



Neutral Citation Number: [2023] EWHC 2135 (Ch)

Case No: PT-2019-000205

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

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

Date: 25/8/2023

Before:

MASTER CLARK

Between:

SHILL PROPERTIES LIMITED

Claimant

- and -

ANNE BUNCH

Defendant

Samuel Hodge (instructed by **Clarke Mairs LLP**) for the **Claimant**
Nigel Woodhouse (instructed by **Simons Rodkins Solicitors LLP**) for the **Defendant**

Hearing dates: 18, 19 and 21 April 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10am on 25 August 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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Master Clark:

1. This is my judgment following the trial of this claim for specific performance of a contract of sale dated 7 December 2018 between the claimant (as buyer) and the defendant (as seller) of 7 Gunstor Road, London N16 8HF (“the property”).

Parties and the claim

2. The claimant, Shill Properties Limited, is an investment company.
3. The defendant, Anne Bunch (“Mrs Bunch”), owns the property. Mrs Bunch was born on 11th December 1931 and is now 91. At the time of the material events, she was 86, turning 87, and living on her own at the property.
4. As will be seen, Mrs Bunch disputes that a valid exchange of contracts took place. However, for the sake of concision, I refer to it as the exchange (and its cognates), rather than as the purported exchange.
5. The only copy of the contract in evidence is that signed by Mrs Bunch. It includes an endorsement that contracts were exchanged pursuant to Law Society Formula B at 11.42am between Sean McCarthy, as the claimant’s conveyancing solicitor, and Ansuya Tailor as Mrs Bunch’s conveyancer.
6. The key terms of the contract were:
 - (1) the purchase price was £840,000;
 - (2) the deposit was 5% of the price, £42,000;
 - (3) the completion date was 8 February 2019.
7. The claim was commenced on 12 March 2019. The only relief now pursued is specific performance of the contract.
8. The defences raised in the now Re-Re-Re-Amended Defence dated 11 April 2023 are:
 - (1) the contract was void for non-compliance with Law of Property (Miscellaneous Provisions) Act 1989
 - (i) the purchase price is shown as £840,000 whereas the agreed price was £940,000; alternatively
 - (ii) the true purchaser was Safety Investments Limited, and the contract was not signed on its behalf; alternatively
 - (iii) at the date of exchange, the claimant’s conveyancing solicitor (Sean McCarthy) did not hold a signed contract.
 - (2) Mrs Bunch entered into the contract in reliance upon a misrepresentation by the claimant that it was a “cash buyer”, and the contract is to be rescinded in consequence.
 - (3) The contract was procured by undue influence exercised on behalf of the claimant and is to be set aside on that ground.

Relevant persons

9. The following relevant persons feature in the narrative:

Mirianna Bunch	Mrs Bunch's daughter
Jacqueline (Jakki) Pearce	Mrs Bunch's friend
Alexander Knight Properties (AK)	Estate agents instructed by Mrs Bunch
Sam Djeddet	Director of AK
Nicola Henshall & Felix Hobson (H & H)	Purchasers introduced by AK
Bower & Bailey LLP (B & B)	Solicitors acting for H & H in their proposed purchase of the property
Robert Eden	Partner at B & B dealing with H& H's purchase of the property
Avenue in London Ltd trading as Fine & Country Finsbury Park (FC)	Estate agents instructed by Mrs Bunch
Ali Demir	Estate agent/principal at FC
Adam Tahir	Estate agent at FC
Cavendish Legal Group (Cavendish)	Solicitors acting for Mrs Bunch in the sale of the property
Nicholas Pelmont	Partner at Cavendish dealing with sale of property on behalf of Mrs Bunch
Ansuya Tailor	Legal executive at Cavendish dealing with sale of property on behalf of Mrs Bunch
Charles Margulies	Director of and shareholder in the claimant
Bernard Margulies (Mr Margulies)	Son of Charles Margulies – responsible for day-to-day management of the claimant
Taylor Rose TTKW (TR)	Solicitors acting for the claimant in its proposed purchase of the property
Sean McCarthy	Solicitor at TR dealing with the claimant's purchase of the property
Mehreen Iqbal	Assistant solicitor at TR dealing with the claimant's purchase of the property
North London Scaffold Limited (North London)	Company owned and/or controlled by Charles Margulies
Safety Investment Limited (Safety)	Company proposed to take over purchase of the property in place of the claimant
Nathan Beck	Owner of Safety

Witness evidence

Claimant's evidence

10. My order dated 7 March 2023

- (1) refused the claimant's application for relief from sanctions in respect of the late service of its witness statements (and was upheld on appeal by the order dated 30 March 2023 of Leech J); and
- (2) granted Mrs Bunch permission to re-amend to put forward a positive case that the contract was not signed at all on the exchange date.

At the trial itself, the claimant submitted that the excluded statements were admissible hearsay evidence. I held that they were not.

11. On 5 April 2023 I granted the claimant permission to adduce 2 further witness statements, both relating to the issue (raised by re-amendment) of whether Mr McCarthy held a signed contract on the date of exchange:

- (1) Mr McCarthy himself;
- (2) James Godden, the claimant's solicitor, on the issue of whether TR's letter dated 11 December 2018 was created on the date on its face – his evidence as to this was not challenged.

12. I do not consider that Mr McCarthy was a witness whose evidence can be relied upon when unsupported by contemporaneous documents, for the reasons discussed in detail in the course of the judgment, but which can be summarised as follows:

- (1) His evidence was that he did not remember much about the relevant events and was very dependent on the file. In particular, he did not remember Friday 7 December 2018, the date of exchange. Although he kept large numbers of attendance notes of his conversations with Mr Margulies (including as to relatively mundane matters), he did not keep attendance notes of
 - (i) his being authorised (by, he says, Charles Margulies) to sign the contract;
 - (ii) the alteration of the price on the engrossed contract from £820,00 to £840,000;
 - (iii) the exchange of contracts.
- (2) He entered a priority search against the property when he had been told by Mrs Bunch's solicitors that she was no longer proceeding with the sale to the claimant;
- (3) He misstated the contractual purchase price as £940,000 in an email copied to Mr Beck;
- (4) He misstated the nature of the transaction to Safety's lender's solicitors;
- (5) Most importantly, he provided, for the first time in his oral evidence, a fanciful explanation of why he was provided with the draft contract on Monday 10 December 2018 after the apparent exchange on Friday 7 December 2018.

Defendant's evidence

13. Mrs Bunch's witnesses comprised
 - (1) Mrs Bunch herself;
 - (2) Nicola Henshall – her evidence was not challenged;
 - (3) Nicholas Pelmont – who did not provide a witness statement, and upon whom a witness summons had been served.

14. The bundle also included 2 psychiatric reports:
 - (1) The report dated 17 February 2020 of Dr Neil Brener addressing Mrs Bunch's capacity
 - (i) to enter into the contract in December 2018;
 - (ii) to conduct litigation as at 10 February 2020.
 - (2) The report dated 22 December 2022 of Dr Simon Adelman as to Mrs Bunch's capacity to conduct litigation as at 19 December 2022.

Mrs Bunch

15. Both psychiatric reports concluded that Mrs Bunch had capacity to conduct litigation. Dr Brener assessed her as having underlying mental health issues, with emotional instability, and a failing memory which would probably gradually deteriorate. He concluded that at the date of his assessment, and around the time of December 2018 she was vulnerable to manipulation. In particular, he records Mrs Bunch telling him that she had been tricked into signing papers that had not been explained to her; and that she felt harassed and bullied into signing them when she didn't want to.

16. Dr Adelman found that Mrs Bunch had mild cognitive disorder, but that her cognitive processing was slow and she became muddled if interrupted. She had a very good memory for past events. She told Dr Adelman that she was tricked into the contract by a "young estate agent", Adam Tahir.

17. When giving her oral evidence, Mrs Bunch was very frail – she became tired to the point of needing to sleep on several occasions, requiring a break in her evidence. She had very little recollection of the relevant events or her own witness statement, which she contradicted on occasion. She had difficulty understanding questions put to her, and became confused very readily. I do not consider I can place any reliance on her evidence, except where it is unchallenged.

Mr Pelmont

18. Mr Pelmont also had very little independent recollection of the relevant events in this claim. He only met Mrs Bunch on one occasion, when he visited her at her house on 29

November 2018 to discuss with her the “pros and cons” of the offers of the claimant and the rival purchasers, H & H. Whilst I have reservations about some aspects of Mr Pelmont’s evidence, his evidence as to this was straightforward and I accept it.

Ms Henshall

19. Ms Henshall is a Senior Associate in the Disputes Department of Norton Rose Fulbright LLP where she has been employed since September 2015. Her witness statements were clear and detailed. She plainly had a rapport with Mrs Bunch and spent time talking with her about Mrs Bunch’s life and the time she spent in Africa. Ms Henshall has no interest in the outcome of the claim, having bought another property.

Factual findings

20. In mid 2018, Mrs Bunch instructed AK to market the property for sale, with an asking price of £1 million. AK showed Ms Henshall and Mr Hobson around the property on Saturday 30 June 2018. The following Monday 2 July they offered £895,000. This was rejected; and on 5 July 2018 they offered £910,000, which was also rejected.
21. It is not clear when Mrs Bunch instructed FC. Mrs Bunch’s uncontradicted evidence is that Adam Tahir knocked on her door and introduced himself to her.
22. FC introduced the claimant to the property. Mr Margulies visited it on 13 August 2018. The claimant offered £810,000 that day. Mr Margulies was the main point of contact between the claimant and FC, and the claimant and TR.
23. On 14 August 2018, Mr Tahir sent an email to Ansuya Tailor in the following terms:

“So, We may agree a sale for the following: 7 Gunstor Road N16 8HF. Owner is called Ann Bunch and is VERY old – her house is in a state of disrepair and she needs to move out as she can hardly get up the stairs. We have a **cash Buyer** in place at a level of £810,000.

Below is the vendors friend, who she speaks to when she needs advice.

Jacqueline Pearce
[mobile phone number and email address]

The offer hasn’t been accepted as of yet but Jacqueline is going to speak to Ann and try to get the offer accepted.

Apparently Ann has not had the best experience with sols, so I have told her you are the best of the best and the sweetest thing out there

Jacqueline is going to call you tomorrow AM to discuss steps etc with you and if all good they will instruct you to go ahead.

Can you let me know if/when Jacqueline calls please

xx

PS - where is my probate"
(emphasis added)

Mrs Bunch's unchallenged evidence was that Mr Tahir told her that Mr Margulies was a cash buyer. In my judgment, the inference to be drawn from that and from the terms of the email above is that Mr Margulies told Mr Tahir (as Mrs Bunch's agent) that he was a cash buyer.

24. It is unnecessary to set out the subsequent very unprofessional exchange of emails between Ms Tailor and Mr Tahir, which show a high degree of familiarity between them on a personal (and perhaps even romantic) level.
25. On 15 August 2018, Mr Tahir sent a memorandum of sale at the price of £810,000 to the claimant and TR. On 20 August, Cavendish opened a file in Mrs Bunch's name, and sent her a client care letter signed by Mr Pelmont.
26. On 21 August 2018, Mr Demir (AD) and Mr Margulies (BM) exchanged WhatsApp messages:

AD: "Did your solicitors get the contracts"

"Pls do searches asap need exchange quick on this."

BM: "He got the contract yesterday and he has already ordered the searches".

That was untrue.

27. On 24 August 2018, Mrs Bunch completed the Property Information Form with Mr Tahir's help, and signed it.
28. On 29 August 2018 Ms Tailor emailed Ms Iqbal a contract pack including a document named "Freehold Contract of Sale 5th edition.DOC", referring to the property as "7 Gunster Road" and showing a price of £810,000.
29. On 30 August 2018, AK informed Ms Henshall and Mr Hobson that the price of the property had been reduced to £920,000, and it was reduced to £900,000 shortly after that.
30. On 3 September 2018, Mrs Bunch instructed Dexters to market the property for £920,000.

31. On 3 and 4 September, there was a further exchange of WhatsApp messages between Mr Demir and Mr Margulies:

3 September

AD: "Push for exchange this week":

BM: "We definitely will exchange this week"

4 September

AD: "Will ask mow"

32. On the same day (4 September) Mr Margulies emailed Sean McCarthy:

"Where are we on this? Can we exchange?"

and on 5 September

"Where are we on this one?

I need to exchange on Friday

I am afraid I will lose it

Please provide me with an update asap!"

33. On the same day Mr Margulies and Mr Demir exchanged WhatsApp messages:

BM: "Arranged?"

AD: "No answer last night will be trying again shortly"

"Still trying"

BM: "Comon!"

AD: "Done"

"Go ahead"

34. On 6 September Ms Tailor emailed Ms Iqbal that "we have not heard from you since sending out the draft papers" and that "I understand that your client is quite keen to exchange contracts as soon as possible."

35. On Friday 7 September 2018, Mr Tahir drove Mrs Bunch from her house to Cavendish's offices with her friends Jakki Pearce and "Len", together with Mr Tahir. Ms Tailor conducted the meeting. She prepared an attendance note dated 7 September, but not written until 1 February 2019. The note records that Mrs Bunch confirmed that she wished to sell the property and buy another property, Flat 21, De Beauvoir Place. From the presence of Mr Tahir at the meeting, it is to be inferred that the proposed purchaser was the claimant.

36. Between 7 and 17 September, Mr Margulies sent voicemail messages to Mr Demir (no transcriptions were in evidence), and WhatsApp messages pressing for exchange.

37. In the meantime, on 11 September 2018, Ms Henshall and Mr Hobson offered £860,000 for the property.
38. On 18 September 2018, Ms Taylor sent a further chasing email to Ms Iqbal. The same day Ms Iqbal opened a purchase file (with the purchaser shown as Charles Margulies) and sent a client care letter to Charles Margulies, copying in Mr Margulies. Her covering email asked for the client care letter to be returned as soon as possible, and for £500 for property searches. Neither were ever provided to her.
39. On the same day Ms Iqbal raised a number of queries about the draft contract and title to the property. Ms Taylor responded the following day, including stating, unusually, that the property was “sold as seen”.
40. On 21 September 2018, AK wrote to Ms Henshall and Mrs Bunch confirming that Mrs Bunch had accepted H & H’s offer of £860,000; and on 8 October 2018, B & B confirmed to Cavendish that H & H had received their mortgage offer.
41. On 10 October 2018, Ms Taylor emailed Ms Iqbal to tell her that Mrs Bunch was no longer proceeding with the sale to the claimant. Mr Margulies’ response was to email Mr McCarthy: “Please take over here”. The same day Mr McCarthy put a priority search on the title of the property.
42. As to this, the Land Registry’s Practice Guide 12: Official Searches states:
- “2.1 Official search with priority of whole or of part of the estate comprised within a registered title**
 ...
 You can only apply for a priority search if the search is in respect of a protectable disposition, that is for a valuable consideration.
 ...
 Besides updating the details of a previously obtained official copy of the register a priority search has the effect of ‘freezing’ the register.”
43. Mr McCarthy initially sought to justify his application by saying that he was protecting his client’s interests, and that it was not uncommon for conveyancers to take the course he did. However, he eventually accepted that, since the contract had been withdrawn, his client had no interest in the property that could properly be protected by a priority search, and that he should not have done it. I consider it sharp practice.
44. On 11 October 2018 Cavendish sent the draft contract and supporting papers to B&B. On 16 October B&B again confirmed to Cavendish that their clients had their mortgage offer. On 19 October Cavendish sent to B&B an engrossed contract, engrossed

Transfer and Replies to Requisitions on Title. There is nothing to suggest other than that the sale to Ms Henshall and Mr Hobson was going ahead.

45. There are no WhatsApp messages between Mr Demir and Mr Margulies after 20 September until 5 November 2018, when Mr Demir messaged Mr Margulies:

“Gunstor will happen.
Just trying hardest on price.”

46. Neither Mr Demir nor Mr Margulies gave evidence. However, the natural meaning of this message is that Mr Demir was trying to obtain the lowest possible price for the property for the claimant. In doing so, he was acting on the claimant’s behalf, and in breach of his duty to Mrs Bunch.

47. On 6 November 2018, Mr Margulies emailed Mr McCarthy:

“I am told you should have received the contract back today ready to exchange.”

Mr McCarthy and Ms Iqbal’s reply was that no contract had been received.

48. Later that day, Mr Demir messaged Mr Margulies on WhatsApp:

“Sean to email seller solicitors confirming his in a position to exchange at 820K
They will forward contracts and every thing once they get the email from sean.
If everything goes to plan we should exchange on Thursday.
Sean needs to email them now.
If he doesn’t then they won’t send the contracts”

49. There are then no further WhatsApp messages in evidence between Mr Demir and Mr Margulies after 6 November until 5 December, 2 days before the exchange of contracts. It is unlikely in my judgment that no messages passed between them, but their content is a matter of speculation.

50. On 7 November 2018, Ms Henshall had a phone call from Mrs Bunch. She was very distressed and very confused. She told Ms Henshall that she had made a very bad mistake, and that she wanted Ms Henshall’s help to fix it. She told Ms Henshall that she had been persuaded to sell to someone else, that she had instructed her solicitor and signed a document, although she didn’t know what it was. The main issue seemed to be that she had only just realised the other buyer would strip the house and take out all the original fireplaces since the estate agents had suggested to her that she could sell these for extra cash. She was very upset about this and adamant that she did not want this to happen to the house which she had believed was being sold to a Jewish

gentleman as his family home. It was of course untrue that Mr Margulies personally was buying the property, and that he intended to use it as his family's home.

51. On the same day, Ms Henshall emailed B&B, saying:

“I had a call from the seller this morning telling me that two days ago she had been persuaded by another agent to sell the house to a **cash buyer** and she instructed her solicitor accordingly, but now she has changed her mind. Based on my discussions with her and the estate agent we are dealing with, I think that she is just very muddled and misremembering things that happened before she accepted our offer. However, I would appreciate if you could just confirm with her solicitors that everything is ok and they have not been instructed to prepare contracts for another buyer.”
(emphasis added)

52. Also on 7 November 2018, Mr Djevdet of AK emailed Ms Tailor:

“I am somewhat confused as to what is going on with the sale of this property. When I spoke to you this morning you updated me to say that you are working on the related purchase of Mrs Bunch in order to catch up with her sale, of which our buyers inform us that they are ready to exchange.

...

My colleague Naciye visited Mrs Bunch today who seemed very distressed, she re confirmed that she only wants to sell to our buyers and felt pressured by Fine and Country (Adam Tahr). Whilst my colleague was at the property Mrs Bunch contacted Fine and Country and spoke with Adam to confirm that she would not switch buyer, she then asked my colleague to speak with him to re confirm her decision at which Adam went on to say that they had put a charge on the property but would not elaborate further. Within a couple of minutes Mrs Bunch received an angry call from her friend Jacky trying to persuade her again to switch buyers, I cannot understand why Jacky is so insistent on Mrs Bunch switching buyers unless she has some vested interest?? Mrs Bunch re iterated to her that she wanted to stick with our buyers. Mrs Bunch then called you whilst my colleague was present to inform you of her decision to sell to our buyers, she then asked my colleague to speak with you however you refused and said you would speak to Mrs Bunch alone.”

53. Notwithstanding this flurry of communications, on 7 November 2018 at 18.22, Ms Iqbal emailed Ms Tailor, copying in Mr McCarthy:

“I write further in this matter as I understand this matter is no[w] proceeding.

Please confirm that you client is happy to proceed with the purchase price of £820,000 with immediate exchange.”

54. There are also no further emails in evidence to or from TR from 7 November until 5 December. Again, it is unlikely in my judgment that there were no emails, but again their content is a matter of speculation.
55. On 8 November 2018, B & B emailed Mr Pelmont confirming that they were holding a signed contract and 10% deposit, and were ready to exchange straightaway.
56. On 9 November 2018, Ms Tailor, in response to a query from Mr Pelmont, told him that both sets of (buyers') solicitors were holding signed contracts and deposits. That was untrue, as TR was not holding a deposit or signed contract at that date. Mr Pelmont's response was

“I agreed with Jacqui that we would speak to Adam Tahir and see if his people would come up in price. If they will meet the 2nd peoples price or almost, then they could have it. What do you think?”

57. Ms Tailor replied: “Adam was going to sell some of her stuff at auction so that could get her more £££.”
58. Notwithstanding this exchange of emails, the same day Mr Pelmont emailed B&B:

“There is no contracts race at the moment.

We withdrew the contract from the first buyers and your buyers are the only ones currently with a contract. At the moment we are at least 2 weeks away from being in a position to exchange as we are not ready to exchange on Anne's related purchase.”

59. Ms Henshall's solicitors replied

“Can you expressly confirm that you are not instructed to proceed with any other buyer?”

to which Mr Pelmont's reply was

“Yes, at present that is the case.”

60. Whilst these statements by Mr Pelmont may have been strictly true, they were far from being the whole truth, to the extent that they were misleading: Mr Pelmont did not tell Mr Eden that he and Ms Tailor were actively soliciting a higher offer from the claimant with a view to it being the buyer of the property.

61. The evidence includes an email dated 15 November 2018 the header of which is from Mr Demir to Mr Margulies, but the body of which is addressed to Mr McCarthy and signed by Mr Tahir:

“Hi Sean

...

The solicitors have met with the seller and she has categorically said she is going with our buyer. The way in which this will be handled is as follows

- Sellers solicitors will send contracts back to you ASAP
- They will inform the other party that there will be a contract race
- On Monday a conditional exchange will be offered by the vendors sols
- The only condition is that the seller needs to buy her retirement flat which will be ready in circa 10 days
- Our buyer must be in a position to exchange on Monday. If he is not then the sellers solicitors will have to offer exchange to the other buyers so we have a window [of] advantage and will be offered first
- agreed price is £840,000
- Completion will be circa mid-end Jan

We spoke with the client just now and he will also be in touch to confirm the above.

...

Adam Tahir

62. There is, however, no evidence that Mr Pelmont (or Ms Taylor) met with Ms Bunch other than on 29 November as set out below, or that the basis of the sale set out in the email was ever agreed by or on behalf of Mrs Bunch.

63. On 19 November, Mr Tahir emailed Mr Pelmont and Ms Taylor:

“Just an FYI – the buyer has paid funds and signed contracts and so is in a position to exchange today albeit with the conditions.”

This was untrue on both counts.

64. On 21 November, Mr Djevdet emailed Mr Pelmont asking for an update on the sale of the property, as his buyers were ready to exchange. Mr Eden replied:

“I spoke with Nick yesterday. He will contact me directly re any developments.

Nick kindly confirmed that his client has a connected purchase which is a retirement home. They have not received the management pack yet so that deal is probably at least 2 weeks off being able to exchange. Having spoken to Nick I feel comfortable that only one contract to sell 7 GR is in issue (ie to us!) and that we will get told promptly of any developments on the sellers related purchase.”

65. An attendance note of Mr Pelmont dated 29 November 2018 (but written on 4 February 2019) records that he and Ms Tailor attended Mrs Bunch at the property:

“Given Anne’s potential vulnerability, I decided personally attend Anne’s house with Ansuya to make sure Anne was fully aware of what she was doing and also to ensure that there had been no duress from either agent. AK had a keen buyer at a slightly higher price and I talked through the pros and cons of the 2 buyers with Anne to make sure she made the correct choice. Her preference was to go with Fine & Country’s buyer and I discussed with Anne that I would try to get that buyer to come up in price by £20K so that it would be almost on a par with the A.K. buyer.

After over an hour meeting with Anne she was very happy to sign the sale and purchase contracts.

I could see when I visited Gunstor Road that it was in a very poor state of repair and extremely cluttered, Anne was sleeping in a corner of the living room downstairs and rarely going up to the second floor.”

66. The contract as signed by Mrs Bunch provided for a price of £820,000. Thus, on 29 November 2018, Mrs Bunch agreed to sell the property to the claimant for £40,000 less than the amount she had agreed over 2 months earlier with H & H, and with a deposit half that of H & H, in circumstances where H & H were and had for some time been ready to exchange contracts immediately. Mr Pelmont’s evidence was that when going through the pros and cons of each buyer, he referred to the fact that the claimant was a cash buyer, that that was a “pro”, and that if the claimant had not been a cash buyer, that would have been a “con”.
67. In circumstances that are again unclear, Mr Pelmont apparently succeeded in persuading the claimant to pay £20,000 more. On 5 December 2018, Ms Tailor emailed B & B to formally withdraw the contract. Shortly afterwards, Mr McCarthy of TR emailed Ms Iqbal and Ms Tailor:

“I am instructed that the following has been agreed:

1. Purchase price of £840,000
2. Exchange on a 5% deposit to be released as agent
3. Completion to take place at the end of March 2019.”

68. Mr McCarthy then emailed Ms Iqbal to ask whether she was happy with the title to the property. Her reply attached Office Copy entries and stated:

“Below is all I know about the title.

Client gave no funds to order property searches. Client did not return signed client care letter.

I thought matter was aborted.”

69. Later that evening, Ms Iqbal emailed Mr McCarthy to say that she did not mind assisting him, but did not feel comfortable dealing with the transaction. Mr McCarthy's explanation was that Ms Iqbal was uncomfortable with Mr Margulies pushing and asking for things to be done quickly. I consider it more likely, and I find, that she was uncomfortable dealing with the transaction because of the matters set out in her email. Indeed, as will be seen, Mr McCarthy exchanged contracts without having a signed client care letter from the claimant.

70. Mr Margulies authorized Mr McCarthy to exchange contracts by an email on 5 December (16:46). Shortly afterwards, Mr McCarthy emailed Mr Margulies, copying in Mr Beck:

“I have just receiving a call from the Sellers Solicitors asking if you are ready to proceed to exchange.
The purchase price is £940,000...”

71. Mr McCarthy's evidence is that there were discussions at the time that Safety might become involved in the purchase by a back to back sub sale to them. He said that that was what he understood the price to be, by which he must have meant, I find, the price Safety would be paying. The natural reading of the email is, however, that the price referred to is the price the claimant would be paying. In my judgment, the most likely explanation for this is that Mr Margulies did not wish Mr Beck to know what the claimant was paying, and, for that reason, Mr McCarthy misstated in his email the price being paid by the claimant.

72. On the evening of 5 December, Mr Hobson called in to Mrs Bunch's house to see her, and talk to her about why she was not going ahead with them. He came away from the conversation frustrated that the fact that the claimant was a cash buyer was being used to promote its interests, when, since H & H's mortgage was in place, they were as good a prospect from Mrs Bunch's point of view. This was reflected in the letter drafted (but not sent) by Ms Henshall to Mrs Bunch the next day:

“We accept that you are free to sell your property to whoever you like, but we are very concerned that you seem to be under the impression that the other buyer:

- (1) is a family;
(2) has offered a similar price to us and/or is in a better position because it is **paying in cash.**

...

[She set out that:

- (1) the claimant was set up in 2016 to buy, sell and own real estate; and that it owned at least 8 other properties; and

(2) Charles Margulies was a director of 21 other companies involved in buying, selling and leasing property.]

“The buyer is therefore not a family. Whilst it is not impossible that Mr Margulies intends to live in Gunstor Road, he is not the buyer and based on the above, it seems highly unlikely.

With regard to the price, our offer was £860,000 with 12% on exchange of contracts. We have been reliably informed that the purchase price offered by Shill Properties Limited is £810,000. We find it difficult to understand why anyone would accept an offer from a development company for £50,000 less than a genuine buyer who has everything in place, has already signed the contract and the mortgage deed and is entirely flexible on the completion date. Your solicitor was informed some weeks ago that everything was complete on our side and that 12% was sitting in our solicitor’s account just waiting for you to name a day. **A cash buyer does not provide anything better than this.**”
(emphasis added)

73. The contract signed by Mrs Bunch includes an endorsement that contracts were exchanged on 7 December 2018 at 11.42am. It has the following manuscript amendments or additions: the price is changed from £820,000 to £840,000, the completion date is 8 February 2019, and the deposit is 5%, £42,000 said to be “released to buyer” (which must have been intended to be “released to seller”). On the same day, Ms Henshall made an increased offer of £870,000 by an email sent at exactly the same time, 11.42am.

74. Formula B is in the following terms:

“For use where each solicitor holds his or her own client's signed part of the contract.

A completion date of is agreed. Each solicitor confirms to the other that he or she holds a part contract in the agreed form signed by the client(s) and will forthwith insert the agreed completion date.

Each solicitor undertakes to the other thenceforth to hold the signed part of the contract to the other's order, so that contracts are exchanged at that moment. Each solicitor further undertakes that day by first class post, or, where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor's office, to send his or her signed part of the contract to the other together, in the case of a purchaser's solicitor, with a banker's draft or a solicitor's client account cheque for the deposit amounting to £..... .”

75. No original or hard copy or electronic copy contract signed by or on behalf of the claimant has been located. In particular:

- (1) the documents sent by TR to the claimant's solicitors do not include a physical or digital copy of the signed contract;
- (2) Ms Iqbal's electronic file forwarded to Mr McCarthy on 24 January 2019 did not contain a copy of the contract;
- (3) the documents sent by Cavendish to Mrs Bunch's solicitors did not include a physical or digital copy of the signed contract.

76. Mr McCarthy's written evidence was, at para 8 of his witness statement:

“At the time of exchanging contracts I held Shill's signed contract. I know this because I signed it (on behalf of Taylor Rose) as agent of Shill, having been authorised to do so.”

77. However, there is no email from Ms Iqbal forwarding to him the contract at any time, nor from any other member of TR doing so before 7 December 2018. On 10 December 2018 (the Monday following exchange), Ylenia Zanghi, a paralegal at TR emailed Mr McCarthy

“Hi,
Sorry can you tell me the address of the property for which I have to print the contract? I got 7 Gunstor rd but I think I did not write it correctly”

78. Shortly after, Ms Zanghi emailed to Mr McCarthy's secretary an attachment with the same name as that sent to Ms Iqbal on 29 August 2018. Regrettably, that attachment was not in the bundle. The following day, she emailed him an attachment named “letter to seller's solicitor enclosing contract 7 Gunster road.doc”.

79. On 11 December 2018, Mr McCarthy sent to Ms Tailor a letter referring to the exchange of contracts on 7 December 2018 and enclosing “our client's part of the executed contract”.

80. Mr McCarthy's oral evidence was that he was authorised by Charles Margulies by telephone call to exchange contracts, but there is no attendance note recording that authorisation. He had no recollection of exchange itself or of amending the contract or putting in the completion date, or of anything that happened on 7 December. There is no attendance note of exchange.

81. As to requesting a copy of the contract from Ms Zanghi, Mr McCarthy's evidence was that this was a further copy of the contract, because the copy signed by him had been “misplaced” between Friday 7 December and Monday 10 December. He said that he printed off a “duplicate” and added in the amendments and additions in manuscript. None of this is found in his witness statement. Mr McCarthy did not explain how a

document of such importance could have been lost in a solicitors' office over a weekend (or why he did not send the signed contract to Cavendish on 7 December having undertaken to do so). In my judgment, his explanation is a recent fabrication to explain the inconvenient fact that the draft contract was not sent to him by Ms Zanghi until 10 December. I reject it.

82. The claimant's counsel submitted that this would be a finding of dishonesty, and that Mr McCarthy had no apparent reason or benefit in misrepresenting the position to another conveyancer. As to this, the position on 7 December was that neither the claimant, or Ms Iqbal (or Mr McCarthy) had taken any steps to progress the conveyancing. Ms Iqbal had not sent him the draft contract. Given the history of the matter, Mr McCarthy knew that there was a risk that Mrs Bunch's other buyers would increase their offer (as in fact they did), or that Mrs Bunch would just change her mind. He was under pressure from Mr Margulies to exchange contracts as soon as possible. Going through the motions of exchange without actually having a signed contract was "corner cutting" i.e. achieving the result the client was pressing for, with a reasonable belief that in the normal course of events this would not be detected.
83. As to the deposit, this was also not sent on 7 December, contrary to the undertaking required by a Formula B exchange. Mr McCarthy's initial evidence was that he would not have exchanged contracts unless his firm was holding the deposit. However, it is clear and I find that he did do so; and he did not send the deposit to Cavendish until 17 December. Ms Taylor's note on the contract "£42,000 released to [seller]" is untrue.
84. Shortly after exchange, it was proposed or agreed that Safety's involvement would be by "taking over" the contract.
85. On 10 December 2018 Mr McCarthy sent an email to Mr Beck setting out that he had been told that Mr Beck was taking over the contract and was sending £94,000 – Mr Beck/Safety paid this sum to TR on 12 December (although the deposit shown as payable under the contract and paid was 5% or £42,000). I find that this reflected an agreement or understanding between the claimant and Mr Beck/Safety, that they take over the contract. North London paid the contractual deposit of £42,000 to TR on the same day, 5 days after exchange of contracts.
86. On 31 December, Mr McCarthy wrote to Ms Taylor informing her that his client required access to the property for the purposes of a valuation. Mrs Bunch refused access when first sought, and again on 2 January 2019.

87. On 16 January 2019, Sterling Ackroyd wrote to Cavendish alleging duress and fraud by Mr Tahir, and that the sale was at an undervalue . Mr Pelmont responded in his letter dated 21 January 2019, which is in effectively the same terms as his attendance note set out above.
88. On 22 January 2019, Mr McCarthy opened a purchase file for the transaction: the client was shown as Charles Margulies, and the price was shown as £810,000. On the same day he sent a client care letter to the claimant, again referring to the price as being £810,000.
89. On 23 January 2019, Black Book Finance, the company arranging finance for Safety to buy the property, informed Mr McCarthy that their valuer had tried unsuccessfully 3 times to gain access to it. The same day he received a loan pack including a draft offer for a 6 month loan of £600,000 to Safety to be secured on the property.
90. On 31 January 2019, Mr McCarthy wrote to Mr Margulies:
- “ We need to discuss how you are structuring the transaction as the contract was exchanged in Shill and [if] it’s a back to back a new firm will need to be instructed to represent Safety.”
91. On 5 February 2019, Mr McCarthy wrote to Ms Tailor:
- “Our client would like to complete the Transfer of the Property in the name of Safety Investments Limited in place of Shill Properties Limited. Please can you confirm that your client will agree to the transfer taking place in the name of Safety Investments Limited which is the Buyers joint venture partner on this matter.”
92. On the same day he wrote to Safety’s lender’s solicitors:
- “The Seller has agreed for us completing in the name of Safety Investments Limited but they have just indicated that completion may be delayed beyond the 8th February 2019 due to the Seller changing Solicitors.”
- This could not have been true at this stage. The “agreement” must, I find, have been provided by Cavendish without reference to Mrs Bunch.
93. On 6 February 2019, Safety’s lender’s solicitors asked Mr McCarthy:
- “I note that the Contract is in favour of Shill Properties Limited as Buyer. What is the connection between Shill and the Borrower, Safety Investments Limited? Did Shill pay the Deposit under the Contract? Is this to be repaid by Safety to Shill? Will Shill have any interest or claim on the property on completion? Please

provide a Deed of Variation to the Contract to amend the Buyer to Safety. Do you also act for Shill? Please clarify and advise re all of the above.”

94. Mr McCarthy’s reply on the same day was:

“The parties are JV Partners and Safety actually paid the deposit by way of loan/agreement with Shill. Shill acted as the nominee on exchange. Yes, we acted for Shill due to assessing there to be no conflict of interest due to having a substantial common interest. We shall provide the Deed of Variation or provide written confirmation to amend the Buyer to Safety in due course. Shill will have no claim on the Property”

95. In cross-examination, Mr McCarthy accepted that the statement that on exchange Shill acted as nominee was untrue, though he said it was not deliberately so, because by that stage (i.e. 6 February 2019) those were his instructions. I do not accept that. He was setting out the position as at the date of exchange, and that statement was either intentionally untrue, or carelessly so to the point of recklessness.

96. On 7 February, Stirling Ackroyd wrote to Cavendish and TR alleging that Mrs Bunch entered into the contract of sale under duress and undue influence, and would not be signing the TR1, so that completion would not proceed.

Analysis and conclusions

Compliance with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 (‘the 1989 Act’).

97. Section 2 of the 1989 Act provides:

“2.— Contracts for sale etc. of land to be made by signed writing.

- (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.”

Wrong purchase price

98. The defendant submitted that the true price agreed was £940,000 and since the contract showed a price of £840,000, it failed to incorporate all the terms agreed by the parties.

99. The only documents relied upon in support of this argument are:
- (1) the e-mail dated 5 December 2018 from Mr McCarthy to Mr Margulies, copied to Mr Beck stating that the purchase price being paid for the property was £940,000;
 - (2) the e-mail from Mr McCarthy to Mr Beck dated 10 December 2018 referring to Safety taking over the contract and sending £94,000 (where the normal deposit on exchange is 10% of the purchase price).
100. As to this, first, Mr McCarthy's email of 5 December 2018 to Cavendish sets out the agreed price. If this had been wrong, Cavendish would have responded by return, as it would have been too low by £100,000. Secondly, the 5% deposit of £42,000 (5% of £840,000) shown on the face of the contract was, in fact, paid, albeit late. Thirdly, as discussed above, I have found that these emails reflected the separate arrangements between the claimant and Mr Beck/Safety.
101. I therefore reject the argument that the contract showed an incorrect purchase price.

Incorrect buyer

102. The argument that the claimant was not the true buyer of the property, and was Safety's nominee, is based on Mr McCarthy's email dated 6 February 2019 to Safety's lender's solicitors, set out at paragraph 94 above. There is however no other evidence to support Safety being the intended purchaser, or the claimant buying the property on its behalf.
103. Both Ms Iqbal's initial client care letter dated 18 September 2018 and Mr McCarthy's later one dated 22 January 2019 in respect of the purchase of the property are addressed to the claimant. If Safety was the "true purchaser" and the claimant only an agent nominee on exchange, the obvious thing to have done would have been for Safety to have been the named party, and to have instructed TR (or their own solicitors) in the transaction.
104. I also consider that the following email correspondence shows that the claimant was the purchaser at the date of exchange:
- (1) Mr McCarthy to Mr Margulies on 31 January 2019:
"We need to discuss how you are structuring the transaction as the contract was exchanged in Shill and [if] it's back to back a new firm will need to be instructed to represent Safety".
The fact that Mr McCarthy proposed a back to back sale shows that it was the claimant itself who was entitled to complete; and that Safety could only acquire an interest in the property by contracting to buy it.
 - (2) Mr McCarthy to Cavendish on 5 February 2019:

“Our client would like to complete the Transfer of the Property in the name of Safety Investments Limited in place of Shill Properties Limited. Please can you confirm that your client will agree to the transfer taking place in the name of Safety Investments Limited which is the Buyers joint venture partner on this matter.”

If the claimant had been Safety’s nominee, there would have been no need to change the buyer under the contract, as the claimant would have been able to complete using Safety’s funds, and transfer the legal title to Safety afterwards.

- (3) Similarly, on 5 February 2019 Mr McCarthy emailed Gold Funding (apparently Safety’s proposed lender):

“I am trying to get the Seller to agree for the transfer being completed in the name of Safety Investments Limited as they are not an original party to the contract. The Contract is non assignable so if they do not agree we will need to do a back to back and another solicitor will need to be instructed to act for Safety”.

Similarly, an assignment of the benefit of the contract requires that the claimant is entitled to that benefit i.e. has something to assign.

105. Turning to Mr McCarthy’s email of 6 February 2019, his reference to the payment of £94,000 being paid by Safety by way of loan/agreement, indicates that the funds were the claimant’s funds, having been loaned to it. Similarly, his reference to a Deed of Variation indicates that in its absence, the claimant would remain the purchaser. The sentence “Shill will have no claim on the Property” refers in my judgment to the position once the proposed Deed of Variation has been executed.

106. I therefore reject the defendant’s submission that the claimant was not the true buyer of the property.

No signed contract

107. Having concluded above that Mr McCarthy did not hold a signed contract on 7 December when he purported to exchange contracts, it follows that the requirements of section 2 of the 1989 Act were not satisfied, and there was no valid exchange. The claim fails for that reason.

Misrepresentation

Legal principles

108. As stated in *Chitty on Contracts*¹, the modern law of misrepresentation is a somewhat complex amalgam of common law, equity and (as a result of the Misrepresentation Act 1967) statute law. Mrs Bunch alleges a dishonest (fraudulent) misrepresentation, which if established, entitles her to rescind the contract.

¹ 34th edn, 2021

109. However, the applicable legal principles were largely common ground. For present purposes, it is sufficient to refer to *Chitty* (and the cases cited there):
- (1) The statement relied upon must be false: *Chitty* at 9-006;
 - (2) If a statement is ambiguous, the representee must prove that they understood the statement in a sense in which it was in fact false: *Chitty* at 9-007, *Leeds City Council v Barclays Bank plc* [2021] QB 1027 at [69];
 - (3) A statement of intention may be a misrepresentation of existing fact if, at the time when it was made, the maker did not in fact intend to do what they said, or knew that they did not have the ability to put the intention into effect: *Chitty* at 9-007;
 - (4) A statement will be treated as true if it is substantially correct, and the difference would not have induced a reasonable person to enter the contract: *Chitty* at 9-006; *Avon Insurance v Swire* [2000] 1 All ER (Comm) 573;
 - (5) The misrepresentation must be made by the other party to the contract or by their agent, and it is sufficient that the agent is agent for the purpose of passing on the misrepresentation to the misrepresentee: *Chitty* at 9-030;
 - (6) A statement may be made which is true at that time but which subsequently ceases to be true to the knowledge of the representor before the contract is entered into. In those circumstances, a failure to inform the representee of the change of circumstances will itself amount to a misrepresentation: *Chitty* at 9-025; *With v O’Flanagan* [1936] Ch 575;
 - (7) To establish fraudulent misrepresentation, the representee must prove that the false representation was made:
 - (i) knowingly; or
 - (ii) without belief in its truth; or
 - (iii) recklessly, careless whether it be true or false.*Chitty* at 9-056; *Derry v Peek* (1889) 14 App Cas 337;
 - (8) The representor must intend the representation to be acted on: *Chitty* at 9-039; *Goose v Wilson Sandford & Co* [2001] Lloyd’s Rep PN 189 at [48];
 - (9) The misrepresentation must have operated on the mind of the representee – it must have induced i.e. materially influenced them to enter into the contract, but need not be the sole cause: *Chitty* at 9-041, 9-045;
 - (10) In cases of fraudulent misrepresentation, it is no defence for the representor to show that if the misrepresentation had not been made, the representee might still have made the contract: It is enough that it had some impact on his thinking, “was actively present in his mind”: *Chitty* at para 9-047; Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 ChD 459, 483;
 - (11) Although the legal burden of reliance is on the representee, there is, in fraudulent misrepresentation cases, an evidential presumption of reliance which is very difficult to rebut: *Chitty* at 9-048; *BV Nederlandse Industrie v Rembrandt Enterprises Inc* [2020] QB 551 at [41] – [45] per Longmore LJ.

Analysis

110. The misrepresentation alleged by Mrs Bunch is that the claimant was a “cash buyer”.
111. She relies upon 3 occasions when this is said to have been made
- (1) in about August 2018 by Mr Margulies to Mr Demir;
 - (2) by Mr Tahir on behalf of the claimant to Ms Tailor in his email dated 14 August 2018;
 - (3) on a date before 5 December 2018, by Mr Tahir to Mrs Bunch.
112. As to the evidence that the representation was made, she relies upon
- (1) Mr Tahir’s email dated 14 August 2018 to Ms Tailor;
 - (2) Ms Henshall’s email dated 7 November 2018 to B & B (set out at para 51 above);
 - (3) Ms Henshall’s draft letter emailed to Mr Hobson on 7 December 2018 (see para 72 above);
 - (4) Mr Pelmont’s evidence that when going through the “pros and cons” of the 2 buyers, he referred to the claimant being a cash buyer.
113. The issues arising in relation to this part of the Defence are:
- (1) the meaning of the expression “cash buyer”;
 - (2) whether Mr Margulies made the representation;
 - (3) whether the representation was true;
 - (4) if so, whether the representation was made fraudulently, within the meaning set out in *Derry v Peak*;
 - (5) whether Mrs Bunch was induced by the representation to enter into the contract.

Meaning of “cash buyer”

114. In my judgment, the ordinary and natural meaning of the expression “cash buyer” is a person who intends or expects to buy a property without the assistance of a secured loan or finance. Although there was no evidence as to Mrs Bunch’s understanding of this expression, the proper inference is, in my judgment, that she understood it to have its ordinary and natural meaning.
115. I reject the claimant’s counsel’s submission that the expression is ambiguous and capable of meaning someone who intends to pay in cash if they need to i.e. if they cannot obtain a mortgage. The claimant’s pleaded case is that its preferred course was to buy the property using mortgage finance (as was its usual practice), but that if finance could not be commercially obtained, then a cash purchase would be progressed with. It is not, in my judgment, be apt to call such a person a cash buyer.

Whether Mr Margulies made the representation

116. The claimant's pleaded case is that Mr Margulies did not make the representation to Mr Demir. I note that, although the claimant was debarred from relying upon its trial witness statements, it did not serve evidence from Mr Demir or Mr Tahir denying that the source of the statement that the claimant was a cash buyer was Mr Margulies. As I have concluded above, on the evidence before me, the natural (and uncontradicted) inference is that Mr Margulies made the representation to Mr Demir (who was Mrs Bunch's agent), for the purpose of it being communicated on to Mrs Bunch and her solicitors.
117. This conclusion is supported by the fact that although the usual practice is for a valuation to be obtained by the buyer's mortgagee, the claimant did not in fact seek access to the property for the purpose of obtaining a valuation until after contracts had been exchanged. The inference to be drawn from this is that the claimant did not wish Mrs Bunch to know that it was intending to obtain a mortgage or some other form of secured finance i.e. that it was not in fact a cash buyer.

Whether the representation was true

118. It follows from my conclusion as to the meaning of "cash buyer" that the representation was not true when made.
119. However even if "cash buyer" has the meaning contended for by the claimant, there is no evidence before me from which it could be inferred that the claimant was able to complete in cash i.e. without obtaining a secured loan. The claimant submitted that the burden of proof was on Mrs Bunch to show that the representation was untrue. However, in this case, the claimant has positively alleged (in para 7(5)(b)(iii) of its Amended Reply) that it would pay in cash by the time of completion if required, so has the burden of proving that allegation. In addition, whether it was so able is an issue on the face of the statements of case, as to which the claimant was required to give disclosure.
120. The only documents in evidence relevant to the claimant's financial position are its accounts filed at Companies House (comprising only balance sheets) which show:

Balance sheet date	Current assets/liabilities £	Net assets/liabilities £
30 September 2018	153,597	(41,958)
30 September 2019	170,126	(52,990)

121. The claimant realistically accepted that on a balance sheet basis the claimant was not able to complete in cash; but submitted that the balance sheets did not shed any light on

the claimant's ability to raise funds from others should it need to. The claimant is hampered in showing this by the exclusion of its witness statements; the position remains therefore that there is no evidence before the court showing that the claimant would have been able to complete in cash; and the available evidence is that it could not.

Whether the representation was made fraudulently

122. Paragraph 7A(1)(f) of the amended particulars of claim states:

“The Claimant will also give credit to the Defendant to reflect the costs the Claimant would have had to incur on its finance for the Property, had the sale completed (and had such borrowing been obtained). The Claimant's borrowing on the Property was originally to be £350,000 at an interest rate of 2.9% pursuant to a **mortgage which had been arranged in principle.**”
(emphasis added)

123. I note that there is nothing in the evidence before to support this allegation. The only evidence as to an offer of a secured loan is the offer made to Safety of a short term loan of £600,000 at an interest rate of 1% per month.

124. Paragraph 7(1)(e) of the Amended Reply states:

“Bernard Margulies explained to Ali Demir

...

(e) that the option of purchasing the Property with the assistance of mortgage finance was preferred by the Claimant at that time, but that, if finance could not be commercially obtained, then a cash purchase of the Property would be progressed with.”

125. It is clear from the above passages that the claimant's intention and expectation throughout was that it would fund the purchase using secured finance. Given my finding above as to the meaning of “cash buyer”, the only conclusion is that the claimant knew that it was not in fact a cash buyer. This is sufficient for the representation to be fraudulent.

Whether Mrs Bunch was induced by the representation to enter into the contract

126. Mrs Bunch believed that the claimant was a cash buyer at all relevant times. The question therefore is whether that belief materially influenced her decision to go ahead with the claimant.

127. The claimant's counsel submitted that, on the balance of probabilities, the “cash buyer” factor did not and could not have played a real and substantial part in Mrs Bunch's decision. He relied upon the fact that in early November 2018, Mrs Bunch having

agreed to sell to the claimant, then changed her mind and decided to sell to H & H. This meant, he submitted, that the cash buyer factor was not sufficient to favour the claimant over H & H.

128. He submitted that by the time of the meeting on 29 November 2018 (with Mr Pelmont and Ms Taylor), Mrs Bunch would have known (either having been told by Cavendish, or indeed Ms Henshall) that H & H:

- (1) had a higher offer by £40,000 (£860,000 as against £820,000);
- (2) had a higher deposit (£86,000 as against £41,000);
- (3) had a mortgage offer;
- (4) could exchange immediately; and
- (5) could be flexible with regards to completion timing to suit Mrs Bunch.

As to the last factor, Mrs Bunch was not rushing to completion: she needed time to move out as she was downsizing.

129. In those circumstances, he submitted that there was simply no benefit at all in choosing the claimant, even if it was mentioned that the claimant was a cash buyer. That factor could not have played a real and substantial part in Mrs Bunch's decision to contract. There was, he said, simply no rational benefit of choosing the lower offer on the basis it was a cash buyer where H & H were in the position they were, which was entirely certain and would suit all her needs.

130. He submitted that the real factor which influenced Mrs Bunch's decision was the allegedly poor behaviour of AK, and that the "cash buyer" factor was neutral, because H & H were in effectively the same position. I reject that submission. When Mr Pelmont was going through the "pros and cons", he included in the "pro" for the claimant that it was a cash buyer. By being one, the claimant put itself in the race i.e. it was not disadvantaged by the true position, which was that finance would have to be raised. For this reason, just as Mr Pelmont considered it a material factor when going through the pros and cons with Mrs Bunch, I consider that it was a material factor in her thinking.

131. Finally, the claimant relied upon the fact that this defence was raised at a relatively late stage in the claim as indicating that Mrs Bunch did not in fact place any reliance on the claimant being a cash buyer: it was not raised in her original defence dated 28 June 2019, and was first put forward in her proposed amended defence in opposition to the claimant's application for summary judgment.

132. In my judgment, this fact demonstrates the difficulties Mrs Bunch has faced in defending this claim as a very elderly, very frail and vulnerable person with significant

memory and cognitive issues. Her defence is founded on the evidence of Ms Henshall and the file of Cavendish, neither of which were available when the claim was first responded to in correspondence and the original defence filed.

133. For these reasons, I conclude Mrs Bunch has established her defence of fraudulent misrepresentation, so that if I am wrong that no valid exchange of contracts took place, then she is entitled to set aside the contract.

Undue influence

134. Mrs Bunch's counsel realistically accepted that she could only succeed in this defence if she could establish that FC, and, in particular Mr Tahir, was acting on the claimant's behalf in their dealings with Mrs Bunch.

135. Mrs Bunch relied primarily on the curious email dated 15 November 2018 set out at paragraph 61 above, and particularly on the reference to the claimant as "our buyer" and "the client". In my judgment, this falls far short of showing an agency relationship. "Our buyer" in its ordinary and natural meaning referred to the fact that the claimant was introduced to the property by FC, and does not go beyond that. The reference to "the client" is ambiguous, and capable of meaning that the claimant was FC's client. However, in the context in which it was written, where the claimant was in fact Mr McCarthy's client, that was, in my judgment, its meaning.

136. The defence based on undue influence therefore fails at the first hurdle.

Postscript

137. I apologize to the parties for the slight delay in producing this judgment. I have however reminded myself of both the evidence and submissions by reviewing the recordings of the hearing, in addition to my note taken at the hearing.