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Judgment: approved by the Court for handing down
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Delivered: **17/4/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

2009 No 101289

BERNARD J FITZPATRICK, NAOMI FITZPATRICK, JOHN G McILWAINE and CLAIRE A McILWAINE

Plaintiffs;

and

SARCON (NO 177) LIMITED

Defendant.

DEENY J

[1] This judgment relates to the proper interpretation of an agreement between the parties with regard to the construction and purchase of an apartment in Belfast. It particularly touches on Clause 8 of the agreement between the parties relating to delay and extensions of time. It is decisive of the issues between these parties but the parties also wish it to act as the determination of certain preliminary questions which, subject to the particular facts in other cases, are common to a number of actions between Sarcon (No 177) Limited and various purchasers of apartments in the same development.

[2] On 4 May 2007 the plaintiffs entered into two agreements with the defendants. One was a building agreement for the construction by the defendants at the request of the plaintiffs, referred to therein as the employer, of Apartment 28 of the Merchant Building, Pilot Street/Princes Dock, Belfast. On the same date an agreement for lease was signed whereby the defendant granted a lease of the premises to the plaintiffs on the terms and conditions therein specified. The

plaintiffs say that they have validly rescinded the contract owing to the repudiatory conduct of the defendant. They seek repayment of their deposit of £23,750. The defendant denies the claim and counterclaims for a declaration that it is entitled to an extension of time to complete the apartment by 31st October 2009, as it did and an order for specific performance of the two agreements mentioned above with damages and interest thereon.

[3] The most relevant part of the Defence and Counterclaim reads as follows:

> "4. The defendant admits that the said Building Agreement provided for a completion date of 31 May 2009 but avers that the obligation to erect and completely finish the Apartment by the completion date was expressly subject to Clause 8 of the Building Agreement. The defendant therefore denies that time was of the essence in relation to the completion date. Clause 23 of the Building Agreement is limited in its terms to time limits.
>
> 5. The defendant avers that it is entitled to a reasonable extension of time for completion.
>
> 6. The defendant admits that the Apartment was not erected and completely finished by 31st May 2009 but denies that time was of the essence in this regard."

[4] In Clear Homes v Sarcon (No 177) Limited [2010] NI Ch. 16 and Hollway and Hollway v Sarcon (No 177) Limited [2010] NI Ch. 15 I decided in the light of all the contractual provisions including Clause 23 that time was not of the essence of this contract. Following this a significant number of actions between the Defendant and purchasers remain outstanding. It is appropriate to deal with the facts of this instant case to a degree and these I now set out. The contract in question is the Building Agreement between the parties. I will set out the essential features although it is right to say that the plaintiffs' counsel drew attention to a number of other matters which it may be appropriate to list in due course. By Clause 1 of the agreement the developer agreed that it "shall procure that its contractor shall build and completely finish in a good and workmanlike manner for the employer upon the site mentioned in paragraph 3 of the Schedule an apartment …"

[5] Paragraph 6 in its entirety read as follows:

> "Completion Date
>
> 6. Subject to Clause 8 below the Developer shall procure that its contractor shall erect and completely finish the said Apartment and make same fit for habitation and use on the date of completion mentioned in paragraph 6 of the Schedule or such earlier date notified by the Developer or the Developer's solicitor on not less than 20 days working notice to the Employer or the Employer's solicitor."

In the Schedule one finds the following:

> "6. The date of completion: 31st May 2009."

Paragraph 8 in its entirety reads as follows.

> "Delay and Extension of Time
>
> 8. If the building work is delayed by bad weather, industrial disputes, shortage of labour or difficulties in obtaining materials or any other cause outside the Developer's or the Developer's contractor's control, a reasonable extension of time for completion shall be allowed by the employer."

[6] In the said Schedule the apartment is described as Site No 28, the Merchant Building. There was another building on an adjoining site called the Granary Building. It is common case that this agreement was mutually conditional on the agreement for lease and I need not address that separate but contemporaneous agreement.

[7] The defendants proceeded to retain Messrs Gilbert Ash as their main contractor. One matter of on-going dispute is whether they ought to have done that before fixing completion dates with the purchasers. It may be that the developer did not optimally coordinate its sale of the premises off the plans to persons such as the plaintiffs with the contracts it entered into with the contractor. Certainly the contractor at the second stage of tendering said that the programme would take 24 months rather than the 22 months that had been envisaged by the developer apparently. Construction commenced and proceeded.

[8] On 6 February 2009 Messrs Carson McDowell, solicitors for the defendant, wrote to Messrs James F Fitzpatrick, solicitors for the plaintiffs, in the following terms:

> "Please note that your client will now have been informed by Messrs BTW Cairns that completion of this apartment is anticipated for October/November 2009. We will write to you further once an exact date for handover of this apartment is confirmed."

The letter made no application to the employer for an extension of time nor indeed made any reference to Clause 8 of the agreement nor provided any reasons at all as to why completion was to be delayed.

[9] On 6th May 2009 the defendant's solicitors wrote to the vendors' solicitors in the following terms.

> "We refer to your letter dated 6 February. We have taken our client's detailed instructions on this proposed purchase.
>
> The Agreement for Lease and Building Agreement are dated 4th May 2007. The completion date stipulated in the Building Agreement is 31st May 2009. Clause 23 of the Agreement provides:
>
> "In relation to time limits specified in this Agreement time shall be deemed to be of the essence.
>
> We contend that this contractual completion date of 31st May 2009 constitutes a time limit in respect of which time is of the essence. By your said letter of 6th February 2009 our clients were informed that the completion of the premises was anticipated for October/November 2009. It was further stated that you would write to them again once an exact date for handover of the premises was confirmed.

> We are of the opinion that it is not open to your client to suggest a new completion date. Our clients are entitled to expect completion to take place on 31st May as stated in the Building Agreement.
>
> Our clients do not accept the attempt by your client to alter the completion date and any such attempt is viewed as an unqualified refusal to perform under the terms of the Building Agreement. The completion date was agreed and accepted by our respective clients back in May 2007 when the Agreements were signed. We confirm that our clients are in a position to complete on 31st May 2009 as agreed and wish to do so on that date.
>
> Our clients will be deprived of the whole benefit of the Building Agreement in the event that your client fails to complete as agreed and there will be significant commercial consequences for them.
>
> We now formally ask you to confirm to us in writing that your client will be in a position to complete the sale of the premises to our clients as agreed on 31st May 2009."

[10] I observe that the court has found that their view that time was of the essence was incorrect. Although this was not the thrust of the plaintiffs' argument it could be said that this was akin to a notice to complete making the date of 31st May 2009 of the essence.

[11] On 8th May 2009 the defendant's solicitors wrote back as follows:

> "We refer to your correspondence of 6th instant.
>
> We respectfully disagree with your interpretation of our client's rights."

It can be seen that on this second opportunity the vendors' solicitors failed to set out that their client was entitled to an extension of time either at all or if it brought itself within Clause 8 of the building agreement.

[12] On 5th June 2009 Messrs James F Fitzpatrick again wrote to the vendors' solicitors, as follows.

> "We refer to your letter dated 8th May. Your client has failed to complete in accordance with the Building Agreement dated 4th May 2007. In these circumstances our clients hereby rescind the Agreement and/or hereby accept your client's repudiation of same.
>
> Our clients are accordingly discharged from any obligations contained in the Agreement and we request a full refund of the deposit in the sum of £23,750 (together with interest from 19th April 2007) within the next 7 days. In the absence of a full refund, with interest, proceedings will be issued against your client without further notice and use will be made of this correspondence to fix it for all the costs of and incidental thereto. Please confirm that you have authority to accept service of such proceedings."

[13] The vendors' solicitors wrote back to Mr Patrick Peake of James F. Fitzpatrick on 8 June 2009 to this effect.

> "We refer to your correspondence of 5th instant in respect of the above matter.
>
> Your clients do not have the right to rescind.
>
> For the avoidance of all doubt, the building agreement and agreement for lease remain in place between our respective clients and our client shall enforce each and every provision of same."

It can be seen therefore that on this third occasion the vendors' solicitors again failed or refused to make any case at all that their client was entitled to some extension of time beyond 31st May 2009. Mr Brett Lockhart QC, who appeared with Mr Paul McLaughlin for the plaintiffs, referred to an atmosphere of corporate hauteur on the part of the vendors and their advisors and of them arrogating to themselves rights they did not in fact enjoy. It is not necessary for me to speculate on whether this was arrogance on the part of the vendors or their advisors or simply error, but it is significant that despite being written to twice by the purchaser's solicitors the latter never troubled to advance a case on behalf of their clients that the delay was within Clause 8 and/or outside their client's control.

[14] Subsequently, on 4 September 2009, the vendors' solicitors wrote to advise "that the anticipated completion date for the property is the 26th October 2009". They give details of how access could be obtained through the agent, BTW Cairns. On 17th September the plaintiffs' present solicitors Messrs Elliott Duffy Garrett wrote back saying that they were now instructed and that the contract had already been "rescinded/repudiated". On the same date they sent a writ of summons to the vendors' solicitor with a follow up letter on 22nd September. On 23rd September the defendant's solicitors wrote as follows:

> "Your correspondence of 17th instant refers. The contract between our respective clients has not been rescind/repudiated.
>
> For the avoidance of all doubt the building agreement and agreement for lease remain in place between our respective clients and our clients shall enforce each and every provision of same."

Again, although the plaintiffs would say too late in any event, no opportunity was taken to make the case, in any way, now made on behalf of the defendant nor assert any contractual rights it may have had.

[15] A number of these cases were listed for hearing in the current term. A collective approach was adopted, albeit rather late in the day. Ms Creed, solicitor, was active in convening a group and initially wished the court to answer two questions at this hearing. Subsequently counsel have expanded those to five questions. I shall have to return to them at the conclusion of this judgment. They read.

> (1) Did the Developer require an extension of time under Clause 8 of the Building Agreement to complete the construction of the apartment after the date for completion contained in paragraph 6 of the schedule to the Agreement?
>
> (2) If the answer to (1) is yes, was the Developer obliged to take any particular step in order to be entitled to such an extension of time?

> (3) If the Developer failed to take any required step, what are the consequences of such failure?
>
> (4) If the failure by the Developer to take any required step amounted to a breach of contract, did it give rise to a right on the part of the purchaser to rescind the contracts?
>
> (5) If so was the purchaser required to take any step in order to exercise its right to rescind the contracts?

[16] I pause at this point to say, for the assistance of the solicitors' profession in particular, that, as will have been apparent from my earlier judgments in relation to this matter, the vendors' solicitors had adapted the template furnished by the Law Society of Northern Ireland: "Standard Form of Building Agreement". Some of my findings therefore may well be applicable more widely to the issue of completion dates but some will be specific to the terms of this contract and the facts of this case.

[17] For convenience I set out the relevant clause from that standard form relating to delay and extension of time with its similar wording.

> "7. If the building work be delayed by bad weather, industrial disputes, shortage of materials, or any other cause outside the builder's control, a reasonable extension of time for completion shall be allowed by the employer."

Neither side here called a conveyancing expert from Northern Ireland to say how that clause has been applied in practice by the profession or the courts. Both sides in this action were agreed that there was no relevant Northern Ireland authority on the point and nor have my own researches discovered one.

The Defendant's Case

[18] I had helpful written and oral submissions from Mr Mark Horner QC who appeared with Mr Michael Humphreys QC for the defendant. I have taken these submissions carefully into account even if all are not set out herein. It was submitted that once the court had ruled that the contract did not make the completion date of 31st May 2009 subject to the proposition that time was of the essence that date became merely a target date. Completion was now to be within a reasonable time which in the case of this building was 31st October.

[19] Secondly, they submitted that Clause 8 could not assist the purchaser because it was mandatory and the purchaser must allow the extension of time sought by the developer and had no discretion to refuse it. There was no need for any notice. In any event it was not a condition or innominate term which went to the root of the contract.

[20] Beyond these submissions those purchasers, who would appear to be the majority, who had not objected to the letter of February 2009 could not now claim to have accepted any alleged repudiation of the contract by the vendor and could not object.

[21] Counsel sought to argue that my judgments in Clear Homes and Hollway were in support of their contentions regarding Clause 8. I reject those submissions. I expressly found e.g. at paragraph [31] of Hollway that Clause 8 of the agreement "can operate, in whatever way it ought to, whether or not time is of the essence …"

Furthermore at paragraph [33] of Hollway I said:

> "Clause 8 did not give [the defendant] complete protection. It would not cover delay on their part or that of their contractor in commencing the works, for example."

[22] Thirdly at paragraph [37] of Hollway I said of Clause 8 provisionally that if I had not decided on the time of the essence point:

> "I would have to reach a conclusion as to whether merely informing the purchasers of a delayed completion date could constitute a valid exercise of the developer's rights under Clause 8. I incline, I may say, to the view that that correspondence does not constitute a valid exercise of the right. It seems to me that some application, albeit informal, has to be made to the employer to `allow' the extension of time envisaged by Clause 8, but only for certain stated reasons. `Allow' here means permit and requires some exercise of will on the part of the employer, in my provisional view, at least. But in the light of my finding above I make no concluded ruling on the operation of the clause."

[23] `Allow' according to Chambers English Dictionary means "permitted; licensed; acknowledged". The Compact Oxford English Dictionary (2005) defines

`allow' as : (1) Let someone have or do something. (2) Decide that something is legal or acceptable. (3) Provide or set aside. (4) Take into consideration. (5) Accept that something is true. Clause 8 does not read: "the time for completion will be extended for any period of delay". It is mandatory on the employer only "if" the reasons for delay fall within Clause 8.

[24] If the reasons for delay are set out to a purchaser and his solicitor they could consider whether they are legitimately within Clause 8. They may do so with or without seeking particulars. They can, if they conclude that they are indeed reasons within Clause 8, then adjust to making their arrangements for completing the purchase at the revised completion time. If on the other hand they are minded to dispute whether the reasons are within Clause 8 they can seek particulars of the delay and prepare themselves to refuse to complete and if necessary defend their position in court if sued or sue themselves for the return of a deposit and declaration, as here.

[25] Before I turn to consider Mr Horner's submission that the date of 31st May 2009 is now a mere target in the light of my finding that time is not of the essence I shall say a word about the approach of this court in the area of land law. It is right to say that our land law up to 1921, had developed in common with the rest of the island of Ireland somewhat differently from England and Wales. (Scotland is different again). Many of those differences continue e.g. in regard to the completion of contracts or some interests in land such as a fee farm grant. It is the case therefore that the courts in Northern Ireland do advert to decisions of the High Court and the Supreme Court in the south for assistance on occasions. It is also true that Professor J.C.W.Wylie was able to write a text book on Irish Conveyancing Law which referred to both jurisdictions but I note that he felt unable to continue a full cross-border approach in the most recent editions of that book and his Irish Land Law (Preface to 4th Edition).

[26] I am a judge sitting in a court in the United Kingdom. The decisions of the House of Lords, and now the Supreme Court, are binding upon me unless they can be properly distinguished e.g. if the law in Northern Ireland is different from that in the jurisdiction in which the Supreme Courts' decision is grounded. It remains the case that we have a different set of statutory provisions to those in England. The Law of Property Act 1925 does not apply in Northern Ireland. But these differences must not be overstated. Where there is not a specific reason arising from statute or precedent applicable in this jurisdiction the courts of Northern Ireland will follow the English decisions, and particularly if of the highest court in the United Kingdom. Indeed our own Court of Appeal has shown a marked reluctance, in the past, to depart from decisions of the English Court of Appeal even when our court

considered them erroneous e.g. Beaufort Developments (NI)Ltd v Gilbert-Ash(NI) Ltd [1997] NI 142; [1999] 1 A.C. 266.

[27] Mr Horner relied on Wylie and Woods on Irish Conveyancing Law 3rd Edition paragraph 13.12.

> "As explained in the previous paragraph, the general rule in contracts for the sale of land is that time is not of the essence for the contract. At most the closing date is to be regarded as a `target date', for which the parties are aiming but, which, it is understood by both of them, neither of them may, as things turn out quite hit. The result is, therefore, that in most cases either party is entitled to complete the contract after the closing date has passed and will not be regarded as being in breach of contract so long as he completes within a `reasonable time' thereafter."

The learned authors go on to consider this matter in a helpful and informative fashion. They commence paragraph 13(17) by saying:

> "The position at a common law of a party faced with delay in completion by the other party is far from satisfactory. Unless he chooses to seek specific performance, which he can do at once, his position is bedevilled by uncertainty. First, it is settled that he cannot take action, such as to rescind the contract for delay, unless the `reasonable time' for completion allowed by the common law after the contract closing date has elapsed. Secondly, it has long been held that he cannot serve notice on the delaying party as soon as the completion date fixed by the contract has passed for the aggrieved party must wait until there has been what has been called variously an `unnecessary', an `undue', a `great and improper' or a `gross vexatious and unreasonable' delay by the other party."

Pausing there, however, one notes that the authorities cited for those strong statements are either southern Irish or of some antiquity or from the judgment of Harman J in Smith v Hamilton [1951] Ch. 174 at 181 but that decision has been expressly disapproved of by the English Court of Appeal in Behzadi v Shaftesbury

Hotels Ltd [1991] 2 All ER 477. I shall return to that. Finally for these purposes at 13.18 it is said that:

> "Apart from the uncertainties over the `waiting period' prior to service of the notice and the length of notice required, there are more fundamental doubts about the position at common law. One is that it is not clear why, as seems to be the rule, the notice cannot be served as soon as the contractual closing date is passed, provided it limits a reasonable time for completion thereafter. It is arguable that the court should be concerned solely to see that the purchaser is allowed the requisite reasonable time after the closing date and, if the notice provides for this, it is difficult to see why it matters how quickly it is given after the closing date had passed when the other party is technically in breach of contract."

I need not quote further save to say that the rest of the paragraph consists of further legitimate doubts about the wisdom of this alleged rule that the innocent party must wait in the way outlined. I also note (1981) vol. XVI Irish Jurist 28, 33 where the learned authors say "it is wrong to permit a man who has undertaken to complete on a specific date to fail to do so with complete immunity from liability for foreseeable damage".

[28] For my part I reject the application of any such purported rule in this jurisdiction. The parties agreed the date of 31st May 2009. If time was of the essence even a very modest failure on the part of the developer to abide by it would be fatal to the enforceability of his contract. But because time is not of the essence the importance of the date does not disappear completely. It is the date on which the parties had agreed. It was a term of the contract. It was clearly not a warranty in my view but a condition or an innominate term; per Diplock L.J. in Hong Kong Fir Shipping Company v Kawasaki Kisen Kaisha [1962] 26. . The courts are here to enforce the agreements of parties, properly construed.

[29] It would be wrong to equate a contract which does have a specific completion date with a contract where no completion date has been agreed between the parties either at all or in effect. Such contracts are being enforced in this court e.g. where the completion date was agreed as 14 days after the (developer's) architect certified that the apartments were fit for occupation, as in the Titanic Quarter, another Belfast apartment block. That is not what the developer agreed here. There is good authority, as we will see, for the proposition that a reasonable time is the time

provided by the parties up to the date of completion, subject to some extension where delay has been caused by circumstances outside the developer's control.

[30] I turn to two decisions of the House of Lords in England. It should be remembered that although Section 41 of the Law of Property Act 1925 does not apply here the very same wording is to be found at Section 88 of the Judicature (Northern Ireland) Act 1978.

> "Stipulations in a contract as to time or otherwise which according to rules of equity are not to be deemed to be or to have become of the essence of the contract are also construed and have effect at law in accordance with the same rules."

The first relevant authority is Stickney v Keeble [1915] AC 386. There the House of Lords (including, I note, Lord Atkinson, formerly of the Irish Bar) held that:

> "Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, and in determining the reasonableness of the time so limited the Court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto."

In his judgment, of eleven pages, Lord Atkinson at no point suggests, by way of analogy or otherwise, that the case would be differently decided in Ireland. At page 411 he says:

> "It would, in my view, be quite unjust to allow the respondents to retain money deposited as a guarantee for the due performance of the very contracts which they themselves, not the depositor, have failed to perform."

He agreed with the trial judge that a 14 day notice was sufficient but that was nearly 4 months after the original completion date had passed. It should be borne in mind that the delay there was caused by the inability to give good title.

[31] Lord Parker of Waddington wrote, as his judgment was read by Lord Parmoor, as follows at pages 415,416:

> "Where it could do so without injustice to the contracting parties [equity] decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.
>
> This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.
>
> It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time." (My underlining throughout).

Leading counsel for the defendant rather chastised his opposite number for arguing that the effect sought by the defendant was not fair to his client. I may say that I hope that every court would wish to see justice and fairness done to parties. Here the plaintiffs have high authority in support of such a laudable ambition. The court should not grant specific performance to the vendor in delay here unless it could be done "without injustice". Expressly Lord Parker contemplates that the defendant by his conduct may have "lost the right to specific performance." I bear these important dicta in mind.

[32] That decision was cited with approval in a further decision of the House of Lords in Raineri v Miles & Anor [1980] 2 All ER 145. The House (Lords Edmund-

Davies, Fraser of Tullybelton, Russell of Killowen and Keith of Kinkel, Viscount Dilhorne dissenting) was dealing with a slightly different point from the one before me. They upheld a decision of the Court of Appeal (Buckley, Bridge and Templeman LJJ) [1979] 3 All ER 763 to the effect that failure to complete a contract for the sale of land on the date specified in the contract constituted a breach thereof and entitled the other party to recover any damages properly attributable thereto, provided that the failure to complete was not due to some conveyancing difficulty or some difficulty with regard to title [the Rule in Bain v Fothergill] notwithstanding that the time for completion was not expressed to be of the essence of the contract, for the fact that time had not been declared to be of the essence did not mean that the express date for completion could be supplanted by the courts treating it as a mere target date and in effect enabling the defaulting party to insert into the contractual provision some such words as "or within a reasonable time". The effect of Section 41 of the Law of Property Act 1925 was not to negative the existence of a breach of contract where one had occurred but in certain circumstances to bar any assertion that the breach amounted to a repudiation of the contract. That was the case where the party was seeking damages for the delay. I note that Viscount Dilhorne, though dissenting quoted the passage above from Lord Parker with apparent approval. I refer to the judgment of Lord Edmund-Davies. At page 154(c) one finds this.

> "The former courts of equity did not rewrite contracts, nor did they hold that a man who had broken his word had kept it. No case has been cited to Your Lordships where they denied all relief to the petitioner who proved that the respondent had delayed in the due performance of his contract. But what they did in proper circumstances was to ameliorate the asperities of the common law. They differed from the common law courts in the granting of remedies and not in the recognition of rights, and, so far from altering the substantive common law they followed it and applied it in their own courts when they thought it right to do so."

At page 155(f) His Lordship said.

> "In the instant case the date for completion was not expressed to be of the essence and it has not been suggested (though I think it might possibly have been) that the surrounding circumstances nevertheless so rendered it. In that state of affairs the appellants submit that the law as it has stood ever since 1875 exculpated them from all liability for the foreseeability damage

> sustained by the respondents as a direct result of their failure to keep their words. My Lords, were this indeed right the respondents would suffer a substantial injustice. The fact that time had not been declared to be of the essence does not mean that the express date for completion could be supplanted by the courts treating it as a mere `target' date and in effect enabling the defaulting party to insert into the contractual provision some such words as `or within a reasonable time thereafter'."

[33] I now turn to Behzadi v Shaftesbury Hotels Ltd [1991] 2 All ER 477. For these purposes I cite the judgment of Purchas LJ at 495, 496, he having quoted from two of the judgments in Raineri op cit:

> "At common law where no specific date for completion was provided a term would be implied, namely that completion should be within a reasonable time. A party could not, therefore, be in breach of such a contract or incur any liability in respect of it until it had been established that he had, in breach of this implied term been guilty of unreasonable delay. In my judgment, there is here a distinction to be drawn between open ended contracts and those with a specific date which, with great respect, may possibly have escaped Harman J in Smith v Hamilton [1950] 2 All ER 928, when he decided to employ in the contract of sale a term `or within a reasonable time thereafter'. Where a date for completion is prescribed, as there was in Smith v Hamilton … there was no room for the implication of such a term."

This case, of strongly persuasive authority, read with the earlier decisions of the House of Lords is of assistance to this court in arriving at a just and lawful conclusion.

[34] I find that once the 31st May 2009 had passed without completion the defendant here was in breach of contract. Nevertheless it was open to it and is open to it to seek relief from the consequences of that breach of a condition in the contract. But should such relief be granted? In considering that one must consider the conduct of the defendant at the relevant time. By February 2009 it had sufficient information within its knowledge, but not the knowledge of these plaintiffs, that it would not complete by 31st May. It had sufficient information to know that

completion could be anticipated by October or November. That information proved to be correct. In at least two of the other cases brought to my attention by way of illustration, the vendor's solicitors were able to give details of the reasons for delay shortly after the letter of February 2009. Given the wording of Clause 8 and the other relevant contractual provisions constituting the circumstances of the case as envisaged in the authorities I find that the letter which ought to have been written by the vendor's solicitor in February 2009 was a letter setting out, albeit in summary form, that delays had regrettably occurred in whatever way they had occurred, but that, on their assertion, they fell within Clause 8 of the contract and the vendor was therefore asserting a right to extend the completion time. I note that here the vendor's solicitors did not even write that the delay in completion was for reasons outside of the control of their client, which may have been enough. This would not have been onerous. One standard letter, or two, for each of the two buildings under construction, would suffice. I accept Mr Lockhart's submission that sufficient detail needed to be given in such a letter, or possibly in subsequent particulars if requested, to allow the purchaser to make a judgment. The purchasers were all liable to find the money to pay for these apartments when the completion date came along. In the events that had happened they had a few weeks warning of the precise date and then a further period of 5 days pursuant to Clause 11. It will be recalled that the contracts could not be subject to finance, at the insistence of the developer. The purchasers therefore had to have the monies ready. As it happens by 2009 the property market had fallen sharply and the court takes judicial notice of the fact, brought home to it repeatedly, that by then it would be difficult to obtain finance in the amounts agreed at the height of the market in May 2007. Some purchasers, of course, would be paying for the apartments out of their own resources but even that might require the timely liquidation of other investments. It seems to me that it is not only fair and just but a proper interpretation of Clause 8 that the purchasers should be told of any alleged contractual right on the part of the developer to extend the time. That would allow the purchaser and its solicitors to assess whether those were indeed grounds for extending time thus necessitating the purchaser to have its monies ready for October or November or whether, in truth, some or all of the reasons were not valid reasons and the purchaser should serve either a notice to complete or, if and when appropriate, a notice of rescission. For completeness let me make it clear that in any market conditions a purchaser "off the plans" will need to know when he will have to have his funds in place to complete. The way of doing that agreed by the parties here was to fix a completion date. It remained the completion date until and unless the vendor lawfully exercised a right to an extension of time under the contract. The letter of 6th February informing the purchaser's solicitors of an "anticipated" completion 8 or 9 months hence, without reasons and without reference to Clause 8 did not, I find, by itself extend the time for completion.

[35] The defendant here seeks equitable relief from the consequences of its own breach of contract. But he who seeks equity must do equity. Chappell v The Times [1975] 2 All ER 233, 240 c-g, C.A.; Snell on Equity, 32nd Ed., Chap. 5. It cannot be said that the vendor here behaved equitably to the other party to the contract; it has kept them in the dark and treated them with a wholly unjustified disdain after it was in breach of contract.

[36] Mr Horner pointed out that the contract did provide for Notices under several clauses but not at this point. Nor was any time given for when such an application for an extension of time should be made. I accept the final point but we are not talking about a Notice but an exercise of a contractual right by the developer. If there is any ambiguity as to the interpretation of Clause 8 in this regard I remind myself of the doctrine of contra proferentem. For convenience I set out the law on this topic as summarised by me in Hollway v Sarcon op cit.

> "[22] In addition they rely on the proposition still referred to by lawyers by the concluding words of the Latin maxim 'verba cartarum fortius accipuntur contra proferentem' (Bacon's Maxims Three). A deed or other instrument shall be construed more strongly against the grantor or maker thereof. It is clear that Sarcon was the maker here. The rule applies only in cases of ambiguity and where other rules of construction fail. London and Lancashire Insurance v. Bolands Limited [1924] AC 836, 848; Lindus v. Melrose [1858] 3 H&N 177, 182. I share the view of Eveleigh LJ in The Olympic Brilliance [1982] 2 Lloyds' Rep. 205, C.A. that the principle was "usually a rule of, if not last, very late resort." This was a view shared by the Court of Appeal in Macy v Quazi The Independent 13/1/1987 and by Auld LJ in Direct Travel Insurance v McGeown [2004] 1 All ER Comm 609. The proper approach is to seek to ascertain the intention of the parties from their contract in its context. If the court is left in a real state of uncertainty as to the correct interpretation due to ambiguity in the language then contra proferentem applies. As Lord Sumner said in London and Lancashire Fire Insurance Co Ltd [1924] AC 836 at 848 it –
>
> > 'is a principle which depends upon their being some ambiguity that is to say

> some choice of expression – by those who are responsible for putting forward the clause, which leaves one unable to decide which of two meanings is the right one.'

Sir John Pennycuick said in St Edmundsbury v Clark (No 2) [1975] 1 All ER 772, at 780, delivering the judgment of the Court of Appeal in England:

> `.. it is necessary to make clear that this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation. The presumption itself is not a factor to be taken into account in reaching the conclusion'."

If I were uncertain the doctrine would clearly assist the Plaintiffs here and confirm the interpretation in their favour. This contract has already been the subject of three days of submissions from three senior counsel. I have now had a further two days from two seniors and a leading junior on another aspect of the contract. It is only right that if in doubt any court should construe the contract against the party which made it and refused to contemplate any amendment.

[37] As to when the developer was obliged to exercise or seek to exercise any rights under Clause 8 the answer in this particular case is not difficult. They had the necessary information by February 2009 and that was when they should have done so. But, in equity I do not find that that is the only time they could have availed of Clause 8. If, when the plaintiffs' solicitors here had written in May 2009 they had then replied not in the terse fashion they did but had explained the reasons why the vendor was, in its view, entitled to an extension under Clause 8, I find that that would still have been an effective exercise of the defendant's rights (subject to the reasons being found to be within Clause 8). It would have been before the date of completion.

[38] One might go further. When the Notice of Rescission was served 5 days after the completion date under the contract it seems conceivable to me and indeed I might well have found that the developer could even then have made its case pursuant to Clause 8. (Note that 5 days is the period for a Notice to Complete under Clause 11 of this Agreement and under the General Conditions of Sale.) That would

have been within a reasonable time of the date of completion under the contract. I find that Clause 6 and the completion date read together were either a condition going to the root of the contract or an innominate term" breach of which might or might not amount to a repudiation depending on the gravity of the consequences of the breach" per Lewison L.J. at [29] of Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445; [2011]1 P&CR 14 See also Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223 where Etherton LJ at paras 61 to 64 points out that "whether or not there has been a repudiatory breach is highly fact sensitive". The breach here is grave in my view.

1. The purchasers are told only of an "anticipated" new date for completion.

2. That date is not a few days or weeks after the agreed date but five or six months later.

3. The purchasers are left wholly in the dark as to whether or not they are legally obliged to complete at the later time because the developer is entitled to an extension of time under Clause 8 for reasons for delay beyond his control or that of his contractor.

If the developer had chosen to he could in June have remedied the third and, perhaps, the first of these but he did not do so. If the Notice gave 28 days, say, to complete then the developer would have to complete or assert his Clause 8 rights within that time. He could not leave the purchaser in continuing uncertainty. But again on the facts of this particular case it did not do so. In fact it did not mend its hand until after its own revised date for completion when the Defence and Counterclaim drafted by Mr Humphreys of counsel was served on 12 November. By then it was in my view clearly too late. In exercise of my discretion at equity and for the reasons herein I find that the plaintiffs' solicitors were entitled to serve the Notice of Rescission 5 days after 31st May 2009. As I have said the Defendant could still have been defeated then (and for a short time thereafter) but in the absence of any exercise of rights under Clause 8 it was not and the Plaintiffs were entitled to view the unexplained breach as a repudiatory breach of the contract and rescission took effect when Messrs Carson & McDowell replied disdaining to invoke their clients rights or inform the purchasers of the reasons for delay. For the avoidance of doubt this is not mere formalism. The vendor in default did not even say that the delay was caused by reasons beyond its control or that of its contractor let alone give any details of such delay.

[39] Support for those conclusions in this case might also be found, if required, in the other terms of the contract and the correspondence of the vendor's solicitors. On

28 March 2007 they wrote to the purchaser's solicitors. The letter included the following paragraphs:-

> "We would point out that the agreement for lease and draft lease are in standard form [sic]. You will appreciate in a development such as this conformity of documentation vital [sic]. Accordingly, no amendments to specific clauses of the Agreements or the Lease will be accepted by our client, except in the case of manifest error. Our client will not make any exception to this rule and in particular we would respectfully ask you to refrain from having your client(s) sign a contract which has been unilaterally amended as any such contract will be immediately returned. In respect of the replies to building development pre-contract enquiries we will not answer any pre-printed or routine query sheets. We will, however, respond to any relevant specific further questions you have.
>
> Your client(s) has/have been made aware that signed agreements must be returned no later than 21 days from the date of this letter i.e. 18 April 2007. We would ask for your cooperation in ensuring that this target date is achieved. Due to the very high level of interest in these properties since their release on to the market our client will not extend this deadline. If the agreements are not received within the stipulated time limit, our client reserves the right to cancel your client's site reservation immediately and the Property will be offered to the next person on the waiting list."

This emphatic approach was also followed in the next letter from the vendor's solicitor of 5 April 2007 which was in like tone and made express reference as to time e.g.: "The strict time frames for return of signed Agreements must be adhered to."

[40] I have already indicated a rejection of the defendant's submission that in some way it had two periods of reasonable time after 31st May 2009, one at large and one thereafter under Clause 8. It simply does not make sense if only because the reasons are likely to be overlapping. I did ask counsel what was reasonable time at common law. My own researches have led me to conclude that the law on this is

also entirely clear. There is discussion of the topic at paragraph 6-064ff of Hudson's Building and Engineering Contracts 12th Edition (2010). At 6-066 it reads.

> "Where, however, the reasonable time obligation arises because a stipulated date has ceased to be applicable by reason of prevention or breach, a special difficulty can arise. No doubt the original contract completion date will, in the great majority of cases, tend to be accepted by both sides as evidence of what is a "reasonable time and ordinary circumstances", so that the new reasonable time for completion will be arrived at by adding such additional periods of delay as can be shown to have been caused by the prevention or breach (including any further delays beyond the control of the Contractor occurring during that additional period)."

[41] The law on this topic was clearly established by the House of Lords in Hick v Raymond and Reid [1893] AC 22. I quote from the speech of Lord Herschell LC at page 29:-

> "My Lords, there appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances" say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practability of discharging a vessel they may differ in summer and winter. Again, where increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extra-ordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to

> me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay have not been caused or contributed to by the consignee."

[42] That that case is still good law is apparent from subsequent authorities such as SHV Gas Supply and Trading SAS v Naftomar Shipping and Trading Company Limited Inc [2006] 2 All ER (Comm) 215. I take the opportunity to quote from Robert Goff J in British Steele Corporation v Cleveland Bridge and Engineering Company Limited [1984] 1All ER 504 at 512:-

> "I turn to the question of delivery within a reasonable time. It was common ground between the parties that the principles I had to apply in this connection were those stated by the House of Lords in Pantland Hick v Raymond and Reid op cit viz that the question of what constituted a reasonable time had to be considered in relation to the circumstances which existed at the time when the contractual services were performed, but excluding circumstances which were under the control of the party performing those services. As I understand it, I have first to consider what would, in ordinary circumstances, be a reasonable time for the performance of the relevant services; and I have then to consider to what extent the time for performance by BSC was in fact extended by extraordinary circumstances outside their control."

It is safe to conclude therefore that a reasonable time in this context is the original completion date plus any additional time relied on by the builder or vendor beyond his control and not "caused or contributed to" by him.

[43] Reinforced by those authorities I find that Clause 8 was, as it says, the clause in this contract which dealt with "Delay and Extensions of Time". The right and the

only right of the Developer to an extension of time arose from this clause. I reject the notion that it enjoyed some kind of vague right less than or different from or greater than the rights to which it had expressly agreed. Clause 8 was consistent with the common law as properly understood.

[44] That conclusion is reinforced by the arguments of plaintiff's counsel which I will not set out in full. But Mr McLaughlin pointed out that the contract was entered into in a rising market; as it proved either at or immediately prior to the height of that market. In those circumstances it is not surprising that the developer would be content with and would limit his rights to those set out in Clause 8. If it had addressed its mind to the issue, counsel submitted, it would not have worried about not being granted an extension of time because if the purchaser rescinded it would merely sell the property to the next person in the queue.

[45] Before I turn to deal with the five questions on which the parties would like a ruling there is an important submission of Mr Horner which I need to address. The defendant here was in breach of a condition of the contract going to the root thereof i.e. that they would complete on 31 May 2009 so that the plaintiffs would have to find the money on that date and on doing so be able to take possession of a dwelling fit for occupation personally or by tenants, or at least an innominate term. They had the opportunity to obtain an extension of time as of right under the contract by relying on reasons beyond their control as indicated and agreed in Clause 8 of the contract. This also they failed to do. What is the position if, unlike the plaintiffs here, the purchasers and their solicitors simply remained silent and inactive following receipt of the letter of 6 February 2009 informing that completion would be delayed to an anticipated date in October or November 2009? Mr Horner submits that in those circumstances the purchasers cannot avail of the repudiatory breach by the defendant. The matter is addressed in Chitty on Contracts at 24-013. The paragraph in its entirety is worthy of consideration but is best summed up in this sentence. "Unless and until the repudiation is accepted the contract continues in existence for 'an unaccepted repudiation is a thing writ in water'." See Howard v Pickford Tool Company [1951] 1 KB 417, 421 per Asquith LJ, with whom Eversheld MR and Singleton LJ agreed. It appears therefore that in those cases, it may be the majority, where the purchasers' solicitors did not take issue with the letter of 6 February 2009, they cannot complain of the repudiatory contractual breach by the defendant. They will be liable under the contract unless the court finds the reasons for delay were not outwith the control of the developer or its contractor pursuant to Clause 8 and the court finds they can pray that in aid for some reason not currently apparent. It does not seem to me that I received full argument from counsel on that point and I wish to reserve my position upon it to a degree. Mr Lockhart's clients were not in that factual position but better placed.

[46] I now turn to the questions on which the parties sought guidance.

(1) Did the Developer require an extension of time under Clause 8 of the Building Agreement to complete the construction of the apartment, after the date for completion contained in paragraph 6 of the schedule to the Agreement?

The developer did require an extension of time under Clause 8 of the Agreement as they were unable to complete within the time set in the contract.

(2) If the answer to (1) is yes, was the Developer obliged to take any particular step in order to be entitled to such an extension of time?

The Developer was obliged to assert his right to an extension of time pursuant to Clause 8, by seeking an extension of time based on causes outside his control or that of his contractor.

(3) If the Developer failed to take any required step, what are the consequences of such failure?

The Developer did fail to take the required step. Where a purchaser accepted the breach of the condition on the part of the defendant as a repudiatory breach in a clear way by way of service of notice of completion or a notice to rescind the contract was thereafter at an end unless the Developer or its solicitors wrote timeously in response exercising the right (or purported right) under Clause 8 of the contract.

(4) If the failure by the Developer to take any required step amounted to a breach of contract, did it give rise to a right on the part of the purchaser to rescind the contracts?

Yes.

(5) If so was the purchaser required to take any step in order to exercise its right to rescind the contracts.

Yes. The purchaser was required to serve a notice of completion or notice to rescind following the failure to complete by 31 May and to assert Clause 8 rights. If in fact the developer, in other cases, did write back asserting that Clause 8 right then the contract remains extant until and unless the court finds that the reasons for delay relied on were not in truth outside the control of the developer and it was not

therefore entitled to rely on Clause 8. The court reserves its position as to the effect of such a factual finding, if made, on those purchasers who remained silent or inactive. Mr Lockhart and Mr McLaughlin were not acting for such a party and it seems to me that counsel acting for someone in such a position would be entitled to address me before I could safely decide that in a legally binding way. It may be that if they failed to accept the breach because they had not been given the information they were entitled to it might affect their legal position. But any party seeking to argue the "writ on water" point will be at risk of costs.

[47] I find for the Plaintiffs here on their claim and on the counter-claim. They are entitled to return of their deposit with interest at 5 % from 19 April 2007.