Case No: CH/2010/0459

Neutral Citation Number: [2011] EWHC 326 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2011

Before :

SIR WILLIAM BLACKBURNE

- -

Between :

GUY PATRICK IRWIN	**Claimant/Respondent**
- and -	
(1) CELIA ROSE WILSON **(2) FLORENCE OLIVIA WILSON** **(3) ALICE REBECCA WILSON**	**Defendants/Appellants**

- -
- -

Gregory Hill (instructed by **Hutchinson Mainprice**) for the **Appellants**
Timothy Carlisle (instructed by **Colemans Solicitors LLP**) for the **Respondent**

Hearing dates: 3 February 2011

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Judgment

Sir William Blackburne :

Introduction

1. This is an appeal against a decision of His Honour Judge Madge sitting in the Central London County Court on 16 July 2010. It arises in proceedings started in March of last year in which the claimant seeks a declaration that a contract dated 28 October 2009 for the sale by him to the three defendants, who are sisters, of a leasehold flat at 1 Cranworth Gardens, London SW9 was lawfully terminated by a notice given on his behalf by his solicitors on 1 February 2010. In addition to the declaration, the claimant seeks possession of the flat and associated monetary orders.

2. The defendants countered by issuing an application in the proceedings for summary relief by way of specific performance of the contract. Their application is supported by a document headed "Particulars of Different Remedy Sought" which is, in effect, a defence and counterclaim to the claimant's particulars of claim.

3. The leasehold interest in the flat, for which the price to be paid is £580,000, is comprised in a lease dated 21 April 1983 and in another dated 16 April 1999. Title to the property so to be sold is registered with absolute title under title number SGL372337. By clause 5 of the contract, the title to be deduced is expressed to consist of official copies of the entries and of the title plan appearing on the register of that title number as at 16.46 pm on 26 August 2009. The contract incorporates the fourth edition of the Standard Conditions of Sale so far as applicable to a sale by private treaty (as this is) and insofar as they are not varied by or inconsistent with the terms of the contract.

4. The dispute between the parties centres on clause 25. Headed "Completion Date" it provides that:

> "25.1 The Completion Date shall be 14 days after the Seller's solicitors shall have served (by fax or by email) the Buyer's solicitors with copies of:
>
> (a) The Office Copy entries relating to Title SGL32337, as amended by the Land Registry to show that [*sic*] the correct location of the Property on the Filed Plan;
>
> (b) A Deed of Variation to the Lease dated 21st April 1983, executed by the Freeholder and Seller to replace the existing Lease Plan with a plan showing the correct location and floor layout of the floor plan, drawn to scale and showing a north point and being fully Land Registry compliant.
>
> (c) The consent of the Seller's mortgagees to the proposed variation to the Lease.
>
> (d) Same as (a) but relating to the adjacent flat.
>
> (e) Same as (b) but relating to the adjacent flat.

(f) Same as (c) but relating to the adjacent flat.

25.2 If the Seller, having used all reasonable endeavours, shall not be able to provide all of the information referred to in 25.1 to the Buyer's solicitors by February 1st 2010, then either side may give notice of five working days to terminate this Agreement, whereupon the Buyer shall vacate the Property and the Seller's solicitors shall return that part of the deposit which they were holding as stakeholders to the Buyer's solicitors and the Seller shall return that part of the deposit which was released to him on exchange of contracts, to the Buyer's solicitors.

25.3 For the avoidance of doubt, the Buyer shall not be required to vacate the Property in accordance with clause 25.2 unless and until the Seller's solicitors confirm that they are in funds to reimburse the whole of the deposit including the £6,000 which they held as agents for the seller on exchange of contracts."

The title number referred in clause 25.1(a) accidentally omitted a figure "7". There is no dispute that it is intended to refer to the title number mentioned in clause 5, namely SGL 372337.

5. Clause 26 permits the buyer to go into occupation of the property from exchange and sets out the terms, including a monthly payment, on which that is to occur. I understand that the defendants did take up and have since remained in occupation.

6. It appears that the reason for the amended plans referred to in clause 25.1(a) was that, presumably by accident when the leases of the claimant's flat and the adjoining flat were granted, the two lease plans were transposed. That error, I understand, was carried into the filed plans recorded on the respective Land Registry titles.

7. It is common ground between the parties that the claimant used all reasonable endeavours but was unable to provide the defendants' solicitors with all of the information referred to in clause 25.1 by 1 February 2010. At 16.02 pm on Monday 1 February the claimant's solicitors faxed a letter to the defendants' solicitors in which the following was stated:

> "In accordance with Clause 25.2 of the agreement dated 28th October 2009 between our clients, we hereby give five working days' notice to terminate that Agreement when our client requires your clients to vacate the property and we shall in turn return the deposit paid on exchange of contracts."

The defendants had paid a 10% deposit, equal to £58,000, of which £6,000 was held by the claimant's solicitors as his agent and the remaining £52,000 held as stakeholder. This explains the reference to the £6,000 in clause 25.3.

8. By the Standard Conditions applicable to the contract, a notice which is received after 4 pm on a working day is to be treated as having been received the next working day.

It follows therefore that, having been faxed after 4 pm, the notice contained in the letter of 1 February is to be treated as having been received by the defendants on the following day, Tuesday 2 February. It is common ground that the day of service is to be excluded in calculating the five working days. The five days given by the notice therefore expired on Tuesday 9 February.

9. On Monday 8 February 2010, the defendants' solicitors sent the following letter to the claimant's solicitors:

> "We write with further reference to your letter of 1st February.
>
> That letter purported to give notice terminating the Agreement of 28th October 2009 with effect from close of business today. Your letter was sent following non-compliance with the conditions set out in Special Condition 25.1 of the Contract. Special Condition 25.1 is a unilateral condition for the benefit of the Buyer. As such the Condition is capable of being waived by the Buyer and the Buyer hereby waives that Condition.
>
> The Contract in consequence still being live, the Buyer is now making arrangements to complete, having made appropriate financial arrangements to avoid using mortgagees' monies. Please let us have an immediate completion statement as at tomorrow's date.
>
> If notwithstanding this letter you do not confirm by midday tomorrow that your client will now complete, we shall be serving a completion notice, followed if necessary by an application to the Court for specific performance on the expiry of that notice.
>
> The Contract no longer being conditional, and our clients being entitled forthwith to complete the purchase, their right to possession of the property is incidental to the right to complete and they will therefore not be vacating the property in the interim."

10. That letter was also faxed. It was faxed at 15.37 pm. By the Standard Conditions applicable to the contract, a notice is given when it is received and, if sent by fax, is to be treated as received, subject to proof to the contrary, one hour after despatch. It follows therefore, there being no proof to the contrary, that the notice of purported waiver of clause 25.1 was given at 16.37 pm on that Monday and, as that was after 4 pm, is to be taken as given the following day, Tuesday 9 February. That was on the fifth and last of the five working days notice given by the claimant's notice of the previous week.

11. When the defendants' summary judgment application came before him on 16 July 2010, Judge Madge directed that the question whether, as the defendants' solicitor's letter of 8 February had contended, clause 25.1 was capable of waiver by them as being for the buyer's (i.e. the defendants') benefit should be argued first. In an

admirably short and clear judgment he held that the clause was not simply for the benefit of the purchaser with the result that it was not open to the defendants to waive it. He therefore dismissed their application. In so doing he referred to and placed reliance on what was said by Brightman J (as he then was) in *Heron Garage Properties Ltd v Moss* [1974] 1AllER 421 at 426 ("*Heron Garage*"). He also referred to and placed reliance on the presence in clause 25.2 of a right in the seller (i.e. the claimant) to give notice of termination if all of the information referred to in clause 25.1 had not been given to the buyer's solicitors by 1 February 2010.

This appeal: the issues

12. It is against that decision, and the dismissal of the summary judgment application which thereby resulted, that the defendants appeal. Norris J refused the defendants permission to appeal on paper but, on their renewed application, Mann J gave them permission. I shall continue to refer to them as the defendants rather than as the appellants. I shall also continue to refer to the claimant as such. For completeness I should mention that the claimant has served a respondent's notice.

13. Three broad issues were argued before me: (1) whether clause 25.1 is for the sole benefit of the buyer (i.e. the defendants), (2) whether, even if it is, clause 25.1 is severable from the remainder of clause 25, in particular the right of termination by notice give by clause 25.2, and how, if it is capable of waiver and was otherwise waived, the date for completion of the contract is to be determined, and (3) whether, even if the first and second issues are resolved in the defendants' favour, it was open to the defendants to seek to waive the condition and call for completion after the claimant had given notice under clause 25.2 to terminate the contract, albeit that the defendants' purported waiver was notified before expiry of the five working days provided by that notice. The second and third issues were not argued before Judge Madge but I was invited by counsel to determine them if they arose. I indicated that I was willing to do so: they do not involve contested issues of fact; the matters were fully argued; costs and time will be saved.

The defendants' case

14. For the buyers Mr Gregory Hill submitted that, properly understood, the term in clause 25.1 for the service on the buyers' solicitors of copies of the various Land Registry entries, deeds of variation and mortgage consents ("the documents service term" as I shall call it) was for the exclusive benefit of the buyers, that it was capable of waiver by them, and that by the letter of 8 February, they did waive it. Benefit, he submitted, is to be assessed by reference to the substance of the relevant provision and by reference to the position that results if the contract is performed. The presence of a right given to either side to terminate the transaction if the term is not performed does not necessarily show that the performance of that term is intended to benefit both of them. The purchaser needs the termination right to ensure that he is not kept waiting indefinitely for the term to be performed: the right gives him a let-out from the contract if the term is not fulfilled. Correspondingly, the seller needs the termination right to ensure that he cannot be made to keep trying indefinitely to procure the performance of the term, especially as his obligation is merely to use "all reasonable endeavours" and performance of the term is dependent on the cooperation of others which is not something he can compel. This is so whether performance of the term is for the exclusive benefit of the purchaser or is advantageous to both of

them. The contractual purpose of the seller's right to terminate is therefore to give him the certainty that he is free of obligation when his termination notice takes effect. *Heron Garage* does not assist the claimant and the court below was wrong to think that it did.

15. On the second issue - the severability of the documents service term from the remainder of clause 25 - Mr Hill submitted that the only question that arises is how the date for completion is to be fixed. This, he submitted, is a matter of mechanics only. The court should construe the contract in a way which enables effect to be given to a waiver of that part of clause 25.1 constituted by the documents service term and also provides a completion date. He submitted that, although the effect of a waiver is ordinarily to treat the relevant term as omitted from the contract, there is no intrinsic reason why in appropriate cases the term in question should not be treated as performed. He submitted that the court can and should adopt the analysis which is most appropriate to what makes the transaction effective and leads to its performance; it should avoid an approach which leads to the transaction going off on what he referred to as a "technicality". He directed my attention, by way of an analogy, to the approach of Hoffmann J (as he then was) *Spiro v Glencrown Properties Ltd* [1991] Ch 537 at 544G - H where what was in issue was the characterisation of an option to buy land. If therefore waiver is equated with performance, clause 25.1 itself provides that completion is to follow 14 days later. In the events that happened that would have been 14 days after the giving of the notice by the defendants' solicitors in their letter dated 8 February 2010. This analysis enables the contract to be completed substantially as the parties intended. The only alteration to their obligations as a result of the waiver is that the claimant does not actually have to produce the corrected plans. This releases him of a burden and causes him no detriment whatever.

16. Even if the result of an effective waiver is to treat the waived provision as if it had been omitted so that, in the instant case, the terms of clause 25.1 can no longer be applied as the completion date is fixed by reference to the performance of a term which no longer exists, there remains nevertheless an obligation to complete in that, if and in so far as a contract for the sale of land does not specify a time for completion, jurisprudence in the field of vendor and purchaser allows an implication that completion is to take place after a time which is reasonable in all the circumstances. See, for example, *Chaitlal v Ramlal* [2003] UKPC 12 at para 22. Once the relevant part of clause 25.1 was waived therefore, completion could have taken palace as soon as the necessary transfer had been agreed and a completion statement prepared. Whatever a reasonable time for those purposes might have been, it must have elapsed by 8 April 2010 when the defendants issued their application notice for specific performance and, *a fortiori,* by the time of the hearing before Judge Madge on 16 July. Mr Hill referred also to *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 443 as an example of the willingness of the court to substitute its own machinery where the machinery fixed by the contract, being a subsidiary and non-essential part of the contract, has broken down for any reason. In that case the machinery in question was for the ascertainment of the sale price of certain leasehold reversions which, by the contract, was to be at a fair and reasonable price by the application of objective standards.

17. On the third issue - whether it was open to the defendants to waive the provision of the corrected plans after the claimant had given notice under clause 25.2 to terminate the contract - Mr Hill submitted that on the correct construction of that sub-clause termination only occurs on the expiry of the five working days. The reference in the clause is to "… notice of 5 working days to terminate …" the contract. That is, moreover, a perfectly sensible result for the parties to have intended to produce in that it is appropriate to give the other party an opportunity to do whatever is necessary to ensure that the contract completes, rather than going off: if the seller gives the notice, the buyer can waive the documents service term (as the defendants have done), and if it is the buyer who gives the notice, the seller has a last chance to bring to fruition his efforts to fulfil that term. The fact that the contract remains alive while the notice is running, and that the right to terminate will cease on the corrected plans being obtained, even after 1 February, support this conclusion. There is no significant prejudice to whichever party gives the notice if the position is crystallised when the notice expires rather than when it is given: either way, the party's interest in knowing where he stands is protected. In short, Mr Hill submitted, the right of the party giving the notice is not an unqualified right to cry off: it is a right to cry off unless, when the notice expires, the party receiving the notice can complete in a way which ensures that the giver of the notice gets what he contracted for and is not prejudiced by completing.

The claimant's case

18. For the claimant and in support of the decision by Judge Madge in the court below, Mr Carlisle submitted that the documents service term was not one the performance of which was exclusively for the benefit of the defendants as buyers. He submitted that the provision of corrected plans and Land Registry entries benefits the seller in that his position as owner of the leasehold interest is correctly defined in relation to, first, the superior (freehold) title, second, his mortgagee and, third, the Land Registry title. It also minimises any risk of liability or costs as against either his freeholder or his mortgagee if the incorrect documentation should remain in place. Those benefits, he said, would continue after completion of the sale to the defendants.

19. At the forefront of Mr Carlisle's submissions was the provision in clause 25.2 conferring the right to terminate the contract in the event that, despite the use of all reasonable endeavours, the seller is not able to provide all of the information referred to in clause 25.1 by 1 February 2010. The existence of that right is a real benefit to the vendor. Moreover, if the parties had thought that the provision of the information was for the benefit of the buyer and not the seller, one might have expected the buyer alone to be permitted to give notice terminating the contract in the event that the term could not be performed. The contract could easily have so provided. But the contract is not so worded. It empowers either side to terminate the contract in the event of non-performance of the documents service term. The fact therefore that it is open to the seller, having used all reasonable endeavours but having failed to perform that term, to take advantage of that failure by giving notice of termination of the contract is, Mr Carlisle submitted, a clear indication that the term cannot have been simply for the buyer's benefit. He submitted that Judge Madge was right so to have concluded. He referred me to *Heron Garage* (upon which the judge below had also placed reliance) and certain observations in *Moreton v Montrose Ltd* [1986] NZLR 496 at 505-505. He submitted that the right is or may be of benefit to the seller in so far as it

allows what Mr Carlisle described as a "change of mind" on the seller's part enabling him to "re-assess the market". I took this to mean that it would enable the seller to attempt to achieve a higher price for the flat by selling it to someone else.

20. On the second issue - severability and the relationship of the completion date to the fulfilment of the documents service term - Mr Carlisle submitted that the term was closely interlinked with clause 25.2 which modified what might otherwise appear to be an absolute obligation on the vendor's part (in clause 25.1) to serve the buyer's solicitors with copies of the various documents in question by stating that the obligation in that sub-clause is no more than one to use all reasonable endeavours. It was therefore not open to the buyer to waive clause 25.1 (or any part of it) in isolation from clause 25.2. He went on to submit that, in any event, the date for completing the contract is fixed by reference to the service by the seller's solicitors on the buyer's solicitors of the various documents referred to in the documents service term. If that part of clause 25.1 is waived, there is no ascertainable date for completion. The Standard Conditions do not assist because clause 12.3 of the contract has disapplied Standard Condition 6.1 which sets out, in the absence of anything to the contrary in the contract itself, when the completion date is to occur.

21. On the third issue - the availability of a power to waive after notice of termination is given pursuant to clause 25.2 - Mr Carlisle submitted that the proper construction of clause 25.2 is that upon giving the notice all primary obligations under the contract cease leaving as secondary obligations only the vacation of the property by the buyer and repayment of the deposit by the seller. He submitted that the purpose of the notice is not to give to the parties a last chance to obtain and serve copies of the relevant documents. If it were, the contract could and would have said so. The aim of the five days was simply to give the buyer (if in possession) time to make arrangements to vacate and to give the seller time to make arrangements to repay the deposit.

Conclusions

22. Beguilingly straightforward as the matter appeared to Judge Madge, I consider that the issues raised are far from simple. They break down into four separate points.

(a) Benefit of condition

23. The test for determining whether a contract term is for the exclusive benefit of one party, failing which and in the absence of any express power of waiver the term is not capable of unilateral waiver by the party to the contract who claims to have the benefit of it, is that stated by Brightman J (as he then was) in *Heron Garage* at 426e - h;

> "Without seeking to define the precise limits within which a contracting party seeking specific performance may waive a condition on the ground that it is intended only for his benefit, it seems to me that in general the proposition only applies where the stipulation is in terms for the exclusive benefit of the plaintiff because it is a power or right vested by the contract in him alone… , or where the stipulation is by inevitable implication for the benefit of him alone … If it is not obvious on the face of the contract that the stipulation is for the

> exclusive benefit of the party seeking to eliminate it, then in my opinion it cannot be struck out unilaterally. I do not think that the court should conduct an enquiry outside the terms of the contract to ascertain where in all the circumstances the benefit lies if the parties have not concluded the matter on the face of the agreement they have signed."

24. In a decision of the New Zealand Court of Appeal, to which Mr Carlisle referred me, namely *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 (and to which I shall return later) there is (at page 334) a citation from an earlier decision of the same court (*Hawker v Vickers* [1991] 1 NZLR 399 at 402-3) setting out the following statement of the approach in law:

> "A party may waive a condition or provision in a contract which is solely for that party's own benefit and is severable. In such a case the other party is denied the right to treat the condition as unsatisfied and is obliged to complete notwithstanding the loss of that advantage. The question is one of construction of the contract. It turns on whether the stipulation is in terms or by necessary implication for the exclusive benefit of the party, and the answer is derived from consideration of the contract as a whole in the light of the surrounding circumstances…"

That seems to me, with respect, to be an entirely accurate summary of the relevant approach.

25. Measured by that approach and confining my gaze simply to what I have referred to as the documents service term, there can be no doubt that the term is for the exclusive benefit of the buyer. It is akin to the term in a contract for the sale of land stating what the title is which the vendor has to give. In such a case, as Lord Langdale MR stated in *Bennet v Fowler* (1840) 2 Beav 302 at 304:

> "… the obligation to which a vendor is subject to make out a title is intended for the benefit of the purchaser only, and… if he thinks fit to waive it, he has a right to do so."

26. Mr Carlisle sought to persuade me that the term is not of that nature because title is dealt with by clause 5 of the contract. He is right that that clause states what the title is which the seller agrees to provide but it does not follow that the documents service term is not also concerned purely with a matter of title, as in my judgment it clearly is. The term is concerned with the rectification of a defect in the expression of the vendor's title which had come about, as I have mentioned, by a misidentification of the leasehold flat at 101 Cranworth Gardens by the plan attached to the lease creating that interest, which defect, unsurprisingly, was reflected in the filed plan on the registered title. The nub of the matter, as Mr Hill submitted, is whether the performance of the term is for the exclusive benefit of the buyer. If performed - and the transaction completes - the claimant no longer has any interest in the property of which he was once but is no longer the owner. Defects in his former title cease to be of concern to him. It might have been otherwise if there was evidence that the claimant was the owner or had some interest in the adjoining flat (and was affected

therefore by the defect because of the transposition of plans referred to earlier) and in consequence (in right of that other flat) interested in having the error corrected. There was no suggestion, however, that that is this case. None of the other matters identified by Mr Carlisle as constituting "benefit" to the seller from the existence of the documents service term are properly to be so characterised: they all related to the claimant's position as owner of the flat and therefore assumed, or appeared to assume, that the contract would not be completed.

(b) Severability

27. But, as Mr Carlisle was at pains to point out, the documents service term does not stand alone. It appears in clause 25.1 and is part of a larger provision determining the completion date of the contract. Does that mean - I do not at this stage look at clause 25.2 - that it is not open to the buyer to waive performance of that term (assuming that the term is in all other respects exclusively for the buyer's benefit)?

28. I do not consider that it does. Commonsense suggests that it ought to be open to the buyer to waive a term dealing with the title to that property. But, if he does, how is the completion date to be determined? As Mr Carlisle rightly pointed out, it cannot be by reference to the Standard Conditions as Standard Condition 6.1 – which is the material condition - has been expressly disapplied by clause 12.3 of the contract. How then does the matter stand?

29. There are, as Mr Hill submitted, two ways of approaching the matter. The first is to treat the waived stipulation as if it had been performed. The other is to treat the waiver as if it had deleted the stipulation from the contract altogether. (This last was the approach favoured by Brightman J in *Heron Garage* (at 427) in the passage which I have set out above where there is reference to the party claiming the exclusive benefit of a stipulation "seeking to eliminate it" and to the stipulation in question being "struck out unilaterally".)

30. Which of these two approaches is the appropriate one to follow must depend upon the contractual context. In the instant case each leads to the same result. If the former approach is followed and one treats the waived stipulation as if it had been performed, clause 25.1 can take effect according to its terms: completion is to take place 14 days after waiver. The latter approach – treating the waived term as if it had been struck out of the contract – merely means that clause 25.1 cannot take effect according to its terms and, as a consequence, the contract fails to make any provision (or any effective provision) for fixing the completion date. That is not, however, fatal to the contract since, as Mr Hill submitted, the jurisprudence establishes that if the parties do not set out in their contract when completion is to occur, the court steps in to supply the date. The decided cases show that the courts will go to some lengths to supply a completion date where, for any reason, the parties have failed to do so. In the instant case that means, as Mr Hill went on to submit, that the date is to be measured by what needs to be done to complete the contract once any need to perform the documents service term is to be ignored. I can see no good reason why the date which falls 14 days from the date when that term is waived (assuming it is otherwise validly waived) should not be taken to be the completion date. Fourteen days was the period which the parties themselves agreed on the footing that the term was performed. It is difficult to see why there should be any greater period merely because the term is waived. On any

view a reasonable period had passed by 8 April 2010 when the defendants issued their application for specific performance.

31. I should add that on this point Mr Carlisle drew my attention to a later passage in *Heron Garage* on which he placed some reliance. In that passage (at 427c-d), Brightman J said this:

> "There is an added difficulty in the way of Heron's case. The decision in *Hawksley v Outram* [1892] 3 Ch 359 suggests that a stipulation cannot be waived if it is inextricably mixed up with other parts of the transaction from which it cannot be severed. Clause 8 of the sale agreement specifies the date for completion. That date under cl.8 is dependent upon the date when Heron receive planning consent without conditions or when Heron is deemed to have approved conditions attached to the planning consent. Nothing is said about the date for completion if Heron waive the condition for planning consent. So it would seem that Heron's unilateral elimination of cl.7 of the sale agreement will also eliminate cl.8 and leave the date for completion in the air…"

Mr Carlisle submitted that the position is the same in the instant case if it is otherwise open to the buyer to waive the documents service term.

32. Mr Hill submitted that this passage was not part of the ratio in *Heron Garage*, that the view there expressed was "tentative" and that I should not obliged to follow it. I agree. The fact that a contract for the sale of land provides, as it well may, that completion is to take place a stated number of days after the vendor has shown that he has a particular title to the land in question does not mean that the purchaser cannot waive the vendor's obligation to show that title merely because to do so "will leave the date for completion in the air" if by that is meant either that the stipulation in question cannot be waived or, if it were otherwise to be waived, the contract will cease to be enforceable. The only consequence of the waiver by the purchaser in such a case is that the contract proceeds to completion either as if title had been shown or (which comes to the same thing) as if the contract provided that the vendor was under no obligation to show title. I cannot for one moment think that the court in such a case would have any difficulty in fixing a date for completion by reference to what remained to be done in order to carry the contract to completion.

(c) The right to terminate given by clause 25.2

33. What then of the presence in clause 25.2 of the right, conferred separately on both the buyer and the seller, to terminate the contract in the event that, despite having used all reasonable endeavours, the seller has not secured performance of the documents service term by 1 February 2010? It was the presence of this right that persuaded Judge Madge to conclude that clause 25.1 was not capable of waiver by the defendants.

34. In my judgment, the presence of that right is irrelevant to whether the documents service term is for the exclusive benefit of the seller. The principle is that a party may waive a contract term if that term, if performed, is of benefit to him but not to the

other party (or parties) to the contract. By contrast, the right to terminate the contract conferred by clause 25.2 is exercisable if and only if the term cannot be or is not performed.

35. This very point was discussed in *Globe Holdings*, the New Zealand decision referred to earlier. In that case a condition of the contract for the sale of an apartment block stipulated that, within 60 days of acceptance, the purchaser would obtain planning consent from the local council for the sub-division of the block. The contract contained a general condition that in relation to any financial or other conditions either party could, at any time before the condition was fulfilled or waived, avoid the contract by giving notice. Within the 60 days the purchaser's solicitors gave notice that the special condition was waived and that, accordingly, the contract could be regarded as unconditional. The question was whether the notice was legally effective. In the course of a judgment dealing with a number of points, the New Zealand Court of Appeal (at 339) cited a passage from the earlier decision of *Hawker v Vickers* which stated that

> "…there is nothing inconsistent in providing expressly or by necessary implication for unilateral waiver of a condition up to a certain date and thereafter for allowing either party to avoid the contract for non fulfilment of the condition. Such a provision simply recognises the commercial reality that the nature and significance to the parties of a condition in a contract may change over time or at a point in time. If the contract [*sic*] is fulfilled or waived, the parties then have the certainty of an unconditional contract. If not fulfilled or waived by the nominated date, each is free to end the contract by appropriate notice to the other."

The court then pointed out that:

> "The argument against waiver rests upon the desirability of certainty for a vendor from being able immediately to bring the contract to an end, or see it immediately collapse, once the given time has elapsed. But certainty is achieved by a different rule, namely that any waiver must occur on or before the condition date, or at least before the contract is actually brought to an end (if it is not automatically void). It has to be remembered that we are at this point concerned with a situation in which it is to be accepted that there is no substantive benefit to [the vendors]. Therefore, their only legitimate interest is in knowing whether the transaction is to proceed or not. Once the time allowed for the fulfilment of the condition expires they can forthwith give notice of cancellation if they have not already been informed that the sale will go ahead. It matters not to them whether it does so because of fulfilment or because the purchaser elects to proceed anyway. The achieving of certainty is in the vendors' own hands if there has been no action by the purchaser. If there has been a waiver the transaction proceeds as it would have done if the condition had been satisfied on the date of the waiver… We conclude

> therefore that a distinction is to be drawn between the benefit of the substance of the condition and the benefit of the time limit …"

36. The reasoning in that passage thus distinguishes between the benefit of the condition - here the documents service term contained in clause 25.1 - and the benefit of the right to terminate the contract if the condition has not been fulfilled by the due date - here the right to terminate the contract after 1 February if the information in question has not been provided. These are two distinct terms of the contract. The existence of the right in either party to terminate the contract if a particular condition is not performed by the due date is not inconsistent with the condition in question being for the exclusive benefit of the other party to the contract and with that other party having the right, if necessary by implication of law, to waive the condition.

37. *Heron Garage* is not authority for a contrary view. The condition in that case was that the purchaser would obtain a particular planning consent. Obtaining that consent was a condition precedent to the contract. Brightman J put the matter thus (at 426b):

> "The town planning consent is expressed in cl.7 of the sale agreement as a condition fundamental to the enforceability of the sale agreement as a whole. It is not expressed as a condition which is precedent only to the liability of Heron as purchaser. Clause 7 is not a clause which is expressed only to confer rights on Heron. It is expressed to confer a right also on the vendors."

It is perhaps the presence of the last sentence in that passage which needs some elaboration. The right there referred to was a right in either party, if the stipulated planning consent should not have been obtained within 6 months or within such extended period as the parties might agree, to terminate the agreement by notice in writing to the other. It was part and parcel of the very clause stating that the contract was conditional upon the particular planning consent being obtained. The purchaser, Heron, had shortly before the expiry of the 6 month period given notice in writing to the vendor's solicitor purporting to waive what it described as the benefit of clause 7 of the contract. It is not surprising therefore that Brightman J concluded that the condition was not capable of waiver by the purchaser: it was a condition precedent to the very existence of the contract and, what is more, it contained a provision expressed to be for the benefit of both parties.

38. The only other authority I need to refer to, and can do so very briefly, is *Yewbelle Ltd v London Green Developments Ltd & anr* [2007] 2 EGLR 152; [2007] EWCA Civ 475 in which there was an agreement for the sale by the vendor to the purchaser of a development in south London with a view to its redevelopment in accordance with a particular planning permission. The planning permission was subject to a suitable agreement being entered into under section 106 of the Town and Country Planning Act 1990. The vendor was obliged to use all reasonable endeavours to secure the section 106 agreement and the purchaser was under no obligation to complete in the absence of such an agreement. One of the questions was whether a term should be

implied into the contract under which the vendor could rescind the contract if, despite the exercise of all reasonable endeavours, the necessary section 106 agreement could not be achieved and the buyer did not waive that condition. Implicit in that question was that it was open to the buyer to waive the condition. The Court of Appeal, upholding Lewison J on this point, saw no inconsistency between the presence in the contract of a condition - the obtaining of the necessary section 106 agreement – which was for the sole benefit of the buyer and the implication into the contract of a term to the effect that, if the seller complied with his obligation to use all reasonable endeavours but was unable to complete the section 106 agreement, the seller should give to the buyer an opportunity to complete the sale without that agreement (in other words, to waive the condition requiring that agreement) but if the buyer should choose not to complete the sale on that basis the vendor would have the right to terminate the contract.

(d) The notice to terminate

39. The final question is whether the claimant's notice, set out in his solicitor's letter of 1 February 2010, was an effective exercise of the power to terminate the contract given by clause 25.2.

40. It is not in dispute that, subject only to the effect of the notice contained in the letter of 8 February sent by the defendants' solicitor, the claimant's notice was effective and the contract was terminated. The defendants accept that, by the time the claimant's notice was given, the claimant had used all reasonable endeavours to provide all of the information referred to in clause 25.1 but had not been able to do so.

41. The outcome of this question turns on whether the claimant's notice was effective to terminate the contract when it was given – i.e. when it was received by the defendants' solicitors - or whether it only took effect upon the expiration of the five working days to which (as clause 25.2 required) the notice referred. This question was not a matter dealt with by Judge Madge. Given his conclusion that it was not open to the defendants to waive clause 25.1 it necessarily followed that the letter of 8 February, which alone is relied on as negating the effect of the claimant's notice, was of no effect. I should add that Mr Carlisle does not suggest that once 1 February had passed it was, irrespective of the giving of notice under clause 25.2, too late for the defendants to seek to waive the benefit of clause 25.1.

42. Is a notice given under clause 25.2 only effective to bring about a termination of the contract on the expiration of the five working days, which is what Mr Hill submitted? Or does such a notice, as Mr Carlisle submitted, take immediate effect as a termination of the contract when given, but give five working days to the buyer to vacate the property (assuming that the buyer is in occupation) and a like period to the seller (and his solicitors) to return the deposit?

43. On first considering the point, I inclined to the view that it was the former. As Mr Hill pointed out, clause 25.2 refers to "notice of 5 working days to terminate this Agreement, whereupon…". This construction treats the notice, if given by the buyer, as effectively a notice to perform: its service gives to the seller a final five working days within which to provide the stipulated information, failing which the contract comes to an end without further ado. If given by the seller, it is effectively a notice putting the buyer to his election whether he wishes to waive the benefit of the

documents service term in clause 25.1 and complete his purchase notwithstanding the incorrect plans or whether he still expects performance of the term but is leaving it to the seller to terminate the contract by allowing the notice to expire.

44. Mr Carlisle was able, however, to draw my attention to a very recent decision of the Court of Appeal in *Akzo Nobel UK Ltd v Arista Tubes Ltd* [2010] EWCA Civ 28 ("*Akzo*") in which the same point had arisen for decision. In that case, the claimant, Akzo, had sought specific performance of an agreement made on 31 December 1998 under which the defendant, Arista, had agreed to take underleases of five units (referred to in the agreement as "Business Property") in certain factory premises. The landlord's consent was needed, both to the grant of the underleases to Arista and also to an assignment to Arista of the headlease. Akzo agreed to use all reasonable endeavours to procure those consents (referred to in the agreement as "Property Consents") and Arista was allowed in the meantime to take up occupation of the property in question under a licence arrangement. As matters turned out Arista remained in occupation under the licence arrangement for eight years. For its part, although it made efforts to do so, Akzo was unable to obtain the Property Consents or an assignment to itself of the headlease until 13 December 2007. But by then, Arista had served notice on Akzo to terminate the agreement. It had done so by a notice on Akzo dated 30 October 2008 pursuant to the following term (referred to as paragraph 11) of the agreement:

> "If by [31 December 1999] all Property Consents shall not have been obtained in respect of any Business Property then either the Seller or the Purchaser may, by three months notice in writing to the other, terminate on the date of expiry of that notice, the obligations of the parties hereto in respect of that Business Property… (but without prejudice to antecedent breach) in which event the Purchaser shall vacate the Business Property in question by the end of such notice period."

45. After observing (at [17]) that there was no dispute that Arista was entitled to serve the notice on Akzo on 30 October 2008, Mummery LJ (with whom the two other members of the court agreed) said of the notice:

> "It was not a notice to complete the parties' transaction by giving Akzo a last chance and by setting a deadline for it to take a transfer of the lease and to obtain the Property Consents. It was a notice to terminate the parties' contractual obligations, a provision which enabled either party to escape from obligations in relation to the Premises. Such a notice could be served by either party if Akzo had not obtained the Property Consents by the stipulated date. The obligations which could be terminated included Arista's obligation to pay a fee for its licence to occupy the Premises. One would not normally or reasonably expect that, in the absence of express provisions in the [agreement] or fresh agreement between the parties, a notice terminating the parties' obligations, once given, could be unilaterally revoked or reversed or that, as [counsel for Akzo] strongly contends it has no legal effect on the parties' obligations before the notice has expired. In my view, the

> immediate effect of the notice was that there was no longer any obligation on Akzo to use reasonable endeavours to obtain Property Consents or an assignment of the lease, or on Arista to take underleases of the Premises."

The reference in that passage to a notice once given being "unilaterally revoked or reversed" could equally extend to an attempt, as here, to waive the benefit of the condition. Mummery LJ continued (at [19]):

> "It is common ground that the notice provision must be construed as a whole, in its context and in its ordinary and natural meaning. As I read paragraph 11 the parties clearly agreed that, if the Property Consents had not been obtained by 12 months after the date of the [agreement], they were entitled to serve notice in writing terminating the parties' obligations in respect of the Premises. Arista's obligations included the obligation to take the underleases, as well as its obligation to pay the fee under the Licence Agreement. On service of the notice the position of the parties was that Arista would have to vacate the Premises by the end of the notice period and it would cease to be under an obligation to pay the licence fee, or to be under an obligation to take the underleases of the Premises. The language of the paragraph does not allow Akzo to reverse or vary that position on Arista's obligations, such as by obtaining the Property Consents at any point down to the expiration of the notice. The obligation to take the underleases did not arise before the notice was given and the purpose of giving the notice was to prevent it from ever arising subsequently, given that Arista would be bound to vacate the Premises by the expiry of the notice period."

46. Although the decision in Akzo cannot, of itself, determine the construction of clause 25.2 in the instant case, as each is concerned with a differently worded clause, it is difficult to see why, given the similarity of language, the result in the instant case should be different from that in Akzo. The reasoning which led to the decision in Akzo (upholding the decision of Floyd J in the court below) is no less applicable, in my view, to the instant case.

47. Although he sought to do so, Mr Hill was unable to provide any convincing grounds why the reasoning in Akzo should not apply to the notice in this case. He submitted that the factual matrix in *Akzo* was different in that the premises there were commercial premises from which Akzo was conducting a business, that the period of notice was a substantial three months to enable Akzo to wind down and that there was a need for the parties to have certainty once the notice was given. In the instant case the premises are residential. He submitted that, by the terms of the notice provision, Arista was to vacate "*by"* the end of the notice period, so that Arista was able to go out of occupation at any time after the notice had been given, thus supporting the conclusion that once the notice was given nothing that subsequently happened could lead to the contract being completed. In instant case, by contrast, the language used is different: the reference in clause 25.2 is to "*whereupon"* implying that there is no expectation that the buyer will vacate before the end of the notice period. Finally, he

submitted, the effect of the notice in *Akzo* was to fix a final date by reference to which occupation, and payment for occupation, were to be determined. In the instant case the position is different: clause 25.3 does not require the buyer to vacate until the seller's solicitors confirm that they are in funds to reimburse the whole of the deposit. Mr Hill told me that no such confirmation was given by the claimant's solicitors.

48. I am not persuaded that these differences are material. The fact that the premises in the instant case are residential does not suggest that there is any less need for certainty than if there were commercial as in *Akzo.* The use of "*whereupon"* does not mean that there is no expectation that the buyer will vacate before the notice has expired. Clause 25.3 is a protection for the buyer. It throws no light on the nature of the notice served under clause 25.2.

49. In my judgment, the notice given under clause 25.2 enables the parties to bring an end to their relationship if one of them chooses to do so and the relevant information has not been provided by 1 February. The more natural contruction of the clause is to read it as having that effect when it is given. It is inconsistent with that purpose to allow an obligation to complete to arise (either because the documents service term is performed or the term is waived) after the notice has been given. The whole point of the notice is that the time for completion has passed.

50. In my judgment, therefore, the claimant having through his solicitors served a valid notice under clause 25.2 it was too late for the defendants to seek thereafter to waive the claimants' obligation as seller, to provide all of the information referred to in clause 25.1.

Result

51. It follows that the contract was validly terminated and, although for reasons different from those on which he based his decision, Judge Madge was correct to dismiss the defendants' application for specific performance.