15,000 in total) withdrew their pledges when they learnt that the Council would become the legal owners of the Woods. Donors were offered various choices when they donated money, such as to receive a full or partial refund depending on whether the purchase did not proceed or more money was raised than required, with the option to leave the money with FROBAW as an accretion to its funds. In default the donations were considered as unconditional gifts to FROBAW.

77. Mr. Humphries said that FROBAW had allowed the Council to purchase the Woods using FROBAW's funds because they were satisfied that the Council's assurances throughout March and April 2020 and the Memorandum of Understanding ensured that FROBAW would be given joint and equal management of the Woods and that the Woods would be given additional environmental protections, namely Nature Reserve Status and an Article 4 Direction. Otherwise they would not have allowed the Council to purchase the Woods. He did not believe

that the Council could or would have bought the Woods without the financial assistance of FROBAW.

78. The relationship with the Council was amicable until during a walk in the Woods with Mr. Hogg on 5 November 2021 when Mr. Hogg stated that he wanted the committee's agreement to the felling of 100 trees, and requested that the committee not consult its members, which request was declined. Previously the stance of the Council had been that there would be 'light touch management'. This was a change of attitude.

79. Commenting on the Council's tree surveys, Mr. Humphries noted the failure to carry out a footfall count survey, and the absence of a proper and rigorous risk assessment based on approved and established best practice. He carried out research in the topic of Ash Dieback Disease and risk management; and he forwarded an email from Dr Thomsen setting out her views to the Council but the Council has appeared to ignore all of this. Having considered the relevant statistics of death and injury from falling trees and applying them to the facts as FROBAW understood them, he concluded that the Council's proposal for, and felling of, so many mature and veteran trees in an ancient woodland and in an important wildlife habitat in a secluded location with very low actual footfall was totally disproportionate.

80. James Crawford is a member of FROBAW and gave evidence as to the assessment of the risk to people presented by trees in Becky Addy Wood. As District Judge Woodburn's order precluded expert evidence being given as such, his evidence is material to show the narrative of discussion between the parties when their relationship deteriorated.

81. Mr. Crawford is a Westwood Parish and Wiltshire Council sponsored tree warden. He had worked for the Forest Research 'Observatree' programme surveying on tree health, and

particularly Ash Dieback Disease. He trained as a Quantified Tree Risk Assessment Surveyor in October 2020.

82. He joined FROBAW in May 2020 as he put it to contribute to the prevention of the unnecessary felling of trees in the current climate emergency using a proven risk management approach to woodland management, and particularly the best understanding of the risk of harm to members of the public in woods. His view was that most ash trees in the Woods were living and will continue to do so for a reasonable period, albeit in some cases with a reduced canopy.

83. Mr. Crawford considered that the Council had induced scaremongering by its approach as to the danger posed by ash trees and that FROBAW had been physically prevented from engaging in joint management of the Woods.

84. He explained the footfall surveys that FROBAW carried out in 2022 and concluded that by reason of the application of the QTRA analysis the majority of the trees surveyed were not a risk to the public. He noted that in October 2021 the Council had marked up what it said were dead or dangerous trees in the Woods by spray paint. They were up to 20 metres from the footpath, giving the impression of cutting a swath of living Ash either side of the path. He considered that the time stated by the Council for carrying out the felling works, 6 months, was driven by expediency, not by risk of harm. He criticised the Council's later surveys as to their factual basis and their methodology. He noted that as a Parish Tree Warden he would have expected to have been notified for comment if work was proposed on trees protected by a Tree Protection Order (by which I think he meant a Tree Preservation Order). He had not been consulted in respect of the fellings, and neither had FROBAW.

85. Janet Hudson is a committee member of FROBAW. She is qualified in Data Analysis to a high standard. She gave evidence as to the footfall surveys carried out by FROBAW, to demonstrate how it was carried out, and to show that it was methodologically sound and how it differed from the methodology used by the Council in assessing the risk to the public. She told me that the results of the survey aligned with her personal experience of walking her dog in the Woods over the past 20 years, namely very limited use by the public.

86. Christopher Hogg has been the Green Spaces Officer at the Council since January 2020. He works under Ian Brown, the Chief Executive and Town Clerk of the Council. He was the principal liaison and contact between the Council and FROBAW and its members throughout this dispute. Although his evidence dealt primarily with matters arising after the acquisition of the Woods by the Council, and in particular as to the steps taken to manage the Woods, the liaison with FROBAW and the circumstances of and justification for the proposed and actual tree felling, he did refer to matters leading to the purchase as well.

87. He considered that the Council had made it clear to FROBAW that it was not willing to share ownership of the Woods. He considered that the Council was buying the Woods with donations, and that the donors did not intend to have any ownership rights over the Woods by their donations. None of the parties intended to create a trust by the purchase.

88. Since acquisition the Council has managed the Woods. This is not limited to consideration of the safety of the public and Ash Dieback Disease, but also included matters of ecology, prevention of and dealing with rough sleeping and/or fly tipping in the Woods and repairing storm damage. The Council had in November 2020 permitted a bat ecologist to carry out a long term study in the Woods, and had notified FROBAW of this as a matter of courtesy.

89. He met with Ms Otter-Barry on four occasions between May and November 2020 at which the management of the Wood was discussed. In July 2020 the Council commissioned a preliminary ecological appraisal of the Woods by Ecosulis Ltd. The draft report was produced in September 2020, and the final report was published in January 2021. It was provided to the Claimants and Jackie Hayes on 12 February 2021 for discussion. He also contacted FROBAW on an application for funding for various works including development of the Management Plan, tree surveying, support for the bat project, installing gates and signs and equipping volunteers with the practical tools for work at the Woods. This consultation did not fall under the Memorandum but was informal, as it was not considered an important management decision affecting the Woods.

90. They had a Zoom meeting in March 2021. Mr. Hogg did not recall saying that the parties had to be in agreement as per the Memorandum of Understanding; he was conscious that the Woods were the Council's responsibility and did not want to commit the Council without authorisation. From time to time the parties would meet and discuss the proposed Management Plan. Mr. Hogg attended the FROBAW AGM in July 2021 and discussed that he was drawing up the Management Plan with FROBAW, and mentioned his concerns about Ash Dieback Disease.

91. FROBAW suggested that the right of way through the Wood might be diverted away from dangerous trees, or be gated. Mr. Hogg raised these suggestions with Wiltshire Council, but was told neither was legally possible.

92. The ash dieback became more extensive over the summer, and Mr. Hogg notified FROBAW of the need to appoint a surveyor and sent them the outline specification for the contract for the survey. The survey carried out by Conservation Contractors Ltd. in October 2021 informed

his report to the Committee, which report itself became (in the Council's view) the Management Plan. Prior to the Committee Meeting Mr. Hogg talked Ms Otter-Barry through the survey on site. He explained that the Management Plan would be based on the discussions with FROBAW and the extensive specialist input. He had discussed the Council's approach to woodland management, and in particular Ash Dieback Disease, with Heather Elgar and Joe Middleton of the Woodland Trust; the Somerset Wildlife Trust and Somerset Council (in respect of the possibility of shutting footpaths); Joe Alsop at Natural England and Dr Clark, head of research at the Future Trees Trust. The Management Plan would seek to limit tree works to areas close to the public right of way and highway; to close those parts of the Woods which could be closed, and to monolith rather than fell where possible. FROBAW was not an expert body, which was why he consulted widely.

93. He was disappointed by the contents of the survey, and wanted to keep discussing matters with FROBAW, and offered further meetings in November and December 2021. He was not aware that FROBAW objected to his Management Plan; no-one indicated that to him.

94. The Committee Report was sent to the Claimants and others on 11 November 2021. He reminded them that FROBAW had not taken a formal decision on the matter. At the time he considered that the FROBAW committee was supportive of the proposed Management Plan. He then saw an email that Ms Otter-Barry emailed FROBAW on 12 November describing the proposed Management Plan (not that it was referred to by that description) as 'rather concerning'. He denied asking the committee that they not consult with their membership, saying that this was the opposite of what he wished.

95. At the Environment and Green Space Committee meeting Mr. Hogg answered questions from FROBAW on the proposed management plan. Thirty-nine members of the public were

present. The Council indicated that it intended to carry out further arboricultural and ecological survey work to assist in the implementation of the management plan. There would be a fourteen-day consultation period with FROBAW. The Committee resolved not to commission works until the Council had undertaken detailed consultation with FROBAW and the tree survey was to be sent to the FROBAW leaders.

96. FROBAW never commented on the Management Plan. Mr. Hogg offered the Claimants a walk through the Woods; this was not accepted. On 17 November 2021 he emailed the Claimants, Jackie Hayes and Amanda Starks with a copy of the October survey. He asked that it not be shared outside of the committee as it contained the surveyor's personal details and the Council had received what it considered at the time to be a threatening email from a member of the public following the EGS Committee meeting. He said:

> "As well as the tree survey which I will forward now, I've included the report that went to the committee. Prior to the adoption of the final resolution which will be ready once the minutes are drafted. I request that you send this to your members for their consideration as was discussed last night…"

And hoped that they could continue working together on finalising the management plan.

97. On 26 November 2021 he emailed Ms Otter-Barry urging them to consider the Report and the survey, and saying the following:

> "We cannot undertake a second survey because we would still have to account for risks that were assessed in the first survey. Therefore these areas of the approach are the Town Council's legal obligation as landowner and cannot be the subject of consultation."

Mr. Hogg said that by this he meant to say that the Council could not consult itself out of its obligations; they had a duty as a responsible public body and landowner, to protect the public.

98. He next met Ms Otter-Barry in December 2021, when she asked that all correspondence be done in writing or in formal meetings. He considered this obstructive and legalistic. Despite attempts to discuss the management plan with FROBAW it never responded. FROBAW never made a formal decision as to whether they agreed with the contents of the management plan. Mr. Hogg thought that, in the absence of any response, the management plan was concluded on about 2 December 2021. He considered that there was no obligation on the Council to consult with FROBAW thereafter, as the plan had been produced; matters thereafter related to its implementation. Notwithstanding this he tried to engage with FROBAW in the spirit of liaison and trying to maintain a positive relationship.

99. The Woods were damaged by a storm in February 2022, and some trees were felled as emergency safety works.

100. On 14 March 2022 the Council and FROBAW had a four-hour meeting chaired by Councillor Alex Kay. It discussed the closure or diversion of rights of way, which the Council maintained was not possible. The Council explained that its public liability insurance required it to undertake any works recommended by its specialist advisers and that footfall is not relevant, in terms of its insurance and liability position.

101. In May 2022 the Council engaged a detailed survey of trees for the purpose of prioritising and identifying immediately dangerous trees. This was the survey that was intended to identify the trees to be felled. On June 2022 the Council resolved to undertake the works specified as required by the May survey immediately. As a courtesy Mr. Hogg informed FROBAW of this intention. On the day work was scheduled members of the public went to the Woods and shouted at and threatened the tree surgeons. The police were called

and the works suspended whilst security was reviewed. They were re-scheduled for 1 September with security in attendance. Again, protesters arrived and the police were called. The emergency work was completed on 6 September 2022.

102. On 29 September 2022 the Forestry Commission approved the Council's application for a license to fell 152 trees. FROBAW were not involved in obtaining this license as it was viewed as an operational matter. The Council's intention remained to fell only those necessary for felling; the license covered all of those that might, on the worst case, be felled.

103. A mediation was attempted on 23 January 2023 but was unsuccessful. On 1 February felling work commenced under the terms of the license but was thereafter restrained by an injunction obtained by the Claimants on 10 February 2023. On 14 April a tree fell across the public right of way, probably affected by Ash Dieback Disease, honey fungus or a combination of each. Mr. Hogg considered that this was precisely the risk that he and the Council were concerned about.

104. Mr. Hogg gave his evidence in a straightforward manner that was consistent with the documentary record he was taken to. He was genuinely surprised by the approach taken by FROBAW after the parties fell out, and I think still finds it difficult to fully appreciate why FROBAW take the view that they do. As far as his recollection is concerned I consider that he was an honest witness who sought to give accurate evidence, and was broadly reliable although he accepted that there were some matters he did not recall, in the sense that they may have occurred, but he did not have a memory of it.

105. Ian Brown is currently the Chief Executive and Town Clerk of the Council, a post he has occupied since 1 October 2022. He dealt with the Council's conveyancing solicitor in 2020.

106. On 8 April 2020 the Council's Environmental and Planning Committee resolved to acquire the Woods working in partnership with other Councils and organisations, and to provide funding of £3,000. The Council rejected the idea of shared ownership, and the parties agreed that the Council would buy the Woods with gifts from the public, collected by FROBAW.

107. He agreed with the sentiment expressed in a letter from Ms Otter-Barry to the Council dated 28 March 2022 which said:

> "The notion of a Trust was briefly mentioned as a possibility back in 2020 before the decision was made to gift FROBAW funds for [the Council] to buy the Woods outright."

108. In a discussion with the auctioneer on 15 April 2020 Mr. Brown explained that the Council led the 'consortium' to buy the Woods.

109. He was referred to Cllr Kay's briefing note of 16 April 2020 which said that an 'outright' purchase of the Woods by the Council was not being proposed. He considered that this was a reference to the funding of the purchase not coming solely from the Council. The note suggested the following resolution:

> "To approve Officers [*sic*] make appropriate enquiries and actions to acquire Becky Addy Woods in order to protect them, for the community and (in principle) to seed a community fund and/or seek grants and donations as available. The Council will work in partnership with other Council and organisations towards the aim."

That same day an agenda for a full Council meeting of 21 April 2020 was circulated which contained the following draft resolution:

> "The Council will stand as financial guarantor up to an agreed maximum amount and as lead agency on behalf of residents from both parishes and having sought and received funds from the same, seek to procure the purchase of BAW."

The meeting took place remotely. In fact, the following resolution was passed:

> "In recognition of the tremendous public fundraising in support of the purchase of Becky Addy Woods and in order to ensure the maximum community participation and involvement to protect and enhance this wood's ecological integrity and public amenity in perpetuity Bradford on Avon Town Council will proceed to make purchase (*sic*) from the vendor [and] will continue to raise funds in the interim period up to completion of the purchase."

It also agreed to 'seed' fund £3,000 towards the purchase, confirming the Environment and Planning Committee's earlier resolution.

110. Mr. Brown's view was the Council intended to purchase the Woods whether or not it received public donations to do so. He understood that the contemplated public funding was to be by way of gift from the public, facilitated by the fundraising efforts of FROBAW.

111. On 21 April he received the Heads of Terms Agreement from Ms Otter-Barry. These terms were not agreed to by the Council. They indicated that Westwood Parish Council would be a party to the intended management trust, but they declined to take part as he understood it (Becky Addy Wood is not in fact within the geographical boundaries of Bradford on Avon Town Council, but within the adjacent Westwood Parish Council area). On 23 April Ms Otter-Barry enquired whether the Heads of Terms were agreed. Chris Hogg responded that the Council was awaiting a response from its solicitor. In an exchange with the solicitor Mr. Brown stated that the Council wished to retain ownership, but also wanted to work 'hand in hand' with FROBAW. On 24 April Mr. Brown produced a draft Memorandum of Understanding, based on the Heads of Terms document. He asked the solicitor to advise on paragraph 3.2(a) of the document, asking in respect of the anticipated management trust whether:

> "this can be interrupted [this appears to be an autocorrect error for 'interpreted'] as informal (ultimately we require there (sic) funds and we wish to work with them, but

retain land ownership. It is recognised this would be drawn up after purchase, in this para and para d) refers to 'whatever future management is agreed'"

Mr. Brown said his intention was to create a mechanism for management, not to set up a trust 'in an ownership sense'.

112. The solicitor responded the same day, amending the draft and advising against entering into a restrictive covenant as that would mean that a restriction on title existed. He also commented that:

> "A 'Trust' moving forward is not likely to be a helpful way given its legal meaning. I anticipate that the most likely way forward would be 'committee' under the Council or, if more formality was required, the setting up of a Company (limited by guarantee) which could include the Council and the Friends as its members."

113. The reference to a Trust in the draft was removed. The amended draft was sent to Ms Otter-Barry by Mr. Hogg, who explained why the wording had been changed. His email said this:

> "There are a few small changes, such as changing the reference of trees affected by ash dieback from singular to plural so we don't have to consult on every tree (such as in an emergency safety situation) but that the approach will be agreed in a management plan. It also refers to expertise, rather than the Cotswold AONB specifically, to make the document robust. Similarly, a removal to another document, the draft of the article 4 direction, so this agreement is self-standing, but, the article 4 direction itself remains.
>
> The solicitor clarified that this agreement isn't in the form of a 'Heads of Terms' agreement, so we have managed to define it as a Memorandum of Understanding. This recognises the formal role of FROBAW. A MOU is a document that Ian has used in previous positions, managing AONB partnerships between local authorities and government departments. We really hope that this is acceptable to you. Similarly the solicitor advised that use of the word trust might cause problems for both parties unless we defined it in specific terms. This might include unintended legal liabilities for members of the FROBAW. Our future relationship is described elsewhere in the

agreement and should make it clear that your intent, participation and significant contribution is clearly recognised."

114. After some further amendments the final Memorandum was agreed and signed on 27 April and on 30 April FROBAW transferred £30,000 to the Council. Mr. Brown believed the monies were a gift to the Council. The Council would not have proceeded to contribute to or to purchase the Woods had it thought they were being purchased on the basis of joint ownership.

115. Mr. Brown considered that the Council had subsequently dealt with FROBAW on the basis that the Memorandum committed the parties to trying to work together in the spirit of liaison where possible. He understood that the purpose of the Memorandum was in part to satisfy FROBAW that the Council would manage the Woods appropriately; but he considered that the Council was the landowner that would make the final decision and would manage the Woods for the benefit of the community and the public more generally.

116. Mr. Brown did not have much if any direct personal spoken interaction with FROBAW concerning the terms of the correspondence leading to the Memorandum of Understanding or the dealings with FROBAW afterwards; he was however in charge of the negotiations. He appeared knowledgeable about the Council's aims and was careful in his responses to cross-examination, in which he was not shaken. His evidence is I consider reliable, although I do not accept his evidence that the Council would have purchased the Woods had FROBAW not contributed funding. There is no corroborative evidence to support this, and having regard to the sum that FROBAW was providing, the overall price and the informal nature of the relationship and the risk of it not proceeding as a joint venture between them I would have expected this contingency to have been discussed.

117. Elizabeth Kay was an elected councillor at all materials times, and still is. She was the chair of the Council's Environment and Green Spaces Committee. From the outset in March 2020 she was keen to see the Wood used as a community green space to add to the Council's property holding. She wanted to protect the Wood for the benefit of the community and the Wood; and prevent its sale to a private party. She communicated with Mr. Brown, Ms Otter-Barry, Mr. Humphries and Mr. Hogg in this regard. She considered that they had to act fast. On 16 April she emailed Ms Otter-Barry as I have set out at paragraph 56 above. By referring to a trust she meant to say that there would be a package ensuring that the Woods would remain a green space; nothing more than that. This occurred during the pandemic; making arrangements was more difficult; it was simpler for the Council to acquire the Woods.

118. Cllr Kay attended the full council meeting on 21 April 2020. She understood that the acquisition would also be funded by crowdfunding and donations, the donations being donations to the Council. Ms Otter-Barry had been provided with a donation form by the Council, but had rejected it in favour of FROBAW's form which she had said was simpler. She was aware that FROBAW had received pledges of £50,000.

119. Thereafter the Council's officers were involved in securing the purchase of the Woods and for agreeing the Memorandum of Understanding with FROBAW; Councillor Kay was not. She recalled having a conversation with Mr. Brown and being informed that a trust was not workable or practicable, and that the Council was going forwards with a Memorandum of Understanding.

120. She herself pledged £500, which was paid into FROBAW's account. She did not consider that she was acquiring any interest in the Woods by so doing. She said that her

donation was not conditional on any agreement being reached with the Council, save that if the Council did not ultimately acquire the Woods she would have expected the return of her donation.

121. She chaired an EGS Committee meeting on 16 November 2021 that was attended by several members of FROBAW as well as representatives of the Council. The agenda was circulated three days before the meeting. The woodland management plan was discussed at length. One of the resolutions had been to commission some works to implement the plan. That plan was paused for two weeks for FROBAW to consult its members about ADD and the plan, but there was no response from FROBAW.

122. Ms. Otter-Barry and Mr. Humphries complained to her about a lack of consultation by the Council. On 10 December 2021 Councillor Kay wrote to Mr. Brown, Mr. Hogg and two other councillors as follows:

> "We allowed time for further consultation with FROBAW and the public in general, on the survey and the immediate actions suggested necessary for BAW. I gather this has not really happened and the tree survey has not been discussed. The definition of 'dangerous' is lacking as is the evaluation of 'risk of harm' factor. We do not have counts of how many people use the Woods on a day-to-day basis. This lack of consultation and engagement about ways to limit or at least slow the felling process is, reputationally bad for the Council and it reneges on the spirit of the FROBAW MoU. I understand concerns from both sides. There is quite a groundswell of discontent and we need to consider this very carefully".

123. She explained that due to personal difficulties she was not closely and personally aware of events in 2021 and took FROBAW's complaints at face value. Councillor Kay had been a member of FROBAW but ceased to be so in April 2022 when she was frozen out of it, as she saw it at the behest of Ms Otter-Barry and a clique controlling FROBAW as a result of the

disagreement with the Council. Her view of the dynamics of the relationship was that it was good initially but foundered on disagreements over the approach to ADD, with Ms Otter-Barry regarding the Council as the villain of the piece.

124. At one point in her cross-examination Cllr Kay was asked about the involvement of FROBAW in the funding of the purchase. She said this. It was not the case that she thought that FROBAW were 'just raising money for the Council'. They were from the outset working towards a common goal. The money was not 'for' the Council but to purchase the woods. It was not an 'us and them'. They were working to a common goal. Somewhat surprisingly she was accused of lying.

125. Councillor Kay was also cross-examined about a 'good news' photo shoot organised by the Council on site on 22 April 2020 (which was before the acquisition of the site) as being presumptuous, and about signage erected by the Council on the site that Mr. Wilmshurst described as 'propaganda'. Whilst the relevance of this line of questioning was not immediately, or indeed on reflection, apparent, it did demonstrate the present animus between the parties.

126. Councillor Kay's evidence was accurate and truthful. She did not lie. It was apparent to me that she has found the disagreement profoundly upsetting.

127. Katherine Nottage is a retired teacher and at material times a member of FROBAW who was called by the Council to demonstrate her intention as to the ownership of the Woods given that she made a contribution to FROBAW for the purchase of the Woods. Her intention and understanding was that FROBAW was simply a conduit for the provision of funds to the

Council. The tenor of her evidence as a member of FROBAW was that the committee of FROBAW was behaving on something of a frolic of its own in disagreeing with the Council and entering into litigation; and that the committee ignored her views. I consider that her evidence reflects her honestly held beliefs and opinions.

128. I turn next to the legal basis for the claim as put forward by the Claimants. They rely on the terms of the Memorandum of Understanding considered in the circumstances in which it was executed, and what they contend is the failure on the part of the Defendant to comply with the terms of the Memorandum to produce certain legal consequences. Taking them in the order set out in the Amended Particulars of Claim, first, they contend that the failure on the part of the Defendant to adhere to the terms of the memorandum is a breach of contract. They seek an order for specific performance of the memorandum, alternatively damages for breach of contract, and injunctive relief. Alternatively they contended that FROBAW was entitled to a beneficial interest constructive trust. In the further alternative they contended that the combination of the terms of the Memorandum, coupled with the Defendant's behaviour and failure to honour the terms of the Memorandum would lead to the imposition of a constructive trust, either under the principle known as the Pallant v Morgan equity, or under the principle set out in the decision of the Court of Appeal in De Bruyne v De Bruyne [2010]. If the Wood was held on trust for FROBAW as a beneficiary, then Mr. Wilmshurst sought an order under section 14 Trusts of Land and Appointment of Trustees Act 1996 ('ToLATA') that the Defendant be restrained from felling trees, and that the Defendant's beneficial interest in the Wood be sold to the Claimants. The pleaded claim to an interest by a resulting trust was withdrawn by Mr. Wilmshurst in the course of the hearing.

129. It became apparent during closing submissions that Mr. Wilmshurst was adopting a more nuanced approach to the Claimants' rights and remedies. His principal submission was

framed around the application of the Pallant v Morgan equity to the facts of this case. He contends that the agreement to acquire the land was a joint venture of the sort that engages that principle, and that the substantial failure of the Memorandum of Understanding, either because it is too vague as to critical parts, an unenforceable agreement to agree, or because the Defendant has wilfully failed to comply with it, means that it would be unconscionable for the Court not to recognise that the Defendant is entitled to an equitable interest under a constructive trust. As he put it:

> "The stark position of the Defendant in these proceedings is that it is entitled to keep the £30.000 as a gift and is not under any obligation to adhere to the terms of the MoU"

In so doing he was referring to the case filed by the Council asserting that the Memorandum of Understanding was not intended to create legal relations, and indeed Mr. Hogg's initial witness statement to the same effect.

130. It should be noted that Mr. Hogg in his witness statement served on 27 April 2023 said that:

> "[He] understood that BOATC's position is that it did not intend to create a legally binding agreement on the parties to the MoU and therefore does not consider that the MoU is legally binding .... I also understand that BOATC will say that, even if the MoU was intended to be legally binding, the terms relied on by FROBAW are too vague and unclear so as to be enforceable and/or do not have the legal effect created by FROBAW"

As I read this, Mr. Hogg is here setting out the Council's position which it had no doubt taken legal advice upon. More significantly, neither Mr. Hogg nor Mr. Brown or Cllr Kay were cross examined on the basis that they did not believe that that the MoU was of legal effect. Insofar as either of them had a material belief in the efficacy of the Memorandum, and insofar

as that is material, I find that they considered that it was a binding agreement, and intended it to be so.

131. Alternatively Mr. Wilmshurst would press the De Bruyne principle into service to the same end. He also argued that this was a common intention constructive trust of the Gissing v Gissing type, but rather more fainty and briefly. These arguments were particularly significant because of the remedy sought, compulsory sale and purchase by the Claimants on behalf of FROBAW of the Defendant's remaining beneficial interest. This buttressed the fact that the Claimant's motivation is to protect the Wood and its environment which, as they now see it, requires that they have full control over it.

132. As to the claim in contract (which I note was how the claim was put by counsel on the initial application before HHJ Russen KC for injunctive relief) the primary argument is that clause 3.2(d) requires the parties to concur on a management plan, and to concur on the steps within it. The upshot of that, it seems to me, is that in the absence of such agreement the parties would be unable to carry out works of management falling within such a plan. In the alternative, Mr. Wilmshurst contends that the obligation is one to consult with the Defendant and consider their views in good faith. On either construction he maintains that the Defendant failed to honour its obligations.

133. I would add that Mr. Wilmshurst appeared ambivalent over Mr. Jagasia's arguments first that the effect of clause 3.2(a) being unenforceable the Memorandum of Understanding as a whole was unenforceable; and secondly that clause 3.2(d) was itself unenforceable as an agreement to agree or because it was too unclear to be given meaning. I suspect this was because he considered that the greater the failure of the Memorandum of Understanding, the more likely his Pallant v Morgan argument was to succeed. To the extent that the

Memorandum was enforceable, he contended that the appropriate remedy was specific performance, either by requiring the Defendant to produce a Woodland Management Plan that the Claimant could agree to; or by consulting with the Claimants and considering their representations in good faith.

134. By its Defence, the Council put the Claimants to proof of the fact that the Memorandum is binding at all, maintaining that it was not intended to create legal relations. That is a bold assertion, given that it is said to deal with the consequences of the payment of £30,000 raised by FROBAW and supplied to the Defendant for the purpose of enabling the Defendant to purchase the Wood, and further that it contains (at clause 3.3) a provision conferring on FROBAW right of pre-emption over the Wood. At the conclusion of the hearing Mr. Jagasia accepted that subject to arguments of ambiguity and lack of clarity, this was a binding contractual agreement. The fact that the Defendant was unwilling, on the face of the pleadings, to accept that the Memorandum was at least in part legally binding may have some consequences when I come to deal with the issue of equitable remedies. I shall consider it then.

135. The first sustained point is that the Memorandum is too vague to be enforceable. The Amended Defence, a lengthy document of some 37 pages, submits both that the terms relied upon are too vague to be enforceable, and that they are too vague to be enforceable in the manner the Claimants contend, leaving open the possibility that they are enforceable on some other basis. Given that Mr. Wilmshurst accepted the Defendant's contention that clause 3.2(a) is an agreement to agree, and therefore did not assert any breach flowing from it, the primary issue on that footing is whether clause 3.2(d) has an enforceable and determinable meaning. Further, that clause, insofar as it may be enforceable, the Council says imposes an obligation essentially to consult with FROBAW in good faith as to matters falling within its ambit, and

this they contend they have done; there has been no breach. If there has been a breach, then it would not be appropriate to seek to remedy that breach by an order for specific performance. The remedy of specific performance will not be made where the obligation is unclear, or where performance requires supervision by the court. They maintain that would be the position here. Any damages would be nominal.

136. Next, they submit that the relationship between the parties is governed only by the Memorandum of Understanding, and that that document does not create a relationship of trustee and beneficiary in respect of the Wood. Because the Defendant has not acted unconscionably there can be no question of the equitable doctrines set out in De Bruyne or Pallant v Morgan being applicable; but in any event on their correct analysis they would be not applicable or not appropriate here. Specifically dealing with the Pallant v Morgan equity, Mr. Jagasia contends first that the agreement or understanding between the parties does not engage the principle, it not being one that sought to confer an interest or benefit on the Claimants or FROBAW. Secondly, it is not unconscionable for the Claimant to refuse to hold the Woods for itself. He points to the existence of the Memorandum of Understanding which is what FROBAW bargained for and received. That may be a difficult point to run together with the argument that the agreement is not binding for want of intention to create legal relations, or entirely void for uncertainty, but it is open to him to run them in the alternative. Thirdly it is not unconscionable because FROBAW positively chose to agree that the property should not be held on trust, because (as was apparent from the evidence) some of its members were concerned about FROBAW's potential financial liability from falling trees. FROBAW is seeking to have the benefit of ownership without any concomitant liability. That latter point seems to me to be something of a bad jury point. A beneficiary of a trust of land does not owe duties to third parties on the land; if a trustee is liable the beneficiary may have to indemnify him.

137. Putting them in what I consider to be a logical order, the issues seem to me to be as follows:

(1) Is the Memorandum of Understanding intended to be legally binding?

(2) Is the Memorandum of Understanding sufficiently certain to be enforceable? Are clauses 3.2(a) and (d) of the Memorandum sufficiently certain to be enforceable?

(3) To the extent that they are enforceable, is the Defendant in breach of the terms of clauses 3.2(a) or (d) of the memorandum?

(4) Are the Claimants entitled to a remedy under Pallant v Morgan?

(5) Are the Claimants entitled to a remedy under De Bruyne?

(6) Were the Woods held under a common intention constructive trust of the Gissing v Gissing type on their purchase by the Defendant?

(7) What remedies arise if the Woods are held in trust?

(8) What is the position concerning the alleged breach of contract?

(9) Is Damages/Specific performance available?

138. (1) Is the Memorandum of Understanding intended to be legally binding?

The description of a 'Memorandum of Understanding' may not itself indicate that the agreement it encompasses is intended to be binding. A 'memorandum' is often a reference to a record, and not an operative agreement itself. An 'understanding' may well indicate something in distinction to a binding agreement. Whether an agreement is intended to be contractually binding or not is not to be determined simply by the label that the parties place upon it, but by consideration of its terms in the context in which it came to be made. It is to be decided as an objective fact, and not (unless the parties have agreed this between themselves, in which case that would be a relevant objective fact) by reference to one or other parties' subjective understanding of the position.

139. The existence of an express agreement in other than a domestic or social context, as here imposes a burden on the party who asserts that it is not intended to be binding (see Edwards v Skyways [1964] 1 WLR 349 at 355A 'clear words' required). Whilst this is not a typical commercial agreement, it is in my view an arm's length agreement of a nature that would be expected to impose contractual obligations, formally executed by the parties. Clear words (or a clear implication) would indeed be required before it could be concluded that the parties did not intend this to be a contractually binding agreement.

140. The vagueness of the document may indicate that it is not intended to be legally binding. I consider the wording in more detail when considering whether the wording is so vague that it, or parts of it, are unenforceable notwithstanding that the parties intended it to be legally binding. There can be no doubt I think that the wording is broad and imprecise. Further, the fact that the parties anticipated that a further document would be produced (the BAW Management Plan referred to in clause 3.2(d)) might also indicate that that was to be the legally binding stage of the process. Although it seems to me to be somewhat pointless (or optimistic) for the parties to enter into a non-binding agreement with a view to generating a binding obligation, where FROBAW's leverage would disappear on the acquisition of the Woods.

141. FROBAW paid money to the Council as a result of the Memorandum of Understanding. The money that it paid to FROBAW was not the Council's money – FROBAW had not received it as agent for the Council, and had not used the Council's donation form when receiving donations. FROBAW had received it with the intention of the donor that it would be used for the purpose of acquiring the Woods. It does not matter whether as between FROBAW and the donor there existed some sort of trust relationship; the Council was not entitled to the money unless FROBAW decided that it should have it. So the Council

benefited from the agreement and FROBAW agreed to pay the Council a sum of money up to £30,000 as provided by clause 4.2. The Council was about to commit itself to acquiring some woodland for a reasonable sum of money. It did so on the basis that FROBAW committed itself to making a contribution to the purchase price. I have no doubt that reasonable parties would have considered that this document was intended to be legally binding.

142. The genesis of the document may indicate that it was or was not intended to be legally binding. The discussion between FROBAW and the Council prior to the execution of the Memorandum of Understanding shows that FROBAW wished to ensure that the usage of the Woods took place as it wished. It wanted to bind the Council so far as it was able. It was not willing to rely on the Council's goodwill. It wanted certainty. The Council for its part was clear as to those restrictions that it would not be willing to agree, but never stated that it did not wish to be bound by legal restrictions or obligations, and the Memorandum of Understanding reflected that which it was willing to agree to and be bound by. The fact that it was formally executed as a document by parties able to bind both the Council and FROBAW; that it contained terms that were plainly legally effective (clause 3.1 as to purchase; 3.3 as to the right of pre-emption; 3.4 as to the obligation to repay monies to FROBAW and third party donors, an unusual obligation which is specifically said to be 'legally enforceable') and that it by its terms provided that:

> "This agreement will end if either party ceases to exist or if its termination is agreed by both parties"

Indicates quite clearly that the parties considered that it was generally a legally binding agreement.

143. <u>(2) Is the Memorandum of Understanding sufficiently certain to be enforceable? Are clauses 3.2(a) and (d) of the Memorandum sufficiently certain to be enforceable?</u>

The parties have agreed, as I have indicated, that clause 3.2.(a) is not sufficiently certain to be enforceable on the basis that it amounts to an agreement to agree. That is a legal question, and although a court will often accept the joint view of the parties as to the legal effect of a contractual provision, it seems to me that because the effect of the Memorandum of Understanding as a whole remains in issue, I have to come to a view as to the meaning and effect (if any) of clause 3.2(a).

144. Put in its setting, para. 3.2(a) provides:

> **"3.0 The Council undertakes:**
>
> 3.1 That it will use all reasonable endeavours to purchase the Woods in its name in order to protect conserve and enhance the Woods for their ecological value and public amenity. It will provide the necessary funds to add to the funds that FROBAW has raised.
>
> 3.2 That to this end it will:
>
> a) adopt measures to protect the woods for conservation of its biodiversity in perpetuity, including setting up a robust arrangement for the future management of BAW with members including BOATC and FROBAW, details would be drawn up after purchase….."

Again, this is a vaguely worded provision. It is however not an agreement to agree. The role of the Council and FROBAW is to be members, possibly amongst others, of the 'robust arrangement' which the Council is to set up. The Council's obligation more generally is to adopt measures to a particular end. The clause requires the Council to do something, not to agree those matters with FROBAW or anyone else. The requirement that details would be drawn up after purchase does not in my view require the parties to agree these terms. The party who is to draw up the details is the Council. They will be the owners of the land and as such subject to its burdens and obligations, and it is natural and consistent with the wording of clause 3.2 that it is the Council that will adopt that measure and set up the arrangement.

145. It might be argued that the need for agreement in respect of this putative future arrangement can be seen in clause 3.2(d), which refers to '[the Council ensuring] that, whatever future management structure *is agreed* for Becky Addy Wood,….' (my emphasis), and that an agreement to agree without a mechanism to obtain certainty is not binding on the parties. In my view the meaning to be given by this provision is coloured by the background to the agreement. The parties were working towards an expressed common purpose and goal, under time pressure. They considered that certain matters were to be dealt with in the future and that where possible this was to be dealt with by agreement. In the absence of agreement however the Council's obligation was to set up a robust arrangement in accordance with clause 3.2(a).

146. I turn next to the issue of vagueness. Courts should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so (Openwork Ltd v Forte [2018] EWCA Civ 738 per Simon LJ at [25]). *A fortiori*, where a purported agreement has been partly executed (see NHS Commissioning Board v Vasant [2019] EWCA Civ 1245 per Lewison LJ at [35]). In the present case the agreement has been performed. I find that an objective bystander would have considered that the acts of the Council in acquiring the Woods and the act of FROBAW in making contribution to the purchase price was done pursuant to the agreement that they had thought that they had reached. I put to one side the question as to whether the Council were acting in a duplicitous manner by purporting to act in accordance with an Agreement that they did not believe to be binding. Viewed objectively, the steps taken by the parties were the steps they contemplated taking pursuant to the Memorandum of Understanding as a binding agreement. Are the provisions capable of sensible meaning?

147. The purpose of the obligations contained within clause 3.2 is to protect, conserve and enhance the Woods for their ecological value and public amenity, as set out in clause 3.1. That

is the 'end' that these obligations refer to. The Council is obliged to set up a 'robust arrangement' to that end, which must involve FROBAW and the Council as participants, although it may involve others. That they will be 'members' indicates that they will be parties within a body. It does not have to be a free-standing legal entity. One can properly be described as members of a committee, even if that committee is an *ad hoc* arrangement formed by another party. No doubt there may be others. Some further guidance is provided by clause 3.2(d), which states that '[the Council] will (d) ensure that, whatever future management structure is agreed for Becky Addy Wood,….'

148. It is in my view possible to ascertain what is required by clause 3.2(a). There must be a management structure that is capable of making decisions concerning the conservation of the Woods and biodiversity. That structure must be clear and there must be a place in it for FROBAW, as well as for other interested parties if considered appropriate. It must be a permanent structure. If the Council could terminate it at will, then it would not be robust. I do not consider that the structure itself must be a partnership, or that unanimity either generally or as between the Council and FROBAW is required as far as its general decision-making is concerned. To require general agreement is to invite deadlock, and a public body holding land is under an obligation to deal with it pursuant to its statutory powers and for the public good. As is well known, where it comes to environmental and public matters, two honest and committed actors can have very different views as to what is in the public good, and may be driven to contrary views as to the public good by their own very different viewpoints. One further element of this is the landowner's responsibility to third parties qua landowner. Because the Council is the landowner it suffers the burdens that flow from that, and FROBAW does not.

149. I note also that clause 3.2(d) which speaks of decisions under the Management Plan also refers to significant decisions taken outside the ambit of the Management Plan where these decisions are not urgent; in this case the obligation is to consult FROBAW. Where significant decisions are urgent there is by implication no need to consult FROBAW at all, undoubtedly on grounds of efficiency and expediency in such circumstances. That to me indicates that the general relationship between the Council and FROBAW under clause 3.2(a) is one of consultation, not one requiring unanimity.

150. Whether unanimity might be required in respect of the production of the Management Plan I consider when I deal with clause 3.2(d).

151. I conclude that clause 3.2(a) is not too vague to be enforceable. It requires the Council, in the absence of agreement, within a reasonable period of purchase, to put forward a management structure of the type and nature that I have set out above.

152. I turn next to Clause 3.2(d). It provides:

> "[the Council] will:
>
> ....
>
> d) ensure that, whatever future management structure in agreed for Becky Addy Wood, FROBAW, as a major contributor to the cost of purchase, will be a partner in the production of BAW Management Plan and any revisions to that plan which will guide all important management decisions affecting the wood, such as the management of trees that should become infected with Ash Dieback, and ways to best promote the natural regeneration of the woodland following best practice as recommended by expert bodies. If any other significant decisions are required on areas not covered by the plan, the Council will consult FROBAW in advance of any decision, unless there is a requirement to take immediate action in an emergency, e.g. safety reasons."

153. This clause provides that the management structure set up under clause 3.2(d) will produce the BAW Management Plan. That plan will deal with or guide the important management decisions affecting the Woods. Examples of what sort of things are to be dealt with are given – specifically dealing with ADD and the Wood's natural regeneration; and the plan is to follow best practise as recommended by expert bodies. These are examples and not limitations. 'All management decisions' is a wide phrase. The plan could, for example, deal with matters relating to adverse use of the Woods by third parties, such as rough sleepers or wild campers.

154. The Council maintains that this obligation is meaningless, as a requirement to 'partner' is not capable of sensible meaning. Alternatively they contend that it imposes an obligation on the Council to consult with FROBAW. FROBAW say that if it means anything it requires the Council to agree with FROBAW as to what should be done; and on the basis that FROBAW wish to restrain the Council from taking steps to fell trees, a failure to obtain this agreement would stymie the Council's plans.

155. Unless specifically stipulated to the contrary by way of agreement between partners, the basic rule as to decision making in a partnership is that those decisions must be made jointly. FROBAW contends that this is the meaning that should be given to the provision. The Memorandum does not however import the functioning of a partnership into clause 3.2(d). It stipulates rather that the Council will ensure that FROBAW will be a partner in the production of [the] BAW Management Plan. 'Partner' is a word that is used in many different contexts and it bears different meanings in those contexts. I have described the wording of the Memorandum as broad and informal. That indicates that the reference to FROBAW being a partner means that they will be substantially involved in, not that they will have a right of joint veto. Is such a provision capable of enforcement?

156. Given that the entire basis of the agreement lies in the parties stated community of interest, this provision in my view requires the Council and FROBAW to use either reasonable or their best endeavours, acting in good faith to adopt a joint Management Plan through the Management Structure that they have adopted; but if they cannot jointly agree such a plan, the view of the Council is that which prevails. That is so because as I have noted above Clause 3.2(d) provides that in the event that if a matter arises on a topic that does not fall within the Management Plan, the Council's obligation is to consult FROBAW in advance of any such decision (save in emergency). An obligation to consult requires the consultor to give the consultee the opportunity to state their views before the consultor's mind becomes fixed. For present purposes, that is an obligation with a certain legal content. It is a concept that is more commonly found in statutory duties, but I see no reason why a local authority (which a Town Council is) may not contractually bind itself to consult before it takes a decision in respect of its property. The position is I think different where a local authority binds itself either to deal with property in a specific way, or not to deal with it in specific way. One can see that an authority can bind itself to restrict a specific use of land ancillary to its general power (see e.g. Stourcliffe Estates v Corpn of Bournemouth [1910] 2 Ch 12, where a local authority covenanted not to construct toilets on land acquired for the purpose of a public park) but a covenant only to act generally in respect of property with the consent of a third party is not a reasonable outcome, notwithstanding the present community of interest. In the context of contractual construction, reasonable parties would not ordinarily consider that a local authority would bind itself in this way.

157. Further, the obligation to 'consult' in respect of matters falling outside the Management Plan indicates that the relationship between the Council and FROBAW under

the agreement is not one of formal or informal partnership in a business sense. The ultimate decision-making power lies with the Council, not with FROBAW.

158. If I am wrong in my view that clauses 3.2(a) and/or (d) are sufficiently certain to be enforceable, the issue arises as to the consequences of that. Whether the clause fails or the whole agreement fails depends on the severability of the clause from the contract, and the intention of the parties. If it is severable, the remainder will stand. If not, and the parties are taken to have regarded it as an essential provision, then the agreement as a whole will fall. The issue of severability is decided by reference to the objective intention of the parties – would they have considered that the remaining part of the contract as a whole would fail or survive?

159. Such an analysis would have regard to those parts of the agreement that are enforceable. So, beyond clauses 3.2(a) and (d) it will be noted that clause 3.2(b) provides:

> "[The council will] seek the designation of the wood by Natural England as a statutory nature reserve, and the implementation of a restrictive covenant to protect the wood in perpetuity."

The second part of that clause requiring the implementation of a restrictive covenant is too vague to be enforceable as the requirement to 'protect' the woods is too vague as to its content. The first part of the clause by contrast is sufficiently certain to be enforceable.

160. In my view the parties would have concluded that the contract would survive, even if clauses 3.2(a) and/or (d) were ineffective. This is because the purpose of the contract was to enable the Council to purchase the Woods, and the evident common purpose of the parties would have led FROBAW to wish to enforce the obligation on the part of the Council to use their endeavours to acquire the land even if they were not to be contractually bound to deal with it as set out in Clause 3.2(a) and (d). The Memorandum of Understanding provided

machinery for the purchase of the Woods under the right of pre-emption should the Council decide to dispose of it, making allowance for the payment through mechanism of the FROBAW decision. Moreover specific provision for repayment was included in the event of the Woods not being purchased; the inference being that a lesser failure of part of the contract would not lead to the entire termination of the agreement.

161. (3) To the extent that they are enforceable, is the Defendant in breach of the terms of clauses 3.2(a) or (d) of the Memorandum as alleged by the Amended Particulars of Claim? Looking first at the contentions relevant to cl. 3.2(a), the Claimants say that the Council failed to set up a 'robust arrangement for the future management of the Woods' (Amended Particulars of Claim para. 37(1)). It appears at first blush that the Council may well have been in breach of this obligation. The Council took no steps to set up any arrangement, robust or otherwise, for the future management of the Woods that involved FROBAW. Instead they informally liaised with FROBAW. Given that the Claimants withdrew their contention that clause 3.2(a) is contractually binding it followed that I have not been addressed (beyond the limited content within the skeleton arguments). I therefore take the matter no further.

162. Sub-paragraphs (2) to (8) of paragraph 37 of the Amended Particulars of Claim assert failures to either create or follow a Management Plan, which appears to fall within cl. 3.2(d). Sub-paragraph (2) asserts that they 'failed to agree a management structure involving FROBAW as a partner in the production of a management plan which will guide all important Management decisions affecting the Woods.'. Insofar as this concerns the failure to create a management structure, FROBAW has withdrawn this allegation. Insofar as it complains that no Management Plan has been produced with FROBAW's agreement, as I have said I do not consider that this is an agreement to agree, or that FROBAW's agreement was necessary. I therefore do not consider that this breach is made out.

163. Sub-paragraph (3) asserts that the Council 'failed to produce a management plan to guide all important management decisions affecting the Woods'. What 'all important management decisions concerning the Woods' comprises are set out by way of examples, but also because these were considered the prime matters, as management of trees affected by ADD, and promoting the natural regeneration of woodland following the best practice recommended by experts. The Council says that Mr. Hogg's Report to Committee on 16 November 2021 is such a Management Plan, whilst the Claimants deny this.

164. Whilst it is unfortunate that Mr. Hogg's report was not labelled 'Management Plan' and he did not expressly state to the Claimants that this was what the document was, I consider that it satisfies the agreed requirement. It is, in generalities, a plan for the management of the Woods as the Memorandum of Understanding contemplated. It was a report made to the Council's Environmental and Green Spaces Committee for the purpose of guiding the management of the Woods in the future, and in particular (but not exclusively) dealing with ADD. Although the requirement was that it would guide 'all important management decisions', the Memorandum of Understanding itself anticipated that it might not. In terms of its scope and intention, this was the Management Plan as defined. Ms Otter-Barry denied that it was a management plan because it was only three pages and contained a proposal to fell 128 trees. In her view, such a plan would cover at least a 5 year period and run to 'approximately over 25 pages'. I do not consider that the length or period of the document governs whether or not it is a Management Plan within the meaning of the Memorandum of Understanding. I have come to the clear view that the Claimants and the committee of FROBAW more generally considered both that a Management Plan that they had not agreed was not valid; and that a Management Plan that did not deal with the Woods in a manner that they did not consider appropriate could not be properly described as a Management Plan. In

these views they would have been wrong. It is the purpose of the plan as derived from the nature of the content that matters, and in my view this content is sufficient. Viewed objectively, it was a Woodland Management Plan.

165. The bigger dispute appears to be over the allegation, at sub-paragraph (4), that the Council 'failed to involve FROBAW as a partner in the production and/or revisions of such management plan'. Insofar as the pleading suggests that FROBAW's assent to the production of the Management Plan is required, I have rejected that contention. The issue is whether the Council involved FROBAW in the production of the plan as a partner, which I have held means consulting with them; seeking their views and when given considering them in good faith before coming to a decision. As a matter of fact, after the committee meeting in November 2021 Mr. Hogg asked the Claimants to comment on the plan that the Committee had approved, and the Council allowed FROBAW 14 days to respond. That FROBAW did not respond seems to me to have arisen essentially for four reasons. First, in the run up to the meeting the Claimants appear to have become concerned about and wary of the attitude of the Council to tree management. Secondly, the document not being headed 'Management Plan' the Claimants may not have treated it as seriously as they should have. Thirdly, I have no doubt that the contents of the report came as an utter shock to them. Their purpose as they saw it was to save these trees where possible. This report as they saw it ran quite counter to what they had considered a common and shared approach with the Council. And fourthly, they believed that actions depended on agreement, and in the absence of agreement no action could be taken.

166. Mr. Hogg sought out FROBAW's views on his report to the committee. I find that he did that in good faith, and had he received a response he would have carefully considered and responded to it.

167. At sub-paragraph (5) the Claimants assert that the Council failed to consult FROBAW in respect and in advance of significant decisions not covered by any management plan, including in respect of the management of ADD. Although this is a general allegation, this case centres on ADD. The obligation to 'consult' expressly relates to management decisions not covered by the management plan. Was the management of ADD not covered by the management plan? The management plan did not need to descend to particulars as to the number and location of trees to be felled, monolithed or kept. It instead needed to set out the approach that was to be adopted. Such an approach might be as simple as engaging third parties to advise and following their advice. It might be as specific as felling trees in particular locations and leaving all others. The management plan as produced by Mr. Hogg provided for this approach. It follows that the obligation to consult in respect of the management of ADD did not arise.

168. In any event, to the extent that their evidence differs I prefer the evidence of Mr. Hogg to that of Ms Otter-Barry as to the consultations that were carried out as to the manner of managing ADD. One point that I have reflected on is whether the consultation was effective, or whether it was simply lip service or window dressing. Ms. Otter-Barry maintained that she was told that there would be no consultation about the felling. As was apparent, the Council were concerned that in the event of a tree fall they might be liable at law for injury to the public. They were also concerned that a failure to follow expert advice would void their insurance. In these circumstances their discussions with FROBAW might well not have led to the result that FROBAW wanted, or indeed that objectively was correct, either as to a determination of a notion of acceptable risk to the public, or as to whether a commercial insurer would have invalidated its insurance in the event that it declined to follow the advice it had received from its appointed expert. But I do not consider that the Council's initial views

precluded it from consulting with FROBAW on those issues, because I do not consider that the Council's initial views were their inevitable and fixed views. They would have considered the views of FROBAW, had they been made, before coming to their conclusion.

169. Sub-paragraphs (6) and (7) complain about the Council's unilateral carrying out of felling and monolithing works in 2022 and 2023 respectively in the absence of an agreed Management Plan and advance consultation with FROBAW. I do not consider that these alleged breaches have been made out. Mr. Hogg's report to the committee is the Management Plan; it did not need to be agreed. Advance consultation was thereafter necessary only in respect of 'areas not covered by the Plan'. The Management Plan did cover the selection of felling and monolithing trees, and it was not necessary to consult further. But in any event the Council through Mr. Hogg was willing to and sought to consult with FROBAW. FROBAW however believed that the Council was not acting in good faith and did not respond to the attempt to consult save insofar as it sent the Council its research indicating that the Council's methodology was flawed. That was, to the extent that FROBAW wished to engage with the Council, its response to the Council's indication of its plan or its intention. The Claimants' complaint is that the Council has not accepted its arguments. In my view there was no breach of the agreement here.

170. Sub-paragraph (8) asserts that the Council did not accept the findings of the Claimants' research and advice as to how to deal with ADD. I do not consider that the Council was obliged to accept those views and findings.

171. <u>(4) Are the Claimants entitled to a remedy under Pallant v Morgan?</u>

A court will grant a claimant a remedy in equity under the doctrine of <u>Pallant v Morgan</u> [1953] Ch 43 where two parties form a common intention that one of them will acquire property and

that the other will obtain some interest in it. Then , where the first party relies on that common intention to his detriment, but the other party having acquired the property pursuant to the common intention then resiles from the common intention such that it would be unconscionable for him to hold the property solely for himself, equity will grant him a remedy – Snell's Equity 34th. Ed. para. 24-039.

172. The Council and FROBAW each intended to purchase the property. FROBAW would I am sure have sought to purchase the Woods in the absence of the Council's involvement. There is a dispute as to whether it was the intention of the parties that FROBAW would obtain 'an interest' in the property; whether FROBAW relied on that common intention to its detriment; and whether it would be unconscionable not to award a remedy.

173. Starting with the alleged intention that FROBAW would obtain an interest in the property, the first question is whether it was agreed that it would obtain a *proprietary* interest in the Woods. This might be thought a surprising point of dispute, because the Memorandum of Understanding does not overtly provide for FROBAW to receive a proprietary interest in the Woods. It grants a right of pre-emption, and to the extent that this might be considered a proprietary right (see Megarry & Wade's Law of Real Property (10th. Ed.) at para 14-062 to 14-064) FROBAW has the benefit of it. The question is whether the parties thought FROBAW would receive a proprietary interest in the Woods. The Claimants did not argue that the right of pre-emption was sufficient for these purposes.

174. It appeared from the evidence of the Claimants that what they thought they were to receive was an equal say in the management of the Woods. They equate that as having an interest in the land, or alternatively on the land being held 'on trust' for that purpose. In effect,

they would have the rights of beneficiaries under a trust. That is in my view however incorrect for a number of reasons.

175. First, it is a fallacy to consider that because a person has rights over land, which may be extensive, they are therefore a beneficiary in respect of the land. A beneficiary may well have rights in respect of the use of or dealing with the land – see the Trusts of Land and Appointment of Trustees Act 1996 sections 11-14, but the existence of rights does not inevitably point to proprietary ownership. Thus licensees might have clear and enforceable rights over land enforceable in contract only. And third parties might have personal rights of veto or consent-giving over a landowner's decision-making without themselves being beneficiaries.

176. Secondly, the Memorandum is the agreement between the parties. Where parties formalise their relationship in a document, then the ordinary assumption is that the document contains the entirety of the agreement, and that understandable approach is the approach that the parties appear to have adopted here. There is no application to rectify the agreement, so its effect is a matter of its construction, or true meaning. Whilst it is possible for an agreement to create an obligation of trustee and beneficiary between the parties (typically perhaps in the case of specifically enforceable contract of sale of land) it is a matter of construction of the agreement whether it does so. This agreement does not.

177. Thirdly the Council made it plain to FROBAW that it would <u>not</u> hold the land as trustee. FROBAW accepted that assertion, if not expressly then at the least tacitly and subjectively, in that they were happy to be off the hook for any consequential liability. They were of the view that the Memorandum was both the best agreement obtainable and sufficient for its purposes. Whilst, had the Memorandum on its face created a relationship of

trustee and beneficiary such an assertion as to the Claimants' subjective intention would have been immaterial, absent rectification, it is a plain indication that one party at least did not intend such a relationship to arise, and it should not be thought to arise by inference or implication.

178. The next issue is whether the Pallant v Morgan equity may arise even if the common intention does not extend to the acquiring party conferring an interest in the land to the deferring party. The Claimants' case is that this is the sort of case where the equity should be engaged. The Council has taken FROBAW's money. It stepped in to buy the Woods on the basis of a joint venture. It now ignores FROBAW, resulting in much indignation.

179. Pallant v Morgan is a form of constructive trust which arises for the prevention of fraud, whether legal or equitable. It is related to proprietary estoppel, another equitable doctrine where equity may intervene in a proprietary manner to either restrain or rectify behaviour which amounts to resiling from a common position of the parties where the claimant has acquired an equity in respect of property though his detrimental reliance. There is a dispute as to whether the basis of the Pallant v Morgan equity is that of a common intention constructive trust, or breach of a fiduciary duty arising from agency (see Generator Developments v Lidl UK Gmbh [2018] EWCA Civ 396; Dixon v Willan [2022] EWHC 2160 (Ch)). Fortunately I do not have to seek to resolve that.

180. Pallant v Morgan was authoritatively considered in Banner Homes v Luff [2000] Ch 372 at 397-399 where Chadwick LJ described the equity in the following terms:

> "It is important, however, to identify the features which will give rise to a Pallant v. Morgan equity and to define its scope; while keeping in mind that it is undesirable to attempt anything in the nature of an exhaustive classification. .....

(1) A Pallant v. Morgan equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it.....

(2) It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the Pallant v. Morgan equity; equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust. On its facts Chattock v. Muller, 8 Ch.D. 177 is, perhaps, best regarded as a specific performance case. In particular, it is no bar to a Pallant v. Morgan equity that the pre-acquisition arrangement is too uncertain to be enforced as a contract—see Pallant v. Morgan [1953] Ch. 43 itself, and Time Products Ltd. v. Combined English Stores Group Ltd., 2 December 1974 —nor that it is plainly not intended to have contractual effect—see Island Holdings Ltd. v. Birchington Engineering Co Ltd. , 7 July 1981.

(3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property.....

(4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. .....

(5) That leads, I think, to the further conclusions: (i) that although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that although there will usually be advantage to the one and correlative disadvantage to the other, the existence of both advantage and detriment is not essential—either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where the non-acquiring party was never "in the market" for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that

he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangement or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage therefrom.

181. The reference to 'interest in land' in section (3) above was *obiter dicta*, in that it was common ground in Banner v Luff that the deferring party would acquire a financial benefit from the land because of the intended but unenforceable transaction.

182. Equally, in all other cases (as far as I am aware) prior to Banner Homes v Luff, the deferring party was expected to receive some financial benefit from the arrangement, or (as in Pallant v Morgan) to benefit from possession of the property itself. Is it a necessary precondition to the finding of such an equity that the common intention was to have some monetary or proprietary interest or benefit from the property?

183. This issue has been considered in two recent cases. In Kearns Brothers v Hova Development [2012] EWHC 2968 Mr. Edward Bartley Jones QC applied the formulation of the Pallant v Morgan equity of Lewison J in Kilcarne Holdings v Targetfollow (Birmingham) Ltd [2005] EWCA Civ 1355. Lewison J described the equity thus:

> "219. Essentially, the principle is that (i) if A and B agree that A will acquire some specific property for the joint benefit of A and B, and (ii) B, in reliance on A's agreement, refrains from attempting to acquire the property, then equity will not permit A, when he acquires the property, to keep it for his own benefit, to the exclusion of B. Because this equity is in the nature of a constructive trust, it is unaffected by section 2 (1) of the Law of Property (Miscellaneous Provisions) Act 1989."

184. Mr. Bartley Jones QC then said:

> "117. This formulation simply requires the specific property to be acquired 'for the joint benefit' of A & B. It does not require some agreement or understanding that B will acquire some specific proprietorial interest (be it legal or equitable) in the

> property. Indeed, in joint venture cases it may frequently be the case that B is never intended to have any specific proprietorial interest (be it legal or equitable) in the property. As in Banner Homes, it may be intended that some company is to purchase the property. What Lewison J's formulation concentrates on is the utilisation, or exploitation, of the property for the *joint benefit* of A & B."

His Lordship then commented (at [120]) that the equity was intended to operate in what might be described as failed joint ventures for the purchase of land. As such it was a close relative to the constructive trust. The requirement of an intention that B should intend to acquire a specific proprietary interest was unnecessary, contrary to the purpose underlying the trust and not required by the authorities.

185. In Michael v Phillips [2017] EWHC 614 (QB) Mr. Martin Rodger QC held that an agreement could not satisfy the Pallant v Morgan equity unless the parties intended that the parties would *concurrently* enjoy an interest in the property. In Michael v Phillips there was to be no joint exploitation of the property (at [113]). Mr. Rodger distinguished Kearns Brothers v Hova Development [2012] EWHC 2968 as a case in which the property was (in fact) to be exploited by both acquiring parties after acquisition. There was a right to share in the proceeds of sale after development.

186. The argument against widening the scope of the equity seems to me to be that where the parties did not contemplate the receipt by the deferring party of a proprietary interest, to cause the acquiring party to hold the property on trust first imposes a constructive trust of a remedial nature, which is not open to English Courts – see Westdeutsche Landesbank Girocetrale v Islington LBC [1996] AC 669 per Lord Browne-Wilkinson at [716], and secondly invites the Court to declare beneficial shares where there is no basis to guide it.

187. I do not consider either of these arguments to be persuasive. It might well be the case that where the parties purport to enter into an agreement, or joint venture, that does not

confer *proprietary* rights on the deferring party, the failure of the acquiring party to uphold the agreement means that it might be inappropriate to hold that the unconscionability necessary for the existence of the equity exists. On the one hand, the deferring party might have other, contractual or restitutional remedies. In those circumstances it may be perfectly fair, or not unfair, to leave it to those. But in other cases those remedies may not be sufficient. It may well be unfair to leave the deferring party to those remedies. In what circumstances will the Pallant v Morgan equity be available?

188. In my view where the parties, at the time of contracting, had known of the circumstances that existed when the purpose failed, and would have concluded that in those circumstances the deferring party would have had a fair proprietary interest in the land, then the Court may so order. Whilst ordinarily contracting parties will be taken to be left to their remedies at law, where the agreement reflects bad faith dealing on the part of the acquiring party, a court is likely to hold that the deferring party should have a proprietary interest reflecting its true intention. The significant point is not that it contracted for a proprietary interest, but that it gave up the prospect of acquiring a proprietary interest to the acquiring party that, had it not been misled by the acquiring party, it would have sought to acquire.

189. The Claimants case is that the Council never really intended that FROBAW should have any effective rights in respect of the Wood under the Memorandum of Understanding, and that it acted in bad faith. Notwithstanding its assurances it drafted and proffered a document that it now asserts is meaningless and pleads that it is not legally binding. On the strength of what it considered to be a joint venture, FROBAW both paid over its money and desisted from bidding for the Woods. If that were the true position, it seems to me that a Court would be entitled to hold that the parties had intended a joint venture for the joint exploitation of the Woods; that the venture had failed; and that by acquiring the Woods in these circumstances

and using the funds provided by FROBAW, the Council would hold the Woods on trust for itself and FROBAW. FROBAW's common law remedy or recovering its money would not be an adequate remedy in these circumstances.

190. I do not consider that the Council acted dishonestly in acquiring the land or negotiating with FROBAW. I consider that the Council was of the view that FROBAW would not acquire a proprietary interest in the Woods, and made that plain to FROBAW. FROBAW trusted that the Council's perceived community of interest would provide it with sufficient return for its money. That expectation has been proven disappointed. That is not sufficient to oblige or require the court to grant FROBAW equitable relief, whether or not the contract is wholly ineffective. I go into the evidence in a little more detail when I consider the issue of unconscionability below.

191. Considering the question of detriment, the Council argues that FROBAW suffered no detriment because it was a conduit of the money from its members to the Council, and that FROBAW would not have raised sufficient funds to purchase the Woods anyway. I reject these arguments. As I have indicated above, the money received by FROBAW and passed on to the Council was FROBAW's money beneficially. It plainly suffered a detriment by paying it over to the Council for the purchase of the Woods. Secondly, although there was no guarantee that FROBAW would have raised sufficient funds to purchase the Woods, there was in my view a realistic prospect that it would have done so. By agreeing to defer its chance of so doing it gave up a thing of value and the Council consequentially benefitted. It is idle speculation to consider whether the final sale price would have been higher had FROBAW been in the market.

192. The next issue is that of unconscionability. As I have indicated above, I do not consider that the Council was dishonest or misleading in its negotiations with FROBAW. That does not necessarily mean that the Council has not acted unconscionably when considering its dealing with the Woods overall. Is it unconscionable, or unfair, for the Council to hold the entire beneficial interest in the Woods, to the exclusion of FROBAW and the Claimants, in the events that have happened? I consider that it is not. The Claimants' view of the Council's approach to negotiations and to its dealing with the Woods and FROBAW has been highly critical, and tantamount to accusing the Council of acting in bad faith in its negotiations and conduct. I have no doubt that, having heard the evidence, the Council has not negotiated the acquisition of the Woods in bad faith, and has sought to apply the Memorandum of Understanding as they understood it. The Claimants' suspicions of the Council's motivation in using its donation form is in my view an after the event rationalisation of the Claimants' suspicions of the Council's behaviour once the parties had fallen out and FROBAW appreciated that the Council's view both of the nature of FROBAW's rights and what should be done with the Wood and ADD differed substantially from their own.

193. The Council's attitude to negotiations appears both clear and open. First, it stated that it did not wish to acquire the Woods jointly with FROBAW or anyone else. Secondly it stated that the arrangement on acquisition was not that of a trust. Thirdly it maintained that it wished to act together with FROBAW in respect of the Woods. Fourthly it maintained that it shared a community of interest with FROBAW. I do not find any bad faith in respect of these statements or matters. The drafting of the Memorandum of Understanding was undoubtedly poor. In part that was due to the shortage of time; otherwise it is likely to have been the result of poor advice given to the Council. There is little to be taken from Mr. Brown's statement that he had used the structure of a Memorandum of Understanding elsewhere; there is no evidence that this is false. One can readily understand that a broad and vague expression of

intention might be thought to work well where the parties do not in fact fall out. It is only when it is put to the test that one discovers its true legal meaning, or its uncertainties.

194. (5) Are the Claimants entitled to a remedy under De Bruyne?

Alternatively the Claimants rely on the judgment of Patten LJ in De Bruyne v De Bruyne [2010] EWCA Civ 51:

> "51. There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely in any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to inter vivos transactions as it does to wills: see Rochefoucauld v Bousted [1897] 1 Ch 196; Bannister v Bannister [1948] 2 AER 133."

195. Insofar as this passage from De Bruyne both seeks to synthesize certain circumstances in which courts of equity will find a constructive trust to arise and to emphasise the nature of such constructive trusts as depending on equitable fraud, it is helpful; but it still requires a finding of equitable fraud.

196. De Bruyne was itself a case which concerned the availability of a husband's shares in a company as matrimonial property available for distribution. Shares were transferred out of

a discretionary trust (where the children were potential objects of the trust) to the husband on the basis and by reason of his promise to settle those shares on trust for his children. Otherwise the grandparents, whose consent was necessary for a valid appointment to the husband would have withheld it. A constructive trust in favour of the children arose on the appointment of those shares. The shares were accordingly unavailable for distribution in ancillary relief proceedings between the husband and his wife. The trial judge found a common intention constructive trust under the principles set out in Lloyd's Bank v Rosset [1991] 1 AC 107 to exist, on the somewhat artificial basis that the intention of the children could be found in the knowledge of their father, the husband. The husband's appeal asserted that the children could not have had an adequate intention; that the children had not acted to their detriment; and that this was a remedial constructive trust contrary to Westdeutsche. Patten LJ broadly agreed with these criticisms of the judgment below, but then found that the behaviour of the husband fell within the accepted scope of a fiduciary relationship as arising where a transferee received property on the basis of an understanding or agreement, even though the putative beneficiary was not aware of the agreement. That principle cannot assist FROBAW or the Claimants here, because they were aware of the agreement and the terms of acquisition, namely the Memorandum of Understanding. The principle would only be applicable if the parties considered that they were acquiring on a certain basis otherwise than that provided by the Memorandum of Understanding. That they did not. They understood that the property was to be acquired on the basis of the Memorandum of Understanding.

197. The Claimants argue that the principle in De Bruyne applies where property is transferred under an agreement that it will be held for the benefit of a third party; it was held (in part) for the benefit of a third party, FROBAW; the Council have unconscionably resiled from the agreement, ergo the Woods must be held on an equivalent constructive trust. The first fallacy here is the assertion that the property was transferred 'for the benefit of'

FROBAW. The benefit must be a proprietary one. Where the agreement provides for the third party to have management input, that does not equate to a proprietary interest.

198. In any event, whether De Bruyne is an example of the rule in Rochefoucauld v Boustead, or the principle that equity will not allow a statute to be an engine of fraud, or something wider matters not. It does not help the Claimants here where as I have found the Council did not act dishonestly, and did intend to honour the agreement, such as it was. The Claimants are entitled to their remedies in contract or in restitution. There is no gap-filling for equity to become involved in.

199. (6) Were the Woods held under a common intention constructive trust of the Gissing v Gissing type on their purchase by the Defendant?

The Claimants say that the common intention of the parties is to be inferred objectively from their conduct. The difficulty that the Claimants have is that where parties are negotiating as to the terms as between themselves on which one of them will acquire property, unless one can point to discussions which demonstrate that the agreement is not the entire basis of the acquisition, the necessary inference will be that the parties must have intended their rights to be governed by the agreement, for good or ill. That is all the more so where in the course of negotiation the parties agree, or the party intending to acquire the property states, that that party acquiring the property will not hold it as a trustee, as here.

200. The Claimants then argue that the intention to create a trust can be inferred from the terms of the Memorandum of Understanding. This appears to me to be little if at all different from contending that the Memorandum of Understanding provides that the Claimants, on behalf of FROBAW, are to have a beneficial interest in the Woods. If that is so, then this would be an express and not a constructive trust. Whether or not that is the correct analysis makes

no difference here. On any basis the court would have to construe the Memorandum and hold that on its true meaning the parties intended the Claimants to hold a beneficial interest in the Woods.

201. The Claimants point to various matters as indicating an intention that the Claimants were to have a beneficial interest. Besides the contribution to the purchase price, these were the fact of the Memorandum of Understanding; the reference to the Woods being bought 'in the name of the Council'; the provisions relating to FROBAW's on-going interest in the management of the Woods; the 'FROBAW percentage' provisions in clause 3.3; the reimbursement clause; and the use of the word 'donation' and the rejection of FROBAW's donation form.

202. None of these matters, taken individually or collectively demonstrate an intention that the Claimants or FROBAW will, would or did acquire a beneficial interest in the Woods. Taking them in order and shortly, the fact of contribution to the purchase price begs the question as to whether it was intended that the Claimants would acquire an interest in return. The existence of the Memorandum of Understanding itself does not indicate an intention to acquire an interest. FROBAW's interest in managing the Woods is not the same thing as a beneficial interest in the Woods, and it is fallacious to argue that because the Memorandum provides that FROBAW should have 'a voice' in the management of Woods, and that beneficiaries under a trust would have a right to be heard as far as trustees' decisions relating to trust property is concerned, therefore the Memorandum demonstrates an intention that FROBAW should have a beneficial interest. The FROBAW percentage is a discount FROBAW receives should it exercise its right of first refusal in the sum it contributed to the purchase price. That it will in the future receive that benefit in certain circumstances does not indicate that it presently has a beneficial interest in the absence of those circumstances. Indeed if it

presently had a beneficial interest, that would be a fraction of the current value of the Woods, whatever that might be, and hence a variable sum from time to time, rather than a fixed historic sum. The reimbursement provision does what it says; it provides for reimbursement on the Council's failure to acquire the land. It is not a necessary or logical inference from such a provision that the Council will hold the Woods on trust for FROBAW. Lastly, the terms of the donation agreement used by FROBAW confirms that monies supplied to FROBAW pursuant to that form became FROBAW's property, but that does not affect the beneficial interest in the Woods on acquisition. As I have held, the use of the Council's donation form was not put forwards in order to disadvantage FROBAW, and FROBAW's rejection of it would not in my view indicate to the Council that FROBAW was intending to acquire a share in the Woods on acquisition.

203. (7) Remedies in respect of property held in trust

For the reasons I have indicated there is no trust either formed or to be imposed in this case.

204. (7) Breach of contract

As I have indicated above I consider that the Council has not complied with its duty under cl. 3.2(a) to set up a robust arrangement for the future management of the Woods. That has not however been pursued by the Claimants as an effective term, and in consequence as a term that has been broken. I therefore deal with it no further at present. Whether it gains further life consequential on this judgment I will leave in the first instance to the parties.

205. Insofar as the Claimants have alleged breach of cl 3.2(d) I have found that the Council is not in breach either of the obligation to produce a Management Plan, or to consult with FROBAW as regards other significant decisions.

206. If I am wrong in my view that cl. 3.2(d) does not require the Council and FROBAW to jointly agree a Management Plan, the issue then arising is what the consequence would be if they were unable to agree on such a plan. I would conclude that the formation of such a plan was an important part of the basis of the acquisition. The parties would understand that there was a possibility that they might not be able to agree on the plan; I consider that it would be implicit that they would use their best endeavours to agree such a plan, and would act in good faith in so doing. But what would be the consequence if they nonetheless failed to agree? The three options seem to be to be that the contract would otherwise subsist, save that there would be no Management Plan; or that contract would determine, and the Council would be obliged to return the money received from FROBAW; or that the contract would come to an end and FROBAW would receive some proprietary interest in the Woods (which is the Claimants' case on the basis that the Memorandum of Understanding is void or unenforceable).

207. I do not consider that a failure to agree a Management Plan under cl 3.2(d) has the effect of determining the contract. The Woods would have been acquired; the Council would still have been under a duty to consult with FROBAW in non-emergency cases, and FROBAW would have the benefit of the right of pre-emption. I note that the Memorandum of Understanding specifically provides for an obligation to reimburse in the event of the Woods not being purchased (cl. 3.4); no such provision is provided in respect of failure to perform any of the other anticipated tasks.

208. <u>(9) Damages and Specific Performance</u>

For the reasons I have set out above there is no breach of contract on the part of the Council; hence no issue as to damages or the specific enforceability of the Memorandum of Understanding arises, although I would note that insofar as clause 3.2(a) is concerned my view

is that the Court could specifically perform the obligation to set up the robust arrangement for the future management of the Wood if the Council failed or refused to do so.

209. The claim therefore fails.

210. If the parties are able to produce an agreed minute of order, then I would be grateful if they could forward it to the court office. However, in case there are matters on which they are not agreed I will list this case for a further hearing before me after 28 days with a time estimate of 2 hours at which I will consider the form of the order and any consequential matters that are not agreed. I will adjourn to that hearing the consideration of any application for permission to appeal from me, and for any extension of time for seeking permission to appeal from the Court of Appeal. If there are remaining matters of dispute, I direct that each party will provide at least three days before the hearing a short summary of its contentions on not more than 5 pages of A4.

HHJ Blohm KC

5 September 2024