Neutral Citation Number: [2011] EWHC 1131 (Ch)

Case No: 9BM30626

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 5 May 2011

Before :

HHJ DAVID COOKE

- -

Between :

Phoenix Property Investors Ltd	**Claimant**
- and -	
Grange Securities Ltd	**Defendant**

- -
- -

Avtar Khangure QC (instructed by **Vicarage Court Solicitors Ltd**) for the **Claimant**
Paul Burton (instructed by **Challinors**) for the **Defendant**

Hearing dates: 8-10 February 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke:

1. In this case the claimant seeks the return of £200,000 paid to the defendant pursuant to a contract for the sale of land. The claimant alleges that the contract required the defendant to complete certain works of renovation and conversion prior to completion, but that the defendant failed to do so in circumstances which amount to a repudiatory breach of the contract which it has accepted. It is common ground that the contract has been terminated, but the defendant's position is that all the works that it was required to do by the contract have been completed and it is the claimant, not the defendant, that is in repudiatory breach of contract by failing to complete.

2. The contract in question is dated 10 May 2006, and provides for the sale by the defendant to the claimant of a property at 28/29 Tenby Street, Hockley, Birmingham for a price of £860,000. The property is a listed building in Birmingham's Jewellery Quarter and was originally a factory, but had been extensively damaged by fire at some point prior to 2003. In 2003 it was acquired by the defendant in its fire damaged state, with a view to being restored and converted into six residential flats and three office units. The defendant then set about obtaining the necessary planning and building regulation approvals (planning approval was given on 22 August 2005, see p 747 in the trial bundle), and began the reconstruction work.

3. The claimant company is interested in the purchase of buy to let properties. The evidence is that it is owned by Mr Teja Singh. It has offices near to the property, at 8 Tenby Street. One day in late 2005, Mr Gurdip Singh, son of Teja Singh, saw Mr Ash Kumar, a director of the defendant company, standing outside the property at which work was evidently being carried on. The two men were known to each other, and a discussion began in which, according to Gurdip Singh, Mr Kumar told him about the project his company was engaged in and that the property would be for sale once it had been converted. Gurdip Singh was subsequently shown round the site with his father, and they were told that the flats and offices were to be constructed to a high standard and that the work would be ready for hand over in the middle of 2006. The claimant company was interested in buying the renovated property as an investment, and the parties orally agreed a price of £860,000, subject to contract.

4. Contracts were not exchanged for some months. I do not think I need to go into detail about what went on in this period; it is sufficient to say that it is clear from the documentary and witness evidence that in the early part of 2006 the defendant was pressing for exchange of contracts, but those involved on behalf of the claimant, particularly its director Mr Dermot McFall, were concerned about the amount of work remaining to be done before the property would be ready for occupation. A draft form of contract was prepared by the defendant's solicitor and sent to the solicitor acting for the claimant. It appears to be almost entirely in a standard form; it refers to and incorporates a set of standard conditions of sale, subject to a schedule of amendments that appear to be of an equally standard and routine nature. Although it stated the details of the property and the price, and referred to a deposit of £100,000 (as the parties had agreed between themselves), it made no reference at all to the works that were being undertaken. As originally drafted, the date for completion was left blank.

5. It was the claimant's evidence that Mr Kumar wanted an early exchange so that a deposit could be paid and released to the defendant, and that Mr Kumar told Mr McFall that the work would be completed and the property ready to be handed over by July of that year. Mr McFall said that he continued to be doubtful about this, but

on Mr Teja Singh's instructions he agreed that contracts could be exchanged. Mr McFall's evidence was that his solicitor advised that the contract should be amended so that completion would not take place until the works were finished. The documents from his file show that he then agreed on the telephone with the defendant's solicitor some amendments presumably intended to have that effect (p1233). The solicitors then made these amendments in manuscript to the copies of the contract which they respectively held, and exchange took place by telephone on 10 May 2006.

6. The contract appears at page 752 in the bundle, and the manuscript amendments are on the following page. There are two of them:

   i) After the reference to the deposit of £100,000 in clause 1.10 there was added "to be held as agents and released to Seller". This would be consistent with the claimant's case that the defendant was anxious to obtain funds.

   ii) Clause 1.5, defining the date of completion, was amended so that rather than merely filling in the blank with a date, it read as follows:

   > " 1.5 "the Completion Date" means 28 July 2006 subject to completion of works (if any) set out in an agreed snagging list prepared by 14 July 2006 to the satisfaction of the buyer "

7. Even as amended, therefore, the contract said nothing at all about what works it was intended that the seller would do. The reference to a "snagging list" is somewhat odd in this context; all the witnesses agreed that a snagging list is something that is normally only produced once building works have reached a stage which is usually referred to as "practical completion" or "substantial completion", and is intended to identify matters of a minor nature require to be rectified, being matters which would not substantially interfere with the occupation and use of the building. It appears therefore that the parties must have envisaged that the work that was to have been done would have been substantially completed by 14 July 2006 so that it would be appropriate at that date to prepare a snagging list.

8. It is not in dispute that the building was not complete by July 2006. The claimant's solicitors wrote a letter dated 18 July 2006 (p 1240) saying as follows:

   > " Our clients have inspected the site and found that it is far from finished and not yet in a state where it is appropriate to prepare a final snagging list. Our client's estimate is that the building will not be ready until the end of August. While this will be reviewed, you should appreciate that the state of the building affects the completion date fixed by clause 1.5 of the contract.
   >
   > In particular, we are advised that the courtyard needs to be levelled and paved, the fountain installed, the electrical provision for the building has yet to be installed, floors remain to be laid.
   >
   > Nevertheless, our clients have instructed [us] to pass on to you their enclosed cheque for £100,000 being a further payment on account, which you are authorised to pass on to your clients. "

This was also consistent with an underlying assumption that the work would first be brought to a state of substantial completion, and then a snagging list would be drawn up.

9. There was a reply from the defendant's solicitors, dated 24 July 2006 (p 1244) which said as follows:

> "… your client has an amended the original drawings and plans and has insisted on extras, which have delayed their development. I enclose for you a list of extras which your client insisted upon.
>
> We feel as it is your clients insistences (sic) extra items are being carried out, it is unfair for you to penalise our client and extend the completion date to August. "

The "list of extras" referred to is a document (p 1243) prepared by Mr Kumar headed "Cost of extra works on 28-29 Tenby Street project as at 10 07 06", containing a number of items against which amounts are listed totalling £20,603, including VAT.

10. At this point the parties' respective versions of events diverged substantially. The defendant's evidence was that the claimant wanted to slow the process down and delay completion for its own reasons. It was suggested that it did not have relevant funding, and that it suited Mr Gurdip Singh not to progress the matter because he was at that time facing allegations of fraudulent evasion of VAT in relation to other matters. Mr Kumar had pressed for completion and Gurdip Singh had pleaded with him to keep the deal open and offered an additional £100,000 deposit, its purpose being as a token of earnest that the claimant still intended eventually to complete. After that, according to Mr Kumar, Gurdip Singh had stalled for time and Mr Kumar was reluctant after that to carry out any further works until he had been contacted again by Gurdip Singh in July 2007, saying that the claimant was now in a position to proceed again.

11. The claimant's version was that it had funding in place, but the defendant had still not completed the works, and Mr Kumar had requested the additional payment in order to enable him to do so. Mr Khangure submitted that the additional £100,000 was not in fact an addition to the deposit as defined in the contract (as originally pleaded), but a payment on account of the purchase price. The distinction might make a difference if I were to conclude that it was the claimant that was at fault in terminating the contract, with the result that the defendant was entitled to forfeit the contractual deposit, but would have to prove loss in order to recover any further amount. According to the claimant's witnesses, they had checked regularly on the progress of the works but were either told, or could see for themselves, that they had not been finished.

12. As between these two accounts, I am in no doubt that the version given on behalf of the claimant corresponds better to the contemporary documents and is to be preferred. Certainly, the claimant would appear to have had funds available to it by way of bank finance; its solicitors received an offer of facilities by letter dated 19 July 2006, followed up by the sending of facility and security documentation from the Royal Bank of Scotland dated 24 July 2006, which the solicitors progressed in correspondence with the bank between then and October of the same year (see p760ff), thus giving every impression that the claimant intended to pursue the

transaction. Thereafter, the bank enquired periodically about when the transaction would be ready to complete, and the claimant's solicitors replied that they were instructed by their clients that the works were not yet finished. All of this is consistent with the claimant's case that it was the defendant that was holding things up by not having completed the work.

13. Mr Kumar said in his witness statement (p423) that he had been alerted to the claimant's alleged difficulties in progressing when his office had been visited by officers from HMRC in July 2006, enquiring about the proposed deal as a result of documents they had discovered during a search of the claimant's offices. This cannot be correct; the claimant produced a copy of a witness statement filed by HMRC in the other proceedings identifying that the search and seizure order permitting HMRC to search the offices of an associated company at the claimant's address in Tenby Street was not obtained until 17 January 2007, the search itself taking place a few days later. Furthermore, the letter from the defendant's solicitors dated 24 July 2006 complaining about the claimant's alleged changes to the specification having delayed the works is not consistent with the claimant having begged the defendant not to insist on completion of the sale when it would otherwise have been in a position to do so.

14. It does not appear that any further correspondence passed between the two firms of solicitors until 18 July 2007, when the defendant's solicitors wrote (p1241) saying:

> " further to the above matter which has been delayed since this time last year, we have been advised by our client that the property is now ready for your clients to attend and carry out a snagging list.
>
> Could you please arrange for your clients to contact has direct so that this matter can now proceed towards completion. "

This letter, and particularly the reference to the property "now" being ready, is not consistent with the delay having been caused by the claimant being unwilling to proceed, rather than the defendant not having finished the building work.

15. I am satisfied the true reason for the delay emerges from the documents obtained relating to planning matters. The planning permission that the defendant had obtained contained a number of conditions relating to preservation of features of the listed building. It is clear that during the middle part of 2006, the local authority inspected the property and found that certain aspects of the work that had been done did not correspond with the plans were submitted, or comply with the conditions imposed on the planning permission. On 8 November 2006 the local authority served a contravention notice (p839). This evidently led to a number of meetings between planning officials and the defendant's representatives, including the architects engaged on the project, in which the defendant negotiated variations to the plans originally submitted and revised works which the council would accept. That work had plainly not been completed by 18 June 2007 when the local authority wrote (p858) as follows:

> "… following our telephone conversation of 15 June 2007 in order to ascertain what progress has been made to carry out the work that we had previously agreed was required, I was pleased to be advised that people were in the process of being hired to carry out this work.

> I would be grateful if you would ensure that this work is carried out at the earliest possible opportunity, as the building is listed and falls within a conservation area.
>
> I will be re-evaluating this case in a month's time; by then I would hope that the required works are well underway. "

16. Mr Kumar was obliged to accept in cross-examination that this process had occurred, although he sought to minimise the significance of the changes the local authority required. I do not accept that he was right to play down this aspect; it is plain from the documentation that the local authority's objections were substantial. Mr Kumar said in cross examination that the cost had been "a few thousand". In doing so, he seemed to me to be evasive, and he then had to accept that the invoices (p928) showed that he had been charged £43,000 + VAT by one contractor and £2,000 by another for work required because of the enforcement notice. The timetable in which changes were discussed with the local authority and, apparently, begun to be implemented, fits precisely with the gap in correspondence between the two firms of solicitors. When that correspondence resumed with the letter from the defendant's solicitors referred to above, the terms of that letter are much more consistent with the defendant having by then completed works to the satisfaction of the local authority so that it was in a position (as it thought) to hand over the building, than with the claimant having emerged from a period of silence to say that it was now ready to proceed.

17. On the claimant's account, having been told in July 2007 that the property was ready for handover, they tried to make arrangements to inspect it for themselves, since they doubted from what they could see that the work was in fact complete. Mr McFall gave evidence of attempts to view the property which were put off, for one reason or another, by the defendant. Eventually, he gained access in November 2007, taking with him a building contractor, Mr John Postans. As a result of that visit, Mr Postans prepared an eight page document headed "Snagging List of Property 28-29 Tenby Street Birmingham B1 3AJ" which was sent to the defendants on 6 December 2007. This document, which was referred to in the proceedings as "the snagging list" contains a number of detailed points in respect of each of the residential and office units arising from the inspection by Mr Postans. He concluded with the observation that the electrical heaters and towel rails installed did not seem to him to be adequate, and a final paragraph:

> "PLEASE NOTE
>
> Most importantly there are two certificates which are required for building completion: -
>
> 1) Part P electrical certificate
>
> 2) Completion certificate for Building Control.
>
> Plus any conditions put on the property by the authorities which I know there are several. There is a lot more work yet to be done on the property which may take months before the end result. "

18. Mr Postans gave evidence, saying that he was surprised at the condition of the property when he visited it. He had expected only to see what he referred to as normal snagging type issues, but found the property to be far from the state of substantial completion that would normally be expected before a snagging list could be prepared. He regarded the work that had been done as being of poor quality and not having been carried out by competent tradesmen.

19. In January 2008, Mr Kumar sent a letter responding to the snagging list (p1248). He continued to maintain that "the reason for the delays has been solely down to your client's constant changes and delays to the specification". For the reasons given above, I do not accept that. He went on to say that he had given the claimant a substantial discount on the price of the building because "it was purchased in a 'sold as seen' state". That is clearly inconsistent with the contract having been entered into at a time (May 2006) when the restoration works were on any account nowhere near finished. Mr Kumar went on to refer to the claimant's "nitpicking attitude" and concluded "I have had sight of the snagging list and will put matters right that were discussed at the time of exchange. However I will not do any extras unless a separate figure is discussed to carry out this work." He did not however specify what works he regarded as extras. He did not repeat the list of items previously sent, or ask for an additional payment of £20,000, being the value he had attributed to those items.

20. On 24 February 2008, the defendant's solicitors wrote saying "I am instructed that the works on the property are now complete and that we should now proceed to completion" (p1249). This led to a further inspection of the property by Mr McFall and Mr Postans. Mr Postans gave evidence that on this inspection he found that very little of the outstanding work had been done, and that which had was of a poor quality. Some months later, on 4 July 2008, the defendant's solicitors wrote again saying "I enclose the building regulations certificate, electrical certificate and a fire certificate. My clients have now carried out all the snagging works in the property. My client has now performed its part of the contract. Will you now please advise me of the date by which your clients will complete…". I note at this point that the claimant's solicitors have complained repeatedly since then that the copy of the electrical certificate provided was only the first page of a multipage form. They were not satisfied that the certificate was authentic, and repeatedly requested the remaining pages which would have given details of the tests carried out by the certifying electrician. Those pages were eventually provided, but only very shortly before the start of the trial, too late for any challenge to the authenticity of the certificate or the accuracy of the recorded test results to be pursued at trial.

21. The claimant was not satisfied that the work was finished and did not agree to complete the contract. On 24 July 2008 the defendant's solicitors sent a formal notice to complete (p1253). This led to an exchange of correspondence between solicitors in which the claimant maintained that it was anxious to complete but required access to the property to be satisfied that the work had now been finished, but the defendant initially declined to allow such access saying that it would serve no purpose and that it intended to rely on an independent expert's report to confirm that the work had been done. After some further months, it was agreed in October that access would be given to the expert nominated by the claimant, Mr David Martin of GVA Grimley. At the same time, the defendant instructed its own expert, Mr Anthony Foster of Knight Frank. Both experts gave evidence at trial.

22. Mr Martin did not obtain access to the property until December. It seems that the delay may have been because when Mr Foster inspected the property for the defendant in November 2008, he had advised his client that, contrary to the position taken in July, the works identified in the snagging list were substantially outstanding (see his email sent on 12 November at p 952, which attached a list of items noting that some "are snagging items that require action"). At some stage, someone on the defendant's side produced their own list of matters outstanding (p946-9), though none of its witnesses was able to identify by whom or when it had been prepared. It appears from various references to items "still" being outstanding that this was not the list sent on 12 November, but was produced later.

23. Mr Martin produced his report, which had attached to it a report by a mechanical and electrical engineer, Mr Ambler, and was sent to the defendant at the beginning of March 2009. It identified a number of matters which were said to require further work, and several items of regulatory paperwork which the claimant was advised to obtain from the defendant. Its conclusion (p 579) was that:

> " This development has been reasonably constructed with materials commonly adopted for developments of this type and age… However, there are a number of legal/technical issues and letters of confirmation in respect of discharging conditions which should be obtained by your solicitor for our review, as requested throughout this report.
>
> Subject to the provision of this information and satisfactory resolution of the issues raised in this report, in particular remedial works to snagging items identified, from a building surveyor's perspective you would be in a position to proceed with the purchase of the freehold of 28-29 Tenby Street."

Mr Martin accepted in his evidence that his instructions in compiling this report, and the report itself, went significantly beyond the issues that had been identified in the December 2007 snagging list.

24. Mr Foster's report was produced in March 2009. His brief was limited to considering the matters listed in the December 2007 snagging list, and his conclusion (p 648) was that:

> "… we have revisited the property on 4 March 2009 and can confirm that the snagging works have been completed satisfactorily… We understand that the electrical certificates are available and that a review has been undertaken of the heating within the property which indicates that the heaters are appropriately sized for the size of the rooms etc. The Building Regulation Completion Certificate is also available for review.
>
> We therefore consider that the property is currently in a satisfactory condition and suitable for occupiers and that it is suitable for the sale to be progressed. "

25. This led the defendant's solicitors to point out that Mr Martin had not addressed matters by reference to the snagging list, to assert that the defendant's only obligation was to deal with the matters on that list (p1280) and to serve a second formal notice to

complete on 30 March 2009 (p1287). The response from the claimant's solicitors was that they had been back to Mr Martin who confirmed that the matters on the December 2007 snagging list had not in fact been completed. They suggested a joint inspection by the two experts to try and produce some agreement. No such inspection, however, took place.

26. Soon after this the claimant changed solicitors and the new solicitors sent a letter dated 10 August 2009 maintaining that the works identified in the snagging list had not been completed, stating that they considered the defendant's second notice to complete to be "invalid" and enclosing the claimant's own notice to complete (p1294). They stated that the purchase had not previously been completed because of the defendant's failure to complete the works on the snagging list, that the claimant was ready willing and able to complete and give "notice under Condition 6.8 of the Standard Conditions of Sale… to complete the contract in accordance with that condition" within 11 working days.

27. It appears from the reply (p1296) that there may have been another letter sent on the same date, although no copy of the second letter is in the bundle. The reply rejects the claimant's notice to complete on the grounds that "…first my clients have already rescinded the contract. Secondly, my clients do not accept that they are in breach".

28. It appears that the second letter from the claimant must have proposed a further inspection, because Mr Martin inspected again on 14 August 2009, accompanied by Mr Ambler. He produced a report in October 2010, going through, item by item, the matters listed in the December 2007 snagging list, and stating the observations made by himself and Mr Ambler at the end of 2008 and in August 2009. His conclusion (p 686) was that "this reinspection confirmed that some redecoration has been undertaken, but the majority of the items previously identified remained outstanding."

29. The claimant's solicitors did not however wait for the report (although they may have been told the results of the further inspection) nor did they allow the 11 working days stipulated in the notice to expire before they wrote on 24 August 2009 saying:

> " We write further to the Notice to Complete served on 10 August 2009.
>
> Our client has been advised that the works detailed in the snagging list remain incomplete and therefore we consider the contract to be rescinded.
>
> We seek payment of the deposit monies of £200,000 together with interest and our client's legal and surveyors fees … if payment is not received, we will prepare court documentation for issue. "

30. The claimant's pleaded case is founded upon this letter which, by paragraph 7 of the Reply, is pleaded to be an acceptance of the defendant's previous repudiatory breaches of the agreement. It was accepted before me that this letter brought the contract to an end, and the issue of contractual liability therefore revolves around whether the claimant was entitled to terminate the contract at that date. The analysis of the terms of the contract, and the effect of the various notices that were served prior to 24 August 2009, is however not straightforward.

31. The contract itself, as noted above, made no reference to the nature or extent of the works to be carried out. The reference to a snagging list was, taken by itself, meaningless without a means of ascertaining the works that were to be done, against which "snags" could be identified and rectified. The Defence pleaded, in paragraph 6, that the contract "was simply for the sale and purchase of the property" and "it was no part of the Agreement that the defendant would carry out any works at the property save as expressly agreed in the Agreement… it was a matter for the defendant how it chose to convert the property and the nature and extent of the conversion works carried out at the property save as expressly agreed in Agreement". The term "Agreement" was not defined in the Defence, although the same term, without a capital letter, was defined in the Particulars of claim to mean the contracts exchanged on 5 May 2006. The pleading is somewhat disingenuous as there were of course no works expressly specified in that contact.

32. Mr Kumar however accepted that before contracts had been exchanged he had a set of plans which showed the proposed conversion works and that he had discussed these with Gurdip Singh and given him a copy. Although there was a conflict of evidence as to whether Gurdip Singh had ever requested alterations to the designs, and if so whether that was before or after the contracts were exchanged, it was not suggested, and could not reasonably have been suggested, that the commercial bargain struck between the two men did not involve the defendant carrying out and completing the works that had been begun, whatever they were. Mr Burton expressly disawowed the suggestion that his pleaded case included an allegation that the written contract did not sufficiently set out all the material terms agreed between the parties. This was understandable; had that been the position, the contract would be void and, on the face of it the monies paid pursuant to it would be returnable as the claimant now seeks.

33. Given the manifestly unsatisfactory drafting of the contract and the manuscript amendment to it, the requirement for the contract to set out all the material terms can only be satisfied if the court adopts a very broad interpretation of what was actually written, and what it implies. Fortunately, in the circumstances of this case, it seems to me that it is possible to arrive at that conclusion. The reference in the manuscript amendment to the production of a snagging list by 14 July 2006, in the factual context of a partly redeveloped building, in my view necessarily implies that the defendant was undertaking to have performed the works that had been orally agreed between Mr Kumar and Mr Gurdip Singh to the extent that would normally be referred to as "substantial completion" or "practical completion" by that date, in order that a snagging list should be produced. The defendant would then be required to perform the work set out on such a list by 28 October 2006.

34. This raises the question of what was the scope of the works that had been orally agreed. The starting point would obviously be the plans that Mr Kumar showed to Mr Gurdip Singh. It was accepted that the project as built involved various amendments to these plans. Mr Kumar's position was that he had agreed prior to exchange of contracts to undertake certain additional works, but only if the claimant paid extra for them. Gurdip Singh's evidence was that when he had walked round the property with his father and Mr Kumar, Mr Kumar had explained to them what the finished project would look like and they had discussed how it would be laid out and what fittings would be included. He denied that he had asked for any changes to be made, before or after exchange of contracts, or that he had agreed to pay any extra for them. He had, he said, only discussed one possible variation which would be to provide air conditioning in an office that he was considering using for himself. He had not

pursued this after Mr Kumar had come back to him saying that it would cost an additional £10,000. There was some evidence to support the fact that there had been a discussion of an additional price of £10,000 for air conditioning in the file note made by the claimant's solicitor at the time of exchange of contracts on which the solicitor had written "air conditioning unit extra £10,000" (p1233).

35. At some stage after the original plans were produced, therefore, the designs must have been changed. This would not however be particularly unusual in any building project and does not therefore necessarily indicate that the changes were made at the request of the purchaser, still less that it was agreed that an additional payment would be made for them. Having regard to the respects in which I found that Mr Kumar's evidence did not fit the contemporary documents, I prefer Gurdip Singh's account and find that the most likely scenario is that whatever discussions these two men had about the design or specification of the buildings took place before or in conjunction with the negotiation of the purchase price, and were therefore reflected in that price whether or not they involved changes to the original drawings. There is certainly no evidence to corroborate Mr Kumar's assertion that he agreed this price with a specific reservation for the cost of variations, or that specification changes were requested after exchange. Further, I note that although Mr Kumar attached prices to the items that he referred to in July 2006 as extras, when he sent this list to his solicitors (p762) he did so by way of providing "reasons for delays on Tenby Street" and neither he nor his solicitors at any stage asked for any additional payment. Although in his witness statement he referred to Gurdip Singh insisting on specification changes after exchange of contracts, the list he produced and described as works "attended to after [Gurdip Singh] had expressed the claimant's desire to move towards completion" (ie after June 2007) was the same list that he had previously supplied in July 2006, when he at the very least strongly implied (p762) that these changes had already been made.

36. It was agreed at the bar that the issue as to whether the defendant had or had not completed the works required by the contract could be confined to the items listed in the December 2007 snagging list (and so did not extend to the additional matters identified in Mr Martin's first report). Mr Burton set out as one of the issues to be determined the question whether or not any such items on that list were extras that the defendant was not obliged to provide under the original contract. It was not contended that any of the items were matters that the defendant had never agreed to perform at all, so the only question would be whether the defendant's agreement was before or after the exchange of contracts. For the reasons given above, my finding is that on the balance of probability, insofar as any such items were not contained in the original drawings and specifications they had been agreed between Mr Kumar and Gurdip Singh by the time contracts were exchanged, and they therefore formed part of the works that the defendant was obliged to perform under the contract at that date.

37. The Defence pleaded that on the proper construction of the agreement, "snagging" meant snagging as generally understood in the construction industry, i.e. matters that could only be identified once the conversion works were completed. Further, it was pleaded that no date had been agreed in the contract for the completion of such works, and that as snagging had not in fact been resolved, no obligation to complete could have arisen. I do not regard those points as sustainable; they would mean that the defendant could have avoided any obligation to complete at any time by the simple expedient of not doing the work it had agreed to do. Even if no dates had been stated, or could be implied from the terms of the contract, the law would imply a requirement that the main works would be completed within a reasonable time, and that if a

snagging process then took place, the snags identified would also be rectified within a reasonable time. In this case, however, as I have indicated above the contract identified a date for preparation of a snagging list, therefore necessarily implying that work would have progressed to the stage at which snagging could take place by that date, and it further provided a specific date for completion, the implication from which in my view is not that the date would be indefinitely postponed if the defendant had not performed the snagging works, but that the defendant undertook to perform the snagging works by that date. No doubt (and Mr Khangure did not submit otherwise) time was not, initially, of the essence in relation to either date.

38. It was pleaded in the Defence that all the main works, and all the snagging in respect of those works, had been completed by July 2008. As a result, it was pleaded that the defendant was entitled to serve both of its notices to complete, and that when the claimant failed to complete the contract in accordance with those notices "pursuant to clause 7.5 of the Standard Conditions the defendant was entitled to rescind the agreement and did so". The position in relation to the second notice to complete was pleaded without prejudice to the pleading that the contract had been rescinded by reference to the first such notice. The pleadings did not identify the manner in which the rescission had taken place, and I was not referred to any contemporary documents expressing an intention on the defendant's part to rescind. The defendant did not rely at trial upon either of these two notices as bringing the contract to an end or entitling it to damages or other relief. Mr Burton submitted that they were irrelevant, and focused his argument solely on whether at the time of the claimant's notice in August 2009 the works identified in the December 2007 snagging list had been completed either entirely, or in all material respects such that any remaining deficiencies would not have justified the claimant in terminating the contract.

39. The defendant's two notices do not however fall out of the picture completely. In its reply, the claimant pleaded that the defendant's purported rescission pursuant to each of these notices was an unlawful repudiatory breach of the agreement, which the claimant had not accepted at the time, but which it did accept by "the effect" of its letter of 24 August 2009. Mr Khangure submitted in his closing argument that since the defendant no longer maintained the position that it had performed all the required work by the date of its two notices, it necessarily followed that it could not maintain that its own notices were justified, and it must therefore have been in repudiatory breach of contract by purporting to terminate the contract when they were not complied with. This submission, if accepted, would mean that it would not be necessary to evaluate the extent to which the works had been performed by the time of the claimant's own notice to complete.

40. I do not think however that it can be accepted. I pass over the difficulty that the claimant's letters of 10 and 24 August 2009 make no reference to any purported rescission by the defendant at the time of the defendant's notices to complete. Mr Khangure's point relies firstly upon the defendant having wrongly purported to rescind the contract following the service of one or both of its own notices, thereby putting itself in repudiatory breach of contract, and secondly upon it still being open to the claimant to accept that repudiation at the time of its letter dated 24 August 2009. As to the first of these points, I have not seen anything in the evidence which, were it not for the pleaded case, would have led me to the conclusion that the defendant did in fact purport to rescind the contract. However, it is not in my view open to the defendant now to deny that it did so, without an amendment to the defence which specifically pleads that it had done. No such amendment was sought.

41. As to the second point though, if (as must be assumed in the light of the pleading) the defendant did purport to rescind the contract, the claimant has admitted by its own pleading that it did not at the time accept that rescission as terminating the contract and I agree with the submission by Mr Burton that it is no longer open to it to do so. Between receipt of the defendant's first and second notices to complete, and all the way up to August 2009, the claimant continued to insist that it wanted access to the property either to satisfy itself that the work required had been carried out, or to identify that which needed still to be done in order that the defendant could finish it off. In doing so, it seems to me, it was taking the position that it wanted the contract to be performed and was therefore electing to affirm the continued existence of the contract. Further, in serving its own notice to complete on 10 August 2009, the claimant was necessarily treating the contract as still in existence at that date. Having done so, it could not thereafter treat the contract as having already come to an end by virtue of the defendant's previous purported rescission.

42. Instead, it seems to me the position is this. The claimant having served its notice on 10 August 2009 on the basis that the contract was then in existence and should be performed, the defendant made it abundantly clear by its solicitors' response dated 18 August 2009 that it refused to perform any further work under the contract and regarded it as at an end. That can be the only import of the letter, which said, as noted above, "… first my clients have already rescinded the contract. Secondly my clients do not accept that they are in breach". Although the letter went on to say "in any event it seems by the service of the notice to complete that your client intends now for the contract between our clients to come to [an] end" it seems to me that in the context of the rest of the letter, this must be taken as meaning that the claimant served its notice in the expectation that the defendant would not comply with it and with the intention of declaring the contract to be at an end when the period allowed in the notice to complete had expired. The defendant's own letter was intended, in my judgment, to make it clear that it was not necessary to wait until the expiry of this period, the defendant regarding the contract as already at an end. The claimant, by its response of 24 August 2009, accepted that position, albeit without referring directly to the letter of 18 August. Accordingly, if the defendant had not in fact sufficiently complied with its own obligations by 18 August 2009, its refusal to perform further was a repudiatory breach of contract.

43. The issue does then eventually boil down to which if any of the items listed in the December 2007 snagging list remained outstanding at 18 August 2009 and to what extent, and whether any deficiencies individually or collectively would justify a refusal by the claimant to complete. This in turn raises potential issues, given the extremely brief drafting of the contract, as to the standard of work it required, and whether its satisfactory performance is to be assessed objectively or at the discretion of the claimant. In my judgment, some term as to the quality of work must be implied in order to give the contract a sensible business effect. I would take that term to be that the work should be to a good and workmanlike standard, reasonably suitable for residential or commercial occupiers as the case might be. Although Gurdip Singh said that he had been told by Mr Kumar that the development was intended to be of a high quality (Mr Kumar accepted that he had said that) it was not pleaded that there was any representation relied on or contractual term to that effect, and I do not therefore treat the standard of work required as being enhanced by reference to such statements.

44. The manuscript amendment to the contract referred to snagging works being identified on an "agreed" snagging list and then remedied "to the satisfaction of the purchaser". Mr Burton did not suggest that matters could not have been included on the December 2007 snagging list without the prior agreement of the defendant. Nor in my view should the contract be taken as giving to the claimant an unfettered discretion as to whether the standard of work was satisfactory or not. I agree with Mr Burton that to give the contract business effect, it must be interpreted as referring to the purchaser's "reasonable" satisfaction. I bear in mind also that, whatever the deficiencies of drafting, the contract plainly envisages that snagging works will be identified and dealt with before completion. It does not adopt the structure which, I accept, is common in other cases of a property being handed over when it is substantially complete, with the retention of a percentage of the purchase price to be paid over at the end of a defects liability period provided that any matters becoming apparent in that period have been rectified. No doubt it would be too strict an interpretation to require that absolutely every deficiency identified, however slight, must be rectified before completion. There must be some threshold of materiality below which a failure to remedy would not justify a refusal to complete, but in my judgment, given that the express term refers to "snagging" matters which are themselves inherently minor, that threshold would be low.

45. As to the state of the premises on 18 August 2009, the only inspection at or about that time was undertaken by Mr Martin on 14 August. It was not suggested that any work had been done in between these two dates (or, if it is relevant, since 10 August when the claimant served its notice to complete). Mr Foster had not made any inspection since March of that year. In accordance with case management directions, the two experts met in January 2011 and produced a joint statement dated 1 February 2011 (p708). This statement included a table setting out all the matters listed in the December 2007 snagging list, columns showing Mr Martin's comments at his inspections in December 2008 and August 2009 respectively, and a third column headed "snagging items agreed/disagree[d]". In this context, it was accepted that if an item was marked as "agreed" that meant that the two experts agreed that it was still outstanding at 14 August 2009. Somewhat confusingly, "disagreed" meant that Mr Foster considered that the particular item had not been outstanding at his last inspection, whether or not Mr Martin concurred in that opinion.

46. Mr Khangure focused his submissions on those items that were marked on the list as "agreed" to be outstanding. At my request, these were transferred to a separate schedule, which was the basis of the questions put to the experts during the trial. There were 59 items on that schedule, which on the face of it indicates a substantial number of items accepted by the defendant's expert as being outstanding. In giving his evidence however Mr Foster drew back from what was said in the joint statement in a considerable number of instances. He produced photographs which he had taken on his first and second visits, some of which, he said, showed that items shown in the list attached to the joint statement as still outstanding had in fact been completed at the time of his inspection in March 2009. He explained the change in his position, not in my view entirely satisfactorily, by saying that he did not have the photographs to hand when he went through the schedule attached to the joint statement with Mr Martin in January 2011 (because they were in the files at his former firm) and in their absence had accepted what Mr Martin said about these items. Although he had received the photographs on 31 January, he had not referred to them before signing the joint report the following day. Nevertheless, I allowed the photographs to be

produced since they provided evidence as to the actual state of the property at the dates taken and I have taken them into account.

47. The photographs showed that two particular categories of items in the list had in fact been corrected. The first of these was the reference, made in respect of a considerable number of rooms in the building, to the electrical cables leading to towel rails and storage heaters being loose and requiring to be clipped to the wall. The photographs showed that as at March 2009, all these cables had been clipped to the wall, albeit in many cases that the cable runs were rather long and the clipping of a rudimentary nature. This was in my judgment (and Mr Martin appeared to accept this as well) a sufficient although not very good quality resolution of this issue. The second category related to doors, it being noted in relation to many of the internal doors in the building that they required to have "insulation strips" fitted. Mr Foster said that the original reference had been to the fitting of intumescent fire insulation strips, and he referred to photographs which showed that by March 2009 this had been done. Mr Martin accepted that this was so and explained that he had interpreted the list as referring to something different.

48. A third category of items referred to island kitchen units that were not fixed to the floor in some of the flats, Mr Foster's opinion being that they were intended to be movable, although he could not explain why they had been fixed in some flats but not in others. There was also reference to the main staircase being noisy, by which it was meant that the boards creaked and squeaked when trodden on. Both experts agreed however that this was probably a function of the fact that the staircase was old, and could not in any event be interfered with as a significant feature in a listed building. These matters I leave out of account, since I am not satisfied on the evidence that the contract required them to be fixed.

49. In a number of other respects, Mr Foster repeated his view that the defects noted were of a very minor nature and would not interfere with the occupation or use of the building. These were matters such as paint or mortar splashes, items that required painting, tiled splashbacks not being provided to sinks, doors or drawers that needed adjusting, uneven or non-matching electrical sockets, a broken window, an external cable not secured and lights that did not work. I accept that these were matters of a minor nature both individually and collectively, and might well have been matters that parties to a development contract could agree should be dealt with after completion during a defects liability period. That however was not the structure of this contract which, as noted above, expressly required the defendant to go beyond substantial completion of the works and deal with snagging items before completion, to the reasonable satisfaction of the purchaser. It was therefore in my view a breach of contract not to have dealt with these matters, albeit perhaps not in itself a particularly serious one. I proceed on the basis that these matters in themselves would not have justified a refusal to complete, being below the threshold of materiality I have referred to.

50. Other matters however could not in my judgment be dismissed as minor or inconsequential. Of these, by common consent, the most important was evidence of a continuing problem of damp in parts of the structure. The snagging list refers to damp been present on to walls in what was described as "Office 1" and on the wall of a toilet in "Office 2". Mr Martin noted that the damp was still apparent on his inspections both in December 2008 and August 2009. Questioned by Mr Burton, Mr Martin said that when he tested the wall in Office 1 with a damp meter readings were

"off the scale". It was suggested to him that the problem had been cured by having the wall injected and then decorated, but he did not accept that, saying that he had seen no evidence such as a certificate or guarantee relating to any dampproofing injections, and that his readings showed that if wall had been injected, it had failed to cure the problem. I note that the defendant's own list of outstanding matters prepared at or about March 2009 (p946) says in relation to Office 1 "damp on walls still visible but minimal, it appears painted over but not corrected". Mt Martin did not regard it as minimal, but as a substantial issue. I accept his evidence on that point and find that the source of the damp had not been cured.

51. In relation to the damp in the toilet of Office 2, the defendant's witnesses Mr Kumar and Mr Owen Brown said that this had been caused by a leak from a water pipe in the room above the toilet, that the leak had been fixed and the wall of the toilet decorated. Photographs taken by Mr Foster were produced showing very considerable damp, with peeling paint at the time of his first inspection, and a lesser degree of damp showing at the date of his second inspection in March. Mr Martin's evidence was that damp was still apparent at the time of his inspection in August, and that in his view there had been only a cosmetic repair by painting the wall. He accepted that if the problem was in fact caused by a leak from above, repairing the leak and cosmetic decoration might be all that was required, but he cast doubt on whether this was in fact the case, saying that he had seen no evidence of a leak or of it having been repaired, and that if a repair had been carried out by March 2009, any damp in the wall should have dried out by the time of his inspection in August 2009, but it clearly had not. The defendant's list of outstanding matters (p947) noted "There is some damp visible on the right as you enter the kitchen" (which would appear to be a different location) and in relation to the toilet "the damp in the bathroom is now substantial with paint now peeling from the walls. Discolouration is now present on the other side of the wall". There is no mention of the source being a leak, or that it has been corrected; the implication is that the cause is long standing and the effects getting worse.

52. It was suggested that these issues of damp were themselves relatively minor, and exacerbated by the building having been left empty and unheated. Mr Kumar said that since August 2009 tenants had been in occupation, and there had been no complaints from any of them. I do not accept that submission. As Mr Martin said, damp is a continuing problem unless the source of it is eradicated. Mr Foster appeared to accept that also, although he seemed to be straining to minimise the problem in this particular case. He said that he had been told that the problem in Office 2 was caused by a leak above, but accepted that he had seen no evidence of such a leak himself. Taking all the evidence together, I am not satisfied that the source of the problem in Office 2 was a leaking pipe, or that the source of the damp, whatever it was, had been eradicated by August 2009. It remained, in my view, a significant issue.

53. Next, there were a number of what were referred to as "mechanical and electrical" issues, on which Mr Ambler had reported for the claimant. In relation to these, there was no expert evidence to contradict what Mr Ambler said, and he was not called at trial. Mr Foster made it clear that he was not a mechanical and electrical expert and did not purport to comment on Mr Ambler's observations.

    i) Mr Postans had noted in the original snagging list that it appeared to him that the electric heaters and towel rails were insufficient. Mr Ambler's view was

that in order to be satisfied on this point, it would be necessary to produce calculations of the heat output of these items and the heat requirements of the rooms in question. In his report produced after his inspection in August 2009 he said (p655) "The major concerns [are] of the economy and adequacy of the heating generally to meet the demand and information should be sought from the vendors firstly for heat loss calculations and secondly to prove the SBEM calculations and Building Regulation approval have been obtained for the installations." The calculations sought by Mr Ambler were never provided, although it was accepted that the required Building Regulation approval had been given. As referred to above, the defendant belatedly provided a full copy of the electrical certificate. The point was made that each of these certifications would have required a consideration of the heating system and towel rails, and that the fact that the certificate had been given must show that they had been found to be adequate. This does not, however, it seems to me completely answer the concern that Mr Postans and Mr Ambler had raised on the part of the claimant. Mr Ambler in his report certainly requires to see heat loss calculations in addition to confirmation that Building Regulation approval has been given, implying that the approval itself is not necessarily conclusive that the system is adequate. The question for the court is whether the concern that had been raised had been dealt with to the reasonable satisfaction of the claimant as purchaser, and in my view it had not been. Without the supporting information that had been requested for so long, it was reasonable for the purchaser not to be satisfied simply by being told that relevant regulatory approvals had been given.

ii) This matter in my view also needs to be considered in the light of the failure of the defendant to provide a complete copy of the Part P electrical certificate. Mr Postans had raised this specifically in the December 2007 snagging list. Mr Ambler had raised numerous queries about the adequacy of the electrical installation in his first report. Individually, those items were for the most part not themselves noted on Mr Postans' original list, and have not therefore been separately relied on before me. However they support the reasonableness of the claimant's general enquiry for a copy of the electrical certificate, because they put in doubt whether the calculations required to support the giving of such a certificate could have been properly done. In these circumstances, it was not in my judgment adequate simply to tell the claimant that the certificate had been issued, or to provide the first page, without the details of the calculations that were contained on the following pages and would have allowed it to be checked. In this respect also, therefore, it was reasonable for the claimant not to be satisfied that the issue raised by Mr Postans had been resolved.

iii) Among many criticisms of the electrical system that were not shown on the December 2007 list, Mr Ambler dealt with some that were. One was in relation to the towel rail in a bedroom flat six, where Mr Ambler noted that the electrical isolation switch for the towel rail was contained within the bathroom, contrary to the Wiring Regulations. Another was of untidy cabling in an electrical junction box in Office 1. These items by themselves were no doubt remediable at a relatively small cost.

iv) One of the points in the December 2007 list related to the extractor fan in the kitchen of flat 2, which was recorded as not working. Mr Ambler found this

still to be the case on both of his visits, and also noted that the extraction system did not discharge to the atmosphere, the exhaust pipe leading to the roof void rather than outside the building. He was unable to get access to roof and floor spaces to inspect sufficiently to determine whether the same might be true of other extractors. Mr Kumar denied that this was the case, but it was clearly shown to be so by the photographs produced by Mr Foster which showed an open pipe in the roof space (and also an extremely untidy jumble of poorly laid roof insulation, although that was not an issue on the snagging list). This therefore was not a matter simply of replacing the extractor fan, but required additional work to be done, and further evidence to show that the same poor workmanship had not been repeated elsewhere.

v) Mr Ambler noted in his first report a lack of water pressure in the shower in flat 3, and that this was still apparent in August 2009. Mr Knight made no comment on this other than that he had not inspected M&E items, so Mr Ambler's report was not challenged by other expert evidence. Mr Kumar denied any problem with water pressure, but I do not regard that as sufficient to outweigh Mr Ambler's evidence, which I accept. In the absence of any rectification or even diagnosis of the problem, it was in my judgment plainly reasonable for the claimant not to be satisfied that it had been resolved.

54. In all these respects, therefore, I am satisfied that the matters listed in the December 2007 list had not been dealt with to the reasonable satisfaction of the purchaser. Taken together, in my judgment they are substantial in that they do, or may, require substantial expenditure to remedy, together with potential significant disruption to any occupiers. That being so, in my judgment they cross the threshold of materiality I have referred to, without it being necessary to define that threshold precisely. Mr Burton did not present his case on the footing that the obligation to do so was not a condition precedent to the obligation to complete the purchase of the building. Indeed, his skeleton argument positively presented it as a condition precedent, in support of his argument (which I have rejected above) that the defendant was not obliged to complete if it had not complied with its own obligation to perform the identified snagging works. In my view, it was right to accept that this obligation was a condition precedent, given the specific amendment that had been made to the contract making completion of the contract "subject to" completion of the works on the snagging list.

55. It follows therefore in my view that when the defendant unambiguously refused to perform any further work by the letter of 18 August 2009, it was in repudiatory breach of contract in that it had refused to perform a term which was a condition precedent of the claimant's obligation to complete the purchase, and the claimant was thus entitled to, and did, treat the contract as discharged. The same conclusion could in my view be reached by a consideration of the express terms of the standard conditions. Condition 7.6 provides that if the seller fails to complete in accordance with a notice to complete, the buyer may rescind the contract. Whilst it is true that in this case the claimant rescinded the contract before allowing the period stipulated in the notice to complete to expire, in my judgment it was not necessary for it to wait further once the defendant had made clear its position that it was not going to comply.

56. Condition 7.6 provides that if the buyer rescinds the contract, it is entitled to repayment of the deposit, with accrued interest. It is accepted that this does not operate to exclude the discretion of the court to determine whether the deposit should

be repaid pursuant to section 49(2) Law of Property Act 1925, but in my judgment there are no grounds to exercise the discretion in favour of the defendant in circumstances where, as here, termination of the contract came about solely by virtue of the defendant's repudiatory breach. The defendant has failed to show any breach of contract by the claimant; the matters that I have found outstanding at August 2009 must plainly have been outstanding at the date of each of the defendant's earlier notices to complete and so the claimant was not in breach of contract by failing to comply with those notices. I have also rejected the defendant's case that the delay in completing the work arose at the claimant's request. In the circumstances, it is not necessary for me to deal with the question whether the additional £100,000 was paid by way of deposit or on account of the purchase price, though have been required to do so I would have concluded that it was paid on account of the purchase price, that being the way it was described in the covering letter sending the cheque. On either basis, the claimant is entitled to have it repaid, having brought the contract to an end. There is no claim for any additional loss.

57. The outcome therefore is that there will be judgment for the claimant for repayment of £200,000, with interest.