Neutral Citation Number: [2019] EWHC 805 (Ch)

Case No: CH-2018-000274

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM DEPUTY MASTER COUSINS

Rolls Building,
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 01/04/2019

Before :

Mark Cawson QC
Sitting as a Deputy Judge of the High Court

- -

Between :

ALEXANDER KUZNETSOV	**Claimant**
- and -	
LONDON BOROUGH OF CAMDEN	**Defendant**

- -
- -

Simon Williams (instructed by under **the Public Access Scheme**) for the **Claimant**
Matt Hutchings QC (instructed by **Camden Borough Council**) for the **Defendant**

Hearing date: 21 March 2019

- -

Approved Judgment

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

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MARK CAWSON QC

MARK CAWSON QC

1. This is an appeal against the decision of Deputy Master Cousins reflected in an order dated 21 September 2018 whereby he:

   (a) acceded to an application dated 5 February 2018 whereby the Defendant sought an order that the Particulars of Claim dated 18 September 2016 be struck out under CPR 3.4(2)(a), and dismissed the claim; and

   (b) dismissed a cross application dated 13 May 2018 whereby the Claimant sought permission to amend the Particulars of Claim in an attempt to forestall the application to strike out the Particulars of Claim as originally formulated.

2. Permission to appeal was granted on a limited basis by Morgan J on 29 November 2018.

3. The Claimant is represented, as he was below, by Mr Simon Williams, and the Defendant is represented, as it was below, by Mr Matt Hutchings QC. I am grateful to them both for their helpful written and oral submissions.

Background

4. The Claimant held a long leasehold interest in 150 Bacton, Haverstock Road, London NW5 4PS registered at HM Land Registry under title number NGL803753 ("**the Property**"). The Property was within a block of flats forming part of the Bacton Estate, Gospel Oak, Camden ("**Bacton Estate**"), the freehold of Bacton Estate, and thus the freehold reversion to the Property, being vested in the Defendant.

5. On 25 April 2013 the Defendant was granted planning permission for the redevelopment of the Bacton Estate and other land, including the construction of 290 dwellings and 3 employment units. The planning permission was amended by further planning permissions dated 9 March 2016.

6. Possession of the Property was required by the Defendant in order to implement the planning permissions. To that end the Defendant made a number of offers to the Claimant to acquire the Property. It is the Claimant's case that these offers led to the conclusion of a binding and enforceable agreement by the Claimant countersigning a letter from the Defendant to the Claimant dated 16 February 2017 in circumstances to which I will return.

7. On 26 October 2015 the Defendant made a compulsory purchase order ("**the CPO**") authorising the compulsory acquisition of the Bacton Estate including the Property. The Claimant objected to the CPO, and a public enquiry was held in September 2016. The Inspector's Report dated 4 January 2017 recommended confirmation of the CPO. By letter dated 7 March 2017 the Secretary of State accept the findings of the Inspector and confirmed the CPO.

8. On 13 April 2017 the Defendant executed a General Vesting Declaration ("**the GVD**") vesting the Property in the Defendant. On 5 June 2017 the Defendants certified that

service of the GVD had been completed on 19 April 2017. The effect of the GVD was that as from 20 July 2017 the Property vested in the Defendant.

9. In May 2017 the Defendant issued proceedings in the Administrative Court, Planning Court seeking to set aside the CPO, and to quash the GVD by way of judicial review. These proceedings were heard by Dove J in early August 2017 and dismissed by Dove J in a judgment delivered on 26 September 2017.

10. Upon the vesting of the Property in the Defendant, the Claimant ceased to hold any legal interest, right or entitlement (including that of possession) to the Property, save for an entitlement to statutory compensation, to be assessed by the Land Chamber of the Upper Tribunal, if not agreed.

The Current Proceedings

11. The current proceedings were commenced on 22 September 2017 at a time when the Claimant was acting in person.

12. Central to the proceedings is the Defendant's letter to the Claimant dated 16 February 2017 that I have referred to. This was in the following terms:

> *"Dear Mr Kuznetsov,*
>
> *I recommend that you seek your own Red Book valuation undertaken by a suitably qualified and accredited surveyor. You can approach local estate agents who may be able to offer this service alternatively you can contact the Royal Institute of Chartered Surveyors ("RICS"). If you notify me of the fee and details of the surveyor the council will pay the cost direct so that you do not need to use your own money.*
>
> *On receipt of the "Red Book" valuation the council will be willing to purchase your property at that value and pay compensation and all reasonable expenses.*
>
> *I look forward to hearing from you and receiving the details and fee for the surveyor of your choice.*
>
> *Yours sincerely*
>
> *Jennifer Farr*
>
> ***Senior Development Manager****"*

13. It is the Claimant's case that on the receipt of this letter he added in manuscript at the bottom thereof the words: *"Thank you! I accept your offer and will instruct a valuer, as requested"*, and then added his signature and the date (5 March 2017) before returning it to the Defendant. The Defendant disputes having received the letter so endorsed back from Claimant, although it is accepted for the purposes of this appeal that I must proceed on the basis that the letter was so returned.

14. The Particulars of Claim, in their original form, alleged that the Defendant approached the Claimant on several occasions starting from 2015 with a view to acquiring the Property, and that following several meetings with the Defendant's representatives in

2016, Mr Adam Tucker, the regeneration team leader, orally agreed to acquire the Property at a *"Red Book"* valuation assessed by a qualified RICS-accredited valuer nominated by the Claimant, pay compensation for the home loss of 10% of that value and cover valuation costs and other expenses. In paragraph 8 of the Particulars of Claim the Claimant alleged that having deduced title, and the title so deduced being accepted by the Defendant … *"the Defendant confirmed its decision to proceed. As a result, on 22 February 2017, the Claimant received a proprietary (or, inter-alia, promissory) estoppel dated 16 February 2017 and signed by Julia Farr, Senior Development Manager, containing an undertaking to purchase my property at the Red Book valuation, pay compensation and all reasonable expenses."* The Claimant then alleged that having returned the countersigned letter, *"and in reliance on the agreement"*, he instructed surveyors to undertake the valuation as a result which he incurred not only the valuation fee but other substantial costs.

15. The principal relief sought as set out in the Claim Form was: *"Specific performance of a proprietary estoppel for the purchase of the leasehold interest in the Claimant's residential property to the Defendant who is also the Claimant's landlord …"*

16. The Defendant's Defence, in short, denied that the letter dated 16 February 2017 contained any offer or promise to purchase the Property, denied that the letter as signed by the Claimant had been received by the Defendant, and denied that the circumstances, as pleaded, could give rise to a proprietary estoppel.

17. Further details as to the Claimant's claim were contained in a witness statement dated 22 September 2017, a *"Response"* to the Defendant's Defence, and *"Answers"* provided in January 2018 to a request made by the Defendant for Further Information. At paragraphs 3 and 5 of the latter document, the Claimant asserted that an offer on the part of the Defendant to purchase at a *"Red Book"* valuation had been *"verbally reiterated"* by Julia Farr at a meeting at the Property on 16 February 2016 (sic), that Julia Farr advised that she would confirm this in writing, and against this background he received the letter dated 16 February 2017. He then said that he *"accepted the offer by signing it on 5 March 2017 and delivering it by hand to the Camden Council Town hall next day"*.

The applications before the Deputy Master

18. The Defendant's Application dated 5 February 2018 brought pursuant to CPR 3.4(2)(a) sought to strike out the Particulars of Claim on the basis that there was no real prospect of the Claimant establishing at trial the proprietary estoppel alleged, and that formed the basis of his claim for relief.

19. In response to the Defendant's application, the Claimant issued his cross application dated 13 May 2018. By this application the Claimant, having by then obtained legal advice, applied to amend the Particulars of Claim to add a new claim that his return of the countersigned copy of the letter dated 16 February 2017 gave rise to a binding and enforceable contract.

20. In particular, it was proposed that paragraphs 8 and 9 of the Particulars of Claim be amended to read as follows:

> *"8. Having deduced the title which was accepted by the Defendant, the Defendant confirmed its decision to proceed. As a result, on 22 February 2017, the claimant received an offer dated 16 February 2017 and signed by Julia Farr, Senior Development Manager, containing an undertaking to purchase my property at the Red Book valuation, pay compensation and all reasonable expenses (Exhibit 1). Having accepted the offer by countersigning the letter dated 16 February 2017 and returning it to the Defendant (Exhibit 2) and in reliance on the agreement, I instructed Templar Consultants to undertake the required valuation and paid for the valuation … Relying on the Defendant's agreement, not only I paid for the property valuation but also incurred other substantial costs, including payment to third parties."*
>
> *9. …. It is submitted that the offer and acceptance amounted to a binding agreement for the Defendant to purchase the property compliant with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989; alternatively, as both parties acted relying on the terms of it, the Defendant is estopped from resiling from the agreement…"*

21. At paragraph 18 of the proposed Amended Particulars of Claim, it is pleaded that: *"The Defendant has now taken possession of the Property so the completion of performance of the agreement has taken place save for payment of the price by the Defendant"*. The prayer thereto includes a claim for an order that the Defendant pays … *"the purchase price for the property and makes the payments pursuant to the agreement contained the letter dated 16th February, countersigned by me on 5th March 2017".*

The Decision of the Deputy Master

22. The Deputy Master had little hesitation in holding that the claim, as originally pleaded, should in principle be struck out as having no merit. I do not deal further with this in that, given the limited extent of the permission to appeal granted, this part of the Deputy Master's judgment does not call for review. However, the Deputy Master recognised that the matter did not end there, and that it had been submitted on behalf of the Claimant that the proposed Amended Particulars of Claim put right any deficiencies in the Particulars of Claim such that his case had, as the Deputy Master put it, more than reasonable prospects of success *"based upon the provisions of Section 2 of the 1989 Act when regard is had to the express terms of the [16 February 2017 letter], together with support to be had from proprietary estoppel and detrimental reliance, which reference has been made above."*

23. However, the Deputy Master held that the proposed draft amendments to the Particulars of Claim in fact fell far short of providing the necessary basis to enable the claim to proceed, there being, as he held, *"no merit in the various assertions"* made on behalf of the Claimant.

24. The Deputy Master set out his reasons in paragraph 40 of his judgment as follows:

> *"(1) Although the emphasis changed to an extent during the course of argument to the effect that there was seemingly a "course of dealing" over a period of time between the parties on which the terms of an agreement can be demonstrated, the essential feature to which attention has to be directed as*

founding agreement between the parties is the interpretation of the express terms of the Letter. This continues to provide the basis for the case presented by [Claimant] in that the terms accepted and relied upon by the parties are contained in the same document.

(2) In my judgment the submission singularly fails to demonstrate that the parties had agreed all the essential terms of the agreement in order to satisfy the essential provisions of Section 2 of the 1989 Act, namely description of the parties, the property and the price in the same document. Counsel himself has in effect conceded that the letter is "not as detailed as many property agreements are." I therefore reject the analysis submitted on behalf of [the Claimant] that the Letter contains all the essential terms of a contract on which the parties have agreed.

(3) I also fail to see the relevance of the assertion that [the Defendant] has taken ownership, control and possession of the Property. This action occurred by virtue of the process of [the Defendant] seeking to redevelop the Bacton Estate – not as a result of any agreement between themselves and [the Claimant]. The ownership, control and possession of the Property by [the Defendant] was the direct result of it obtaining the CPO and subsequently the GVD.

(4) Further, it is submitted that [the Defendant] having gone into possession of the Property the agreement for sale had been completed with only the payment from [the Defendant] to [the Claimant] remaining to be paid. In such circumstances it is submitted by Counsel that Section 2 of the 1989 Act has no application as its terms apply only to executory contracts, not completed contracts. I reject the submission. Clearly in my judgment the provisions of Section 2 are of paramount consideration. I have found that no agreement has been reached between the parties sufficient to satisfy such provisions. As I have stated above, the fact that [the Defendant] has taken possession of the Property is referable to the CPO and the GVD, and not to any agreement for the sale of the Property reached between the parties.

(5) As to the submission made by Counsel that the alleged agreement for sale is a contract for the disposition of land, rather than a contract for the disposition of land, this point does not arise for consideration as I have found that there is no binding agreement between the parties sufficient to satisfy the provisions of Section 2.

(6) Finally, as there was no agreement for sale then the concept that proprietary estoppel can be relied upon as a make-weight in support cannot arise for consideration."

Grounds of Appeal

25. The Claimant's Grounds of Appeal raised some 19 grounds of appeal extending over 19 pages. In view of the limited scope of the permission to appeal granted, it is only necessary to refer to the first two:

"Ground 1: The Deputy Master erred in law by concluding that the requirements of Section 2 of [the 1989 Act] have not been satisfied.

Ground 2: Notwithstanding that the provisions of Section 2 of [1989 Act] have been satisfied, Section 2 does not apply to the agreement reached."

26. In granting limited permission to appeal, Morgan J expressed himself as follows:

"1. It is arguable that the letter of 16 February 2017 countersigned by the Appellant amounted to an open contract for the sale of the lease of the Appellant's flat and that the contract complied with Section 2 of [the 1989 Act].

2. It is appropriate to grant permission to appeal to put forward the argument in 1. above.

3. I will also, with some hesitation, allow the Appellant to argue on appeal that any contract which would otherwise be created by the letter of 16 February 2017 did not have to comply with Section 2 of [the 1989 Act].

4. For completeness, I will allow the Appellant to argue on appeal that in the light of the arguments permitted as aforesaid, it was not appropriate to strike out the claim.

5. The arguments identified in the above 4 paragraphs above are the "limited grounds" on which permission to appeal is given."

27. By a Respondents' Notice, the Defendant seeks to uphold the judgment below on the following additional ground:

"An offer and acceptance in writing in the course of correspondence does not satisfy the requirements of section 2 [of the 1989 Act].

On the Appellant's case, the Respondent's letter dated 16 February 2017 constituted an offer, which he accepted by signing and returning it to the Respondent on 5 March 2017.

The above did not constitute a contract which set out "all the terms which the parties have expressly agreed in one document" within the meaning of Section 2 of the 1989 Act."

The Claimant's case on the Appeal

28. As to Ground 1, and whether the countersigned letter dated failed to satisfy Section 2 of the 1989 Act for the reasons given as dealt with by the Deputy Master in paragraph 40(2) of his judgment, Mr Williams refers to Megarry & Wade, the Law of Real Property, 8th edition at paragraph 15-027, where the learned authors observed that:

"There are 3 essential elements upon which the parties must expressly agree if there is to be a valid contract for the sale of land or an interest in land. These are:

(i) the parties;

(ii) the property;

(iii) the consideration.

If these elements have been determined with sufficient certainty and incorporated into the written agreement, the requirements of the Act will be satisfied. This is so even though the parties had not agreed on other terms, such as the completion date, whether a deposit should be taken, or whether vacant possession should be given on completion."

29. The Claimant's case is that these three essential elements are contained within the letter dated 16 February 2017, and that whilst the Deputy Master concludes that the Claimant had failed to demonstrate that the parties had agreed all essential terms of the agreement, he does not identify the missing term or terms. It is further the Claimant's case that there were no other terms agreed that are not reflected in the letter dated 16 February 2017.

30. The additional ground for upholding the decision raised by the Respondents' Notice is, as referred to in paragraph 27 above, that an offer and acceptance in writing in the course of correspondence does not satisfy the requirements of Section 2 of the 1989 Act. As authority for this proposition, Mr Hutchings QC does, as I shall refer to in more detail below, rely upon the decision of the Court of Appeal in *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259.

31. In response to this argument, Mr Williams submits that this latter case can be distinguished, because in that case the Court of Appeal was there concerned with an exchange of correspondence where there was no one document containing the signature of both parties as there is in the present case.

32. Further, in paragraph 17 of his Skeleton Argument, Mr Williams had sought to submit that *"the agreement reached orally and reduced to writing by the letter dated 16 February 2017"*, i.e. that the letter dated 16 February 2017 was not an offer that was then accepted by the Claimant signing and returning the same but an expression of the prior oral agreement. During the course of Mr Williams's opening submissions, I challenged Mr Williams as to how this proposition tied in with the proposed pleaded case as set out in paragraph 20 above. In response, Mr Williams accepted that some refinement of the pleaded case would be required in order to run such a case, and before Mr Hutchings QC began his submissions, Mr Williams proposed an alternative form of wording for paragraphs 8 and 9 of the proposed Amended Particulars of Claim so as to refer to the Claimant having countersigned the letter dated 16 February 2017 and returned it to the Defendant in reliance on a prior oral agreement reflected by the terms of the letter.

33. As to Ground 2, and the argument that it was not necessary to satisfy the requirements of section 2 of the 1989 Act, the Claimant's case is that:

(a) Section 2 is only of relevance to executory contracts, and has no relevance to contracts which have been completed. Once a contract that does not comply with Section 2 has been completed, then it becomes irrelevant that it did not so comply therewith – see *Tootal Clothing Lt v Guinea Properties Ltd* (1992) 64 P&CR 452 at 455 per Scott LJ. The Claimant criticises the finding in paragraphs 40(3) and (4)

of the Deputy Master's judgment that the Defendant took possession of the Property pursuant to the GVD rather than pursuant to, and by way of completion of the alleged contract. It is said that this concerns a disputed question of fact as to the basis upon which the Defendant took possession of the Property that it was not appropriate for the Deputy Master to resolve on a summary application to strike out.

(b) Further, by reference to *Rollerteam v Riley* [2017] Ch 109 at [37] – [39], referring to the judgment of Sir Andrew Morritt C in *McLoughlin v Dulffill* [2010] Ch 1 at [20] and [21], the Claimant argues that a distinction needs to be drawn between a contract for the disposition of an interest in land to which Section 2 of the 1989 Act applies, and a disposition of an interest in land to which Section 53(1)(of the Law of Property Act 1925 applies. It is argued that if a contract can properly be construed as one of disposition rather than for disposition, i.e. the contract in itself effects a disposition, then it is not necessary to satisfy the requirements of Section 2. It is maintained, to quote from paragraph 14 of Mr Williams Skeleton Argument, that this is *"arguably the position here, the contract is one of disposition, having resulted from settlement negotiations"*. It is submitted that the Deputy Master missed the point in paragraph 40(5) of his judgment in saying that the point did not arise for consideration as he found that there was no binding agreement between the parties sufficient to satisfy the provisions of Section 2. The point that the Claimant seeks to make is that because the contract was one of disposition, it was not necessary to satisfy the requirements of Section 2 in the first place.

The Defendant's case on the appeal

34. As to Ground 1, Mr Hutchings QC realistically recognised that he faced some difficulty in arguing that the letter dated 16 February 2017 did not express the three essential elements of an open contract, namely parties, the property and the consideration, and that the Deputy Master had not identified any other terms agreed between the parties that were not reflected therein. Realistically, he did not therefore seek with any vigour or enthusiasm to uphold the Deputy Master's decision as reflected in paragraph 40(2) of his judgment.

35. At the forefront of Mr Hutchings QC's case was the submission reflected in the Respondent's Notice that an exchange of correspondence containing an offer and acceptance cannot give rise to a document satisfying the requirements of Section 2.

36. As I have mentioned, Mr Hutchings QC places particular reliance of the decision of the Court of Appeal in *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259. This case concerned a number of other issues, and it was not strictly necessary for the Court of Appeal to decide the point that arose in respect of Section 2, but it did so. The real point that arose was as to whether an exchange of correspondence in the ordinary sense of an exchange of letters or other written communication written by one party to the other where there was no one document signed by both parties, could satisfy the requirements of Section 2. The principal issue was whether this could give rise to a circumstance *"where contracts are exchanged"* within the meaning of Section 2 – see 284A-C, per Stuart-Smith LJ. Ultimately the Court of Appeal rejected the argument that it could, holding that the reference in Section 2 to *"where contracts are exchanged"* was a reference to the traditional practice of exchanging contracts by way of an

exchange of contracts in identical form, one signed by one party, and the other signed by the other party.

37. Mr Hutchings QC submits that the *Commissioner for the New Towns* case provides authority for the wider proposition that an exchange of correspondence, including one such as that that took place present case where, unlike in the *Commissioner for the New Towns* case, the result of the exchange was one document containing the signature of both parties, will not satisfy the requirements of Section 2. He places particular reliance upon the following passages from that case, namely:

> At 287H-288A, per Stuart-Smith LJ:
>
> *" CoopInd's solicitors' letter does not purport to record all the terms that have been agreed in a document, even by reference to the letter of 11 January. It is merely an invitation to confirm that such an agreement exists and as such is an offer ..."*
>
> At 289F-G, per Stuart-Smith LJ:
>
> *"Nor, in my view, does an offer and acceptance in writing in the course of correspondence satisfy the requirements of section 2. For some reason Parliament required a greater degree of formality in relation to contracts for sale or other disposition of interest in land and used for that purpose the well recognised concept of exchange of contracts."*
>
> At 293C, and 294B-E, per Evans LJ:
>
> *"They must, however, be documents which set out, or incorporate by reference, "all the terms which have been expressly agreed." (Again, my emphasis.) The exchange therefore has been preceded by an express agreement…*
>
> *If the above analysis is correct, then there is a short answer to CoopInd's contention that an "exchange of contracts" took place in the present case. The letters relied upon, both dated 16 January, did not record the express terms of any agreement already reached. They were, admittedly, the final offer and acceptance which concluded the negotiation. CoopInd does not suggest otherwise; in fact this is expressly accepted in its supplementary submissions, and in any event this is apparent from the terms of the letters themselves. The letter from Mr. Jones on behalf of CoopInd in terms envisaged that M.K. might not agree and that its confirmation was necessary before agreement could be reached. This was not, in my judgment, setting out the express terms of an agreement already made. Rather, it was inviting M.K. to make an agreement in writing in the same terms as those which had been agreed, orally and subject to approval, at the meeting on 11 January.*
>
> *In my judgment, the concluding stages of correspondence by which agreement is reached, in other words, the final offer or counter-offer and an unqualified acceptance of it, cannot also constitute the "exchange of contracts" which is required by section 2 before a contract can be made. A further exchange of documents, setting out or incorporating all "the terms which the parties have*

expressly agreed," must take place, or the parties must sign a simple document which incorporates them or sets them out."

38. Mr Hutchings QC extracts from the passages from the judgment Evans LJ referred to above the proposition that as Section 2 requires that the written document should set out, or incorporate by reference, *"all the terms which have been expressly agreed"* [emphasis added], and thus a document created by exchange cannot satisfy Section 2 because the exchange required to be preceded by an express agreement.

39. This line of argument is potentially undermined by the new way that Mr Williams sought to put the Claimant's case as reflected in the revisions suggested to the proposed Amended Particulars of Claim referred to in paragraph 32 above, namely that the letter dated 16 February 2017 as countersigned by the Claimant reflected and recorded a prior oral agreement.

40. In response to the new way that the case was put, not previously reflected in the proposed Amended Particulars of Claim, Mr Hutchings argued that there were other fundamental conceptual difficulties with a contract formulated in the terms set out in the letter dated 16 February 2017, in particular that it appeared to be a form of unilateral contract pursuant to which, at best, the Defendant might become bound to sell, but only upon the Claimant performing by providing it with the *"Red Book"* valuation referred to therein. On this basis, it was suggested that until this event occurred, no consideration had moved from the Claimant sufficient to support a contract. These were not, of course, issues that were ventilated before the Deputy Master.

41. As to Ground 2, the essence of the Defendant's case is as follows:

(a) As to the completed contract point, it is said that the relevant contract, even if concluded, was never completed. There was no transfer, and the effect of the GVD was that leasehold interest in the Property vested in the Defendant on 20 July 2017, with possession being recovered pursuant thereto on 20 October 2017. Whilst the present proceedings had by then been commenced, there is some doubt as to whether they had been served on the Defendant. Certainly, the Defendant was not on notice that it was being asserted against that it was contractually bound to sell the Property to the Defendant until that allegation was made in the proposed Amended Particulars of Claim served together with the Claimant's application dated 13 May 2018. In the circumstances, it is said that it is plain that the Defendant took possession pursuant to GVD, and was certainly not intending to take possession by way of completion of any contract, and any argument to the contrary is fanciful.

(b) As to the contract *of* disposition point, it is said that, no proper basis for arguing that the letter dated 16 February 2017, even as signed by the Claimant, should be construed as having the effect of actually disposing of the Claimant's leasehold interest in the Property the subject matter of the alleged contract. On any view, a transfer would have been required to be executed once the price had been determined in order to transfer the Property to the Defendant.

Correct approach to strike out application under CPR 3.4(2)(a)

42. The issue is as to whether or not the Particulars of Claim disclose reasonable grounds for bringing the claim. It is not in dispute that in the light of the cross application to amend the Particulars of Claim, I am entitled to look at the case as proposed to be pleaded by way of the relevant proposed amendments. Indeed, as permission to appeal was not grant in respect of the striking out of the claim as originally advanced, the focus of the present appeal must necessarily be upon the proposed amended Particulars of Claim, subject to the complication that the further proposed amendments were suggested during the course of the Claimant's opening submissions before me.

43. The principles to be applied are not in dispute. In deciding whether or not there are reasonable grounds to bring a claim, the Court is essentially concerned as to whether the claim as pleaded, or proposed to be pleaded, has a real prospect of success. A claim may be struck out as not being a valid claim as a matter of law. However, a statement of case would not be suitable for striking out if it raised a serious live issue of fact which could only be properly determined by hearing oral evidence. An application to strike out should not generally be granted unless the court is certain that the claim is bound to fail. See the notes in Civil Procedure 2018, volume 1 at 3.4.2..

Ground 2

44. I propose to deal firstly with Ground 2 of the Grounds of Appeal because I consider that this can be dealt with fairly shortly.

45. As to the completed contract point, it is certainly right that, where a contract has been completed, then the requirement to satisfy the provisions of Section 2 of the 1989 Act is likely to fall away – see *Tootal Clothing Ltd v Guinea Properties Ltd* (supra). However, this does require the contract to be completed. I agree with the Defendant that it is fanciful to suggest that the Defendant's act of taking possession pursuant to the GVD before it had even been asserted against it that it was party to a contract with the Claimant, an act which the Claimant was positively objecting to at the time on public law grounds, could ever be construed as representing the completion of the alleged contract. *Tootal Clothing Ltd* is, as I see it, concerned with the situation where the parties have entered into a formal transaction by transfer or conveyance transferring or conveying the subject matter of the unenforceable contract in the way that the unenforceable contract had envisaged, not a situation such as the present.

46. Mr Williams refers to *E Johnson Co (Barbados) Ltd v N.S.R. Ltd* [1997] AC 400 as authority for the position that the setting in train of compulsory purchase machinery does not frustrate any prior contract for the sale/purchase of a property. However, that does not answer the question as to whether the relevant contract was, or was not completed by the exercise of the compulsory purchase powers. If anything, it demonstrates that the two regimes of the contract on the one hand, and the compulsory purchase powers of the other hand, can coexist without any necessary conflict between them. Further, it is important to note that, in that case, the compulsory purchasing authority was not a party to the contract.

47. As to the contract *of* disposition point, it is certainly right that the Deputy Master would appear not to have fully appreciated the point being made. However, I agree with the Defendant, that it is impossible to construe the letter dated 16 February 2017 as being a disposition of the Property. The letter dated 16 February 2017 did not purport to effect any disposition of the Property. It merely, at best, recorded an agreement on the part of

the Defendant to purchase at some point of time in the future. It is at that point that any disposition of the Property would take place, by way of a formal transfer of the Property to the Defendant. I do not therefore consider there to be any real prospect of the Claimant's argument on this point succeeding at trial.

48. In short therefore, I do not consider that the two points taken under Ground 2 raise any real prospect of success, and I dismiss the appeal so far as it turns on this ground.

Ground 1

49. This ground turns upon a consideration of the wording of Section 2 of the 1989 Act, which provides as follows:

> *"2(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.*
>
> *(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.*
>
> *(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."*

50. As I have indicated, Mr Hutchings QC did not advance with any great vigour or enthusiasm the argument that the letter dated 16 February 2017 as countersigned by the Claimant did not contain all the terms that had been agreed between the parties, or did not contain all the terms necessary and essential for a valid open contract. In my judgment he was right to do so. The letter dated 16 February 2017 enables one to identify the relevant parties, namely the Claimant and the Defendant, the property the subject matter of the Contract, namely *"your property"* which, as a matter of proper construction, was plainly the Claimant's interest in the Property, and the price, albeit determinable by reference to the *"Red Book"* valuation that the Claimant was to obtain. The Deputy Master did not identify the terms that he considered to be missing from the document, and none were identified during the course of submissions. This finding of the Deputy Master cannot, in my judgment, stand.

51. It is necessary therefore to turn to the alternative way that the Defendant puts its case in seeking to uphold the decision of the Deputy Master, namely that raised as an additional ground for supporting the decision by the Appellant's Notice.

52. As to this, I am not persuaded that the *Commissioner for the New Towns* case provides authority for the general proposition that an exchange of contracts cannot give rise to a binding contract where the result of that exchange is not the document signed by different parties, but one document signed by both parties. The difficulty in the *Commissioner for the New Towns* case was that it was impossible to identify one document incorporating the terms of the contract signed by or on behalf of each party to the contract, and so it was necessary to consider whether contracts had been *"exchanged"* in the manner envisaged by Section 2. As I have already mentioned, the Court of Appeal held that an exchange of contracts as envisaged by Section 2 involved,

and involved only, the traditional process whereby identical contracts, one signed by each party, are exchanged so is to create a legally binding contract.

53. On this basis, an exchange of correspondence where there was no one document signed by both parties, nor an exchange of identical contracts, will necessarily fail to comply with Section 2. It is important to bear in mind this was the issue that the Court of Appeal was concerned with in *Commissioner for the New Towns* case, and therefore the issue that the judgments therein were addressing.

54. I agree with Mr Hutchings QC that one can extract from the passages from the judgment of Evans LJ in the *Commissioner for the New Towns* case referred to in paragraph 37 above support for a general proposition that Section 2 cannot be satisfied unless the written document sought to be relied upon records the express terms of an agreement already reached, and that this does then lend support to an argument that if the document created by exchange itself gives rise to the contract, then it cannot record the express terms of an agreement already reached. On this basis it could be said that if, in the present case, the relevant contract was concluded by the Claimant accepting an offer made by the letter dated 16 February 2017 by signing and returning the same, then the provisions of Section 2 were not be satisfied.

55. However, bearing in mind the particular issue that the Court of Appeal was dealing with, I do not accept that Evans LJ was seeking to suggest, or that there is any proper foundation for a principle of such general application.

56. The key wording in Section 2(1) is, in my judgment, the wording: *"... can only be made in writing and only by incorporating all the terms which the parties expressly agreed"*, and subject to the distinct position in respect of exchange of contracts, the wording requiring that that document be signed by or on behalf of each party. If a contract was actually concluded in the circumstances of the present case, then I see no difficulty in saying that it was *"made in writing ... incorporating all the terms which the parties expressly agreed"* by the Claimant countersigning the letter sent to him (signed) on behalf of the Defendant and sending it back to the Defendant.

57. In *Re Stealth Construction Ltd* [2012] 1 BCLC 298, the Court was, in the context of a preference claim brought pursuant to Section 239 of the Insolvency Act 1986, concerned with whether an exchange of correspondence by email could give rise to a contract satisfying the requirements of Section 2 of the 1989 Act in circumstances where there was an email chain, and the electronic signatures on the emails could be taken to be signatures buyer on behalf of the relevant parties for the purposes of Section 2(3). David Richards J, sitting as Vice Chancellor of the County Palatine of Lancaster, said this at [45]:

> *"[45]Section 2(3) requires also that the document incorporating the terms be signed by or on behalf of each party. The liquidator accepts that Miss Gillis's email to Mr Ireland and Mr Ireland's reply constitutes a single document for these purposes. In my view, this is right where, as here, the second email is sent as a reply and so creates a string, as opposed to being simply a new email referring to an earlier email. It is the electronic equivalent of a hardcopy letter signed by the sender in itself signed by the addressee."*

58. It is true that David Richards J's remarks were based upon a concession by the liquidator, and that ultimately the point proved not to be material because he held that the exchange of emails in question did not constitute a contract at all, and in any event did not incorporate all the terms expressly agreed between the parties. However, it does lend support to the proposition that a hardcopy letter signed by the sender, which is itself signed by the addressee in the context of an exchange of correspondence giving rise to a contract would satisfy the requirements of Section 2.

59. Consequently, even if, in the circumstances of the present case, the contract as alleged was created by an exchange of correspondence in the sense of the Claimant signing and returning the letter dated 16 February 2017, I am not persuaded that this means that there is no real prospect of establishing trial that the requirements of Section 2 are satisfied. To the contrary, to the extent that a contract was otherwise created, I consider that the requirements of Section 2 would have been satisfied.

60. I appreciate that the Claimant's case may now have moved on, and may no longer be based on offer and acceptance in the light of the proposed revised pleading, and be based now on the exchange of correspondence recording an earlier oral agreement. In that case, the exchange of contracts point *might* not ultimately arise. However, I do have concerns about the inconsistency between the way that the case is now sought to put on behalf of the Claimant as referred to in paragraph 32 above, and how it was put in the Claimant's witness statement dated 22 September 2017 and in the Answer to the Request for Further Information, in terms of offer and acceptance, and consider it entirely possible that the Claimant's case might still ultimately turn out to be one of offer and acceptance. However, given my finding that a contract satisfying the requirements of Section 2 might be created by an exchange of contracts where there is one document signed by both parties, I do not consider that this would provide a basis for striking out the claim.

61. As to the further revised case, and the argument advanced by Mr Hutchings QC in response to it, somewhat on the hoof, I can see not inconsiderable force in Mr Hutchings QC's argument that the letter dated 16 February 2017 does not, on its face, give rise to a binding and enforceable contract on the basis of the apparent unilateral nature of any contract, and the possible absence of consideration on the part of the Claimant to support an immediate binding obligation on the part of the Defendant. Further, I did not find Mr Williams's explanation as to the consideration said to move from his client to be particularly persuasive.

62. I have given careful thought as to whether it would be appropriate to uphold the decision below on the basis of these arguments, but have concluded that it would not be appropriate to do so. These are arguments that it would have been open to the Defendant to have taken before the Deputy Master in support of its strike out application, even on the basis of the offer and acceptance case as argued before the Deputy Master, in that the actual terms of the relevant agreement as contained in the letter dated 16 February 2017 would have been no different even if the contract itself was concluded in a different way such that the countersigned letter reflected the terms of an earlier oral agreement.

63. Further, as became clear from exchanges during the course of submissions, the issues in respect of the possible unilateral nature of the contract, and the provision of consideration thereunder, are not necessarily straightforward issues notwithstanding

that I can see force in what is being said on the Defendant's behalf. They are, in my judgment, the sorts of issues that require further more detailed consideration and argument before I could safely conclude that the binding contract that has been asserted stands no real prospect of being established at trial so as to warrant the strike out of the Particulars of Claim.

Overall Conclusion

64. In the circumstances, on the basis of my findings above that there is a real prospect of the Claimant establishing at trial that the letter of 16 February 2017 countersigned by the Claimant amounted to an open contract for the sale of the Claimant's leasehold interest in the Property, and that the contract complied with Section 2 of [the 1989 Act], I find that the appeal should be allowed on Ground 1, but not on Ground 2 for the reasons set out above.