

ENGLAND AND WALES / JUDGMENT

Amaal Ventures Ltd & Anor v Eros Ltd
[2026] EWHC 870 (Ch) (17 April 2026)
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Claim No: PT-2024-000493

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

PROPERTY TRUSTS AND PROBATE LIST (CH D)

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

17 April 2026

B e f o r e :

STEPHEN JOURDAN KC SITTING AS A JUDGE OF THE HIGH COURT

Between:

- (1) AMAAL VENTURES LIMITED
- (2) SHIEVON VENTURES LIMITED

Claimants

- and -

EROS LIMITED

Defendant

Representation

John McGhee KC and Jonathan Chew (instructed by Bryan Cave Leighton Paisner LLP) for the Claimants

Jonathan Seidler KC and James McCreath (instructed by PCB Byrne LLP) for the Defendant

Hearing and judgment dates

Hearing dates: 2 March (pre-reading), 3, 4, 5, 6 and 11 March 2026

Draft judgment sent to the parties on: 13 April 2026

HTML VERSION OF JUDGMENT

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Date of handing down of judgment: This judgment was handed down remotely at 10.30 am on Friday 17 April 2025 by circulation to the parties' representatives by e-mail, and by release to the National Archives.

STEPHEN JOURDAN KC:

Introduction

This claim relates to contracts entered into in October 2020 for the off-plan sale of two flats in Mayfair for premiums totalling just over £10.6 million. The Claimants are the buyers. The Defendant is the seller.

On 3 August 2023, the Defendant served notices which, if valid, fixed the date for the completion of the sales as 17 August 2023. On that date, the Defendant served notices to complete. If valid, they made time of the essence for completion by Friday 1 September 2023. The Claimants did not send the completion monies to the Defendant's solicitors by that time, and on Monday 4 September 2023, the Defendant wrote saying that the contracts were terminated.

The Claimants say that the notices to fix the completion date were not valid because the seller failed to provide a structural defects insurance certificate required by the contracts. Alternatively, they say that the notices to complete were not valid, because a furniture package which formed part of the sale was not sufficiently installed in the flats. They claim specific performance. Or, if that fails, they say that the money paid by them under the contract – 30% of the purchase price – should be repaid to them. The Defendant says that the notices were valid, it validly terminated the contracts, and it is entitled to keep the payments.

The Development and the Contracts

22 Hanover Square, London, W1 was acquired in July 2014 by the Defendant, Eros Limited, a company in the Clivedale group. They proposed to redevelop the property as a combined luxury hotel and residential development, with leisure facilities and parking. Mandarin Oriental were chosen as the hotel operator. The development was given the name "Hanover Bond". There was to be a north tower and a south tower, together containing 77 flats.

It was proposed that the Mandarin Oriental would operate a rental pool programme. If a flat was entered into that programme, the hotel would use the flat for up to 90 days per year (the maximum permitted by the planning legislation) for short term lets. Advertising material headed "Mandarin Oriental Mayfair London – Rental Pool with Furniture Pack – indicative earnings" was provided to prospective purchasers, including the Claimants. The documents gave indicative earnings of £2,600 per night (equal to £234,000 for 90 nights) for a 2 bed flat, and £3,400 per night (equal to £306,000 for 90 nights) for a 3 bed flat. In order to participate in the proposed rental programme, it was necessary for the flat to be fitted out with what was referred to as a "furniture package". This was furniture, fixtures and equipment ("FF&E") such as sofas, rugs and pictures, and operating supplies and equipment ("OS&E") such as cutlery and bed linen, of a type satisfactory to the Mandarin Oriental.

On 1 October 2020, the Defendant as "Seller" entered into two contracts ("the Contracts") for the sale of two flats in 22 Hanover Square ("the Flats"). The first contract was with the First Claimant, Amaal Ventures Limited as Buyer for the sale of a 999 year lease of flat N4.4, a 3 bed flat, for £5,961,000. The second contract was with the Second Claimant, Shievon Ventures Limited as Buyer for the sale of a 999 year lease of flat S8.1, a 2 bed flat, for £4,641,000. Those prices equated to about £4,560 per square foot for flat N4.4 and £4,716 per square foot for flat S8.1. The Contracts are in the same form insofar as is material.

Both the Claimant companies were British Virgin Island registered companies. The ultimate beneficial owner of both companies was Ashiesh Aadinatha.

In summary, under the Contracts:

- (a) The Seller agreed to use all reasonable and proper endeavours within its control to procure the construction of the Flat and the development in a good and workmanlike manner and in accordance with various requirements, including those of the "Warranty Provider", subject to necessary variations. The "Warranty Provider" was "any of the new home warranty scheme administrators referred to in the CML Lender's Handbook that the Seller may decide to appoint".

- (b) Once the Flat was substantially completed, the Seller was to serve a notice fixing the completion date – a "Completion Notice". Clause 5.2 said that the Seller had to provide the Buyer's solicitors with copies of three documents on or before service of the Completion Notice. They were a "Certificate of Insurance", the final building control certificate relating to the Flat and the buildings insurance schedule and policy. The Certificate of Insurance was "the certificate of insurance for the Flat issued by the Warranty Provider".
- (c) Clause 5.3 said that the Flat would be treated as substantially completed when it is ready for occupation notwithstanding the existence of any "Snagging Items". These were "minor outstanding items or defects in the Flat or the fixtures fittings and contents thereof which do not impact on the beneficial use and enjoyment thereof". The Buyer had the right to inspect after service of the Completion Notice and could serve a list of any Snagging Items, after which the Seller was to remedy them as soon as reasonably practical at its own cost. Also, if within 6 months after completion any Snagging Items arose, the Buyer could on two occasions notify the Seller and the Seller would then be obliged to procure that they were remedied at its own cost and in a good and workmanlike manner as soon as reasonably practical.
- (d) A "Deposit" and two "Stage Payments" were payable under clause 4. The Deposit was 10% of the Price, less a non-refundable reservation fee paid before the Contract was entered into. The Deposit was payable on entering into the Contract. The First Stage Payment was 10% of the purchase price payable within 12 months of the Contract. The Second Stage Payment was also 10% of the purchase price payable within 24 months of the Contract.
- (e) All three payments were to be paid to and held by the Seller's solicitors as stakeholder pending completion, or determination of the Contract. However, under clause 4.9, if the Seller was able to obtain insurance including deposit protection cover in the event of the Seller's insolvency or fraud, the part of the Deposit or Stage Payments protected by the insurance was to be released to the Seller.
- (f) The "Furniture Package" was included in the sale. This was "the furniture and other chattels to be included in the sale and which are required in order for the Flat to be compliant for the purposes of the Rental Programme, an indicative schedule of which is attached at Appendix 4". The Rental Programme was "the proposed programme for the renting of the flats within the Development to the Hotel Operator for up to 90 days a year".
- (g) If the Seller did not serve a Completion Notice prior to 31 December 2023, then either party could serve notice terminating the Contract, in which case the Deposit and Stage Payments were to be returned to the Buyer.
- (h) The Standard Conditions of Sale (Fifth Edition) applied, with certain amendments.

In the Appendix to this judgment, I set out the relevant terms of the N4.4 Contract and the relevant Standard Conditions including the amendments made by the Contracts.

Appendix 4 in the case of both Contracts provided an "indicative schedule" of the Furniture Package. In both cases it was headed "The Residences – Mandarin Oriental – Mayfair London" and then said "Provisional furniture schedule. Scheme: Mo_May (2 bedroom, apartment N6.4)."

Flat S8.1 was a 2 bed flat, but flat N4.4 was a 3 bed flat, so clearly the wrong indicative schedule was attached in the case of that Contract.

There followed a long list of FF&E and OS&E, such as a sofa, pillows, artwork, clothes hangers, soap dispensers and hand lotion, and including equipment such as a coffee maker, a kettle and a hairdryer. In each case there was a description of the item, often detailed, a photo, the name of a company, a description, a description of the finish, and the quantity.

Subsequent events

The Claimants paid the Deposits and the Stage Payments for both flats, amounting to 30% of the purchase price. The Second Stage Payment for flat S8.1 however was paid late. It had been due on 1 October 2022. The Defendant agreed to defer exercise of its right to terminate for non-payment until 1 March 2023, on the basis that it was received by then with interest. Even then, it was not in fact received until mid-March 2023.

On 18 May 2023, the Defendant's then solicitors, Brecher, served a Completion Notice for flat N4.4, fixing the Completion Date as 1 June 2023. On 8 June 2023, Brecher served a Completion Notice for flat S8.1, fixing the Completion Date as 21 June 2023. Subsequently, Brecher served notices to complete. The validity of these notices was disputed, however.

On 31 July 2023, the Defendant instructed Kingsley Napley in place of Brecher. They wrote to the Claimants' solicitors saying that the Defendant was withdrawing the notices served by Brecher and would not rely on them.

On 3 August 2023, Kingsley Napley then served fresh Completion Notices for both flats fixing the Completion Date as 16 August 2023. Notices to complete were then served on 17 August 2023 which expired on 1 September 2023. These are the notices which are relied on by the Defendant.

The Claimants' solicitors, Charles Russell Speechlys ("CRS") did not send the balance required to complete the purchases to Kingsley Napley by 1 September 2023, a Friday. On that day, they emailed Kingsley Napley saying that the mortgage advance had been held up due to a lending delay; they had the balance from the Claimants needed to complete, and: "It is very possible that the money will appear in our client account on Monday". On the following working day, Monday 4 September at 10 am, CRS emailed Kingsley Napley saying that they had received the mortgage advance and had tried telephoning. At 11.45 am, Kingsley Napley emailed CRS saying that they had been instructed to rescind the contracts.

The issues

The issues are as follows:

- (a) Did the Defendant provide a valid Certificate of Insurance prior to serving the Completion Notices?
- (b) If not, did that invalidate the Completion Notices?
- (c) What were the Defendant's obligations in respect of the Furniture Package?
- (d) To what extent was the Furniture Package present and installed in the Flats on the date of the service of the notices to complete - 17 August 2023?
- (e) Did any deficiencies in the Furniture Package mean that the notices to complete were invalid?
- (f) In the light of my decision on the above issues, was Eros entitled to terminate the Contracts on 4 September 2023?
- (g) If the Contracts were not terminated then, are the Claimants entitled to an order for the specific performance of the Contracts?
- (h) If the Contracts were terminated then were the Stage Payments deposits or part payments of the purchase price?
- (i) Was the provision for the forfeiture of the Deposit and/or Stage Payments a penalty?
- (j) Should I order the repayment of the Deposit and/or Stage Payments under s.49(2) of the Law of Property Act 1925 or by granting relief against forfeiture?

Before turning to the issues, I will give my reasons for refusing to adjourn the trial and for deciding to admit a witness statement as hearsay evidence. I will also give my evaluation of the three witnesses called by the Defendant.

The application to adjourn the trial and to admit Mr Aadinatha's witness statement as hearsay evidence

The Claimants served only one witness statement, that of Ashiesh Aadinatha, the ultimate beneficial owner of the Claimants. However on Monday 2 March 2026, the day before the start of the trial, the Claimants' solicitors, Bryan Cave Leighton Paisner ("BCLP") wrote to the seller's solicitors, PCB Byrne. They said that Mr Aadinatha was in East Africa and could not travel to the UK due to the severe security situation in the Middle East, following the attacks on Iran and Iran's retaliatory attacks across the Gulf. Mr Aadinatha's partner and his businesses in Dubai needed his urgent attention. They said that because of this, the Claimants had made the decision that Mr Aadinatha would not be called to give evidence and the Claimants would rely on his evidence as hearsay evidence.

Correspondence followed in which PCB Byrne said that there was nothing to stop Mr Aadinatha flying to London. They said that it was not open to the Claimants to rely on his evidence as hearsay because the seller had the right to seek permission to cross examine him pursuant to CPR rule 33.4. It caused the Defendant considerable prejudice in that the right to cross examine

Mr Aadinatha would be lost. They would be content to cross examine him over videolink. And if it remained the Claimants' position that they would not call Mr Aadinatha to give evidence then the proper course was for the trial to be adjourned at the Claimants' cost.

In response, BCLP disputed that an adjournment was appropriate. They said if the witness statement could not be admitted as hearsay evidence they were willing to proceed without relying on it at all.

That remained the position at the start of the trial. Mr McGhee KC for the Claimants said that the Claimants wished to rely on Mr Aadinatha's statement as hearsay evidence. If that was not permitted, the Claimants would not rely on the statement at all. Mr Seitler KC for the Defendant said that he wished to cross-examine Mr Aadinatha, and an adjournment should be ordered to ensure that was possible. He said that if an adjournment was ordered, the Defendant would take steps to compel Mr Aadinatha's attendance and would apply to treat him as a hostile witness and cross-examine him.

I refused to adjourn the trial and said I would admit Mr Aadinatha's statement as hearsay evidence, although I was unlikely to attach any weight to any part of it that was contested, and I would bear in mind the Defendant's lack of opportunity to cross-examine Mr Aadinatha in evaluating any submissions on the facts. I said I would give my reasons in my judgment following the trial. These are my reasons.

The first question was whether to adjourn the trial. If there is a witness that a party wishes to call, and the evidence of that witness is necessary to ensure that there is a fair trial, the Court will generally order an adjournment if there is a good reason why the witness cannot be called unless there is an adjournment. In such a case, inconvenience to the other party, or other court users, is not a relevant countervailing factor and is usually not a reason to refuse an adjournment.: see

Bilta (UK) Ltd v Tradition Financial Services Ltd

[2021] EWCA Civ 37 at §§49 -64 per Nugee LJ. At §54 he said: "...the importance of a particular witness's oral evidence to the fairness of a trial will all depend on the facts, and the question cannot be approached in a mechanistic or box-ticking manner."

Having read the pleadings, the witness statements and the skeleton arguments, it seemed clear to me that Mr Aadinatha's evidence was either not going to be relevant at all to the issues to be determined at the trial or, if relevant, only peripherally so, and that the only party likely to be prejudiced by his absence was the Claimants. The submissions of Mr Seitler for the Defendant on the adjournment application reinforced that view. The high point was a suggestion that he might be able to establish by cross-examination of Mr Aadinatha that he had misled a lender, a fact I considered would have no bearing on any of the issues. That being so, I considered it would plainly be wrong to adjourn the trial to give the Defendant an opportunity to try and compel his attendance and seek permission to treat him as a hostile witness.

The second question was whether to admit Mr Aadinatha's statement as hearsay. The starting point is that the Civil Evidence Act 1995 provides that evidence shall not be excluded in civil proceedings on the ground that it is hearsay. The Court does, however, have power to exclude hearsay evidence if its admission would mean that the trial would be unfair.

In

Cottrell v General Cologne RE UK Ltd

[2004] EWHC 2402 (Comm), Morison J refused to allow two hearsay statements from a witness which the defendant wished to adduce to be admitted in evidence. The witness statements were served late because the defendants decided not to contact the witness until after the time directed for the exchange of statements. The defendant therefore had to apply for an extension of time to rely on the evidence. That application was refused. Morrison J held that to grant the extension would unfairly prejudice the claimants. If the hearsay notice had been served timeously, the claimants would have had an opportunity to apply for permission to cross-examine the witness, which might well have produced the result they wanted. He said at §26: "It would I think be quite unfair if the claimants were to be deprived of the opportunity to cross-examine and they have been deprived of that opportunity simply because the defendants chose not to take a statement from him in the first place and exchange it and serve their hearsay notice in time if minded to do".

However, in the later case of

Polanski v Condé Nast Publications Ltd

[2005] UKHL 10

;

[2005] 1 WLR 637

, the House of Lords said that it would only exceptionally be right to refuse to admit hearsay evidence. The issue was whether the claimant should be permitted to give oral evidence by video link from Paris. He was unwilling to enter the UK for fear of extradition to the USA. Reversing the Court of Appeal, the House held that he should be entitled to do so. The Court of Appeal had also considered whether, having refused to permit video link evidence, his witness statements should be excluded under CPR Part 32.1, if he sought to adduce them as hearsay evidence but failed to attend for cross-examination pursuant to a requirement under CPR Part 33.4. The majority in the House of Lords disagreed with the view of the Court of Appeal that the court would in those circumstances be bound to make an order excluding the witness statements as evidence. Lord Nicholls, with whom Lord Hope and Lady Hale agreed, said at §36: "Such an order should be made only if, exceptionally, justice so requires. The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly. The principle underlying the Civil Evidence Act 1995 is that in general the preferable course is to admit hearsay evidence, and let the court attach to the evidence whatever weight may be appropriate, rather than exclude it altogether."

Lady Hale said at §74: "The substantive law following the 1995 Act, therefore, is that relevant hearsay is always admissible; there are various procedural safeguards aimed at reducing the prejudice caused to an opposing party if he is not able to cross-examine the maker of the statement; but the principal safeguard is the reduced - even to vanishing -weight to be given to a statement which has not been made in court and subject to cross-examination in the usual way. The court is to be trusted to give the statement such weight as it is worth in all the circumstances of the case."

Although those statements were not necessary for the court's decision and were therefore obiter, I considered that I should apply those statements of principle by Lord Nicholls and Lady Hale in preference to the approach taken by Morison J in

Cottrell

. I did not consider that this was an exceptional case where justice required the exclusion of Mr Aadinatha's statement. I considered that the trial could be conducted justly by bearing in mind the fact that the Defendant had been deprived of the opportunity of cross-examining Mr Aadinatha.

The witnesses

The Defendant called three witnesses. First was Pankaj Thukral, now chief lending officer at GB Bank Ltd. In 2023, he was Clivedale's chief financial officer. He gave his evidence in a straightforward way and I am satisfied he was doing his best to assist the Court.

Second was Mr de Rougé, the director of sales and marketing at Clivedale Group, a role he has held since June 2023. A significant part of his role at that time involved preparing flats in 22 Hanover Square so that they would be ready on time and accord with the specifications of individual buyers.

In his statement at §20 he said: "The Flats were wallpapered by 10 August 2023, with S8.1 completing on that date and N4.4 having already completed on 3 August 2023. The rest of the FF&E was delivered to the Flats by 10 August 2023. The OS&E was delivered to the Flats by 31 August 2023. The final task was then the installation of the furniture and unpacking of the OS&E. This occurred on or around the first week of September 2023."

However, in cross-examination, it became clear that he had no personal knowledge of any of those matters. The evidence in his statement on this point was based on his interpretation of documents. And in his oral evidence, he came up with a different interpretation of the documents to that in his statement.

PD57AC §3.2 says: "A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case". The statement of compliance which has to be signed under §4.1 says: "This witness statement sets out only my personal knowledge and recollection, in my own words. On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when."

A witness can refresh their memory by looking at contemporaneous documents, in which case the statement must identify the relevant documents, and make it clear to what extent their memory has been refreshed by them. But that is not what Mr De Rougé did. Rather he engaged on an exercise of analysing documents and drawing inferences from them. Mr De Rougé's statement should have set out what he personally remembered. As to the documents, he could usefully have explained the function of the documents, and in respect of the individuals referred to in the documents who they were and what their roles were in supplying and installing furniture and fittings. But I do not think it was appropriate for him to engage in the exercise of analysing the documents and drawing inferences from them, which is a very long way from setting out his personal knowledge and recollection. So even if I had thought he was carrying out that exercise impartially I would not have placed any reliance on his analysis of the documents. But in any event, I formed the impression that Mr De Rougé was seeking to interpret the documents in a way favourable to the Defendant rather than doing so impartially.

The third witness was Sameer Gehlaut, the ultimate beneficial owner of Clivedale and so the Defendant. He was an argumentative witness, more concerned with saying things he thought would advance the Defendant's case than with listening to and answering the questions he was asked. Some of his evidence was inconsistent with the contemporary documents. I formed the impression he had little recollection of the events of 2023 and was attempting to reconstruct them in a way favourable to the Defendant's case.

(A) Did Eros provide a valid Certificate of Insurance prior to serving the Completion Notices?

The relevant provisions of the Contract

Clause 5.2 in the Contracts provides:

"5.2 The Seller will provide to the Buyer's Solicitors upon or before service of the Completion Notice:

5.2.1 a copy of the Certificate of Insurance; and

5.2.2 a copy of the final building control certificate relating to the Flat; and

5.2.3 a copy of the buildings insurance schedule and policy"

"Certificate of Insurance" is defined as "the certificate of insurance for the Flat issued by the Warranty Provider" and "Warranty Provider" is defined as "any of the new home warranty scheme administrators referred to in the CML Lender's Handbook that the Seller may decide to appoint".

The CML Lender's Handbook was a document produced by the Council of Mortgage Lenders. Since the Contracts were entered into, it has been updated and renamed the "UK Finance Mortgage Lenders' Handbook". It is used by lenders to instruct solicitors in lending transactions. Part 1, clause 6.7 says that if the property has been built or converted in the past 10 years, or is to be occupied for the first time, the solicitor must ensure that it was built or converted under a scheme acceptable to the lender, as listed in part 2. Part 2 then tells the reader for each lender which schemes are acceptable to that lender. For example, for Barclays Bank UK plc, 16 names are listed, including "Homeproof (previously AEDIS Warranties Ltd)".

The correct approach to the interpretation of the Contracts

The interpretation of a written contract is a question of law. The aim is to ascertain the meaning which the contract would convey to a reasonable person having all the relevant background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Evidence of the subjective intentions of the parties and previous negotiations cannot be used in determining what the contractual language means. Business common sense may be. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense at the expense of the words used. One must also be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. Contractual interpretation involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: see

Providence Building Services Ltd v Hexagon Housing Association Ltd

[2026] UKSC 1

at §§2 and 21-24 and the cases cited there.

In interpreting a written contract, you cannot consider what the parties did after it was signed:

Lewison: The Interpretation of Contracts

(8th ed) §3.185 and 3.187 and

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd

[1970] AC 583 at 603.

What the Contract meant by a "Certificate of Insurance"

Mr Chew, who argued this issue for the Claimants, relied on the statement in

Lewison: Interpretation of Contracts

at §14.30 that: "A certificate need not be in any particular form, but it must be clear and readily understandable and must be given by the person named or described in the contract".

He also relied on the decision of Devlin J in

Minster Trust v Traps

[1954] 1 WLR 963 at 982 that a certificate "... must, to satisfy the contract, be unambiguous and readily understandable".

Mr Seitler said that those principles only applied to a certificate by a person given the task of determining some issue, like a contract administrator under a building contract. I disagree. As Mr Chew submitted, the effect of serving a valid Certificate of Insurance (along with the other documents referred to in clause 5.2.1) was to set the date for completion, 2 weeks after service of the Completion Notice. Once that date passed, the Buyer would be liable to pay interest if completion did not take place and would be vulnerable to the service of a notice to complete. The timetable for dealing with Snagging Items would also start to run. It was, therefore, essential that the Buyer should be able to tell, just by reading what is proffered as the Certificate of Insurance, that it satisfied the contractual requirements.

I think the quotation in

Interpretation of Contracts

at §14.02 from Lord Sumption's judgment in

Fairfield Sentry Ltd v Migani

[2014] UKPC 9

is a good summary of the ordinary meaning of "certificate":

"As a matter of language, a 'certificate' ordinarily means (i) a statement in writing, (ii) issued by an authoritative source, which (iii) is communicated by whatever method to a recipient or class of recipients intended to rely on it, and (iv) conveys information, (v) in a form or context which shows that it is intended to be definitive. There is no reason to think that a document must satisfy any further formal requirements, unless its purpose or legal context plainly requires them".

Given that, and the definition of "Certificate of Insurance", I consider that only a statement in writing issued by a Warranty Provider conveying the information that structural defects in the flat were insured would suffice.

The documents

On 18 May 2023, the Defendant's then solicitors, Brecher, sent to CRS a Completion Notice for flat N4.4. With it, they sent a certificate of structural insurance. This had in the bottom right hand corner a signature followed by the following: "Managing director, BCR Legal Group Limited which is authorised by the Financial Conduct Authority issues this certificate on behalf of the Peoples' Insurance Company (Group) of China".

Neither BRC nor the Peoples' Insurance Company (Group) of China ("PICC") was a Warranty Provider. The document did not include anything to indicate that it had been issued by a Warranty Provider. That document by itself was not, therefore, a Certificate of Insurance for the purposes of the Contracts.

However, the certificate was not intended to be read alone. It said: "In consideration of the premium shown below as having been paid, this Insurance Certificate certifies that the Property described below has been deemed acceptable for insurance purposes and provides cover as defined in Sections 2 and 3 of the insurance policy wording as amended by any endorsements set out below from the Insurance Commencement Date and for the Period Covered in Years as set out below".

The insurance policy wording referred to was not provided with the certificate on 18 May 2023. But it was provided later. On 24 May 2023 CRS replied pointing out that PICC was not a Warranty Provider. On the same day, Brechers replied, sending the insurance policy wording referred to in the certificate, saying: "Please see page 4 for an explanation of the various parties involved. The brand name of the policy is Homeproof and the scheme administrator is Aedis Warranties Ltd. It appears on the approved list for most lenders ... The ultimate insurer is the People's Insurance (Group) of China Ltd and their managing agent is BCR Legal Group Ltd."

The insurance policy document attached to that email is headed "HomeProof". It says:

"

Introduction to your HomeProof New Build 10 Residential Warranty

This policy wording is evidence of a legally binding contract of insurance between you (the insured) and us The People's Insurance Company (Group) of China Limited (PICC) (The Insurer)...

You must read this policy wording, Initial Certificate, Certificate of Insurance and any endorsements together. The Initial Certificate and/or Certificate of Insurance tells you which sections of the policy wording apply. Please check all the above documents carefully to make certain they give you the cover you want.

We agree to insure you under the terms, conditions and exceptions contained in this policy wording or in any endorsement applying to this policy wording ...

The parties involved in your insurance

Your insurance has been arranged and placed with us by HomeProof as the scheme administrator. HomeProof is a trading style of Aedis Warranties Ltd who is authorised and regulated by the Financial Conduct Authority (FCA) in the United Kingdom and is entered on the FCA Register under references 622190.

We have appointed HomeProof to administer your insurance on our behalf. Throughout this policy document they are referred to either as the scheme administrator and or as the firm that arranged and placed your insurance with us ...

Your insurer

BCR is the managing agent for the People's Insurance Company (Group) of China Limited (PICC) who are regulated by the China Banking and Insurance Regulatory Commission and not subject to FCA regulation. This means that neither the Financial Services Compensation Scheme nor the Financial Ombudsman Service apply to the cover under this policy.

Definitions of terms used

...

Certificate of Insurance

The document issued by the scheme administrator on our behalf to signify acceptance of each completed residential property for insurance under sections 2, 3 and 4 of this insurance policy...

Insurer/we/us/our

BCR is the managing agent for the People's Insurance Company (Group) of China Limited (PICC) who are regulated by the China Banking and Insurance Regulatory Commission and not subject to FCA regulation. This means that neither the Financial Services Compensation Scheme nor the Financial Ombudsman Service apply to the cover under this policy.

BCR Legal Group Limited is authorised and regulated by the Financial Conduct Authority under firm reference 480599. Registration number 4407651. Registered in England and Wales. Registered office 25 Dollis Park, London, N3 1HJ and their activities are covered by subject to both the Financial Services Compensation Scheme and the Financial Ombudsman Service".

The certificate refers to the policy wording in the insurance policy document, and the insurance policy document makes it clear that it must be read together with the certificate. Therefore, in my judgment, the two have to be read together to decide if the requirements of the Contracts were satisfied. That is so even though the policy document was supplied 6 days later than the certificate. The same would be true under clause 5.2.2 if the building insurance certificate comprised 2 pages, and page 1 is sent on one date and page 2 was sent on a later date. Once both pages have been sent, the Seller has complied with the requirement to "provide a copy" of the building control certificate.

In my judgment, the certificate and the policy wording together satisfied the requirements of the Contracts. It is true that the certificate is signed by the managing director of BCR and if you read it alone it would appear to have been issued by BCR and not HomeProof. But the policy wording is clearly issued by HomeProof and made it clear that HomeProof was the scheme administrator. It defined "Certificate of Insurance" as "the document issued by the scheme administrator."

Together, the certificate and policy are a statement in writing, issued by an authoritative source, communicated by the Seller to the Buyer, which conveyed the information that the certificate had been issued by Homeproof as scheme administrator, in a form or context which showed that it is intended to be definitive. I do not think that the Contracts require that the certificate of insurance must say that the Warranty Provider itself is providing the insurance cover. The definition of "Warranty Provider" is "any of the new home warranty scheme

administrators

...". It refers to "administrators" not "insurers".

The policy wording was not provided until after the Completion Notice served on 13 May 2023. The Defendant could not, therefore, rely in this claim on that Completion Notice as fixing the completion date. But it did not do so. Rather, it relied on the Completion Notices served on 3 August 2023. On that date, its new solicitors, Kingsley Napley, wrote to CRS with fresh Completion Notices for the two Flats. They said that no reliance would be placed on the notices served by Brechers. They enclosed the certificates of insurance for each flat. They said: "We would refer you to the new build warranty document issued by 'Homeproof' (trading style of Aedis Warranties Ltd.). Please refer to the wording at to the top of page 4 which makes clear that the scheme administrator is Homeproof who placed the insurance with BCR as Managing Agent for the PICC. Homeproof are a scheme administrator referred to in the UK Finance Lenders Handbook (formerly CML Lenders Handbook). It is therefore the case that Homeproof are a Warranty Provider as defined in the Agreement".

By that time, CRS had been sent the policy document. And as I have said, I consider that the provision of copies of the certificates followed by the policy document sufficed to comply with the requirements of clause 5.2.1, even though they were not sent at the same time. Accordingly, despite Mr Chew's skilfully advanced submissions, I consider that the Defendant did provide to the Claimants' solicitors a copy of the Certificate of Insurance before service of the Completion Notices relied on in this claim.

(B) If not, did that invalidate the Completion Notices?

Given my decision on issue (A), this issue does not arise. If it had, I would have determined it in the Claimants' favour. The obvious purpose of requiring the Seller to provide the Buyer with copies of the three documents listed in clause 5.2 before serving the Completion Notice was to enable the likely requirements of the Buyer's lender to be satisfied. That being so, it would make no sense to interpret the Contracts as allowing the Seller to serve a Completion Notice at a time when copies of those documents had not been provided.

It is true that the Contract does not say in so many words that providing copies of the documents is a condition precedent to service of the Completion Notice. But it is not essential for this to be spelled out: see

Disclosure and Barring Service v Tata Consultancy Services Ltd

[2025] EWCA Civ 380

at §26. What is necessary is that it is clear from the contract that one thing cannot occur until another has happened. I consider that the Contracts do make it clear that the Completion Notice cannot be served until the flat is substantially completed and copies of the clause 5.2 documents have been provided to the Buyer.

(C) What were the Defendant's obligations in respect of the Furniture Package?

The parties' cases

The Claimants' pleaded case in the Particulars of Claim is that: "The Furniture Package had not been installed in either of the Flats either at the date of the purported service of the notices to complete or even at the date of the purported rescission of the Contracts and in the premises the Defendant was not ready willing and able to complete the Contracts at either of those dates with the consequence that the purported notice to complete and/or the purported notices of rescission were invalid and of no effect."

In response, the original Defence pleaded "The Furniture Package had in fact been installed in each of the Flats by 14 August 2023."

The Amended Defence, served shortly before the trial, pleaded: "The Furniture Package had in fact been substantially delivered to each of the Flats by 14 August 2023. By reason of its definition and in any event there was no contractual obligation on the Defendant to provide and/or install the Furniture Package at the date of Completion capable of preventing its occurrence. The Flats did not have to be 'dressed' at the time of Completion. Alternatively, any defect in the Furniture Package constitutes a "Snagging Item" within the meaning of the Contracts, and accordingly may be resolved after Completion under the mechanism in clause 5.7."

Although the Particulars of Claim referred to both the date of service of the notice to complete and the date of the purported rescission, in his submissions Mr McGhee focussed exclusively on the former date, 17 August 2023. The only relevance of events after that date was that they shed light on the situation on 17 August 2023.

What was to be included in the Furniture Package?

The Defendant submitted that it was uncertain what was to be included in the Furniture Package. It related only to a "proposed" programme, and the list of its contents was said to be "indicative" and "provisional". Whether a programme was finalised by the time the Flat came to be completed or indeed at all depended on the actions of a third party, the Hotel Operator. The same is true of whether the contents of the Furniture Package had been finalised. In fact, there was no Rental Programme in August or September 2023 - the evidence made it clear that it did not start until 2024. The parties cannot have intended provision of something so uncertain to be a condition of being able to require completion of the sale of the flats.

In exchanges with counsel, I suggested that what the Contracts required was the provision of such furniture and fittings as were required to comply with the requirements of the Hotel Operator's Rental Programme if there was one at the time of completion of the sale, and if not the furniture and fittings listed in Appendix 4 to the Contract, or something very like them. I understood both counsel to agree with that formulation. I think that encapsulates what the Contracts required. And I think that, read in that way, it was sufficiently clear what it was that had to be included in the sale.

Was the Defendant required to install the Furniture Package?

The Claimants' case was that the Furniture Package had to be installed and not merely provided. By "installed" the Claimants mean that the furniture and fittings had to be unpacked, put in the correct place in the flat, and connected to the electrical supply if appropriate.

The Defendant disputed this. I therefore asked Mr McGhee on what basis he contended that the Defendant was liable to install the Furniture Package. He said it was obvious, but said he was not relying on an implied term. I asked him what language in the Contracts should be interpreted as requiring the Defendant to install. In response, he relied on the word "compliant" in the definition of Furniture Package: "the furniture and other chattels to be included in the sale and which are required in order for the Flat to be

compliant

for the purposes of the Rental Programme, an indicative schedule of which is attached at Appendix 4". He said that in order to comply with a rental programme of the kind in contemplation here, furniture and fittings would have to be capable of immediate use by the guests staying in the flat under the Rental Programme.

I agree that, in order for the Hotel Operator to include a flat in a Rental Programme, the Furniture Package would have to be installed by the time guests started staying in the flat. But I do not think it is obvious that the parties intended that the Defendant would be responsible for this installation. They might have intended that the relevant Claimant would do this. Or that the Hotel Operator would take responsibility for this, to ensure that its precise requirements were complied with. Even if that is wrong, there was no Rental Programme in operation in August or September 2023. So the obligation to supply a package "compliant for the purposes of the Rental Programme" could not, at that time, have required the Defendant to install the Furniture Package. I therefore think that the word "compliant" will not bear the weight that Mr McGhee put on it. As to business common sense, the Claimants would obviously have wished that the Defendant take responsibility for installation. The Defendant would equally obviously have wished not to take on that responsibility. I do not think business common sense assists in deciding what was agreed on this issue.

Mr McGhee relied on the fact that the Defendant in fact did try to install the Furniture Package in the flats. Mr De Rougé said he was trying to get everything installed by 1 September 2023, the date on which the notices to complete expired. But this is no assistance in interpreting the Contracts:

see §43 above. A party to a written contract may try and do more than they are required to do under the contract. But if they fail, their attempts cannot be used to enlarge their obligations, unless they create a variation of the contract or an estoppel by convention, which is not suggested here.

(D) To what extent was the Furniture Package present and installed in the Flats on 17 August 2023?

Is the burden of proof relevant here?

The Defendant submitted that the burden of proof on this issue was on the Claimants. The Claimants disagreed, but said it did not matter as there was sufficient evidence to determine the issue regardless of the burden of proof. For reasons I will explain, I think that the burden of proof does matter in this case.

In

Aero Properties Ltd v Citycrest Properties Ltd

[2002] P & CR 21, Blackburne J said at §24 that a purchaser who wishes to contend that, at the time of service of a notice to complete, the seller was not ready to fulfil his outstanding obligations and therefore that the notice was invalid: "... must adduce evidence to show either that the vendor was in breach of some obligation under the contract - for example, a failure to show title or answer a requisition - or that the vendor would not have been able within the time reasonably required to do so to setup the necessary administrative arrangements to enable completion to take place". However, it is apparent that there was no argument in that case about who bore the burden of proof, so I do not regard that statement as providing guidance on the issue.

In

Midill (97PL) Limited v Park Lane/Gomba International

[2008] EWHC 18 (Ch)

at §12 HHJ Mackie QC, sitting as a Judge of the High Court, treated that statement by Blackburne J as establishing that "...the burden of proof lies on the party seeking to establish that the other was not ready able and willing to complete." The purchaser sought to appeal against that decision, but permission was refused by the Court of Appeal. Carnwath LJ said at §§21-22 that he could see some "theoretical force" in the argument that the service of a notice to complete contains an implied assertion by the giver that he is ready to complete, and accordingly when that assertion is put in issue it is for him to prove it. He pointed out that in the

Aero Properties

case there was not any argument on the point as a distinct issue of law. But he went on to say at §§23-24 that permission to appeal should be refused. This was because HHJ Mackie was satisfied on the evidence that the seller was ready to complete, and his reference to the burden of proof was a "makeweight, rather than an essential part of the reasoning". In the light of that, I do not consider that HHJ Mackie QC's decision on this point should carry the persuasive force that would usually attach to a decision of a judge of the High Court.

In

Cantt Pak Ltd v Pak Southern China Property Investment Ltd

[2018] EWHC 2564 (Ch)

at §88-92, Barling J discussed the issue, but reached no conclusion. He said at §92: "Where factual evidence on a specific issue has been called by both sides, few cases are likely to turn on the burden of proof alone."

The burden of proof is only relevant where, exceptionally, the evidence is insufficient to enable the judge to reach such a finding. A judge will decide a case on the burden of proof alone only when driven to it and where no other course is open to them given the unsatisfactory state of the evidence. Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances. The court arrives at its conclusion by considering whether on an overall assessment of the evidence (i.e. on a preponderance of the evidence) the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities: see

Re A (Children) (Care Proceedings: Burden of Proof)

[2018] EWCA Civ 1718

;

[2018] 4 WLR 117

at §58 and

Brendon International Ltd v Water Plus Ltd

[2024] EWCA Civ 220

;

[2024] 1 WLR 2434

at §54.

In the present case, as explained below, there are issues where the evidence is insufficient to enable me to reach a conclusion. In relation to those issues, the burden of proof is relevant, and I must therefore decide on whom the burden lies. As I explain below, I also think that the burden of proof is relevant to whether the Defendant can argue that, even if the Furniture Package was not sufficiently present on 17 August 2023, it was able on that date to ensure that the missing components were provided by 1 September.

Who has the burden of proof here?

In

Brendon International,

Snowden LJ explained at §50 how one determines where the burden of proof lies: "The general rule in civil litigation is that they who assert must prove. So, where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the burden of proving such allegation to the civil standard of proof rests on that party at all times. Accordingly, if, when all the evidence has been adduced, the court does not find the allegation proven on the balance of probabilities, the party upon whom the legal burden rests will lose their claim."

The question, then, is whether the allegation that the Furniture Package was not supplied or installed on 17 August 2023 is an essential part of the Claimants' case or an essential part of the Defendant's case. This depends on the facts that it is necessary for the Claimants to prove in order to *prima facie* establish the cause of action asserted by them, and the facts that it is necessary for the Defendant to prove in order to negative that *prima facie* cause of action.

The Claimants claim specific performance of the Contracts. To establish that cause of action, the Claimants have to prove the existence of a contract for the sale of an interest in land, and circumstances justifying the intervention of a court of equity: see

Snell's Equity

(35th ed) §17-003 and

Hasham v Zenab

[1960] AC 316

. In my view, it is sufficient for the Claimants to prove that the Contracts were entered into and that the Defendant claims that the Contracts were terminated, and to make it clear that the Claimants do not accept that is correct, explaining why. Those are the allegations which form an essential part of the Claimants' case. It is then for the Defendant to prove facts establishing that the contract was validly terminated. Proof of those facts is necessary to negative the Claimants' *prima facie* cause of action. That view is supported by

Phipson on Evidence

(21st ed) §6-08, which gives examples of the incidence of the burden of proof in civil cases. The first is: "In actions in contract, the burdens of proving the existence of the contract, breach and damages are all on the claimant; while the defendant has the onus of facts pleaded in confession and avoidance, e.g. infancy, release, rescission, accord and satisfaction, fraud".

The evidence

Before turning to the detailed evidence on this issue, I will make some observations on the evidence and my approach to it.

The best evidence on this issue would be a video or photos of the Flats on 17 August 2023, showing what was there, or a contemporary document clearly recording that. Unfortunately, there is no such evidence. Nor did either party call a witness who had seen the Flats on that date and could recall what was there. As I have said, Mr De Rougé had no personal knowledge of what was in the Flats on that date. The evidence on this issue therefore comprised emails, text messages and, importantly, a number of documents referred to as "trackers". These were documents produced either by the Defendant or by its suppliers, which listed on a flat by flat basis what items were missing or defective. A substantial amount of time in both Mr De Rougé's evidence and in closing submissions was spent in examining in close detail the information in the trackers.

Mr De Rougé said in cross-examination that the trackers were important documents and he wanted them to be as accurate as possible; there could be the odd mistake but he was doing his best to make them accurate.

On examining the trackers, it is apparent that errors were sometimes made in them. Sometimes there was more than one tracker on the same date, with different information in - in such a case, they cannot both be right. Mr Seitler was able to demonstrate that two trackers sent on 14 August 2023 by Mr de Rougé contained some inconsistent information in relation to flat N1.1, although in some cases this was just because one tracker had more information in than the other.

Accordingly, it is necessary to be cautious in placing too much weight on them. Having said that, bearing in mind the function of the trackers, and what Mr De Rougé said about them, in the absence of evidence that a tracker is incorrect, I think it right to treat it as a reasonable indication of the situation at the date it was prepared. But the information in the trackers needs to be read with such other information as is available.

Mr De Rougé also said that a tracker produced on one date might not tell you what was in the flat at a later date, because sometimes things were moved, or "swapped" into another flat at a later date, to enable the contract relating to that flat to be fulfilled. This is corroborated by an email dated 19 May 2023 from Mr de Rougé saying that the furniture packs for the Flats were missing, and "Can we shift 2 other furniture packs to this apartment and order 2 more?" It is also corroborated by two trackers from 29 August and 4 September 2023, which have a column headed "swap". I therefore accept that evidence. However, the trackers in question indicate that when this

happened, it was recorded. This is what I would expect. As I have said, the trackers recorded what was missing or defective on a flat by flat basis. Unless a written record was made of items moved from one flat to another, the trackers would have become useless. Accordingly, I will only determine that an item was swapped into or out of one of the Flats where that is recorded in a tracker. That accords with Mr Seitler's submission that: "Swapping is documented".

A further point on swapping is this. Mr De Rougé said that in the case of the Flats, he regarded the deadline which he had to hit for installing the Furniture Package as being 1 September. He was aiming to ensure that the Furniture Packages were installed by that date. That being so, it would be surprising if items were swapped out of the Flats between 17 August and 1 September 2023.

In his evidence in cross-examination, Mr De Rougé placed importance on an email dated 17 August 2023 from Mehul Johnson, the Defendant's President of Development. This said: "Also Augustin N4.4 and S 8.1 have FF&E option 1 installed already, in case they don't complete they will fall into Amberly/rental pool/sale lot." Mr De Rougé said that he thought at the time that this meant that Mr Johnson had personally inspected the Flats and was satisfied that the Furniture Packages were installed. This was inconsistent with his witness statement at §10, in which he explained Mr Johnson's role. There, he said that Mehul Johnson: "... would ensure that the flats were ready from a fit out perspective. My team and I would then take over and oversee the furnishings and finishing touches, always with the required timeline in mind." It was also inconsistent with §20 of his statement, as to which see §34 above. Mr Seitler relied on a text exchange on 10 August 2023 as showing that Mr Johnson provided detailed information about the extent of the FF&E and OS&E in the Flats. But as Mr McGhee demonstrated in his reply, in those messages Mr Johnson was asking Adam Cheung to report on the issue - Mr Johnson was receiving not providing the detailed information.

I do not think that the email of 17 August 2023 meant that Mr Johnson had inspected the Flats and was satisfied that the Furniture Packages were installed in them. The context for his email was a request from the general manager of Mandarin Oriental for a "list of all the unit owners who purchased the design/furniture package so far and is it correct that you are offering the three different design options to the owner, correct?" and a draft reply from Mr de Rougé saying that there were 22 flats currently with a furniture pack, all but one of which was with "Theme 1". Mr Johnson's email was commenting on what would happen to the Flats if the Claimants did not complete, not on the extent to which the Furniture Package was installed.

The headboards

Mr de Rougé explained that the headboards for the beds had integrated reading lights and also lights referred to as "curved lighting".

The documents here do not give a clear picture of the position with the headboards. The Gus tracker dated 14 August 2023 has FF&E in orange. Mr de Rougé said he was not sure what that meant: "I don't know exactly if it means check, or if it means something else". The tracker sent on that date to Robena (who supplied the blinds and curtains) said headboards were required. A text

message from Lewis Bacchus of Hospitality Projects (who supplied the furniture) later on 14 August said that he was aiming to deliver the headboards by 16 August. So it is clear that they were not present until then.

But it is unclear if they were delivered on 16 August. The electrical tracker dated 21 August 2023 has "reading light" and "curved lighting" in red. Mr de Rougé said he believed that this meant things hadn't started at all, but he did not remember exactly. It also says "furniture and blinds delay" in relation to N4.4 which suggests something was missing. The red might just refer to the need to wire in the headboards, but "furniture delay" suggests something was missing and the headboard is the most likely candidate. Against that, a Hospitality Projects tracker on 29 August 2023 said in relation to flat S6.4 "swap headboard with N4.4". It reports a missing headboard in flat N8.1 but not in N4.4 or S8.1. This probably means that there was a headboard in N4.4 and that the plan was to move it to S6.4. It seems unlikely that it means the reverse, as the sale of flat S6.4 had completed in July. So the documents are not consistent.

On 6 September 2023, Mr de Rougé emailed Hospitality Projects with "our latest tracker". This said of FF&E for both flats "delivered, not installed" and in relation to S8.1 that there was a missing marble coffee table and bedside tables. There was no mention of missing headboards. So that suggests the headboards were present by that date but not installed. An email on 8 September 2023 from Mr Cheung at Clivedale to Mr de Rougé said that all FF&E were to be installed - again, no suggestion of anything missing.

On the basis of the unsatisfactory and conflicting evidence, I do not think I can reach a conclusion on whether the headboards were present on 17 August. However, I conclude if they were present in the flats, they were not installed.

The other furniture

Mr de Rougé explained that the other items of furniture did not need to be assembled - they were not flat packed - but they were wrapped up in plastic or other material to keep them safe during transit. It is common ground that, apart from the headboards, the furniture was delivered to the Flats by 17 August 2023, wrapped up, but not unpacked then or by 4 September.

The curtains and blinds

Mr de Rougé explained that there were blackout curtains. There were also sheer blinds, which let in light but provided privacy. Both were intended to be operated electrically using a wall mounted control panel made by Lutron. The curtains could be opened and shut manually, but not the blinds. In the case of flat S8.1, there was not enough space to mount the Lutron control panel.

An email on 14 August from Mr de Rougé to Robena attached the Robena tracker and said "Please let us know when pending window treatments expected to be delivered and installed?". The tracker which followed said "curtains and blinds required" for N4.4 and "All pending" for S8.1. The Gus tracker of the same date had window treatment for both flats in red marked "Delayed" and also lighting/electrical in red with "04.08.23 Lutron Panel" for flat N4.4 and "Lutron Panel -

dwg req" for S8.1. By comparison, the entry for flat N6.4 has window treatment in green "complete" but for lighting/electrical is in red with "Lutron panel", indicating that the issue in the Flats was not merely electrical, but rather the absence of the curtains and blinds.

An email from Lee Robinson (the electrician) of the same date says "blinds/curtains not fitted", although in relation to another flat, N1.1, he said "Robena still missing a blind in living room", suggesting that "not fitted" meant that the curtains and blinds in the Flats were present but not hung up. But an electrical tracker on 21 August had window treatments for both Flats in red and the comment "furniture and blinds delay" for N4.4 suggesting the issue was not merely electrical. For S8.1, the comment was only on the electrical issue relating to the Lutron panel.

An email dated 1 September from Mr de Rougé to Robena said: "Please let us know when pending window treatments expected to be delivered and installed?" And a further email dated 8 September from Mr de Rougé to Robena said: "Following our call yesterday, could you please update us as to the exact delivery date for the missing curtains blinds in N4.4/S8.1". A later email on the same date from Mr de Rougé to Lee Robinson said: "My understanding is Lee you have now finished all apartments and are awaiting for the blind connector boxes from Robena who will reply on my other email."

The evidence here is not entirely clear and consistent, but on balance supports the conclusion that on 17 August, the curtains and blinds were missing. The emails on 1 and 8 September are clear. Although it is possible that the curtains and blinds were delivered to the Flats by 17 August and then removed, I think that is unlikely.

Artwork

The documents make it clear that the artwork was missing and the Defendant did not dispute this.

The television in flat N4.4

The Claimants accepted that the televisions in flat S8.1 were installed. They said they needed to be tuned, but accepted that this fell within the definition of Snagging Item and could therefore be disregarded for present purposes. But they contended that the televisions in flat N4.4 were in the flat, but not hung up on the wall.

The Robena tracker on 14 August said: "TV inside apartment, requires to be hung up". An email from Mr de Rougé to Lee Robinson on 8 September at 9 am said: "Could you please send your latest updated tracker. There then followed a tracker which under the heading "ITAV" (information technology and audiovisual) said: "TVs to be installed". However, an email later that day from Mr Cheung headed "latest tracker from site visit - updated 08.09.23" said: "TVs installed - not set up".

From that, I conclude that the TVs were fixed to the wall in flat N4.4 sometime between 14 August and 8 September, but it is not possible to say when. I cannot, therefore, determine whether they were fixed to the wall on 17 August.

The pendant lights

Mr de Rougé said that the base build of the flat included lighting. This was not challenged and the specifications of the Flats in Appendix 2 to the Contracts refer to lighting. The Furniture Package included pendant lights intended to be wired in, and also table lamps intended to be plugged in, clearly in order to supplement the lights included in the base build.

On 11 August, Mr Cheung of Clivedale emailed his colleagues, including Mr de Rougé, with "handover during my annual leave". This said there were Lutron panels which required fixing in a number of flats including the Flats and then: "They still require connecting the Blinds, Headboard Lights, Pendant Lighting in majority of the apartments. Prime focus was to get the Lutron Panels in first so Smartcomm could wire it up in ahead of schedule. Coming in on 14.08.23." So that suggests the pendant lights were present in the Flats, but not connected.

The Gus tracker of 14 August had lighting in orange. The Robena tracker of the same date said "all lighting required". Both those are consistent with the 11 August email. The email from Lee Robinson of the same date said for N4.4 "Lutron panels can be fitted also feature light" which again suggests that the light fittings were present but not fitted. The electrical tracker dated 21 August had "feature lighting" in red which is ambiguous.

I conclude that the pendant lights were present in the Flats on 17 August, but not wired in.

OS&E

The Claimants' case was that the table lamps intended to be plugged in were not present. So far as N4.4 was concerned, the dry bar, bedside tables and bed bases were either missing or defective so that they needed to be swapped. So far as S8.1 is concerned, in addition to the loose lighting, a mirror needed to be fixed to the wall and also there were bedside tables missing. The other elements of the OS&E were still boxed up. The Defendant's case was that there were probably a few things missing but it is not possible to say what they were. As to the lighting, this may or may not have been missing. As the other items, they were FF&E and were present.

The Gus tracker dated 14 August had OS&E in orange with the word "unpack". The Robena tracker of the same date said "all OS&E required". On 17 August, an internal Hospitality Projects email was copied to Clivedale. It asked that the lighting "for both Rental and Hotel" which was in Brook Street be collected as soon as possible. Subsequent emails make it clear that this happened on 25 August. On 29 August, Hospitality Projects emailed saying that all lights were delivered to site on 25 August and "we were able to distribute half the residence lights". Mr Seitler said we could not be sure this included the lights for the Flats, but I think it is more likely that the emails were referring to all the table lamps.

As to the other items, a Hospitality Projects tracker on 29 August said in respect of N4.4 that bedside tables were missing and a dry bar and 2 bed bases needed to be swapped, and in respect of S8.1, that 2 bedside tables needed to be swapped. I think those documents support the Claimants' case.

Rugs

The Claimants' case was that the rugs were not present. The Defendant disagreed.

The Gus tracker dated 14 August had rugs in green, marked "complete". However, the Robena tracker of the same date said "all pending". An email of the same date from Jeff Holtgen, the supplier, to Mr de Rougé said: "For N4.4, S8.1 and N8.1 we never had any rugs on order." And on 8 September he emailed saying: "The rugs for N4.4, N8.1 and S8.1 were ordered on the 22.08 and have a 9 week lead time so we should receive these by early October latest."

The evidence here is conflicting. The emails say that the rugs were not ordered, but the Gus tracker says that they were complete. I do not, therefore, feel able to reach a conclusion on whether there were rugs in the Flats on 17 August.

Summary

In summary, I conclude that on 17 August 2023:

- (1) It is unclear whether the headboards were present, but if they were, they were not installed. As I have held that the burden of proof is on the Defendant, I will treat the headboards as missing.
- (2) The other furniture was in the Flats, wrapped up.
- (3) The curtains and blinds were missing.
- (4) The artwork was missing.
- (5) It is unclear whether the televisions in N4.4 were hung on the wall. As I have held that the burden of proof is on the Defendant, I will treat them as not hung on the wall.
- (6) The pendant lights were present in the Flats on 17 August, but not wired in.
- (7) The table lights were missing. In N4.4, the bedside tables were missing and the dry bar and 2 bed bases were either missing or defective. In S8.1, 2 bedside tables were either missing or defective. The other items of OS&E were in the Flats in boxes.
- (8) It is unclear whether the rugs were present. As the burden of proof is on the Defendant, I will treat them as not being present.

Given my conclusion that the Contracts did not require installation, the only items that matter are the missing or defective items - the headboards, curtains and blinds, artwork, table lights, rugs and, in N4.4, the dry bar and bed bases and in S8.1 the bedside tables.

(E) Did any deficiencies in the installation of the Furniture Package mean that the notices to complete were invalid?

What is required for a notice to complete to be valid?

A contract for the sale of a freehold or leasehold estate in land will provide for a completion date, either set out in the contract or to be fixed by some contractual mechanism. On that completion date, the sale is to complete. The seller must then convey to the buyer the title to the land that they have agreed to convey and, if chattels are included in the sale, transfer possession of those to the buyer. And the buyer must then pay the outstanding part of the price to the seller. If a party is unable or unwilling to do what they have promised to do on the completion date, that is a breach of contract. It entitles the other party to damages for any loss suffered by the breach. But it does not automatically allow the other party to terminate the contract. Termination (often called "rescission") is only permissible if either the contract expressly says that the time limit for completion is strict - "of the essence" - or that is implicit from nature of the subject matter e.g. a sale of a business as a going concern. If the contract says time is of the essence, or that is implicit, then even 10 minutes delay entitles the other party to terminate:

Union Eagle Ltd v Golden Achievement Ltd

[1997] AC 514

. But in most contracts, time is not of the essence for completion unless and until one party serves on the other a notice to complete. That is the case here.

Standard condition 6.8 says:

6.8.1 At any time after the time applicable under condition 6.1.2 on completion date, a party who is ready, able and willing to complete may give the other a notice to complete.

6.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract".

Similar conditions have been included in standard conditions of sale for many decades.

Given the focus in this case on what was required for a notice to complete to be valid, on 4 March 2026, I wrote to the parties saying I might want to ask questions about

Cantt Pak Ltd v Pak Southern China Property Investment Ltd

[2018] EWHC 2564 (Ch)

, which was not in the bundle of authorities.

The

Cantt Pak

case concerned a contract for the sale with vacant possession of some 3.34 acres of land, with various buildings, and an open yard, on which were stored a number of heavy industrial boilers belonging to the seller and some metal shipping containers. A quantity of scrap metal and some building supplies owned by an agent of the seller were also on site. There were various companies in occupation under licences which could be terminated on short notice, and they had all agreed to vacate within a couple of days if asked to do so. The seller's obligation to give vacant possession on completion meant that the seller was obliged to ensure that the occupiers vacated and the boilers, containers and scrap metal were removed by the time completion occurred.

The contractual completion date passed without the buyer being in a position to tender the purchase price. The seller then served notice to complete, at a time when the occupiers, boilers, containers and scrap metal all remained on the site. That remained the position up to the expiry of the notice. Barling J held that the notice to complete was valid, and the seller was entitled to terminate the contract and forfeit the deposit. He held that the validity of the notice to complete had to be determined at the date it was given, which both Mr McGhee and Mr Seitler agreed with, and which is plainly correct.

At §86, Barling J quoted a passage from Blackburne J's judgment in

Aero Properties Ltd v Citycrest Properties Ltd

[2002] P & CR 21 at §24, where Blackburne J said that in order to invalidate a notice to complete, it must be shown that "the vendor would not have been able within the time reasonably required to do so to setup the necessary administrative arrangements to enable completion to take place". Barling J then held at §§93-101 that, on the evidence, the seller could, at the time of serving the notice, have ensured that the occupiers vacated and that the boilers, containers and scrap metal were removed, before the notice expired. He then concluded at §102-104 that the notice to complete was valid.

He did not explain his reasoning, but it seems clear that he treated the seller's obligation to provide vacant possession on completion as one of the "administrative arrangements to enable completion to take place".

If that decision was correct, then the right question in the present case is whether, on 17 August 2023, the Defendant was in a position to ensure that the Furniture Package was provided by 1 September 2023. If the obligation to give vacant possession on completion is treated as an administrative arrangement, so too must be the obligation to provide the Furniture Package. It was for that reason that I asked counsel to address me on the

Cantt Pak

case.

Mr McGhee made two submissions on this point. First, he argued that

Cantt Pak

was wrongly decided. He submitted that providing vacant possession on completion is not an administrative arrangement - it is a substantive obligation. The same is true of the obligation to install the Furniture Package. Second, he argued that in any event it was not open to the Defendant to defend the notices to complete on the ground that it was in a position to install the Furniture Package on 17 August 2023. It had not pleaded that, and he said he would have approached the cross-examination differently if it had been pleaded.

Mr Seitler said that

Cantt Pak

was correctly decided. He accepted that the Defendant had not pleaded that it was, on 17 August 2023, in a position to install the Furniture Package between 17 August and 1 September 2023. He did not make an application to amend the Defence to plead that. But he said that this did not matter because the burden of proof was on the Claimants and therefore they had to plead and prove that the Defendant was not in a position to install the Furniture Package in that period.

As to Mr McGhee's first submission, I should follow Barling J's decision unless I am convinced that it was wrong:

Lornamead Acquisitions Ltd v Kaupthing Bank HF

[2011] EWHC 2611 (Comm)

[2013] 1 B. C. L. C. 73 at §98.

If I were deciding the point without regard to Barling J's decision I would reach a different conclusion. I think that

Aero Properties,

and

Cole v Rose

[1987] 3 All ER 1121, an earlier case referred to in in

Aero Properties,

make an important distinction between matters of substance and matters of conveyancing. The natural meaning of condition 6.8 seems to me to be that the person serving the notice must be ready, at the date of the notice itself, to comply with their substantive obligations under the contract. That also makes commercial sense. A buyer can ascertain relatively easily whether the seller is currently able to comply with their substantive obligations. In the case of vacant possession, the property is either vacant or it is not. In the case of an obligation to provide a

furniture package, the contents are either there, or they are not. But if Barling J is right, the buyer has to ascertain not whether the seller is ready and able to carry out their substantive obligations, but whether they will be so by the end of the 10 working day period following service of the notice. This may be difficult or impossible. The buyer may not know, for example, whether the seller will be able to ensure that people in occupation will vacate by the completion date.

But having said that, I can see strong attractions of Barling J's interpretation in a case like

Cantt Pak

, where obtaining vacant possession clearing a property of people and things where it seems very unlikely that the buyer is going to complete. So although I have doubts about the correctness of the decision, I am not convinced that it is wrong.

That being so, it is necessary to determine the pleading point. I think that, as Mr Seitler submitted, it turns on the burden of proof. If I am right on the burden of proof, it was an essential element of the Defendant's case that on 17 August 2023 they were in a position where they were ready, able and willing to supply the Furniture Package by 1 September. Therefore if the Defendant wanted to rely on that fact, they should have pleaded it. In that case, the Claimants would have understood that there was an issue of fact not only as to the position on 17 August, but also as to whether, on that date, the Defendant was in a position where it was able to ensure that the Furniture Package was provided by 1 September. They would, in that case, have known that they had to cross-examine on whether it was, indeed, the case on 17 August that the Defendant was in a position to ensure that the Furniture Package was delivered by 1 September. It is true that Mr de Rougé's statement said at §20: "...we were easily in a position to deliver and install the furniture packs earlier had proof of funds been provided". But given the Defendant's pleaded case, that was no more than a passing comment and it was understandable that Mr McGhee did not cross-examine on it. I think, therefore, that the Claimants would be unfairly prejudiced if the Defendant was allowed to rely on this point.

I should say that if I am wrong on the burden of proof, then it was for the Claimants to have pleaded and proved that the Defendants were not, on 17 August 2023, ready, able and willing to supply the Furniture Package by 1 September. In that case, I think that the Defendant could have relied on Mr de Rougé's statement that the Defendant was easily in a position to deliver and install the Furniture Packs.

Was the Defendant entitled to serve notice to complete even if there were deficiencies in the Furniture Package?

The Defendant argued that failure to provide the Furniture Package, or some part of it, did not prevent service of a notice to complete. "Completion" was defined in the Contracts as "completion of the Lease" with no reference to the Furniture Package. Clause 2 said that "the Seller will sell, and the Buyer will buy, the Flat" with no mention of the Furniture Package. Clause 3.1 said "The price for the Flat is the Price" again with no mention of the Furniture Package. Clause 15 said that on completion, "the Seller will grant and the Buyer will accept the grant of the Lease on the

Completion Date and (if required) the Buyer shall enter into the Hotel Operator Disclaimer". There was again no reference to the Furniture Package.

The Defendant accepted that meaning had to be given to clause 30: "The Furniture Package is included in the sale". It said there were two ways of doing this:

- (a) First, clause 30 could be construed as a description of the Flat being sold, rather than a free-standing contractual obligation to provide an as yet unspecified set of chattels. It functions as a description or representation that the Flat being sold will be compliant for the purposes of any rental programme put in place. A failure to provide the Furniture Package would entitle the Buyer to damages, but would not be relevant to the service of notice to complete. The Defendant relied on

Bechal v Kitsford Holdings Ltd

[1989] 1 WLR 105.

- (b) Second, the Furniture Package could be regarded as something to be addressed under "Snagging Items", defined as "minor outstanding items or defects in the Flat or the fixtures fittings and contents thereof which do not impact on the beneficial use and enjoyment thereof". The Defendant argued that this is apt to describe the Furniture Package: it contains contents, the fact (if it be so) that the Furniture Package is still being delivered and laid out at the time of completion is (in the scheme of a contract to build the Flats themselves and grant a 999 year lease of them) properly described as "minor", and the lack of furniture does not impact on the beneficial use and enjoyment of the Flat.

Was the Furniture Package part of the description of the Flat?

On the first submission, I will start with the language of the Contract. The natural meaning of clause 30 is that the Furniture Package is included in the sale provided for by the preceding clauses of the Contract. The fact that the Furniture Package is not referred to in clauses 2, 3 or 15 is immaterial, because the effect of clause 30 is to include the Furniture Package in the sale referred to in those clauses.

On the natural reading of the language used in the Contracts, the Furniture Package did not form part of the description of the Flat. Rather, it comprised chattels that the Seller was obliged to provide to the Buyer on completion of the sale. Standard Condition 9 provides:

"9.1 The following provisions apply to any contents which are included in the contract, whether or not a separate price is to be paid for them.

9.2 The contract takes effect as a contract for sale of goods.

9.3 The buyer takes the contents in the physical state they are in at the date of the contract.

9.4 Ownership of the contents passes to the buyer on actual completion".

Condition 9.3 obviously does not apply, as the Furniture Package did not exist at the date of the Contracts. But the remainder of condition 9 does apply. The Contract is a contract for the grant of an estate in land - the Lease - and also a contract for the sale of goods - the Furniture Package. The Price is payable for both together. And on Completion, the Seller must grant the Lease, conferring on the Buyer a right of exclusive possession of the Flat, and must also give possession to the Buyer of the Furniture Package.

Can the Defendant rely on *Bechal v Kitsford Holdings*?

I will start with the decision of the Court of Appeal in

Johns v Deacon

(unreported decision 23 January 1985). A transcript is available from LexisNexis.

In that case

,

the contract was for the sale of a 26 acre farm. The contract said: "All fixtures and fittings in the nature of tenants fixtures and fittings described in the Agents Particulars of Sale are included in the sale". One item listed in the agents' particulars of sale was a dismountable wooden stable block with 6 loose boxes standing on a concrete foundation, but which could be dismantled and taken away. After contracts were exchanged, the buyers discovered that the stable block had been dismantled and removed from the farm. The buyers asked for it to be returned, but the seller refused. The buyers then offered to complete with a retention from the price until the outcome of the dispute relating to the stable block. The seller refused and served notice to complete. The buyers remained willing to complete on the basis of a retention, but the seller continued to refuse that offer, and on the expiry of the notice said that the deposit was forfeited. The buyers then claimed recovery of the deposit and won.

The seller argued that the notice to complete was valid, but that argument was rejected by *Browne-Wilkinson LJ*, with whom *Griffiths* and *O'Connor LJ* agreed:

"Under the general conditions of sale to which the contract was subject, a notice to complete can only be served if the party giving the notice is, at the time the notice is sent, ready able and willing to complete, or is not so ready, able and willing by reason of the default or omission of the other party to the contract. There is no question here of any fault of the purchasers' preventing the vendor from completing this contract. The question is: Could the vendor serve a valid notice to complete on 13th April at a time when he was unable to transfer the stable block which he had contracted to sell? On the face of it, of course, he was not. He could not complete the contract he had entered into. On the other hand, reliance is placed on general condition No 13, which relates to misdescriptions and compensation. Broadly stated, that condition provides that, if there is a material misdescription, it shall not annul the sale, nor entitle the purchaser to be discharged from his purchase, but shall entitle the purchaser or the vendor, as the case may require, to compensation. It then has a provision for arbitration as to the amount of compensation in the

event of dispute. General condition 13(1) refers to the payment or allowance of compensation under the next paragraph.

Mr Buxton submitted that this was a misdescription of the kind which did not cause the sale to be annulled but gave rise to a right to compensation. He submitted that in the circumstances the vendor was entitled to serve a notice to complete under general condition 19 requiring the whole of the purchase money to be paid over by the purchasers notwithstanding the fact that on any footing there had to be compensation for the failure to make title to the stable block. I find that an extraordinary suggestion. In my judgment it is fallacious for this reason. A valid notice to complete could not be served under general condition 19, since the vendor at that stage was not able and willing to complete. He could not complete on the terms that he was to receive the full £100,000, because, by reason of the misdescription provisions, that no longer was the full purchase price payable. The purchase price payable was £100,000 less the compensation. Unless and until that reduction in the purchase price had been agreed, he could neither make title to the whole of the property contracted to be sold nor make title to the lesser amount, being the property less the stable block. Accordingly, he was in no position to say at that stage that he was able and willing to complete either the literal terms of the contract or the contract as affected by general condition 13. It follows that in my judgment his notice to complete was a bad notice and that the purported attempt to rescind on failure to comply with the notice to complete was itself a repudiation of the contract by the vendor."

That reasoning seems to me to apply here. Mr Seitler submitted that the stable block in

Johns

was a fixture rather than a chattel and so was different to the Furniture Package. I do not think it is clear whether the stable block was a fixture or a chattel, but I do not think it matters. It was part of what the seller agreed to sell. In my view, it follows from the decision in

Johns

that if the Defendant was not ready on 17 August to give possession to the Claimants of the Furniture Package, then the Defendant was unable to transfer what it had contracted to sell and could not complete the contract it had entered into.

The Defendant might, perhaps, have been able to rely on standard condition 7.1.1. As amended by the Contracts, that says that if any plan or statement in the contract is misleading or inaccurate due to an error or omission, then if there is a material difference between the description or value of the property, or of any of the contents included in the contract, as represented and as it is, the buyer is entitled to damages, and such an error or omission only entitles the buyer to rescind the contract if it results from fraud or recklessness, or where the buyer would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect.

It is unclear whether that condition applies where the seller promises to sell chattels that are not yet in existence and does not supply them. But even if it does, then the reasoning in

Johns

means that the seller is not able to serve a notice to complete until the amount of compensation has been agreed or - at the very least - the seller has offered a sufficient reduction in the price to allow for the compensation properly due.

McGrath v Shah

(1989) 57 P. & C. R. 452 concerned a contract for the sale of a house. Completion did not take place on the contractual completion date, and the sellers served notice to complete under National Condition 22 and then, when the buyers did not complete, terminated the contract and forfeited the deposit. The buyers claimed that the sellers were not entitled to terminate for three reasons. First, they said that the sellers had made misrepresentations prior to the making of the contract and therefore were not entitled to serve a notice to complete. The judge, John Chadwick QC sitting as a Deputy High Court Judge, rejected that argument. He said at pp.475-8 that where a purchaser has the right to rescind a contract for misrepresentation, unless and until the purchaser does rescind, the contract remains alive: "... if the purchaser chooses not to rescind the contract, the contract remains in force with all its incidents". The seller can, therefore, serve notice to complete.

Second, the buyers said that certain representations had become terms of the contract and had been breached. Mr Chadwick held that they had not become terms of the contract.

Third, the buyers alleged breaches of terms that undoubtedly were included in the contract as to works that the sellers agreed to do between exchange and completion. Mr Chadwick held on the facts that the sellers were not in breach of those terms. One alleged breach related to net curtains which the sellers had agreed to fit. Net curtains had been fitted to all the windows other than those in the attic and those at the rear. Mr Chadwick held that the sellers were only obliged to fit net curtains at those windows which required them for the purpose of preserving privacy to the occupiers of the rooms, and that that would not extend to the attic windows, or to the patio doors. He then said:

"But if I were wrong in that, I would take the view that the failure to provide net curtains to attic windows and patio doors in a property selling for £345,000 was a matter of such little materiality that it must be regarded as

de minimis

in the context of a provision in Condition 22 that the vendor be ready and willing to fulfil his obligations. In construing Condition 22 it seems to me permissible to look at the provisions of Condition 17(1) in order to form a view as to what matters would give rise to a liability to pay compensation, and to bear in mind that one of the reasons why a vendor cannot serve a notice

under Condition 22(1) in a case where he has not fulfilled his obligations, and cannot do so, is that if his failure to fulfil his obligations is likely to give rise to a right in the purchaser to compensation, then the amount of that compensation will have to be agreed before completion can be forced upon the purchaser."

So clearly he took the same view as the Court of Appeal in

Johns

- if the seller has agreed to provide items on completion then any material failure to do so, for which the buyer would be entitled to compensation, will mean that no notice to complete can be served unless the amount of compensation has been agreed.

Bechal v Kitsford Holdings

was a case about a sale by auction. The contract simply described the property as "Lot 70". In the particulars, Lot 70 was said to be a shop investment; they gave the address of the property - 225 East India Dock Road, Poplar, London E14 - and the ground floor area as being 385 square feet, but beyond that were silent. After notice to complete was served by the seller, the buyer claimed that the property was only 240 square feet rather than the 385 square feet stated in the particulars of sale. The seller nonetheless said they were terminating the contract and forfeiting the deposit. The seller then applied on motion for an order vacating the caution registered by the buyer to protect the contract. The motion was argued on the assumption that there was a material error in the area of the property stated in the conditions of sale.

What appears to have been an extempore judgment was delivered by Sir Nicholas Browne-Wilkinson VC, as he had by then become. He held that the seller was entitled to serve notice to complete. He referred to

McGrath v Shah,

but only on the first point decided in that case - the misrepresentation issue. He said:

"In that case it was said by the purchasers that the vendors had made a misrepresentation as to the area of part of the property, and on that ground it was said that the vendors could not serve a valid notice under condition 22. The judge rejected that submission and rejected in particular a submission that whenever the circumstances were such that a purchaser might be entitled to rescind the vendor was not entitled to serve a notice to complete. The judge therefore held that there was a valid notice to complete under condition 22. The question was, "Could the vendors carry out their contract?" The answer was, "Yes, they could." They could sell the property which they had contracted to sell and they could make title to it. What they might have been required to do was to pay damages for misrepresentation.

In the present case it seems to me one must ask the same question. On the facts of this case, on 30 November 1987 when they served the notice to complete, could the vendors fulfil the contract they had entered into? In my judgment they plainly could. The area sold is merely part of the

description of the property and not a matter which would have featured in any way in the conveyance. To have performed that contract they would have had to tender a conveyance of all the property at 225, East India Dock Road, and if they did tender that, that would be a performance of their contract. If, contrary to the facts, somebody had raised the question that there was a misdescription of its area, they might have been required to accept an abatement in the purchase price referable to the reduction in the area stated. But in any event they were able and willing to fulfil that contract."

The decision in

McGrath

on the misrepresentation issue could not have been relevant in

Bechal

unless Sir Nicholas Browne-Wilkinson VC considered that the statement as to the size of the property was a representation rather than a term of the contract. If so, then

McGrath

was indeed directly on point. In that case, what he must have meant by "an abatement in the purchase price" was a reduction in the purchase price to reflect the buyer's right in equity to set off against the purchase price a reasonable pre-estimate of the buyer's right to damages for misrepresentation.

If, however, the statement as to the size of the property was a term of the contract, then the decision in

McGrath

on the misrepresentation issue would have been irrelevant. In that case, I think that the decision in

Bechal

was inconsistent both with

Johns

and with what Mr Chadwick said in

McGrath

about the need to agree compensation where the seller could not convey what he had promised to convey. Certainly one would expect that Sir Nicholas would have discussed

Johns

and what Mr Chadwick had said in

McGrath

about a situation where a seller was not able to convey what they had promised to sell.

Accordingly, I conclude that

Bechal

is to be understood as a case about the effect of a misrepresentation on a notice to complete, and is not relevant to this claim. But if that is wrong, and it is to be understood as deciding that a seller can serve a notice to complete when he cannot convey the physical property he has promised to convey, I regard it as inconsistent with

Johns,

which is a decision of the Court of Appeal and binding on me.

In

Clowes Developments (UK) Ltd v Mulchinock

[1988] 1 WLR 42 at 49-50, Carnwath J said that he did not see the decisions as necessarily inconsistent. This was because

Johns v Deacon

was a case where the seller was unable to sell a specific part of the property he had contracted to sell, whereas in

Bechal

the seller could sell what he had contracted to sell, albeit that its quality was not as described in the contract.

With great respect to an eminent judge, I find that a difficult distinction to understand. If a seller promises to convey the freehold title (a right of exclusive possession without limit of time) to a property with an area of 400 square metres but can only convey the freehold title to a property with an area of 300 square metres then the seller cannot convey the title they have promised to convey. That is so just as much as if the seller promises to convey title to a property with a stable block and can only convey title to a property without a stable block.

In

Donnelly v Weybridge Construction Ltd

[2006] EWHC 2678

, Ramsay J held that the sellers in that case were not entitled to serve notice to complete. That was because they could not grant leases of substantially what they had promised to due to the flooring material in the flats being different to that provided for in the contract. It was, therefore, not necessary for him to resolve the potential tension between

Johns

and

Bechal.

However, he said, obiter at §178: "... where there is a misdescription which would reduce the purchase price, the claim for an abatement does affect the ability of a vendor to be ready and willing to complete. It therefore impeaches the notice to complete." I respectfully agree with that.

Further, even if I had agreed with Carnwath J's suggestion for how

Johns

and

Bechal

might be reconciled, it would not assist the Defendant here. The failure to provide parts of the Furniture Package was not an error in the quality of what the Defendant promised to provide on completion, but an omission to provide part of the physical property which the Defendant promised to provide.

Accordingly, I do not think that the decision in

Bechal

assists the Defendant.

Is a failure to provide the Furniture Package a Snagging Item?

Clause 5 makes it clear that the Buyer cannot refuse to complete because of the presence of Snagging Items. But the definition of Snagging Items does not refer simply to outstanding items or defects in the Flat. It includes outstanding items or defects in "the fixtures fittings and contents thereof". Given that the Furniture Package is included in the sale, I think you must apply the definition of Snagging Items to the Flat and the Furniture Package together. You have to look at the Flat and its fixtures, fittings and contents, including the Furniture Package as a whole, and determine whether any outstanding items or defects constitute Snagging Items. If there is no Furniture Package at all, then it cannot be said that there are only "minor outstanding items or defects in the Flat or the fixtures fittings and contents thereof" because all of the fittings and contents included in the sale will be missing.

On my interpretation of the Contracts it was incumbent on the Defendant to ensure that by the time the completion date arrived, the Furniture Package was present in the Flat. I do not regard that as a result which is contrary to business common sense. The Defendant had agreed to include the Furniture Package in the sale. The Defendant was in control of fixing the completion date. That being so, I think it is reasonable that the Defendant had to ensure that the Furniture Package was present in the Flat by the completion date.

Were the failures to provide the Furniture Package within the definition of Snagging Item?

That does not mean, of course, that any failure to provide part of the Furniture Package by the completion date means that the Seller cannot serve notice to complete. If the defects or omissions are minor outstanding items or defects in the Furniture Package which do not impact on the beneficial use and enjoyment of the Flat as a furnished apartment, then they are Snagging Items, and notice to complete can be served.

Mr Seitler argued that, in deciding whether a defect or omission impacted on the beneficial use and enjoyment of the Flats, one had to look at Mr Aadinatha's position. He said in his witness statement that he did not want to live in the Flats, and as the Rental Programme was not in operation, any defects or omissions made no difference to him.

I disagree with that. I think the test is objective - would a reasonable buyer be concerned that the defect or omission would materially impact on the enjoyment of the Flats as furnished apartments by people living or staying in them, bearing in mind the very high price being paid and the consequential expectation that the Flats would be furnished to a high standard.

I think that the missing artwork, rugs, table lamps, bedside tables and dry bar were minor omissions which did not impact on the beneficial use and enjoyment of the Flat as a furnished apartment. You could live or stay in the Flat satisfactorily without those things, even bearing in mind the expectation of a high standard of furnishing commensurate with the very high price.

But the missing curtains and blinds seem to me to fail the test. Without curtains to keep out the light it would be difficult to sleep, and without either curtains or blinds there would be a lack of privacy. I think the same is true of the missing headboards and bed bases. I do not think that having parts of the beds missing or defective in very expensive flats of this kind can be said to constitute a minor omission, and I think that their absence would materially impact on the enjoyment of the Flats by a reasonable person.

(F) In the light of my decision on the above issues, was Eros entitled to terminate the Contracts on 4 September 2023?

I therefore conclude that the Defendant was not ready, able and willing to complete the sale on 17 August 2023 when the notices to complete were served, and they were of no effect. The Defendant was not, therefore, entitled to terminate the Contracts on 4 September 2023 and they remain in existence.

(G) If the Contracts were not terminated then, are the Claimants entitled to an order for the specific performance of the Contracts?

The Defendant said that the party claiming specific performance had the burden of pleading and proving that they were ready and willing to complete. In support, it relied on a passage in

Snell's Equity

(35th ed). That appears in a section headed "Other reasons for refusing specific performance" beginning at §17-026.

That says: "In addition to the terms of the contract, there are a number of other factors which may defeat a claim for specific performance. Such factors may concern the circumstances in which the contract was made, the enforceability of other contractual obligations, the conduct of the claimant or the consequences of performance". Then at §17-038 is the heading "Default by the claimant" and then the passage relied on by the Defendant: "A claimant who seeks to enforce a contract must show (i) that he has performed, or has been ready and willing to perform, all terms and conditions (apart from trivial ones) then to be performed by him; (ii) that he is ready and willing to perform all terms and conditions thereafter to be performed by him; and (iii) that he has not acted in contravention of the essential terms of the contract."

It seems to me that the editors there are treating the matters referred to in §17-038 as points to be realised by a defendant to seek to defeat a specific performance claim. In my view, if a claimant claims specific performance, that necessarily carries with it the assertion that the claimant is entitled to that remedy and therefore that the claimant is ready and willing to complete. It is then for the defendant to raise as a defence that the claimant is not ready and willing to complete. In the present case, the Defendant has not pleaded that, and therefore there was no need for the Claimants to call evidence on that issue.

I will not make an order for specific performance on the handing down of this judgment. The parties agreed that I should adjourn all consequential matters, and then subsequently resolve any matters that the parties cannot agree in order to make an appropriate order. It was also agreed that I should extend until 21 days after the making of that order the time for any applications for permission to appeal against my decisions in relation to Mr Aadinatha's witness statement, and a refusal to allow the Defendant to rely on some very late disclosure. I will so order.

The remaining issues in the claim do not arise, given my decision so far. However, they were fully argued, and involve making an evaluation of the evidence. That being so, I think I should give my decision on them.

(H) Are the Stage Payments deposits or part payments?

A deposit is a payment made by the buyer to the seller as an "earnest" or guarantee for the performance of the contract. If the sale completes, the deposit is contractually treated as part payment of the purchase price. If the sale does not complete due to the seller's breach of contract, the seller is contractually obliged to return the deposit to the buyer. If the sale does not complete due to the buyer's breach of contract, the deposit is forfeited by the seller: see

Howe v Smith

(1884) 27 Ch D 89

and

Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd

[1993] AC 573, at 578.

Mr McCreath, who argued this issue for the Defendant, submitted that the two Stage Payments were not deposits but part payments of the purchase price, which became the absolute property of the Defendant, with no contractual obligation to return them to the Claimants in any circumstances. If that is right, it would mean that if the Contracts were terminated because of the Seller's breach, the Seller could keep the Stage Payments, although in that case they would be liable to the Buyer for damages in respect of any loss suffered.

Clause 27 provides that the Deposit and the Stage Payments are to be returned to the Buyer if no Completion Notice is served by the Seller by the Long Stop Date. But on Mr McCreath's argument, if the Seller serves a Completion Notice and then fails to complete, in breach of contract, the Seller can keep the Stage Payments. I think that makes no commercial sense, and is a result that that could only be produced by clear language.

Mr McCreath's first point was that the Deposit was called a "deposit" and the Stage Payments were called the "First Stage Payment" and the "Second Stage Payment". He said that contractual labels are seldom arbitrary. That is true - see per Lord Hoffmann in

Chartbrook v Persimmon Homes

[2009] UKHL 38

;

[2009] 1 AC 1101

at §17. But as Lord Hoffmann went on to say, contractual labels are usually chosen as a distillation of the meaning or purpose intended to be stated more precisely in the definition, and in such cases the language may help to elucidate ambiguities. I do not think that the use of the label "Stage Payment" is sufficient to make it clear that the Seller was intended to keep the payments if the Contract was terminated for its own breach. Rather, I think they convey the message that they were payments due as the progress of the Contract reached a particular stage.

Second, Mr McCreath relied on the fact that clause 4.3 provides for the Stage Payments to be paid to the Seller, not the Seller's solicitors, unlike the Deposit. There is nothing in that point. Clause 4.4 says that the payments have to be made to the Seller's solicitors' client account. And clause 4.5 says that they are to be held by the Seller's solicitors as stakeholder pending Completion, or determination of the Contracts, or release pursuant to clause 4.9. Clause 4.9 treated the Deposit and Stage Payments in the same way - they could be released to the Seller if there was "deposit protection cover in the event of the insolvency of the Seller or fraud by the Seller". If the Stage Payments were not deposits, it is difficult to see how they could be covered by deposit protection cover.

Third, he pointed out that clause 17 of the Contracts amended Standard Condition 7.4.2(a)(i) to provide that if the contract went off through the Buyer's default, the Seller could forfeit both the Deposit and the Stage Payments. But they did not amend Standard Condition 7.5.2(a) to provide that if the contract went off through the Seller's default, the Buyer could recover the Deposit and the Stage Payments.

However, nor did the Contract amend the condition 7.5.2(a) to replace the expression "deposit", meaning any sum paid as a deposit, with "Deposit", meaning the 10% payable on entering into the Contract. I think that the failure to amend clause 7.5.2(a) either way tells one nothing about the parties' intentions.

Accordingly, although Mr McCreath advanced his submissions on this point skilfully, I cannot accept them. I conclude that the Stage Payments were deposits, which under the Contracts the Defendant was obliged to return to the Buyer if the Contract was terminated due to the Seller's breach, but which the Defendant could forfeit if the Contract was terminated due to the Claimants' breach.

(I) Was the provision for the forfeiture of the Deposit and Stage Payments a penalty?

The rule against penalties

A contractual provision which applies where one party breaches a contract, providing for that party to pay money, or depriving them of the right to recover money which would otherwise be payable to them, may be characterised as a penalty. If so, it will not be enforceable save to the extent of the real loss suffered by the innocent party. The test to be applied was determined by the Supreme Court in

Cavendish Square Holding BV v Makdessi

[2015] UKSC 67

;

[2016] AC 1172

. It has been discussed in later cases, which were reviewed by Asplin LJ in

Houssein v London Credit Ltd

[2024] EWCA Civ 721

. For present purposes, the key principles are as follows.

First, the test is whether the impugned provision is a secondary obligation which arises on breach of a primary obligation, and which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation, so as to be extravagant, exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. The test is applied at the date the contract is entered into.

Second, in applying that test, one must first decide if the stipulation is in substance a secondary obligation engaged upon breach of a primary contractual obligation. If so, one must next identify the extent and nature of the legitimate interest of the promisee in having the primary obligation performed. Then one must determine whether or not, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or in its effect, because it is out of all proportion to the legitimate interest.

Third, the penalty rule is an interference with freedom of contract which undermines the certainty that the parties are entitled to expect of the law. Therefore the court should not be astute to descry a penalty clause. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption is that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.

Deposits and the rule against penalties

In the

Dojap

case, the Privy Council held that a provision in a contract for the sale of land in Jamaica for the forfeiture of a 25% deposit was a penalty. The judgment was delivered by Lord Browne-Wilkinson. He explained that the payment of a deposit as "earnest money", customarily 10% of the purchase price, was an exception to the rules on penalties. The exception was anomalous but settled, and equity has no power to relieve against the forfeiture of a deposit. But the special treatment afforded to deposits was capable of being abused if the parties to a contract, by attaching the label "deposit" to any penalty, could escape the general rule which renders penalties unenforceable. "It is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money". The trial judge had been wrong to test the question of reasonableness by reference to the standard practice of banks selling land at auction in Jamaica. "In order to be reasonable a true deposit must be objectively operating as 'earnest money' and not as a penalty. To allow the test of reasonableness to depend upon the practice of one class of vendor, which exercises considerable financial muscle, would be to allow them to evade the law against penalties by adopting practices of their

own". Rather, the correct approach was to start from the position that, without logic but by long continued usage both in the United Kingdom and formerly in Jamaica, the customary deposit has been 10%. A vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit. There were no such circumstances in the

Dojap

case.

Does the third

Cavendish

principle referred to in §179 above - the importance of respecting a bargain reached between parties of equal bargaining power - apply when deciding whether a deposit of more than 10% is penal? Mr McCreath, who argued this issue for the Defendant, said it did. Mr McGhee said it did not.

Lords Neuberger and Sumption said in their joint judgment in

Cavendish

at §16: "... the fact that a sum is paid over by one party to the other party as a deposit, in the sense of some sort of surety for the first party's contractual performance, does not prevent the sum being a penalty, if the second party in due course forfeits the deposit in accordance with the contractual terms, following the first party's breach of contract". On that basis, it would seem that the principles stated in their judgment should apply when determining whether the right to forfeit a deposit is a penalty, including the importance of respecting a bargain between parties of equal bargaining power.

Lord Mance said it was uncertain whether the penalty doctrine applied to deposits: §170. Therefore his judgment does not assist on this point.

Lord Hodge discussed deposits at §§234-238, in a section of his judgment headed "the clauses to which the rule against penalties applies". At §234, he said that the penalties rule did not apply to a reasonable deposit, because it "provides the vendor with some assurance of performance while the property is taken off the market during the period from the date of the contract to the completion of performance ... its purpose not being related to any loss that the vendor may have suffered and that he may seek to recover in damages". At §235 he discussed

Dojap

and said: "In effect, the Board applied a test of commercial justification akin to the test which Colman J later applied in the

Lordsvale Finance plc

case [1996] QB 752." At §236, he referred to

Polyset Ltd v Panhandat Ltd

(2002) 5 HKCFAR 234, where the Hong Kong Court of Final Appeal held that: "Where the deposit exceeded the conventional amount, the court would permit forfeiture only if the party seeking to forfeit could show that exceptional circumstances justified the higher amount". He said the Hong Kong court's conclusions there were wholly consistent with Lord Browne-Wilkinson's approach in

Dojap.

At §238, he concluded that: "... (a) a deposit which is not reasonable as earnest money may be challenged as a penalty and (b) where the stipulated deposit exceeds the percentage set by long-established practice the vendor must show special circumstances to justify that deposit if it is not to be treated as an unenforceable penalty."

Therefore I think that he, too, considered that the question of whether a deposit is a penalty should be evaluated applying the principles that apply generally to the rule against penalties.

In my view, the correct approach in the light of the judgments discussed above is as follows. A seller must show special circumstances to justify a deposit of more than 10% of the purchase price. Otherwise, the right to forfeit the deposit will be a penalty. In deciding if there are such special circumstances, the question is whether forfeiture of more than 10% of the purchase price is exorbitant or unconscionable because it is out of all proportion to the seller's legitimate interest in having the sale completed. In making that assessment, the fact that the parties were of equal bargaining power is an important consideration, but not decisive.

The position here

Mr McGhee argued that the Deposit and the Stage Payments had to be treated as a single payment. I reject that argument. They are different payments made at different times and there is no justification for treating them as a single payment.

The right to forfeit the 10% Deposit is plainly not a penalty: see

Dojap

. As to the Stage Payments, there are obviously good reasons why a seller of a flat off-plan will want to receive payments of more than 10% of the purchase price in advance of the completion date. If the buyer defaults and the contract is terminated, the seller will be able to apply the payments to meet any losses suffered as a result. They provide security to ensure that either the buyer will complete or, if they do not, the seller will be able to recoup their losses. That does not mean that it is acceptable for the contract to provide for the seller to forfeit those payments if the contract is terminated. The issue with a deposit is that it is a one-way bet in favour of the seller. If the seller's losses are greater than the deposit, they can recover the additional amount by way of damages. But if the seller does not suffer any loss, or the losses are lower than the amount of the deposit, the seller gets to keep the deposit and so ends up with more money than if the contract

had been completed.

Mr McCreath submitted that Mr Thukral's evidence supported the Defendant's case. In his witness statement at §17, he said that the Contracts provided for a deposit, two stage payments and then the remaining balance when the sales completed. He then said: "However, it is an industry standard practice to structure sales in this way to mitigate risk." I accept that evidence, which was not challenged. Mr McGhee said it was opinion evidence given by someone with no expertise to which no weight should be given. I disagree. I think it is evidence of fact. But it does not matter, as I do not think it gives any support to the Defendant's case. Mr Thukral was only referring to the practice of requiring stage payments in a contract of this kind. He did not say it was industry standard practice for the seller to keep such payments on termination of the contract regardless of whether they had suffered any loss. That raises quite different issues.

Mr McCreath then submitted that these were contracts with very different characteristics compared to the sale of an existing property where the custom of paying a 10% deposit existed. In an ordinary "vanilla" sale, the seller's risk is minimal. There is no need to spend money between exchange of contracts and completion. The period between exchange and completion is usually fairly short, and a major change in the market is unlikely. But here, the Defendant had to build the flats and borrow money to do so. High interest rates applied. The sale proceeds from the flats would go to reduce the Defendant's borrowings so it had a strong interest in ensuring receipt of the purchase price. The flats were unusual and would only appeal to a particular type of purchaser so there was no guarantee as to how quickly they could be sold. There was a long gap between exchange and completion, during which the market could change substantially. The buyers were offshore companies with no assets and there would be no prospect of recovering damages from them if the sale went off. These risks were logically related and could compound. The structure of the payments reflected the increase in risks as more debt was incurred as the development proceeded. The closer to completion one got, the more the Defendant had a legitimate interest in the sale completing.

Mr McGhee did not dispute the factual existence of those factors. But he disputed they justified a deposit of 30% in the absence of evidence explaining and justifying the selection of that figure rather than 10% or 11% or 20% or 50% or some other percentage.

In my view, those factors did justify the Defendant in taking more than the normal 10% deposit. The risks taken by the Defendant were substantially greater than in a contract for the sale of an existing property, and justified an additional amount by way of earnest or guarantee that the Claimants would complete. The Defendant had a legitimate interest in ensuring that completion took place that went well beyond that of a seller of an existing property.

As to Mr McGhee's submission that there was nothing to explain or justify the selection of 30% rather than some other percentage, I think the answer is that the parties agreed on 30%. As I have explained, I think it is relevant that the terms of the Contract were agreed between two sophisticated parties on a level playing field.

Accordingly, I conclude that the provision for the forfeiture of the Stage Payments was not a penalty.

(J) Should I order the repayment of the Deposit and/or Stage Payments under s.49(2) of the Law of Property Act 1925 or by granting relief against forfeiture?

Relief from forfeiture of a deposit

In

Dojap

at p.579A

,

Lord Browne-Wilkinson said that equity had no power to relieve against the forfeiture of a deposit. Mr McGhee argued that this was inconsistent with what Lord Hodge said in

Cavendish

at §227. I can see no such inconsistency and consider I should follow

Dojap

on this point.

However, there is statutory jurisdiction to relieve against the forfeiture of a deposit. S.49(2) of the Law of Property Act 1925 applies to a contract for the sale of land and provides: "Where the court refuses to grant specific performance of a contract, or in any action for the return of the deposit, the court may, if it thinks fit, order the repayment of any deposit."

In

Midill (97PL) Ltd v Park Lane Estates Ltd

[2009] 1 WLR 2460

at §§31-53, Carnwath LJ reviewed the authorities and gave guidance on the exercise of that jurisdiction. He regarded the previous decisions of the Privy Council in

Bidaisee v Sampath

(1995) 46 WIR 461 on the equivalent provision in a Trinidad and Tobago statute, and of the Court of Appeal in

Omar v El-Wakil

[2002] 2 P & CR 36 as setting out the applicable principles for the exercise of the jurisdiction. He also discussed the decision of Neuberger J in

Tennaro Ltd v Majorarch Ltd

[2003] EWHC 2601 (Ch). In

Solid Rock Investments v Reddy

[2016] EWHC 3043 (Ch), Henry Carr J also discussed the jurisdiction under s.49(2) at §§5-13.

The following points emerge from those decisions:

- (a) S.49(2) was originally enacted because previously a buyer who had a defence to a claim for specific performance in the Court of Chancery, but no defence to a claim for breach of contract in a common law court, could not recover the deposit. However, the jurisdiction is not confined to that situation.
- (b) The starting point is that a deposit is an earnest for performance, which the seller is entitled to forfeit if the buyer defaults, without any question of it having suffered any loss or any particular amount of loss. It is common knowledge that if a purchaser pays a deposit, he is likely to forfeit it if he does not fulfil the contract. Moreover, deposits are very usual features of conveyancing transactions and conveyancing transactions are common. It is important that there should be certainty attaching to the consequences of paying a deposit. One should start from the position that the deposit should not normally be ordered to be repaid. In a situation where a purchaser could not perform, the circumstances which make it appropriate for the court to exercise its discretion in his favour must be exceptional. Inability to complete is exactly the risk the deposit was intended to guard against. There needs to be something special or exceptional to justify overriding the ordinary contractual expectation of the parties.
- (c) The fact that the seller did not suffer a loss by reason of the buyer's failure to complete is, of itself and without more, not a sufficient reason for the court to exercise its discretion in favour of a defaulting buyer. There has to be something more.
- (d) A factor which could justify ordering the return of the deposit is an offer by the purchaser to arrange for a sale to a third party at a higher price, rejected by the seller for no stated reason, as in

Tennaro

, which Carnwath LJ in

Midill

at §53 said was "

readily understandable

".

- (e) It is relevant to consider how close the purchaser came to performing the contract, what alternatives he was able to propose to the vendor and how advantageous they would be compared with actual performance of the contractual terms. Where the purchaser simply could not perform the contract or offer any such alternative, then it would be exceptional for the deposit to be returned.
- (f) It is also relevant to consider whether the vendor has caused or contributed to the failure to perform the contract, for example, by delays in answering the purchaser's questions or delays in providing relevant details.

The relevant facts

Counsel relied on a number of facts as relevant to this issue. I make the following findings of fact:

- (a) Mr Aadinatha was very slow in getting the funds together to complete, and he should have got the funds together much earlier than 4 September. There was a small delay in the money being loaned by Access Bank reaching CRS which was not his responsibility, but that would not have mattered if he had arranged to borrow the necessary money when he should. There was no valid reason for his failure to ensure that the completion monies reached Kingsley Napley by 1 September 2023. The Defendant was not in any way responsible for Mr Aadinatha's failure to achieve that.
- (b) Mr Aadinatha originally intended to complete the purchase in early August but changed his mind for no reason recorded in the documents.
- (c) Mr Aadinatha misled Access Bank - from whom the Claimants were to borrow the money - as to the rent that would be payable under the Mandarin Oriental rental programme. He told them on 7 June 2023 that the rental yield would be 12%. But that was not the case, as under the rental programme the flats could only be included in the rental programme for 90 days a year, and under the terms of the rental programme, the flat could not be rented out for the rest of the year. The correct yield was around 5%.
- (d) It would have made commercial sense for the Defendant to have accepted the money on 4 September 2023, even though that was after the expiry of the notices to complete, because the Defendant had substantial loans and was under pressure from the lenders to sell flats and apply the sale proceeds in reduction of the loans.
- (e) The Defendant's decision to terminate the Contracts on 4 September 2023 was not for any commercial reason. It was because Mr Gehlaut had lost patience with the Claimants after what Mr Gehlaut perceived as repeated delays and excuses. Mr Gehlaut was told on the morning of 4 September that CRS were saying that the Claimants were in a position to complete, but nonetheless decided that Kingsley Napley should serve notice rescinding the Contracts, rather than extending time by one working day to allow the money to be paid that day. Mr Gehlaut did this because he felt that the Claimants had been given every opportunity to complete and enough was enough.

- (f) The market value of the flats now is the same as the prices in the Contract, as agreed by the valuation experts in their second joint statement.
- (g) The Defendant has not suffered any loss by reason of the breaches of the Contract. The Defendant originally counterclaimed damages for breach of the Contracts. However, by amendments made on 24 February 2026, shortly before the trial, that part of the Counterclaim was deleted. That left only a counterclaim for the removal of unilateral notices if the Court held that the Contracts had been terminated, something Mr McGhee said it was accepted the Defendant was entitled to. Accordingly, I will make my assessment on this issue on the assumption that the Defendant suffered no loss as a result of the Claimants' failure to complete and the termination of the Contracts.
- (h) Therefore, if the Defendant keeps the Deposit and the Stage Payments, it will have made a profit of £3,180,600 compared to the position it would have been in if the Claimants had sent the completion monies to Kingsley Napley on 1 September 2023.

Discussion

Mr McGhee relied on the following factors as making this case special or exceptional.

First, the only reason that completion did not occur on 1 September 2023 was because of a delay occasioned by an intermediary bank in transmitting the loan monies. I reject that argument. As I have said, that delay would not have mattered if the Claimants had taken steps when they should have to ensure that CRS were in funds by the expiry of the notices to complete.

Second, the funds were received by CRS and thus the Claimants were ready to complete by 11am on 4 September 2023 only 2 working hours after the end of the final day for completion and indeed before Eros purported to terminate. That is true, but there is nothing special or exceptional about a buyer who is ready to complete shortly after the expiry of a notice to complete.

Third, there was no change in Eros' circumstances justifying termination between close of business on 1 September and 11.45am on 4 September. That is true, and I have held that the decision to terminate was due to emotional rather than commercial considerations. That does, I think, amount to a special or exceptional factor.

Fourth, if Eros is permitted to retain those sums it will have made a huge windfall profit - 30% of the purchase price. I think the size of the benefit to the Defendant here from forfeiture of the deposits is capable of being a special or exceptional factor. I have held that the right to forfeit the Stage Payments was not a penalty, because of the additional risks assumed by the Defendant identified in §190 above. But in the event, those risks did not occur. At the time the Contracts were entered into, the provision for the forfeiture of the two Stage Payments was not out of all proportion to the legitimate interest of the Defendant in encouraging the Claimants to perform their obligations. But the position on 4 September 2023 and now is quite different. The flats have not fallen in value and the Defendant has suffered no loss by reason of the Claimants' failure to complete.

Accordingly, there are two special or exceptional factors here that could justify granting relief under s.49(2). Accordingly, I must conduct a balancing exercise. As to that:

- (a) I give substantial weight to the fact that there is no explanation for Mr Aadinatha's failure to get the funds together to complete, and his failure to do so by the expiry of the notices to complete. He did not give evidence and Mr McGhee offered no explanation for his failure to get the funds together in time, nor for his change of mind in early August 2023.
- (b) I give substantial weight to the fact that these are contracts entered into between sophisticated parties with access to the best legal advice.
- (c) I give substantial weight to the windfall effect of refusing relief, which is very much greater than in the case of an ordinary 10% deposit. But I think that is partially balanced out by the fact that the Defendant assumed the risks identified in §190 above even though they did not in the end eventuate.
- (d) I give some weight to the fact that the Defendant's reason for terminating the Contracts rather than allowing the Claimants one additional working day to complete was Mr Gehlaut's frustration with Mr Aadinatha's delays and excuses, when it was in the Defendant's commercial interests to allow completion to take place late. Mr Gehlaut was, of course, doing no more than exercising the Defendant's contractual rights. But it was an uncommercial and unreasonable thing to do in the circumstances.
- (e) I do not give any weight to the fact that Mr Aadinatha misled Access Bank about the likely rental yield, which seems to me to be irrelevant.

There are, then, factors pointing in different directions. In the end, I think I should give the greatest weight to the factors pointing against the grant of relief. Overall, I consider that the factors which point in favour of granting relief under s.49(2) are outweighed by those pointing in favour of leaving the contractual allocation of risk undisturbed. Accordingly, if I had held that the Defendant was entitled to terminate the Contracts on 4 September 2023, I would have refused to order the return of the Deposit or the Stage Payments.

The position if the Stage Payments were part payments of the purchase price rather than deposits

Finally I should comment on the position if the Stage Payments were part payments of the purchase price rather than deposits. I will do so briefly given my decision on the other issues above.

If I had decided that the Defendant was entitled to terminate the Contracts and that the Stage Payments were part payments of the purchase price, I would have concluded that there was a total failure of basis. In deciding if there is a total failure of basis, it is necessary to assess carefully and in a realistic way what the buyer was to get for his money:

Chitty on Contracts

(36th ed) §33-064 and 65 and

Warman v. Southern Counties Car Finance Corporation Ltd

. [1949] 2 K. B. 576. I consider that the Contracts are contracts for the sale of flats, and that the Defendant's obligations in relation to carrying out the Development and constructing the flats were ancillary or incidental to the performance of the obligation to sell the flats, rather than being independent substantive obligations. I do not think that that the Contracts are analogous to the shipbuilding contract in

Hyundai Heavy Industries Co Ltd v Papadopoulos

[1980] 1 WLR 1129.

The parties were in agreement that, in that case, were it not for the contractual provisions entitling the Defendant to keep the Stage Payments:

- (a) the Claimants would be entitled to recover the Stage Payments in a restitutionary claim for failure of basis;
- (b) the contractual provisions entitling the Claimants to keep the stage payments should be regarded as effecting the forfeiture of that restitutionary claim;
- (c) the Court has jurisdiction in equity to grant relief against that forfeiture.

The judges who have said that the Court does have such jurisdiction have also said that the Court should only grant relief if it would be unconscionable for the seller to retain the money: see

Stockloser v Johnson

[1954] 1 QB 476 at 484-5 and 490, and

Else (1982) Ltd v Parkland Holdings Ltd

[1994] 1 BCLC 130 at 144e.

Given the facts I have found above, I do not consider it would be unconscionable for the Defendant to retain the Stage Payments. The same considerations as those which I have discussed in relation to s.49(2) would apply equally to the exercise of this jurisdiction. Accordingly, if I had held that the Defendant was entitled to terminate the Contracts, and that the Stage Payments were part payments rather than deposits, I would not have granted relief from forfeiture.

Conclusion

I summarise my conclusions as follows:

- (a) The Completion Notices were valid because a Certificate of Insurance was provided to the Claimants before the Completion Notices were served.

- (b) If that is wrong, then the failure to provide a Certificate of Insurance would have invalidated the Completion Notices.
- (c) The Defendant's obligation in respect of the Furniture Package was to supply it but not to install it.
- (d) There were significant omissions from the Furniture Package which meant that the Defendant was not ready and able to complete on 17 August 2023.
- (e) The Defendant cannot rely on an argument that it was, on 17 August 2023, ready and able to ensure that the Furniture Package was supplied by 1 September 2023.
- (f) The deficiencies in the Furniture Package meant that the notices to complete were invalid.
- (g) The Defendant was, therefore, not entitled to terminate the Contracts on 4 September 2023.
- (h) The Claimants are entitled to an order for specific performance.
- (i) The Stage Payments were deposits, not part payments of the purchase price.
- (j) The right to forfeit the Deposit and Stage Payments was not a penalty.
- (k) If I had held that the Defendant was entitled to terminate the Contracts, I would not have ordered repayment of the Deposit or the Stage Payments under s.49(2) of the Law of Property Act 1925, nor by way of granting relief against forfeiture.

Appendix to the judgment

The relevant terms of the flat N4.4 contract

Parties

- (1) EROS LIMITED (incorporated in Jersey) whose address is 12 Castle Street, St Helier, Jersey JE2 3RT (Seller);
- (2) AMAAL VENTURES LIMITED (incorporated in The British Virgin Islands) c/o Charles Russell Speechlys LLP of 5 Fleet Place, Farringdon, London EC4M 7RD (Buyer).

1 Interpretation

.1 The definitions and rules of interpretation set out in this clause apply to this Agreement.

Account

means the Seller's Solicitors' client account details of which have been supplied in writing to the Buyer or the Buyer's Solicitors;

Buyer's Solicitors

Charles Russell Speechlys LLP of 5 Fleet Place, Farringdon, London EC4M 7RD (Ref: TJM.213988/2) or such other firm of solicitors as is notified to the Seller by the Buyer from time to time;

Certificate of Insurance

means the certificate of insurance for the Flat issued by the Warranty Provider;

Completion

means completion of the Lease of the Flat pursuant to the terms of this Agreement and "Actual Completion" means the date on which such completion actually takes place;

Completion Date

the date defined in clause 5.1;

Completion Notice

the notice defined in clause 5.1;

Completion Time

means 1:00pm;

Deposit

£576,100

Development

the combined hotel and residential development within the Estate (of which the Flat is to form part) containing apartments with leisure facilities and vehicular parking at basement level with all common parts and communal facilities in accordance with the Plans and Specifications;

Direct Transfer

means the electronic transfer of cleared funds into the Account;

Encumbrances

means those matters which are set out and referred to in Schedule 1;

Estate

the Seller's site at 22-23 Hanover Square, London W1 which is registered at the Land Registry with title number NGL706634 and is shown edged red on Plan 2 to the Lease;

Flat

Flat Number N4.4 forming part of the Development in respect of which the Lease is to be granted as more particularly described in Schedule 1;

Flat Specification

means the specification in the form set out in Appendix 2 including (where applicable) any variations or amendments that may be made in accordance with clause 7;

First Stage Payment

10% of the Price;

Furniture Package

means the furniture and other chattels to be included in the sale and which are required in order for the Flat to be compliant for the purposes of the Rental Programme, an indicative schedule of which is attached at Appendix 4;

Hotel Operator

means the entity chosen by the Seller to operate the hotel within the Development the brand name of which may be associated with the apartments within the Development

Hotel Operator Disclaimer

An agreement in the form attached at Appendix 3 with such amendments as the Hotel Operator shall reasonably require;

Interest Rate

shall mean 4% above the base rate of The Royal Bank of Scotland plc from time to time in force (or if the base rate ceases to be published at such other comparable rate as the Seller may reasonably designate);

Lease

the lease of the Flat to be granted by the Seller to the Buyer in the form of the draft lease attached at Appendix 1 with such amendments as the Seller may from time to time reasonably require;

Long Stop Date

means 31 December 2023...

Planning Permission

means the planning permission(s) authorising the Development;

Plans and Specifications

means the plans drawings specifications and sections relating to the Development from time to time which are available for inspection by the Buyer at the offices of the development manager, Clivedale London;

Price

£5,961,000

Rental Programme

the proposed programme for the renting of the flats within the Development to the Hotel Operator for up to 90 days a year;

Reservation Fee

£20,000;

Second Stage Payment

10% of the Price;

Seller's Solicitors

Brecher LLP of Fourth Floor, 64 North Row, London W1K 7DA (Ref: JE/MXK/E194-29) or such other firm of solicitors as is notified to the Buyer by the Seller from time to time;

Snagging Items

minor outstanding items or defects in the Flat or the fixtures fittings and contents thereof which do not impact on the beneficial use and enjoyment thereof;

Stage Payments

means the First Stage Payment and the Second Stage Payment that have been agreed between the Buyer and the Seller as set out in clauses 4.3.1 and 4.3.2 below in part payment of the Price;

Standard Conditions

shall mean the Standard Conditions of Sale (Fifth Edition) and "Standard Condition" shall mean any one of the conditions...

Warranty Documents

means the policy documentation issued by the Warranty Provider for the Flat;

Warranty Provider

means any of the new home warranty scheme administrators referred to in the CML Lender's Handbook that the Seller may decide to appoint;

Working Day

shall mean a day other than a Saturday Sunday or public holiday on which banks generally are open for business in London and a "Working Day" shall be deemed to end at 5.30 pm and "Working Days" shall be construed accordingly...

2 Agreement for sale and purchase

2.1 The Seller will sell, and the Buyer will buy, the Flat.

2.2 The interest to be sold is the Lease with vacant possession on Completion.

2.3 The Buyer cannot require the Seller to grant the Lease to any person other than the Buyer.

3 Price and Reservation Fee

3.1 The price for the Flat is the Price.

3.2 The Buyer has before the date of this Agreement paid the Reservation Fee (receipt of which the Seller hereby acknowledges). The Reservation Fee shall not be refundable but the Reservation Fee shall be credited against the balance of the Price due from the Buyer on the Completion Date.

3.3 Any interest accruing on the Reservation Fee shall accrue to the Seller.

4 Deposit and Stage Payments

4.1 The Buyer is to pay the Deposit to the Seller's Solicitors no later than the date of this Agreement by means of telegraphic or other direct bank transfer from the Buyer's Solicitors' client account for the credit of the Account on terms that it shall be held by the Seller's Solicitors as stakeholder pending Completion or determination of this Agreement or release of whole or part of the Deposit pursuant to clause 4.9 below.

4.2 In the event that this Agreement is validly determined by the Seller as a result of the default of the Buyer then the Deposit shall be forfeited by the Buyer and retained by the Seller.

4.3 The Buyer will pay the Stage Payments to the Seller as follows:

4.3.1 the First Stage Payment must be paid by the Buyer within twelve (12) months from and including the date of this Agreement (time being of essence for the purpose of this payment); and

4.3.2 the Second Stage Payment must be paid by the Buyer within twenty-four (24) months from and including the date of this Agreement (time being of essence for the purpose of this payment).

4.4 All payments due to the Seller under clause 4.3 shall be paid from the Buyer's Solicitors' client account to the Account so that the payments are received in the Account in cleared funds on or before the relevant due date for payment.

4.5 The Stage Payments shall be held by the Seller's Solicitors as stakeholder pending Completion or determination of this Agreement or release of whole or part pursuant to clause 4.9 below.

4.6 In the event that the Buyer shall fail to pay any of the Stage Payments by the due date for payment (time being of the essence) then the Seller may determine this Agreement by giving written notice to the Buyer and upon service of such notice this Agreement shall determine and the Buyer shall forfeit to the Seller the Deposit and any Stage Payments received by the Seller's Solicitors but without prejudice to the rights of either the Seller or the Buyer in respect of any prior breach of this Agreement by the other party.

4.7 The Buyer confirms to the Seller that it will make no claim, pursuant to section 49(2) of the Law of Property Act 1925 or otherwise, for the Deposit or Stage Payments to be returned to it.

4.8 The balance of the Price will be payable by the Buyer on the Completion Date in accordance with clause 15.1.2.

4.9 The Deposit and the Stage Payments shall be held by the Seller's Solicitors as stakeholder until the date five Working Days after the date on which evidence has been sent by the Seller's Solicitors to the Buyer's Solicitors that the Flat has been registered with the Warranty Provider where the cover being provided by the Warranty Provider includes deposit protection cover in the event of the insolvency of the Seller or fraud by the Seller (evidenced by the Warranty Provider's policy number and access code for the Flat in question) wherein such part of the Deposit or Stage Payments so protected up to the limit of cover shall be released to the Seller as agent.

5 Completion Notice

5.1 Completion shall take place on the date ten Working Days after service of notice (the "Completion Notice") in writing by the Seller on the Buyer (counting the date of service as the first of those ten days) that the Flat has been substantially completed (the "Completion Date").

5.2 The Seller will provide to the Buyer's Solicitors upon or before service of the Completion Notice:

5.2.1 a copy of the Certificate of Insurance; and

5.2.2 a copy of the final building control certificate relating to the Flat; and

5.2.3 a copy of the buildings insurance schedule and policy.

5.3 For the purpose of this clause the Flat shall be treated as being substantially completed when it is ready for occupation notwithstanding:

5.3.1 the existence of any Snagging Items; or

5.3.2 any landscaping work remains outstanding; or

5.3.3 any connections to the telephone service have not been provided by the appropriate supplier; or

5.3.4 there are outstanding any works comprising decorating painting construction building or completion of works in or to the accessways communal areas entrance halls the lobbies of any buildings of which the Flat forms part provided access is available to the Flat; or

5.3.5 the remainder of the Development or the building of which the Flat forms part and any of the services and facilities to be provided (including parking) not having been completed provided that the works to the remainder of the Development and such building are at such a stage as to enable the Buyer to gain access to the Flat; or

5.3.6 the presence on the remainder of the Development of contractors and their plant and machinery.

Provided that safe access and egress can be obtained to and from the Flat.

5.4 Following the service of the Completion Notice the Buyer shall be entitled to inspect the Flat by prior appointment on reasonable prior written notice (the "Inspection").

5.5 If following the Inspection the Buyer (acting reasonably) is of the view that there are any Snagging Items then the Buyer shall be entitled to serve written notice on the Seller setting out details of such Snagging Items.

5.6 The Seller shall procure that any proper Snagging Items referred to in a notice served pursuant to clause 5.5 are remedied as soon as reasonably practical at its own cost and in a good and workmanlike manner.

5.7 In the event that following Actual Completion any Snagging Items arise then the Buyer shall be entitled to serve two written notices on the Seller setting out details of all such defects provided that the written notice is received by the Seller within 6 months from (and including) the Completion Date in which case the Seller shall procure that any such proper Snagging Items are remedied at its own cost and in a good and workmanlike manner as soon as reasonably practical.

6 Building Works

6.1 The Seller will use all reasonable and proper endeavours within its control to procure the construction of the Flat and the Development in a good and workmanlike manner and in accordance with the Flat Specification, the Plans and Specifications and the terms of the Planning Permission and the Planning Agreement and in compliance with building regulations consent of the local authority the Construction (Design and Management) Regulations 2015 and the requirements of the Warranty Provider but subject to any such revisions amendments or variations as may be necessary and which (where necessary) must where required be authorised approved or ratified by the local authority or its duly appointed officers whether prior to or subsequent to the completion of the Flat.

6.2 The Seller shall not be responsible for any delay caused by industrial or labour disputes, shortage or late delivery of materials, shortages of labour, the default of any contractor or supplier, fire, tempest, frost, hazardous or adverse ground conditions, inclement weather or any other circumstance or any cause beyond the control of the Seller.

6.3 The Buyer acknowledges that Completion of the sale of the Flat in accordance with clause 5 may take place prior to the completion of the works to the remainder of the Development.

6.4 Notwithstanding the covenant for quiet enjoyment (or any other relevant provisions to be incorporated in the Lease) the Buyer acknowledges that the Seller and those authorised by the Seller will be entitled to complete the outstanding works to the Development and such other works of whatever nature as the Seller may in its absolute discretion carry out or authorise notwithstanding any noise disturbance inconvenience or annoyance of whatever nature that may be caused as a result of such works (the Seller agreeing with the Buyer to use all reasonable efforts to cause as little disturbance inconvenience and annoyance as is reasonably and economically practical in all the circumstances) and make good any damage caused to the Flat and common areas or amenities provided that the outstanding works shall not materially interfere with the Buyer's use and enjoyment of the Flat.

6.5 The Buyer will make no objection to or representation about nor institute any proceedings whether by injunction or for damages or otherwise in relation to and waives all rights and claims whatsoever that he may have as a result of the carrying out and/or completion of the works to the Development save for any claim arising from fraud and/or negligence on the part of the part of the Seller.

6.6 The provisions of this clause 6 will remain in full force and effect notwithstanding Completion....

15 The Lease

15.1 The Grant of the Lease and Completion

15.1.1 Completion is to take place on the Completion Date and the Seller will grant and the Buyer will accept the grant of the Lease on the Completion Date and (if required) the Buyer shall enter into the Hotel Operator Disclaimer.

15.1.2 The Buyer is to pay the Price less the Reservation Fee, Deposit and Stage Payments actually paid to the Seller together with the amounts due under clause 15.2 of this Agreement and the Lease by Direct Transfer on the Completion Date.

15.1.3 The Seller will procure that the Seller's Solicitors prepare the engrossments of the original and the counterpart of the Lease and (if required) a signing copy of the Hotel Operator Disclaimer and send the relevant documents to the Buyer or the Buyer's Solicitors no less than five Working Days before the Completion Date.

15.1.4 The Buyer will promptly execute the counterpart of the Lease and (if required) the Hotel Operator Disclaimer preparatory to the grant of the Lease.

15.1.5 All monies payable by the Buyer pursuant to this Agreement shall be paid by Direct Transfer.

15.1.6 If either party shall serve a notice to complete upon the other in accordance with Standard Condition 6.8 (as varied by this Agreement) the defaulting party shall pay on Actual Completion to the other in addition to all other monies payable hereunder (and without prejudice to all other rights and remedies available to the Seller) the sum of two hundred and fifty pounds (£250.00) plus Value Added Tax per notice towards the legal costs in connection with such notice.

15.1.7 The Buyer shall on Completion pay the Seller's Solicitors the sum of £150.00 plus VAT towards the cost of preparing the engrossments of the Lease.

15.1.8 If required by the Seller the Buyer shall enter into the Hotel Operator Disclaimer prior to Completion.

15.1.9 If the balance of the monies payable under this Agreement shall not have been received by the Seller's Solicitors prior to the Completion Time on the date fixed for Completion, Completion shall be deemed to have taken place on the next subsequent Working Day...

17 Conditions of Sale

17.1 The Standard Conditions are incorporated in this Agreement so far as they relate to the grant of a lease, are not inconsistent with the other clauses in this Agreement, and have not been modified or excluded by any of the other clauses in this Agreement, and in the case of conflict between the terms of this agreement and the Standard Conditions, the terms of this agreement are to prevail.

17.2 The following Standard Conditions do not apply:

Standard Conditions 1.37(d) and (e), 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.5, 2.2.6, 3.1.3, 4.6.2, 5, 6.1, 6.3.2, 8.2.5 and 8.3.

17.3 Standard Condition 7.1.1 is varied to read: "If any plan or statement in the contract or in written replies to written enquiries given by the Seller's Solicitors to the Buyer's Solicitors before the date of the contract is or was misleading or inaccurate due to an error or omission, the remedies available to the buyer are as follows".

17.4 Standard Condition 7.1.1(b)(ii) is varied to read: "where he would be obliged, to his prejudice, to accept property differing substantially (in size, quality, appearance, tenure or value) from what the error or omission had led him to expect.

17.5 Standard Condition 7.2.2 is varied by the deletion of the words "...less (where the buyer is the paying party) any deposit paid" and the substitution of the words "... less (where the buyer is the paying party) the Deposit and any Stage Payments paid".

17.6 Standard Condition 7.4.2(a)(i) is varied to read "forfeit and keep the Deposit and any Stage Payments actually received and any accrued interest"...

27 Long Stop Date

27.1 If the Seller has not served a Completion Notice in accordance with clause 5.1 of this Agreement prior to the Long Stop Date, then (prior to service of a Completion Notice by the Seller) either party may give not less than 16 Working Days' notice to the other and (unless a Completion Notice is served by the Seller during such notice period) upon expiry of the notice this Agreement will terminate.

27.2 Upon termination of this Agreement pursuant to clause 27.1 neither party will have any further rights or obligations under this Agreement except that the Seller will within 5 working days of termination of this Agreement pursuant to clause 27.1 repay the Deposit and any Stage Payments received to the Buyer.

27.3 In the event that that this Agreement is terminated in accordance with clause 27.1, the Seller shall return the Deposit together with the Stage Payments and any accrued interest thereon within 5 working days of termination....

30 Furniture Package

The Furniture Package is included in the sale...

Schedule 1 The Flat

Flat number N4.4, 22 Hanover Square, London W1 as more fully defined in the Lease attached in Appendix 1

The relevant Standard Conditions including deletions and additions made by the Contract

1.1.3 A party is ready, able and willing to complete:

- (a) if he could be, but for the default of the other party, and
- (b) in the case of the seller, even though the property remains subject to a mortgage, if the amount to be paid on completion enables the property to be transferred freed of all mortgages (except any to which the sale is expressly subject).

2.2.1 The buyer is to pay or send a deposit of 10 per cent of the purchase price no later than the date of the contract.

6.1.2 If the money due on completion is received after 2.00 pm, completion is to be treated, for the purposes only of conditions 6.3 and 7.2, as taking place on the next working day as a result of the buyer's default.

6.8.1 At any time after the time applicable under condition 6.1.2 on completion date, a party who is ready, able and willing to complete may give the other a notice to complete.

6.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.

7.1.1 "If any plan or statement in the contract, or in the negotiations leading to it

,

written replies to written enquiries given by the Seller's Solicitors to the Buyer's Solicitors before the date of the contract

is or was misleading or inaccurate due to an error or omission, the remedies available to the buyer are as follows:

- (a) When there is a material difference between the description or value of the property, or of any of the contents included in the contract, as represented and as it is, the buyer is entitled to damages.
- (b) An error or omission only entitles the buyer to rescind the contract:
 - (i) where it results from fraud or recklessness, or
 - (ii) where he would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect.

7.4.1 If the buyer fails to complete in accordance with a notice to complete, the following terms apply.

7.4.2 The seller may rescind the contract, and if he does so:

(a) he may:

(i) forfeit and keep any deposit and accrued interest

the Deposit and any Stage Payments actually received and any accrued interest.

(ii) resell the property and any contents included in the contract

(iii) claim damages

(b) the buyer is to return any documents he received from the seller and is to cancel any registration of the contract.

7.4.3 The seller retains his other rights and remedies.

7.5.1 If the seller fails to complete in accordance with a notice to complete, the following terms apply.

7.5.2 The buyer may rescind the contract, and if he does so:

- (a) the deposit is to be repaid to the buyer with accrued interest
- (b) the buyer is to return any documents he received from the seller and is, at the seller's expense, to cancel any registration of the contract.

The buyer retains his other rights and remedies.

9.1 The following provisions apply to any contents which are included in the contract, whether or not a separate price is to be paid for them.

9.2 The contract takes effect as a contract for sale of goods.

9.3 The buyer takes the contents in the physical state they are in at the date of the contract.

9.4 Ownership of the contents passes to the buyer on actual completion.

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