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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **10/09/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

JAMES OLIVER McDONALD

Plaintiff

and

NICHOLAS McKENNA, WILLIAM JOHN IRWIN and PATRICK JAMES McGRATH

Defendants

COGHLIN LJ

[1] In this case the plaintiff, James Oliver McDonald, claims against the first-named defendant, Nicholas McKenna, an order for specific performance of a contract made between the plaintiff and the first defendant for the sale and purchase of property situate at 50 Malone Park, Belfast ("the property") and, consequently, payment by the first defendant of the balance purchase monies in respect of the sale of the said property being £2,150,000 together with interest thereon at 6% above UK clearing bank base rate at the date of the contract. Further and in the alternative the plaintiff claims against the first defendant damages in lieu of specific performance, damages for breach of contract and interest thereon.

[2] Further, and in the alternative, the plaintiff claims damages for negligence and breach of contract on the part of the second and third named defendants who, at all material times, were engaged by the plaintiff to act as solicitors upon his behalf with regard to the sale of the property by the plaintiff to the first defendant. In this judgment references to the first defendant include, where appropriate, references to the second and third defendants.

[3] Mr Horner QC and Mr Good appeared on behalf of the plaintiff while the first defendant was represented by Mr Michael Lavery QC and Mr Ronan Lavery and

Mr Hanna QC and Mr Hugh MacMahon appeared on behalf of the second and third named defendants. I wish to acknowledge my appreciation of all sets of counsel for the assistance that I derived from their carefully prepared oral and written submissions.

Background Facts

[4] One of the fundamental questions to be determined by the court in this case relates to the credibility of the parties. However, there is a substratum of fact which appears to be common case.

[5] The plaintiff is a retired certified accountant who worked primarily for the Labour Relations Agency ("LRA") and certain charities. He is now some 74 years of age and, prior to the events with which this case is concerned, he had resided with his family in the property since 1971. His wife died in February 2003 and since that time the plaintiff has lived alone in the property. He has two children, Noel who is now aged 47 and Janette who is now aged 40. Sadly, his daughter is wheelchair - dependant as a consequence of a serious industrial accident. The plaintiff himself in latter years has suffered a stroke and developed a degree of arthritis as a consequence of which the stairs and large garden of the property have become somewhat of a burden. In the circumstances, the plaintiff decided that it would be appropriate for him to "downsize" to a bungalow and thereby also release some capital which might be used to provide a degree of security for his daughter. The plaintiff consulted Templeton Robinson Estate Agents who placed the property on the market in March 2007 at an initial valuation of £2.25m. The plaintiff was informed by Mr Patrick Palmer, the representative of Templeton Robinson who dealt with the sale of the property, that they expected that there would be very considerable interest in the property.

[6] The property market in Northern Ireland was still buoyant in the spring of 2007 and it took little time for Mr Palmer's expectations to be fully borne out. By 3 April bids had reached £3.3m and that had been increased to £3.4m by 11 April. On 13 April 2007 the first named defendant telephoned the plaintiff and inquired about the sale of the property. The plaintiff and the first named defendant had known each other for approximately 30 years and were members of the same religious body although both agreed that they were not close friends. The plaintiff knew the first defendant to be a wealthy businessman from the Ballymena area. The plaintiff informed the first defendant of the current bid at £3.45m and the first defendant said that he was interested in the property and arranged to call with the plaintiff.

[7] 15 April 2007 appears to have been a Sunday and, according to the plaintiff, the first defendant did call at the property on his way back from the airport and confirmed that he would bid £3.5m. On 16 April the plaintiff telephoned this offer to

Mr Palmer. On the same date Mr Palmer was contacted by the first defendant who made an unconditional offer of £3.5m. The first defendant seems to have told Mr Palmer that he wanted the house for his son, that it was immaterial that his son had not seen the property and that he would sign an unconditional contract within a week of receipt by his solicitor. Mr Palmer's notes confirmed that the plaintiff was made aware of this information.

[8] On 17 April 2007 Mr Palmer had a further conversation with the plaintiff who felt that it would be only fair to give the under-bidder an opportunity to match or improve on the first defendant's offer. Contact was made with the under-bidder who maintained that he would not offer more than £3.45m. On 19 April 2007 the first defendant was informed by Mr Palmer that his offer of £3.5m had been accepted. On the same day Mr Palmer had a conversation with the plaintiff confirming acceptance of the first defendant's offer and that the first defendant would sign an unconditional contract within 2 weeks of his solicitors receiving the draft. According to Mr Palmer's note on the same day the first defendant confirmed that he was pleased with a completion date of 3 August 2007.

[9] On 24 April 2007 Mr Palmer sent a Memorandum of Sale to the second and third named defendants with a covering letter informing them that the solicitor acting on behalf of the first named defendant was Mr John McKenna of Eamonn McEvoy & Co Solicitors, Lurgan. Mr John McKenna is a son of the first named defendant. The covering letter also confirmed that the first named defendant's offer was £3,500,000 subject only to title with a signed unconditional contract to be returned to the second and third named defendants within 2 weeks of the purchaser's solicitor receiving the contract and title deeds. The completion date was stated to be 3 August 2007.

[10] The second and third named defendants subsequently received a Memorandum of Sale and contract signed by the first defendant on 30 May 2007. The contract was subject to the General Conditions of Sale Law Society of Northern Ireland (3rd Edition 2nd Revision) but contained a reference to "see special conditions" with regard to the date for completion. Condition 15.1 of the General Conditions provides as follows:

> "15.1 The date for completion shall be stated in the Memorandum of Sale but if not so stated shall be the first working day after the expiration of 4 weeks from the date of the contract, and completion shall, in default of prior agreement take place at the office of the Vendor's Solicitors, or, if required by the Vendor at the office of the Solicitors for the Vendor's mortgagee."

The special conditions added by the solicitors acting on behalf of the first defendant read as follows:

> "Special Conditions
>
> 1. The balance purchase monies shall be payable as follows:
>
> £1,000,000 on 29 June 2007
> £2,150,000 at the date of actual completion
> in accordance with Special Condition 2 below.
>
> 2. General Condition 15.1 shall be deleted. Upon receipt of copy accepted Contract the purchaser shall actively market the property for sale and thereafter assign/sub-sell his interest in this contract to the ultimate purchaser to whom the Vendor shall demise the property in accordance with General Condition 11(4). The Vendor shall co-operate in the marketing of the property. The Purchaser shall make reasonable endeavours to complete without undue delay.
>
> The Vendor will be kept advised of developments."

Together with the signed contract the first named defendant's solicitors forwarded to the second and third defendants a cheque for £350,000 being 10% of the purchase price by way of deposit. On 7 June 2007 the plaintiff signed the contract and a copy of the accepted contract was sent to the first defendant's solicitors on 19 June 2007.

[11] On 6 June 2007 the second and third defendants wrote to the solicitors acting on behalf of the first defendant in the following terms:

> "Dear Sirs
>
> Re Our Client - James McDonald
> Your Client - Nicholas McKenna
> Premises - 50 Malone Park Belfast
>
> We refer to the above and your letter dated 1 June 2007 with enclosed Offer to Purchase and deposit monies.

> As you will be aware our client is contracted to purchase alternative premises with a completion date scheduled for 29 June 2007. Special Condition 1 in the Contract states that balance purchase monies of £1,000,000 will be paid on 29 June 2007 and therefore for all intents and purposes we consider that legal completion will have taken place on this date and all monies received will be for the benefit of our client.
>
> Please confirm by return that there will be no objection to our client using the balance purchase monies to assist in the purchase of his new premises.
>
> We await hearing from you."

On 28 June 2007 the first named defendant's solicitors wrote to the second and third named defendants in the following terms:

> "Dear Sirs
>
> Re Our Client - Nicholas McKenna
> Your Client - James McDonald
> Premises - 50 Malone Park Belfast
>
> We refer to the above and to earlier correspondence. In accordance with the terms of the Contract we enclose herewith our cheque in the sum of £1,000,000 on your undertaking not to encash same until you receive authority from John McKenna to do so.
>
> Yours faithfully".

[12] The first named defendant subsequently authorised the use of the £1M by the plaintiff to purchase a bungalow but no further payments have been made by the first named defendant in accordance with the contract and the property remains unsold. The current market value of the property is agreed at approximately £1million.

The Divergent Accounts

The Plaintiff

[13] The plaintiff said that he had known the first defendant for some 30 years largely through church business but they were not "buddies". That appeared to be fairly consistent with the attitude of the first named defendant who described the plaintiff as a friend "but not close". He said that after the telephone call and visit from the first defendant on 15 April 2007 he informed the second named defendant, who was his family solicitor, of the identity of the first defendant's solicitors and thereafter left the matter entirely in the hands of Mr Palmer and the second and third named defendants. According to the plaintiff the only reference to a completion date was the 3rd August 2007 with which he expressed himself to be happy. The plaintiff said that there was no reference to the first defendant buying the house for his son during the initial telephone call or meeting and that the first time he was informed that was the intention of the first defendant was in a telephone call a couple of weeks later, possibly on 25 April. The plaintiff gave evidence that, at that time, he was told by the first defendant that he intended to "sell the property on" within the completion date set by Mr Palmer and he could thereby avoid paying Stamp Duty. The plaintiff said that he told the first defendant that it was a matter for himself and there was no discussion about the price that the first defendant was likely to achieve. The plaintiff said that he did not inform Mr Irwin about the first defendant's change of plan presuming that he would be informed in due course by the first defendant's solicitor. The plaintiff maintained in evidence that the importance of a completion date did not register with him and he did not appreciate that was the date when the balance of purchase money would become due. He said that he left such matters to Mr Irwin.

[14] The plaintiff confirmed that, apart from the sale of 50 Malone Park, the second and third defendants were also representing him at the material time in the purchase of a bungalow at Old Court Avenue. Completion for the purchase of the bungalow was to be on 29 June 2007 and the plaintiff said that when he attended the second and third defendants to sign the contract for 50 Malone Park on 4 June 2007 he was informed by the assistant, Carmel, that the deposit of £350,000 had been received and a further £1m was to be paid on 9 June 2007. The plaintiff said that he did not know why he was receiving £1m but that he was "delighted" since that sum could be used to discharge the purchase price of the bungalow. He said that he did not read the contract in full at the time that he signed it nor did he receive any advice or instruction from the second and third defendants about the Special Conditions. He said that he only became aware of the existence of the Special Conditions when Mr Irwin sent him a copy of the contract in August 2008. He described himself as being "aghast" when reading Special Conditions 1 and 2 and so disappointed with Mr Irwin that he decided to consult alternative solicitors.

[15] The plaintiff also gave evidence about meeting the first defendant at Deane's Restaurant at Queen's University in the autumn of 2007. The plaintiff believed that the meeting took place in August while the first defendant's recollection was that it

was in November. According to the plaintiff this meeting was primarily about church affairs. He said that, at the end of the meal, he asked the first defendant about the payment of interest on the balance of the purchase price but that he responded with a blank refusal. He could not remember whether he asked the first defendant when he was going to complete. The plaintiff repeatedly described himself as "naïve" and prepared to place his complete trust in Mr Irwin, Mr Palmer and the first defendant. However, with the passage of time his patience began to "wear thin" and he began to put pressure upon the second named defendant to secure the completion of the contract in respect of 50 Malone Park and payment of the balance purchase price.

The First Defendant

[16] The first defendant described himself as being in the "catering distribution business" and stated that he had been investing in commercial property all his life but had no experience of the domestic market. He said that, after he had been told on Friday 19 April that his bid of £3.5m had been accepted for 50 Malone Park, he went to see his son on the Saturday. His son instantly told him that he was not interested in the property and the first defendant maintained that he therefor contacted the plaintiff on the Monday and told him that "the deal is off." According to the first defendant he again met the plaintiff at 50 Malone Park on Monday 21 May 2007 and eventually agreed to lend him £1.35m. The first defendant said that his initial suggestion was £1m but the plaintiff "talked him up" emphasising his need for funds to settle on his daughter. The first defendant was adamant that he had never agreed to purchase 50 Malone Park and he asserted that the plaintiff expressly agreed that he would never actually purchase the property. He said that the arrangement was for his son John, who was the solicitor acting upon his behalf, to prepare a contract as "security" for the loan of £1.35m. He said that he thought the house would eventually be sold and the new purchaser would pay the price to the plaintiff. The first defendant denied that he had ever agreed a completion date of 3 August 2007 and, while he accepted that he had received several letters from Mr Palmer, he said that he never paid much attention to such correspondence because he had gone back to the plaintiff within a few days to make clear that the deal was off. He explained that he never informed Mr Palmer of this change because he didn't want to "breach his confidence with the plaintiff." In cross-examination by Mr Horner the first defendant said that when he received a telephone call from Mr Palmer he said virtually nothing and "just held the phone." He also said that if Mr Palmer had asked "do you want to go to the moon?" he would have said yes. Mr McKenna said that he had told his son that he had made it clear to the plaintiff that the deal was off but he was quite unable to explain why his son appeared to continue to act as if the deal was very much alive. He was referred to the letter that he received from Templeton & Robinson dated 24 April 2007 at a

time when, according to his evidence, he had told the plaintiff that the deal was definitely off. His response was:

"I didn't consider that I was duty bound to do anything about that letter."

[17] The first defendant agreed that he had met the plaintiff in Deane's Restaurant at Queen's University but, according to him, rather than church business, the principal reason for the meeting was to discuss what was to happen to the property at 50 Malone Park. The first defendant said that the plaintiff appeared to have forgotten that it was his own responsibility to sell the property. He said that the plaintiff was seeking to increase the loan and quoted him as saying "Nick I need a few more quid". He said he had refused any increase and denied that there had been any reference to interest on the purchase money.

[18] The first defendant gave evidence of going to see the plaintiff on a Saturday afternoon sometime in March 2008 and telling him that it looked as if "they" had "called this wrong". He maintained that Templeton & Robinson had been instructed by himself and the plaintiff to put the property back on the market in September of 2008 because it was "not a good idea" to market property during the summer. In cross-examination by Mr Hanna the first defendant said that he did not know why the plaintiff had not gone back to the under-bidder when he had told him the deal was off and he denied that it was ever his intention to resell the property maintaining that, thereafter, the transaction was at all times a loan secured on the contract.

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Credibility of the plaintiff

[19] It is clear that the description of their commercial relationship to which the plaintiff has testified is, in many material respects, quite inconsistent with the account about which the first defendant has given evidence. As always, when seeking to resolve questions of credibility it is important to have regard not only to the actual content and import of the evidence but also to the demeanour of a witness and the manner in which he or she delivers their evidence, always bearing in mind that the fact that a witness embellishes, exaggerates or is even dishonest about a particular matter does not by any means inevitably lead to the conclusion that all of his or her testimony should consequently be rejected. In addition, as far as possible, it is important to set the disputed aspects of a witness's account within the context of all the rest of the evidence in the case and, in particular, to test it against any material that may be regarded as reasonably objective. In this case my task has been considerably eased by the careful and contemporaneous notes maintained by Mr Palmer of Templeton Robinson Estate Agents. In the course of listening to his evidence I formed the opinion that Mr Palmer was a reliable, accurate and

disinterested professional who had been retained at different times to act both on behalf of the plaintiff and, later, the first defendant. I was also impressed with the evidence given by Mr Irwin the second named defendant. While he is a defendant in the action and, therefore, clearly at risk, Mr Irwin was quite prepared to admit his professional shortcomings and conceded that he was not in any way challenging the adverse findings detailed in the expert solicitor's report from Mr McIvor.

[20] Mr Palmer described the plaintiff as "slightly naïve" and I accept that he showed a degree of naivety in placing a disproportionate amount of trust in the first defendant. However, I do not accept that the plaintiff simply "left everything" in the hands of Mr Palmer and Mr Irwin to the extent that he sought to persuade the court. For example the notes made by Mr Palmer of conversations with the plaintiff on 24 May 2007, 29 May 2007, 8 June 2007, 19 June 2007 and 26 June 2007 persuade me that, while he may not have been comprehensively advised as to the legal implications of Special Conditions 1 and 2, the plaintiff was effectively advised by Mr Palmer, and appreciated, the need for a definite completion date together with the significance of such a date for payment of the balance purchase monies. I am satisfied that once the deposit and the £1 million had been received from the first defendant the plaintiff was prepared to be reasonably patient about completion and payment of the balance purchase price.

[21] Nor am I persuaded that, as he maintained in evidence, the plaintiff received from Carmel the information that the first defendant was prepared to pay £1m "out of the blue". It is quite clear from Mr Palmer's note of 21 May 2007 that the plaintiff told the first defendant that he was concerned about losing the bungalow if the contract for the sale of 50 Malone Park was not signed. On 24 May 2007 Mr Palmer recorded that the plaintiff was well aware that he was tied into buying the bungalow and needed the contract for the sale of 50 Malone Park together with a completion date in order to obtain bridging finance. Contemporary notes made by the second defendant and his staff confirm that the plaintiff was concerned about co-ordinating the sale and purchase of the two properties. The notes made by the second defendant on 25 May 2007 give rise to a clear inference that a proposal came from the first defendant's solicitor that the first defendant would provide a signed contract the following week with a £350,000 deposit, that £1million would be paid during June, thereby removing the plaintiff's need for a Bank of Ireland bridging loan, that the completion date which was 'open-ended' would be agreed when the balance of the purchase money was to be paid and that the plaintiff was happy with those proposals. The further note made by Mr Palmer on 31 May 2007 confirms that it was the plaintiff who told Mr Palmer that he was to receive a deposit of £350,000 together with another £1m in July.

Credibility of the First Named Defendant

[22] The fundamental case made by Mr McKenna was that, having been told by his son that he was not interested in the purchase of 50 Malone Park on Saturday, he contacted the plaintiff on the following Monday, 23 April, and told him that "the deal is off." According to Mr McKenna the plaintiff responded by stating that his "heart was set" on purchasing the bungalow which he said was to cost approximately £960,000. Mr McKenna responded by saying "… you are going to have to leave this with me …" He said that there had been an exchange of telephone calls during which the plaintiff told him that he required funds for his daughter and "talked me up" from an offer of £1m to a final agreement to lend £1.35m. According to Mr McKenna this was finally agreed between the parties at the plaintiff's house on 21 May 2007. The agreement was that he would lend the plaintiff £350,000 by May and £1m by June. He was adamant that, after 23 April 2007, the plaintiff could not have entertained any reasonable belief that he was buying a house in which he had absolutely no interest. He said that he arranged for his solicitor son to prepare a contract "as security for the loan of £1.35 million". He conceded that the contractual document made no mention of a loan but maintained that it was "understood" between himself and the plaintiff that was the nature of the transaction. At another point in cross-examination he said it was agreed that the transaction would proceed "as if" it was a purchase but it was accepted that he would never complete. He was adamant that it had never been his intention to 'flip' the property and he claimed that he had never heard of that term

[23] The first defendant did not impress me as a credible witness whether by the content of his testimony, his demeanour or the manner in which he gave his evidence. He simply had no answer to some of the questions put in cross-examination and his testimony contained significant matters that were not put in cross-examination to the plaintiff or his witnesses thereby suggesting that, to at least some extent, Mr McKenna was basically making it up as he went along. However, the objective confirmation of his dishonesty was copper fastened by the contemporaneous notes kept by Mr Palmer. For example, in examination in chief the first defendant denied that he had ever agreed a completion date of 3 August 2007 a denial that was easily contradicted by Mr Palmer's note of 19 April of his conversation with the first defendant and his letter to the first defendant of 24 April 2007. Mr Palmer's notes of conversations with the first defendant and his solicitor are completely inconsistent with the former's assertion that he had told the plaintiff that the 'deal was off' on 23 April. In my opinion those notes are consistent, and only consistent, with the first defendant reaching an agreement with the plaintiff to buy 50 Malone Park and to sell it on, presumably in the hope of taking a profit from the resale and avoiding Stamp Duty. All of Mr Palmer's notes relating to conversations with the first defendant and/or his solicitor son are only consistent with such an arrangement and, in the course of cross-examination, Mr McKenna agreed that Mr Palmer's notes were "accurate in the main". When asked in cross-examination why he thought that his son responded to Mr Palmer as if the sale and purchase of 50

Malone Park was proceeding and why he thought his son would want to mislead Mr Palmer Mr McKenna simply had no answer.

[24] Some of Mr McKenna's answers bordered on the nonsensical and I have already referred to his responses when cross-examined about telephone calls from Mr Palmer. For example, having confirmed that he had no doubt that the agreement with the plaintiff to lend him £1.35m was concluded on 21 May, he was quite unable to explain how the reference to "either the week commencing 23 April 2007 or the week commencing 1 May 2007" came to be included at paragraph 1*(a)(i)* of the Replies to Particulars dated 13 April 2011. He said that he took the date of 21 May from Mr Palmer's notes which "made sense". However, the note actually made by Mr Palmer of his conversation with Mr McDonald on that date was completely inconsistent with the nature and form of the agreement alleged by the first defendant to have been arrived at upon that date. The first defendant accepted that he had received but stated that he did not consider that he was duty bound to do anything about the formal letter from Mr Palmer dated 24 April 2007 setting out the details of the transaction despite the fact that the terms contained therein were totally contradictory of his assertion that he had earlier informed the plaintiff that 'the deal is off'.

[25] Mr McKenna said that his solicitor son knew about his decision not to purchase the property and subsequently to lend the money to the plaintiff but he was unable to explain why, in such circumstances, his son had sought a property certificate and searches as well as raising inquiries about service charges and rights of way in correspondence headed "subject to contract" in relation to 50 Malone Park. When he was referred to the Special Conditions introduced into the draft contract for sale by his solicitor son containing references to "balance purchase monies" and completely omitting any reference to a loan or security for a loan the first defendant offered the explanation that "there may be some error in the words." He also accepted that the letter written by his solicitors on 13 May 2009 in answer to the plaintiff's letter of claim made absolutely no reference to a loan, security for a loan or repayment of a loan. In cross-examination by Mr Horner Mr McKenna denied that he had ever suggested making staged payments to the plaintiff's solicitor. Mr Hanna drew his attention specifically to a memorandum made by Mr Irwin on 24 January 2008 of a telephone call to Mr John McKenna, his son. That note read:

> "General chat re: balance due to Mr Jim McDonald. His father and brother are meeting next Tuesday to discuss a `payment on account' and he will be in touch."

Mr McKenna denied ever hearing of such a suggestion which he accepted would be totally inconsistent with his version of the meeting at Deane's Restaurant. He also

accepted that his son John could only have obtained such information from himself or his other son, Stephen. In all the circumstances, I was satisfied that the failure to call Mr McKenna's solicitor son, John, as a witness to support his testimony was a matter of very considerable significance.

The Law relating to interpretation of contracts.

[26] Any consideration of the correct legal relationship between the plaintiff and the first named defendant must commence with a consideration of the contractual documents to which both have appended their signatures. A document described as "Memorandum of Sale" was signed by the first named defendant on 30 May 2007 and by the plaintiff on 7 June 2007. That document clearly identified in writing the property, the identity of the parties and the purchase price. The agreement incorporated the General Conditions of Sale Law Society of Northern Ireland (3rd Edition, 2nd Revision) subject to two special conditions. The copy accepted contract was sent by the second named defendant to the first named defendant's solicitor under cover of a letter dated 19 June 2007 which also contained a request for a Deed of Assignment. Thus, it seems clear that both parties committed themselves to documents the clear and objective wording of which recorded the sale of the property by the plaintiff and the purchase thereof by the first named defendant.

[27] The generally accepted starting point for disputes about contractual interpretation are the five principles identified by Lord Hoffman in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896. Those principles have been refined over time in particular, by Lord Hoffman himself and Lord Bingham in BCCI v Ali [2002] 1 AC 251 when the latter observed that:

> "To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant events surrounding the transaction so far as known to the parties. To ascertain the parties intentions the court does not of course enquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified."

In Riley v National Insurance and Guarantee Corporation Limited [2009] 1 All ER (Comm) 116 Moore-Bick LJ observed that:

> "The principles to be applied in the construction of a clause of this kind were not in dispute … it is

> unnecessary to repeat them here, but it is worth noting that they include the following: a presumption that the words in question should be construed in their ordinary and popular sense; that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense; that the commercial object of the contract as a whole, or the particular clause in question, will be relevant in resolving any ambiguity in the wording; and that in a case of true ambiguity, the construction which produces the more reasonable result is to be preferred. I would only add by way of comment that difficulty of construction is not the same thing as ambiguity."

In Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 Lord Clarke emphasised that the overriding principle that had emerged with regard to the construction of commercial contracts was the need to approach issues of construction with business common sense and in giving the judgment of the court he said at paragraphs 14 and 21:

> "14 The principles have been discussed in many cases, notably of course, as Lord Neuberger MR said in Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, [2011] 1 WLR 770 at para 17, by Lord Hoffmann in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim, in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 , 912 f - 913 g and in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 21–6. I agree with Lord Neuberger (also at para 17) that those cases now show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably

> have been available to the parties in the situation in which they were at the time of the contract.
>
> 21. The language used by the parties will often have more than one potential meaning … In doing so (determining what the parties meant by the language used), the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[28] One of the principles identified by Lord Hoffman in the Investors Compensation case was the requirement to exclude from admissible background any evidence of the previous negotiations between the parties and their declarations of subjective intent. The rule prohibiting the admission of pre-contractual negotiations for the purpose of interpreting a contract was confirmed by the House of Lords in Chartbrook Homes Limited v Persimmon Homes Limited [2009] 1 AC 1101. In delivering the main judgment of the House in that case Lord Hoffman noted that to allow evidence of pre-contractual negotiations to be used in aid of construction would require the House to depart from a long and consistent line of authority and he then proceeded to examine the reasons for retention of the rule observing at paragraph [38]:

> "[38] Like Lord Bingham, I rather doubt whether the Investors Compensation Scheme case produced a dramatic increase in the amount of material produced by way of background for the purpose of contractual interpretation. But pre-contractual negotiations seem to me capable of raising practical questions different from those created by other forms of background. Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations of one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded. But the

> imprecision of the line between negotiation and provisional agreement is the very reason why in every case of dispute over interpretation, one or other of the parties is likely to require a court or arbitrator to take the course of negotiations into account."

[29] In the course of giving the judgment of the Privy Council in Attorney General of Belize v Belize Telecom [2009] 1 WLR 1988 Lord Hoffman considered the process of implication in the context of contractual construction and at paragraph 16 he said:

> "Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."

Lord Hoffman went on to caution against the dangers of treating alternative approaches to the process of implication by different judges as if they had a life of their own and emphasised the importance of an objective construction of the instrument as a whole stating at paragraph 21:

> "21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such

> a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech (Trollope and Colls Limited v Northwest Metropolitan Region Hospital Board [1973] 1 WLR 601 at 609) that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would really be understood to mean?"

[30] The Parole Evidence Rule is a long established rule providing that where a contract has been made wholly in writing, evidence is not admissible to add to, vary or contradict the written terms and, in particular, extrinsic evidence cannot be given to show the real intention of the parties. In AIB Group (UK) Limited v Martin [2002] 1 WLR 94 Lord Hutton said at paragraph [4]:

> "[4] I would add one further observation. It is a general rule in the construction of deeds that the intention of the parties is to be ascertained from the words used in the deeds and that, with certain limited exceptions, extrinsic evidence cannot be given to show the real intention of the parties. On occasions this rule may lead to the actual intention of the parties being defeated but the rule is applied to ensure certainty in legal affairs."

There are certain recognised exceptions to the rule that have been usefully set out by the learned authors of Lewison on The Interpretation of Contracts (5th Edition) pages 120-124 although none of those exceptions appear to arise in this case. However, consideration of the relevant jurisprudence emphasises the significance of context, and it seems to me that, bearing in mind the numerous exceptions that appear in the decisions of different judges, considerable caution is required before any absolute application of the rule should be permitted to unjustly exclude relevant evidence. It was for that reason as well as the need to identify legitimate background material and the basic obligation to ensure that all parties were afforded a fair hearing that I heard a substantial body of evidence *de bene esse.*

The case made by the parties

[31] It is not altogether easy to tie down the case made by the first named defendant which has gone through a number of variations in the course of his pleadings, skeleton argument and evidence. Some of these variations have the appearance of being basically inconsistent. For example at paragraph 15 of the defence and counterclaim the first defendant asserts that on 1 June 2007 he lent the plaintiff the sum of £350,000 and on 28 June 2007 he lent him £1m. That total sum was to be returned upon completion of the alleged contract and in the event of such completion not taking place within a reasonable period the said money was to be repaid. At paragraph 16 it is alleged that it was an express or implied term of that loan that in the absence of a purchaser willing to complete the purchase of the property within a reasonable period at the price stipulated in the memorandum signed by the parties that the sums lent by the first defendant to the plaintiff were to be returned with interest. By way of contrast the reference to a loan is not present at paragraph 1 of the first named defendant's skeleton argument in which it is alleged that his case is that he entered into a contract for the purchase of the property at a price of £3.5m and that the sum of £1.35m advanced to the plaintiff was to be credited against that price when he sold the property. In that paragraph it is asserted that the completion of the contract was conditional upon his obtaining a buyer for the house at a price of £3.5m. In his evidence the first defendant maintained that he had told the plaintiff that the "deal was off" on the Monday following acceptance of his bid to purchase the property, that he never agreed that he would purchase the property in which he had no interest but that in May 2007 he agreed to lend the plaintiff £1.35m grounded on the security of the document prepared by his solicitors son.

[32] Mr Michael Lavery has argued on behalf of the first defendant that the contract for the sale of the property was void for uncertainty because of the absence of a fixed completion date and, particularly in the context of Special Condition 2, the failure of the contract to provide a mechanism by means of which any such completion date might be established. He also relied upon the use of the phrase "reasonable endeavours" as contributing to the uncertainty. He submitted that the contention by the plaintiff and the second and third named defendants that the contract should be read as if it contained the words "the contract shall be completed within a reasonable period" amounted to an attempt to re-write the contract. He further argued that this submission was reinforced by the agreement by both parties to strike out Clause 15 of the General Conditions which contained a specific requirement for a date for completion to be stated in the Memorandum of Sale and, if not so stated, set out a clear alternative timetable by which completion should be achieved.

[33] The second and third named defendants, with the support of the plaintiff, referred the court to a body of case law which they argued confirmed that there are many circumstances in which a term will be implied that completion is to take place within a reasonable time and that the duration of such a reasonable time may be determined with the benefit of hindsight.

Discussion

The substance of the transaction

[34] Applying the principles of contractual interpretation set out above I am satisfied that, having regard to the natural and ordinary meaning of the words chosen and approved by the parties and their legal representatives in a conventional commercial context, the document signed by the plaintiff and the first named defendant constitutes a contract in writing for the sale of the property. I do not accept that any reasonable person having all the background knowledge which would reasonably be available including the pre and post contract correspondence and notes could reasonably come to any other conclusion. Neither the document itself nor any of the relevant background material makes any reference to the transaction being a loan. In any event, for the reasons set out above, I simply do not believe the first defendant's evidence about calling the deal off and later, on 21 May 2007, telling the plaintiff that he would lend him £1.35m and that the transaction would go ahead as if it were a purchase although it was agreed that he would never complete.

[35] In their written closing submissions on behalf of the first named defendant counsel have summarised his case at paragraph 44 in terms that the first named defendant entered into an agreement to purchase the property at 50 Malone Park but that completion of this agreement was to be conditional upon his securing a purchaser of the property at a price of £3.5m or greater. In essence, any obligation on the part of the first defendant to purchase the property was conditional upon his securing a purchaser to whom it could be resold for £3.5m or greater. The first and most obvious obstacle to the success of such a submission is the complete absence of any reference to such a condition in the document prepared and approved by the parties and their legal advisors.

[36] The question then arises as to whether such a term should be implied. Prima facie, the Memorandum of Sale, prepared with the benefit of legal advice, appears self-contained. Does business efficacy require the implication of such a term? In the absence of such a term the risk would fall upon the first named defendant rather than the plaintiff. It may well be that the first defendant was quite prepared to bear

any such risk based upon the belief, shared by so many others, that the market would continue to rise and a substantial profit was assured. However, it is important to bear in mind the words cited above from the judgment of Lord Hoffman in The Attorney General of Belize case relating to the process of implication. The court is concerned only to discover the meaning of the instrument and cannot introduce terms to make it fairer or more reasonable. The court cannot rewrite contracts simply because the parties or a party failed to foresee and to provide for a particular eventuality such as a fall in rental values – see Scottish Widows Fund v BGC International [2012] EWCA Civ 607. If the absence of an express term causes loss to one or other of the parties the loss must lie where it falls. In Chartbrook Lord Hoffman stated at paragraph 20 of his judgment:

> "[20] It is of course true that the fact that a contract may appear to be unduly favourable to one of the parties is not a sufficient reason for supposing that it does not mean what it says. The reasonable addressee of the instrument has not been privy to the negotiations and cannot tell whether a provision favourable to one side was not in exchange for some concession elsewhere or simply a bad bargain."

[37] In the circumstances, I am not persuaded that there is any basis for implying such a term.

Uncertainty as a consequence of the lack of a specific date for completion or a formula for fixing such a date.

[38] Mr Michael Lavery submitted on behalf of the first defendant that the absence of a completion date or any formula by which such a date could be clearly established, especially in the context of Special Conditions 1 and 2, had the inevitable result of causing the contract for the sale of the property to fail for uncertainty. Indeed, during the course of his cross-examination the first named defendant maintained that the contract, including the Special Conditions, actually recorded that completion would never take place and that reflected his agreement with the plaintiff and his instructions to his solicitors son. Perhaps not surprisingly if that had been the case, he was completely unable to explain the basis for the information supplied to Mr Palmer by his solicitor on the 14 of May and the plaintiff on 21 May 2007. Mr Lavery argued that to imply a term such as "the purchaser shall complete within a reasonable period of time" would essentially amount to the court rewriting the contract.

[40] Mr Horner on behalf of the plaintiff submitted that the contract defined the parties, identified the property and recorded the consideration and that, in such

circumstances, it was a valid open contract in respect of which it was permissible to imply a term requiring completion within a reasonable time in order to ensure "business efficacy". Mr Hanna advanced a similar submission on behalf of the second and third named defendants relying upon what he submitted was a well-established body of case law as to what may constitute "a reasonable time" in any particular case and that there was clear authority for the proposition that the duration of a reasonable time may be determined with the benefit of hindsight.

[41] Breach of the obligation to perform within a reasonable time was considered by Maurice Kay LJ in delivering the judgment of the Court of Appeal in England and Wales in Peregrine Systems Limited v Steria Limited [2005] EWCA Civ. 239 when he said at paragraph 15:

> "15. ….The consideration of whether there has been a breach of an obligation to perform within a reasonable time is not limited to what the parties contemplated or ought to have foreseen at the time of the contract. In my judgment, the correct interpretation of authorities such as Hick v Raymond and Reid [1893] AC 22 is that adopted by His Honour Judge Richard Seymour QC in Astea (UK) Limited v Time Group Ltd [2003] EWHC 725, [2003] All England (D) 212, where he said that the question whether a reasonable time has been exceeded is
>
> > '… a broad consideration, with the benefit of hindsight, and viewed from the time at which one party contends that a reasonable time for performance has been exceeded, of what would, in all the circumstances which are by then known to have happened, have been a reasonable time for performance. That broad consideration is likely to include taking into account any estimate given by the performing party of how long it would take him to perform; whether that estimate has been exceeded and, if so, in what circumstances; whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, actively, in the sense of collaborating in

> what was needed to be done, or passively, in the sense of being in a position to receive performance, or not at all; whether it was necessary for third parties to collaborate with the performing party in order to enable it to perform; and what exactly was the cause, or were the causes of the delay to performance. The list is not intended to be exhaustive.'

I do not seek improve upon that formulation."

In Ostfriesische Volksbank EG v Fortis Bank [2010] EWHC 361 (Comm) Burton J referred to the observations of Maurice Kay LJ in Peregrine Systems quoted above and accepted that it was for the court, with hindsight, to fix a reasonable time.

[42] I am satisfied in the context of the particular circumstances of this case that an obligation on behalf of the first defendant to perform the contract within a reasonable time should be implied and that it is for the court to fix that reasonable time. The note made by Mr Palmer on 21 May 2007 records a conversation between Mr McDonald and Mr McKenna, reported to Mr Palmer by the plaintiff, indicating that the first defendant was "happy" that he was going to try and flip the house between May and the initial August completion date. As I have indicated above, after receipt of the deposit and the part payment, I am satisfied that the plaintiff was prepared to be flexible about the obligation to complete within a reasonable time, no doubt influenced, at least to some degree by the trust that he placed in the first defendant. That obligation remained and was clearly recognised by the first defendant and his solicitor as evidenced by the second defendant's note of 24 January 2008 when he was informed of the meeting between the first named defendant and his son to discuss "a payment on account." Subsequent correspondence between the respective solicitors illustrates pressure being applied on behalf of the plaintiff for completion to take place. I accept the evidence of the plaintiff and Mr Palmer that the plaintiff was not involved in marketing the property again in September 2007 At that point, Mr Palmer was acting on the instructions only of the first defendant and his solicitor. It seems that the property could have been marketed earlier in June but that the first defendant and his solicitor wished to speak to another agent although it is unclear whether they ever did so. The letter from Mr Palmer of 6 September 2007 confirms the first defendant's instructions that the property was to be marketed at offers over £3.4 million. The first defendant continued to reject offers which were reasonable having regard to the then state of the market. In my view, the period was finally brought to a close when

the first defendant unreasonably rejected the offer of £2.75 million in March 2008 despite being strongly advised by Mr Palmer to accept and despite his own acceptance that the figure of £3.5 million that he wanted was "very unrealistic".

[43] Mr Lavery also based his argument on uncertainty upon inclusion in the contractual document of the obligation that his client should make "reasonable endeavours" to complete without delay. In his closing submissions Mr Lavery criticised such a term as vague and at best ambiguous.

[44] In Jet2.Com Limited v Blackpool Airport Limited [2012] EWCA Civ 417 counsel on behalf of the defendant appellant argued that the phrases "use their best endeavours" and "use all reasonable endeavours" were too uncertain to give rise to any obligation enforceable in law. All three members of the Court of Appeal in England and Wales, after conducting a review of the relevant jurisprudence, agreed that the use of such phrases could give rise to a binding contractual obligation, depending upon context, provided that the objective of the endeavours could be identified with certainty. At paragraph 18 of his judgment Moore-Bick LJ said:

> "In general an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain to be enforceable, provided that the object of the endeavours can be ascertained with sufficient certainty…."

and Longmore LJ observed that "The phrase 'best endeavours' has, however, a respectable history behind it." At paragraph 66 Lewison LJ dissented but he did so on the basis that, in his opinion, in the absence of any express reference to flight scheduling, the objective was not sufficiently clearly identified for the agreement to have any legal content.

[45] In my view the objective in this commercial transaction was clearly the sale of the property. It is fundamental to the case made by the first defendant that such a sale was only to be completed if a purchaser was found who was prepared to pay £3.5 million or more but that, despite his reasonable endeavours, no such purchaser could be identified. As I have indicated above, no such term was included in the legal document prepared by the parties and their advisers and I am not persuaded that any such term should be implied. For the sake of completeness I do not believe the evidence of the first defendant that such a term was ever discussed let alone agreed between the parties whatever view he himself may have held as to the likely behaviour of the market. In such circumstances the first defendant has clearly failed to make reasonable endeavours to complete having rejected all offers to purchase for

lesser sums.

[46] Accordingly, for the above stated reasons, there will be a decree for specific performance of the contract requiring the first defendant to pay the plaintiff the balance purchase monies amounting to £2,150,000.00 together with interest thereon from 31 March 2008. It follows the case against the second and third defendants will be dismissed. I shall hear the parties with regard to the precise calculation of interest together with any relevant submissions as to costs.