



Neutral Citation Number: [2018] EWHC 3405 (Ch)

Case No: HC-2016-001207

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: 10/12/2018

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

Between :

(1) ROBERT JAMES OAKLEY
(2) CAROLYN OAKLEY
(3) JONATHAN MARK PAGE
(4) UNION PENSION TRUSTEES LIMITED
(5) MORGAN LLOYD TRUSTEES LIMITED

Claimants

- and -

HARPER McKAY DEVELOPMENTS LIMITED

Defendant

Paul Ashwell (instructed by Cole Francis) for the Claimants
Roy Fairgrieve in person for the Defendant

Hearing dates: 15–19 October

Judgment Approved

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a claim concerning a contract to sell a property at 32–40 North Street, Horsham and 1 Norfolk Road, Horsham (collectively referred to as “Norfolk House”). The first four Claimants were until 10 March 2017 the trustees of a pension scheme called the Oakley & Page Pension Scheme, and in that capacity were (and remain) the freehold owners of Norfolk House. On 10 March 2017 the fourth Claimant retired as trustee of the pension scheme and was replaced by the fifth Claimant. The Defendant is a small property development company.
2. On 11 May 2015 contracts were exchanged for Norfolk House to be sold to the Defendant for the purposes of converting it from offices to flats. The purchase price was £2,225,000 plus VAT, and the completion date was specified to be 7 August 2015. On 12 October 2015 the Claimants rescinded the contract for failure to complete, giving notice that they would be retaining the deposit and accrued interest.
3. On 18 April 2016 the Claimants brought the present claim seeking various declarations, the most important of which is that they were entitled to rescind the contract. The Defendant denies that the Claimants were entitled to rescind, and originally counterclaimed for specific performance of the contract. That counterclaim is no longer pursued; instead the Defendant now seeks damages for breach of contract by the Claimants. It is agreed that if the Defendant does establish a right in principle to damages there will need to be a second trial to assess them.
4. Both the Claimants and the Defendant filed applications seeking summary judgment, which were heard by Master Teverson on 8 May and 8 June 2017. In a judgment of 11 September 2017 both applications were dismissed, save for one declaration in favour of the Claimants. Master Teverson then gave directions for the claim and counterclaim to proceed to trial.
5. The Defendant had instructed solicitors and was represented by counsel at the summary judgment hearings. By the time of the trial, however, the Defendant’s solicitors had come off the record and the Defendant was represented by its sole director Mr Roy Fairgrieve, in person. The Claimants were represented by Mr Paul Ashwell.
6. The Claimants relied at the trial on the evidence of five witnesses: (1) Mr Robert Oakley, the first Claimant, (2) Mr Don Freeman, a solicitor at Bennett Oakley, a firm unrelated to the Claimants, which until 16 December 2016 was acting for the Claimants in the property sale, (3) Mr Simon Elliott, the Managing Director of Bennett Oakley, (4) Mr Martin Landivar, of Landivar Architects, who had been retained by the Claimants to carry out preliminary architectural work in relation to the property, and (5) Mr Alex Bateman, the Head of Planning at Stiles Harold Williams (“SHW”), a firm of property advisors that had also been retained by the Claimants. All of those gave oral evidence, save for Mr Freeman whose evidence was admitted pursuant to a hearsay notice under to section 2 of the Civil Evidence Act 1995, without objection by the Defendant. In the event, however, his evidence was not relevant to the issues in dispute at the trial.

7. The Defendant relied on the evidence of three witnesses: (1) Mr Fairgrieve, (2) Mr Peter Byfield, a partner at Wannops solicitors, who were acting for the Defendant between 25 September 2015 and 28 September 2018, and (3) Mr Bill Buckler, the director of a property development company who had some discussions with Mr Fairgrieve regarding the funding of the Defendant's purchase of Norfolk House. By the time of the trial, Mr Byfield had retired and was not available to attend the trial; as with Mr Freeman, however, none of his evidence was ultimately relevant to the factual issues in dispute.
8. After my draft judgment was provided to the parties in the usual way, Mr Fairgrieve sought permission to discuss the draft judgment with his former legal advisers, following which – and with their assistance – he made further written submissions on one aspect of the judgment. I have taken account of those submissions (and Mr Ashwell's written responses to the points raised) in my conclusions set out below.

Factual background

9. It is necessary to set out in some detail the chronology of the negotiations between the parties, in order to explain the legal disputes between the parties that emerged when those negotiations ultimately failed, and my findings on those disputed legal issues. That chronology primarily derives from an extensive set of exchanges of emails, letters and text messages between the parties and their respective solicitors and other advisors during the course of 2015, as well as correspondence with related third parties such as the Defendant's potential funders for the purchase and development of Norfolk House. While the relevant witnesses were cross-examined on the interpretation of some of the documents, most of the relevant facts are uncontentious and are evident from the face of the relevant contemporaneous documents.

Initial negotiations and exchange of contracts

10. The Norfolk House property was, as is common ground, ripe for conversion from offices to residential units. Prior to exchanging contracts with the Defendant, the Claimants had sought to explore the use of the rules on permitted development rights to convert the property into either 17 or 19 flats. They had been informed that their 17 flat scheme would fall within the rules, which meant that prior approval would not be required for the scheme, but the 19 flat scheme would require prior approval. The Claimants subsequently submitted a planning application in relation to dormer windows and skylights to facilitate the 17 flat scheme. Their planning agent for these applications was SHW, and their architect was Mr Landivar.
11. The Defendant first became interested in the property in late 2014, and made an offer to purchase it on 6 March 2015. Contracts were exchanged on 11 May 2015. By way of standard clauses, the contract incorporated the conditions in Part 1 of the Standard Commercial Property Conditions (Second Edition) (hereafter the "Standard Conditions"). The following further specific clauses of the contract are particularly relevant for the purposes of these proceedings:

"13. Acknowledgement by the Buyer of condition

The Buyer acknowledges that before the date of this contract, the Seller has given the Buyer and others authorised by the Buyer, permission and the opportunity to inspect, survey and carry out investigations as to the condition of the Property. The Buyer has formed the Buyer's own view as to the condition of the Property and the suitability of the Property for the Buyer's purposes.

14. Access

14.1 The Seller will permit the Buyer to have access to and exclusive use of the Property at reasonable times on reasonable notice for the purposes of commencing conversion works of the Property into self contained units including construction of internal partition work and storage of materials and all other similar works.

18. IPRs

18.1 The Seller will assign to the Buyers all copyright and other rights in all plans and reports prepared by Stiles Harold Williams Surveyors and Martin Landivar in relation to the Property for nil consideration.

23. Secured Finance

23.1 If the Buyer chooses to obtain finance which is to be secured on the Property following completion (Secured Finance) then the Seller will use reasonable endeavours to assist any such lender with any reasonable enquiries it may raise it may have [sic] save that the Buyer will pay the Sellers reasonable costs to do so."

12. The Defendant paid a deposit of £118,750, representing a little over 5% of the purchase price, and the completion date in the contract was 7 August 2015 or earlier by agreement. Pursuant to clauses 5.5–5.7 of the contract, if completion did not occur on that date due to the buyer's default, the difference between the deposit and a sum equal to 10% of the purchase price would become immediately payable to the seller. That sum, referred to as the "deposit balance", would then be treated as forming part of the deposit for the purposes of the contract.

The Defendant's planning applications in relation to Norfolk House

13. At some point during May 2015 the Claimants' pending planning application for dormer windows at Norfolk House was assigned to the Defendant. The Defendant then took over negotiations with the local authority in relation to that application, and also submitted a notification under the permitted development rights rules for the conversion of the property into 33 flats (rather than the 17 flat scheme that had been notified by the Claimants). Mr Landivar

was commissioned to do further architectural work for both applications. His invoice for that work was sent to the Defendant on 18 May.

14. On 4 June the Defendant wrote to Mr Bateman at SHW instructing him to withdraw the dormer window planning application, on the grounds that he understood that the application was likely to be refused.

Extension of the completion date to 7 September

15. At the time of exchange of contracts on Norfolk House the Defendant did not have a firm offer of finance for the property. The Defendant did, however, have a prior relationship with MSP Capital, who had provided finance on a previous development project on another site in Worthing, and MSP had been approached to finance the Norfolk House scheme on a similar basis, taking the first legal charge on the property. On 29 June 2015 MSP instructed Savills to value the site. Savills provided their report to MSP on 14 July. Their estimate of the developed value of the property was significantly lower than Mr Fairgrieve had anticipated. As a result, towards the end of July MSP reduced their previous (provisional) finance offer to the Defendant, leaving a shortfall of around £750,000. MSP were willing to cover that shortfall with mezzanine funding, but on terms that Mr Fairgrieve considered to be unacceptable for him. An email from Mr Fairgrieve to Mr Oakley on 24 July described MSP's revised terms as a "deal breaker".
16. Mr Fairgrieve therefore started to explore with the Claimants whether they would be prepared to extend the completion date to September, to enable him to find alternative mezzanine finance on better terms. On 3 August the solicitors then acting for him, Laing Law, formally wrote to Bennett Oakley notifying them that the Defendant would not be able to complete the purchase on 7 August and asking whether the Claimants would be willing to postpone completion (and if so on what terms).
17. It is clear from the contemporaneous correspondence that the Claimants were very concerned about the delay, but were prepared to accommodate a limited extension of time if certain conditions were met. On that basis Bennett Oakley replied to the Defendant proposing various terms, including the payment by the Defendant of £25,000 compensation, plus a sum of £103,750 representing the deposit balance pursuant to clauses 5.5–5.7 of the contract, and a revised completion date of 7 September 2015. The Defendant's counterproposal was that the completion date should be extended to 30 September 2015. The Claimants refused and maintained that completion should occur by 7 September 2015, with time of the essence.
18. On 7 August Laing Law confirmed that the Claimants' terms were agreed by the Defendant, and Bennett Oakley replied saying that the agreement was "subject to us sorting out the documentation to reflect the revised terms". The payment of £128,750 was sent to the Claimants that day.

Requests for a further extension of time for completion

19. After that, however, things went downhill. The Claimants were by then concerned about the Defendant's ability to complete, and started to question the Defendant's funding arrangements. Mr Fairgrieve assured the Claimants on 11 August 2015 that he would "most definitely complete on 7 September" and that his funding was "aligned". On the same day Laing Law emailed Bennett Oakley saying that the Defendant was "pursuing funding mezzanine funding options with QED and HNW".
20. When cross-examined about these statements, Mr Fairgrieve said that the discussions with QED fell away but that HNW (i.e. high net worth) was a reference to a Mr Luke Wishart, an individual who had apparently lent Mr Fairgrieve the funds to enable the deposit to be paid for Norfolk House, and who had also invested in the Defendant's development project in Worthing. Mr Fairgrieve had met with Mr Wishart during July to discuss mezzanine funding for Norfolk House.
21. Mr Wishart's position was set out in a letter dated 13 July in which he said that:

"As discussed during our meeting on 11th July I am unable to forward the mezzanine funding required to supplement the MSP loan without 30 days clear notice.

Please also ensure that the terms of the contract relating to the copyright are fully met. We must have copyright release on all works carried out on behalf of the seller by the architect and agent before completion, this needs to include a breakdown of works provided to ensure no conflict of interest."
22. Mr Fairgrieve also had an initial telephone call with another potential individual investor, Mr Buckler, on 10 August, and possibly had a further discussion with him after that. It is clear from Mr Buckler's evidence, however, that those discussions were at a very early stage, and Mr Fairgrieve did not follow up on these by sending him any documentation such as planning approvals or costs estimates. The discussions therefore did not lead to a concrete offer of funding from him.
23. On 14 August Bennett Oakley sent Laing Law a draft deed of variation to the contract, specifying 7 September as the completion date, with time of the essence. That reflected the terms agreed on 7 August. That draft was rejected by Laing Law on 18 August, stating that the Defendant was no longer willing to agree a final completion date of 7 September that removed the notice to complete period.
24. The ostensible reason for this change of position was that the Defendant was concerned about the risk in the event of an "unforeseen delay"; Laing Law nevertheless continued to maintain that the Defendant had "every intention of completing on 7 September 2015". It is evident, however, that, the real reason for the Defendant's refusal to agree the draft was that by then Mr Fairgrieve

was aware that he would be unable to complete by that date. That was because the only offer of mezzanine funding (other than from MSP) remained that of Mr Wishart, who had specified a 30 day notice period for drawdown, and Mr Fairgrieve had not got to the stage of triggering that notice period.

25. It was not until 25 August, however, that the Defendant admitted to the Claimants that it was in fact “likely” to need an extension of the completion date to 30 September. Thereafter on 1 September Laing Law sent Bennett Oakley a revised draft deed of variation, specifying a completion date of 30 days from the date of the variation agreement. That would necessarily have taken the completion date to beyond 30 September. The Claimants did not agree to that proposal, nor was any further variation ever agreed between the parties. The original contract therefore remained in force, but it was common ground that this took effect subject to the agreement (reached on 7 August, as set out above) that the completion date should be extended to 7 September 2015.

Correspondence on the copyright issue

26. Meanwhile, and in parallel with the discussions above concerning a further extension of time for completion beyond 7 September, an issue had started to emerge concerning the copyright assignments to be provided pursuant to clause 18 of the contract. This was mentioned briefly in emails on 6 and 7 August, and then raised again in Laing Law’s email of 18 August, which sought “clarification” of the position with regards to the assignment of copyright.
27. When this query was relayed to the Claimants’ architect Mr Landivar, he was initially reluctant to grant any assignment of copyright to the Defendant until his 18 May invoice for the work done for the Defendant (which was still unpaid) had been settled. As a compromise, on 21 August Mr Oakley suggested that the copyright grant should explicitly be limited to the drawings that Mr Landivar had prepared for the Claimants, and should not cover the work that had been done separately for the Defendant.
28. It appears that Mr Landivar accepted that suggestion, because he wrote a letter in the following terms:

“Re: Copyright license for office/residential designs for Norfolk House, Horsham

With reference to the above, we confirm that we hereby grant Harper McKay Developments Limited with full title guarantee a royalty-free, unconditional, irrevocable, non-exclusive license to use and reproduce the plans and reports for any purpose whatsoever connected with Norfolk House, 32–40 North Street, Horsham RH12 1BZ and the license hereby granted shall carry the right to grant sub-licenses and shall be transferable to third parties without in each case the need to obtain our consent.

This copyright license pertains to the drawings for the planning consent: Ref. No: DC/13/2177 for 'Notification of proposed change of use of offices (B1a) to 19 residential units (Class C3) with 18 car parking spaces (Prior Approval).''"

29. Mr Elliott of Bennett Oakley then emailed Laing Law on 26 August saying that "I have the copyright assignments that will be handed over on completion". Laing Law responded saying that the assignments were needed for the Defendant's funders, and asking "Would you mind releasing them now please?" Thereafter, two versions of Mr Landivar's letter appear to have been sent to the Defendant. One version (mistakenly) bore the date of 7 August 2014. There is no record of when this was sent to the Defendant, but the chronology would suggest that it was sent at some point between 26 and 28 August. The second version, correcting the date to 7 August 2015, was forwarded to Laing Law on 28 August.
30. Later on 28 August Mr Fairgrieve sent an email to Laing Law complaining that Mr Landivar's copyright release related to only part of the work that the Claimants had said was carried out by them. In particular, he believed that the work carried out by the architect had also included a measured survey and the dormer window planning application initially submitted by the Claimants, which he considered should be included in the copyright release. He concluded by saying that "We are unable to accept the current form of copyright release as it only relates to part of the scope of works commissioned by the seller." He asked his solicitors to "forward this email to the other side so that there is no further misunderstanding and to ensure that we can move forward to conclude matters." Laing Law duly forwarded the email to Bennett Oakley on the same day.
31. In response, Mr Landivar prepared a third version of his letter, which was (like the second version) dated 7 August 2015, but which set out the copyright licence in the following amended terms:

"Re: Copyright license for office/residential designs for Norfolk House, Horsham

With reference to the above, we confirm that we hereby grant Harper McKay Developments Limited and Harper McKay Developments (Horsham) Limited with full title guarantee a royalty-free, unconditional, irrevocable, non-exclusive license to use and reproduce the plans and reports relating to work carried out for Oakley Page Pension Scheme for any purpose whatsoever connected with Norfolk House, 32-40 North Street, Horsham RH12 1BZ and the license hereby granted shall carry the right to grant sub-licenses and shall be transferable to third parties without in each case the need to obtain our consent."

32. That third version was sent to Laing Law as an enclosure to a letter from Bennett Oakley dated on 2 September. Bennett Oakley also enclosed a letter from Mr Bateman at SHW (also dated 7 August 2015), which stated:

“NORFOLK HOUSE

We confirm that we hereby grant Oakley and Page Pension Scheme, Harper McKay Developments Limited and Harper McKay (Horsham) Limited, with full title guarantee, a royalty-free, unconditional, irrevocable, non-exclusive license to use and reproduce the plans and reports for any purpose whatsoever connected with Norfolk House, 32–40 North Street, Horsham, RH12 1BZ.”

33. On that basis, Bennett Oakley’s 2 September letter stated that the Claimants were in a position to assign the required rights to the Defendant on completion, and confirmed that the Claimants were, therefore, ready, willing and able to complete the purchase on 7 September.
34. The status of the two letters sent on 2 September is disputed. Mr Ashwell submitted that since the Claimants did not intend to provide the Defendant with copyright rights until the point of completion, the letters were essentially being provided to the Defendants in draft form. That was not accepted by the Defendants. I do not, however, have to resolve that issue because whatever the status of the letters, they were again not accepted by Mr Fairgrieve. The initial response from Laing Law in an email to Bennett Oakley on 3 September noted that “The letters from Mssrs Landivar and Stiles Harold Williams appear to have been backdated. My client is concerned as to why these have not been dated correctly. Please arrange for these to be redated so that they can be sent on to my client’s funder.” In parallel with that email, Mr Fairgrieve contacted Mr Landivar directly on the same date, forwarding his letter and asking “Please would you amend the date to that of the date of typing the attached and forward a copy back to me.”
35. On 7 September Laing Law forwarded to Bennett Oakley a further email sent to them by Mr Fairgrieve on 5 September, saying (in the covering email) “please see my client’s email below setting out the position with regards to nature of the copyright to be assigned and dating of the assignment. The assignment of the copyright needs to meet the requirements below”. Mr Fairgrieve’s email repeated that the two letters were backdated and should be dated as of “today’s date or the date of writing”, and also objected that the third version of the letter from Mr Landivar was not conclusive as to what was covered. In particular, Mr Fairgrieve noted that the letter did not specify that the plans included the measured survey that he believed had been carried out, and the dormer window planning application.
36. Mr Fairgrieve’s 5 September email also noted that the Defendant’s funders would require 30 days’ notice to draw down funds for completion (presumably a reference to Mr Wishart’s conditions). Given that Mr Fairgrieve had still not triggered that notice period, there was by then no prospect of completion any point during September, whatever the position on the copyright releases.
37. On 8 September Bennett Oakley replied expressing puzzlement as to why the copyright issue continued to be a problem, and asking for a draft of the assignment letters that the Defendant considered necessary for its purposes.

The next day, in a further attempt to clarify the scope of the work covered by the copyright letters, Bennett Oakley sent Laing Law an email attaching the planning information for the work that SHW and Mr Landivar had carried out for the Claimants in relation to the Claimants' planning applications (including the dormer window application initially submitted by the Claimants) and noting that the letters already produced "confirm transfer of copyright for work carried out for our clients on these applications". Bennett Oakley also confirmed categorically that this work did not include any measured survey, and reiterated that the Claimants were in a position to assign on completion the copyright in relation to work carried out for them. The email concluded:

"Unless we have your confirmation by 5pm today that completion will take place on Friday 11th September 2015 we will be serving a notice to complete tomorrow."

38. The Defendant did not confirm that it was able to complete by 11 September. Nor did it provide a draft of the copyright assignment that was sought. Instead Mr Fairgrieve reiterated his objection regarding the date on the copyright letters, as well as his belief that Mr Landivar had carried out a measured survey for the Claimants, and maintained that the Claimants either had to clarify the scope of works carried out by Mr Landivar, or had to provide a blanket copyright release. This was a rather odd request, because Bennett Oakley had provided precisely that clarification in their email of 9 September.

Correspondence on the access issue

39. A further issue that was raised by the Defendant during the course of the negotiations, albeit rather more intermittently than the copyright issue, was the question of access to the Norfolk House site. As I have set out above, clause 14 of the contract required the Claimants to allow the Defendant access to the Norfolk House site at reasonable times on reasonable notice, for the purposes of commencing the conversion of the property into flats. There is no dispute that, until 7 August 2015, access to the site was permitted by the Claimants, who gave Mr Fairgrieve a front door key as well as the code for the padlock securing the front gate of the site. Mr Fairgrieve did not ever make use of that access for the purposes of commencing conversion work; he did, however, show the property to some funders and valuers during that time.
40. On 7 August, which was the date initially set in the contract for completion of the sale, the Claimants changed the padlock code, which prevented Mr Fairgrieve from gaining access to the property. Less than an hour after the code had been changed, Laing Law asked Bennett Oakley for the new code. Bennett Oakley replied asking "Please confirm for what purposes access is required so this can be considered". The only response to that from Laing Law was "Please see clause 14 of the contract ref access".
41. Mr Fairgrieve asked again for the new padlock code on 11 August, apparently for the purpose of a site visit with a surveyor. On 14 August, when Bennett Oakley sent the first draft deed of variation to Laing Law, the accompanying email stated that "Once you can confirm this has been signed by your clients

we can let you have the access code”. Since the deed of variation was never ultimately signed, the access code was not given to the Defendant.

42. On 3 September Mr Fairgrieve sent an email complaining that he “still [had] no access to the property to gear up”, and a further email on 11 September said that he required “immediate access to the property under the terms of the contract”. An email from Laing Law on 14 September repeated the request for the access code, saying that this was needed “to enable [the Defendant] to progress the mezzanine funding”. The Claimants did not respond to any of these requests. In his oral evidence at the trial, Mr Oakley said that the access code had been withheld because he had lost trust in Mr Fairgrieve and felt that he was looking for excuses to delay completion.

Service of notice to complete, and eventual rescission of the contract

43. On 11 September 2015 the Claimants served on the Defendant a notice to complete, pursuant to clause 8.8 of the Standard Conditions. That provides:

“8.8.1 At any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete.

8.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.”

44. As required by that provision, the Claimants gave the Defendant 10 working days to complete, which meant that completion was required by 28 September at the latest.
45. The Defendant then instructed Wannops, who wrote to Bennett Oakley on 25 September saying that they had been engaged by the Defendant to advise on the “contractual position”. As their letter went on to make clear, the contractual issue in question was the construction of clause 18.1. As to that, Wannops’ letter acknowledged that copyright assignment was not sought in respect of the work commissioned separately from Mr Landivar by the Defendant, and made no further requests in relation to the measured survey, nor did they ask for any further clarification of the scope of Mr Landivar’s copyright release. Instead Wannops raised a different point: that in their view clause 18.1 of the contract required copyright to have been released to the Defendant on exchange of contracts. The deed of assignment could, they said, be drafted so as to revert the rights in the event of a failure to complete. Wannops said that if the copyright issue could be resolved, the Defendant would be in a position to initiate the 30 day notice period for the drawdown of its finance. On that basis Wannops suggested that completion could take place by 6 November at the latest, and requested a discussion “with a view to trying to reach some form of compromise”.
46. Bennett Oakley replied by email on the same day (25 September), asking to see by close of business on 28 September (1) a draft deed of assignment of

copyright, (2) confirmation of Defendant's funding offers, (3) evidence that the relevant lenders required copyright assignment prior to completion, and (4) evidence of a 30 day drawdown requirement, together with evidence that the Defendant had asked for a waiver of that requirement. On receipt of those documents, they said, they would discuss the matter with their clients.

47. Wannops did not reply until 28 September, when they said that they could provide items (2)–(4), but not within the timescale requested, and only if there was a “clear indication” from the Claimants that completion was likely. As to the draft copyright assignment, Wannops said that they were in a position to draft this, but would not do so until the Claimants had responded. The 28 September deadline therefore expired without the Defendant either completing or providing the documents requested by Bennett Oakley.
48. Subsequent correspondence revealed that the Defendant was by then looking at a new principal lender, Bridgebank Capital, to provide a bridging loan that would be secured by way of a first charge on the property. On 9 October a mortgage offer from Bridgebank was forwarded by Wannops to Bennett Oakley, noting that the Defendant was awaiting further mortgage offers from “other lenders”, which would be forwarded shortly. Wannops also noted that Bridgebank required a minimum 30 day drawdown period, and acknowledged that the completion date of 6 November which they had proposed “may now be incompatible” with that drawdown period.
49. On 12 October, having received no further information or documentation from the Defendant, the Claimants served notice that they were rescinding the contract pursuant to clause 9.5 of the Standard Conditions, and would be retaining the deposit, along with the £25,000 compensation payment and accrued interest.

The claim and counterclaim

50. On 18 April 2016 the Claimants issued a claim seeking four declarations:
 - i) A declaration that the contract for the purchase of Norfolk House was not varied to provide for a completion date later than 7 September 2015.
 - ii) A declaration that the Claimants were not required by clause 18.1 of the contract to assign intellectual property rights before completion of the contract.
 - iii) A declaration that the Claimants were entitled to rescind the contract on 12 October 2015.
 - iv) An order that the unilateral notice registered by the Defendant in the Charges Register of the Claimants' title on 13 May 2015 be discharged and vacated.
51. As to the first declaration the Claimants accepted in their Particulars of Claim, and the Defendant asserted in its Defence, that although there was no valid

contractual variation of the 7 August completion date, the Claimants waived and/or were estopped from relying on any right that they might have had under the contract to require completion before 7 September 2015. The Defendant did not claim that any later completion date had been agreed, and therefore did not dispute the Claimants' entitlement to the first declaration. The Defendant did, however, contest the other declarations, and counterclaimed for specific performance of the contract.

The summary judgment applications

52. On 20 December 2016 the Claimants applied for summary judgment, and the Defendant cross-applied for summary judgment dismissing the second and third of the declarations sought by the Claimants.

53. In his judgment of 11 September 2017, Master Teverson noted that the first declaration was not controversial, and that although the Defendant had sought to obtain the agreement of the Claimants to the completion date being extended to 30 September 2015, it was clear that this was not agreed. It appears that, by an oversight, this finding was not addressed in Master Teverson's order following judgment. It was therefore agreed that my final order in this case should include an order making that declaration in favour of the Claimants.

54. As to the second declaration sought by the Claimants, Master Teverson found in favour of the Claimants:

“The contract was not a conditional contract in the sense of a contract being made subject to a condition precedent such as the obtaining of planning consent. It specified a date for completion of the contract. In my view the words ‘the Seller will assign’ import an obligation on the Seller to do in time for completion and not before. I accept the submission of Mr Ashwell that if the parties had intended the assignment to be provided prior to completion, the contract would have stipulated for that expressly by providing a date or specific time period prior to completion by which the assignment was to be made. I accept his submission that the parties are unlikely to have expected the rights to be assigned prior to completion in case the transaction failed to complete requiring rights to be re-assigned.”

55. On that basis Master Teverson declared that:

“the Claimants were not required by clause 18.1 of the contract of sale ... to assign intellectual property rights to the Defendant any earlier than the date of completion of the sale of Norfolk House”.

56. The remainder of the issues were, Master Teverson found, not suitable for summary determination and had to proceed to trial.

Issues for trial

57. The first and main issue for determination is whether the Claimants were entitled to rescind the contract, as per the third of the declarations that they seek. It is common ground that this depends on whether the Claimants were entitled to serve notice to complete on 11 September 2015. That in turn raises two sub-issues:
- i) *The copyright issue:* Were the Claimants ready, willing and able to complete when they served the notice to complete? The Claimants say that they were. The Defendant says that the Claimants were not ready, willing and able, because the Claimants were not in a position to assign copyright as required by clause 18.1 of the contract.
 - ii) *The access issue:* Were the Claimants in breach of clause 14.1 of the contract by failing to provide access to the Norfolk House site after 7 August 2015? If so, did that cause or materially contribute to the Defendant's inability to complete the purchase?
58. The Defendant also initially contended that the Claimants' breach of clause 18.1 (by failing to assign the relevant rights earlier) prevented it from finding alternative finance and was therefore a cause of the failure to complete. That argument has, however, necessarily fallen away following Master Teverson's declaration that the Claimants were not required to assign copyright pursuant to clause 18.1 until the point of completion of the sale; there was, therefore, no breach of that clause as alleged by the Defendant.
59. The remaining issues are the resolution of the unilateral notice point (i.e. the fourth declaration), and the disposal of the Defendant's counterclaim. These points are related, and I will therefore address them together after my findings on the copyright and access issues.

The copyright issue: discussion

60. The copyright issue turns on the question of whether the Claimants were ready, willing and able to comply with the copyright assignment requirement in clause 18.1 at the time when they served notice to complete on 11 September 2015.
61. The requirement for a party to be ready, willing and able to complete at the time when notice to complete is served does not mean that every document required for completion must have been prepared at that time. Rather, the test is whether the party serving notice is "poised to complete", such that they were ready to set in motion any necessary administrative arrangements to enable completion within the relevant time limit (*Northstar v Brooks* [2006] EWCA Civ 756, §188).
62. So, for example, the fact that administrative documents such as a completion statement remain to be drawn up does not prevent a seller from being ready, willing and able to complete. However a seller will not be ready if there are matters of substance that have not yet been resolved.

63. The difference between a matter of substance and an administrative formality is illustrated by *Cole v Rose* [1978] 3 AER 1121. In that case, at the time of exchange of contracts there were three charges on the land being sold, which needed to be discharged on or before completion. The vendor's solicitor was aware of two of the charges and had confirmed that undertakings in respect of both of these would be given. Shortly before notice to complete was served a third charge came to light. At the time when notice to complete was served, the vendor's solicitor was still in the process of making enquiries to ascertain that he could undertake to discharge the third charge. He later confirmed that he could indeed do so. The judge held that the notice to complete was ineffective. The problem was not that as at the relevant date the undertakings to discharge had not been formally executed: that was simply part of the administrative arrangements for completion. Rather, the problem was that, as a matter of substance, at the time when notice to complete was served the vendor's solicitor did not know whether he would be able to give an undertaking in respect of the third charge. The judge considered that he was not in those circumstances ready, willing and able to complete.
64. In this case, the Claimants say that they were ready, willing and able to complete when they served notice, for the following main reasons:
- i) Assignment of copyright is, Mr Ashwell submitted, a routine administrative matter; therefore failure to deal with this before notice to complete is served should not invalidate the notice, by contrast with cases such as *Cole v Rose* (above) and *Jneid v Mirza* (1981, unrep, CA) where the outstanding issues concerned the vendors' ability to pass title to the land sold.
 - ii) The copyright letters sent to the Defendant on 2 September 2015, albeit expressed as licences, amounted in substance to assignments because they conferred rights that were transmissible without consent, rather than merely personal rights. Alternatively, the Defendant waived its right to require assignments rather than licences (or was estopped from requiring strict compliance with that requirement), since it did not say that assignments as such were necessary. Instead the Defendant's concern was with the dating of the two copyright letters and the substantive scope of the licence that was offered by Mr Landivar.
 - iii) If those letters did *not* suffice for the purposes of clause 18.1, and something more was required to assign copyright to the Defendants, Mr Landivar and Mr Bateman's evidence was that they would willingly have executed assignments, and could have done so on at most a few hours' notice if required.
65. In response the Defendant says that:
- i) The requirement for the assignment of copyright was not a mere administrative formality but a matter of substance, and that the Claimants therefore have to show as a matter of substance that they were ready, willing and able to assign copyright in the relevant plans and reports to the Defendant.

- ii) The two copyright letters sent on 2 September 2015 merely purported to confer non-exclusive *licences* to use the copyright, and did not fulfil the obligation in clause 18.1 to *assign* ownership of the copyright to the Defendant.
 - iii) Nor were the Claimants ready, willing and able to grant assignments or even procure assignments of the relevant rights, because they were not the owners of the copyright, and the Claimants had not made any arrangements for the copyright to be assigned either to them, or to the Defendant.
66. In determining these competing contentions, the starting point has to be the construction of clause 18.1. This was a condition inserted into the contract at the request of the Defendant, and was drafted by Laing Law. It was common ground that the word “assign” in that clause meant what it said: the Claimants did not suggest that it should be interpreted to include something that was not, in substance, an assignment of the relevant rights.
67. Did the clause mean, however, that the Claimants were required themselves to be the owners of the rights in the relevant plans and reports, in order that they could assign those rights to the Defendant? On this point I agree with Mr Ashwell that the words “The Seller must assign” must be interpreted as requiring the Claimants to assign by themselves if they owned the rights, or procure the assignment by the owners if they did not own the rights. In this case the rights were owned by Mr Landivar and SHW, the Claimants duly took steps (as I have recorded above) to confirm that both of those were willing to grant what the Claimants thought were appropriate rights in the relevant plans and reports, and no objection was made at the time that the assignment had to be granted by the Claimants themselves rather than by the relevant owners of the copyright. It was clear from Mr Fairgrieve’s evidence that his concern was not with who the assignment came from, but with the substance of the right that was granted to the Defendant. That is also consistent with the obvious purpose of the provision. I therefore consider that it was sufficient for the relevant rights to be provided by the owners of those rights rather than by the Claimants.
68. The provision of those rights – or at least the agreement to provide those rights on or before completion – cannot be characterised as an administrative formality. It is true that it was not a matter that went to the Claimants’ title to Norfolk House, but it was nevertheless a substantive condition of the contract to sell the property. It was, moreover, a condition that was of considerable importance to the Defendant, because (as Mr Fairgrieve explained in his evidence) the acquisition by the developer of the copyright in pre-existing plans for the property was a requirement of all or nearly all lenders that funded development projects.
69. The question is therefore whether the two copyright letters sent on 2 September 2015 established that the Claimants were ready, willing and able to comply with clause 18.1. I consider that the Defendant is right to say that those letters did not in substance amount to “assignments” of the copyright. They did not transfer the copyright from Mr Landivar and SHW to the

Defendant, but merely granted non-exclusive licences (or on Mr Ashwell's construction confirmed that such licences would on completion be granted). I accept Mr Oakley's evidence that he genuinely believed that the wording of those letters did comply with the requirements of clause 18.1; but that belief was, I find, mistaken as a matter of law.

70. That is, however, not the end of the matter, because as I have set out above there was protracted correspondence between the parties on the subject of the two copyright letters, during which the Defendant did not ever raise the point that the letters sent to him concerned the grant of "licences" rather than "assignments" of the relevant rights. Rather, Mr Fairgrieve's objections solely concerned the dating of the two letters, and whether the Landivar letter covered a measured survey and a particular planning application. The date point quickly fell away, and the measured survey/planning application points were dealt with by the Claimants' clarifications (particularly in the 9 September letter from Bennett Oakley) that the Landivar letter covered all the work done for the Claimants, but did *not* include a measured survey because Mr Landivar had not carried out any such survey for them. That is presumably why Wannops in their letter of 25 September made no further reference to these two issues.
71. Bennett Oakley's request on 8 September for a draft of the assignment letter that the Defendant sought is also relevant. That gave the Defendant an express opportunity to provide draft text referring to an assignment rather than a licence, if that was what the Defendant required. The Defendant did not, however, ever send a proposed draft assignment, nor did Laing Law do so, nor did Wannops when they came on board later in September.
72. The Defendant and its solicitors therefore had numerous opportunities to ask the Claimants for assignments rather than licences, prior to the date on which notice to complete was served. Since no point on this was ever taken, but the Defendant said instead (repeatedly) that its objection was to other problems with the letters, the question arises as to whether the Defendant is to be regarded as having waived its rights to insist on assignments as such, rather than non-exclusive (but transferable) licences in the form proffered by the Claimants.
73. Mr Fairgrieve's written submissions after my draft judgment was handed down advanced three reasons why, in his submission, the Claimants could not rely on waiver for the purposes of clause 18.1. The first was that the parties could not by waiver produce what was in effect a variation of the contract, in light of the principle that any variation of a term material to a contract for the sale of land must comply with the formalities in s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989, and in particular the requirement in s. 2(1) that:

"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 exchange, in each."

74. In that regard Mr Fairgrieve referred in particular to the judgments of the Court of Appeal in *McCausland v Duncan Lawrie* [1997] 1 WLR 38 and *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123. Mr Ashwell in response relied on (among other things) *Courtney v Corp* [2006] EWCA Civ 518, which he submitted was binding authority for the proposition that a waiver could operate outside of s. 2.
75. In *McCausland v Duncan Lawrie* the Court of Appeal held that the variation of a term material to a contract for the sale or other disposition of an interest in land must comply with the formalities of s. 2 of the 1989 Act. Nevertheless the court considered that an argument based on estoppel would remain arguable. Morritt LJ (with whom Tucker J agreed) also cited with approval (at p. 47H) a passage from the judgment of Lord Atkinson in *Morris v Baron* [1918] AC 1, p. 31, in which an express distinction was drawn between the variation of a contract, and cases where “one party at the request of and for the convenient of the other forbears to perform the contract in some particular respect strictly according to its letter”, and where the contract was therefore “not varied at all, but the mode and manner of its performance is, for the reasons mentioned, altered.”
76. The Court of Appeal in *Courtney v Corp* likewise drew a clear distinction between an express agreement to vary a contract to which s. 2 of the 1989 applied, and the waiver of a term in such a contract. Arden LJ, delivering the leading judgment, noted at §§13–14 that while *McCausland v Duncan Lawrie* concerned an express agreement to vary the contract, in the case before her there had been no such express agreement. Rather, she concluded:
- “What happened was that the lender encouraged the respondent to believe that the loan would still be made even after 31st December 2003. ... The true position was that the lender agreed to waive the term requiring the facility to be made available by 31 December 2003. He was entitled to do this because of the terms inserted for his benefit as lender but, because there was no express agreement to vary the contract, Section 2 did not invalidate what had happened. It did not in fact apply to that act of the lender. Section 2 only applies to the terms which were expressly agreed between the parties. It is only those terms which Section 2 requires to be inserted into the contract, which both parties sign.”
77. In relation to estoppel, a different approach was taken by the Court of Appeal in the *Dudley Muslim Association* case, at §33 (per Lewison LJ):
- “It is clear that any variation of a contract that falls within the ambit of section 2 must itself comply with the required formalities of that section: *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38. That case left open the possibility that estoppel might outflank the section, although it would be surprising if one could do by promissory estoppel what one could not do by informal contract. ... Unless a case falls within section 2(5), to admit a defence based on promissory estoppel

would be effectively to repeal the section by judicial legislation
...”

78. This comment was, however, *obiter*, since the Dudley Muslim Association had not asserted either a variation of its contract or a promissory estoppel, but had instead relied on various public law defences. It is also notable that the court did not comment on the application of s. 2 of the 1989 Act to a waiver of contractual rights, although Lewison LJ had earlier (at §29) mentioned “waiver or promissory estoppel” as being contractual defences of the kind that the Dudley Muslim Association might, in theory, wish to put forward. By contrast, the comments of Arden LJ in *Courtney v Corp* (which were not mentioned in the *Dudley* case) expressly concerned the waiver of a contractual term, and were part of the *ratio decidendi* of the case.
79. In those circumstances I am bound to follow the approach taken by the Court of Appeal in *Courtney v Corp*. Accordingly, although an express variation of a material term of a contract falling within s. 2 of the 1989 Act would be required to comply with the formalities of s. 2, that does not prevent the courts from giving effect to a waiver of a right under such a contract. I also note that the contrary conclusion would mean that the doctrine of waiver simply could not operate in relation to a material term of a contract covered by s. 2 of the 1989 Act; there is, however, no suggestion that this is the case in any of the authorities to which I have been referred. Indeed, as I have recorded above, the Defendant itself expressly pleaded that the Claimants should be held to have waived (or that they were estopped from relying on) their right to require completion before 7 September 2015.
80. Mr Fairgrieve’s second objection was that the Defendant cannot be said to have made any unequivocal representation that it would accept less than full compliance with clause 18.1, in circumstances where the Defendant rejected the two copyright letters sent on 2 September 2015. I do not accept that submission. It is well-established that waiver may be implied from a course of conduct. Whether that is made out will turn on the facts of the individual case. In *Bremer Handelsgesellschaft v Vanden Avenne-Izegem* [1978] 2 Lloyd’s Rep 109, for example, Lord Salmon held that defects in *force majeure* notices had been waived in circumstances where:

“[t]he buyers’ message of July 4 ... also recited the whole of the sellers’ force majeure (cl. 22) notice of July 3 pointing out what was wrong with it, namely, that it had referred to the monthly instalments as being 500 tonnes each whereas the 500 tonnes had been reduced to 280 tonnes. There was no suggestion of any kind either in that telex or any of the others that there was anything else wrong with the notice, e.g., that it was defective or served out of time. I think that any reasonable sellers would rightly have inferred that the buyers were accepting the notice as a valid and effective notice under cl. 22 save that the reference to 500 tonnes should be altered to 280 tonnes. To put it another way, the buyers made an unequivocal representation that they were treating the notice as a valid and effective notice under cl. 22.”

81. In the present case, it is necessary to take what was said in the correspondence together with what was *not* said, namely the fact that Mr Fairgrieve and his solicitors did not ever object to the grant of “licences” rather than “assignments”, despite numerous opportunities to raise this point. Nor was it ever suggested that there might be further unspecified objections to the copyright letters other than those identified by Mr Fairgrieve; if anything, the correspondence implied the opposite. I consider that any reasonable sellers would have inferred that while Mr Fairgrieve objected to the date on the letters and the scope of the rights conferred by Mr Landivar’s letter, he accepted the licence form of the two letters as being valid and effective for the purposes of clause 18.1.
82. Mr Fairgrieve’s third objection was that the waiver point did not emerge until the trial, and was not pleaded by the Claimants, nor did they subsequently seek to amend their pleadings to allege waiver. I do not consider that this is a sufficient basis on which to reject the waiver point. The requirement is for statements of case to plead material facts. The Claimants’ pleadings did so, identifying in the Particulars of Claim the main sequence of events (which I have set out in more detail above), including in particular the copyright letters sent to Laing Law on 2 September 2015, the email from Laing Law in response on 3 September 2015, and Mr Fairgrieve’s further email of 5 September. The Reply went on to state that “Neither Laing [Law] nor the Defendant itself ever queried or disapproved the nature of the legal rights being granted, as opposed to the identification of the plans or reports.” This point was specifically referred to in the judgment of Master Teverson, who noted in relation to the copyright issue that:
- “I accept that the giver of a notice must at the time be ready to complete and that the position should not be looked at hypothetically. ... In my view again, this line of argument needs to be seen in its evidential context. The evidential context is that Mr Fairgrieve himself does not appear to have been focussing attention at all on the difference between an assignment and a licence. His concerns were with the dating of the document and with the detailing of the works in respect of which copyright was to be released.
- In my view ... the Claimants have a realistic prospect of persuading the court at trial that the practical differences between obtaining an assignment of the copyrights and the form of licence granted ... [were] not such as to warrant invalidating an otherwise effective notice to complete, in circumstances in which the objections made to the form of the document were not that it was a licence rather than an assignment.”
83. The material facts were, therefore, sufficiently pleaded by the Claimants. The characterisation of those facts as giving rise to a waiver is a matter of law, and it is not suggested by the Defendant that the evidence before the Court would have been in any way different had the Claimants expressly pleaded waiver or estoppel from the outset.

84. I therefore reject Mr Fairgrieve’s submissions on the waiver point, and find that the Defendant waived its rights to insist on assignments of the relevant rights under clause 18.1, rather than the licences offered by the Claimants. It follows that the Claimants were indeed ready, willing and able to comply with clause 18.1 at the time when notice to complete was served on 11 September. They had provided express confirmation that the rights in the plans and reports prepared by Mr Landivar and SHW for the Claimants would be given to the Defendant on completion, and no objection had been made by the Defendant regarding the form of the rights being offered. The Claimants did make clear that the rights would not be provided *until* completion, and Wannops objected to that in their letter of 25 September, but that objection was rejected by Master Teverson.
85. I therefore do not need to reach any conclusion on Mr Ashwell’s alternative submission that if the two copyright letters did not suffice, then the evidence is that Mr Landivar and Mr Bateman could and would, if asked, have provided letters referring to assignments of the rights rather than licences. It is, however, appropriate to observe that Mr Landivar and Mr Bateman were never asked to grant assignments of the rights rather than licences. The wording in their letters was sent to them by the Claimants, and there is no evidence that either the Claimants or Mr Landivar and Mr Bateman ever directed their minds to the grant of assignments rather than the grant of licences. In those circumstances I would be hesitant to find that the Claimants were ready, willing and able to grant assignments as such.
86. I also note that in *Cole v Rose* a similar argument to that advanced by Mr Ashwell was rejected by the judge, in a passage at p.1128h–1129a:
- “Counsel for the vendors also suggested that in considering whether a vendor is, when serving a notice, ‘ready to complete’ one does not look at his particular knowledge at that time, that is one does not consider the question subjectively so far as the vendors’ actual knowledge is concerned, but rather one considers the position objectively with a view to saying whether the vendor, whatever he himself knew, was in fact ready to complete. By that test, the vendors’ solicitor was no doubt ready although he himself was not quite assured of the fact on 29th January [when notice to complete was given]. I do not think any such test should be applied. It is a matter of reading condition 19(2). That provides that the party giving the notice must at that time be ready to complete. The answer given by the vendors’ solicitor in cross-examination ... shows that he was not ready.”
87. The judge therefore took the view that even if, with hindsight, the vendor could say that the third charge was one that could be discharged, at the time when notice to complete was given the vendor did not know what the charge was and therefore could not give an undertaking in that regard. That suggests that a party is not ready, willing and able to complete if there is a substantive matter of which it is (at the time) unaware, and to which that party has therefore not (at the time) directed its mind.

88. As I have said, however, I do not need to reach a firm conclusion on that argument in this case, because I have in any event concluded that in the circumstances of this case the Landivar and SHW copyright letters were sufficient for the purposes of clause 18.1.

The access issue: discussion

89. In relation to the access issue, the Defendant says that:
- i) The Claimants denied access to the property from 7 August 2015 onwards, by changing the padlock code and refusing to give Mr Fairgrieve the new code. This was a clear breach of clause 14.1 of the contract, which should be construed as requiring access for potential funders as part of the process of preparing to convert the properties.
 - ii) Alternatively, if clause 14.1 cannot be given that construction, there was an implied obligation to give access to potential funders, or at least the Claimants cannot rely on failure to complete given that they prevented the purchaser from raising funds to complete by denying access to potential funders.
 - iii) The denial of access caused or materially contributed to the Defendant's inability to complete, since it hindered the Defendant in obtaining alternative mezzanine finance on better terms than those offered by MSP.
90. The Claimants' position is that:
- i) They accept that access was denied. However clause 14.1 only requires access for the purpose of commencing conversion works, and the Defendant did not ever start conversion works at Norfolk House, nor did Mr Fairgrieve ask for access for this purpose after 7 August.
 - ii) No term requiring access for funders should be implied into the contract. The point has never been pleaded, and the suggested term does not meet the strict legal test for implied terms in a contract.
 - iii) In any event the Defendant has not established that the denial of access caused or materially contributed to the failure to complete.
91. Again, the starting point is the construction of the contract. As with clause 18.1, clause 14.1 was inserted at the request of the Defendant. In this case, however, the Defendant's initial proposal was for access on wider terms than was ultimately agreed. In an email sent to Mr Oakley on 17 March 2015, the proposal was for access "to be provided both before and after exchange of contracts to carry out due diligence. The seller further agrees to allow the buyer to have access after exchange of contracts to also store materials on site ahead of completion, at the buyers [sic] own risk." In the end, however, clause 14.1 made no mention of access for due diligence, but was confined to a requirement for access for the purposes of commencing conversion work on the property.

92. It is common ground that the Defendant did not ever start conversion work or request access to do so. Instead Mr Fairgrieve argued that funding was part of the development process, and clause 14.1 should therefore be construed as extending to access for potential funders, which he said he did want.
93. I do not accept that construction. On its face, the clause specifically concerns access for the purpose of commencing the conversion work, and the examples given in the clause (constructing internal partition work, storing materials “and all other similar works”) make clear that this provision is designed to address work physically done on site. Due diligence for funders might well be a precursor to commencing a conversion project, but is a very different matter to storing materials and starting construction works.
94. There was, moreover, no reason for clause 14.1 to include access for funders, because the Claimants’ obligation to assist prospective funders was explicitly addressed elsewhere in the contract, in clause 23, which required the Claimants to use reasonable endeavours to assist any lender with any reasonable enquiries raised. If a prospective funder had sought access to the Norfolk House site for the purpose of its due diligence enquiries, that would, I consider, properly have fallen under the terms of clause 23. I also note the terms of clause 13, which recorded that the buyer “and others authorised by the Buyer” had already, prior to exchange of contracts, had the opportunity to inspect the property so as to form a view as to its condition and suitability for their purposes.
95. In those circumstances I do not consider that it is appropriate to construe clause 14.1 to include access for the purposes of prospective funders. Nor do I consider that such an obligation should be implied into the contract. The suggestion of an implied term first emerged in the following comment in Master Teverson’s judgment:
- “The Defendant has in my view a reasonable argument that following the agreement to extend the completion date until 7th September 2015, there was an implied obligation on the part of the Claimants to permit access to the property if reasonably required by the Defendant for inspection by a prospective funder. The Claimants may well have understood at the time of exchange of contracts that the Defendant had all its funding in place, but prior to the contractual completion date, Mr Oakley was made aware by Mr Fairgrieve of a funding issue. The Claimants agreed to a one month extension of the completion date, in return for £25,000 compensation, an increased overage payment, and the balance of the deposit. In that changed situation, it is in my view arguable that reasonable access to potential funders was required to be allowed.”
96. Mr Ashwell noted that the Defendant had not sought to plead an implied contractual term whether as suggested by Master Teverson or otherwise. He nevertheless addressed the point fully at the trial, and I therefore consider that it is right to decide the issue on the substance. The test for the implication of a term into a contract is a strict one and requires, among other things, that the

term is necessary to give business efficacy to the contract: see in particular the dictum of Lord Simon in *BP Refinery v Shire* (1977) 180 CLR 266, 283, cited with approval by Lord Neuberger in *Marks and Spencer v BNP Paribas* [2015] UKSC 72, §18. Lord Neuberger suggested an alternative formulation of this point at §21, namely that “a term can only be implied if, without the term, the contract would lack commercial or practical coherence”.

97. In this case, an implied right of access for potential funders (even if confined to the time period after the extension of the completion date) would fail that test for the simple reason that, as I have already said, clause 23 already required the Claimants to assist potential funders on an ongoing basis with specific enquiries, which could have included requests for access to the site. The contract was therefore entirely coherent without the need to imply any term in this regard.
98. Mr Ashwell also referred me to the recent decision of Deputy Master Arkush in *Aquisitive v Malcolm Thorpe* (26 October 2017, unrep), rejecting an implied obligation to allow access to the property for the buyer’s potential funders. The reason for that rejection was, however, that the Deputy Master did not consider it appropriate to imply an obligation for the seller to facilitate the buyer obtaining finance. In the present case the facts are rather different, since there is an express requirement in clause 23 for the Claimants to do precisely that; but that clause is also the reason why in this case no term needs to be implied.
99. In his submissions at the trial, and in supplementary written submissions provided shortly after the hearing, Mr Fairgrieve sought to rely on the judgment of Megarry J in *Schindler v Pigault* (1975) 30 P & CR 328, 333 as authority for the proposition that irrespective of whether a requirement to permit access to funders should be implied into the contract, a seller should not be entitled to take advantage of the buyer’s failure to complete if the buyer’s failure was caused by the seller.
100. The comments of Megarry J in *Schindler* must, however, be seen in the context of the very specific facts of that case, in which the seller had agreed to provide access to an intended sub-purchaser, but their agents mistakenly failed to provide the keys. The judge evidently regarded the seller as being in some way in default, in these circumstances. In the present case, by contrast, the Claimants had *not* agreed to provide access to any specific funder, nor was access for any specific funder requested by the Defendant. The only request for access that made any reference at all to funders was the very general and vague request on 14 September, saying that access was required to enable the Defendant “to progress the mezzanine funding”. The Claimants were entitled not to respond to that: for the reasons given above, clause 14.1 did not require access to be given for that purpose, and nor was clause 23 engaged in the absence of any request or enquiry from any lender. Nor is there any suggestion of a separate agreement between the parties that access would be provided for this purpose. This case is therefore not comparable to the situation in *Schindler*.

101. Even if, contrary to my conclusions above, I had found that the refusal of access was a breach of the contract or some other agreement between the parties, that would only assist the Defendant in this case if it could be shown that this contributed to or caused the failure to complete.
102. It is apparent from the evidence, however, that this was not the cause of the failure to complete in this case, or even a material contributing factor. Although the 14 September email referred to access for the purpose of progressing mezzanine funding, as I have already explained the only offer of alternative mezzanine finance at the time was from Mr Wishart, who was not asking for access to the property as a condition of his investment. The discussions with Mr Buckler had not progressed beyond some initial enquiries. Furthermore, while Mr Buckler said that he would have needed to visit the site as part of his initial due diligence process, Mr Fairgrieve did not ever ask for Mr Buckler to be given access to the property.
103. I do not, therefore, consider that the lack of access was a material contributory factor in the Defendant's failure to progress the negotiations with either Mr Wishart or Mr Buckler. Rather, it seems probable that for whatever reason Mr Fairgrieve decided not to pursue either of those options for his mezzanine finance. It is noticeable, in this regard, that when Bennett Oakley asked to see confirmation of the Defendant's funding offers (in its email on 25 September, referred to above), Wannops' various responses made no mention of offers from either Mr Wishart or Mr Buckler.
104. It is also telling that Wannops' letter of 25 September said that "our client has funding in place" and that once the copyright issue had been dealt with the Defendant would be in a position to draw down the finance by 30 October. In similar vein a further letter from Wannops on 27 October claimed that both on 7 August and on 7 September the Defendant "would have had funds available to it", but for the unresolved copyright issue. It follows from what I have said above that I do not consider this assertion to have been correct: irrespective of the copyright issue, the Defendant did not have funds available to complete the purchase on either 7 August or 7 September. For the purposes of the access issue, however, the relevant point is that there was no suggestion in either of these letters that any lack of access had hindered or was continuing to hinder the Defendant's efforts to arrange funding for the purchase.

Conclusions on the copyright and access issues

105. In conclusion, therefore, I find that the Claimants were indeed ready, willing and able to complete when they served notice to complete on 11 September 2015. I also find that the Defendants were not hindered from completing by any breach of contract by the Claimants in relation to access to the property. Accordingly the Claimants were entitled to rescind the contract for failure to complete on 12 October 2015.
106. In making these findings, it is appropriate to say that I do not in any way doubt the sincerity of Mr Fairgrieve's intent to complete the purchase of Norfolk House. It is, however, inevitably the case that a prospective purchaser who exchanges contracts on a property before concluding the necessary financial

arrangements for that purchase does so at considerable risk; and in this case the risk materialised when the formal finance offer made by MSP to the Defendant was considerably lower than the sum required for the project. Mr Fairgrieve's optimism that he would be able to arrange alternative mezzanine finance within the required timescale then unfortunately turned out to be misplaced.

107. The disputes between the parties on the copyright and access issues perhaps distracted Mr Fairgrieve, and there does seem to have been some confusion on his part as to the requirements of the contract in these respects. Mr Fairgrieve also appears to have believed, mistakenly, that the Claimants were attempting to withhold the rights to some of Mr Landivar's work for them. Ultimately, however these were satellite issues that did not prevent the Defendant from completing. The real problem was rather that Mr Fairgrieve was unwilling to accept the terms of the mezzanine finance offered by MSP, but failed to secure an alternative offer that could be drawn down in time for completion (even by the extended date of 7 September). Given more time, it is possible that an acceptable solution would have been found. However, having extended time for completion once, the Claimants were entitled to bring the negotiations to an end by giving notice to complete and, when that did not occur, they were entitled to rescind the contract and retain the deposit.

The counterclaim and unilateral notice issues

108. On 13 May 2015 the Defendant registered a unilateral notice in the Charges Register of the Claimants' title to Norfolk House, pursuant s. 34 of the Land Registration Act 2002, on the basis that the Defendant had "the benefit of an interest affecting a registered estate" because it had a contract to purchase the property. The notice remained after service of the counterclaim, because the Defendant was pursuing a pending land action in which it was claiming specific performance.
109. During the course of 2018, it became apparent to the Defendant that the Claimants were carrying out development work on Norfolk House. On 11 May 2018 Wannops said that the Defendant considered that this was a repudiatory breach of the contract, and noted that this would require the Defendant to make an application to amend the counterclaim to seek damages rather than specific performance. The Claimants said that they would not object to that amendment.
110. Given that change of position on the part of the Defendant, on 28 September 2018 the Claimants applied to the court to remove the unilateral notice. That application was opposed by the Defendant. On 1 October 2018 Master Teverson referred that application to be heard at the trial. The Claimants therefore renewed their application before me.
111. Mr Fairgrieve accepted that his counterclaim, if it arose, would indeed be for damages rather than specific performance. On that basis he did not dispute that the unilateral notice should be removed. I therefore made an order to that effect on the last day of the trial.

112. As for the disposal of the counterclaim, I indicated that I would give permission for this to be amended if necessary. My conclusions above mean that the amendment is in the event not necessary, since I have found that the Claimants were indeed entitled to rescind the contract. The counterclaim therefore falls away, whatever basis on which it might be put.