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Judgment: approved by the Court for handing down | *Delivered:* **16/04/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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2010 No. 002862

BETWEEN:

JOANNE McGARRITY
and
NIGEL McGARRITY

Plaintiffs;

-and-

SARCON (NO. 177) LIMITED

Defendant.

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BURGESS J

Background

[1] Joanne and Nigel McGarrity are the plaintiffs in these proceedings. I will refer to them hereafter as the Purchasers.

[2] The defendant is Sarcon (No. 177) Limited. This company is the developer of the James Clow Apartments at Pilot Street, Belfast. I will refer to it as the Vendor.

[3] The Purchasers represent one case selected from a group of litigants ('the Group') set out in Schedule 1 of a Group Litigation Order made by Deeny J on 11 September 2013 ('the GLO').

[4] A consolidated statement of claim was delivered representing the GLO issues, which are being pursued on behalf of the Group. The statement of claim in this action was amended to reflect the GLO issues as they apply to the facts in this case. It is agreed that the other GLO Purchasers will not amend their individual pleadings pending the outcome of the GLO but may amend those (if necessary) to incorporate

the GLO issues (where not specifically pleaded in their existing individual pleadings) following judgment in this case.

[5] The Purchasers, with another party, sought a "Representative Order" under the provisions of Order 15 Rule 12 of the Rules of the Supreme Court seeking to include non-Group Purchasers in the decisions of the court in relation to the issues set out in the GLO. Their concern related to the costs exposure incurred by them while the remaining purchasers essentially got the benefit of their efforts: and the Vendor's concern that if it succeeded in the issues raised in the GLO, the remaining purchasers could seek to raise arguments and incur costs and time with issues which were not directly argued in the GLO proceedings. This was on the basis that the purpose of the GLO and any group litigation in general is to bring finality to the litigation before the courts.

[6] While I refused that application, I gave a series of Directions to all those parties not involved in the GLO and, through them, other potential parties who may become involved by reason of claims of professional negligence. The purpose was to invite them either to join the GLO or to immediately amend their proceedings in respect of any matter they wished to argue either differently to the arguments put forward by the Purchasers or alternatively in respect of other arguments that they may wish to raise and which could be then addressed in these proceedings. Those parties were given notice that failure to carry out any such step would result in a refusal to amend their proceedings in the future. I am advised that no steps have been taken by any of the parties upon whom those Directions have been served. In that way therefore it is hoped that resolution of the GLO issues will be binding on all purchasers of apartments in this development.

[7] That of course leaves issues particular to the facts in each individual case. By way of example, there may have been specifications in relation to an apartment different to others about which complaints are made and which this court will not be addressing: in the legal process of purchasing an apartment requisitions may well have been raised with replies given which may impact on the rights and liabilities of either party: and information may have been given to individual purchasers different to that given to others which may have the effect of in some way qualifying representations upon which either party may rely. These are simply given by way of illustration.

[8] During the course of the proceedings, a number of new issues arose in relation to the GLO issues as a result of evidence given. The court is grateful to both parties and their legal representatives for taking a pragmatic approach to such developments and, with the consent of the court, the statement of claim and defence underwent further amendments so as eventually to reflect all of the issues upon which the determination of the court is sought.

Previous legal proceedings

[9] The Purchasers entered into a Building Agreement with the Vendor dated 4 May 2007 (the Building Agreement). This was for the purchase of an apartment (the apartment) at the Granary Building (Block A), James Clow Development, Pilot Street Belfast. The site number was 128, the contract price was £282,500 and the deposit was £28,250. The date of completion in the Building Agreement was 31 May 2009.

[10] The development included in addition to Block A, a separate block known as Merchants Building (Block B) and common areas within the development site.

[11] In April 2009, the Vendor's solicitors wrote to inform all purchasers (including the Purchasers) that the completion of the apartments (originally scheduled to be completed in May 2009) would be extended to October/November 2009. The purchasers did not accept that the Vendor was entitled unilaterally to an extension of time, contending that time was "of the essence pursuant to Clause 23 of the Building Agreement". They then sought to rescind their respective agreements. The Vendor's solicitors responded by asserting that 'the Building Agreement and the Agreement for Lease remain in place between our respective clients and our client shall enforce each and every provision of same'. Thereafter, following further correspondence, the Vendor served a Notice to Complete on the purchasers of apartments in Block B on the 27 October 2009 (the October Notice to Complete), and on the purchasers of Block A on 8 December 2009 (the December Notice to Complete).

[12] The Court of Appeal has given judgment in relation to a number of salient terms within the Building Agreement, most importantly a determination that the date of completion, namely 31 May 2009, was not a date for which time was "of the essence" pursuant to Clause 23 of the Building Agreement. Instead the Court accepted that the Vendor was entitled to an extension of time within the provisions of paragraph 8 of the Building Agreement, subject to an assessment of fact of whether or not the grounds for extension of time fell within the definition of Clause 8.

[13] A secondary issue considered by the Court of Appeal was that if any period of delay fell outside the reasonable extension provisions under Clause 8, then the Vendor would be liable in damages for any loss sustained by the purchaser in consequence. No evidence has been given that the reasons for the extension of time fell outside the provisions of Clause 8, and therefore these issues no longer arise in the GLO proceedings.

[14] The Purchasers and the other purchasers however now deny that they are obliged to complete their respective agreements with the Vendor and seek the return of the deposits paid in respect of the apartments.

[15] Each of the purchasers commenced proceedings seeking rescission of the agreements. Thereafter, on or about the 5 January 2012, the purchasers served letters further confirming rescission of the agreements on the basis that the Vendor had not complied with certain conditions in the planning permission for the Development and did not have title to certain balconies at the Development. These alleged breaches had not been raised before.

[16] The proceedings by the purchasers now seek rescission on a number of grounds - that the Vendor:

- Has failed to comply with the Building Agreement in terms of specification;
- Cannot give good title to certain balconies which overhang adjoining land not in the ownership of the Vendor;
- At the date of each of the Notices to Complete was not ready, willing and able to complete having regard to:
  (a) certain requirements contained in conditions in the planning permission for the development;
  (b) the state of completion of the Blocks;
  (c) an alleged departure from the specification; and
- Did not comply with the requirements of an Addendum to the Building Agreement.

[17] The Vendor rejects these allegations and by way of counterclaim seeks specific performance of the agreements.

The Notices to Complete

[18] As can be seen, the role of the Notices to Complete feature large in the determination of these actions. I therefore set out the approach that I believe requires to be taken in law to such Notices.

[19] The validity of the Notices must be determined by reference to the position at the time of their service and the person serving any such Notice must continue to be ready and willing at any time during the period contained in the Notice to fulfil his part of the contract – see *Aero Properties Limited v City Crest Properties Limited* [2002] 2 P. and C. R. 21. A gloss can be added to that principle in that the parties serving the Notice are entitled to a sufficient further period within which to set up "the necessary administrative arrangements" respecting completion – see Cole v Rose [1978] 3 All E.R. 1121.

[20] The authorities indicate that by "administrative arrangements" what is meant is, for example, obtaining documents such as a charge into the hands of the solicitor in circumstances where the whereabouts of that document and its availability is known. What is not covered is anything which requires a step by way of substance still to be taken such as, for example, where there is a charge but a chargee might be

unwilling to allow it to be discharged. That would not be an administrative step but one which could give rise to a failure to show title.

[21] In *Aero*, the court determined that it is for the party upon whom the Notice is served to adduce evidence to show the other party is not able to complete. The court did not however then determine as to who was to prove that that evidence showed that inability. This is not easily resolved in these cases since, on occasion, the Vendor is the plaintiff and, at other times, it is the defendant.

[22] In *Madill (97 PL) Limited v Parkland and Estates Limited* [2009] 2 P&CR 6 at paragraph 22 the court stated:

> "… Under the applicable condition the right to serve a completion notice is given to a party 'who is ready, able and willing to complete'. The service of such a notice can be said therefore to carry with it an implicit assertion to that effect. If the truth of that assertion is put in issue, it is not unreasonable to expect the giver to be able to justify it. To that extent I am prepared to assume that he carries at least some obligation in subsequent proceedings to call evidence to support his position, and that he cannot simply rest on a notice. Although the judgment of Blackburn J in Aero Properties contains statements suggesting that the burden of proof lies on the recipient of the notice, there does not appear to have been any argument on that point, as a distinct issue of law."

[23] Therefore, I approach the burden of proof as lying on the Vendor, provided the Purchasers raise the issue and put before the court evidence to show that there is an issue to be decided.

[24] Having served a Notice, time is then made of the essence for both parties. If it is shown that the persons serving the Notice are not able to complete on the new date for completion specified in the Notice, the other party allegedly in default can terminate the agreement, leaving the server of the Notice in default.

Rescission and Specific Performance

[25] Depending on whether or not the Vendor is a defendant or a plaintiff the remedy sought by Purchasers will be for rescission. I will be dealing with a number of headings where the Purchasers argue that they are entitled to rescind and wish to rescind the Agreements. Not every breach or misrepresentation by a Vendor gives rise to the right to rescind. That breach or misrepresentation must be either substantial and/or fundamental in the sense that it defeats the objective of the parties in making the agreement. Even if the right to rescind arises, it is still a

discretionary remedy. As I come to each heading, I will determine whether the right to rescind arises and, if it did, whether the circumstances are such that the right should be granted to the purchaser. In the same manner, I will have considered under each heading and ultimately overall whether the Vendor should be entitled to specific performance of the Agreements and, given that this judgment is intended to extend beyond the particular circumstances of this case, in what circumstances specific performance of other agreements would be granted.

Planning History of the development

[26] The land upon which the development has been carried out was formerly the site of the business carried on for many years by James Clow and Company Limited. It is a rectangular piece of land bounded on two boundaries by Pilot Street, Belfast and by Princes Dock Street, Belfast respectively, and on the other two elevations by properties in the ownership of third parties. The boundaries and dimensions of the site are shown in four Land Registry maps contained in a Booklet of Title ("the Booklet") which was furnished to the purchasers of any apartment, including the Purchasers. This Booklet is contained in the exhibits. I will refer to this land as 'the Site'.

[27] Also included in the Booklet is a Property Enquiry Certificate dated 5 January 2007 which stated that "Pilot Street is maintained" (that is by the Department of Environment under the Roads (NI) Order 1993) and "Princes Dock Street is on Harbour Property". This latter reply is expanded on in a Statutory Declaration made by Thomas Hugh Crawford, a Director of James Clow and Company Limited, dated 13 October 2000. In it, he declares that the company had enjoyed continuous enjoyment of access over Princes Dock Street "as shown on the plan attached", although it was a private road in the ownership of Belfast Harbour Commissioners ("BHC"). The Declaration also set out other easements and rights enjoyed by the company, in addition to the right of access for the purposes of its business. For the right to exercise all of these rights, the company had discharged outlays based on invoices received from BHC in respect of cleaning the street.

[28] As stated, a plan was attached to the Declaration defining the boundaries of the Site. This plan equates to the Land Registry maps and the title maps in prior title. A further declaration was made by a Nicholas Lord confirming his knowledge of the use of Princes Dock Street, again by reference to a map showing the boundary lines of the Site.

[29] The title to the Site devolved to AWG Residential Limited, who, on 6 December 2004, applied for Planning Permission in respect of the whole Site under application numbers Z/2004/2830/F. The application was for the erection of 135 apartments in two blocks. Planning permission was granted on 20 December 2005, but I will refer to this permission hereafter as "the 2004 Permission" – in order to accord with its description in the pleadings.

[30] The 2004 Permission features large in this matter. Some of its terms form the basis of some of the Purchasers' defence to the claim that they are obliged to complete the agreements entered into by them to purchase the apartment. As the evidence unfolded, some of the terms were no longer relied upon, so I set out here only those which remain live issues between the parties namely:

(1) Condition 4(b) which reads:

> "4. The applicant shall, prior to the commencement of any works pursuant to this Permission, submit:-
>
> (b) A detailed scheme for remedial works and measures to be taken to avoid risk from contaminants when the site is developed. The remediation scheme shall be agreed in writing with the Planning Service and shall be fully implemented before the development hereby permitted is first occupied. Any variation of the scheme shall be agreed in writing with the Planning Service in advance of works being undertaken."

(2) Condition 5 which reads:-

> "The applicant on completion of the works, shall provide to the Planning Service written confirmation, that all works were completed in accordance with the agreed details including suitable photographic and documentary evidence and as built plans."

[31] The development contained in the 2004 Permission incorporated the two Blocks, A and B. Included in the application were a number of specifications including, for the purposes of this action, the proposed finishes of the elevations of the two Blocks (hereinafter referred to by me as "the 2004 elevation finishes").

[32] Attached to the 2004 Permission is a plan stamped "Granted" by the Department of Environment's Belfast Planning Office. Again the rectangular shape of the Site is shown, reflecting all maps to which I have referred, including those in the documents of title forming the root of title to the Site.

[33] On 13 February 2006, the Vendor was registered as the owner of the Site under Land Registry Folios AN134225L, AN134226L, AN134227L and AN134228L.

[34] On 14 April 2006, the Vendor submitted a new planning application under reference Z/2006/0898 ('the 2006 Application'). This sought to:

- Increase the number of apartments from 135 to 171;
- Change the 2004 elevation finishes; and
- Add balconies to the Pilot Street and Princes Dock Street elevations.

[35] This application was refused on 5 December 2007 after detailed discussions between the Vendor and its representatives and the Planning Department. In her evidence, Ms Joan Mary McCoy, of White Ink Architects, the architect for the development, told the court that the application was rejected on the ground of the application for the increased height of the Blocks in order to accommodate the additional apartments. She said the planners had informed her that they had liked the change to the façade and the inclusion of the balconies, but they dealt with the application as a whole, not in sections. No new application was made at that time to address the balconies and/or the proposed changes to the elevation finishes. Nevertheless, her evidence was that it was the Vendor's intention at all times from their acquisition of the Site to incorporate the balconies and to change the 2004 elevation finishes.

[36] The Vendor then proceeded with the development and, as part of its marketing, two brochures ("the Brochures") were produced, which were available for proposed purchasers. I note at this stage that there is no reference to the Brochures, or any of their content, in either the Building Agreement or the Agreement for Lease.

[37] In her evidence, Ms McCoy stated that the Brochures did not reflect the 2004 Planning Permission as regards the balconies and the elevation finishes, but rather the 2006 Application as regards both matters. Both Brochures had pictures of the outside elevations of both Blocks, representing their appearance during the day and at night. Included in one of the Brochures were the floor plans of two types of apartment (one bedroom and two), their layout, dimensions and standard finishes for kitchens and bathrooms. All apartments were shown to have balconies. Also included in the Brochures was a narrative which referred to the inclusion of "floor and ceiling glazing and glass balconies …" and:

> "The buildings' façades had been carefully considered, with the balanced palette of external material which affords the development a sense of quality, ensuring its aesthetic appeal will withstand the test of time".

[38] For reasons to which I will come I will comment at this stage:

(a) That the photographs/illustrations would be seen as illustrative of the finished development aesthetically;

(b) That the narrative addressed the aesthetics of the elevations;

(c) That the durability of the elevation finishes was addressed in terms of withstanding the test of time; and

(d) That separately from the Brochures, but nevertheless relevant to the obligations of the purchasers in respect of certain service charges, the finishes and their durability could well impact on maintenance issues.

[39] In the event, the elevation finishes eventually provided differed both from the 2004 Permission and from those shown in the Brochures. At my request, Ms McCoy prepared a separate set of drawings showing how the various elevations developed, suitably coloured to show the materials incorporated in the elevations:

(i) As shown in the plans accompanying the 2004 application;

(ii) As shown in the Brochures which reflected the 2006 Application ("the Brochure finishes"); and

(iii) As actually constructed ("the actual finishes").

I am obliged to Ms McCoy for providing these very helpful drawings.

[40] On any view of the differing façades, it is clear that substantial changes have been made both in terms of their appearance and the materials used. As I have said, I will be returning to this aspect of the case, but at this stage I would record that on the evidence of Ms McCoy:

(i) A decision to change the elevation finishes from the 2004 elevation finishes and the Brochure finishes (that is the finishes proposed in the 2006 Application) was made before the agreements entered into by the Purchasers with the Vendor for the purchase of the apartment;

(ii) No notice was given to the Purchasers about this change;

(iii) No documents were available for inspection before the Agreements were entered into which would have disclosed the true position regarding the elevation finishes – indeed any reference to the 2004 Permission documents or the Brochures would have been misleading; and

(iv) No further application for planning permission for changes to the elevation finishes was made until 16 January 2009 ('the 2009 Permission') – 21 months after the Agreements for the purchase of the apartment were completed.

[41] Having listened carefully to the evidence, I can find no satisfactory reason for this failure to disclose information relevant to an aspect of the Development so prominently featured in the Brochures, so clearly regarded as important by the

Vendor, and potentially important for purchasers, not least given the potential role in respect of the cost of the maintenance and replacement of any such finishes.

[42] Ms McCoy also confirmed that in commencing the building of the Blocks, it was the intention of the Vendor to include the balconies as incorporated in the 2006 Application, which was refused. Again, no planning application was made in relation to the balconies until the 2009 Application. In making that decision, however, the Vendor did not change the layout of the development by moving the Blocks from their original designed position on the Site. A map attached to all of the planning applications and to the agreements with Purchasers, reinforced by the narrative in those agreements, showed the elevations of the Blocks as immediately abutting Pilot Street and Princes Dock Street. Therefore the balconies shown in the 2006 Application inevitably encroached on to lands beyond the Site owned by the Vendor.

[43] Despite this, in the Certificates of Title, incorporated in the 2006 Application and the 2009 Application, it stated:

> "I hereby certify that the accompanying application is made by or on behalf of Sarcon 177 Limited ... who is in actual possession of every part of the land to which the said application relates and is entitled to a fee simple absolute."

This was signed by a representative of White Ink Architects.

[44] This representation is clearly wrong and was accepted as wrong by Ms McCoy. The Vendor had no title to the lands over which the balconies intruded. Indeed, as required in any planning application, no neighbourhood notification was given either to the Department or to BHC, despite the fact that the title in the Booklet clearly set out their entitlement to the lands adjoining the Site.

[45] I find it extraordinary that the Vendor or its representatives would not have realised that there was an encroachment, and that there was a necessity to address the absence of title in order, in turn, to grant title to the balconies as represented in the Agreement for Lease. Indeed in their skeleton argument (paragraph 12.5), counsel for the Vendor acknowledges that the fact that the balconies overhung Princes Dock Street was "quite apparent from the title furnished and the lease plan". Looking forward, it is even more extraordinary that no steps were taken to address this deficiency until late 2009 at which stage, to all intents and purposes, and certainly as far as the Vendor was concerned, the development was complete and fit to be occupied.

[46] The effect of these particular matters mean:

(a) The Vendor had no intention to build the proposed development in accordance with the 2004 Permission as it related to the balconies and the facades of both Blocks.

(b) That the Vendor's intention, confirmed by counsel, was to build in accordance with the Brochures. However, while that may be right as regards the inclusion of the balconies, it is not right as regards the elevation finishes.

(c) For those purchasing apartments with balconies overhanging adjoining land, they were contracting with the Vendor to buy an apartment with a balcony, which is in accordance with the Brochures not the 2004 Permission.

(d) For those purchasing apartments with balconies contained within the Site, there was no change from 2004 Permission.

(e) As regards the facades, all purchasers could only have been purchasing either in accordance with the 2004 Permission or the Brochures, not the facades actually constructed. Whatever rights the Vendor may have had under the Agreements to make changes to the Blocks without consultation, in entering into any agreement for the purchase of an apartment, a purchaser is entitled to be told accurately what was to be the starting point in respect of the elevation finishes, in order to make an informed decision as to whether or not to proceed. That was not available to any purchaser, based on a conscious decision by the Vendor to make changes which were in conflict with the 2004 Permission and the Brochure, which, on its argument, formed the basis of the agreement between it and the purchasers.

General legal structure

[47] Given that this was an apartment development, consisting of two Blocks with common areas within the Blocks and outside (within the Site), agreements entered into had to provide for a number of matters, namely:

(i) How the development was to be built and completed;

(ii) What was to be delivered to any individual purchaser in regard to the apartment being purchased by them;

(iii) What title would be given to the purchaser in respect of the apartment purchased by them;

(iv) When was the purchaser obliged to pay the Vendor and take the title for the apartment and assume any other liabilities in respect of the development;

(v) How the common areas, including for example lifts, heating and general maintenance, including the structure itself (which in turn included facades) were to be maintained and where necessary replaced. This gives rise to two aspects namely:

(a) Who decides what work requires to be done?

(b) Who pays for that work?

[48] The above package represents the benefits and liabilities it was intended would be enjoyed and assumed by purchasers.

[49] The legal documentation prepared to deal with all of these aspects was the Building Agreement and the Agreement for Lease, with a draft lease attached. None referred to, or incorporated the Brochures. In addition, by a letter of 5 April 2007, the Vendor's solicitors sent an Addendum to the Agreements to the Purchasers' solicitors. This was after their receipt of the Booklet but before any agreement was signed by either party. In the letter, specific reference is made to the possibility that a Building Control Certificate would not be available at the time originally envisaged, that is before the return of the Agreements. The Addendum's terms were:

> "The Developer, as a condition precedent to completion, shall obtain at its expense all requisite consents, being those permissions, consents, approvals, licences, certificates and permits in legally effective form as may be necessary, lawfully to commence, carry out, maintain and complete the Development to include (without limitation) the approval of the Building Control Department of the Local Council where the Development is situate. Where Building Control Final Completion Certificate in respect of the Apartment is not available at completion, same shall be furnished to the Employer *(in this case the Purchasers)* as soon as possible."

[50] I will deal with this Addendum at this stage since, during argument, it was submitted by the Vendor that since it was not attached to the Agreements when returned to the Vendor's solicitors for acceptance by the Vendor, it was not attached to the contract between the Purchaser and the Vendor. That argument, however, does not bear examination. It needs to be set in the context of the letter sending the Booklet and the Agreements. Dated 28 March 2007, it states:

> "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 enquiry sheets. We will however respond to any relevant specific questions you have."

[51] I am satisfied that in keeping with the Vendor's approach, this Addendum was seen as a term now introduced into the Agreements, 'a condition precedent to completion', without which the Vendor would not sign, and which if it had been considered as excluded from the signed Agreements would have been returned by the Vendor. Indeed, the covering letter again makes clear that '[o]nly unconditional contracts will be accepted in this matter'. The position is then confirmed by a letter dated 19 November 2009 from the Vendor's solicitors, advising the Purchasers that the Vendor would be in a position to complete the transaction on 30 November 2009, and in which specific reference is made to the Addendum and its terms, clearly indicating that the Vendor regarded it as a condition of the agreements between the parties.

It states:

> '5. Notice of Building Control Plan Approval. Please note, Building Control Final Completion Certificate in respect of the Property will be furnished in accordance with the Addendum to the Building Agreement.'

[52] **I determine that the Addendum was fully understood by both parties to represent an amendment to the proposed Agreement for Lease and Building Agreement originally sent to the Purchasers and incorporated into the Agreements by consent of both parties.**

[53] The Building Agreement and the Agreement for Lease are inextricably linked. Paragraph 5 of the Agreement for Lease states:

> "This Agreement is conditional upon a contemporaneous Building Agreement for the erection of an apartment on the Site being entered into contemporaneously between the Purchaser of the one part and the Vendor of the other part and in the event of the said Building Agreement not taking effect

> or ceasing to take effect then the present Agreement shall also cease to have effect."

Linked to the above agreements, and contained in the Booklet, were a number of supporting documents again forming an integral part of the obligations of both parties. These included:

(a) The plans and specifications and layout of the Apartment, the Blocks and the outside common areas.

(b) The 2004 Permission.

(c) The Lease which was to be entered into. There were three parties to the proposed lease, the Vendor, the Purchasers and James Clow Apartments Management Limited ('the Management Company'). The Management Company had been formed for the purposes of addressing the maintenance and long term upkeep of the development. Membership initially involved two classes of shares, two A shares issued to the developers and 135 ordinary shares, one in respect of each apartment. I will return to this vehicle in due course but at this stage simply record that an apartment owner was issued with an ordinary share to which certain rights were attached. Those rights were restricted in the sense that they had no voting rights until such times as all of the apartments were sold, at which stage effectively the apartment owners took on the responsibility for the long term maintenance and upkeep of the development. The Vendor as developer retained a residual title of fee simple subject to the leases in respect of the apartments, with a right to the rents issuing from them.

[54] I have referred above to the 2004 Permission included in the Booklet. Its role played a part in the legal arguments between the parties. Under the Building Agreement it provided as follows:

> "1. The Developer shall procure that its contractor shall build and completely finish in a good and work-like manner for the Employer *(in this case the Purchasers)* upon the site mentioned in paragraph 3 of the Schedule, an apartment ('the Apartment') therein shortly described as to the Apartment number situation and level within the Developer's development situate at and known as James Clow Apartments, Pilot Street/Princes Dock Street, Belfast ('the Development') in accordance with the plans and specifications lodged by the Developer with and passed and approved by the appropriate authorities for the sum mentioned in paragraph 4 of the Schedule

('the Contract Price'). The Employer shall be entitled to inspect the said plans (copies of which will not be supplied) and specifications by arrangement with the Developer's solicitors Carson McDowell at their offices in Murray House, 4-5 Murray Street, Belfast BT1 6DN."

[55] In relation to those plans and specifications paragraphs 3, 4 and 5 of the Building Agreement provide:

> "3. The said plans and specifications may be varied or altered in accordance with the requirements of the appropriate competent authorities provided that such variation or alteration does not materially alter the design, layout, nature or standard of construction of the Apartment or the Development.
>
> 4. The material shall be of the respective kinds as described in the plans and specifications.
>
> 5. In the event of the Developer's contractor being unable to obtain any of the materials, fittings or appliances provided in the specification, alternative materials, fittings or appliances of similar quality and cost may be substituted at the absolute discretion of the Developer's contractor (at no extra cost to the employer)."

[56] A number of issues arose out of the interpretation of the above clauses.

(i) It was argued that there was no requirement on the part of the Vendor to erect and complete the development in accordance with the 2004 Planning Permission. It was argued that the terms and conditions of the Permission were not incorporated into the Agreement. This, however, is to ignore the representations made by the Vendor in the Replies to the printed Enquiries Before Contract contained in the Booklet. The relevant Replies are as follows:

> "2(a) Please furnish copy Planning Permission permitting the erection of the present development on a permanent basis – approval enclosed in Booklet of Title.
>
> (b) Please confirm that the Planning Permission relates to the residential complex to be erected on the site in accordance with the Building Agreement – confirmed.

(c) Please confirm that the Planning Permission has not been revoked and is not subject to a notice to revoke – confirmed.

(d) Please furnish a copy of the Building Regulations Approval for the apartment to be erected on the site – awaited. Will be furnished when to hand."

These representations explicitly refer to the Planning Permission then in existence and a representation that the development would be completed in accordance with that Permission – not merely in accordance with the specifications or building materials or any other matter of a similar nature. Any purchaser reading the representations and the Planning Permission provided, would be entitled to assume not just that the physical building would be erected in respect of the Planning Permission, but that the conditions contained in the Planning Permission would also be met. Indeed any failure to meet them would render the Planning Permission at best voidable, possibly void. In any of those circumstances, the ramifications for the development as a whole and the apartments in particular could have been potentially serious for any purchaser, serious enough not to require them to complete the purchase of an apartment.

Therefore I reject any argument that the conditions of the 2004 Planning Permission are not included in the obligations of the Vendor under the Agreement for Lease and Building Agreement.

(ii) Under paragraph 3 of the Building Agreement, any variation or alteration may be made provided it is made "in accordance with the requirements of the appropriate competent authorities" and didn't make any material changes in the identified areas. An argument was put forward that this left it open to the Vendor to make only those changes which were required by the planning authorities. On the other hand, the Vendor argues that it allows for any change that it might wish to make, while accepting that it had to obtain permission from the planning authorities, if required, and did not materially alter the design, layout, nature or standard of construction of the apartment or the development. I believe that once planning permission is granted the circumstances in which the authorities could revoke that permission would be rare, if it existed at all. While there is some scope for arguing an ambiguity in the wording, I am satisfied that the argument of the Vendor is the preferred one. It does not open a Pandora's Box given that any change had to accord with the conditions included in the respective clauses. Therefore, there would be no material change in the wide range of areas of interest – layout, design standard of construction etc.

[57] However, the Purchasers in this case, and I believe all purchasers of apartments with balconies overhanging adjoining lands, wanted to purchase an apartment with a balcony as shown in the Brochures, even though that represented a variation or alteration of the design and specification set out in the 2004 Permission. To that extent, I believe I can take it as implied that both parties agreed to that variation, even outwith the power of the Vendor to make changes under Clause 3 of the Building Agreement, the change having to receive planning permission before the date of completion. If necessary, I would grant the request of the Vendor to rectify the Agreements to reflect the parties' common position at the time of their execution, namely that a balcony was to be included. As set out in paragraph 5-115 of Chitty on Contracts:

> "The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

All the criteria are met – as regards the balconies.

[58] As I have said, at the Date of Completion there would have to have been planning permission, and that would have to be evidenced – as per the Addendum to the Agreements. It was argued that if the Purchasers had been aware there was no planning permission for the balcony at the time they entered into the Agreements they would not have executed them. First, no evidence was given to that effect; secondly, they should have been aware of the position when they executed the Agreements, but did not resile from executing them; and thirdly, under the Addendum, they would have known that without that permission at the Date of Completion they would not have to complete.

[59] **I therefore reject the argument that the absence of planning permission for the balcony at time of the execution of the Agreements would allow for rescission of the Agreements or a claim for damages. However, I allow the Building Agreement to be rectified to qualify the 2004 Permission to include a balcony.**

[60] The change in specification of the façade is a separate matter. Here, there was no meeting of minds at the time the Agreements were executed – see paragraph [38](e) above. The intention of the Vendor was not to provide elevation finishes either in accordance with the 2004 Permission or the Brochures. While it may have had the right within the terms of Clause 3 of the Building Agreement to make changes, it was incumbent on it to set out what the starting point would be – if only to allow for an assessment of the criteria under which changes could be made. The

Vendor at paragraph 25 of its second skeleton argument says that if needs be Clause 1 of the Building Agreement should be rectified to read as follows:

> "The Developer shall procure that its contractor shall build and completely finish in a good and workmanlike manner ... an apartment ... in accordance with the plans and specifications incorporated in the brochure for the Development for the sum in paragraph 4 of the Schedule."

But that is not what it was intending to do. It is not the case where that was its intention, only for it to change its mind, resorting to the provisions of Clause 3 to effect any changes. It had made a conscious decision not to build according to either of those documents.

[61] **In those circumstances, I would not agree to any rectification to accommodate the changes to the elevation finishes. For the same reasons, I reject the argument that there was estoppel by convention – there was no convention basis.**

[62] For the sake of completeness, I will deal with disclaimer clauses contained in the Brochures referring to statements and representations made in them, including the description of the elevation finishes which I have set out in paragraph [29] above. The Clauses stated:

> "These particulars do not constitute any part of the offer or contract. None of the statements contained in these particulars are to be relied on as statements or representations of fact and intending purchasers must satisfy themselves by inspection or otherwise as to the correctness of each of the statements contained in these particulars. Configurations of kitchens, bathrooms and wardrobes may be subject to alteration from those illustrated without prior notification. Purchasers should satisfy themselves as to the current specification at the time of booking.
>
> The Vendor does not make or give, and neither the selling agent, nor any person in their employment, has any authority to make or give representation or warranty whatever in relation to any property. Artist impressions and internal photographs are for illustration only. Plans are not to scale and all dimensions shown are approximate."

[63] The disclaimer referred to purchasers satisfying themselves 'by inspection or otherwise' as to the statements made as to the elevations. At the time of the

completion of the Agreements the Blocks did not exist, leaving only the plans and specifications referred to in the Building Agreement as the sole source of such information. In the skeleton argument, the Purchasers claim that they were in a weak position regarding changes. However, they and their representatives had time before entering into the Agreements to inspect the drawings and compare them to the Brochures, which in any case were defined as 'illustrative'. However, if they had exercised that right, they would not have discovered what the Vendor intended to provide in terms of the finishes to the facades. There were no drawings for what was intended. A purchaser had no means to discover what was intended, the Vendor having seemingly made the conscious decision not to indicate its intentions.

[64] Assuming the Brochures form part of the contractual relationship between the parties and that, accordingly, the disclaimer clauses are incorporated in to the Agreements, this would be of no avail to the Vendor. The Misrepresentation Act (Northern Ireland) 1967 (as amended) states in Section 3 as follows:

> 'If a contract contains a term which would exclude or restrict –
>
> - Any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> - Any remedy available to another party to the contract by reason of such misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977."

[65] The test contained in the Section 11(1) of the 1977 Act is applied subjectively in the light of the circumstances that were, or ought reasonably to have been, known to the parties or in the contemplation of the parties when the contract was made. Even if, for the purpose of determining this point, I was to accept that the misrepresentation or mistake that the plans available for inspection were those the Vendor intended to build was innocent, he clearly ought to have known. Therefore the clauses do not assist the Vendor – see *Walker v Boyle [1982] 1 All E.R. 634.*

[66] What then is the remedy available to the Purchasers by reason of that misstatement as to the elevation finishes? Mr John Smylie R.I.B.A., architect, representing the Purchasers, is of the opinion that the new materials gave a 'poorer aesthetic finish … and has significantly cheapened the look of the development'. That is his opinion on the aesthetics, not one shared by Ms McCoy. In the skeleton argument, the Purchasers argue that this change allows for rescission, basing that

argument on the judgment of the court in *Donnelly v Weybridge Construction Ltd [2006] EWHC 2678 (TCC).* The Court held:

> "1. In regard to the main claim (a) on the facts, the failure to install limestone flooring and the reconfiguration of the car park were departures from the contractual specifications. The balconies were important to a purchaser and affected the value of the flats and W was not entitled to omit them. The evidence showed that W had used every endeavour to adhere to the specification in the case of the limestone flooring, but that there has been no satisfactory way of overcoming the technical problems. However, the substitute flooring was not as near as possible to the same quality and value and had lessened the value of the flats; (b) the misdescriptions were substantial, Flight v Booth 131 E.R. 1160 applied. C had a choice whether to rescind, or to complete and seek an abatement, and had taken the former option, which they were entitled to do. Accordingly, W had not been entitled to require completion and was in repudiatory breach of contract with C, which had been accepted, and C were entitled to return of their deposits."

[67] However, in respect of the two breaches of specifications (the omission of the balconies and the quality of the finishes), the court pointed to an adverse effect on the value of the flat contracted to be bought. No evidence was given in this case that there has been any direct impact, adverse or otherwise, on the value of the apartment as a result of the change in the elevation finishes. What I have considered, however, is whether there is any adverse impact on purchasers in terms of the cost of upkeep and replacement of these finishes as opposed to those originally proposed.

[68] In Reply to Enquiries Before Contract 12, an estimate of the level of service charge was set out in respect of each of the two types of apartments (one bedroom and two bedroom). The services are set out in the draft Lease. No evidence was given as to whether these estimates of services charge were based on the actual finishes, including the materials now used in respect of same. However, given the intention of the Vendor at the time of the signing of the Agreements to construct the actual finishes, I believe that I am entitled to assume that the projected service charges reflect those actual finishes. These estimated charges were known to the Purchasers at the time of entering into the Agreements.

[69] **Therefore as regards the issue of cost and any implication arising from the changes to the facade finishes, I have concluded that the misrepresentation by the**

Vendor did not adversely impact on the decision of the Purchasers to enter into the Agreements, and that the remedy of rescission is not available to them on this specific ground.

[70] As to the issue of aesthetics, this could be a matter of fact in each case. In the case of the Purchasers, I do not believe it played any significant role, if indeed any role at all. They did not inspect any documents; they determined to buy the apartment within a matter of an hour of arriving at the agent's office, paying a deposit part of which would be lost if they did not proceed to contract; they have never visited the apartment or the development; and the facades would have been clear to all as the building works were being carried out and yet there was no enquiry let alone complaint about any aspect of the Blocks during their construction. I have determined that the specific look of the Blocks played little, if any, part in the decision of the Purchasers to proceed, certainly not a part which was fundamental to that decision.

[71] **Having considered all aspects of the issues surrounding the change to the elevation finishes, I have concluded that it does not afford the Purchasers any right to rescission of the Agreements, nor, in the absence of any adverse impact on the value of the apartment, is there any remedy in damages.**

The Agreement for Lease

[72] The relevant terms for the purposes of this judgment are:

Clause 1. This provides

> "1. The Vendor shall grant and the Purchaser shall accept the Lease of the premises ("the Lease") described by reference to site numbers specified in paragraph 3 of the Schedule hereto ("the Site") on the Vendor's development situate at and known as James Clow Apartments, Pilot Street/Princes Dock Street, Belfast ("the Development") TOGETHER WITH the easements, rights and privileges and SUBJECT to the reservations, covenants and conditions more particularly contained in the draft form of the Lease annexed hereto for a term of 800 years from the date specified in the lease.

[73] The premises, that is the proposed apartment, are described in two ways:

(i) By the site number in the schedule. There is no map annexed to the Agreement for Lease defining the boundaries, either of the Development or of the apartment. Instead in paragraph 3 of the Schedule it states:

"3. Site details: Apartment No: 128, James Clow, the Granary Building, Level 11, Princes Dock Street, Belfast."

(ii) They are more particularly described in the draft lease which defines the Apartment as that described in the first schedule which provides as follows:

"Apartment No: 128 on the 11th floor and known as Apartment No: 128, James Clow Apartments, Pilot Street/Princes Dock Street, Belfast, shown for the purposes of identification only outlined in red on the Plan and which includes:

(i) The floor and ceiling finishes and installations, but not any other part of the floor slabs and ceiling slabs that bound the Apartment.

(ii) The inner half severed medially of the internal non-load bearing walls that divide the Apartment from any Other Apartments or any other parts of the Building.

(iii) The interior plaster and decorative finishes of all walls dividing the Apartment from the Building Common Parts.

(iv) The doors and door frames, the windows and the window frames of the Apartment.

(v) All additions and improvements to the Apartment.

(vi) The Conduits exclusively serving the Apartment.

and which for the avoidance of doubt excludes any exterior and/or structural parts of the Building."

[74] On the map annexed to the draft lease, the apartment shown by a red line incorporates the balcony which is shown as overhanging Princes Dock Street. "The Building", referred to in the above schedule, is itself defined by reference to the map where it is outlined in green: and "the development" similarly is shown on the map annexed to the draft lease outlined in yellow. Both the yellow line and the green line incorporate the balcony.

[75] The term of the proposed lease is described as 800 years from the date specified in the Lease. No differentiation is drawn in respect of the term to be granted between the balcony and the rest of the apartment. I recorded earlier that I found it extraordinary that neither the Vendor's solicitor nor in the case of Mr McGarrity, his solicitors, identified this flaw in the title, particularly given the central role in the mind of both of the requirement for a balcony. I also expressed my view that it was extraordinary that the Vendor's solicitors did not appear to have begun to address this matter until late in 2009. I have carefully read all of the correspondence and emails contained in the documents disclosed in this matter as to how and when a resolution of this particular problem was undertaken.

Princes Dock Street – BHC

[76] The first document is an email dated 2 December 2009 from Mr Alan Reilly, a solicitor in the same firm as the Vendor's solicitors, Carson and McDowell, to a fellow solicitor, Mr Neill Allsop who was acting on behalf of the Vendor. It appears from the email that Mr Reilly had spoken the previous day to a representative of BHC about a possible way forward. It is also clear that the architects on the previous day had sent maps as a result of "a query" from the Vendor's solicitors. The suggestion was that maps of the overhang be prepared and sent by the Vendor's agents to BHC "on a without prejudice basis" to see how matters could be resolved. The indication from Mr Reilly was that this might not necessarily be easy.

[77] The next email is dated 10 December 2009 from the architects to the Vendor's solicitors containing sketches showing details of the apartments involved and the dimensions of the balconies. Discussions then clearly took place which resulted in an email dated 21 December 2009 from Mr Allsop to Mr Reilly, now described as the solicitor for BHC, the relevant portion of which states as follows:

> "I note your client is prepared to grant a licence to my client, for the balconies of the Development to overhang Princes Dock Street. I further note that your client has proposed the consideration under the Licence to be £100 per balcony, such figure to be reviewed every fifth year in accordance with RPI. Such proposal would be acceptable to my client, however, I am of the mind that, if it would be acceptable to your client, a one-off capital payment might be the "cleaner" route for both parties involved. I have suggested this to my client and he is currently liaising with his funder to ensure sufficient monies will be made available to him to allow us to make a proposal. When I am in receipt of instructions, I will revert forthwith.

> You will be aware that the Road Service has recently granted my client a Licence to Overhang, for the balconies which overhang Pilot Street. As discussed, I attach same hereto for your information."

[78] It is clear at this stage that no agreement had been reached with BHC in relation to the form of any licence, with Mr Reilly responding to the above email on the same day stating that he had relayed the details to his client.

[79] The next development was on 5 January 2010, when Mr Allsop again wrote by way of email to Mr Reilly, the relevant portion of which is as follows:

> "I refer to our email exchange below and our recent conversation when you advised that the single Payment proposed by the Harbour was £32,000.
>
> My client would not be in a position to pay such sum at this juncture and accordingly I would be grateful if we could proceed with the yearly fee (£100 per balcony) route. To that end, I look forward to receipt of your proposed draft licence for approval."

[80] Again, it is obvious that, as at 5 January 2010, no draft of the licence had been provided for approval, let alone agreed. Indeed, the emails from both solicitors and were marked "Subject to Contract". I also note that on that date the Vendor did not appear to be in a position to pay the sum of £32,000, a seemingly modest amount given the cost of the development, which could be seen as evidence of a lack of liquidity giving rise to a sense of urgency to effect completion of the apartment sales as quickly as possible.

[81] On 1 February 2010, another solicitor in the Vendor's solicitors' firm, acting for BHC, sent a draft licence to Mr Allsop. It referred to the fact that BHC would have preferred a one-off payment, although the draft licence reserved an annual sum. The request was made as to whether the lump sum approach could be agreed since otherwise the licence would need to include a remedy for non-payment. The email also sought details of the contractual terms of the leases for the apartments so that it could be inserted at Clause 1.5 of the draft licence. The solicitor also had assumed for some reason that it was the intention that the balconies would form part of the exterior structure and would therefore remain in the Management Company's ownership.

[82] On 12 February 2010, a final form of licence was forwarded to Mr Allsop asking, if he was happy with it, if it could be printed and signed by the Vendor. The relevant maps were to be attached. However, it was not until an email of 22 February 2010 that the solicitors for BHC were able to confirm that they were holding the licence duly signed, but with an instruction not to release it until

payments were made "from the period of 20 October 2009 to 30 April 2011 and also the discharge of the legal fees". Arrangements were then made for the transfer of the sum then outstanding, although a small adjustment was made later to that amount. Nevertheless, the basis of the calculation remained the same, namely from 20 October 2009. The licence was eventually released on 1 March 2010. I will refer to this as 'the BHC Licence'.

[83] The BHC Licence is between BHC and the Vendor, with a third party, Mangon Developments, joined to act as guarantor for the performance of the obligation of the Vendor. The licence fee was fixed at £1,600 per annum subject to 5 yearly, upward only, reviews, together with liability for other outgoings. The licence was stated to be for a period of 800 years from 20 October 2009. Purchasers of any apartment in respect of a balcony had the right to use the balcony, subject to all restrictions, covenants and stipulations in the BHC Licence. BHC was granted rights of access to the balcony for the purposes of inspecting its state of repair. Having compared the terms of the draft lease as regards the conditions for the use of the remainder of the apartment with those imposed under the BHC Licence, I am satisfied that the latter places neither any restrictions or obligations different from those that are imposed by the Vendor under the terms of the draft lease.

[84] The guarantee granted by Mangon in respect of the rent is for a period of 20 years only. In the event of any liquidation or the Vendor going into administration, there is an obligation on the part of this company to take over the obligations under the licence. During the course of the hearing, it was argued that this potentially gave BHC as licensor a right to repossess or re-enter the areas occupied by the balconies in the event of the Vendor or Mangon ever defaulting on payment of the annual licence fee of £1,600. This appears to have been considered by the Vendor since in 2011 there are a series of emails again from Mr Allsop to another solicitor in the Vendor solicitors' firm in respect of a Supplemental Agreement which was entered into on 24 March 2011.

[85] The Supplemental Agreement affords the owners of the apartments the sort of protection against non-payment of the licence fee which was concerning them. It allows BHC to seek payment of any arrears out of the head rental being paid by the apartment owners to the Vendor under the terms of the leases. In my opinion this will always be sufficient to discharge the amount under the Licence - £1,600. The head rental income is £100 per year from all of 137 apartments, a total of £13,700. Even with only upward reviews, I see no circumstances from a practical point of view that could give rise to a deficiency such as would permit BHC to exercise any right of recovery of the balconies the subject of the Licence.

[86] **I am therefore satisfied that eventually the Vendor obtained a title to these balconies which, incorporated into the draft lease (by way of amendment) would have afforded apartment holders with balconies overhanging Princes Dock Street security of title for some 800 years, and that the terms of the licence would not**

vary from or in any way adversely affect the apartment owners, reflecting as they do the same restrictions, obligations and benefits as contained in the draft lease.

[87] However, the licence was backdated to 20 October 2009, one week before the date of the October Notice to Complete (in respect of Block B) and six weeks before the December Notice to Complete (in respect of Block A). On neither date had the Vendor any title in respect of these balconies, nor any expectation that it would obtain an interest or on what terms, let alone that "a lease of 800 years" could be granted by it to any purchaser entitled to a balcony overhanging the BHC lands - the term provided for in the Agreement for Lease.

[88] No explanation has been forthcoming as to why the date of 20 October 2009 was chosen, and I can only conclude that it was an informed decision to allow retrospectively the Vendor to say it could grant title to a purchaser at the date of the Notices to Complete albeit of 800 years under the terms of the BHC Licence as opposed to a lease – a matter in itself which would not be fatal. If that is indeed the case, it reflects ill as to the bona fides of the Vendor regarding this aspect of the issues in this case.

Pilot Street Licence – Department

[89] This licence was granted under Article 75 of the Roads (Northern Ireland) Order 1993. It is dated 9 December 2009, after the October Notice to Complete, and a day before the December Notice to Complete – 10 December 2009. Correspondence and emails in relation to this particular licence are very scant in the disclosed documentation. From my reading of what there is, it appears that on 7 December 2009 Ms McCoy, architect, sent an email to Mr Allsop stating that on 7 December a representative of another company had experienced difficulties in relation to obtaining title from the Road Services in a development involving overhang of balconies and canopies. Copies of the documentation in that development were sent both to Mr Allsop and a colleague in the Architects' firm. The email states:

> "It appears that this is completely separate from planning permission and so that some kind of statement is required from the structural engineers on the design of the structures to accompany the application. Can you let me know, following your discussion with your contact in Roads Services, if you want us to proceed using these forms? Are you approaching the Harbour Commission separately about the Princes Dock Street side?"

[90] On 10 December 2009, the architects provided details and specifications of the balconies on the Pilot Street elevations of Blocks A and B. There is no evidence relating to what inevitably had to be communications between the Vendor's

solicitors and the Roads Service seeking the licence ('the Department's Licence') dated 10 December 2009. The Department's Licence is a pro-forma and there seems to be some indication on the maps attached that they were in the hands of the Roads Service on 10 December. In the absence of any further documentation, I believe that I have to accept the dating of this document. No term is stated in it and therefore it would appear that it is in perpetuity. No payment is due to be made under it, and apart from conditions relating to the structures meeting certain specifications and the height of the balconies above the road, there are no covenants or restrictions relating to their use. Nothing has been raised to indicate any breach of those conditions regarding the specification, and therefore I proceed on the basis that, as at 10 December 2009, the Vendor was able to grant a tenure in respect of the balconies on the Pilot Street elevations for the term of 800 years, although the leases for the apartments involved would have also have required some amendment. However, in substance, the purchaser of these apartments would obtain a marketable title in a form which would give them security of tenure.

[91] **Therefore, in terms of the position relating to the title of the Vendor to the balconies, the position as determined by me is as follows:**

(a) That the Vendor was not in a position to give title over any of the balconies on either the Pilot Street elevation or the Princes Docks Street elevation in Block B on the date of the October Notice to Complete.

(b) At the date of the December Notice to Complete, the Vendor had title in respect of any balconies overhanging Pilot Street in relation to Block A, but did not have title in respect of any balconies in Block A overhanging Princes Dock Street.

(c) The title of the Vendor in respect of the balconies overhanging Princes Dock Street was obtained at the very end of February 2010, and it was only after that date that it was in a position to give any marketable title to any purchaser equivalent to that contracted. The position giving any comfort in the long term regarding BHC was not attained until the end of February 2010 at the earliest.

(d) For the sake of completeness, none of these matters relate to title to any balconies constructed within the Site to which the Vendor had title outwith the Licences. Therefore, none of the purchasers of these particular apartments would be entitled to seek rescission based on the absence of title to their balconies at the time of the Notices for Completion, whether that be the October Notice to Complete or the December Notice to Complete. Nor do I find that the absence of title to the overhanging balconies would have a prejudicial impact on such purchasers. Their concern, if any, would have been that the facades of the Blocks had balconies – and they did.

[92] In the lead up to the service of the Notices of Completion, and in this context, in the case of the present plaintiffs Nigel and Joanna McGarrity, the Purchasers' solicitors wrote to the Vendor's solicitors on 6 October 2009 indicating that they were rescinding the contract based on the fact that completion had not taken place on 31 May 2009, and that time was of the essence. That was repudiated by the Vendor's solicitors on 6 October 2009 which was in turn repudiated by the Purchasers' solicitors on 8 October 2009. On 9 October 2009, the Vendor's solicitors wrote to the Purchaser's solicitors indicating that the anticipated completion date was to be 30 November 2009, with access to the apartment possible through appointment with the managing agents. On 12 October 2009, the Vendor's solicitors wrote indicating why an extension was permitted under the terms of the Building Agreement, and this was expanded upon at length in a letter dated 14 October 2009. I am not aware of any further correspondence in relation to this aspect of the dispute, but first the issue of the completion date being subject to time being of the essence has been dealt with by the Court of Appeal, and secondly an explanation for that extension having been given, no issue with an extension for those particular reasons has been pursued. I need therefore not deal with that issue.

[93] On 8 December 2009, the Vendor's solicitors wrote to the Purchasers' solicitors stating that:

> "Our client is ready, willing and able to complete on the sale of the property to your clients. Notice to Complete is hereby given pursuant to Clause 11 of the building agreement formed on 4 May 2007. You will be aware of the consequences of your client's failure to comply with this notice and trust you will advise them accordingly."

The Notice to Complete stated as follows:

> "We, the undersigned, as solicitors for and on behalf of Sarcon (No: 177) Ltd (the Vendor) hereby give you notice pursuant to the provisions of Clause 11 of the Building Agreement dated 4 May 2007 and made between the Vendor of the one part on yourselves of the other part ('the Agreement') as follows:
>
> (i) The Vendor is willing to execute a lease to you of the property known as Apartment 128, the Granary Building, Level 11, James Clow Apartments, Princes Dock Street, Belfast (the Property) contracted to be purchased by you by the agreement.

(ii) That you have made default in complying with your obligations under the Agreement in that you failed to complete the purchase of the Property and to pay the purchase money on the completion date.

(iii) YOU ARE HEREBY REQUIRED to make good such default by completing the purchase of the Property and paying the purchase monies together with interest in accordance with the terms of the Agreement before the expiration of 5 working days from the date of receipt of this Notice and if you fail to comply with this Notice within the time aforesaid, the Vendor will proceed to enforce the rights, powers and remedies conferred upon it by the provisions of Clause 11 of the Agreement in relation to forfeiture of deposit, the resale of the Property the recovery from you of any loss incurred by the Vendor in such resale and all expenses and disbursements incurred by it in connection therewith."

The Notice was dated 8 December 2009, a Tuesday, allowing for the period of notice to expire on 15 December 2009.

[94] The property, as is described, is the apartment with a balcony. The Vendor argues that the sale took place not in accordance with the 2004 Permission, as to the dimensions of the apartment, but by the terms of the Brochure - which included the balcony. For the reasons I have given, on 8 December 2009 the Vendor was not in a position to execute a lease of the apartment including the balcony, and it certainly was not in that position on the 15 December when the period given in the Notice to Complete expired. Indeed, on these dates, the Vendor, through its solicitor, knew this.

[95] Therefore, the assertions in respect of either Block made at the time of any relevant Notice to Complete served before 1 March 2010 at the earliest, and any purported exercise by the Vendor under any Agreement for Lease of its right to seek completion was flawed in respect of the title to apartments with balconies overhanging Princes Dock Street. Without more, and even assuming that all other matters relevant to the Vendor being able to complete were satisfied, the Purchasers of such apartments would be entitled to an order rescinding the Agreements and an order for the repayment of their deposits.

[96] On the same basis, as with the preceding paragraph, it follows that in respect of Block A any such assertion in any Notice to Complete served before 10 December

2009 in respect of an apartment with a balcony overhanging Pilot Street was flawed, and without more any such purchaser would be entitled to an order rescinding that Agreement and an order for the return of their deposit with interest.

Other Title Considerations

[97] There are three further aspects of title to address. Before doing so it is worth repeating the factual position as at the dates of completion provided for in the Notices to Complete.

[98] I have already made it clear that the solicitors for the Vendor and for the purchasers should have been fully aware of the defect in title in relation to any balcony overhanging adjoining lands. Any care taken to investigate the title would have made that perfectly clear by reference to the lease maps and the map of the Site deduced in the title. It was also open to the Vendor's solicitor to rectify the title so as to attempt to carry out its obligation to convey a leasehold title for 800 years to the purchasers of the apartments, including the balcony, on or before the dates of completion. As has been seen, in the case of Princes Dock Street no steps were taken before the October Notice to Complete and the first steps to be taken in respect of each was not until around 8 or 9 December 2009.

[99] However, by 1 December 2009 the Vendor, through its solicitor, would have been fully aware of the deficiency in its title. Nevertheless, they sought to continue with their representation in the October Notice to Complete and in the December Notice to Complete that the Vendor was able to complete. In the case of the December Notice to Complete, 5 working days from the date of receipt was given for the expiration of that Notice, namely 15 December 2009. At that time, the Vendor's solicitors were beginning their attempts to rectify the position – but nevertheless made no disclosure to the purchasers of those attempts. Indeed, in due course, as I have stated, the agreement with BHC was completed at the end of February but the Deed, and the term provided for by the BHC Licence, was backdated to 20 October – conveniently the day of the October Notice to Complete. In doing so, I confirm the view that I expressed earlier that anyone coming to the title for the first time would have been misled and, in my opinion, deliberately misled.

[100] Prior to either Notice to Complete, the Purchasers had claimed rescission in October 2009 albeit based on the argument that time was of the essence in relation to the original date for completion. In January 2010, subsequent to the issue in the case of many purchasers of the December Notice to Complete, proceedings were issued seeking rescission of their Agreements and, in the case of other purchasers, they joined by way of counter claim to proceedings against them, again seeking rescission of the agreements. Therefore, within 5 weeks of the December Notice to Complete, the Vendor was fully aware that purchasers (including the Purchasers) were seeking to rescind the contracts – albeit at that time not on the grounds of a defect in title in relation to balconies.

Restrictions contained in the Contract

[101] Notwithstanding the above position, the Vendor argues that it has no obligation to disclose defects in title which could and should have been discovered from an inspection of the title by the Purchasers' solicitors. Here, the title contained a defect which was patent if any care had been taken to inspect it and the lease maps. The Vendor claims that the purchasers are prohibited by the Conditions of Sale from making an objection to the Vendor's title. At paragraph 51 of its first skeleton argument it states:

> "In this case, the question of the defendant's title is expressly addressed in Clause 2 of the Agreement for a Lease:
>
> > 'The right and title of the Vendor to grant the Lease is admitted and the purchaser shall not be entitled to investigation of the Vendor's title nor to have answered any preliminary enquiries or objections or requisitions but without prejudice to this clause the Vendor will furnish a copy of the documents mentioned in paragraph 4 of the Schedule hereto under which the Vendor holds the site with other premises.'"

[102] I determine that the starting point as regards title is that a Vendor is under a duty to prove his title and convey what he is contracted to convey. I also determine that the mis-description in the Vendor's title as regards the balcony is a substantial mis-description given the importance played by the provision of a balcony by both parties. That is the position under general law. But a distinction requires to be drawn between the position under the general law and that under contract law, where a Vendor may insert conditions restricting its liability. But there are, in turn, restrictions as to how far a Vendor may restrict that obligation. In *Re Turpin and Ahern's Contract* [1905] 1 IR 85, Fitzgibbon LJ stated:

> "The general rule is that, where a title is in fact defective, and the defect is, or ought to be, within the knowledge of the Vendor, a condition against investigation will not prevent the purchaser from declining to complete, unless the condition which precludes investigation gives him so fair intimation or warning of the existence of the defect. Here the Vendor, being a party to the settlement, must be taken

> to know its provisions: if it created a block on the title, he cannot estop the purchaser by the condition, unless it indicates the blot."

[103] Similarly, in *Re Flynn and Newman's Contract* [1984] IR 104, Kingsmill Moore J stated:

> "In the absence of any express provision to the contrary, the Vendor undertakes and is bound, in law, to assure good title to a property to be sold and to convey land corresponding, substantially in all respects, with the description contained in the contract. If he fails to do these things, the purchaser may rescind and recover his deposit. The Vendor may, of course, limit his obligation to show good title by suitable special conditions but, if he does so, he must fairly indicate what is the defect in its title to which the purchaser must submit, and must take care that he is not guilty of misrepresentation."

[104] A more recent decision in the Court of Appeal in England and Wales is that of *Area Estates Ltd v Weir* [2010] EWCA Civ 801. In that case, the purchaser contracted with the Vendor to purchase a piece of property which had been subject to a lease. The existence of the lease was apparent from the Schedule to the freehold title. However, an Extra Special Condition 7 ("ESC 7") of the contract of sale provided:

> "The Lease dated 28 April 2004 and referred to on Title Number HD431124 determined by operation of law on 31 August 2006. The buyer shall accept the position and shall not be entitled to require any further proof of the determination or raise any objection or requisition with regard thereto."

Unfortunately, the statement that the Lease had "determined by operational law on 31 August 2006" was not correct. A Notice to Complete was served on 7 March 2008 and the purchaser sought to rescind the contract. In May 2008 the Vendor secured a disclaimer of the lease by the lessees Trustee and Bankruptcy that in June 2008 the purchaser sought return of his deposit. Having rehearsed a number of cases, Carnwath LJ stated:

> "[17] It is well-established, by authorities going back over a century and a half, that a condition which purports to exclude the Vendor's ordinary obligation to give good title may not always be effective. However, the cases do not speak with one voice as to the test to be applied. The important issue, for present purposes, is the necessary

state of mind of the Vendor. Does the principle apply only when he had actual knowledge of the defect, or is it enough that he had the means of knowledge? *Bannister* itself, as I read it, was a case where the representation in the conditions was contradicted by facts of which the Vendor had actual knowledge … .

[18] The passage in Emmet and Farrand … has some useful illustrations from the authorities. I note the following, commenting on the effect of a condition that the property was sold "subject to any general incumbrances or defects in title which may exist":

> 'Further, such a condition will apparently not be sufficient where there are incumbrances or defects of which the Vendor ought reasonably to have known (*Heywood v Mallalieu* [1883] 25 LhD 357, where the Vendor's solicitor would have discovered the existence of an easement if he had made fuller enquiries into certain claims).'

[19] Reference was made in the same passage to *Becker v Partridge* [1966] 2 QB 155, where the contract for sale of an under lease provided that the Vendor's title "has been accepted … and the purchaser shall raise no preposition or objection thereto". This was held to be ineffective, when it emerged that there had been breaches of covenant in the superior lease giving grounds for forfeiture. Although the Vendor did not have actual knowledge, he was held to have had "constructive notice", because the solicitor had neglected to inspect the superior lease as he would have been entitled to do when taking the under lease.

[20] There is a clear statement of principal to similar effect in McGarry and Wade 7th ed paragraph 15-072, commenting on the effect of a general exclusion clause such as "subject to any existing rights and easements of whatever nature":

> "However, it is a fundamental rule of equity that the Vendor cannot rely on such a condition to cover a latent defect in title of which he knew or ought to have known …"

[105] The cases decide that the knowledge which the Vendor's solicitor should have had, and which the Vendor would have had if properly advised, is treated as equivalent to actual knowledge. The Vendor, properly advised, could and should have known that the purported title to the area of overhang simply did not exist. It does not assist the Vendor, in my view, that the purchaser may also have had the means of knowledge, through his assumed notice of the contents of the title if properly read by his solicitors.

[106] **Therefore, in the circumstances of this case the attempt to restrict the obligation of the Vendor to make good title in respect of the balconies is not effective and does not afford the defendant a defence to the fact that it had no title to the balconies overhanging the Department's land or the BHC lands at the time of the October Notice to Complete, nor the expiration of that notice: nor did in relation to balconies overhanging the BHC land at the date of the December Notice to Complete or the expiration of the 5 working days' notice given thereunder.**

[107] The second consideration relates to the claim by the Purchasers that they are entitled to the rescission of the agreements based on repudiatory breach. It is not necessary for me to determine this in the light of the determinations I have made above, but nevertheless for completeness I find that there were grounds for repudiatory breach of the agreements. I have dealt with the defect in title. I have confirmed that the Vendor either knew or ought to have known that there was a defect in the title and secondly within the period of notice given by the December Notice to Complete, his solicitor, and therefore the Vendor, knew full well that there was such a defect. The Purchasers took steps after the expiration of that Notice to indicate that they were rescinding the agreements. It may be that at that stage it was on different grounds, but the Vendor was fully aware of the approach being taken by the Purchasers and other purchasers. This intention was communicated clearly and unambiguously to the Vendor. Its solicitors were already making attempts to place itself in a position to complete and therefore this is not a case where a purchaser by doing nothing, seduced a vendor into believing that there was no danger or prospect of the purchaser seeking to rescind the agreement.

[108] The third and final issue in relation to the question of title is the Purchasers' claim for quiet possession. This, however, is of no assistance to them given the terms and conditions of the Agreement for Lease. At paragraph 2 of the Schedule to Lease it states:

> "That the lessee paying the rent hereby reserved and observing and performing the several covenants on its part and conditions herein contained shall peaceably and quietly enjoy the Apartment and the rights hereby granted during the term without any lawful interruption from or by the lessor or any person lawfully claiming under, through or in trust for it."

[109] The Vendor is therefore only answerable for any interruptions by those claiming under or through it. This would not include BHC or the Department. In fact, at no stage even during the course of completion of the Blocks, where it would have been obvious from the siting of the Blocks that the balconies were overhanging both the Department's land and the BHC land, were steps taken by either of these parties to interfere with the balconies.

[110] **I therefore find no merit in this argument on behalf of the Purchasers**.

Conclusions on Title

[111]

(a) I have determined that the Vendor did not have title to the balconies on the Pilot Street side, that is those now covered by the Department Licence, before 9 December 2009 and was not in a position to complete in respect of any apartment for which a Notice to Complete was served prior to that date. Any purchaser under any such contract is entitled to rescission and the return of their deposit with interest and, given the fundamental nature of this issue, I grant the reliefs sought;

(b) For the same reason, at the expiration of the time set out in the December Notice to Complete, the Vendor had no title to the balconies overhanging Princes Dock Street, and therefore any purchaser of an apartment served with any such notice is entitled to rescission of that agreement and the return of their deposit with interest and, given the fundamental nature of that issue, I grant the reliefs sought;

(c) Any person served with a Notice to Complete after the date of Department Licence is not entitled to rescission based on any defect in title in respect of the balcony;

(d) Any purchaser of an apartment served with a Notice to Complete served on or before 1 March 2010 in respect of an apartment with a balcony overhanging Princes Dock Street, would be entitled to rescission of that agreement and return of their deposit and, given the fundamental nature of that issue, I grant the reliefs sought;

(e) Any purchaser of an apartment on whom a Notice to Complete was served after 1 March 2010 in respect of an apartment with a balcony overhanging Princes Dock Street would not be entitled to rescission based on any alleged defect in title in respect of the balcony; and

(f) No purchaser purchasing an apartment with a balcony which did not overhang either the BHC land or the Department's land, is entitled to rescission based on any defect of title in relation to those apartments overhanging either of those particular lands.

The Building Works

[112] I now turn to those issues that relate to the actual building works carried out. These fall to be considered under:

(i) Planning Conditions; and

(ii) The Building Agreement.

The Planning Conditions

[113] I have already determined that these were incorporated into the contractual arrangements between the parties. The relevant conditions are (4)(b) and (5), which have been set out by me at paragraph [30] above. Condition (4)(b) addressed the issue of the investigation and, if necessary, the removal of any contaminates from the Site. By their very nature, it required work to be carried out before buildings began to appear above ground. I can jump to the very end of the process and confirm that there has never been any argument but that the proper investigation was carried out, any problem was identified, and any material that required to be removed was removed properly.

[114] The requirements contained in Condition 4(b) emanated from Belfast City Council Health and Environment Service by letter dated 7 January 2005 in terms virtually identical to those incorporated in the respective paragraphs in the 2004 Permission. Between March and June 2007 the architects prepared:

(i) A report entitled "Waste Classification of Soils to be excavated" (WCSR); and

(ii) A report entitled "Preliminary Generic Quantitative Risk Assessment" (GQRA).

Between them, these two reports set out the results of ground tests and a number of recommendations for the removal, and disposal, of some contaminates from the Site to avoid further risk when the Site was developed.

[115] On 4 April 2007, the architects submitted the WCSR to the Planning Service, but on 22 June 2007 this report was resubmitted to the Planning Service, this time with the GQRA. The covering letter of 22 June 2007 specifically refers to the submission being in accordance with Condition 4(a) and (b). At page 35 of the GQRA, the requirement for a Validation Report was acknowledged (including what was to be included in that report). In July 2007, a Remedial Option Study Report (the "ROS") was prepared and on 16 July 2007 submitted to the Planning Service. The letter asked the Service to add this to the file and to have it forwarded to the relevant statutory bodies.

[116] On 20 November 2007, the Senior Environmental Health Officer of the Belfast City Council Health and Environmental Service Department wrote to the Planning Service confirming that he had examined the GQRA and the ROS with additional information, and expressed his satisfaction that the remedial strategy and verification measures addressed the identified contaminating risks on the Site. This letter was written under the misapprehension that planning permission for the development had not yet been granted. It stated:

> "Therefore, I would no longer request that planning permission be withheld and instead would request that the following condition be attached to ensure that the remedial works are implemented as agreed and suitably verified.
>
> 1. The applicant on completion of the work shall provide to the Planning Service, for approval, written confirmation that all works were completed in accordance with the agreed details in Report No: E011434C and demonstrates the effectiveness of the remediation (including further gas monitoring) carried out in managing the identified risks. This should include suitable photographic and documentary evidence and as built plans showing the specific elements of the remediation scheme."

The letter, however, went on to state:

> "Furthermore, I would advise that you may also wish to seek the views of Land Resource Management, Environmental Heritage Service."

As can be seen, the proposed wording from the Environmental Health Officer is replicated in the conditions as regards verification.

[117] A considerable degree of confusion arose later as the result, as I find it, of either a delay on the part of the planning authorities to forward all of the above reports to any other statutory body, in particular the Department of Environment's Environmental Heritage Service. It appears that the Planning Service followed the advice of the Environmental Officer from Belfast City Council and forwarded the WCS Report to the Department of Environment, but not the other reports. Therefore, in their reply dated 3 December 2007 to the Planning Office, the Department raised a number of issues reflecting that they did not have in their possession the range of information which would have been available to them if the other reports had in fact been sent to them.

[118] There is nothing further in the discovered documentation indicating any further step by the Planning Service or the Department in relation to these issues until late 2009 when, again after a false start, all the Reports were eventually sent to the Department of the Environment. Further time then elapsed before the Department expressed its satisfaction as to the work that was required to be undertaken and the method of verification. While this may well have been a statutory authority from whom an opinion should be sought, I believe it adds little, if anything, to the issues in this case. That is because, in their letter of 3 December 2007, the Department of Environment stated:

> "The Council is the authorative body in dealing with environmental health issues and would ask you to ensure that they have the opportunity to comment on all relevant information."

The remainder of the letter argues for the provision of reports addressing all the matters already dealt with in the GQRA and ROS. It is also, of course, the position that the planning authority had already approached the Council, and indeed its (the Planning Authority's) approach to the Department was at the suggestion of the Council.

[119] I am therefore satisfied that by November 2007 the requirements of the first part of the condition 4(b) were met – that is that a detailed scheme had been submitted prior to commencement of the works.

[120] The remainder of Condition 4(b) reads:

> "The remediation scheme shall be agreed in writing with the Planning Service and shall be fully implemented before the development hereby permitted is first occupied. Any variation of the scheme shall be agreed in writing with the Planning Service in advance of works being undertaken."

[121] Mr Michael Burrows, Planning Expert, appearing on behalf of the Vendor, argues that the use of the word after 'shall' on the second occasion after the word 'and' in the second sentence means that there are two separate requirements. The first is that the agreement of the Planning Service is required but this does not have to be obtained before the development was first occupied. To argue otherwise he says would require the court to imply that the words 'before the development hereby permitted is first occupied' are inserted after the words 'agreed in writing with the planning authority'. He argues that the court cannot imply words on the authority of *R (on the application of Sevenoaks District Council v First Secretary of State and another* [2004] EWHC 771 (Admin). Instead, he argues, the words "before the development is first occupied" relate only to the works being fully implemented.

[122] Ms Gemma Jobling, the Planning Expert appearing on behalf of the Purchasers, argued that the Clause should be read as the scheme requiring to be agreed in writing by the planning authority before the development was first occupied, and also had to be fully implemented before the development was first occupied.

[123] The distinction is relevant since the written consent of the planning authority was not sent to the Vendor before the Notices to Complete were served, nor by the expiration of the time given to complete in the Notices. Therefore, it is argued, that the Vendor was not in a position to complete when the Notices were served.

[124] After considering previous authorities, Sullivan J in *Sevenoaks* stated at paragraph [38] et seq stated:

> '[38] … In construing a planning permission the question is not what was the intention of the applicant for planning permission, nor is an examination of the intentions of the local planning authority appropriate. The question is: what was permitted by the local planning authority? The answer to that question is to be found by construing in a common-sense way the planning permission together with such other documentary evidence as may be admissible; see per Arden LJ in *Carter*, paras 27 and 28.
>
> [39] Since the planning permission is a public document and breach of a condition may ultimately have criminal consequences if a breach of condition notice and/or enforcement notice is served/issued and not complied with, it is essential that any obligation by way of condition is clearly and expressly imposed. In both *Crisp from the Fens* and *Carter*, the Court of Appeal concluded that the condition in question was ambiguous. That is not the position in this case. There is no ambiguity in condition 12.
>
> [40] The 1990 planning permission has to be construed as a whole, and as soon as that is done, the contract with condition 8 could not be more plain. It will be recalled that condition 8 requires the access from the A20 to be "completed in accordance with the approved details". Thus when the claimant wanted details to be not merely submitted and approved, but also that the works should be constructed in accordance with the approved details, it expressly said so. In these circumstances, there is no basis for implying such an obligation if the claimant failed for whatever reason to impose it by express words.
>
> And later:
>
> [43] A similar approach is to be found in a decision of the Court of Appeal in *Trustees of Walton-on Thames Charities v Walton and Weybridge Urban District Council* (1970) 21 P & CR 411, [1970] 68 LGR 486. Planning permission was deemed to be granted for 50 pre-fabricated bungalows. It was argued on behalf of the Council that that deemed planning permission was subject to a

number of implied conditions, including a time condition, such that the value of the land upon acquisition was £5,000 rather than £125,000. The Council's argument was rejected. Widgery LJ, as he then was said this at p 497:

> "The courts have said on many occasions that it is only fair to a landowner that conditions attaching to planning permissions should be clear and explicit. Their effect is to work a forfeiture, and they have to be judged by the court's strict rules, as any other forfeiture. I have never heard of an implied condition in a planning permission, and I believe that no such creature exists. Planning permission enures for the benefit of the land. It is not simply a matter of contract between the parties. There is no place, in my judgment within the law relating to planning permission for an implied condition. Conditions should be express; they should be clear; they should be within the document containing the permission."

[124] I believe the approach must be one that addresses the whole permission, and in particular the whole of clause 4(b), not just the second sentence in isolation. In reading the condition, a common sense approach should be adopted. Mr Burrows argues that the word "and" in this sentence is disjunctive, not conjunctive. I believe it is conjunctive and, in the true meaning of that word, it connects requirements required from the Planning Service. In the third sentence, it expressly states that any variation requires to be agreed in writing before it is implemented. On the basis of Mr Burrow's argument, if there was to be no variation, the scheme could go ahead without any agreement in writing, but if there was a variation then it would require to be in writing, whereas the scheme it seeks to vary does not. I am also satisfied that such an approach to interpreting the condition as argued by Mr Burrows would defeat the expressed purpose of the condition set out in the first sentence of the condition – to avoid risks from contaminates when the site is developed.

[125] I am satisfied that there is an ambiguity in Clause 4(b) as to whether the agreement of the planning authority was required to be in writing. In my approach, I am not seeking to introduce an implied condition, but resolving that ambiguity as *Sevenoaks* itself stated it is open to the court to do.

[126] I am confirmed in that view when considering Mr Burrow's arguments in relation to Condition 5 (and reading that as part of the whole permission). He argued that the provisions of the clause are either not enforceable for the reasons to which I will come, or if enforceable, that there was no time limit as to when the validation report was to be submitted, confirming all the works had been completed in accordance with 'agreed details'. On that argument, even if there was a requirement to file it, it could be done long after the date upon which the Vendor served the Notices to Complete. I will address the specifics of Condition 5 in a moment, but taken together with his approach to the interpretation and construction of Condition 4(b) it would effectively mean that at the date the Vendor sought completion of the sale of the apartment there was no need for it to produce evidence

that the Planning Service had agreed the works, nor evidence that the work had been carried out to the Service's satisfaction. On that basis, the only thing that required to be done at the date of completion of the sale was that the works submitted (but not necessarily agreed by the planning authority) had been implemented (without verification). In the context of the expressed purpose of condition 4(b) that interpretation defies common sense.

[127] The Vendor cannot claim that such an approach is unfair. It was perfectly possible at any time prior to work commencing to obtain from the Planning Service a letter confirming that the reports submitted in June and July 2007 were satisfactory and, if carried out, would meet the requirements of the Condition. As regards condition 5, the Validation Report was ready in May 2008, but not submitted until 28 October 2009. The work had clearly been completed, since otherwise none of the buildings could have been erected. There was nothing to prevent the Validation Report being submitted and the requisite consents and confirmations obtained from the planning authorities that they were satisfied with the scheme and that it had been properly carried out. The fact is that no-one did anything about it. If they had, all the necessary consents and confirmations would have been available at the dates of the Notices to Complete to evidence that this essential issue relating to safety had been properly discharged.

[128] Condition 5 provides that the Vendor, on completion of the works, is to submit to the Planning Service written confirmation that all the works had been carried out in accordance with the agreed scheme, including suitable photographs and documentary evidence and 'as built' plans. The report submitted on 28 October 2009 did contain photographs. However, the 'as built' plans seem to have been overlooked. However this was rectified by a letter from the architects dated 12 November 2009. Whilst some clarification was sought in December 2009, in the event no issue arose from any of the points raised and, therefore, I believe the latest the validation report could be said properly to have been submitted was 17 November 2007.

[129] There is no requirement for the validation report to have been confirmed by the Planning Authorities as having been received and accepted according to the strict terms of the wording of Condition 5, let alone is there a date inserted by which the report was to be submitted. I have considered that if the Validation Report had been looked at by the Planning Authorities on receipt in November 2009 and they had written confirming that they were satisfied that the works had been carried out properly, inherent in such an acceptance would be an acceptance in writing that the terms and provisions of the various reports submitted in 2007 were satisfactory. However, no such written confirmation that the works that had been carried out was issued by the planning authority as at the dates of the Notices to Complete – and therefore no confirmation was available to any purchaser.

[130] **The purchasers were entitled to evidence that the issues in conditions 4(b) had been properly investigated, identified and removed, and that the process of**

removal has been properly validated. The time to ensure that both steps had been taken was the time that the Vendor sought to transfer ownership of the apartment to the purchasers in a habitable and safe condition. They were not in a position to do that. On this ground it was not able to complete at the date of either of the Notices to Complete and the right to rescission on the part of the purchasers arose.

[131] Again there was nothing to prevent any of these issues being overcome long before the date for the issue of the Notices to Complete. As with the issue in relation to title, nothing appears to have been addressed until October 2009 whenever, as with the title, there appears to have been an urgency bordering on the panic, with professionals seeking to get their paperwork in order. This is abundantly clear from any reading of the emails and correspondence between the professionals on the part of the Vendor and the authorities, seeking written evidence that the issues addressed by Conditions 4 and 5 had been met so that, as recognised by the writers, purchasers could be satisfied that the premises were safe to occupy.

[132] Mr Burrows argued that the purchasers were not entitled to rely on any breach of Condition 5, and did so on two grounds, namely:

(i) That the clause made no provision as to when the validation report was to be submitted, and it was not open to the court to imply any such term – *SevenOaks.* Indeed, Mr Burrows helpfully supplied conditions contained in another application in respect of different lands where a period of 3 months was included in the condition within which completion of the works required to be shown as having been concluded.

(ii) That Clause 7 of the Building Agreement provides that where there is a dispute as to whether an apartment is in fact complete and ready for occupation it would be deemed complete "notwithstanding that there may be minor omissions still outstanding such as would not inhibit the purchaser's reasonable use and enjoyment of the apartment." He argued that there is no dispute that the proper investigations had been carried out, and that the works have been properly carried out. There were therefore no health or safety issues. The fact that the validation report was submitted in October or November 2009 could be seen as a minor omission and therefore could not regarded as a breach.

[133] **Whilst I see considerable merit in the arguments put forward by Mr Burrows as regards a strict interpretation of condition 5, if divorced from condition 4(b) and the permission as a whole, and even if I agree with him, that does not correct the problem in relation to Condition 4 (b). The fact is that at the dates of the Notices to Complete there was not in existence any scheme or report of remediation which had been agreed in writing by the planning authorities and that remained a breach of the planning conditions. However, for completeness the interpretation of condition 5 has to be seen in the context of condition 4(b) and the permission as a whole and, therefore, forms part of that ambiguity which I resolve by identifying that the intention was that it would be available at the date**

when sales were being completed. Given the importance of the health and safety issues surrounding the question of remediation works the absence of confirmation that the scheme had been validated would also be sufficient to allow the purchasers to rescind the contracts, and I would grant the remedies sought.

[134] The above determinations have been made in the context of the 'Planning Conditions'. They also, however, require to be addressed in terms of the Addendum. I have therefore considered whether any of the requirements under the planning conditions required "permissions, consents, approvals, certificates and permits in legally effective form" other than those which may be covered by a Building Control Final Certificate. If any such permission etc was required but was not available at the date of Notice to Complete, does that run contrary to the requirement expressed in the Addendum as "a condition precedent to completion." Any falling under the heading of Building Control Final Certificate would be exempt from that consequence since that was to be produced as soon as possible.

[135] **For the reasons that I have given, the agreement in writing of the Planning Authority required under Condition 4(b) that the works contained in the Reports were accepted by the Planning Service would fall to be a document – whether as a permission or a permit or an approval required and available at the date of completion, as a condition precedent to completion, thus reinforcing my determination that purchasers served with the Notices to Complete are entitled to rescind the Agreements and to the return of their deposits.**

The Building Agreement

[136] I now turn to the question of the building works in the context of the Agreement for Lease and Building Agreement. The question arises as to whether the works to be carried out under the Building Agreement had been completed for occupation by the Purchaser in accordance with that agreement as at the date of the relevant Notice to Complete and the date of the expiration of notice given under each of them.

[137] There is no definition of what is intended to be the date of completion contained in the Agreement for Lease nor any specific date. In the Building Agreement on the other hand there are two "definitions", the first being in the Schedule which referred to 31 May 2007, but with provision that this date could be extended in the circumstances as defined in the Building Agreement. That has already been the subject of the decision of the Court of Appeal and no claim has been made by the Purchasers that the reasons for the extension of that time did not fall within the provisions of the Building Agreement.

[138] The second "definition" is contained in Clause 6 of the Building Agreement which states:

> "6. Subject to Clause 8 below the Developer shall procure that the contractor shall erect and completely

> finish the said Apartment and made 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 working days' notice to the Employer or the Employer's solicitor."

[139] This is supplemented by the provisions of the Clause 7 entitled "Minor Defects" which provides:

> "7. In the event of any dispute between the Employer and the Developer as to whether the Apartment is in fact complete and ready for occupation, the Apartment shall be deemed to be completed notwithstanding that there may be minor defects and omissions shall outstanding such as would not inhibit the Employer's reasonable use and enjoyment of the Apartment and the Developer undertakes to ensure that his contractor shall remedy such minor defects or omissions within a reasonable time of receiving written notification of such defects and omissions …."

[140] The net effect of these provisions is that the Vendor is obliged to erect the Apartment so that it is completely finished and fit for habitation and use, save in respect of any minor defects which would not inhibit the purchaser's reasonable use and enjoyment of the Apartment.

[141] While the agreement refers to "the Apartment", this cannot be seen in isolation to the obligations of the Vendor in relation to the rest of the Block in which any apartment is situated, or indeed any other common areas relevant to access and use of the Apartment. For example, if there was no access available then clearly it could not be said that the Apartment was available for use. Similarly, if a safe access was not available, it could not be said that the Apartment was available for use. Therefore the obligations of the Vendor do not relate solely to the individual apartment, but also to any defect or omission in relation to the common parts, including for example the structure of the building.

[142] The Purchasers claim that at the date of the service of the Notices to Complete there were a long list of defects affecting each of the Blocks, particularly in relation to obligations relating to fire safety, and in particular the obligations under Building Regulations – defects that made the apartments unfit for habitation or use at the relevant date.

[143] I have therefore had to consider the list of defects to ascertain if indeed the consequences are such as argued by the Purchasers, which are denied by the Vendor. In doing so I have considered:

(a) The role, if any, of any Certificate issued by the architects under the provisions of the Building Contract between the Vendor and the building contractor (Gilbert Ash NI) to carry out the development;

(b) Expert evidence given during the hearing;

(c) Contemporaneous evidence where I regard it as relevant and reliable; and

(d) Building Regulations as they relate to fire safety.

[144] As regards the role of any certificate under the Building Contract for the carrying out of the development, there is no reference in the Agreement for Lease or in the Building Agreement according any such certificate a role in the determination of the completion date. No role is ascribed to any such certificate in determining whether an apartment is "completely finished and fit for habitation and use".

[145] However, turning to the Building Contract, two documents were issued by the architects.

(i) The first is defined as a "Statement of Partial Possession" and refers to "Core 4 Entrance Stair (Internal) Block B plus Car Park Level 1". I am satisfied that this is intended to cover three separate parts of the development, namely Core C Entrance Stair (Internal): Block B: and Car Park Level 1. The issue date is 30 November 2009 but states that possession was taken by the employer on 5 October 2009:

(ii) A Certificate of Practical Completion dated 9 December 2009 in respect of "The Works Block A, External Works, External Facades, Car Park Levels O and 2 (Excluding Level 13 Penthouses and Completion of 'Snagging' Items as attached). The Certificate stated that practical completion of these parts had been achieved on 16 November 2009.

[146] Some argument was put forward on behalf of the Purchasers as to the "backdating" of the certificates as to the date of possession or the date of practical completion respectively but having listened to the evidence of Ms McCoy I accept that the dates of 5 October 2009 and 16 November 2009 respectively represent accurately the dates upon which those particular events occurred.

[147] Taking each chronologically, the 'statement of partial possession' is not a Certificate of Practical Completion. Paragraph 18 of the Building Contract provides that if at any time before the date of issue by the architect of a Certificate of Practical

Completion the employer wishes to take possession of any part or parts of the works, and the consent of the contractor is obtained, then the Vendor may take possession of that part. In those circumstances, the architect simply issues a written statement identifying the part which has been taken into possession and the date. Clause 18.1 of the contract provides that in those circumstances practical completion of that relevant part is "deemed to have occurred" and the defect liability period deemed to have commenced. There is therefore no certificate or judgment on the part of the architect that these parts of the works under the Building Contract had been completed to a stage which could be regarded as "practical completion". The consequences of the taking of partial possession relates to the risks then assumed by the Vendor, previously assumed by the contractor. Therefore the statement in relation to Block B and the other two constituent parts referred to in that statement has no role to play in assessment as to whether the apartment in Block B was practically complete, let alone the common areas in Block B.

[148] As regards the Certificate of Practical Completion in relation to Block A and other external parts, this is dealt with in Clause 17 of the Building Contract for the development. In fact Clause 17.1 of the standard JCT contract has in this case been amended in a schedule of Special Conditions appended to the contract. It defines "practical completion" as:

> "A state in which the Works are complete in all respects and free from apparent defects save for any minor items of incomplete works or minor defects the existence, completion or rectification of which in the opinion of the Architect would not prevent or interfere with the use (or the fitting out for use) of the Works: provided that where it is expressly stated in any provision of the Contract Bills that the testing, commissioning, regulation or adjustment of any mechanical or electrical services is to be completed before Practical Completion, the Works shall not be considered to be practically completed until the same is done as the Contract Documents require."

[149] "The works" are defined in the Building Contract as:

> "The works briefly described in the First Recital and shown upon, described by or referred to in the Contract Documents and including any changes made to these works in accordance with this Contract."

[150] This is not of particular help since the recitals in the Building Agreement have been deleted, and no substituted provisions are contained in the Special Conditions to which I have referred above. This is not assisted either since the term "Contract

Documents" referred to in the definition of "the Works" is defined as "the Contract Drawings, the Contract Bills, the Articles of Agreement, the Conditions and Appendix." Contract Drawings are those referred to in the first recital (deleted) and the Contract Bills are the Bills of Quantity referred to in the first recital (deleted).

[151] However, for the purposes of this judgment, I am going to proceed on the basis that the experts who gave evidence to me in relation to the defects, reached their conclusions as to what was required to be provided by the contractor and where they say those works were defective.

[152] The Certificate of Practical Completion was signed by White Ink Architects Limited. It was the obligation of the architects to monitor the state of works during the course of construction and, as the date of the potential completion approached, to inspect the works as to whether they regarded them as practically complete, or practically complete subject to any works outstanding. If those outstanding works individually or cumulatively were more than de minimis then usually any such certificate could not be regarded as valid since the works were not in a suitable state to be regarded as functionally complete.

[153] The snagging list referred to in the Certificate relates solely to individual apartments. No snagging list is annexed in relation to the common areas or any other part of the Block covered by the Certificate. This is surprising given that it is clear from the evidence of all witnesses that there were a number of defects outstanding as at 16 November to Block A, albeit the Vendor argues that these were not serious such as to prevent the reasonable occupation and use of the apartment by the Purchasers. If indeed there is a separate snagging list, it has not been included in the discovered documents, nor, if it does exist, is it appended to the copy of the certificate with which the court has been furnished in the Vendor's files of discovery. Its absence therefore reduces the role of the Certificate in determining whether an apartment was complete as defined by the Building Contract as between the Vendor and the Purchasers.

[154] Indeed whether or not the Certificate is "valid" will depend on: my assessment as to whether outstanding defects at the time could be considered as more than de minimis, that is that they were such as would unreasonably have interfered with the use of the Apartment; and the weight I can place on the fact that it was issued by an architect whose obligation is to use their skills and best endeavours to reach the right decision, as opposed to one that favours the employers (in this case the Vendor). If I were to conclude that the architects have failed in discharging the duty to that standard, then the certificate itself would carry virtually no weight with the court.

The alleged defects

[155] The substantial submissions on the part of the Purchasers related to the question of fire precautions and their allegation that at the dates of the Notices to

Complete there were deficiencies which were serious either individually or cumulatively. This is denied by the Vendor. However, outwith those relevant to fire considerations, the Purchasers also argued that there were other aspects of the development not complete such as would argue that the Vendor was not in a position to hand over the Apartment so that it may be used and inhabited in a reasonable manner by them. This is covered in paragraph 200 of the first skeleton argument of the Purchasers when they state:

> "Separately to the above point (which related to fire precautions) the Apartments were clearly not ready for habitation from the practical point of view. The main stairs had no guard rail – the absence of that would easily ground a personal injury claim for any visitor or guest to an apartment falling on the stairs. The exit routes were not marked, the fire signage was not in place. Moreover the photographs taken of the premises [TB 5/27/592-665] provide an illustration of the true state of the premises."

[156] For the purposes of my consideration I exclude from these submissions the references to the non-marking of exit routes and fire signage since these fall under the consideration in relation to fire precautions. I have inspected the photographs. It is clear from the submissions that have been made on behalf of the Vendor that the area illustrated by the photographs was an area which was being utilised by the its building contractors and could not be taken by me as representing a view of the general state of the development in respect of either Block or the common areas which would be used by Purchasers or their visitors. As regards the hand rail, whilst in no way belittling the importance of the safety of anyone visiting the premises, I see no basis for arguing that it represented a substantial and serious defect such as would not have allowed for a Certificate of Practical Completion to be issued or for the Apartment to be used in a reasonable manner.

[157] **Therefore, as regards any defect other than those relating to fire, I would reject the argument on the part of the Purchasers.**

[158] That then brings the court to consider the serious allegations that the Vendor, and its professional team, would seek to insist on a Purchaser completing a transaction on the basis that the Apartment and the Block in which the Apartment was situated, should be occupied by them notwithstanding the presence of serious issues in and around fire precautions. Indeed, it is difficult to think of a more serious concern on the part of not just those developing premises and their advisors but also those charged with overseeing such issues as the ability of those in any building, particularly one of six storeys in height, being able to evacuate the building safely and quickly.

[159] Given the situation of the development, the statutory authority whose approval in relation to fire precautions was Belfast City Council (the Council). The process has two stages. The first is a requirement of a proposed developer to submit plans for the approval of the Council. Those are considered by the Council's representatives and, satisfying themselves that they comply with all the necessary building regulations, they can then give their approval. The second stage, however, is for the Council through its representatives to inspect the work when it has been carried out to ensure that it complies with those plans (and therefore with the approval that had been given). The obtaining of approval of the plans in itself would not be sufficient to satisfy a test that a vendor is willing and able to deliver premises which, at the relevant date, are safe for an occupier to inhabit. That can only take place when the work has been done and done to the satisfaction of the Council.

[160] The general thrust of the whole process is one to ensure the safety of all occupants of the building and their visitors. That can be achieved even if perhaps one or more matters remain outstanding. Indeed it would be open to discussion between the Council's representatives and any developer during the course of the carrying out of a development to discuss and change precautions, provided they achieve that objective of safety. Therefore I accept the argument on the part of the Vendor that if, for example, in a development involving two Blocks of Apartments (137 in total) a particular sign was not present, that in itself would not mean that the safety of those in that particular Block or that particular Apartment was comprised to a point that it would not be safe for them to occupy that Apartment. Common sense dictates that there will be certain aspects of the precautions which will have considerably greater importance than others. Therefore the fireproofing of doors or the prevention of fire lapping from one part of a Block to another part of a Block would have greater significance than the missing sign to which I have just referred.

[161] These are matters of judgement, and judgement on the part of those who fully understand the mechanics and consequences of precautions, what is missing and the roles those missing elements play in providing such precautions. Therefore an approach which involves going through a tick list, and which argues that if some item remains 'unticked' must lead to a conclusion that the premises are not safe, is one which would find no favour with the court. As I have said, this is a matter of professional judgement to which I will come, based on the opinions which have been given to the court by the experts on the part of both parties, and the approach of the Council in relation to the issue of the Building Control Final Certificate – that is, the certificate which says that all work has been completed.

[162] On 3 June 2009, the Vendor's architects wrote to Mr Colin Mallon of the Council confirming a conversation which apparently had taken place in relation to the consideration of Block B being handed over to the Vendor in advance of Block A. The architect recorded that Mr Mallon had indicated that the Council would be happy for a phased handover "as long as all the life safety systems for Block B are completed and commissioned and the fire escapes are in place and dedicated". On

the papers before the court there then appears to be a hiatus with the next e-mail dated 14 October 2009 being sent by the architects, this time to Mr Alan Mairs of the Council, seeking urgent clarification on the status of building control approvals. In it the architect states:

> "I had previously been informed that Building Control could be phased for the scheme due to the phased practical completion nature of the project however I have not received any confirmation on Building Control Plan Approval for the scheme.
>
> I assume the relevant approvals could be produced now or are we required to wait Colin's return and the subsequent meeting to discuss the washing machine scenario etc.
>
> Our client is currently trying to complete sales of the apartments and requires Building Control approvals to be provided as part of the sales/contract documentation."

I note with interest the architect's view, presumably informed by other discussions, as to the importance of Building Control as part and parcel of the contract documentation. I will return to that.

[163] On 20 October, the architect sent an e-mail to Mr Mallon, who had returned from holiday, following a meeting the previous day seemingly to discuss the plans. In it, he states that he was currently responding to all items and proposed delivery of a response later that day. Mr Mallon was asked if he would be available to assess those replies and confirm whether marked up A3s would be sufficient "at this stage to receive Plan Approval". It then asks whether Mr Mallon would be able to issue plan approval or a letter to that effect "today as our client has purchasers willing to sign and this is the only outstanding contractual document".

[164] Therefore on 20 October 2009, no Plan Approval had been received let alone any confirmation from the Council that the work contained in any such plan, even if agreed, had been carried out and carried out properly.

[165] The approval was granted on 21 October 2009, six days before the October Notice to Complete in respect of Block B.

[166] There then follows a series of e-mails recording the outcome of inspections carried out by the Council's representatives in October, November and December 2009. It is unnecessary for me to set out exhaustive lists of what were regarded as outstanding steps that required to be taken. The Vendor's skeleton argument does not seek to refer to specific defects. Mr Dunlop B.L. in the Purchaser's skeleton

argument does set out a number of them, but I think he would agree not an exhaustive list. The court, however, has gone carefully through all of the e-mails to form a view of the defects in order to then appraise the importance of them in the context of the expert advice given by the witnesses. I believe it is fair to say that the lists can be divided, as regards fire issues, into those matters which either required to be checked or confirmation given on the one part; and those where clearly works still required to be carried out. A number of these matters appeared in succeeding lists of defects, some through into 2010, the final certificate being granted on 17 June 2010.

[167] Where matters required to be checked or steps taken to ensure that certain things had been done, I cannot take these as evidence that they had not been done. That is not the case in relation to those matters where the lists showed that certain matters had not been done in accordance with the Plans and, by their presence on the list, were still required to be carried out by the Council. There is nothing to indicate that any of them were considered by the Council as no longer necessary, thereby varying the original specification or Plan.

[168] A significant date, however, in this process is 22 December 2009 when the architects wrote to the Council in the following terms:

> "Building Control Comments
>
> WIA met with GA today on site to discuss the building control snag letter. Please note that many of items have been attended to or will be attended to over the next few days.
>
> As per our conversation, our client is concerned that purchasers have made comments re: status of Building Control completions – which may be used as a basis to not to complete with sale. Please advise as to whether Building Control can provide a 'comfort letter' recognising that all Life-Line installations are complete and commissioned thus enabling the Building to be occupied and that any outstanding items may be regarded as cosmetic.
>
> GA have advised that all outstanding items should be completed by Wednesday 6 January 2010. I will update your office on Monday 4 January and advise whether a final inspection of these items is required for Wednesday 6 January."

WIA referred to the architects and GA to Gilbert Ash the contractors under the building contract for the development.

[169] In a reply later that day, Mr Mallon on behalf of the Council replied in the following terms:

> "We can confirm that the building can be occupied as all life safety systems are in place, only minor snag items remain to be addressed throughout the development as per my snag list issued on 21 December 2009. BC cannot stop anyone from purchasing their property even with the current economic climate as the BC Completion Certificate is not a condition of the sale to complete. All certs will be issued as agreed when the snag items have been checked."

Whilst one is always grateful for help and guidance from any source, including Mr Mallon, the status of building control in the context of the contractual relationships between the parties will be decided by the court.

[170] Of significance, however, is the fact that in Mr Mallon's opinion the snag list of 21 December 2009 comprised matters which had still to be completed or checked but which both individually and cumulatively were minor, but more significantly "did not undermine the principal objective that the life safety systems in place allowed the building (by which I understand to mean the Blocks and common areas such as car parks) to be occupied". That is the professional judgment at that date by Mr Mallon who was charged with the oversight of the safety requirements of the development, in full knowledge that as a consequence he would be agreeing to the building being occupied by purchasers.

[171] It was an argument between the parties as to whether or not that e-mail meant that until that date the life safety systems were not in place, or at worst given that the list of 21 December was seen by him as containing only minor matters, that it was only on 21 December 2009 that those safety precautions were in place to allow the building to be occupied. Whilst one could take that as one interpretation, it would be equally possible to say that it did not in any way argue that the life safety systems were not in place before 21 December.

[172] I carried out a comparison between matters contained in the snag list of 21 December 2009 with those in October and November 2009. A number are carried forward, some of which include the issue of fire stopping, and 'ensuring and confirming' certain aspects in relation to for example fire resistant hinges on doors. I am satisfied that those carried forward into the December snag list and are there described as "minor" can invest them with the same degree of importance in the earlier lists. There are some matters which are on the lists in those earlier months not on the December list, and a number of other matters (outwith the question of fire) included in the December list which were not included in the earlier lists. As to

the degree of importance that can be placed on the former items they clearly had been rectified before the December list, but again I have required the assistance of experts as to their individual role and any potential cumulative role.

[173] Prior to the hearing, and indeed during the course of the hearing, the two experts, Mr John Smylie on behalf of the Purchasers and Mr Michael Johnston on behalf of the Vendor, sought to address a Scot Schedule with a view to seeing where agreement could be reached. I believe it fair to say that any progress towards agreement was minimal. That appears to me to be in a large part due to the view of Mr Smylie that each individual aspect of fire safety precautions carried either equal or substantive weight to the point that in its absence it could be said that the development was not safe for anyone to occupy. He himself expressed the view that when it came to fire safety it was a matter of "black and white". No one can argue that the safety of those within each of the Blocks was and is paramount, and that a fire safety system is central to ensuring that this objective was attained. However, while I respect the view of Mr Smylie, I do not thereby accept that either Mr Johnston, or Mr Mallon of the Council, or Ms McCoy the architect are in any way less concerned as to the safety of those who occupy this development. I am more than satisfied having listened to Mr Johnston and Ms McCoy that they are people of the highest integrity and expertise. Both came over to the court as seeking to represent their views in a professional manner, fully cognisant both of their duty under their retention as experts as part of the building contract (in the case of Ms McCoy) and as experts in giving their evidence to the court (in the case of both, but in particular Mr Johnston).

[174] I believe that all experts gave their evidence in as impartial a manner as they believed possible. Mr Smylie and Mr Johnston suffered of course from the fact that neither was able to inspect any part of the development at the relevant time. Each were engaged many years later and therefore have not had the benefit of first hand viewing of the entire development instead having to rely on and interpret the contents of a relatively small number of exchanges of e-mails, particularly as between the architects and Mr Mallon. On the other hand, Ms McCoy had hands on dealings with this whole development throughout, and Mr Mallon had access around the relevant time from October 2009 until certainly his letter of 22 December 2009 in which he expressed his opinion as to the role of the defects then outstanding.

[175] It is perhaps unfortunate, and this applies equally to both sides, that in seeking to make their case they felt obliged to disparage the reputation and bona fides of the other side's witnesses. It certainly does not help. It is particularly unfortunate that the argument put forward seemed to imply that Mr Mallon, who did not give evidence, in some way had been pressurised into giving an opinion or approval which said that the apartments were safe for purchasers to occupy, when in fact they were not. That would be a serious position if it were true, but I reject it. There is nothing to indicate as to why Mr Mallon would ever put himself in a position where, if a fire was to have happened and someone had been injured or died, he would have been exposed to considerable criticism, if not more.

[176] Similarly, with Ms McCoy, who gave evidence across a range of matters, including the changes to the facade. It was her evidence that assisted the court in determining the time sequence of those changes, such as to allow the court to conclude that at the time of completion of the Agreement for Lease and Building Agreement by the Purchasers, the Vendor had already decided to change those façades so that they differed both from the specifications included in the 2004 Permission and the Brochures. Her qualifications are impressive, as indeed is her experience. I do not believe for one moment that she would issue a Certificate of Completion which did not accurately reflect her professional judgement, not merely a view representing the wishes of her employer, the Vendor, that the necessary bench mark of safety existed at dates of the Notices to Complete - and that purchasers could move in safely. I remind myself that she completed a statement of partial possession in respect of Block A. If indeed she wished in October 2009 to have misled any purchaser at the whim or behest of a third party including the Vendor, she would have issued a Certificate of Practical Completion in respect of that Block – but did not. That in itself speaks eloquently as to the position regarding that Block at the time of the October Notice to Complete.

[177] To reinforce my decision in respect of one or two of the items, I was subsequently provided with certificates as to fire alarm systems all dated in early October 2009 (with one in November 2009) showing that all testing had been successful – predicated of course by the presence of the alarm systems. There is nothing to indicate that those systems did not correlate with the Plan submitted for approval to the Council.

[178] In coming to my conclusion, I have had regard to the role of the Building Control Department of the Council and their views. Those views in themselves are not binding or definitive, either generally or in particular by reason of any provision in the Agreements. Nevertheless, on the basis of the expertise and the standing of the author of the letter of 22 December 2009, reinforced by the views of Mr Johnston and underpinned by the professional judgement of Ms McCoy in issuing the Certificate of Practical Completion is related to Block B, I am satisfied that as regards Block B the Vendor was in a position to complete as regards the specification of that Block.

[179] The position in relation to Block A is somewhat different in that the Plans for Approval were not approved until 21 October just 7 days prior to the October Notice to Complete. It was not inspected by the Council until 30 October 2009. No Certificate of Practical Completion was issued by the architects in respect of Block A prior to the issue of the October Notice to Complete. That could be for a number of reasons not necessarily connected to fire issues, but it does tend to suggest to the court that whether it be fire issues or other issues, the architects did not feel that it had satisfied the provisions of the building contract with Gilbert Ash to which I have referred above, namely that the Apartment and that Block were habitable. Mr Mallon would have been concentrating on fire issues and building control issues.

Outside those matters could be those which could have rendered flawed the assertion by the Vendor that the premises were fit for occupation. Neither Mr Houston nor Mr Smylie of course can assist. There is in short a vacuum.

[180] I believe that the Vendor must be in a position to show that Block A was fit for use at the time of the Notice to Complete. In the absence of a Certificate of Practical Completion for Block A, the Vendor has not satisfied me that it was in a position to complete in relation to the works to be carried out under the Building Agreement so as to meet its obligation at the date of the Notice to Complete, or indeed at the expiration of the five days' notice given therein, that the Apartment and indeed the Block were fit for use and reasonable occupation by the purchasers.

[181] **Therefore in relation to the Building Agreement and its terms:**

(a) Any purchaser of an Apartment in Block A upon whom an October Notice to Complete was served would be entitled to rescission on the basis that the court is not satisfied that at time or the expiration of the notice given the Block was fit for reasonable use;

(b) Any purchaser of an Apartment in Block B upon whom a December Notice to Complete was served would not be entitled to rescission on the basis that the court is satisfied that the Block was fit for occupation as at the December Notice to Complete or the expiration of the time given by that Notice.

The Addendum and the Building Control Certificate

[182] That leaves the court still with the position that the Building Control Final Certificate, evidencing that all work had been carried out in accordance with plan approved by the Council, was not issued until June 2010. The Addendum, however, provides that were that Certificate not available at completion the Vendor was obliged to furnish it as soon as possible. Inherent in that provision, accepted by the Purchasers, was that completion could take place even though the Certificate itself was not available. In all of those circumstances, I do not believe its unavailability at the date of completion is fatal to the Vendor's case and if that were a matter to be decided by the court, the absence of the Certificate would not undermine the claim that the Vendor was in a position to complete in accordance with the contractual terms.

Abatement

[183] The Purchasers argue that the Vendor was not in a position to complete on the basis that the December Notice to Complete did not make provision for an abatement to the purchase price because of:

(a) Failure to complete the facades and elevations as per the brochure or the 2004 Provision.

(b) To provide certain items in the interior of the apartment namely:

(i) A gas hob in the kitchen;

(ii) Chrome face plates in the kitchen;

(iii) A telephone point in the master bedroom.

Factually, I have determined that:

(i) There is no indication that the change to the facade has in any way decreased the value of the apartment, let alone that there is a sum for damages which could be quantified (and this was not argued before me).

(ii) The amounts involved in respect of the other three items would be extremely small, particularly in the context of an apartment being purchased at a price of £282,250.

[184] **Secondly, while there is authority (*Donnelly v Weybridge* [2006] All E R (D) 62) for stating that an omission to include an abatement for the purchase price even for something so minor could give rise to a right for rescission on the basis that the vendor was not in a position to complete, nevertheless I believe the answer to that argument lies in the fact that rescission is a discretionary remedy, and that if this were the sole matter on which the Purchasers were seeking to rescind the Agreements, I would refuse that remedy, would grant specific performance in favour of the Vendor but with a right to damages.**

CONCLUSIONS

[185] This judgment addressing as it does the GLO issues, seeks to cover a range of scenarios outwith the case of the present Plaintiffs, Mr & Mrs McGarrity. My conclusions therefore first address their specific case, and then I comment on the remaining cases affected by this judgment.

A McGarrity

[186] I have addressed the facts of the Plaintiffs' case at several points in the judgment:

- How they came to sign the initial agreement to buy within an hour of arriving at the offices of the selling agents' offices;
- My conclusion that the differences in the Brochure elevations and the actual elevations would have played no part in their decision to buy the apartment;

- That they had never visited the development during its construction, let alone the apartment, evidencing a seeming indifference to the progress or nature of the building works.

To those I can add:

- That their solicitor raised no additional pre-contract enquiries, although perfectly entitled to do so. Indeed no-one could stop him.
- There was no evidence that there were any representations made to them other than in the documentation to which I have referred during my judgment; and
- Their objection to complete arose only when they received notice that the apartment would be ready on the 30 November 2009 – and that their objection then was on the basis that the completion date had not been met.

[187] I have no doubt that the catalyst for their seeking rescission of the Agreements and the return of their deposits was the collapse in the housing market, with the subsequent drop in the value of the apartment below the agreed purchase price.

[188] Nevertheless, the Vendor having sought to enforce the Agreements, the Court has to decide the legal position as at the date it said it was ready able and willing to complete, in the case of the Plaintiffs, at the date when the time given in the December Notice to Complete expired. If it was not so ready and able for a substantial or fundamental reason, then the Plaintiffs were afforded the right to rescind and have their deposit returned.

[189] In their specific case, the Vendor had no title to the balcony of their apartment at the relevant date. The provision of the balcony was a central feature of the apartment in the minds of both parties, in particular in the mind of the Vendor from virtually the time it acquired the Site. Having determined that the attempt by the Vendor to exclude its obligation to make good title over the apartment (including the balcony) was ineffective, this failing alone allows the Plaintiffs to rescind the Agreements and have their deposit repaid. In addition, the same right arises from the failure of the Vendor to evidence at the relevant date the agreement of the Council to the works under condition 4(b) and condition 5 of the planning permission affords the plaintiffs the right to rescission and the return of their deposit. They are also entitled to payment of their costs.

B Other Purchasers

[190] Clearly time now needs to be afforded for individual parties to a large number of proceedings to consider their positions in the light of the determinations of the range of issues covered by this judgment – and whether there is to be an appeal against all or any of those determinations. It is also possible that in some cases further evidence specific to a case will need to be heard. Therefore I will fix a date for a review of the remaining cases in respect of this development.