



Neutral Citation Number: [2025] EWCA Civ 1374

Case No: CA 2024 002410

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**LEEDS BUSINESS AND PROPERTY COURT**  
**PROPERTY TRUSTS AND PROBATE LIST (Ch.D)**  
**HHJ Klein sitting as a High Court Judge**  
**[2024] EWHC 2550 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30 October 2025

**Before:**

**LADY JUSTICE ASPLIN**  
**LORD JUSTICE COULSON**  
and  
**LORD JUSTICE FRASER**

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**Between:**

|                                             |                          |
|---------------------------------------------|--------------------------|
| <b>WESTFIELD PARK LIMITED</b>               | <b><u>Appellant</u></b>  |
| <b>- and -</b>                              |                          |
| <b>HARWORTH ESTATES INVESTMENTS LIMITED</b> | <b><u>Respondent</u></b> |

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**Nicholas Jackson** (instructed by **Griffiths & Hughes Parry Solicitors**) for the **Appellant**  
**Paul de la Piquerie** (instructed by **Freeths LLP**) for the **Respondent**

Hearing date: 21 October 2025  
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## **Approved Judgment**

This judgment was handed down remotely at 2pm on 30 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice Asplin:**

1. This appeal is concerned with the proper interpretation or alternatively, the rectification of an agreement dated 14 October 2021 which was made between the Appellant, Westfield Park Limited (“Westfield”) and the Respondent, Harworth Estates Investments Limited (“Harworth”) (the “Agreement”). The Agreement was for the sale and purchase of land known as York Holiday Park Development at the site of the former North Selby Mine at Escrick in York (the “Holiday Park”). The Agreement contained a deferred consideration clause. The question for us is whether HHJ Klein was right to interpret that clause to mean that in the circumstances which arose, an additional payment was due from the purchaser, Westfield.
2. If the appeal in relation to the question of construction succeeds, we are asked to decide whether the judge’s obiter observations in relation to the role of an outward accord for the purposes of rectification were wrong and to rectify the Agreement to reflect what is said by Harworth to have been the common intention of the parties.

**Background**

3. This is a summary of the background to this matter. I have taken the facts from the judgment of HHJ Klein and reference should be made to his judgment for more comprehensive details.
4. Harworth was the freehold owner of the Holiday Park. It was marketed as a holiday park including an area for static caravans known as the “Bowl”. Closed bids were invited. Outline planning permission had been obtained which allowed static caravans to be sited in the Bowl subject to a limit on the number of pitches. Flannigan Enterprises Limited was the successful bidder, offering £3 million. Westfield, an associated company, in which Mr Flannigan was also interested, was the eventual purchaser.
5. During his investigations, Westfield’s solicitor, Mr Breathnach, discovered that there is a “Zone of Influence” around the heads of the two mineshafts of the former colliery which are within the Bowl. As the judge records at [8] of his judgment, a zone of influence is described in the then Coal Authority Guidance Note (“Mine Entry Zone of Influence Metadata” 9 October 2014) (the “Guidance Note”) as a buffer around a mine entry which could be affected were there a collapse. The Guidance Note refers to each mine entry having a zone of influence buffer around the mine entry “calculated from the same algorithm used in producing a “Mine Entry Interpretative Report””. It also states that the calculation of the area of the zone of influence “takes into account the size of the mine entry entrance, the geological “drift” deposits for the area and the original source from which the mine entry was captured.”” It goes on to state that where “the calculated ZOI is less than 20m then a default value of 20m is used.” The Guidance Note also explains that in designating a zone of influence “local geographical conditions” are not taken into account and that the designation is “mathematical”.
6. Mr Breathnach spoke to his client, Mr Flannigan, on 7 July 2021. In his attendance note of that conversation Mr Breathnach recorded that he had stated that he would like a Mr Neil Catlow (who provided Mr Breathnach’s firm with advice about historic mining activities) to “advise upon the zone of influence we have to keep clear around the mineshafts . . .” Mr Breathnach contacted Mr Catlow by email and Mr Catlow responded on 8 July 2021 stating, amongst other things, that:

“The Coal Authority require a “zone of influence” around treated mineshafts in which no building can be constructed. On this site though there may be some flexibility and I will ask the CA for their views.”

Having raised the issue with Ms Toolan, who had conducted the matter on behalf of Harworth, Mr Breathnach spoke to a Mr Parry of the Coal Authority on 29 July 2021. Mr Breathnach’s attendance note of that conversation records the following, amongst other things:

“ . . .

He advised that there is a zone of influence comprising a radius of 27 meters [sic] from the centre point of each mineshaft.

. . .

He did go on to say that the zone of influence may be reduced but they would need to consult the surveyor’s abandonment report. This is however contained in the archives in Macclesfield which is currently [inaccessible] due to covid restrictions.

. . . ”

On the same day, Mr Breathnach emailed Ms Toolan and informed her of the Zone of Influence of 27 metres from the centre of each mineshaft and noted, amongst other things, that:

“The net effect is that an area of approximately 4600 sq meters [sic] is undevelopable and this area falls within the zone within which the proposed static caravans can be situated.”

7. Mr Breathnach emailed Ms Toolan again on 17 August 2021. He mentioned that their respective clients were agreeable to a revised purchase price of £2.6m. He went on: “Should the Zone of Influence prove not to apply and those areas prove developable within 12 months of completion then my client will pay an additional £400,000.” He added:

“This is on the basis that my client has unfettered use of the area currently classified as being a Zone of Influence. In the event that partial use of the Zone of Influence is allowed then my client will pay £10,000 per caravan pitch which can be located with these radiuses up to a maximum of £400,000.”

8. Ms Toolan took instructions from Mr Massie, Harworth’s asset manager, and responded on 20 August 2021. She stated that she had spoken with her client “on the mechanism” and that they had commented that they were:

“ . . . broadly in agreement with this and happy for Katie [Toolan] and Martin [Breathnach] to draft something to reflect this. However, I query the £10,000 per pitch which I think would be hard to quantify in practice, i.e., how many sqm is a pitch?

I calculate the current zone of influence suggested by the coal authority to be 4,580.44m<sup>2</sup>.

Given the buyer bid £3M in the knowledge that they could not put a caravan directly on top of the cap I have deducted the area of the caps from the calculation . . . .

Total = . . . 4,496.28m<sup>2</sup>

Therefore my favoured calculation method within the clause would be to include a price for m<sup>2</sup> ‘released’ by the Coal Authority. i.e. £400,000/4,496.28 = £88.96 per m<sup>2</sup>.”

Mr Breathnach replied on 25 August 2021 stating that dealing with the matter on a square metre basis and the formula which had been set out was agreed.

9. Under the Agreement (dated 14 October 2021), Westfield agreed to pay the Purchase Price of £2.6million and covenanted by clause 2.2 to pay “the Released Land Payment” defined as “a sum of up to £400,000 . . . calculated in accordance with the provisions of Schedule 4 of the Sale Agreement. . .”. Schedule 4, which is incorporated into the Agreement by clause 1.4, contains a number of definitions:

“Long Stop Date” means the date 12 months from the date hereof

“Released Land Value” means the price per m<sup>2</sup> “released” by the Coal Authority

“Zone of Influence” means an area designated by the Coal Authority as a 27m zone of influence centred on each of the 2 mine shafts at the Property less the area directly on top of the two shafts (which the parties acknowledge is not considered to be suitable position to site a caravan) and being 4,496.28m<sup>2</sup>. . .”

10. Where relevant, schedule 4 then provides as follows:

“1.1 The Seller has requested the size of the Zone of Influence is reduced by the Coal Authority and continues to make representations to this end.

1.2 The Seller may but is under no obligation to use its reasonable endeavours to engage with the Coal Authority to reduce the Zone of Influence until the Long Stop Date.

. . .

### **3 Released Land**

3.1 If prior to the Long Stop Date the Coal Authority confirm in writing that the Zone of Influence is reduced the Seller will provide evidence of such release to the Buyer and the Released Land Value will be calculated at a rate of £88.96 per m<sup>2</sup> or part thereof.

...

#### **4. Payment of the Released Land Value**

The Released Land Value will be payable by the Buyer to the Seller within 30 days of written demand or of determination of the Released Land Value in the event of a dispute.

#### **5. Use of the Land within the Zone of Influence**

The Buyer will not locate any caravans erect any temporary or permanent buildings or park any vehicles within the Zone of Influence.

...”

11. Harworth liaised with the Coal Authority in relation to the Zone of Influence through its geotechnical consultants, RSK Geosciences. On 31 May 2022, the Coal Authority wrote to RSK Geosciences, as follows:

“...

I can confirm that, as you state, no objection has been raised in regard to the siting of static caravans other than they should not [at] any point infringe on or over the mineshafts protective capping slabs.

We note that you concur with our opinion that any permanent building structures should not be built within the calculated zone of influence, equating here to 25m from the centre of each recorded mine shaft...”

As a result, on 6 July 2022, Harworth’s solicitors demanded payment from Westfield pursuant to clause 3.1 of Schedule 4 of the Agreement. Payment was refused on the basis that there was no confirmation in writing from the Coal Authority that the Zone of Influence had been reduced or that it may be reduced in accordance with clauses 3.1 and 3.2 of Schedule 4.

12. RSK Geosciences contacted the Coal Authority again and on 15 September 2022, the Coal Authority wrote to RSK Geosciences in the following terms:

“... I can confirm that, as you state, no objection has been raised in regard to the siting of static caravans other than they should not [at] any point infringe on or over the mineshafts protective capping slabs.

Following a review of the engineering appraisals completed and as reported in letters dated 1<sup>st</sup> October 2021 ... and 4<sup>th</sup> May 2022 ... the Coal Authority are in agreement with RSK that the calculated zone of influence, where temporary structures (i.e. static caravans) cannot be placed, can be reduced. Specifically, we confirm that the zone of influence is reduced from a radius of

27 metres centred on each of the 2 mine shafts at the Property to a zone of influence with a radius of 3.66 metres centred on each of the 2 mine shafts (with 3.66 metres being the radius of the caps).

The agreement to reduce the zone of influence only applies to the siting of static caravans and does not include permanent structures. Caravans should not be placed in the zone of influence areas. Any change of use would require reassessment and Coal Authority Approval ...”

(the “15 September Letter”).

A further demand for payment of the Released Land Value was made the next day, in reliance upon the 15 September Letter.

13. Mr Breathnach, acting on behalf of Westfield, then emailed Mr Leigh Sharpe of the Coal Authority on 13 October 2022:

“ . . .

I have been provided with a copy of your letter to RSK Geosciences dated 15<sup>th</sup> September 2022 which has created a bit of confusion here. I read it as possibly alluding to there being two Zones of Influence (i.e. one for permanent structures and one for static caravans). Having looked into this, I understand that there can only be one Zone of Influence and that an area of land is either within the Zone of Influence or it isn't.

...can you confirm that there is still only one Zone of Influence and that this remains at 27 metres, i.e. it hasn't been reduced?”

Mr Sharpe responded the same day, as follows:

“ . . .

I can confirm that as you state there is essentially just one zone of influence for the shafts which is the 27m radius referred to, this has not been reduced, and reflects the possibility of minor residual settlements could still take place. The 3.66 radius refers to what is best described as an exclusion zone in which no built development should take place including placement of static caravans, temporary or permanent buildings, services or utilities. Beyond this exclusion zone the placement of static caravans is permissible but no permanent structures/buildings can be constructed with the 27m (radial zone of influence).

... ”

**The Decision below**

14. A claim for £399,989.06, being the Released Land Value, plus interest was commenced and the matter came before HHJ Klein. He summarised the background and the central parts of the witness evidence at [2] - [38] of his judgment. He noted at [35] that the witness evidence had been of limited assistance in relation to the question of construction although he had considered it all, together with the documents to which he was referred and counsels' submissions, before reaching a decision.
15. Having considered the authorities in relation to the interpretation of contracts and the relevance of the factual context in that exercise, the judge concluded at [43] that Schedule 4 cannot be given its plain meaning in two respects. First, because it contemplated the reduction or release of the Zone of Influence. He stated at [44] that "... according to the CA guidance note [the Guidance Note] there is no question of the area of a zone of influence being reduced, otherwise than by a dataset being updated. In particular, there is no question of the area of a zone of influence being reduced because of a case-by-case judgment made by the Coal Authority, for example, because of local geological evidence and representations made to it by an interested party." (The judge had already recorded, at [8], that it followed from the Guidance Note: "... that, unless a dataset used for the standard formula happens to be updated, a zone of influence appears, from the CA guidance note, not to be capable of being adjusted.")
16. Secondly, he held at [45] that: "on a plain reading of the restrictive covenant in clause 5 of Schedule 4, and taking into account the definition in Schedule 4 of the Zone of Influence, a definition which identifies the land in question as being that previously designated by the Coal Authority as a zone of influence, even if the Zone of Influence was removed (released) entirely, no development or parking could take place on the land which was, at the time of the Sale Agreement, designated by the Coal Authority as a zone of influence. Such a reading would defy commercial common sense." The judge concluded that "a more purposive construction of Schedule 4 is, therefore, required" [46].
17. In resolving the question of construction, he held that the following factual background was admissible and relevant:

"47. . .

  - i) the Bowl (the area of the zones of influence) was marketed as a site for static caravans;
  - ii) the only permitted development of the Bowl was as a site for static caravans;
  - iii) the parties believed (wrongly it appears, . . . ) that:
    - a) what areas of land are designated by the Coal Authority as zones of influence is a matter of judgment for the Coal Authority;
    - b) the judgment of the Coal Authority is whether or not development in an area around a mineshaft is high risk;

c) whatever a planning permission provides, development in a zone of influence cannot take place without the Coal Authority's consent (which had not been obtained in this case); and

d) the Coal Authority has the power to re-designate land as not being a zone of influence even when the standard formula determines it to be such.

Mr Flannigan is likely to have believed this because of what he is likely to have been advised by Mr Breathnach (particularly after Mr Breathnach spoke with Mr Parry), and Mr Massie is likely to have believed this because of what Mr Flannigan is likely to have told him during their conversation about the reduction in initial purchase price;

iv) in circumstances where Mr Massie and Mr Flannigan had this same belief, the initial purchase price for the holiday park was reduced from £3 million to £2.6 million.”

18. Having done so, the judge decided at [48] that on a proper construction of clause 3.1 of the Agreement, the Released Land Value became due when the Coal Authority confirmed in writing that it had decided that the siting of static caravans within the Zone of Influence (save for on the mineshaft protective capping slabs) was not objectionable, as it did in the 15 September Letter.
19. He set out the basis for his conclusion at [49] – [51]. In summary, he held that a reasonable reader would appreciate that the general object of the transaction was a sale of the Bowl for the siting of static caravans and that they could not be placed in a zone of influence unless the Coal Authority did not object. They would also understand that Schedule 4 of the Agreement provided for additional payment if the Coal Authority made a written decision allowing static caravans to be sited in the Bowl.
20. He also concluded that clause 5 of Schedule 4 “was likely to have been intended to reflect the position as the parties understood it” [50]. As a result, he held that on its proper construction, clause 5 “. . . does not now prohibit any part of the Bowl being used to site static caravans, save for that area which the Coal Authority continues to maintain, by the 15 September [L]etter, may not be developed in that way (that is the area of the mineshaft protective capping slabs).”
21. Further, the judge made clear at [52] that his conclusion was not altered if Mr Jackson (counsel for Westfield) was right. This was because part of the relevant background was that the parties understood that the Coal Authority could remove land from a zone of influence and accordingly, his conclusion was consistent with Mr Jackson's submissions. He went on at [53] to state that his conclusion was reinforced if Mr Jackson is right because: “[L]ogically, if the Coal Authority can remove land entirely from a zone of influence, there is no obstacle to it permitting limited development of such land, so removing it from a zone of influence for particular purposes.”
22. In the circumstances, the judge observed that it was not necessary for him to reach a decision in relation to the alternative rectification claim. He stated, however, that he

was doubtful that it could have succeeded [55]. He noted that the outcome of that claim would have been likely to depend upon the email from Ms Toolan of 20 August 2021 and the response from Mr Breathnach of 25 August 2021 as the outward expression of accord necessary for a rectification claim. He stated that the emails established that the parties' intended agreement in relation to an additional payment was the same as clause 3.1 of Schedule 4 and therefore, the rectification was likely to have failed [57].

### **Grounds of Appeal and Respondent's Notice**

23. There are four grounds of appeal. First, it is said that the judge erred in fact in deciding that the Coal Authority could not reduce a zone of influence on a case by case basis or as a result of representations being made to it or otherwise by a change in the relevant dataset, where there was no evidence to that effect and the evidence was to the contrary. In this regard, Mr Jackson places emphasis upon paragraph 1.4 of the Guidance Note, Mr Breathnach's attendance note of 29 July 2021, the approach of RSK Geosciences in seeking a reduction and the manner in which the approaches were received by the Coal Authority. Secondly, it is said that the judge erred in law in interpreting the phrase "Zone of Influence" as speaking only as at the point of sale rather than prospectively with reference to such reduction as may have been made subsequently. Thirdly, and alternatively, it is said that he erred in concluding that where the Coal Authority could not lawfully or properly reduce a zone of influence, Schedule 4 of the Agreement led to commercial absurdity sufficient to warrant a purposive as opposed to a literal construction of the Agreement. Lastly, insofar as necessary, it is said that the judge erred in determining that the trigger for the payment of the Released Land Value was the 15 September Letter and/or that that was consistent with the submissions made on Westfield's behalf.
24. By a Respondent's Notice, dated 23 December 2024, Harworth seeks to uphold the judge's order on the additional bases that: even on Westfield's construction, the Released Land value was due as a result of the Coal Authority's 7 September 2022 letter (the content of which is identical to the 15 September Letter); and the rectification claim should succeed on the basis of the judge's findings at [21] and [56] of his judgment, there being a common intention that payment would be made in the event that the Coal Authority did not object to the placement of static caravans in the Zone of Influence. The judge's concern that the outward expression of accord was the same as the terms of the agreement was misplaced.

### **Submissions in outline**

25. In summary, Mr Jackson, on behalf of Westfield, submits that the judge was wrong to proceed on the basis that a zone of influence could never be reduced otherwise than by use of a new dataset and, as a result, to reject the plain and ordinary meaning of the words used in the Agreement. He says that there was no evidence to that effect, it was not supported by the Guidance Note itself, nor was it either party's case but was taken up by the judge himself during closing submissions. He also says that such a conclusion is contrary to the Guidance Note itself and the way in which the Coal Authority responded to enquiries made by Mr Breathnach, on behalf of Westfield, and to RSK Geosciences, on behalf of Harworth. In addition, he seeks to rely on fresh evidence in this regard. He submits that the plain meaning of the words used, considered in the context of the Agreement as a whole and the factual context outlined by the judge at [47] of his judgment were clear. On an objective reading, the Released Payment Value

became due if the Zone of Influence was reduced and not when mere permission was given for any particular use. He also submits that there is nothing in the language of the Agreement which speaks only to the area of the Zone of Influence as at the date of the Agreement. This all makes perfect commercial common sense. Accordingly, there was no reason to look for a purposive construction of the Agreement and in doing so, the judge gave clause 5 of Schedule 4 a meaning which was unnatural and contrary to its plain meaning.

26. Lastly, he submits that the judge's reasoning at [51] – [53] neither reflected Westfield's case nor the purposive construction at which he arrived.
27. Mr de la Piquerie, on behalf of Harworth, on the other hand, submits that the judge applied the appropriate principles of construction and arrived at a conclusion which gives effect to the plain agreement between the parties. He says that the Guidance Note is not inconsistent with the judge's approach and that he was right to give little weight to Mr Breathnach's attendance note and the fact that the parties had sought to persuade the Coal Authority that static caravans could be sited in the Zone of Influence. He says that the judge was entitled to form a view about the Coal Authority's powers and having done so, he was right to conclude that on a literal interpretation, clause 5 of Schedule 4 of the Agreement was redundant. Furthermore, he applied the well known principles of construction contained in *Arnold v Britton* properly. Clause 3.1 of Schedule 4 should not be read in a vacuum and its natural and ordinary meaning should be assessed in the light of the other relevant provisions of the Agreement, the facts and circumstances known or assumed by the parties at the time the Agreement was executed and commercial common sense: *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645, [2020] 193 ConLR 66 per Carr LJ (as she then was) at [41].
28. He submits that the parties agreed that they would ask the Coal Authority whether it regarded the placement of static caravans within the Zone of Influence to be acceptable and if it did the Released Land Value would become due.
29. Lastly, in relation to the rectification claim, Mr de la Piquerie submits that the judge's concern that the wording of the outward expression of accord was the same as clause 3.1 of Schedule 4 meant that rectification could not be granted, was misplaced, the outward expression of accord being merely evidence of common intention rather than defining it. In his Respondent's Notice and Skeleton Argument Mr de la Piquerie stated that the common intention of the parties could be found at [21] and [56] of the judgment and in oral submissions he also referred us to [13] and [49].

### **Fresh evidence**

30. Before turning to the grounds of appeal in more detail, I will address Westfield's application dated 20 December 2024. It seeks to rely upon fresh evidence in relation to the question of whether the Coal Authority (now known as Mining Remediation Authority) was capable of reducing or limiting a zone of influence on a case by case basis. Westfield seeks to rely upon Chapter 14 of the Construction Industry Research and Information Association's "Abandoned Mine Workings Manual" (the "Manual") and, in particular, upon chapter 14.2. It is said that Chapter 14 of the Manual satisfies the criteria for the admission of fresh evidence because: (i) the Manual could not have been obtained with reasonable diligence for use at the trial, because the question of whether the Coal Authority had the power to reduce zones of influence was not in issue

until the matter was raised by the judge during closing submissions; (ii) the Manual would have had an important influence on the result of the trial because it shows that zones of influence could be reduced by the Coal Authority; and (iii) it is to be believed and is from a credible source.

31. Although chapter 14.2 is concerned with “risk zones” Mr Jackson submitted that they are the same as a zone of influence and that the chapter suggests that they can be reduced. He took us to a letter from RSK Geosciences to Harworth dated 1 October 2021 in which RSK Geosciences “appraise[d] the proposed risk assessment regarding the zone of influence” of the two mineshafts at the Holiday Park. When addressing the requirement for “a stand-off or sterilisation zone” RSK Geosciences made reference to “CIRIA C758” which Mr Jackson says is a reference to the Manual. Subsequently, RSK Geosciences made enquiries of the Coal Authority and in its response of 21 April 2022, the Coal Authority stated that “an alternative to the determination of the zone of influence adopted in CIRIA C758D is justified.” Mr Jackson submitted, therefore, that the Manual is directly relevant and satisfies the criteria for the admission of fresh evidence on an appeal.
32. In my judgment, the Manual and chapter 14.2, in particular, does not satisfy the criteria. Although CIRIA C758 appears to have been referred to both by RSK Geosciences and the Coal Authority in correspondence, we have no direct evidence as to whether the Manual is, in fact, an authoritative source. Furthermore, it is not clear to me that chapter 14.2 is relevant to the ability of the Coal Authority to alter or reduce a zone of influence. It is concerned with the location of disused mine shafts and the determination of the “perceived risk zone” and the “potential cone of collapse”. Although the factors which are considered might be relevant to the reduction of a zone of influence, chapter 14.2 does not address whether the Coal Authority has or had such a power. In the circumstances, therefore, it is not clear that it would have had an important influence on the result of the trial.
33. In the circumstances, it is not necessary to consider the witness statement and exhibits filed on behalf of Harworth in opposition to the application. I should add that even if admitted, those witness statements would be of no real evidential value. In particular, the witness statement of Gareth Thomas dated 3 February 2025 seeks to admit into evidence a second-hand account of the Coal Authority’s position. It does so by detailing and evidencing discussions between Mr Thomas and his former colleague who works for that organisation.

#### **Authorities in relation to the interpretation of contracts**

34. There is no need to set out the principles of contractual construction in any detail again here. They are very well known and were fully explained by Lord Neuberger MR in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15]-[23] and by Lord Hodge JSC in his judgment in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10] - [15]. As Mr de la Piquerie submitted that the judge in this case applied the six factors set out by Lord Neuberger PSC at [15] in *Arnold v Britton*, I should set them out, however. He held that the meaning of the relevant words must be assessed in the light of: “(i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the leases [contract], (iii) the overall purpose of the clause and the lease [contract] itself, (iv) the facts and circumstances known or assumed by the parties at

the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intention.”

35. It is also important to keep in mind what Lord Hodge stated at [11] in *Wood v Capita* at which he refers to passages from both *Rainy Sky* and *Gan Insurance* to which Mr Jackson referred us:

“11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.”

36. These principles are also reflected in the *Network Rail* case to which Mr de la Piquerie referred us. Carr LJ (as she then was) with whom Males and Coulson LJJs agreed, stated as follows:

“[41] Having identified the natural and ordinary meaning of the word ‘default’ in the Contract (both alone and in its immediate context in cl 1(1)(j)(iii)), I turn to consider the wider context, the exercise which lies at the heart of ABC’s challenge. As the authorities identify, any contractual clause, however clear, is not to be read in a vacuum. Its meaning has to be assessed in the light not only of its natural and ordinary meaning but also any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense (within the confines set out above). . . .”

37. Lord Hamblen JSC (with whom Lord Hodge DPSC, Lord Kitchen and Lord Sales JJSC agreed) also summarised the principles of construction more recently at [29] of *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, 1 WLR 575, in the following way:

“ . . .

(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.”

38. In relation to ambiguity, Mr de la Piquerie also referred us to *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA Civ 984 at [36] per Lewison LJ, with whom Floyd and Longmore LJJ agreed:

“I do not therefore agree with Mr Snowden that commercial considerations have no part to play in deciding whether a particular interpretation is or is not ambiguous. Moreover, to say that ambiguity or unambiguity is the governing factor may be to miss the point. As Lord Sumption observed in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [14]:

“It is generally unhelpful to look for an “ambiguity”, if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.””

### **Conclusions in relation to interpretation of the Agreement**

39. It seems to me that the judge failed to apply the well-known principles of construction to which I have referred. He failed to apply the six principles explained by Lord Neuberger in *Arnold v Britton* and to undertake the task expressed succinctly by Lord Hamblen in *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd*. He did not begin his task by seeking to determine objectively the natural and ordinary meaning of the words used both alone and in their immediate context and then proceed to consider them: a) in the light of the other relevant provisions of the Agreement, b) the overall purpose of clause 3.1 of Schedule 4 and the Agreement, c) in the light of the facts and circumstances known or assumed by the parties at the time of the Agreement, and d) taking into account commercial common sense. Although he rejected what he described as Schedule 4’s plain meaning at [43] he did not set it out or consider it in context at all.

40. He appears to have been influenced in this approach by the negotiations prior to the execution of the Agreement and to have put those, together with his conclusion about the Coal Authority's supposed lack of power to reduce a zone of influence, at the heart of his reasoning. His conclusion in that regard, coupled with his reasoning at [45] to the effect that a plain reading of paragraph 5 of Schedule 4 would defy commercial common sense, was the basis for his adoption of a purposive approach to interpretation.
41. It hardly needs to be said that prior negotiations and subjective intentions are irrelevant. Furthermore, I agree with Mr Jackson that the judge's conclusion that a zone of influence could not be reduced other than by updating the relevant dataset, has no proper foundation. As Mr Jackson submitted, there was no evidence to support the judge's conclusion that it is not possible to reduce a zone of influence. That is not what the Guidance Note says and there was no other evidence before the judge to that effect. Furthermore, it was neither party's case.
42. It goes without saying that one must consider clause 3.1 of Schedule 4 in the context of the Agreement as a whole, taking into account the fact that it was drafted by professionals. It is relevant that: the additional payment is referred to as the "'Released' Land Payment" (emphasis added); clause 1.1 of Schedule 4 makes reference to Harworth making a request for the size of the Zone of Influence to be "reduced"; that "reduce" is also used in clause 1.2; and that clause 3.1 of Schedule 4 uses both "reduced" and "released". The relevant context includes the definition of "Zone of Influence" itself and paragraph 5 of Schedule 4. "Zone of Influence" is defined by reference to the "area designated by the Coal Authority as a 27m zone of influence centred on each of the 2 mine shafts at the Property less the area directly on top of the two shafts (which the parties acknowledge is not considered to be a suitable position to site a caravan) . . ." Paragraph 5, however, states that Westfield will not locate "any caravans erect any temporary or permanent buildings or park any vehicles with the Zone of Influence".
43. It seems to me that taking all those matters into account (and assuming that the Coal Authority is able to reduce the extent of a zone of influence), the reasonable reader with all the relevant background knowledge which would reasonably have been available to the parties when they entered into the Agreement, (including the matters set out by the judge at [47] of his judgment), would have understood the language to mean what it says. It refers to a reduction of the Zone of Influence or a release of that zone. It does so in the light of the reference to the siting of caravans in the definition itself but makes no reference to change of use or partial exoneration or grant of consent for particular uses. No question of ambiguity arises.
44. As I have already mentioned, not only did the judge rely upon his conclusion that there was no power to release or reduce a zone of influence except on the basis of a change in dataset, he also relied upon his interpretation of clause 5 of Schedule 4 to justify his purposive construction. He decided that on a plain reading, clause 5 of Schedule 4 applied in relation to the land which was designated as a Zone of Influence at the date of the Agreement and therefore, no development or parking could take place on that land, even if the Zone of Influence was subsequently released or removed. He concluded at [45] that such a reading would defy commercial common sense. I agree that that would make no sense.

45. It seems to me, however, that in reaching his conclusion the judge failed to give clause 5 its natural and ordinary meaning and to interpret it in the context of Schedule 4 and the Agreement as a whole. First, clause 5 has no temporal element. There is nothing which expressly ties it to the date of the execution of the Agreement. Secondly and, perhaps, more importantly, if clause 5 is read in the context of Schedule 4 as a whole and the obligation in clause 2.2 of the Agreement to pay the Released Land Value in accordance with Schedule 4, it is clear that the reference to the Zone of Influence in clause 5 should not be read as if it were static. It arises in the context of the endeavours to request the reduction of the size of the Zone of Influence recorded at clause 1.1 and the terms of clauses 3.1 and 3.2 of Schedule 4 which address the situation where “the Zone of Influence is reduced.” It seems to me, therefore, that when read in context, if and when the Zone of Influence were to be reduced or released, it would be reduced wherever it is referred to in the Agreement, including in clause 5 of Schedule 4.
46. It follows, therefore, that no commercial absurdity arises and that properly construed, clauses 3.1 and 3.2 of Schedule 4 mean what they say. They refer to a reduction or release of the Zone of Influence not to a permission for a particular use within such a zone. Accordingly, in my judgment, the 15 September Letter did not trigger the obligation in relation to the Released Land Value.
47. For all of the reasons set out above, I would allow the appeal and dismiss the first ground of the Respondent’s Notice.

## **Rectification**

48. What of the second ground of the Respondent’s Notice which is concerned with rectification? The judge did not need to address this alternative remedy because he had decided the matter of construction in Harworth’s favour. As he pointed out at [57] of the judgment, rectification is available in certain circumstances when an agreement is not reflected in the words of a later written document. He concluded, also at [57], that the outcome of the rectification claim was likely to depend upon Ms Toolan’s 20 August 2021 email and Mr Breathnach’s response of 25 August 2021 which he considered to contain an outward expression of accord. He concluded that the parties’ intention was reflected in the words of clause 3.1 and therefore, rectification was likely to have failed.
49. Mr de la Piquerie says that the judge was wrong to be concerned that the wording of the outward expression of accord was the same as Schedule 4. He submits that outward express of accord is merely evidence of common intention rather than defining it. He relied upon the judgment of the court which was delivered by Leggatt LJ (as he then was) in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [73] and [81]. As [73] is best understood in the light of [72], I will set that paragraph out as well:

*“The need for an “outward expression of accord”*

72. *Joscelyne v Nissen* [1970] 2 QB 86 clearly and authoritatively established that a prior concluded contract is not necessary for rectification and that a common intention continuing at the time when a contract is made is sufficient, subject only to the qualification that some outward expression of

accord is required. That qualification did no more than spell out the sense in which, as discussed earlier, Simonds J in *Crane's case* [1971] 1 WLR 1390 used the phrase common intention to refer to what he also called the common agreement of the parties or the true consensus of their minds - in other words, an intention which the parties not only each held but understood each other to share as a result of communication between them. The same principle was stated by Buckley LJ in *Lovell & Christmas Ltd v Wall* 104 LT 85, 93, in the passage we have quoted earlier (and which was also quoted in *Joscelyne v Nissen* [1970] 2 QB 86, 92) when he said:

“For rectification it is not enough to set about to find what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.”

73. By insisting on the requirement of an outward expression of accord, the Court of Appeal was thus making clear that it is not sufficient for rectification to prove that each party privately and independently had the same intention as the other with regard to a particular provision of their contract. There can be no common intention of a kind with which the written contract can justifiably be made to conform if the relevant intentions remained locked separately in the breast of each party without being communicated by each party to the other. At the same time, the judgment in *Joscelyne v Nissen* makes it equally clear that the insistence on an outward expression of accord does not supplant or detract from the need to establish what the parties actually intended the relevant term of the contract (or its effect) to be. The Court of Appeal was not suggesting that only outward appearances are relevant for rectification and that, provided they appear outwardly to be in agreement, the actual intentions of the parties do not matter. On the contrary, the unequivocal holding in *Joscelyne v Nissen* that the law was correctly stated by Simonds J in *Crane's case* [1971] 1 WLR 1390 leaves no room for doubt that, in order to find a common intention, it is necessary to establish what was in the minds of the parties. As we have outlined and as was considered in detail in the *Shipley* case [1936] Ch 375, which was then approved in *Crane's case*, that has always been the basis of the equitable remedy of rectification. The essence of the remedy is that, in a proper case where there is shown to have been a real mistake, the terms of a written contract (or other document) should be reformed in order to give effect to the parties' real intention.

...

81. The important point made in these passages, however, is not that an outward expression of an accord is unnecessary for

rectification. It is that the communication necessary to establish an outwardly expressed accord or common intention which each party understands the other to share need not involve declaring that agreement or intention in express terms. The shared understanding may be tacit.”

The Court of Appeal’s conclusions are also relevant and so I shall set them out here:

“Conclusion on the law

176. For all these reasons, we are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann’s obiter remarks in the *Chartbrook* case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention.”

50. More recently, the Supreme Court has addressed the requirements for rectification in *Tyne and Wear Passenger Transport Executive (trading as Nexus) v National Union of Rail, Maritime and Transport Workers & Anr* [2024] UKSC 37, [2024] 3 WLR 909. In that case, Lord Leggatt and Lady Simler JJSC, with whom, Lord Lloyd-Jones, Lord Sales and Lord Burrows JJSC agreed, addressed the basis for rectification, the need for outward accord and the relationship with the construction of the contract at [26] – [35]. The most relevant paragraphs are as follows:

“The nature of rectification

26. The first and fundamental point is that the basic role of rectification is not to correct mistakes in transactions, but to correct mistakes in documents recording transactions. As explained in *Snell's Equity*, 34th ed (2020), para 16-001:

“Where the terms of a written instrument do not accord with the true agreement between the parties, equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing.”

In short, rectification is about “putting the record straight”: *Allnutt v Wilding* [2007] BTC 8003, at para 11 (*Mummery LJ*) .

...

29. In the common case where the document is contractual, there was at one time a school of thought that rectification could only be ordered to bring the document into conformity with a prior concluded contract. That view was decisively rejected by the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86 . That case authoritatively established that the claim need not be based on a legally enforceable contract and that a common intention continuing when a contract is made is sufficient, provided there has been an “outward expression of accord” (p 98).

30. Sometimes the mistake sought to be rectified is simply a clerical error in drawing up the document. But this need not be so. The document as drawn up may contain the exact words which it was intended to contain; but the words may be construed by a court as having a meaning that is different from the meaning which the parties understood and intended them to have. This possibility arises because of the “objective” approach which English law adopts to the interpretation of contractual documents (and other documents on which reliance is intended to be placed), giving them the meaning which the document would convey to a reasonable person regardless of whether this reflects what the maker(s) of the document or parties to the transaction subjectively understood or intended the document to mean. Rectification is available as a safety-valve to prevent the injustice that would occur if a party could take advantage of an objective interpretation which is inconsistent with what (in the case of a bilateral transaction) both parties actually intended the document to mean.

31. Doubt was cast on this understanding of the law by obiter dicta in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, paras 48–66 , which suggested that the objective test should be applied, not only in interpreting the document sought to be rectified, but also in identifying the prior common intention on which the claim for rectification is based. Among other objections to this approach, it was never explained why the objective meaning of a formal written instrument intended to create legally binding obligations should be displaced in favour of the objective meaning of earlier less formal and less considered communications which were never intended to be binding if the objective meaning of those communications did not accord with the parties’ shared subjective intention. In the words of Snell’s Equity , para 16-015, the “traditional orthodox approach” was restored by the judgment of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2020]

*Ch 365*, holding that the parties must in fact have made a mistake and had the same actual intention for rectification to be granted. There must also be an “outward expression of accord”—meaning that, as a result of communication between them, the parties understood each other to share that intention: see *FSHC Group Holdings*, para 176.

...

33. It is relevant that the test for rectification, unlike interpretation, is subjective and depends on the parties’ states of mind when considering the correct “target” for rectification in this case.”

51. On the basis of Lord Leggatt and Lady Simler’s explanation of the availability of rectification, Mr de la Piquerie may be right that the judge’s obiter remarks about the similarity between the content of the emails of 20 and 25 August 2021 and Schedule 4 of the Agreement were somewhat hasty. I am not sure how this helps Harworth, however. It is necessary for Mr de la Piquerie to point to findings as to the common intention of the parties reflected in an outward expression of accord. It seems to me that he is unable to do so.
52. Mr de la Piquerie submits that the judge found the parties’ common intention at [21] and [56] of his judgment but was confused about the issue of an outward expression of accord. It is clear, however, from [54] of the judgment that the judge was not deciding the rectification claim at all. He did not need to. In those circumstances, it seems to me that it is difficult, if not impossible, to elevate the content of [21] and [56] into findings of fact as to the parties’ common intention. The judge did not make such findings.
53. In any event, those paragraphs cannot bear the weight which Mr de la Piquerie seeks to place upon them. At [21] the judge comments upon the nature of the proposal made by Mr Breathnach in his 17 August 2021 email and concludes that the proposal was to pay an additional £10,000 up to a maximum of £400,000 “for every static caravan which could be sited in the area of the zones of influence”. At [56] he refers back to his conclusion about the 17 August 2021 email and refers to it as “the first record of a proposal for an additional payment.” These are not findings as to common intention. They both refer to the position of the representative of only one side of the transaction and record a position which was not accepted on behalf of Harworth. A different proposal was made on 20 August 2021.
54. Nor do I consider that findings of a common intention can be patched together by reference to [13], [14] and [49] of the judgment to which Mr de la Piquerie referred in his oral submissions, or to those paragraphs together with [21] and [56]. At [13] the judge stated that having considered all the evidence, he was satisfied that when “Mr Breathnach wrote of the area of the zone(s) of influence being unsuitable for development, he only had in mind that such an area would not be suitable for development by the siting of static caravans there.” He was focussing on emails dated 28 and 29 July 2021 and went on to find that having regard to those emails, “Ms Toolan . . . would reasonably have understood that, in the 29 July email, when Mr Breathnach referred to undevelopable land, he had in mind land on which static caravans could not be sited.)” At [14], the judge stated that Mr Breathnach had made clear in cross

examination that the only development that Mr Flannigan had ever wanted to carry out was the siting of static caravans in the Bowl and at [49] the judge set out his construction of the Agreement.

55. It seems to me that these are not findings as to the common intention of the parties at all. [49] contains the judge's interpretation of the Agreement and [13] and [14] refer to the fact that Mr Breathnach and Ms Toolan had caravans in mind in relation to the development of the Bowl before the exchange of emails in August 2021. They do not address the issue of common intention.
56. In any event, it is not appropriate for us to seek to create what is said to have been the common intention of the parties by sewing together paragraphs from the judgment which are concerned with matters which arose at different times and in different contexts. The judge did not consider common intention because he did not need to address the alternative claim in rectification. It is not possible or appropriate to thread the alleged findings together with an alleged error by the judge in an obiter comment in order to reach the conclusion that we should decide that but for his error, the judge would have granted rectification. Nor is it possible, in the absence of such findings, for us to grant rectification of the Agreement.
57. Although Mr de la Piquerie confirmed that he was not asking us to remit this matter to the judge for him to make the necessary findings, he did mention the idea at one point. It seems to me that had Mr de la Piquerie asked us to do so, we would have declined. Although in some circumstances, it has been suggested that a matter might be remitted in order to enable the judge to provide reasons in relation to a particular point, (see, for example, the discussion in *Michael Hyde & Associates Ltd v J D Williams & Co Ltd* [2001] PNLR 8 at [20], *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [25], and *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2006] EWCA Civ 717), this is a different case and it would not be appropriate to do so here. It seems to me that the judge could not go back and re-calibrate his thinking and reconsider the evidence in relation to a new point at this stage. Apart from anything else, too much time has elapsed since he heard this matter.
58. On this basis, I would dismiss this ground of the Respondent's Notice. To summarise, therefore, I would allow the appeal and dismiss the Respondent's Notice.

**Coulson LJ:**

59. I agree.

**Fraser LJ:**

60. I also agree.