[2020] EWHC 2356 (Ch)

Claim No. PT-2020-000435

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building,
Fetter Lane,
London EC4A 1NL

Before:
DEPUTY MASTER LLOYD

BETWEEN

LODHA DEVELOPERS 1 GSQ LIMITED

Claimant

-and-

(1) 1 GSQ1 LIMITED
(2) 1 GSQ2 LIMITED

Defendants

Joanne Wicks QC and Jonathan Chew (instructed by Bryan Cave Leighton Paisner LLP) for the Claimant
John McGhee QC and James McCreath (instructed by BDB Pitmans LLP) for the Defendants

Hearing dates: 12th August 2020

JUDGMENT

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

Handed down on 28th August 2020

(Signed) STEPHEN LLOYD (Deputy Master)

1 By an application notice dated 19th June 2020 the claimant seeks summary judgment for (i) a declaration that the sale and purchase agreement dated 1st June 2018 as amended and restated by a variation agreement dated 26th October 2018 has been validly terminated by the claimant and (ii) an order for the removal of unilateral notices entered on the claimant's title in respect of the parties' agreement in respect of the property. The claim form includes a claim in respect of a deposit and stage payment said to be forfeit but that head of relief is not the subject of this application.

The background

2 The claimant is developing the former Canadian High Commission in Grosvenor Square; the gross development value is about £950 million. It includes apartments including a penthouse, and smaller units called suites or studios. The defendants are SPVs ultimately controlled by Mr Kostyantin Zhevago a citizen of the Ukraine. Mr Zhevago describes himself an entrepreneur. He was until recently CEO of Ferrexpo a leading iron ore producer of which he is beneficially the principal shareholder, and he was until 2019 a member of the Ukrainian Parliament.

3 By an agreement dated 1st June 2018 Mr Zhevago agreed to purchase the penthouse apartment, apartments 3.7 and 3.8 and Suites 1, 2 and 3 for a total price of £106 million. That contract underwent a variation and a 'restated' agreement was made on the 26th October which is the relevant agreement for these proceedings and which I will refer to as "the agreement".

4 The agreement provided for a deposit (in the agreement called *"the first deposit"*) of £10.6 million and two further payments of £10.6 million each, called respectively *"The Premium Second Advance Stage Payment"* and *"The Premium Third Advance Stage Payment".* I will refer to these simply as 'the deposit' 'the second stage payment' and 'the third stage payment'.

5 The agreement included the following provisions:

(1) The definitions (clause 1) included the following:

(i) The *'anticipated completion date'* was specified as the 31st March 2020 although there were provisions for extension;

(ii) *"completion certificate"* meant a certificate issued by the seller to the effect that in the opinion of the seller (acting reasonably) the works are practicably complete;

(iii) The *'completion date'* was defined as the fifteenth working day following the date of service by or on behalf of the Seller on the Buyer or the Buyer's Solicitors of a completion notice and certain other documents (as specified in clause 1.18) including the completion certificate;

(iv) The *'longstop date'* was the 30th June 2022;

(v) *'Practically Complete'* meant that the Penthouse Apartment and Apartment 3.7 and 3.8 had been constructed in accordance with the seller's obligations under the agreement and as described in the specification and Penthouse Specification, that the building had constructed to the extent required for the Seller to comply with the Seller's obligations and there was no planning condition outstanding that specifically prohibited the use and enjoyment of the premises, safe access to them and the use of the car park and the building.

(2) Clause 3.2 provided that the deposit was to be held as a deposit and in part payment of the premium by the claimant's solicitors as stakeholders until the claimant was able to provide to the defendants' satisfaction written evidence that the building guarantee (as defined) was in place or a bank guarantee.

(3) Clause 3.3 made provision in respect of the second stage payment which was due (and paid) by 31st May 2019 and clause 3.4 dealt with default (in terms similar to clause 3.5 next mentioned).

(4) Clause 3.5 provided that the Buyer should pay to the Seller's Solicitors the third advance stage payment on or before 2 December 2019.

(5) The next clause also numbered 3.5 provided as follows: "*If the Premium Third Advance Stage payment has not been received by the Seller's solicitors as cleared funds and in accordance with clause 6, within 10 working days after the due date then the seller may without prejudice to its other remedies either elect to: 3.5.1 (but only before payment has been*

received) treat this agreement as discharged by the breach thereof by the Buyer in which case the Seller shall be entitled to forfeit and retain any of the First Deposit, the Premium Second Advance Stage Payment that has been paid by the Buyer; or 3.5.2 enforce payment of the Premium Second (sic) *Advance Stage payment owed in which event the Seller shall not be entitled to treat this Agreement as discharged pursuant to clause 3.5.1".* The word 'Second' is clearly an error and should be 'Third'; nothing I have to decide turns on that.

(6) Clause 9 I will set out below.

(7) Clause 19.1 was an 'entire agreement' clause; clause 19.2 provided the agreement might only be varied in writing signed by or on behalf of both parties to the agreement

(8) Clause 23 provided that the illegality, invalidity or unenforceability of any provision should not affect or impair the legality, invalidity or enforceability of the rest of the agreement;

(9) Clause 25 dealt with termination and clause 25.1.1. provided that if *"at any time the Buyer fails to comply with the provisions of Clause 3 relating to the payment of the Deposit on the due date or the Premium Second Advance Stage Payment and the Premium Third Advance Stage Payment (as the case may be) within 15 working days after the due date (but not after payment has been made by the Buyer in accordance with clause 6 , together with any interest due in respect of late payment)… then (and in any case) the Seller may, at any time prior to the grant of the Apartment Lease, determine this Agreement by written notice to the Buyer and this Agreement shall then terminate and the Seller shall be entitled to forfeit and retain any of the Deposit and the Premium Second Advance Stage Payment or the Premium Third Advance Stage Payment as has been paid by the Buyer at the date of termination and without prejudice to any claim by either party against the other in respect of any antecedent breach of this Agreement".*

(10) Clause 25.2 provided *"If this Agreement is validly terminated, the Buyer shall at its own cost procure that any unilateral notice made against the Seller's title to the Premises made by or on behalf of the Buyer shall be removed".*

6 There is an inconsistency in the agreement in that, whereas clauses 3.4 and 3.5 give the seller a right to treat the contract as discharged if the payment of the second or third stage payments are not made within 10 working days after the due date, clause 25.1 gives the same right after 15 working days. Also, clause 25 expressly requires the service of a notice to bring the contract to an end whereas clause 3.4 and 3.5 merely refer to the seller's right to elect between treating the contract as discharged or enforcing payment.

7 The deposit and the second stage payment were paid in accordance with the contract. In about November 2019 Mr Zhevago wished to defer the third stage payment due on or before 2nd December 2019. In an email from Mr York the co-CEO of Lodha to Mr Ian Pellow who is a director of the defendant companies and their shareholder company which he holds on trust for Mr Zhevago, Mr York expressed a wish to focus on completion in the first week in April and separating the completion of two apartments (3.7 and 3.8). An email dated 9th December indicates that an oral agreement had been reached to defer the third stage payment until 2nd April or completion, whichever was the earlier and to *"decouple the delivery of the penthouse from the delivery of 3.7/3.8"* and that the solicitors were to draft and agree the amendment to the contract. There were then exchanges by emails between the two solicitors all clearly marked *"Subject to Contract and Without Prejudice"* relating to a variation agreement, the last of which is dated the 21st February 2020.

8 The next communication is a letter from the claimant's solicitors dated 20th March 2020 referring to clause 3.5 of the contract and the obligation to pay the third stage payment, the fact that no agreement to enable completion to take place on the 2nd April had been finalised, and that the payment had not been made. It went on *"Our client requests your client to make payment of the Premium Third Advance Stage Payment forthwith, and in any event by no later than 5 pm on Friday 27th March 2020"*. There was no response to that letter. By letter dated the 29th April 2020 the claimant by its solicitors gave notice terminating the contract and requiring the removal of the unilateral notices. It

also noted the claimant's right to forfeit the deposit and the second stage payment.

9 The defendants' solicitors responded by letter dated 14th May 2020 asserting four points:

(1) The claimant had not complied with its obligations under clauses 9.3 or 32.2.2 of the contract;

(2) Because of '*the conduct of the parties'* before and after the third stage payment became due, the defendants did not accept that the notice was effective to terminate and or forfeit the contract;

(3) Given the scale of the defendants' investment in the property, the termination and forfeiture provisions of the contract were unenforceable; and

(4) Given that investment Equity would intervene to grant the defendants relief from forfeiture or termination.

As to the first of those points only the allegation of a failure to comply with clause 9.3 is still pursued.

10 The letter went on to seek confirmation that the deposit and stage payments would not be released until completion. Miss Wicks on instructions informed me that the moneys were released to another account where they were being held pending the outcome of this claim, but, in view of this dispute, those moneys have been returned to the claimant's solicitors albeit that they are now being held by the solicitors to their client's order rather than as stakeholders. The letter also went on to say that the defendants were ready willing and able to make the third stage payment with interest and asking for the bank details to which it should be sent.

11 By letter dated 19th May 2020, the claimant's solicitors responded to the four points. These proceedings were commenced on 9th June 2020.

12 In his witness statement Mr Zhevago states that he had the money for the third stage payment to be made on the 2nd December; he had received $70million dollars in dividends from Ferrexpo in 2019 but that a change in tax legislation

meant that he would have had to declare this in his 2019 tax declaration, a public document, and he had been advised that he should avoid paying the money until after March 2020 to avoid adverse political and public attention. He had explained this to Abhishek Lodha, the managing director of the Lodha Group, who was happy to accommodate his request to delay the payment. Mr Zhevago says he was doubtful about completion in April, that it was the claimant's wish to complete the penthouse before the apartments and that by December the claimant wanted to deliver the penthouse before the car parking and common parts were completed. Mr Zhevago accepts that the negotiations for a variation did not conclude but that as far as he was concerned the claimant was content for the third stage payment to be deferred until April and in that belief he continued to spend money on the property, legal fees, progressing plans for the fit out with interior designers, and electrical and mechanical engineers.

13 Mr Zhevago says that the letter of the 20th March demanding the third stage payment by the 27th March came as a shock. He says that to make such a payment without fear of subsequent tax penalties, it is the practice to obtain an approval from the Ministry of Finance in Ukraine which normally only takes 7 to 9 days but on 11th March, Ukraine was put into lockdown as a result of the Covid 19 pandemic, initially until 31st March but on the 25th March extended to the 24th April. He says that such approval was applied for in March but by the end of March it was clear it was not going to be received by 2nd April; that he had explained his difficulty to Mr Lodha and requested further time which was not forthcoming. He received approval on 20th May about 2 days after the Ministry again began to issue them.

14 Mr Zhevago expresses the belief that the real reason for the termination is that the claimant had found a buyer prepared to pay a higher price and he identifies an individual who had approached him prepared to pay £120 million who he supposes to be the person who has now agreed to purchase from the claimant.

15 Mr Markanday of the claimant's solicitors made the witness statement to support the application which sets out the background facts, exhibits the

documents and outlined the arguments. In paragraph 38 he says that, when it became clear that the defendants would not be able to make the third stage payment or complete the purchase, the claimant lost faith in the defendants. By that time another purchaser had expressed interest in the penthouse, two of the suites and three other apartments (i.e. not an identical package) and on the 1st April they had entered into a conditional sale agreement with that purchaser followed by an agreement for sale of a slightly modified package which depends on the removal of the unilateral notices by 1st May 2021.

The issues for determination

16 Under CPR 24.2 (so far as here material) the court may give summary judgment against a defendant on a claim or a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or issue and there is no other compelling reason why the claim or issue should be disposed of at a trial. I must not of course embark on a mini trial and if facts are, or might be, in issue I must make assumptions in the defendants' favour.

17 In this matter the claimant has limited its summary judgment application to the question whether the sale agreement has been terminated and whether the unilateral notices in respect of that agreement should be removed. I am not concerned with the question whether the deposit and second stage payment can be retained by the claimant or must be returned in whole or in part to the defendants.

18 Although it is for the claimant to satisfy me that the test for summary judgment is passed, the arguments have centred on the defendants' arguments that it is not. A number of other points are raised on the pleadings but the argument before me has been confined to three issues:

(1) If, as the defendants contend, the claimant was in breach of its obligations under clause 9.3 of the contract, could it terminate the contract?

(2) do the defendants have a real prospect of showing that relief from forfeiture is available?

(3) do the defendants have an arguable case for a lien for the return of the moneys paid, and does that lien entitle them to retain the UN1s on the register? This last point is not currently pleaded and, I was told, emerged shortly before skeleton arguments were due in correspondence between Counsel.

The clause 9.3 point

19 Clause 9 provides :

"9.1 the Seller shall use reasonable endeavours to procure construction of the Premises so that the NSA equals or exceeds the Agreed Square Footage of each of the Apartments.
9.2 If notwithstanding clause 9.1, the NSA of any of the Apartments is less than 95% of the Agreed Square Footage, then the Price shall be reduced by an amount which equates to the Per Square Foot Rate for each square foot by which the Apartments as built is less than 95% of the Agreed Square Footage.
*9.3 If notwithstanding clause 9.1, the NSA of any of the Apartments is less than 90% of the Agreed Square Footage for the Apartment, then the Buyer shall be entitled to serve a Determination Notice (**Determination Notice**) on each of the Seller and the Seller's Solicitors provided that the Determination Notice must be served within 20 Working Days (as to which time is of the essence) of the Seller notifying the Buyer of the NSA which it will do as soon as reasonably practical after such measurement is capable of being taken.*
9.4 If the Buyer serves a Determination Notice, the Buyer's obligation under the Agreement shall cease and determine and upon such determination the Seller shall repay the First Deposit and the Premium Second Advance Stage Payment and the Premium Third Advance Stage Payment (to the extent then paid by the Buyer) together with accrued interest so long as any moneys are held as stakeholder and the Seller shall have no further liability in respect of the Premises and the termination of this Agreement, and such determination shall be without prejudice to any antecedent breaches by the buyer"

20 The evidence is that the NSA for all elements of the premises equalled or exceeded the agreed square footage and on 16th June 2020 Plowman Craven issued an area measurement report to that effect. Mr McGhee argues that his client had not had access to the property to check this and in any event it is to be inferred that the point at which it must have become reasonably practical to measure the NSA would have arisen much earlier and therefore, regardless of the outcome of that measurement, the claimant was in breach of its obligation

under clause 9.3. I will deal with the argument on (i) the assumption (and of course making or implying no finding) that the claimant could have made the measurement earlier and was in breach of its obligation under clause 9.3 before the 29th April 2020 and (ii) without regard to the area measurement in the report.

21 Mr McGhee's argument is that, for the defendants, clause 9.3 is a valuable contractual right in that it enables the defendants to terminate the contract without risk and to recover the payments it has made. His argument is that whilst the claimant was in breach of its obligations under 9.3 it could not serve a notice under clause 3.5, for to find otherwise would be to enable the claimant to take advantage of its own wrong.

22 Given the skill of Mr McGhee, this argument was akin to being taken on an apparently smooth and comfortable carriage ride, but which, in fact, was over very bumpy ground which ultimately brought it to grief.

23 The difficulty for the defendants is that there is no nexus between the obligation on the defendants to make the stage payments under clause 3 and the claimant's compliance with clause 9 such as to make latter a condition precedent to the former, whether as a matter of construction or as an implied term. It was always entirely possible that both stage payments would fall due before it was reasonably practicable to measure the NSA and notify the defendants. Although clause 9.2 (a shortfall of 5% or more) might lead to an adjustment of the final purchase price it did not impact on the amount to be paid as the second or third stage payment which were expressed as fixed sums not as a percentage of the ultimate purchase price. Mr McGhee argued that all the relevant information rested with claimant and that if the claimant breached its obligation under 9.3 the claimant might exercise its right to terminate the contract and (on its case) forfeit the deposit and stage payments when, by its breach of contract, it had deprived the defendants of the opportunity to terminate the contract under 9.4 and recover those moneys. However, in my judgment, that does not follow, because the defendants would still have an action for breach of contract and hence the right to recover those moneys as damages for breach of contract. If it

does nothing else, clause 25.1 expressly preserves the right of either party against the other in respect of any antecedent breach of contract.

24 In respect of that argument, I therefore find that the defendants have no real prospect of success.

Forfeiture

25 At the centre of the argument based on forfeiture is the distinction between (i) the equitable jurisdiction to grant relief from forfeiture of a deposit or similar and (ii) the extent of the equitable jurisdiction to grant relief from the termination of the contract and loss of the right to specific performance.

26 The inconsistencies between clause 3 and clause 25 do not give rise to any difficulty given that a notice of termination was served on behalf of the claimant, and that notice was served more than 15 days after the date that payment of the third stage payment was due. I also do not need to be concerned with the oral discussions between Mr Zhevago and Mr Lodha because whatever indulgence may or may not have been informally agreed was spent by the time notice of termination was served on 29th April and Mr Zhevago's own evidence is that by email dated 27th March he asked Mr Lodha for further time and Mr Lodha was unwilling to grant it.

27 Ms Wicks argues that it is settled law that, save for two well established exceptions, the equitable relief from forfeiture is not available to grant relief from the termination of a contract for the sale of land. The two exceptions are (i) contracts which are in effect mortgages and (ii) landlord and tenant cases.

28 Ms Wicks accepts that a purchaser under a sale of land obtains an equitable interest which is of a proprietary nature but submits that, although historically a vendor's right to rescind was regarded essentially as security for payment of the purchase price, that it is no longer the law.

29 Her starting point is that a time condition in a contract is a condition breach of which is a repudiatory breach entitling the party to bring the contract to an end.

30 Her first authority is *Steedman v Drinkle* [1916] 1 AC 275 at 279 in which Viscount Haldane, having referred to the jurisdiction to decree specific performance in cases where justice requires it even though literal terms of stipulations as to time have not been observed, continues *" But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain".* Ms Wicks accepts that in this contract clauses 3.3 and 3.5 do not contain those precise words (although they are used elsewhere in the contract) but says that the provisions of clause 3.5 which expressly gives the claimant the right to treat the contract is discharged if payment is not received within 10 days, is to the same effect.

31 The law was reviewed in *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514 (Privy Council) where the vendor was held to have been entitled to terminate a contract and forfeit the deposit when the balance of the purchase moneys was tendered 10 minutes late. Ms Wicks took me to a number of passages in the judgment of Lord Hoffmann in particular on page 520. He there refers to the historical view citing Lord Eldon's L.C outburst in *Hill v Barclay* (1811) 18 Ves 56, 60 pointing to the uncertainty created where the contractual obligations are not respected. Lord Hoffman goes on to distinguish, on the one hand, the willingness of the court to grant restitutiory relief against penalties against, on the other, its unwillingness to grant relief by specific performance against breach of an essential condition as to time. The judgment concludes with his unqualified statement on page 523 dismissing the assertion of the appeal judge that the case *"cries out for the intervention of equity"* saying *"…on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract for the sale of land for failure to comply with an essential condition as to time, equity will not intervene"*.

32 In anticipation of Mr McGhee's reliance on the *Shiloh Spinners* case Ms Wicks referred me to *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd* [2019] 3 WLR 852 (a case on very different facts) in particular the speech of Lady Arden at paragraph 86 which makes the point that Lord Wilberforce's analysis

of the law in *Shiloh Spinners* did not establish any general power of intervention; equity did not mend or relieve against people's bargains and there are categories of cases in which equity did not grant relief.

33 In summary Ms Wick's argument is that although there may be a triable issue over whether the deposit and second stage payment should be repaid, that does not mean that the court can now grant the defendants specific performance of this contract.

34 Mr McGhee said that the claimant had agreed an extension until the 2nd April because of Mr Zhevago's tax issues and thereafter it was difficult to get approval because of Covid; since the 20th May the defendants had been ready to make the third stage payment and that the claimant was seeking to take advantage of the position to forfeit the money paid and enter into a more profitable contract. He said that this property was important to his client who had spent some 8 years looking for a suitable residence in London and would find it difficult to find a comparable property. Mr Zhevago wanted specific performance. Mr McGhee said it was not a question of waiver, estoppel or variation, the issue was relief from forfeiture and that if there was jurisdiction to grant relief then the question whether or not relief should be granted was a triable issue.

35 His starting point was *Shiloh Spinners Ltd v Harding* [1973] A.C. 691 at page 722 where Lord Wilberforce set out the debate over the extent of the equitable jurisdiction. At page 723G Lord Wilberforce said this: "*I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But is it consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court and where the forfeiture provision is added by way of security for the production of the result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful,*

of the gravity of the reaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach".

36 Mr McGhee argues that the absence of express words making time of the essence in respect of the stage payments makes all the difference. He points out that in *Steedman v Drinkle* it was an express term of the contract that time was of the essence and this was crucial to the decision. In that case a piece of land was sold for $16,000 and the purchaser let into possession on payment of a deposit of $1000. The balance of the purchase price was payable by six annual instalments and in default the purchaser was free to terminate the contract and retain the payments already made as liquidated damages. The Privy Council held that as time had been made of the essence, specific performance would not be decreed but the forfeiture of the money paid was a penalty from which relief should be granted on proper terms.

37 Mr McGhee contrasts *Starside Properties v Mustapha* [1974] 1 W.L.R 816. That was an unusual case where the purchaser agreed to purchase a house for £5,950 and was allowed into possession as licensee on payment of a £350 deposit; the balance of the purchase price and interest was to be paid by monthly instalments and after payment of £1,250 she was to be allowed to complete on payment of the balance, on default the vendors were allowed to retain the deposit; she fell into arears and the vendor purported to rescind the contract and required her to vacate the property. The Judge held that the provision was penal and stayed possession to give her time to raise the money to purchase at the contract price. Neither side appealed that order. She then applied to extend the time and the Court of Appeal held that there was jurisdiction to do so.

38 Mr McGhee argued that the difference between *Steedman* and *Starside* is that in *Steedman* there was an express provision that time was of the essence and not simply a provision entitling the vendor to rescind whereas in *Starside* there was not. However, that does not seem to me to have been the point at issue in *Starside*. The court had already granted time and that order had not been appealed, so the time for taking that point had passed; the point at issue in the

reported case was whether, having already granted time, that time could be extended.

39 It is fair to say that Edmund Davies L.J. at page 819F-H and Lawton L.J. at 825H agreed that the Judge had been right to grant time in the first place but it is clear that they regarded the rescission clause as penal It seems to me that this was a case turning very much on its own facts (the transaction was in substance very much akin to a mortgage) rather than laying down any point in principle relevant to the decision I have to make. *Starside* was cited in *Union Eagle* but is not referred to in the judgments.

40 Mr McGhee drew my attention to the passage in the *Union Eagle* case at page 518B to D that until a repudiatory breach has been accepted the party in default may repent and perform the contract according to its terms; however the court went on to point out that, once the time for payment had passed, performance of the contract was only possible on a different term which, absent waiver or estoppel, the vendor could not be compelled to accept. Mr McGhee stressed that *Union Eagle* was a case where there was an express provision that time was of the essence and submitted that is not the case here and that if the parties had intended clauses 3.4 and 3.6 to be 'drop dead' clauses they could have said so.

41 In reply Ms Wicks, in dealing with *Shiloh Spinners*, drew my attention to the following passage which preceded the extract cited above. Having set to one side cases where the court had been asked to relieve against conditions contained in wills or inter vivos gifts as raising conditions of a different kind from those relevant to contractual stipulations, Lord Wilberforce continued*: "Secondly no decision in the present case involves the establishment or recognition directly or by implication of any general power- that is to say, apart from the special heads of fraud, accident, mistake or surprise – in courts exercising equitable jurisdiction to relieve men's bargains. Lord Eldon L.C.'s firm denial of any such power in Hill v Barclay does not call for any revision or review in this case"*.

42 The question I have to decide is whether the defendants have a real prospect of showing that the court could and should grant specific performance of this

contract at the suit of the defendants, notwithstanding their failure to pay the third stage payment by the specified date and given that the claimants have exercised its contractual rights under clause 3.4 and 3.5 and 25.1 to treat the contract as discharged.

43 Although in this case the sums of money involved are very large for a residential property, and involved a purchase off plan with stage payments, the contract is in essence an ordinary contract for the sale of land, negotiated at length between solicitors for the parties. If the high value of the transaction has any relevance at all, then in my judgment, it is to make all the more important the need for commercial certainty.

44 I am not persuaded by Mr McGhee's argument that time was not of the essence in respect of the stage payments. Although those precise words could have been but were not used, the right of the claimant to treat the contract as discharged if the third stage payment was not received in due time was spelt out both in clause 3 and in clause 25. It is significant that in both clauses, a period of grace was built in, so the seller's right of termination was triggered not simply by the buyer's failure to make the payment on or before the due date but also during the further period permitted.

45 For those reasons, in my judgment, the defendants do not have a real prospect of successfully defending this issue. It is unfortunate for Mr Zhevago that the difficulties he was already facing in Ukraine were exacerbated by the impact of Covid 19, but that cannot affect the contractual rights of the parties. It also seems to me irrelevant to consider why the claimant has elected to bring the contract to an end. If that was his right under the contract (as I find it was) his motive is irrelevant.

The claim to a lien

46 Mr McGhee acknowledges that there is no reported case where a purchaser had successfully argued for a lien for repayment of moneys paid under a contract which had gone off through his own fault but, he submitted, it should make no difference. If, for example, a deposit is found to be excessive and in the nature

of a penalty, the purchaser, even if the cause of the contract going off, is entitled to recover all or part of that deposit; the vice lies in the demand for a penalty, not the reason why the contract went off.

47 Ms Wicks' response is that even though a purchaser in default might be entitled to recover all or part of the moneys paid under the contract there is no reason why the purchaser should be elevated to the rank of a secured creditor. Ms Wicks argued that for a lien to arise on the failure of a contract for the sale of land, the failure must have been the fault of the vendor. She relied on *Dinn v Grant* (1852) 5 De G & SM 451 for a clear statement that although the purchaser would have been entitled to a lien for moneys paid under a contract if it had failed through the vendors fault, he, the purchaser, had himself abandoned the contract and was therefore not entitled to a lien. By contrast, in *Rose v Watson* [1864] X H.L.C. 672 the purchaser rescinded a contract for misrepresentations made on the part of the vendor; as against the vendor's trustee in bankruptcy the purchaser was held entitled to a lien in respect of payments he had made pursuant to the contract. Megarry & Wade The Law of Property 9th Edition at paragraph 14.055 is unequivocal *'A purchaser can only assert a lien "where a purchase goes off by reason of some default on the part of the vendor"*.

48 Therefore, in my judgment the defendants are not entitled to maintain the UN1s on the basis of their claim for a lien.

49 For those reasons the claimant's application succeeds on both grounds.