Hilary Term
[2023] UKPC 7
Privy Council Appeal No 0087 of 2020

JUDGMENT

HEB Enterprises Ltd and another (Respondents) *v* Bernice Richards (as Personal Representative of the Estate of Anthony Richards, Deceased) (Appellant) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
21 February 2023

Heard on 17 November 2022

Appellant
Jack Watson
(Instructed by KSG Attorneys at Law (Cayman Islands))

Respondent
Hector Robinson KC
(Instructed by Mourant Ozannes (Cayman Islands))

LORD KITCHIN:

1. This appeal concerns long term agreements for the sale of two lots of land within a commercial development in George Town, Grand Cayman. Each agreement provided for the payment, at the outset, of a deposit and then for the balance of the principal to be paid over 20 years by monthly instalments together with interest. As will be seen, it was also agreed that these payments would begin once the buyer had taken possession of the relevant lot.

2. After many years, during which the buyer had in fact enjoyed possession of the lots and the use of them for his commercial purposes, he repudiated the agreements, following which the sellers treated themselves as discharged from the further performance of their obligations under the agreements. The question is whether the buyer then became entitled to recover from the sellers, not just the payments of principal (as to which there is no dispute) but also all the interest payments he had made while enjoying the right to occupy the lots and use them for his own purposes. The buyer contended there had been a total failure of the basis on which those interest payments were made and so, subject to certain exceptions, he was entitled to an order for their return.

3. The Court of Appeal held that there had been a total failure of consideration but the buyer was not entitled to recover the interest payments he had made because he had enjoyed a real benefit in the form of the right to possession, and that the value of that possession, which the Court of Appeal referred to as mesne profits, had to be accounted for as part of the restitutionary adjustment which fell to be made on the failure of the agreements. The issue on this further appeal is whether the Court of Appeal approached the issues before it correctly and, so far as it did not, whether this has affected the overall conclusion to which it came.

The background

4. In the 1990s Mr Henry Bodden and his wife, acting through HEB Enterprises Ltd ("HEB"), a company of which Mr Bodden was director and principal, embarked on the development of a new shopping complex in George Town, Grand Cayman. The complex was called Caymanian Village and it was developed in two phases. It comprised, in total, 22 shops, each with its own title. Mr Bodden was the original owner of each of shops and it was always intended that HEB would act as his agent in connection with their sale. The Board will refer to Mr Bodden and HEB as "the Sellers".

5. Caymanian Village took the form of a strata development. The properties in such a development are self-contained but share common areas. A corporation is established to manage the development and to ensure that all the appropriate supervisory and administrative work is carried out and that the necessary services are provided. The owners or occupiers of the shops then make an appropriate contribution to the costs and charges that are incurred by the corporation in so doing. These contributions are called "strata fees".

6. Mr Anthony Richards expressed interest in acquiring a number of the shops in Caymanian Village and the dispute giving rise to these proceedings relates to two of those he ultimately agreed to buy, referred to as "Lot 10" and "Lot 11". Mr Richards has since died and his estate is represented in this appeal by his widow, Mrs Bernice Richards. For convenience, the Board will refer to Mr Richards and now Mrs Richards, the personal representative of his estate, as "the Buyer".

7. In very broad terms it was agreed that the Buyer would acquire each of the lots at what were described as pre-construction prices and on pre-construction terms. He would pay a small deposit at the outset and the balance of the purchase price in instalments over 20 years with interest of 12% per annum. Title to each lot would pass to the Buyer once the final payment for that lot had been made.

Lot 10

8. More specifically, in or around December 1994, the Buyer made an agreement with the Sellers to purchase Lot 10. The purchase price was CI$ 120,000. A deposit of CI$ 3,000 was payable at the outset and the balance of CI$ 117,000 was payable over 20 years, with interest at 12% per annum, by monthly instalments of CI$ 1,290.

9. Many of the important terms of the agreement to purchase Lot 10 are set out in a written contract dated 28 December 1994 but they did not represent the entire agreement between the parties. In particular, the written contract did not specify the date upon which the payment of the monthly instalments was to begin. It was agreed, however, by clause 4, that title would pass from the Sellers to the Buyer on payment of the final instalment and all outstanding interest. This was referred to as "closing".

10. Clause 5 provided that vacant possession of Lot 10 would be given by the Sellers to the Buyer on closing unless the Sellers gave their "express consent in writing to earlier possession and subject to such terms as shall then be agreed".

11. Clause 6, headed “DEFAULT”, addressed the consequences of a failure by the Buyer (referred to in this clause as the “Purchaser”) to complete the agreement in the manner provided for and the rights conferred on the Sellers (referred to in this clause as the “Vendor”) by such a failure:

> “If the Purchaser fails to complete this Agreement at the times and as provided for in paragraph 3 hereof (in respect of which time shall be of the essence) the Vendor may at it’s [sic] option rescind this Agreement by written notice to the Purchaser and forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the Purchaser such amount as is sufficient to compensate the Vendor for any work done to the Strata Lot by the Vendor at the request of the Purchaser which involves a deviation from or amendment to the basic plan for the Strata Lots or any substitution requested by the Purchaser in respect of the fixtures and fittings installed in the Strata Lot and no further rights of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims or damages the one against the other and the Vendor may resell the Strata Lot and keep the full sale price absolutely.”

12. Despite the terms of clause 5, the parties had in mind from the outset that the Buyer would take possession of the lot once the building work had been finished and it was ready for occupation, and they agreed that payment of the instalments of principal and interest would begin at that time.

13. The Buyer made the initial deposit payment for the purchase of Lot 10 and he entered into possession, by agreement, on 1 August 1995, having undertaken to pay the relevant strata fees.

14. The Buyer was also provided with detailed interest work sheets showing the amortised payments of interest and principal on the lot from the date of possession to the date of closing. If matters had proceeded in the manner contemplated by the entire agreement between the parties, the final instalment of principal and interest would have fallen due on 1 July 2015.

Lot 11

15. On 11 July 1997 the Buyer made a similar agreement to purchase Lot 11. The purchase price was CI$ 150,000. A deposit of CI$ 7,500 was payable at the outset and the balance of CI$ 142,500 was payable over 20 years, with interest at 12% per annum, by monthly instalments of CI$ 1,321.30.

16. Once again, it was agreed by the Sellers that title would pass to the Buyer on making the final payment. Clauses 4, 5 and 6 of the written contract were in essentially the same terms as those summarised and set out at paras 9 to 11 above.

17. The Buyer made the initial payment required in respect of the agreement to buy Lot 11. After the construction of the shop, he entered into possession, by agreement, on 14 December 1997, having once again undertaken to pay the relevant strata fees. The Buyer was also provided with a detailed interest worksheet showing the amortised payments of principal and interest on the lot from the date of possession to the date of closing, just as he had been for his purchase of Lot 10.

18. In the case of Lot 11, if matters had proceeded in the manner contemplated by the entire agreement between the parties, the final instalment of principal and interest would have fallen due on 30 November 2017.

Repudiation and "rescission"

19. Unfortunately, the Buyer was unable to meet his obligations under the payment schedule of either agreement. Discussions between the parties took place on a number of occasions over the years but to no avail. As recorded by the Court of Appeal, the Buyer from time to time made promises to pay the arrears and benefitted from the repeated forbearance of the Sellers to enforce their rights. In February 2015 the Buyer ceased making any payments in respect of Lot 10. He made some further payments in respect of Lot 11 but was still in arrears when in April 2016 he sent a cheque to the Sellers in the sum of CI$ 1,321 indicating that this was "for all" he "could afford".

20. The Sellers had by this time run out patience, however, and returned this cheque together with a printed email, dated 18 April 2016, which stated (using the original text):

> "It would appear that you do not fully grasp the concept of breach of contract. Your after-the-fact payment, even if it were accepted (which is being sent back to you) still leaves you in breach/default of both our sales agreements.

> Accordingly, we are NOT accepting any further payments on either unit #10 (which you have stopped payments on and are fourteen months behind) or #11 in which you habitually pay months late). Therefore, I will post a check back to you if you make future default payments. The attached check has been mailed back to National House Bakery today."

21. On 28 April 2016, Samson & McGrath, attorneys by then acting for the Buyer, replied that it was clear that the Sellers had invoked clause 6 and had, in the terminology of that clause, "rescinded" each contract by giving the appropriate written notice. They continued that the Buyer was now entitled to the return of all monies paid by him in respect of Lot 10 and Lot 11, subject in each case to the deposits which had been paid and which the Sellers were entitled to keep (together with any interest that had accrued on those deposits). They then proceeded to detail, in tabular form, the payments made by the Buyer and which it was claimed were now due to repaid to him, namely:

Unit #10 payments due over 240 months	$309,184.80
Less payments unpaid	($6,252)
Total	$302,932.80
Unit #11 payments due over 240 months	$317,112
Less payments unpaid	($25,977)
Total	$291,135

22. The Buyer's attorneys maintained that the total sum due to him on rescission was therefore CI$ 594,067.80 (subject to verification and minor correction). They said

that it was possible that the Sellers had rescinded the contracts under the mistaken belief that they were entitled to retain all the monies that had been paid over by the Buyer, and they urged the Sellers to take legal advice. They also indicated that the Buyer might be open to a compromise but subject to that would pursue the payment of the sums to which he was in their view entitled. Finally, they said that the Buyer would need a reasonable period of time to vacate the lots.

23. In the event and as found at trial, the Buyer had by that time made payments of the principal due in respect of Lot 10 and Lot 11 of, respectively, CI$ 110,747.47 and CI$ 96,156.35, and corresponding interest payments of CI$ 191,996.17 and CI$ 194,530.39.

The proceedings

24. On 24 May 2016, the Buyer issued an originating summons seeking a declaration that the agreements had been rescinded by the Sellers' email of 18 April 2016. By a consent order dated 10 February 2017, it was directed that the claim should proceed as if brought by writ. On 29 March 2017, the Buyer filed a statement of claim setting out his claim in more detail. He sought recovery of all the payments of principal and interest he had made and an account of all sums due and owing under clause 6 of the written contracts.

25. On 21 April 2017, the Sellers filed a defence and counterclaim asserting that the Buyer's persistent failures to perform his obligations amounted to a fundamental breach and repudiation of each of the agreements which, on acceptance, discharged them of all further obligations; and that they were entitled to treat the agreements as at an end and, in respect of the breaches of each agreement, were entitled to damages to compensate them for the losses they had suffered. They sought, among other things, payment of interest on instalments due up to the date of termination, strata fees outstanding at the date of termination, strata fees due up to the date of surrender of possession, mesne profits amounting to the commercial rent payable on the shops from the termination date to the date of surrender of possession and, for the avoidance of doubt, orders for possession.

The judgment at trial

26. The action came on for trial before Williams J, in the Grand Court of the Cayman Islands, on 7 February 2018 and it lasted two days. On one important issue between the parties, the Buyer conceded that his breaches of the agreements were repudiatory.

27. Williams J gave judgment on 2 August 2018 and by his order made on 10 August 2018 awarded the Buyer CI$ 593,430.37 on his claim and the Sellers CI$ 135,869.29 on the counterclaim, with the latter figure to be set off against the former. He held that the Buyer was entitled to the return of all of the principal and interest he had paid to the Sellers, less the deposits and any interest on those deposits. He also found that the Sellers were entitled to set off against the sums payable to the Buyer the outstanding strata fees (and interest) in the agreed sum of CI$ 58,297.30 and mesne profits for the period from 19 April 2016 until 30 November 2017 at a rate of CIS$ 4,000 per month for both lots. There was some doubt about the appropriate end date for the mesne profits, as the Court of Appeal later pointed out at para 20 of its judgment. But there was no confusion about the start date, this being the day after the Sellers had, by their email, accepted the Buyer's repudiation of the contracts.

28. In arriving at these conclusions, the judge reasoned that the parties had, in clause 6, addressed the consequence of a repudiatory default by the Buyer. In particular, clause 6, in referring to rescission, meant the exercise of the option to terminate the contract for breach. It provided for the forfeiture by the Buyer of his deposit; the right of the Sellers to resell the property and to retain the full resale price; and the right of the Sellers to retain from the payments made to them compensation for any work done to the relevant lot at the request of the Buyer. But it also prevented the Sellers from claiming damages to compensate them for any other losses they might have suffered as a result of the Buyer's repudiation.

Appeal to the Court of Appeal

29. On appeal, the Sellers argued that the Buyer had enjoyed possession of the lots for nearly 20 years and yet, on the judge's analysis, was entitled to the return of almost everything he had paid. They maintained this was a remarkable and unjust result. The judge ought to have found that the Buyer had repudiated the contracts; that their email accepting the repudiation had not referred to clause 6 and so that clause did not apply; and that the outcome of the repudiation therefore depended on the application of the common law.

30. The Sellers continued that a distinction should be made between, on the one hand, the return of the principal to reflect the failure of any passing of title to Lot 10 or Lot 11 and, on the other hand, the non-return of any interest payments to reflect the use of the shops that the Buyer had enjoyed over the better part of the 20 year instalment programme.

31. The Court of Appeal was persuaded as to the broad merits of the Sellers' submissions and allowed their appeal. Sir Bernard Rix JA, with whom John Martin KC, JA and Sir Alan Moses JA agreed, explained, at para 24, that an argument explored at the hearing was that the failure of the contracts required the application of restitutionary principles. On this approach, the Buyer had to give credit for the enrichment he had received, in the form of possession of the lots, by reference (if not to the interest payable over the period of his possession) to the mesne profits value of that possession.

32. The Court of Appeal acknowledged that one difficulty in the path of the Sellers was the concession at trial that a counterclaim for mesne profits in the form of damages had been abandoned and that, by further concession, the Sellers were only seeking a restitutionary credit up to the value of the interest involved (some CI$ 380,000) and not a larger sum of mesne profits over the period. Nevertheless, the application of general restitutionary principles allowed for a working out of the appropriate amount of any unjust enrichment, as opposed to a counterclaim for damages for breach of contract.

33. There followed a detailed consideration of the submissions advanced by the parties and of a number of authorities, and the Board intends no disrespect for the depth of that analysis by not relating it here. For present purposes it is sufficient to focus on the Court of Appeal's conclusion, at paras 49 to 63, that a full recovery of all the payments in restitution was not compatible with a situation where in the meantime the Buyer had enjoyed a real benefit under each agreement. That incompatibility could be accommodated under the modern law of unjust enrichment. A buyer of land who paid in advance for the later transfer of a title which was never completed could recover the price paid though, in a case such as the present, not the deposit. However, a buyer who had enjoyed possession should not be entitled to recover more than would eliminate any unjust enrichment of the seller. Equally, the Court of Appeal continued, there was no reason why, with the aim of avoiding unjust enrichment on the part of the seller, the buyer should be left unjustly enriched by his possession. As for how that possession was to be valued, there was a well-known way of carrying this out in the absence of a contract, and that was in the form of mesne profits of which the judge in this case had evidence.

34. The next question was whether such a solution was compatible with the parties' contracts. The Court of Appeal was satisfied that clause 6 did not exclude the effect of the principles of restitution. There was express provision for the forfeiture of the deposit and for the retention of sufficient moneys to compensate the Sellers for work done at the Buyer's request. On the other hand, there was no express provision for the return to the Buyer of part payments other than the deposit. This left room for the

application of the general law. Here it was common ground, at least for the purposes of the appeal to the Court of Appeal, that clause 6 did not stand in the way of the Buyer's right to recover what the law permitted by way of restitution. The issue was what that extended to, but it was certainly not to a figure which failed to take account of the value to the Buyer of possession.

35. The Court of Appeal decided that the structure of the transactions and their basis was that the Buyer would obtain possession in return for the price payable with interest over 20 years, at the end of which there would be a closing and passing of title. The court rejected the Buyer's submission that anything less than a full recovery of his payments of principal and interest would give a windfall to the Sellers. To the contrary, the lots had always belonged to the Sellers. The only windfall was that sought by the Buyer, namely that he be permitted to retain the benefit of his possession of the lots for nearly 20 years without any payment, save for the strata fees.

36. The Court of Appeal therefore allowed the Sellers' appeal to the following extent: there fell to be deducted from the sum awarded on the Buyer's claim mesne profits during the period of his possession of the lots, and these mesne profits were to be valued at a figure which, in light of the Sellers' concession, would be limited to the amount of interest paid by the Buyer over that period.

The appeal to the Board

37. Upon this further appeal the Buyer contends first, that the Grand Court and the Court of Appeal were right to recognise that, following the termination of the contracts between the parties, he was entitled to the return of his payments of principal and interest. Secondly, the Court of Appeal was wrong to hold that any award should be discounted to reflect the Buyer's possession of the lots.

38. More specifically, the Buyer contends that no deduction is permitted under the law of unjust enrichment or by reference to the parties' agreements. He argues that the Court of Appeal fell into error in failing properly to apply the legal principles underpinning any claim of unjust enrichment and instead in seeking to engineer a solution which it considered to be fair. As for the written contracts, clause 6 operated as a contractual allocation of risk. On termination, this clause conferred a contractual entitlement to the return of principal and interest without deduction, save as expressly provided for in the clause itself. Alternatively, the clause provided a contractual identification of the basis for the payment of principal and interest such that a restitutionary remedy remained available save as provided under the clause. Put another way, clause 6 provided a clear indicator that in the event of his failure to

complete, consideration in respect of the principal and interest would have failed and so they both ought to be refunded.

39. The Buyer accepts that, absent clause 6, his right to any award would have been subject to the Sellers' rights to sue for damages for his failure to complete the contracts or to seek counter restitution in respect of his occupation of the properties, so far as that was available. As it is, however, the structure of the parties' bargain means that the right to obtain damages is expressly limited to the retention of the deposit and of sums to compensate the Sellers for works carried out, and the Sellers have the right to keep the proceeds of sale of the properties. The parties in this way agreed a contractual limit on liability and a contractual means of ensuring that both parties were compensated in the event of a default.

40. The Sellers do not resist repayment of the instalments of principal but say the claim for return of the instalments of interest on the outstanding principal is misconceived. There was no failure of consideration or basis for these payments of interest because the Buyer was allowed to take possession of the lots, and this possession allowed him to use them and enjoy the commercial benefit of having them, whilst paying the purchase price in instalments, with interest, over a prolonged period. The payment of interest was directly referable to the Buyer's possession. Accordingly, the Court of Appeal arrived at the right conclusion but for rather different and not wholly correct reasons.

41. The resolution of these rival submissions depends, first, upon the identification and interpretation of the entire agreement between the parties in relation to each of the lots, and the correct analysis of the consequences of the repudiation of the agreements by the Buyer. It depends, secondly, on whether the basis for the agreements has failed.

The entire agreements and the right to possession

42. It is convenient to begin with the terms of the agreements themselves. The Board has related the substance of the important terms of the agreements, so far as they were set out in writing, at paras 8 to 18 above. But it is also necessary to say a little more about the basis for the Board's view, expressed at para 12 above, that these terms do not constitute the entire agreement between the parties in relation to each lot.

43. Clause 5 of each written contract provides that vacant possession of the lot will be given on closing unless the vendor gives earlier consent in writing and subject to such terms as shall be agreed. Nevertheless, the Court of Appeal held, and the Board agrees, that the whole arrangement between the parties only makes sense on the basis that the Buyer would take possession once he had paid the deposit and agreed to pay the strata fees and that this was in the contemplation of the parties at the outset. Here the Court of Appeal was right to find that the written contracts, although not themselves providing for vacant possession, contemplate that it will be given.

44. The structure of each of the agreements supports this conclusion. In particular, clause 3(b) of the written contracts did not specify the dates from which the 20 year periods were to run or when they were to end. It was agreed, however, that the periods would start to run with possession. As the Court of Appeal recorded, and the Board has mentioned, the Buyer entered into possession of Lot 10 on 1 August 1995, that is to say, almost nine months after the date of the contract; and he entered into possession of Lot 11 on 14 December 1997, some five months after the date of the contract. The Buyer was from each of these dates required to pay the relevant strata fees and the 20 year period for the payment of the monthly instalments began to run. It was also entirely understandable that the Buyer was thereupon presented with the worksheets setting out amortised payments of principal and interest on each lot from the date of possession to completion. The payments, as recorded on the sheets, differed slightly from those set out in the written contracts but it has not been suggested that these details should affect the outcome of this appeal.

45. The agreement as to the payment of interest is also important. The deposit was payable on making the contract but the balance of the purchase price was payable by monthly instalments over 20 years with interest at 12% per annum. As the Court of Appeal recognised, at para 59, the addition of interest meant the Buyer would pay and the Sellers would receive the equivalent of the full (and not time depreciated) payment of the balance of the price at the time of possession. But so too, the Buyer would have the right to take possession of the lots and enjoy their value over the two decades that he would be making the payments. Further, he would do so without paying rent. Possession by the Buyer was therefore a fundamental aspect of his agreement to make the scheduled payments, including interest at 12%, over such an extended period of time. For their part, the Sellers would be protected by their reservation of title until completion took place and the final payments had been made.

46. In light of all of these matters, the Board is satisfied that the Court of Appeal was entitled and right to find, at para 59, that clause 5 contemplates that possession will be given and similarly, at para 60, that the clause provides for a collateral exercise in fulfilment of what the written contracts already envisage. The Buyer's possession

was a part and parcel of the transactions; indeed, so much so that there was never any separate written consent for the Buyer to take possession, and the Buyer's agreement to pay the strata fees was not even recorded in writing. In this way and although the price would be paid in instalments over 20 years, the addition of interest meant that the Buyer would ultimately pay and the Sellers would receive the equivalent of full payment of the price as at the time of possession.

47. In summary, the entire agreement in relation to each lot is properly to be understood in this way:

(i) The parties agreed for a long postponed transfer of title (that is to say ownership) on full payment of an agreed price by instalments.

(ii) Once the shop had been built and was ready for occupation, the Buyer would have the right to occupy it and to have the full enjoyment of it, rent free, including the right to use it for the purpose of his business. The Sellers would at the same time have what was, commercially and in substance, the full enjoyment of the price.

(iii) These reciprocal rights were achieved by giving possession to the Buyer and by giving to the Sellers (a) the deposit; (b) instalments of the price as they were paid (from which they could derive an income in the form of interest); and (c) interest on the instalments not yet paid from time to time. The aggregate amounted to full enjoyment of the price from the date of possession.

Repudiation and discharge

48. The Board turns now to the repudiation of the agreements by the Buyer. As we have seen, in these circumstances, clause 6 of the contracts, invoked by the Sellers, purports to confer upon them a right to "rescind" the agreement by giving written notice to the Buyer. It is important to understand that any rescission of this kind is very different from rescission *ab initio* such as may arise in cases of fraud or mistake. As the trial judge recognised, the true effect of the step taken by the Sellers was to accept the repudiation by the Buyer as a discharge of the primary obligations of both parties, and to substitute for them a secondary obligation by the Buyer to compensate the Sellers for the losses they had suffered as a result of that repudiation, subject to the effect of any term of the agreement which restricted or excluded any remedy for breach, or provided any further remedy.

49. Here the Buyer contends that there was no term or condition of the agreements that he would, in the event of his default, forfeit his payments of principal or interest and so, the Sellers having accepted his repudiation, he is entitled to recover, if not his deposit, at least the payments of principal and the payments of interest he has made, subject of course to any permissible cross-claim by the Seller for breach of the agreements. He maintains that there is nothing in clause 6 which restricts or precludes that recovery. By contrast, the clause permits the retention by the Sellers of the deposit and any interest which has accrued on the deposit, and any further sum which is sufficient to compensate the Sellers for any work done at his request to Lot 10 or Lot 11 which deviates from the basic plan for the lot, and it also permits the Sellers to resell the lot and to keep the full sale price. But it precludes the Sellers from pursuing any other claim against him as a defaulting buyer.

50. The Board has come to the firm conclusion that this argument of the Buyer must be rejected. Subject to the further but related argument that there has been a total failure of basis for the payments of interest upon the outstanding principal (to which the Board will come), the Board is wholly unpersuaded that, as a matter of interpretation, the Buyer is entitled to the return of these payments of interest on his repudiation of the agreements. The Buyer's argument founders because he has had the benefit of the right to occupy the shops and use them for his business purposes for the many years since their construction, and to do so rent free. It would have made no sense for the parties to agree that he would have that benefit and yet, on his default, towards the end of the instalment period and as the date for closure drew close, have the right to recover all the payments of interest that he had made. Subject again to any total failure of basis, the normal rule applies and payments of interest made by the Buyer under the agreements before the date of discharge are irrecoverable.

Failure of basis?

51. These considerations also provide the foundation for the answer to the next question, namely whether, as the Buyer contends, this is a case in which it was envisaged that title to the lots would be transferred in exchange for all of these payments. The Buyer's argument proceeds in the following way. There has been a failure to transfer title which amounts to a total failure of the basis for the payments. It is important, the Buyer continues, that the court should not be distracted by the fact that he has derived a benefit under each agreement, unless it constituted the basis for the transaction, and here it did not. The only basis for the transaction was the transfer of title and that has not taken place. The Buyer was therefore entitled to recover all the payments he had made by way of principal and interest.

52. A number of other arguments are advanced in support of this aspect of the Buyer's case. It is submitted, first, that there is nothing in the written terms which allows the interest payments to be seen as a form of occupational rent. Here reliance is placed on the terms of the written contracts which provide for vacant possession on closing. It is also submitted that if the Buyer had never entered into occupation of the lots, precisely the same amount of interest would have been payable under clause 3. So, it cannot be said that possession was the basis for the payments of interest. To the contrary, there was express consideration for the Buyer's occupation of the lots namely the payment of insurance and strata fees, but nothing was said about interest.

53. The Buyer points, secondly, to the lack of any relationship between interest and rent. The requirement to pay interest is a feature of the overall price, the balance that remains to be paid and the actual and anticipated interest rates at the time of the written contract. By contrast, rent is usually priced evenly or, in cases the subject of rent review, will increase.

54. These are all powerful points but, in the Board's view, they tend to assume what they are said to establish. In particular, for the reasons the Board has already summarised, the written contract does not represent the entire agreement between the parties in respect of either lot. It was always understood and agreed as part of the complete agreement in respect of each lot that, when the shop had been built and was ready for occupation, the Buyer would take possession, subject in each case to the payment of the strata fees and the deposit. The Buyer would then begin to pay the instalments of the price and interest on the reducing unpaid balance in accordance with the schedule. That is precisely what happened.

55. Next, the Board does not accept that the basis for the interest payments was unrelated to the possession that the Buyer enjoyed. To the contrary, the basis for the interest payments included the right to possession for the duration of each agreement. The payments did not start until the Buyer took possession and the Buyer was entitled to retain possession so long as he continued to pay the strata fees and the instalments of principal and interest. In the result the Buyer was able to enjoy the use of the lots for business purposes for very many years, and to do so rent free.

56. It is true that the same amount of interest would have been payable even if the Buyer had chosen not to enjoy his right to take possession of the lots or had decided not to use them for his business. That would have been a matter for him. In the Board's opinion that does not assist him, however, because he was entitled to take possession of the lots and to use them for his business, and that is what he did. Nevertheless, he invites the Board to hold that this benefit formed no part of the basis for the payments with the result that, in this case and on his default, they must all be

returned. But the Board is firmly of the view that this is not a realistic approach to the respective benefits the parties secured from their agreement, or to the entirety of the basis for them.

57. The commerciality of this conclusion is not affected by what the Buyer calls the arbitrary and unreal relationship between interest and occupational rent. The Board recognises that the right to possession may not be the only basis for the interest payments. Indeed, there is a respectable argument that their basis also includes the Buyer's right and obligation to pay the principal in instalments over the same extended period. But that is nothing to the point if the right to possession, enjoyed by the Buyer, forms a material part of the basis for the interest payments, and the Board is satisfied that it does. As the Board has foreshadowed, it would indeed have made no sense for the parties to agree terms for payment of the price in instalments over 20 years at a significant rate of interest if the Buyer did not have the right to take possession for that time and to use the premises for his business purposes. Nor would it have made sense for the Sellers to have agreed an arrangement under which the Buyer could take possession and yet, many years later, on his repudiation of the agreement, recover all the payments he had made.

58. The Buyer has accepted before the Board that a failure of basis must be total and that if even a part of the benefit which formed the basis for the payments has been conferred, no action will lie for the return of those payments. As Lord Porter explained in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 77, money had and received to the claimant's use can be recovered where the basis (there referred to as consideration) has wholly failed. So too, if a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered: see for example, *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, para 114. On the other hand, a partial failure of consideration for a particular payment gives rise to no claim for recovery of part of what has been paid.

59. In the opinion of the Board, these principles are fatal to this aspect of the appeal. In the particular circumstances of this case, the basis for the interest payments has not wholly failed and the Court of Appeal was wrong to hold otherwise. Part of the basis for the interest payments may have been for the Buyer to obtain ownership of the lots by paying the purchase price in instalments over many years; but another and important part of the basis for these payments was to obtain the right to take possession of each of the lots and to use them for his business in the years to closing.

60. In reaching this conclusion the Board has taken careful account of a number of decisions involving hire purchase agreements to which the Buyer has referred. They

include *Rowland v Divall* [1923] 2 KB 500; *Karflex Ltd v Poole* [1933] 2 KB 251; *Warman v Southern Counties Car Finance Corporation LD* [1949] 2 KB 576; and a further case involving a conditional sale agreement: *Barber v NWS Bank Plc* [1996] 1 WLR 641. Reliance was also placed on *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 concerning a joint venture concerning the dubbing and distribution of films in Italy. The circumstances of each of these disputes were very different from those the subject of this appeal but all of them may be said to support a proposition which the Board would readily accept, namely that a failure of basis may be established notwithstanding the receipt of a benefit. The question in any case is not whether the party claiming a total failure of consideration has received any benefit under the agreement but whether that party has received any part of the benefit for which he bargained and which therefore forms the basis of the agreement.

61. Of more direct relevance to the issues now before the Board is the approach taken to long term agreements for the purchase of land by instalments in Victoria, Australia. Here the Board has been referred to the commentary in *Voumard, The Sale of Land*, 6th ed, 2009, an important treatise in Australia. It is explained, at para 12.280, that, at least in Victoria, Australia, where a vendor elects to rescind a contract on the ground of the buyer's default and the buyer has been in possession under the terms of the contract, the buyer is still entitled, upon adjustment of rights with the vendor, to be credited with the instalments of principal that he has paid, but he is not entitled to be credited with the instalments of interest that he has paid on the principal. The basis for that view is that consideration for the payment of the principal is the conveyance or transfer of the land and that once the vendor, in rescinding the contract, deprives the buyer of the right to the transfer, the consideration for the payment of the principal has wholly failed, and the buyer is therefore entitled to the return of the principal as money had and received to his use.

62. It is recognised in *Voumard* that the soundness of this analysis has been questioned in various articles in the Australian Law Journal (for example, an article by H. Walker, *'Rescission of contracts for sale of land'* (1934) 7(10) Australian Law Journal 366). Mr Walker argues in that article that as the buyer has had possession of the land under the contract, it cannot be said there has been a total failure of consideration for which he contracted. In other words, the contract is an entire contract for the use and occupation for a specified period and a transfer of the freehold at the end of that period in return for a principal sum with interest. The force of this view is acknowledged in *Voumard* but it is suggested that, correctly understood, the consideration is not entire but divisible and that the contract is, from the point of view of failure of consideration or basis, properly regarded as a main contract for the transfer of the freehold in return for the principal sum, and a subsidiary contract under which the buyer is entitled to enjoy possession of the land pending execution of the

transfer, in consideration of the payment of interest on the balance of the principal which remains unpaid.

63. It is not necessary for present purposes (nor would it be appropriate) to attempt to resolve the different views expressed by these authors as to the position under the law of Victoria, Australia. The important point is the recognition that, in the context of an agreement for the purchase of land over a long period, such as that with which the Board is now concerned, a right to enjoy possession of the land before title is transferred may provide at least part of the basis for an obligation to pay interest on the principal that remains outstanding from time to time.

64. The identification of the basis for the agreement in any particular case is therefore of the utmost importance. All will depend on the circumstances of the case and the nature and terms of the entire agreement in issue. The Board has carried out that exercise in the context of the agreements in relation to Lot 10 and Lot 11 and has reached the firm conclusion for the reasons given earlier in this judgment that at least a part of the basis for the entire agreement in relation to each of these lots was the right to enter into possession and occupation, on the completion of the construction, whilst the instalments of principal were being paid. That conclusion is not in any way undermined by a different conclusion reached in relation to other agreements made in different circumstances.

65. The Board must now consider the implications of clause 6 on the claim in respect of these interest payments. The Buyer submits that where a contract makes provision for the recovery of sums on termination, those provisions will govern the parties' entitlements. Here, clause 6 envisages the Buyer will be entitled to recover all payments made under the contract other than the sums expressly referred to, and so the Buyer is entitled to recover the interest payments on the outstanding principal.

66. The Board does not accept these submissions. Clause 6 does not confer on the defaulting Buyer a contractual right to the return of the interest payments he has made prior to the termination of the contract. Nor does the clause provide that in the event of the Buyer's default, the basis for the interest payments would have totally failed.

67. Accordingly, the Buyer's claim for the return of the interest payments can only be advanced on the ground that, having regard to the entire agreement in relation to each lot and all the circumstances, the basis for the obligation to make these payments has failed and that the interest therefore ought to be refunded together with the principal. But that claim suffers from the further flaw the Board has already identified,

namely that the whole basis for the requirement to pay the interest has not failed because the Buyer enjoyed the right to possession of each lot until he repudiated the agreements.

68. In reaching this conclusion the Board has given careful consideration to the decision of the Board in *Mayson v Clouet* [1924] AC 980. That case involved a contract for the sale of land with a deposit to be paid immediately, two instalments of the price to be paid on particular dates and the balance to be paid within 10 days of the production of a certificate that the construction of certain buildings on the land had been completed. The contract provided that if the buyer failed to comply with his obligations, his deposit might be forfeited and the land resold. The deposit was duly paid, as were the first two instalments of the price. But the buyer failed to pay the balance of the price at the stipulated time and failed to complete despite being served with a certificate of completion and fitness for occupation, and despite a final extension of time. The vendor rescinded the contract. The Board held the contract distinguished between the deposit and the instalments and provided for a forfeiture of the deposit only. It followed that the deposit had been forfeited, but the instalments were recoverable.

69. The Buyer contends that, just as in *Mayson*, clause 6 confers upon him a right to recover all the payments made under the agreement (including the interest payments) other than the sums expressly referred to; that if the parties had intended that the deposit and the interest payments were to be forfeited, the contract would have said so; and that the interest payments made by the Buyer on the outstanding principal were refundable on rescission is reinforced by the fact that the clause does consider the position of the interest on the deposit, making it clear that both the deposit and the interest on the deposit were non-refundable.

70. The Board is unable to accept these submissions or that the decision in *Mayson* can bear the weight the Buyer seeks to place upon it. Indeed Lord Dunedin, giving the judgment of the Judicial Committee, made clear ([1924] AC 980, 985) that the answer to the question of whether the instalments of principal and interest are in any particular case repayable must always depend on the terms of the particular contract and the circumstances in which it is made. In *Mayson* the contract distinguished between the deposit and the instalments and provided for the forfeiture of the deposit only, but there was no question of the buyer taking possession before the final payment had been made. Indeed, the balance of the price was to be paid within 10 days of the production of a certificate that certain buildings had been completed.

71. The circumstances giving rise to the dispute and appeal presently before the Board are very different because the agreements contemplated that the Buyer would

continue to make payments of interest on the outstanding part of the purchase price for many years after taking possession. The Board is satisfied that this is a case in which it is appropriate to regard the entire agreement as comprising a contract for the transfer of the title to the lots in return for the payment of the principal and a further and closely related contract under which the Buyer was, on completion of construction, entitled to take possession of the lot at least in part on the basis of the payment of interest on the balance of the purchase price which remained outstanding at any time.

Conclusion

72. For all of these reasons, which differ from those given by the Court of Appeal, the Board is of the view that the Buyer was not entitled to the return of the interest paid on the outstanding principal. The Board will therefore humbly advise His Majesty that this appeal should be dismissed.