Neutral Citation Number: [2014] EWHC 3947 (Ch)

Case No: HC-2012-000018

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

The Royal Courts of Justice
The Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 02/12/2014

Before :

MISS AMANDA TIPPLES QC

- -

Between:

(1) ALAN RONALD GEOFFREY HARDY	**Claimants**
(2) JULIET CAROLINE HARDY	
- and -	
(1) WILLIAM ROBERT GRIFFITHS	**Defendants**
(2) ANGELA MAY GRIFFITHS	

- -
- -

Mr Jonathan Seitler QC (instructed by Cripps) for the Claimants
Mr Stephen Brown (instructed by GoodLaw Solicitors) for the Defendants

Hearing dates: 20, 21, 22, 24 October 2014

- -

Approved Judgment

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

.....

Miss Amanda Tipples QC:

Introduction

1. Laughton Manor is a substantial country residence located a few miles to the east of Lewes in a beautiful area of East Sussex close to the South Downs. The house was designed and built in the mid-19th century by Sir James Duke Bart, a friend of Queen Victoria. It is said that the Italian style of the house, which includes a tower, has strong links with Osborne House on the Isle of Wight. In addition to the main house, Laughton Manor includes a walled garden, a cottage known as "the Pump House", a garage and flat, a small lake, a helicopter pad and 12 acres of land.

2. By a written contract dated 1 April 2011 the Defendants agreed to buy Laughton Manor from the Claimants for £3.6 million ("**the Contract**"). The deposit paid by the Defendants was £150,000 and the date for completion was 31 October 2011. However, by agreement between the parties, the date for completion was extended until 30 April 2012. Completion did not take place on 30 April 2012 and the Claimants' solicitors served a notice to complete. The Defendants failed to complete and the Claimants rescinded the Contract by a letter from their solicitors dated 16 May 2012.

3. The claim form in these proceedings was issued on 22 June 2012. Mr and Mrs Hardy (together "**the Claimants**") seek the following relief:

   (1) a declaration that the Contract has been rescinded or no longer remains on foot;

   (2) a declaration that the deposit of £150,000 and the accrued interest thereon is forfeited to the Claimants;

   (3) £210,000 as damages for breach of the Defendants' obligation under the Contract to pay a further deposit; and

   (4) £35,000 as damages for breach of a collateral agreement made between the parties in December 2011.

4. These claims are all disputed by Mr and Mrs Griffiths (together "**the Defendants**") mainly on the ground that, as a result of misrepresentation by the Claimants, it is the Defendants, and not the Claimants, who are entitled to rescind the Contract. The Defendants have counterclaimed for the following relief:

   (1) a declaration that the Defendants were entitled to rescind the Contract;

   (2) rescission of the Contract;

   (3) repayment of the deposit of £150,000, together with £15,000 that was paid as compensation to the Claimants;

   (4) damages for misrepresentation;

   (5) damages for breach of contract or repudiation; and

(6) a declaration that the agreed deposit was £150,000 and not 10 per cent of the purchase price (and the Claimants are not therefore entitled to payment of any further deposit).

5. The misrepresentations alleged by the Defendants are not based on fraud and this was accepted by Mr Brown, Counsel for the Defendants, on the first day of the hearing. However, after the evidence had finished Mr Brown did seek permission to amend the Defence and Counterclaim to plead fraud. I refused the application, for the reasons I gave at the time. The application was, apart from anything else, made far too late.

The facts

Witnesses

6. I heard evidence from Mr Hardy and Mr Griffiths. I also read the witness statement of Mrs Griffiths, which was agreed by the Claimants. The Claimants called Mr Nicholas Butler MRICS, who gave expert evidence as to likely condition of the property in the period from late 2010 until the Contract was entered into on 1 April 2011. The Defendants called Mr Stephen Hendrie MRICS, who inspected Laughton Manor on behalf of Coutts & Co on 3 May 2012.

7. There were a few factual discrepancies between the evidence of Mr Hardy and Mr Griffiths. These related to their recollection of events that happened four years ago. Mr Hardy gave careful answers to the questions he was asked. Mr Griffiths, on the other hand, found it difficult to simply answer the question put. This was because he could not resist arguing his case. Having observed them both give evidence, insofar as there is any difference in their recollection of relevant events, I prefer the evidence of Mr Hardy to that of Mr Griffiths.

October and November 2010

8. Laughton Manor was privately owned until 1930 when it was purchased by the Ministry of Health to be used as offices. It was sold in about 1990 by the Eastbourne Health Authority. The Claimants bought Laughton Manor in December 2006. Mr Hardy is a businessman and was engaged in brick production before he retired.

9. There are four floors to the main house at Laughton Manor, a lower ground floor, ground floor, first floor and second floor. The access to the tower is from the second floor. There is a balustrade around the house and, between the balustrade and the house, there is a sunken walkway which is at lower ground floor level. The lower ground floor is therefore at a lower level than the garden, but it is not below ground. The house has 44 rooms and, according to the estate agent's sales particulars, the house has a gross internal area of 1,227 square metres or 13,203 square feet. The lower ground floor is made of stone, which Mr Hardy described as "concrete like blocks". The other floors are made of brick. The other feature I should mention is that behind the main house there is a large area of grassland, some one or two acres, which has a gradual slope leading upwards away from the house.

10. In October 2010 the Claimants put Laughton Manor on the market for sale for £4.5 million. Their estates agents were Winkworth. The Defendants first visited the property on 9 October 2010.

11. Mr Griffiths is a Queen's Counsel. He is the joint head of chambers at 4-5 Gray's Inn Square, was called to the bar in 1974 and took silk in 1993. His principal area of expertise is in the law of planning and public law and he also has some experience in property and construction law. Mrs Griffiths is a solicitor whose practice was libel and employment law. At one point she was the managing partner of Oswald Hickson Collier & Co.

12. On 9 October 2010 the Defendants were taken round the main house by Mrs Sarah Turck, who worked for Winkworth. Mrs Turck began her tour of the main house with the guest cloakroom and she told the Defendants that this was the only part of the house which had not been totally refurbished by the Claimants. This was confirmed by Mr Hardy to the Defendants in a conversation which took place at the end of the viewing. This was important to the Defendants as they wanted to purchase a property which had been renovated and, as a result, was in very good condition.

13. During the course of the tour, Mrs Griffiths was concerned about a distinct smell of damp throughout the lower ground floor and also on the second floor, in the area just below the tower. Mr Griffiths did not notice any signs of damp or rot and he had no recollection of discussing the smell of damp with his wife. Indeed, Mr Griffiths said that he "tended to leave these things to my wife" and she took the lead in discussions with Mrs Turck and Mr Hardy. In any event, Mrs Griffiths raised her concerns about the smell of damp with Mrs Turck and Mr Hardy on 9 October 2010. In response, Mr Hardy told the Defendants that works had been carried out to the exterior of the house, including the roof and balustrade, to prevent damp penetration and Mr Hardy took the Defendants to the top of the house to show them the repairs that had been carried out.

14. Mrs Griffiths says that she also raised her concerns about the smell of damp in the lower ground floor on subsequent visits to the property (although it is not clear from her witness statement whether this was in October 2010 or February 2011), when she noticed a ventilation fan in the lower ground floor. Somebody suggested to her, although Mrs Griffiths cannot remember who made the suggestion, that the smell might be attributable to the sauna in the lower ground floor. Mr Hardy was asked about this in cross-examination. His evidence was that he did not think Mrs Griffiths had raised any issues with him about smells in the basement (by which he meant the lower ground floor).

15. The Claimants bought Laughton Manor in 2006 without a survey. The main house is a very large property and it was in disrepair. In particular, Mr Hardy explained that:

    (1) The roof needed mending as, only a week after the Claimants had moved in, it was leaking. Mr Hardy said that the roof needed major work to make it water-tight and this was done by re-felting and re-tiling it.

    (2) There were areas of penetrating damp. The cause of this was the deterioration in the teraline paint finish applied to the exterior of the building by the Eastbourne Health Authority. Mr Hardy said the cracks in the paintwork allowed water penetration which had then given rise to damp on the interior of the house. In 2007 and 2008 the Claimants re-painted the whole building and, at the same time, repaired the cracks in the paintwork and around the windows to stop water getting in.

(3) There was penetrating damp in the external walls of "the Oriental room", the large room at the southern end of the lower ground floor. In cross-examination Mr Hardy explained he was aware of this problem in early 2007. He said the cause of this damp was unfilled holes in the exterior of the house, which resulted from the removal of a metal fire escape. Every time it rained, water tracked into the house through these holes and that gave rise to damp in the Oriental room. The cracks in the teraline paint finish also contributed to the damp in this room.

(4) There was penetrating damp on an internal wall in the Oriental Room. This problem was identified in 2008. Mr Hardy explained that the cause of it was moisture accumulating in an unventilated blocked chimney and water then "tracking down the chimney" on the inside of the wall. Mr Hardy said this problem had been remedied in mid-2009.

16. The Claimants did a considerable amount of work to Laughton Manor. They restored the main house, put in new wiring and plumbing, put in new bathrooms and kitchens, rebuilt the walled garden and added a greenhouse, renovated the cottage, added a driveway to the main house, and cleaned out the lake and added a jetty so that boats could use the lake.

17. However, Mr Hardy was not aware of any rising damp in the main house and this particular type of damp was never apparent to him. I accept the evidence Mr Hardy gave about this. In addition to that, the builders who had been working at the property did not advise Mr Hardy, or his wife, that there were any problems with rot or damp and, as I have mentioned above, the Claimants had never had the property surveyed. Mr Hardy was very clear about these points in the evidence he gave in cross-examination. Further, it was clear from his evidence that Mr Hardy understood the difference between penetrating damp and rising damp, and he was well aware of the difference between damp and rot. Mr Hardy also gave evidence that he did not see any rot (whether dry rot or wet rot) in the main house, and he was not aware of any rot. I also accept that evidence. Mr Hardy's evidence in this regard is corroborated by the expert evidence of Mr Butler MRICS, which I also accept (see paragraph 64 below).

18. The Defendants visited the property for a second time on 16 October 2010. On 17 October 2010 the Defendants made an offer to buy Laughton Manor for £4.1 million, which was accepted by the Claimants on 18 October 2010. The parties agreed that the deposit would be £150,000, which was considerably less than 10 per cent of the purchase price.

19. On 19 October 2010 Winkworth sent out a memorandum of sale to the parties' respective solicitors. The solicitors were Ms Sally Firby of Cripps Harries Hall LLP for the Claimants and Mr Patrick Coni of Castles for the Defendants. Also on 19 October 2010 the Claimants' solicitors wrote to the Defendants' solicitors enclosing various documents, including the draft contract, office copy entries of the title documentation, planning documents and so on.

20. The Defendants visited Laughton Manor for a third time on 24 October 2010. The next day Mrs Griffiths emailed Mr Coni a detailed list of questions that the Defendants wanted him to investigate further with the Claimants. This list did not include any questions relating to damp in the main house. Mr Coni sent Ms Firby a three-page list of "Additional Enquiries before Contract" by email on 25 October 2010. This list must

have been sent after Mr Coni had received Mrs Griffiths' email, as several of her questions are incorporated into his list. Paragraph 2 of the Additional Enquiries asked:

> "2. For the purpose of historical perspective only, and not so as to obviate the need for survey, will the Seller please advise if the property has been subject to any of the following:-
>
> (a) flooding
>
> (b) rising damp, dry rot, wet rot or any other rot
>
> (c) woodworm or any other timber infestation
>
> (d) subsidence or landslip
>
> (e) any other structural or drainage defect."

This question was not in Mrs Griffiths' list and it must therefore have been one of Mr Coni's standard additional enquiries.

21. The Claimants' solicitors provided the "Replies to Additional Enquiries" in a document dated 26 October 2010 ("**the Replies**"), sent to the Defendants' solicitors. The Replies were provided in the following terms:

> "The replies given below (except in the case of any enquiry expressly requiring and given a personal reply from the Seller's solicitors) are given on behalf of the Seller and without responsibility on the part of its solicitors, their partners or employees. They are believed to be correct, but the accuracy is not guaranteed and they do not obviate the need to make appropriate third party searches, enquiries and inspections. The replies are given on the basis that they are limited to the period of the Seller's ownership of the Property and the Seller is only aware of and only has notice of matters within its actual knowledge.
>
> 1. …
>
> 2. The Sellers are not aware of any such issues but as you will appreciate this is an old property and therefore this reply cannot be taken as a warranty as to condition. In relation to (e) the sellers have advised that last summer part of the balustrade had to be replaced.
>
> 3. …"

22. On 26 October 2010 the Defendants told Mrs Turck that they were withdrawing their offer to buy Laughton Manor for £4.1 million. This was because Mrs Griffiths had done her own research with local agents in relation to the value of the property. Based on her research the Defendants took the view that £4.1 million was too much for the property. Mr Coni explained this to the Claimants' solicitors on 27 October 2010. He said that the Defendants' bank had queried the value of the property and the Defendants

had obtained another valuation which valued the property in the region of £3 million to £3.5 million. Mr Coni asked the Claimants' solicitors if their clients were interested in reviewing the purchase price. On 30 October 2010 the Defendants made a revised offer to purchase the property for £3.35 million. However, this offer was rejected by the Claimants the same day, and a further offer of £3.6 million was rejected by the Claimants on 13 November 2010.

23. The Defendants' change of mind over the purchase price did not have anything to do with the content of the Replies. Indeed, there is no evidence to show when the Defendants were sent the Replies by Mr Coni. For example, I do not know whether it was in October 2010 or at some later date and, in his evidence, Mr Griffiths was unable to remember when he read the Replies for the first time. The documents in the trial bundle do not provide any clues as to when Mr Coni might have sent the Replies to the Defendants. Indeed, given that the Defendants withdrew their offer to purchase the property on 26 October 2010, and the Replies are dated 26 October 2010, it is quite possible that Mr Coni did not receive the Replies from the Claimants' solicitors until 27 or 28 October 2010, by which time the deal was off. In these circumstances, Mr Coni may not have sent the Replies to the Defendants in October 2010 at all. However, it is clear from the correspondence that the Defendants had the Replies before 11 May 2012, but there is no evidence to show whether they received them and read them before or after they entered into the Contract on 1 April 2011.

Sale of land on the eastern boundary of Laughton Manor

24. On the eastern boundary of Laughton Manor there are some houses, which are referred to as "Wood Bungalows" on a land registry plan. The owners of these houses asked Mr Hardy if they could buy a small triangular area of land that was immediately to the south of their properties, and abutted the walled garden to the north. The land was an eighth of an acre in size. Mr Hardy took advice from his estate agent and was advised that, if he sold this land to the neighbours, it would not make any difference to the sale of Laughton Manor. His estate agent told him that the land was unimportant as there was still adequate land within the curtilage of Laughton Manor for the planting of trees to screen the neighbouring properties on the eastern boundary. On 15 January 2011 the Claimants agreed to sell this land for £2,000, plus costs, to a company known as Lodge Lane Management Company Limited ("**LLMC Ltd**"). Mr Hardy's email accepting the offer, which was sent to a Mr Mark Hartley, also said this: "What do you intend to do with the area? I would not want any trees removing, are you able to explain your plans?". In response to this Mr Hartley told Mr Hardy that the neighbours wanted the land in order to improve the approach to their houses. Mr Hardy instructed a local firm of solicitors in Lewes to deal with the conveyancing and this land was transferred to LLMC Ltd on 3 March 2011.

January to April 2011

25. In January 2011 the Defendants contacted Winkworth to see if Laughton Manor was still on the market. They were told that a new marketing campaign had begun. In February 2011 Mrs Turck told the Defendants that the Claimants might be more receptive to a lower purchase price. The Defendants visited the property again on 23 February 2011. On this occasion Mrs Griffiths raised a new concern with Mr Hardy relating to the main house being overlooked by the houses on the eastern boundary of Laughton Manor. The Defendants had not seen this as a problem in October 2010, as

the trees were still in leaf. However, Mrs Griffiths was worried about this when she visited the property in February 2011.

26. Mrs Griffiths explains in her witness statement that:

> "I raised this concern with Mr Hardy and with Mrs Turck on numerous occasions during February and March 2011 and I recall showing Mr Hardy from his study window [on the first floor of the main house] the area of particular concern and then standing in the garden with him whilst he reassured us that this matter could be addressed by dense planting and landscaping to an area of land adjacent to the walled garden. He suggested raising the land and then planting evergreens and other trees and shrubs to facilitate privacy".

27. However, Mrs Griffiths' witness statement does not explain precisely which area of land she understood Mr Hardy to be referring to when she says "he reassured us that this matter could be addressed by dense planting and landscaping to an area of land adjacent to the walled garden". There is, for example, no plan annexed to her witness statement identifying which area of land she is referring to within the curtilage of Laughton Manor. This is important because in February 2011 there was land adjacent to the walled garden to the north, north-west and west of the walled garden and this land was all within the curtilage of Laughton Manor. Mr Hardy explained in his evidence that he told Mrs Griffiths trees could be planted for the purposes of screening on a rectangular strip of land starting at the north-western edge of the walled garden, and extending due north to the edge of a drive (which is marked on the land registry plan, although I am not sure the drive still exists on the ground). This land was not the same land as the land he had agreed to sell to the neighbours via LLMC Ltd which, it is common ground, he did not mention to the Defendants. Mr Hardy accepted in cross examination that the land which had been sold to LLMC Ltd could also be used for screening the view of the houses to the east from the main house, but it was only half the land within the curtilage of Laughton Manor available for that purpose. In any event, this is neither here nor there as the Defendants knew that an area of land on the eastern boundary of Laughton Manor had been sold by the Claimants to the neighbours before they entered into the Contract on 1 April 2011. If they were worried about this, they should have investigated the position before they entered into the Contract. They only have themselves to blame for not doing so.

28. On 17 March 2011 the Defendants visited the property once more. The Defendants were accompanied by an architect as they wanted to obtain a preliminary view as to the historical status of the house and its potential for designation as a listed building. The issue that the main house was overlooked by the neighbours was raised again by Mrs Griffiths with Mr Hardy, and Mr Hardy repeated the suggestions he made to Mrs Griffiths in February 2011 about screening. It is common ground that he did not mention to the Defendants that, by this time, the Claimants had sold the small area of land to the north of the walled garden to LLMC Ltd.

29. On the evening of 17 March 2011 Mrs Turck emailed the Defendants to tell them that that week there had been considerable interest in Laughton Manor and "one firm offer" had been received by the Claimants. Mrs Turck's email also referred to "the question

of the neighbouring property" and she told the Defendants that, in her view, she thought this issue could be overcome "with clever screening".

30. On 30 March 2011 the Defendants made another offer to buy Laughton Manor for £3.575 million. They proposed that contracts be exchanged on 30 April 2011, the deposit be £150,000 and that completion should take place on 31 October 2011, or earlier if agreed. That offer was rejected, but on 31 March 2011 the Claimants accepted the Defendants' offer of £3.6 million.

31. Contracts were exchanged by the parties' solicitors under Law Society Formula "B" at 18.55 on 1 April 2011.

32. In relation to this:

    (1) Mr Griffiths' recollection is that the Claimants, via Mrs Turck, told the Defendants they would only accept the offer of £3.6 million if they exchanged contracts the next day.

    (2) The deposit was £150,000 and the completion date was 31 October 2011 "or by mutual agreement between the parties".

    (3) The Defendants understood from Mrs Turck that, if they did not exchange contracts on 1 April 2011, then the Claimants would sell Laughton Manor to the purchaser she had mentioned in her email on 17 March 2011 who had made a higher offer. The Defendants did not know who had made this higher offer.

    (4) On the afternoon of 1 April 2011 Mr Coni telephoned Mr Griffiths to tell him that land on the eastern boundary of Laughton Manor had been sold off by the Claimants. Mr Griffiths then telephoned Mrs Turck and explained to her that, in these circumstances, the Defendants were reluctant to exchange contracts. Mrs Turck telephoned Mr Griffiths back and told him, based on what she said she had been told by the Claimants, that the land was of no strategic importance in terms of value or landscaping potential and could probably be bought back from the neighbours.

    (5) When Mr Griffiths found out that the land on the eastern boundary had been sold, he was reluctant to tell his wife about it. This is because he knew she would be concerned about it. However, she found out about this from Mr Coni, and she then telephoned her husband to discuss the matter with him.

    (6) Mr Griffiths was much keener on the property than Mrs Griffiths, and Mr Griffiths thought there was a real risk the Defendants would lose the property if they did not exchange that day. In cross-examination Mr Griffiths explained his decision making on the afternoon of Friday 1 April 2011 in these terms:

> "[Laughton Manor] is a beautiful property. My wife expressed great anxiety to me about exchanging…. I spoke to Sarah Turck more than once. I agonised over the situation. I did not want to lose the property. My wife was less keen than me to go ahead. For once I got my way. We had been looking for a beautiful country house and we thought we had

> found it. In half to one hour we had to make a decision whether to exchange or not …".

(7) Having persuaded his wife to go ahead with the transaction, by a fax sent at 16.41, Mr Griffiths instructed Mr Coni to "exchange contracts on the terms we discussed with a completion dated 31 October 2011".

(8) When contracts were exchanged Mr Griffiths did not know the precise area of land that the Claimants had sold to LLMC Ltd.

33. Further, before exchanging contracts the Defendants had not obtained any professional advice from a surveyor as to the physical condition of the main house. Rather, the only professional advice the Defendants obtained was from an architect, and that was an initial view as to whether the main house could be listed. In addition to that, there is no evidence that the Defendants had read the Replies before contracts were exchanged (see paragraph 23 above).

The Contract

34. The Contract incorporated the Standard Conditions of Sale (Fourth Edition), together with a number of special conditions (which prevail in the event of a conflict with the standard conditions).

35. Special condition 10 provided that:

> "The Buyer agrees that no representation whether oral or written concerning the Property has been made to it by or on behalf of the Seller which has influenced or persuaded it to enter into this contract or any contract collateral to this contract except representations made by the Seller's conveyancers in writing before the date of this contract."

36. The following standard conditions were express terms of the Contract:

> **3.2 Physical state**
>
> 3.2.1 The buyer accepts the property in the physical state it is in at the date of the contract unless the seller is building or converting it.
>
> **6.8 Notice to complete**
>
> 6.8.1 At any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete.
>
> 6.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.
>
> 6.8.3 On receipt of a notice to complete:

(a) if the buyer paid no deposit, he is forthwith to pay a deposit of 10 per cent.

(b) if the buyer paid a deposit of less than 10 per cent (no less than £500), he is forthwith to pay a further deposit equal to the balance of that 10 per cent deposit.

7.1 Errors and omissions

7.1.1 If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission, the remedies available are as follows.

7.1.2 When there is a material difference between the description or value of the property, or of any of the chattels included in the contract, as represented and as it is, the buyer is entitled to damages.

7.1.3 An error or omission only entitles the buyer to rescind the contract:

(a) where it results from fraud or recklessness, or

(b) where he would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect.

7.2 Rescission

If either party rescinds the contract:

(a) unless the rescission is a result of the buyer's breach of contract the deposit is to be repaid to the buyer with accrued interest.

(b) the buyer is to return any documents he received from the seller and is to cancel any registration of the contract.

7.5 Buyer's failure to comply with notice to complete

7.5.1 If the buyer fails to complete in accordance with a notice to complete, the following terms apply.

7.5.2 The seller may rescind the contract, and if he does so:

(a) he may:

(i) forfeit and keep any deposit and accrued interest,

(ii) resell the property and any chattels included in the contract,

(iii) claim damages.

(b) the buyer is to return any documents he received from the seller and is to cancel any registration of the contract.

7.5.3 The seller retains his other rights and remedies.

37. There is no issue under standard condition 3.2.1 that the Claimants were not selling or converting the property. The Defendants paid the deposit of £150,000 by cheque which was sent by Mr Coni to the Claimants' solicitors under cover of his letter dated 4 April 2011.

June 2011

38. The Defendants visited the property on 12 June 2011 and on the same day met with the neighbours who, through LLMC Ltd, had purchased land on the eastern boundary of Laughton Manor from the Claimants. Mrs Griffiths' evidence is that they arrived early to inspect the land in question. She says that to their "horror" they discovered that the land was "extremely significant" and the neighbours had no intention of selling the land back to the Defendants. The Defendants did not mention any of this to the Claimants at the time. In fact, the first time the Defendants complained about this was when the Defence and Counterclaim was served in August 2012.

October 2011 to April 2012

39. On or about 1 September 2011 the Claimants asked the Defendants if the date for completion could be extended, as their new home at Normandy House, Wallands Crescent, Lewes was not yet ready for occupation. By agreement between the parties the date for completion was extended until 9 January 2012 and this was recorded in a deed of variation dated 14 October 2011.

40. On 28 November 2011 Mr Griffiths contacted Mrs Turck to say there was a risk that the Defendants might not be able to complete on 9 January 2012. This information was relayed to Mr Hardy, together with the information that the Defendants were selling two properties. These properties were the Defendants' home in Hampstead and a flat in Brighton.

41. Mr Hardy discussed the situation with Ms Firby, and on 2 December 2011 there was a meeting between Mr Hardy, Mr Griffiths and Ms Turck at the Hotel du Vin in Brighton in order to discuss the possibility of extending the completion date. Mr Hardy took the view that "the solution" was to stick with Mr Griffiths and he agreed to extend the completion date to 30 April 2012. However, he was only prepared to do so on the terms agreed on 2 December 2011 which are recorded in a letter signed by the Defendants on 6 December 2011 and a further letter (in almost the same terms) dated 14 December 2011 which is also signed by both Defendants.

42. These terms reflect the fact that the Claimants would have to bear the cost of two homes, for a further period of 3.5 months. Mr Hardy explained this to Mr Griffiths at their meeting on 2 December 2011 and said that the "running costs" of Laughton Manor were £10,000 per month. Mr Hardy was asked about these costs in evidence. He said that:

    (1) The Claimants had bridging finance in place with EFG Private Bank Ltd, and that needed to be extended to correspond with the delayed completion date and the additional interest paid in the meantime. The cost of this was £16,700 or thereabouts a quarter.

    (2) The other costs were Council Tax which was £1,602.81 from 30 September 2011 to 30 March 2012; insurance which was £3,300.52 for the twelve months from 28 October 2011; heating which was, on average, £700 per month; and the cost of looking after the garden, which was not specified.

43. The letter of 14 December 2011 which is addressed to the Claimants and is signed by each of the Defendants says this:

> "Further to our meeting in Brighton on Friday December 2nd 2011 we confirm the following:
>
> 1) It is agreed that the completion date for the purchase of Laughton Manor is extended to April 30th 2012 as documented in a deed of variation of even date.
>
> 2) The deposit of £150,000 may be used by the Vendors for their own purposes prior to the completion date and is therefore released to the Vendor as agent.
>
> 3) On the basis you have informed us that the running costs for Laughton Manor are £10,000 per month, we agree to pay you £10,000 per month. The first payment will be made on January 9th 2012 and thereafter on the 9th day of each successive month until the date of actual completion. The first payment is non-returnable but thereafter there will be a pro rata daily reduction in the payment if completion is achieved during a subsisting month.
>
> 4) We will give you three weeks' notice in writing in the event that we are able to complete prior to April 30th 2012."

44. Based on that collateral agreement with the Defendants (which I shall refer to as "**the Side Agreement**"), the parties entered into a deed of variation on 19 December 2011 and the Contract was varied to extend the completion date to 30 April 2011.

45. The Defendants paid £10,000 in January 2012. However, they only paid £5,000 in February 2012. Mr Hardy contacted Mr Griffiths directly by telephone to find what was happening in relation to the Defendants' monthly payments. Mr Griffiths told Mr Hardy he was having difficulty paying and, as Mr Griffiths explained in his witness statement, it was agreed that:

> "there was no requirement to make further monthly compensation payments until the actual date of completion and that the sums accrued would be added to the calculation of the purchase price. They would be payable on the actual date of completion... It was also true that this arrangement would relieve me from having to make the £10,000 monthly payments which were quite a heavy financial outlay."

46. This arrangement, which was a variation of the Side Agreement, was then confirmed in a letter from the Claimants' solicitors to the Defendants' solicitors dated 14 March 2012. By a letter dated 24 April 2012 the Claimants' solicitors reminded the Defendants' solicitors, as a result of this arrangement, a further sum of £25,000 was due from the Defendants to the Claimants on 30 April 2012.

47. In the meantime on 26 March 2012 the Claimants moved out of Laughton Manor into their new home in Lewes.

48. On 28 April 2012 the Defendants' solicitors emailed the Claimants' solicitors and asked for the completion date to be extended until 28 June 2012 on the basis that "Mr Griffiths pays to Mr Hardy upkeep costs of £10,000 per month". The email then went on to say that "Mr Griffiths will be able to complete the purchase on the above date and in the event that he doesn't, Mr Hardy will have his contractual remedies". The Claimants said they would only extend the completion date if they were paid £300,000 by Defendants on 30 April 2012. This sum represented the balance of the 10 per cent deposit and compensation for the delayed completion. The Defendants did not agree to this.

49. On Monday 30 April 2012 the Claimants' solicitors gave the Defendants notice to complete under standard condition 6.8. The notice drew the Defendants' attention to the consequences set out in "[standard] condition 7.5 and elsewhere which will result from failure to complete the Contract within ten working days after service of this notice (exclusive of the day of service)". The Claimants' solicitors sent this notice to the Defendants' solicitors by email and by post.

50. On 8 May 2012 the Claimants' solicitors wrote to the Defendants' solicitors referring to the notice to complete and stating that "You will no doubt have advised your client that the balance of the 10% deposit under the contract is payable. Please could you arrange for the balance to be sent through".

51. Mr Griffiths contacted Mrs Turck and requested a meeting with Mr Hardy at the Hotel du Vin in Brighton on 11 May 2012 to discuss Laughton Manor. Mrs Turck emailed Mr Hardy to tell him that Mr Griffiths said the purpose of the meeting was:

> "for [Mr Griffiths] to discuss meeting the full deposit sum in exchanging (sic) for you agreeing to extend the completion date. I have also made him aware of the need to meeting the compensation costs also."

52. Mr Hardy refused Mr Griffiths' request for a meeting.

53. The Defendants instructed their solicitors to write to the Claimants' solicitors on 11 May 2012. In this letter the Defendants objected to paying the balance of 10 per cent of the deposit, said that the Claimants could not retain the deposit that had been paid, alleged that the Contract had been repudiated by reason of the Claimants "excessive and unreasonable demands" for payment and false representations as to the true condition of the property. The letter then referred to "their Surveyors Report" dated 4 May 2012, which was a reference to the report of Mr Hendrie (see paragraphs 57 to 59 below). The letter concluded by stating that "if [the Claimants] choose to rescind the contract, they will have brought any loss suffered on themselves and will forfeit the right to any deposit or damages" and as a result of the alleged misrepresentations the Defendants would claim recovery of the deposit and £15,000 compensation paid to the Claimants. The purpose of this letter from the Defendants' solicitors was to keep the Contract on foot and, even if the Defendants had any grounds for saying the Contract had been repudiated, that repudiation was not accepted by the Defendants in this letter. Further, the Defendants did not give notice accepting the alleged repudiation in the subsequent letter from their solicitors dated 1 June 2012.

54. There are three other points worth noting about this letter:

(1) In the opening paragraph the Defendants' solicitors say on instructions that a deposit of £150,000 was paid and accepted on exchange of contracts because "it was made known [to the Claimants] that [the Defendants] were willing to exchange [on 1 April 2011] only on the basis that that sum was the agreed deposit, because they had not yet sold their principal property, 6 Rosecroft Avenue". This point is repeated at paragraph 4(a) of the Defence and Counterclaim. There is no factual basis for it. This is because this point about the amount of the deposit, and the reason it was £150,000 (and therefore not 10 per cent of the purchase price) was not mentioned in the Defendants' emails of 30 or 31 March 2011 and it is not a matter that was discussed over the telephone by the Defendants with Mrs Turck or Mr Coni on 1 April 2011. Indeed, it was not until late August or early September 2011 that Mr Hardy found out that Defendants intended to sell their London property. He was told this by Mrs Turck as she knew that the Defendants were having difficulty selling their home in Hampstead and for that reason thought the Defendants might be amendable to the Claimants' request for an extended completion date. Further, if there had been any discussion and agreement prior to exchange on 1 April 2011 that no further deposit could be claimed by the Claimants, one would not expect to see standard condition 6.8.3(b) as a term of the Contract (cf the variations to standard conditions 2, 4 and 7). Whereas in this case standard condition 6.8.3(b) is a term of the Contract.

(2) The letter's opening paragraph continues by stating that "… because of the delayed completion date (8 months) the property would not be the subject of a survey until closer to the completion date. It was on that basis that the contract was signed". This point is repeated at paragraph 4(b) of the Defence and Counterclaim. There is no factual basis for this point either. It was the Defendants' decision not to have a survey when they entered into the Contract on 1 April 2011. There was no discussion, let alone agreement, with the Claimants that the Defendants would arrange for the property to be surveyed at a much later date.

(3) The letter does not complain about the Claimants' sale of land to LLMC Ltd. I can only think that this was not raised in the letter because it was not an issue at the time. The reason it was not an issue is set out in Mr Hendrie's report dated 4 May 2012 which records that, by May 2012, Mr Griffiths had arranged to purchase separately "a small irregularly shaped area of land adjacent to the small houses on the east boundary" and "by including this area in the property, marketability will be significantly improved". The first time the Defendants made any complaint about the Claimants' sale of land to LLMC Ltd was when they served their Defence and Counterclaim in August 2012.

55. The Defendants were required to complete the transaction by 15 May 2012. They failed to do so. The reason for this appears to be because they had not sold their house in Hampstead and, until that property was sold, they did not have the funds to complete the purchase of Laughton Manor.

56. By a letter dated 16 May 2012 the Claimants rescinded the contract with immediate effect and "in accordance with SC 7.5.2 of the Standard Conditions (4th Edition)". The letter also responded to the Defendants' solicitors' letter dated 11 May 2012, invited the Defendants to withdraw the allegations of misrepresentation demanded payment of £210,000 claimed under the Contract and £35,000 under the Side Agreement.

Mr Hendrie's inspection of Laughton Manor: 3 May 2012

57. In the meantime on 3 May 2012 the main house at Laughton Manor was inspected by Mr Hendrie MRICS. This was some 20 months after the Defendants first visited the property in October 2010 and six weeks after the Claimants had moved out of the property in March 2012. Mr Hendrie was instructed by Coutts & Co, the Defendants' bankers, in relation to the Defendants' application for a mortgage. In his written report dated 4 May 2012 Mr Hendrie recommended the property as suitable for a mortgage and did not consider that any special conditions should be imposed. He did not consider that any additional reports were required, such as a structural engineers report, drains test or "timber/damp proofing".

58. Mr Hendrie then provided these comments in his report:

> "While parts of the interior are presented to reasonable traditional standards, other sections would benefit from improvement. Works will be expensive because of the size of the building… There is various rising and penetrating dampness which may be difficult to eliminate. The basement suffers from extensive rising dampness and local wet and dry rot. This timber decay may affect sections of the structure which were covered, unexposed or inaccessible during our inspection. Repairs should be made to prevent further deterioration. The outside of the building has a painted finish which is deteriorating. Stucco details are deteriorating. These areas will require regular and expensive maintenance."

59. The report went on to explain that Mr Griffiths had arranged to purchase a further 8.5 acres of land in two lots adjacent to Laughton Manor. Mr Hendrie valued Laughton Manor at £3.55 million in the condition it was in in May 2012. He valued it at £4

million if the additional 8.5 acres of land was also included. The Defendants received Mr Hendrie's report before 11 May 2012.

60. Mr Hendrie was another careful witness. He explained that, although he could see that the main house needed works doing to it, these works were not substantial enough to require a further report, a further inspection or any retention. Mr Hendrie was asked about the contents of the report in his evidence, and his findings of rot and damp. He annotated a plan to show that he had seen damp in the south-facing walls of the Oriental Room and gymnasium, and also in three areas in the walls around the store room at the north-eastern end of the lower ground floor. It was also on the lower ground floor that Mr Hendrie saw local areas of wet rot in the skirting boards and in the timber of an internal window reveal. He said he saw one area of dry rot, which he said was historic.

61. Towards the end of his evidence Mr Hendrie volunteered that it had been "lashing" with rain in April 2012. Mr Hendrie was asked how he knew this. He explained that he remembered arriving at the property on 3 May 2012 in "terrible rain" and that it had been raining in the days beforehand. He said that on 16 October 2014 he had looked at the computer readings for a weather station located 15 miles from Laughton Manor for the period May 2011 to May 2012. He said that because he had remembered the heavy rain, he looked this information up in preparing to give evidence. It was from those weather reports that he knew that there was exceptionally heavy rain in the area between December 2011 and April 2012. He also said that there was a phenomenal amount of rain in December 2011. Indeed, Mr Butler comments in his report on the long period of wet weather during the spring and early summer in 2012.

62. Mr Hendrie explained that the consequence of this very heavy period of rain was that the water would have been absorbed into the grassland behind the main house and it would have drained down the gradual slope on this grassland to the lowest point. He explained that the lowest point was the walkway around the main house and, once there, the weight of the water would have caused the rising dampness in the walls on the lower ground floor. Another factor Mr Hendrie identified as contributing to the rising damp problem he saw was water-proof cement rendering on the inside of the walls in the lower ground floor, which he said would have done more harm than good. Mr Hendrie was not an expert under CPR Part 35. However, he could give evidence based on what he saw on 3 May 2012 and I held that his evidence was admissible on that basis (see *Rogers v. Hoyle* [2014] 3 W.L.R. 148).

Mr Butler's inspection of Laughton Manor: 14 May 2013

63. On 14 May 2013 Mr Butler was instructed by the Claimants to survey the main house and provide an opinion in the form of a report that assessed, given the current condition of property; (i) the likely condition of the property in late 2010 to 1 April 2011, the date of the Contract; (ii) whether there is evidence that the defects alleged by the Defendants would have existed on 1 April 2011; and (iii) whether such defects would have been evident to the reasonable owner acting without any specialist knowledge. Mr Butler inspected the property on 16 May 2013 and his report, which was prepared in accordance with CPR Part 35, was dated 29 August 2013.

64. Mr Butler summarised his conclusions at the end of his report in the following terms:

> "16.1 I am of the opinion that the likely condition of the property in late 2010 to the date of exchange [1 April 2011] was good. There may have been some deterioration to external elements such as rendering on the roof parapets and stonework, but no more than I would normally expect in a property of this age and type. I would expect such defects to be made good during the course of routine maintenance and redecoration.
>
> 16.2 I do not agree that the defects claimed by [the Defendants] to have existed as at 1 April 2011 were present, except for the local dry rot outbreak to the window frame in the electricity meter room, some local deterioration to the paint finish on the outside of the property and possibly some local dampness at lower ground floor basement level.
>
> 16.3 I am of the opinion that the alleged defects were not present and/or were not evident to a reasonable owner acting without any specialist knowledge, except for the painted finish on the outside of the property and the deteriorating stucco details. I am of the view that a reasonable owner would not be alarmed by such defects and would expect to have these repaired during routine maintenance/redecoration."

65. Mr Butler was cross-examined by Mr Brown. However, the Defendants did not call any expert evidence to counter Mr Butler's evidence and I accept the evidence contained in his report, together with the conclusions he expressed set out above.

66. On 17 May 2013 the Claimants sold Laughton Manor to a Mr Horne for £3.6 million. Prior to the purchase Mr Horne obtained a building survey prepared by C J Rusling BSc (Hons) MRICS. Mr Rusling's report is dated 3 April 2013 and runs to some 41 pages. This report does not actually help me to determine any of the issues in this case as it relates to the condition of the main house more than two years after the Contract, and more than 2.5 years after the Defendants first visited the property on 9 and 16 October 2010 and the Replies were served.

Conclusions

67. The answers to the issues I have to decide are determined by the terms of the Contract and the Side Agreement.

Standard condition 7.1.3: are the Defendants entitled to rescind the Contract?

68. There are no grounds upon which the Defendants are entitled to rescind the Contract under standard condition 7.1.3(a). This is because fraud is not alleged against the Claimants. However, Mr Brown sought to persuade me in his closing submissions that he could still rely on "recklessness". I do not agree with this. Recklessness in this context is, as Mr Seitler Q.C. correctly pointed out on behalf of the Claimants, a different way of putting fraud. Lord Herschell explained this in *Derry v. Peek* (1889) 14 App. Cas. 337 at p. 368:

> "Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knows to be false, or did not believe to be true."

69. I should also add this. Having heard all the evidence there is no basis for any allegations of fraud or recklessness against the Claimants. This is because:

    (1) I am quite satisfied that Mr Hardy, whether by himself or through Mrs Turck, did not mislead the Claimants in any way about the condition of the main house.

    (2) In October 2010 Mr Hardy did not know that there was any rising damp, wet or dry rot in the lower ground floor of the main house. In the light of Mr Butler's report, there is no reason why he or his wife should have known this.

    (3) I do not accept the evidence contained in Mr Griffiths' witness statement that Mr Hardy told the Defendants in October 2010 that "there were no problems relating to dampness, local wet and dry rot. My wife specifically raised this issue with Mr Hardy as we walked around the house with him". This is because, although Mrs Griffiths' evidence explains that she raised her concerns about the smell of damp, she does not give any evidence that she raised the matter specifically in these terms with Mr Hardy. Given that Mrs Griffiths took the lead in asking Mr Hardy questions, and that Mr Hardy's evidence was that he never gave the Defendants an assurance in these terms, I find that Mr Griffiths' recollection here is inaccurate.

    (4) Mr Hendrie's observations about rising damp in the main house were formed 20 months later, in May 2012. This inspection took place after a significant period of rain between December 2011 and April 2012, and that period of heavy rain was more than a year after Mr Hardy had taken the Defendants round the main house in October 2010.

70. The Defendants do not rely on standard condition 7.1.3(b), which is not relevant in the present context as completion did not take place.

Standard condition 3.2.1: caveat emptor

71. The Defendants accepted Laughton Manor in the physical state it was in at the date of the Contract. That is the effect of standard condition 3.2.1 which gives effect to the basic common law rule of *caveat emptor*. Defects of physical quality are regarded as patent defects which prima facie a vendor of land is not required to disclose. The responsibility for their discovery is placed by the law on the purchaser and it is for that reason purchasers commonly obtain a professional survey of the land before entering into the Contract. For reasons best known to themselves, the Defendants entered into the Contract without any professional advice from a surveyor and, having done so, they cannot now complain that they contracted to buy a house that suffered from rising damp and rot.

Special condition 10: the Non-reliance Clause

72. The Claimants maintain that the only representations which are actionable are those "made by the [Claimants'] conveyancers in writing before the date of this contract": special condition 10 (paragraph 35 above). Further, to be actionable such representations must give rise to "a material difference between the description or value of the property" and, if they do, the buyer is only entitled to claim damages: standard condition 7.1.2.

73. However, clause 10 is an exclusion clause and there is an issue as to whether it is fair and reasonable. The Defendants say it is an unreasonable exclusion and is of no effect pursuant to section 3 of the Misrepresentation Act 1967. In his skeleton argument Mr Brown, Counsel for the Defendants, mentioned *Springwell Navigation Corporation v. JP Morgan Chase Bank* [2010] 2 C.L.C. 705, CA.

74. However, Mr Seitler drew my attention to *FoodCo UK LLP (T/a Muffin Break) v. Henry Boot Developments Limited* [2010] EWHC 358 (Ch). In *Foodco v. Henry Boot* Lewison J listed, at paragraph [177] five particular features relevant to the assessment of fairness and reasonableness of a condition, such as clause 10 in this case, in a contract for the disposition of land. Lewison J's approach was approved by the Court of Appeal in *Lloyd v. Browning* [2013] E.W.C.A. Civ 1637 at [24] and [36]. The approach set out in *Foodco v. Henry Boot* is, it seems to me, the correct approach in the present circumstances and I find that special condition 10 is fair and reasonable. This is because:

    (1) It provides certainty and the aspiration of certainty is a reasonable one for the parties to adopt.

    (2) There was no imbalance of bargaining power between the parties. Indeed, Mr Hardy is an experienced businessman. The Defendants are both experienced lawyers. The parties were in an equal bargaining position.

    (3) The parties were each advised by conveyancing solicitors in relation to the Contract.

    (4) Clause 10 was a special condition, and was open to negotiation. However, no point was taken on it by the Defendants or their solicitors.

    (5) The clause expressly permitted reliance on any reply given by the Claimants' solicitors. If, therefore, something of importance had been stated in the course of negotiations upon which the Defendants wished to rely, the Defendants' solicitors only had to ask the Claimants' solicitors the relevant question. That would have revealed whether the Claimants were prepared to formalise the statement so that the Defendants could rely on it or whether the Defendants would have to undertake their own due diligence.

75. This means that the only representations the Defendants can possibly seek to rely on are those made by the Claimants' solicitors in writing before the Contract was entered into on 1 April 2011.

76. The only document that is relevant here is the Replies, which was provided in answer to the Additional Enquiries before Contract. In the present context the only relevant question is 2(b), which is set out at paragraph 20 above. The question itself makes it quite clear that the answer is required "for the purpose of historical perspective only, and not so as to obviate the need for survey".

77. The Replies stated that:

    (1) They were given by the Claimants' solicitors on behalf of the Claimants.

    (2) They were believed to be correct, but the accuracy of the replies was not guaranteed.

    (3) They did not obviate the need to make appropriate third party searches, enquiries and inspections.

    (4) They were given on the basis that they were limited to the Claimants' ownership of the Property.

    (5) They were given on the basis that the Claimants were aware of and only had notice of matters within their own knowledge.

    (6) The Claimants were not aware of any issues relating to rising damp, dry rot, wet rot and other rot. I find that this answer from the Claimants was true.

    (7) The Claimants pointed out that Laughton Manor was an old property and therefore this reply could not be taken as a warranty as to condition.

78. The Claimants gave a truthful answer to question 2(b) of the Additional Enquiries. Further, if the Defendants were really worried about issues such as rising damp, dry rot, wet rot or any other rot, then item 2 of the Replies, together with the opening paragraph of the Replies, made it quite clear that they should get a professional survey. However, this was something they chose not to do.

79. The other fundamental problem the Defendants have here is that, although the Replies were sent to their solicitor Mr Coni, there is no evidence that the Defendants read the document themselves before they entered into the Contract. If the Defendants did not read the Replies, then they cannot have relied on them.

80. The Defendants were aware that the Claimants had sold off land to LLMC Ltd before they entered into the Contract. Given that the Defendants knew this, I do not see that the Claimants can have misrepresented the position to the Defendants. However, even if I am wrong about this (which I do not think I am), all the alleged representations were made orally by Ms Turck (and not even the Claimants), and are therefore excluded by special condition 10. Likewise, special condition 10 also excludes all the representations made in an estate agent's brochure and particulars of sale, any representations made orally by Mr Hardy that the property had been totally refurbished, the contents of an email from Mrs Turck to the Defendants dated 29 October 2010 and what is reported as having been said by Mr Hardy in an article in *The Times*.

81. There are no actionable representations upon which the Defendants relied when they entered into Contract.

Standard condition 6.8.3(b): Can the Claimants recover the further deposit?

(i) The parties' arguments

82. It is the Claimants' case that they are entitled to payment of a further deposit of £210,000. This sum represents the balance of a 10 per cent deposit, namely £360,000 (10 per cent of the purchase price) minus £150,000 (the deposit paid).

83. The Claimants say that they are entitled to this sum as damages for breach of contract based on the following propositions:

(1) The right to payment of a further deposit arose under standard condition 6.8.3(b) when the Defendants received the notice to complete. The Defendants received the notice to complete on or before Wednesday 2 May 2012. There is no dispute about this.

(2) That right to payment arose *before* the Claimants' right to rescind arose under standard condition 7.5.2. This is because the Claimants' right to rescind arose, at the earliest, ten working days *after* a notice to complete had been given under standard condition 6.8.2. The Claimants therefore had a crystallised right to claim the further deposit under standard condition 6.8.2 before the Contract was rescinded by the Claimants' solicitors letter dated 16 May 2012.

(3) There is no inconsistency between standard conditions 6.8.3(b) and 7.5.2. The Claimants' rights under standard condition 6.8.3(b) can co-exist with the Claimants' contractual rights to rescind under standard condition 7.5.2.

(4) On 2 May 2012 the Claimants had a crystallised right to sue for the unpaid further deposit. That right was acquired prior to rescission of the Contract on 16 May 2012 and survived rescission of the Contract. Mr Seitler said this was analogous to a landlord's right to pursue a claim for terminal dilapidations.

(5) The Claimants are entitled to claim damages for breach of the obligation to pay the further deposit, the measure of which is the amount of the further deposit.

(6) The Claimants have pleaded their claim as a claim for damages, rather than as agreed sum they can recover in debt. The Claimants say that this is clear from paragraphs 6.1 and 6.3 and 9.1 to 9.3 of the Particulars of Claim dated 22 June 2012.

84. It is the Defendants' case that the Claimants are not entitled to payment of £210,000 in respect of a further deposit because, as Mr Brown explained in his skeleton argument, to order such payment of a further deposit would be:

> "contrary to a significant number of authorities where it has been held that the contractual rescission of a contract for the sale of land precludes recovery of the unpaid balance of the deposit and does not entitle the vendor to enforce the provisions of the rescinded contract. That is what [the Claimants] are seeking to do in this instance by their reliance on [standard] condition 6.8.3(b)."

The authorities referred to by Mr Brown were *Johnson v. Agnew* [1980] A.C. 367 at p. 392H-393B, *Lowe v. Hope* [1970] Ch. 94, *Johnson v. Jones* [1972] N.Z.L.R. 313 (which follows *Lowe v. Hope*), *Lyon v. Magnet Nominees PTY Ltd* [1978] V.R. 673 (which follows *Lowe v. Hope* and *Johnson v. Jones*).

85. Mr Brown cited *Johnson v. Agnew* in order to direct my attention to one particular sentence in the well-known passage of Lord Wilberforce in his speech at 392H-393B where, having set out some uncontroversial propositions of law concerning contracts for the sale of land, Lord Wilberforce said this:

> "At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the cases of an accepted repudiatory breach the contract has come into existence but has been put to an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission ab initio."" (underlining added)

Mr Brown relied on the words I have underlined to support his argument that, if there is a contractual right to rescind, then the principles of rescission ab initio apply and those principles apply in relation to the Claimants' decision to rescind the Contract under standard condition 7.5.2. He submitted that that must be the right conclusion as that avoids the "rather unpleasant situation that these parties find themselves in" in this case, given the Claimants have suffered no loss on the re-sale of Laughton Manor but are seeking to recover what he referred to as "a very large windfall".

86. Mr Seitler did not refer me to any authorities on this particular issue. In reply he sought to distinguish *Lowe v. Hope* on the basis that case was a claim for payment of the deposit in debt, whereas in this case the Claimants' claim for £210,000 is a claim in damages arising out of a breach of standard condition 6.8.3(b).

87. Following the hearing I drew the attention of Counsel to *Damon Compania Naviera SA v. Hapag-Lloyd International SA ("The Blankenstein")* [1985] 1 W.L.R. 435 and *Firodi Shipping Limited v Griffon Shipping LLC ("The mv Griffon")* [2014] 1 C.L.C. 1. I invited further written submissions from the parties as to the relevance of these authorities, which relate to shipping contracts. Mr Seitler submitted that they reinforced the Claimants' claim to damages on the basis summarised above. Mr Brown advanced the following arguments on behalf of the Defendants:

(1) The Claimants made an express election to terminate the Contract in accordance with standard condition 7.5.2 and, on making that election, they chose to retain the deposit already paid, resell Laughton Manor and claim damages for any difference in value. The Claimants are entitled to nothing more than this.

(2) The Defendants do not dispute the principle found in *The Blankenstein* that rights which have crystallised prior to the acceptance of a repudiatory breach are not extinguished on the subsequent acceptance of that repudiation by the innocent party. However, the Claimants have chosen *not* to treat the failure to complete as a repudiatory breach and they have not put their case on this basis. Rather, they have elected to terminate the Contract under conditions 7.5.1 and 7.5.2 and, having chosen to do so, the Claimants are not entitled to a further deposit. This is because payment of a further deposit is in these circumstances inconsistent with the standard condition 7.5.2.

(3) Standard condition 7.5.2 provides for rescission by agreement, as summed up at paragraph 22-025 of *Chitty on Contracts* (31st Edition). The effect of the Contract being rescinded under standard condition 7.5.2 is that the Contract is completely discharged and cannot be revived. Mr Brown then referred to *Chitty* at paragraph 22-026 and *The Law of Rescission* (2008) O'Sullivan, Elliott and Zakrzewski at paragraph 1.11.

(4) Even if the Claimants had chosen to treat the failure to complete as a repudiatory breach and accepted it, they would still not have been entitled to the further deposit of £210,000 by reliance upon standard condition 6.8.3(b). This is because:

a) This is not a right that had accrued as in *The Blankenstein* and *The mv Griffon*. Rather, the right to the further deposit was "conditional upon further performance by [the Claimants] and the continued existence of the Contract"; alternatively

b) The further deposit is in the form of a part payment of the purchase price and not an earnest for performance of the Contract, and that also distinguishes the facts of this case from *The Blankenstein* and *mv Griffon*. In this context Mr Brown drew attention to the short period of time between the Defendants' receipt of the notice to complete and the time for completion.

(5) Finally, *The Blankenstein* and *The mv Griffon* are not authorities for the proposition that, even if the Claimants had treated the failure to complete the Contract as a repudiatory breach which they accepted, they would have a claim in damages for the further deposit.

(ii) The relevant law

88. Given the Defendants' reliance on *Lowe v. Hope*, I need to say something about the various authorities I have mentioned above.

89. In *Lowe v. Hope* there was a written agreement for the purchase of land. The purchaser was required to pay a deposit of 10 per cent of the purchase price. The deposit was £629. The purchaser only paid £40 towards the deposit, and then failed to complete the purchase. The vendor started proceedings and then applied for judgment in default of defence. The relief sought by the vendor was a declaration that the deposit of £40 had been forfeited to him, an order that the purchaser pay the unpaid balance of the deposit

of £589, and an order that the agreement be rescinded. The purchaser appeared in person at the hearing and was not called upon by Pennycuick J.

90. Pennycuick J. referred to statement in *Williams on Vendor and Purchaser*, 4th Ed (1936), Vol. 2 at p. 1006 (which Mr Brown quoted an extract from in his skeleton argument) and, by approving and applying the principles contained in Mr Cyprian Williams' statement, held at p. 98F-G that:

> "Applying those principles in relation to a deposit payable under the contract of sale but not in fact paid by the purchaser, it seems to me that the vendor having elected to bring the contract to an end by rescission is not entitled to insist on the performance of the contract in relation to the deposit. This is admittedly so, in so far as the deposit bears the character of part of the unpaid purchase price. It seems to me it must equally be so, in so far as the deposit bears the character of a pledge; for once the vendor has rescinded the contract there are no outstanding obligations of the purchaser in respect of which the vendor can be entitled to be protected by a pledge.
>
> It would, I think, be quite contrary to principle that a vendor having rescinded a contract so that the contract is at an end should at that stage be entitled to insist that the purchaser shall hand over to him a contractual pledge with a view to its forfeiture."

91. Pennycuick J. then referred to the earlier decision of *Dewar v. Mintoft* [1912] 2 K.B. 373 and "with much diffidence" reached the view that it was "contrary to the principles applicable in this connection" and declined to follow it (p. 99G). In *Dewar v. Mintoft* which is the earliest authority on this point, a farm was sold at auction to the defendant purchaser. The purchaser, without having paid any deposit, refused to carry out the contract of purchase. The farm was re-sold and the loss suffered by the vendor was less than the amount of the deposit. The vendor sued for the deposit. Horridge J rejected the purchaser's argument that the only damages which could be recovered were the actual loss and damages on resale and ruled that "the defendant could not put himself in a better position by refusing to pay the deposit than if the deposit had in fact been paid, in which case it could be retained by the seller … and … directed the jury that damages should be [calculated accordingly]" (p. 387-8).

92. Accordingly, in *Lowe v. Hope* Pennycuick J. refused to order the purchaser to pay the balance of the deposit. In *Buckland v. Farmar & Moody* [1979] 1 WLR 221 Goff L.J. said at p. 237C-D that he very much doubted whether the view of Mr Cyprian Williams as to effect rescission, and which Pennycuick J. had relied on in *Lowe v. Hope*, was correct.

93. *Johnson v. Agnew* was decided by the House of Lords in March 1979 and, for present purposes, the important passage of Lord Wilberforce's speech is set out in paragraph 85 above. However, equally as important is the passage just before it at p. 392E-H in which Lord Wilberforce set out the following uncontroversial propositions of law:

> "First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.
>
> Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.
>
> Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance."

94. Further, p. 395G Lord Wilberforce agreed with the passage in Goff L.J.'s judgment at p. 237C-D in *Buckland v. Farmer & Moody* (which I have mentioned at paragraph 92 above). Lord Wilberforce then went on to highlight the dangers of placing reliance on textbook authority for an analysis of judicial decisions and, in relation to another passage in the fourth edition of *Williams on Vendor and Purchaser*, described it as being "on the face of it a jumble of unclear propositions not logically related to each other" (p. 395H).

95. In *Millichamp v. Jones* [1982] 1 WLR 1422 Warner J. was referred to a note in *The Conveyancer and Property Lawyer* in 1975 entitled "Bouncing Deposits" which pointed out that the authorities on the consequences of non-payment of a deposit required to be paid by a contract for the sale of land were difficult to reconcile (p. 1427H). He was invited to reconcile the authorities, but he declined to do on the basis that it was a matter for the Court of Appeal (p. 1428A). However, Warner J observed at p. 1428C-E that it seemed to him that the decision of Pennycuick J. in *Lowe v. Hope* not to follow *Dewar v. Mintoft* had been invalidated by the House of Lords in *Johnson v. Agnew*, and that *Johnson v. Agnew* showed that *Dewar v. Mintoft* had been rightly decided.

96. *Lowe v. Hope* was considered by the Court of Appeal in *The Blankenstein*. In that case the sellers wanted to sell three ships for US$2,365,000. On 8 July 1977 the main terms of the agreement, which incorporated the Norwegian Saleform Agreement 1966, were arrived at. Clause 2 provided that, as security for the correct fulfilment of the agreement, the buyers should pay a deposit of 10 per cent of the purchase money on signing the contract. By clause 13, if the purchase money was not paid in accordance with the agreement, the sellers had the right to cancel the contract in which case the deposit was forfeited to them and if the deposit did not cover the sellers' loss they were

entitled to claim further compensation for any loss and for all expenses together with interest at the rate of 5 per cent per annum. The memorandum of agreement was not signed (although the contract was acknowledged in telexes) and, notwithstanding requests from the sellers, the deposit was not paid by 12 August. On 15 August the sellers notified the buyers that the contract had been withdrawn, reserved their right to compensation and sold the ships for US$2,295.000. The sellers claimed the amount of the deposit.

97. The Court of Appeal held that there was a binding contract (notwithstanding that the memorandum of agreement had not been signed) and, by a majority, that the sellers were entitled to damages for the buyer's repudiation of the contract, the measure of damages being the amount of the deposit: see pp. 449F-452B per Fox L.J. and p. 457C-D per Stephenson L.J. Robert Goff L.J. dissented on this point. He held that the sellers were entitled to damages for their loss of bargain, namely, the difference between the contract and market price of the ship, which was less than the amount of the deposit. However, he accepted that if the deposit had fallen due before the contract had been terminated the sellers could claim the deposit in debt: see p. 456F.

98. In dealing with the issue as to whether the sellers could recover the amount of the unpaid deposit, Fox LJ explained at p. 448D that there were two matters which have to be considered:

> "First, what rights did Hapag-Lloyd [the sellers] have under the contract, in relation to the deposit, immediately prior to the acceptance by Hapag-Lloyd of the repudiation? Secondly, what was the effect upon those rights of the acceptance of the repudiation?"

99. In the course of dealing with the first question Fox LJ said at p. 449F-H:

> "Damages for breach of contract are a compensation for the loss which the plaintiff has suffered through the breach. Accordingly, the plaintiff is entitled to be placed in the same position as if the contractual obligation had been performed. In the present case, if the obligation had been performed, Hapag-Lloyd [the sellers] could have sued Damon [the purchaser] in debt for the amount of the deposit and it seems to me that that should be reflected in the damages recoverable for breach of the obligation. The fact that Hapag-Lloyd would thus recover an amount of damages greater than the general loss of the bargain for sale does not seem to me to be a conclusive answer. The purpose of the deposit was to protect Hapag-Lloyd against the event which actually happened, namely the failure by Damon to complete."

100. In relation to the second question, namely the effect of the acceptance of the repudiation, Fox L.J. said at p. 450E-451B:

> "This is not a case where the contract was rescinded because of something affecting its formation. It was put an end to by

> Hapag-Lloyd [the sellers] because of breach of contract by Damon [the purchaser] …
>
> The acceptance of Hapag-Lloyd of Damon's repudiation, therefore, did not affect any rights to which it was entitled under the contract and which had already accrued. The right to damages for failure to sign the memorandum was, it seems to me, such a right. Thus, in my view, there was a promise to sign the memorandum; upon signature by Damon the deposit was payable; and the deposit was forfeitable if the purchaser wrongfully failed to complete. Because of Damon's failure to sign, Hapag-Lloyd suffered damage because the deposit was not payable… Thus far, therefore I would conclude that Hapag-Lloyd is entitled to recover the amount of the deposit by way of damages for breach of contract even though the amount of the deposit exceeds the amount of the general damages. It is said, however, that such a conclusion is inconsistent with *Lowe v. Hope* [1970] Ch. 94 which was, in fact, a more straightforward case then the present because under the contract the obligation to pay the deposit had clearly arisen."

101. As to *Dewar v. Mintoft* and *Lowe v. Hope*, Fox L.J. said this at p. 451F-H:

> "Mr Moore-Bick contends that *Dewar v. Mintoft* is to be preferred to *Lowe v. Hope* because rescission by the injured party only releases the party in breach from future obligations. I think that is right. In deciding *Lowe v. Hope* [1970] Ch. 94 Pennycuick J. did not have the advantage of the decision in *Johnson v. Agnew* [1980] A.C. 367 and the clarification of the law which it contained. Pennycuick J. remarked that it was admittedly the case that if the vendor has accepted the purchaser's repudiation, there can thereafter be no recovery in respect of money bearing simply the character of purchase price. That is correct but it is dealing with a different problem. A purchase price is payable in return for a conveyance and if the obligation to convey has gone because of the acceptance of the repudiation there is no longer a purchase and sale to which a purchase price can be related. The right of the vendor to forfeit the deposit is not, however, dependent upon completion of the purchase. The right to forfeit arises out of the breach and is, therefore, something quite different from the right to receive the purchase money in return for a conveyance.
>
> The result, in my view, is that *Dewar v. Mintoft* [1912] 2 K.B. 373 was rightly decided."

102. Therefore, it seems to me that *Lowe v. Hope* has been regarded as incorrect since at least November 1984 when the Court of Appeal handed down its decision in *The Blankenstein*. The same must apply to the two commonwealth authorities Mr Brown referred me which followed *Lowe v. Hope* namely, *Johnson v Jones* and *Lyon v. Magnet Nominees Pty Ltd.*

103. *The Blankenstein* was considered in *Samarenko v. Dawn Hill House Ltd* [2013] Ch. 36 in which the Court of Appeal decided that failure to pay a deposit on time under a contract for a sale of land is ordinarily a repudiatory breach of contract entitling the seller to terminate the contract. It is to be noted that, with reference to *The Blankenstein*, Lewison L.J. said at p. 46D-E:

> "Moreover Robert Goff L.J. clearly stated that non-payment of the deposit would entitle the seller to bring the contract to an end. In this respect there can be no distinction in principle between a contract for the sale of ships and a contract for the sale of land. This is demonstrated by the court's reliance in *[The Blankenstein]* on both ship contract and land contract cases. That decision is entirely consistent both with the nature of a deposit and with the general approach of the law to repudiation and renunciation of contracts."

104. *The Blankenstein* was recently applied by the Court of Appeal in *The mv Griffon*, in which *Samarenko v. Dawn Hill House Ltd* was also cited. In *The mv Griffon* the sellers agreed to sell the ship to the buyers for US$22 million and on 1 May 2010 the parties executed a memorandum of agreement based on the Norwegian Saleform 1993 (NSF 1993), which is the most commonly used form of contract for the sale and purchase of second hand tonnage. Clause 2 of the memorandum of agreement required a 10 per cent deposit to be paid within three banking days of signature. The deposit was not paid by 5 May 2010. On 6 May 2010 the sellers accepted the buyers' conduct as repudiation and exercised its contractual right under clause 13 of the contract to cancel the agreement and claim compensation. The first limb of Clause 13 provided that:

> "13. **Buyers' default**
>
> Should the deposit not be paid in accordance with Clause 2, the Sellers shall have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest."

105. The sellers claimed the unpaid deposit of US$2,156,000. The buyers accepted that the failure to pay the deposit was a repudiatory breach, but argued that the sellers' damages were limited to US$275,000 being the difference between the contract price and market value. The buyers argued that the sellers were not entitled to the deposit because, under the terms of the NSF 1993 (unlike NSF 1966), a deposit was neither payable nor forfeitable if unpaid before termination of the contract (p. 8F-H). This argument was rejected by the Court of Appeal. Tomlinson L.J. (with whom McFarlane L.J. and Sir Brian Leveson agreed) said at p. 9D-E:

> "[10]. The basic fallacy in this argument is that limb 1 of clause 13 does not prescribe what is to happen if the deposit is unpaid. It does no more than to afford the sellers an express contractual right or rights exercisable in the event that the deposit is not paid. These contractual rights are to be distinguished from those which arise under the general principles governing discharge by breach. The right to cancel given by limb 1 of clause 13 is not dependent upon proof that failure to pay the deposit on time is repudiatory

> in nature. Indeed, until the decision in *Samarenko v Dawn Hill House Ltd* [2013] Ch 36, it would not have been clear cut that a failure to pay the deposit on time is, without more, repudiatory of the Buyers' obligations. Limb 1 of clause 13 therefore confers upon Sellers a valuable contractual remedy over and above the remedy which they already enjoy at common law, the availability of which latter remedy is attended by uncertainty. That uncertainty was greater before the decision of this court in *Samarenko,* and thus at the time when limb 1 was introduced. Whatever the position now, a contractual remedy of termination which has no need to characterise the defaulting Buyers' conduct as repudiatory is a valuable addition to the Sellers' armoury. The circumstances out of which Buyers' repudiation must be spelled out are not always clear cut. *A contractual right of termination exercisable upon the happening or non-happening of an event usually brooks of less argument. The express entitlement to compensation together with interest for losses and expenses is also at least a valuable clarification of a right to which the Sellers were in any event entitled at law, which is henceforth made available as an express term of the contract*." (emphasis added).

106. Tomlinson L.J. said that the proper approach to the contractual analysis is therefore that adopted by Fox LJ in *The Blankenstein* at p. 448D (quoted at paragraph 98 above). The Court of Appeal held that the deposit was an earnest of performance, the right to receive it was unconditional, and was "plainly not conditional upon the contract being performed by the Sellers, nor can it sensibly be regarded as in any other sense conditional" (p. 10D-E).

107. Tomlinson LJ expressed his conclusion on the facts in these terms at p.11A-D:

> "[14]. Thus on 5 May the Sellers were invested with an accrued right to receive and thus to sue for the deposit as an agreed sum forfeitable in the event of failure by the Buyers correctly to fulfil the agreement. It is trite law that in construing contract 'one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption'… Limb 1 of clause 13 does not provide clear and express words intended to deprive Sellers of their accrued right to sue for the deposit…
>
> [15.] On 6 May Sellers both accepted Buyers' repudiatory breach in failing to pay the deposit on time as terminating the agreement and exercised their right to cancel the agreement afforded by limb 1 of clause 13 thereof. The rights unconditionally acquired by the Sellers prior to termination survive the termination. Accordingly, I agree with the judge that the Sellers retain the right to sue for the deposit as an agreed sum which they may simply recover in debt. Alternatively, the Sellers have an accrued right to sue for damages for breach of

> the obligation to pay the deposit, the measure of which is the amount of the deposit."

108. Accordingly, the Court of Appeal held that the sellers could recover the deposit of US$2,156,000.

109. In the light of the authorities the position is therefore:

(1) *Lowe v. Hope* has been regarded as incorrect since the decision of the Court of Appeal in *The Blankenstein*.

(2) There is no authority to support Mr Brown's general proposition that rescission of a contract for the sale of land pursuant to the seller's contractual right to rescind:

a) precludes recovery of the unpaid balance of the deposit;

b) results in the contract being terminated *ab initio* so that unperformed obligations intended to remain enforceable after the contract has been brought to an end are somehow dissolved or discharged.

(3) There is no reason to distinguish between contracts for the sale of land and contracts for the sale of ships in the present context. *The mv Griffon* is an example of a case where the sellers exercised their contractual right to cancel the agreement because the buyers had failed to pay the deposit on time and, so doing, the rights unconditionally acquired by the sellers prior to termination of the contract survived the termination (p. 11D).

(4) The rights unconditionally acquired by the vendor of land prior to the exercise of his contractual right to rescind, survive the rescission of the contract. That is unless the contract for the sale of land contains clear express words divesting or discharging the vendor of any such rights.

(5) The failure to pay the deposit under a contract for the sale of land gives the vendor:

a) the right to sue for the deposit as an agreed sum which can be recovered in debt, or

b) an accrued right to sue for damages for breach of the obligation to pay the deposit, the measure of which is the amount of the deposit.

(iii) Consequences

110. The issues are:

(1) What rights did the Claimants have under the Contract, in relation to the further deposit, immediately prior to the Claimants exercising their contractual right to rescind under standard condition 7.5.2?

(2) What was the effect upon those rights upon the Claimants' contractual rescission under standard condition 7.5.2?

111. Standard condition 6.8.3(b) was a term of the Contract. The Defendants paid a deposit of less than 10 per cent and they received a notice to complete on or before 2 May 2012. On receipt of the notice to complete they were under an obligation forthwith to pay a "further deposit equal to the balance of that 10 per cent deposit". That obligation, which was unconditional, arose immediately when the notice to complete was received by the Defendants.

112. The further deposit that falls due for payment under standard condition 6.8.3(b) is, in my view, an earnest for performance. This is because:

    (1) The sum the buyer is obliged to pay under this standard condition is described as a "further deposit". It is not described as an instalment or part payment of the purchase price.

    (2) The customary deposit in relation to the sale of land in the United Kingdom is 10 per cent of the purchase price. In the event the buyer is obliged to pay a "further deposit" under standard condition 6.8.3(b) the buyer will be obliged to pay a total deposit of 10 per cent of the purchase price. This is no more than the customary deposit, although the obligation to pay it arises in two stages.

    (3) Payment of a further deposit after the service of a notice to complete, and therefore part way through the contractual relationship, does not alter the fundamental nature and purpose of the deposit (see *Samarenko v Dawn Hill House Ltd* at 46H-47I, per Lewison LJ). Indeed, the obligation to pay the further deposit after the service of a notice to complete in circumstances where the buyer has not paid a 10 per cent deposit is entirely consistent with the further deposit being an earnest (or guarantee) for performance of the contract. The seller is still entitled to know whether the buyer is serious about the contract or not and, to that end, look to the buyer for payment of the further deposit.

    (4) Mr Brown did not argue that the further deposit payable under standard condition 6.8.3(b) was a penalty or otherwise excessive in the present context.

113. The Defendants failed to pay the further deposit on or after 2 May 2012. The Claimants were therefore, to use the words of Tomlinson LJ in *The mv Griffon*, "invested with an accrued right to receive and thus sue for" the further deposit as an agreed sum forfeitable in the event of failure by the Defendants to correctly fulfil the Contract (see p. 11A). Further, there is no provision in standard condition 6.8 or 7.5 or elsewhere in the Contract to divest the Claimants of their accrued right to sue for the further deposit.

114. The Defendants failed to comply with the notice to complete and, on 16 May 2012, the Claimants' exercised their right to rescind the agreement provided by standard condition 7.5.2.

115. Standard condition 7.5.2 gives the seller an express contractual right to rescind the contract in the event that the buyer fails to complete in accordance with a notice to complete. This contractual remedy of rescission carries with it the right for the seller to (i) forfeit and keep any deposit and accrued interest, (ii) resell the property and any chattels included in the contract, (iii) claim damages. In addition to the contractual right to rescind, the seller retains his other rights and remedies: standard condition 7.5.3. The fact that the seller has these rights in the event he chooses to rescind the contract

under standard condition 7.5.2 means that, on rescission by the seller, it is quite clear that the contract is not rescinded ab initio. Rather, standard condition 7.5.2 is a means by which a contract for the sale of land which has come into existence can be put to an end. This means that any rights unconditionally acquired by the seller prior to rescission of the contract survive the rescission. The consequence of the seller exercising its contractual rights under standard condition 7.5.2 is not that any accrued rights are then discharged or that the contract is terminated ab initio. Further, the present situation cannot, as Mr Brown suggested, be characterised as "rescission by agreement". The passages Mr Brown referred to in *Chitty* (paragraphs 22-025 and 22-026) are irrelevant in the present context.

116. Accordingly the Claimants' unconditional right to payment of the further deposit survived exercise by the Claimants of their right to rescind the Contract. The Claimants could have sued for the deposit as an agreed sum, which they could have sought to recover in debt. Equally the Claimants were entitled, as they have done, to sue for damages for breach of the obligation to pay the further deposit, the measure of which is the amount of the further deposit.

117. The Claimants are entitled to claim these damages under standard condition 7.5.2(a)(iii). This is because:

    (1) If, the seller rescinds the contract, he may claim damages under this provision in the Contract.

    (2) The seller is entitled to pursue any claim for damages in respect of accrued rights under this standard condition. This provision is not limited to any loss suffered by the seller on re-sale of the property. If the standard condition was limited in this regard, then one would expect to see express words saying so. There are no such words.

118. Alternatively, given that Claimants' other rights and remedies are retained, then it seems to me that they could also have claimed damages under standard condition 7.5.3.

(iv) Other points

119. Finally, in the Defence and Counterclaim the Defendants have alleged that, if the Claimants had any rights to a further deposit under standard condition 6.8.3(b), any such rights were lost by reason of variation of the Contract, waiver or estoppel by agreement or conduct. These points are without substance. There was no variation to standard condition 6.8.3(b) by reason of the deeds of variation dated 14 October 2011 or 14 December 2011 or as a result of the Side Agreement. The factual basis for the waiver and estoppel points are not particularised in the Defence and Counterclaim. Further, there is no evidence to support any contention that the Claimants did anything to encourage the Defendants to believe they were giving up their rights under standard condition 6.8.3(b) which the Defendants then relied upon to their detriment.

(v) Result

120. The Claimants are entitled to damages of £210,000 in respect of the Defendants' breach of standard condition 6.8.3(b) of the Contract.

Standard condition 7.5.2(a)(i): forfeiture of the deposit

121. The Defendants failed to complete in accordance with the notice to complete and the Claimants' rescinded the Contract by their solicitors' letter dated 16 May 2012. The Claimants are therefore entitled to forfeit and keep the deposit of £150,000 under standard condition 7.5.2(a)(i). The deposit had in fact been released to the Claimants in December 2011 as a result of the Side Agreement. The Claimants were also entitled to resell the property under standard condition 7.5.2(a)(ii) in these circumstances, which they did in May 2013.

122. The Defendants have not pleaded a claim for the return of the deposit under section 49(2) of the Law of Property Act 1925. After the evidence, and before closing speeches, they sought permission to amend the Defence and Counterclaim to add this claim. I refused that application, for the reasons I gave at the time. However, even if this claim had been pleaded, there is in my view nothing special or exceptional in this case which would have justified the return of the deposit of £150,000 paid by the Defendants: see *Omar v. El-Wakil* [2002] 2 P. & C.R. 36 and *Midill (97PL) Ltd v. Park Lane Estates Ltd* [2009] 1 W.L.R. 2460.

Clause 3 of the Side Agreement, as varied: Claimants' claim for damages

123. In breach of the terms of the Side Agreement the Defendants failed to pay the Claimants the sums agreed to cover the costs of Laughton Manor down to the date of completion on 30 April 2012. The Claimants' rights under the Side Agreement are additional to their rights under the Contract.

124. Looking at the terms of the Side Agreement, the Defendants agreed to pay the Claimants a monthly sum based on what the Claimants said were the running costs until 30 April 2012, and not beyond that date. This was the *quid pro quo* for extending the date for completion from 9 January 2012 until 30 April 2012. The figure of £10,000 was, it seems to, me a broad-brush estimate by Mr Hardy of the monthly costs of keeping on Laughton Manor. In the light of the evidence it appears that Mr Hardy's estimate was a generous one. However, he did not represent to the Defendants that this figure had been calculated with mathematical accuracy and, given the extension of time sought by the Defendants to complete the Contract, he was entitled to take a broad-brush approach. The Defendants failed to pay £5,000 for February 2012, and £10,000 for each of March and April 2012. The Claimants are therefore entitled to damages of £25,000 under the Side Agreement. I do not think that they are entitled to £10,000 for May 2012 as the obligation was to pay this monthly sum until 30 April 2012. If the Defendants failed to complete on 30 April 2012, then they were entitled to exercise their rights under standard conditions 6.8.1, 6.8.3(b) and 7.5.2 which they duly did.

The counterclaim

125. The counterclaim is dismissed.